

(1980) 06 CAL CK 0021

Calcutta High Court

Case No: Matter No. 780 of 1979

Bharat Barrel and Drum Mfg. Co.
(P) Ltd.

APPELLANT

Vs

Indian Oil Corporation and
Another

RESPONDENT

Date of Decision: June 20, 1980

Acts Referred:

- Arbitration Act, 1940 - Section 33

Citation: 84 CWN 672

Hon'ble Judges: Pratibha Bonnerjea, J

Bench: Single Bench

Advocate: Bhaskar Gupta and Pratap Chatterjee, for the Appellant; Gautam Chakraborty and Prodip Ghosh, for the Respondent

Judgement

Pratibha Bonnerjea, J.

Under a written work order No. MM/36/133/ 77 dated 30.9.77 the petitioner agreed to manufacture drums for the respondent No. 1 on terms and conditions contained in the said document. The said work order contained an arbitration clause as follows :--

Cl 9 In case of any dispute or difference arising out of the contract, the matter shall be referred to the sole arbitration of an officer of the corporation designated for the purpose by the Managing Director of the corporation whose decision will be final and binding on both the parties.

Disputes and differences having arisen between the parties, the petitioner, by its letter dated 30.1.79, addressed to the Managing Director of the corporation, requested him to refer the disputes mentioned therein. The Managing Director, by his letter dated 22.3.79 appointed the respondent No. 2 as the sole Arbitrator. The Arbitrator by his letter dated 11th April 1979 directed the parties to file the

statement of claim and the counter statement within the time mentioned therein. Pursuant to the said direction the petitioner filed its statement of claim on 18.5.79. The respondent No. 1 took several extensions for filing its counter statement. Ultimately by a letter dated 5.6.79, addressed to the Managing Director, the respondent No. 1 alleged that they had a counter claim against the petitioner and sought his permission to press that claim in the reference. The letter did not disclose any particular of this alleged claim. The Managing Director was requested to advise the respondent No. 2 to consolidate the claims of both the parties and to adjudicate upon the same. The Managing Director, by his letter dated 5.6.79 allowed the respondent No. 1 to press the alleged counter claim and advised the respondent No. 2 as follows :--

The learned Sole Arbitrator is hereby empowered to consolidate the claims of both the claimants and the respondents to adjudicate the dispute of the parties and give his award.

Copies of this letter were duly sent to the respondent No. 2 and the petitioner.

The respondent No. 1 thereafter filed its counter statement on 8.6.79 claiming Rs. 9, 51, 885.55 by way of counterclaims. By a letter dated 11.7.79, the respondent No. 1 requested the respondent No. 2 to allow it to file a rejoinder by 6.8.79 but in the meantime the respondent No. 2 fixed the date of hearing on 30.7.79. On 30.7.79, the present application u/s 33 of the Arbitration was taken out.

2. The counsel for the petitioner submitted that this alleged claim of the respondent No. T was never put forward nor any demand was ever made prior to the filing of this counter statement. Hence there was no occasion for the petitioner either to admit or to dispute this alleged claim which was for the first time, brought to light by way of counter claim. There was no dispute in existence when this counter claim was made and as such the arbitrator did not have the jurisdiction to entertain the same. He cited (Mathuradas Goverdhandas v. Khushiram Benarshilal 53 C.W.N. 873) where the Division Bench of this High Court held :

The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action but upon the existence of a dispute and accordingly it is only the existence of a difference or dispute which confers jurisdiction upon a private forum to adjudicate upon that dispute. If there is no dispute, there can be no right to demand arbitration at all.

In A, I, R. 1968 J. & K. 86 at 88 (Jammu Forest Co. v. State of Jammu and Kashmir) it has been held :

A dispute before an arbitrator has been held to be analogous to a cause of action before a Civil Court.

3. According to him a counter claim is a cross-claim and is analogous to filing of a cross suit by the defendant against the plaintiff. He relied on Order VIII rule 6A(2) of

the CPC :

6A(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final Judgment in the same suit, both on the original claim and on the counter claim.

Under the English Law a counter claim is regarded as a cross suit. In Russel on Arbitration, 19th Edn. page 178, the position has been clarified as follows :

The delivery of a counter claim is commencing a legal proceeding within the meaning of section as much as the issue of a writ and when the subject of the counter claim is one which it has been agreed to refer, a stay may be applied for by the other party provided that he has not taken any step in the proceeding after delivery of the counter Claim.

In Chappel v. North (1891) 2 Q.B. 252 it was held at page 255 :

But a counter-claim is in reality, nothing but a cross action and therefore, I think we may assume that the delivery of a counter claim ought to be considered as the commencement of a legal proceeding.

In that case stay was refused on the ground that the plaintiff had taken steps in the proceeding on the counter claim.

I must accept the submission of the petitioner's counsel that a counter claim in a civil suit is not a defence as submitted by the respondents counsel but is a cross suit. It set off and counter claim are available to the respondent in an arbitration proceeding then these provisions will apply with all their legal consequences and a counter claim in a reference must be regarded as a cross claim.

4. The next point to be considered is whether in a pending reference the arbitrator will have jurisdiction to entertain a counter claim and/or cross claim arising out of the same contract if there is no dispute in existence regarding the same.

If a suit is brought in respect of a matter covered by the arbitration agreement, no stay can be granted unless a dispute is in existence regarding the claim in the suit. In (1899) A. C. 79 (London and North Western Rly. v. Billington) there was an arbitration agreement between the parties to refer the "reasonability of the charge" for the services to be rendered by the plaintiff to the defendant. The defendant had accepted the service and made certain payments under protest on the ground that no charge was at all payable but did not raise any dispute regarding the "reasonability" of the demand. The plaintiff filed the suit and the defendant applied for stay, but stay was refused on the ground that there was no dispute in existence concerning the "reason-ability" of the charges prior to the institution of the suit. In Lachminarain Jute Manufacturing Co. Ltd. Vs. Bangur Brothers Ltd., and Union of India (UOI) Vs. Birla Cotton Spinning and Weaving Mills Ltd., it has been held that in order that an action may be stayed for referring the same for arbitration there must

be an existing dispute by and between the parties. If there is no dispute, there is nothing to refer and to arbitrate upon.

5. A counter claim in a reference is a cross claim analogous to making counter claim in a civil suit. If a counter claim in a civil suit cannot be entertained unless there is a cause of action in existence a cross claim in a reference cannot be entertained by an arbitrator unless there is a dispute in existence. The counsel for the respondent No. 1, however, strongly contended that existence of a dispute would be immaterial in case of a counter claim in a reference, the only requirement would be that the counter claim should arise out of the same contract. He strongly relied on an unreported Judgment of S.K. Roy Chowdhury J. delivered on 14.7.75 in Indian Oil Corporation v. The Industrial Gases where the learned Judge held :

In my view, it is clearly within the jurisdiction of the Arbitrator umpire to consider the counter claim made by the respondent if the same arises out of the same contract out of which the dispute arose and covered by the arbitration clause. I have gone through the counter claim as made out in the counter statement filed by the respondent in the arbitration..... The counter claim clearly arises out of the same contract and are maintainable and within the umpires jurisdiction to entertain and go into the same.

6. Let us examine how far this case is an authority on the point that a counter claim can be entertained by an arbitrator even though there is no dispute in existence regarding the same, as submitted by the respondent's counsel. In this case the respondent made counter claims on the grounds that (1) they had overpaid the electricity charges under coercion, (2) suffered loss or damages for stoppage of supply of electricity and/or for supply of lower capacity electricity by the petitioner and for (3) Damage for non-supply of cooling water by the petitioner etc. All these claims were arising out of the same contract. Regarding the counter claim No. 1 a dispute was already in existence as will appear from the Judgment. "In the mean time a dispute also arose between the petitioner and the respondent as to the rate of electricity supplied by the petitioner to the respondent pursuant to the agreement as modified". There is no indication in the Judgment whether there were disputes in existence regarding the counter claim Nos. (2) and (3). The petitioner had taken objection regarding these counter claims on the following grounds :

(1) Counter claim is unconnected with the two disputes.

(2) It is contrary to the agreement between the parties.

Hence it would be seen that the point raised in the present application was not raised before Roy Chowdhury J. or before the Arbitrator in that reference. The learned Judge came to the conclusion set out above on the facts of the case before him relying on Russel v. Pellegrini 119 E. R. 1144, Weall vs. James 68 LT. 54, R.N. Jhunjhunwala 8 Co. v. Alliance Jute Mills 74 C. W. N, 510 Union of India v. Jainarain Mishra AIR 1970 S.C. 753 and [Union of India \(UOI\) Vs. Raman Iron Foundry](#), , and

further held :

Therefore it is quite clear and well settled that the umpire has not only the jurisdiction but also has the duty to entertain the counter claim of the respondent, having arisen out of the same transaction either as set off or as a defence to the claim of the petitioner and considering the mutual claims of the parties to the reference and the award to be made adjudicating the respective claims against each other in the reference.

7. Let us now see whether any of the cases mentioned above supports the submission of the respondent's counsel by deciding the point raised before me. In *Russel v. Pellegrini* 119 E. R. 1144 the plaintiff filed a suit for recovery of monthly hire due under a charter-party agreement which contained an arbitration clause for referring the disputes arising out of the contract to arbitration. Pellegrini also claimed damage from Russel on the ground that the ship was not seaworthy and brought an action. Thereafter Russel proceeded against Pellegrini under Bankrupt Law consolidation Act 1849. Pellegrini demanded arbitration from Russel regarding these disputes arising out of the contract but Russel did not respond. Thereafter an application was taken out by Pellegrini for stay of the proceeding. Lord Campbell C. J. held :

Now I think that both the demand for the monthly hire and the cross claim for damages arose out of the contract and are matters referable within the agreement and therefore we have power to stay the action if satisfied that it ought to stay,

8. Coleridge & Erle JJ, while agreeing with Campbell C. J. expressly held that there were serious disputes in existence regarding the respective claims. In *Weall v. James* 68 L. T. 54 the plaintiff brought an action against the defendants who were partners of a firm. The first defendant made a counter claim in the written statement whereas the defendant No. 2 submitted to a consent decree. Subsequently by consent all disputes in the pending suit were referred to arbitration and an award was made in favour of the defendant No. 1 on the basis of his counter claim. This award was challenged on several grounds but the award was upheld. In this case the entire dispute in suit was referred to arbitration by an express agreement covering the dispute regarding the counter claim. Hence Arbitrator had the jurisdiction to entertain this claim.

9. In (*Union of India v. Jainarain Mishra* A. I. R. 1970 S. C. 753) there was a contract between the parties containing an arbitration clause. Disputes having arisen between the parties, the respondent referred to the arbitration 29 items of claims and the appellant also made a counter claim and an award was made followed by a decree. An appeal was preferred and the High Court allowed the appeal and set aside the award On the ground that the award was uncertain and vague. The appellant moved the Supreme Court which allowed the appeal holding that the Award was not vague or uncertain. In (*R. N. Jhunjhunwalla & Co. v. Alliance Jute Mills*

Co. 74 C.W.N. 510) there was a contract between the parties for delivery of goods by four instalments with an express stipulation that each delivery to be treated as a separate contract. There was a clause for referring the disputes to the arbitration of the Bengal Chamber of Commerce & Industry. The disputes having arisen between the parties the claimant made one reference regarding the disputes arising out of the said four deliveries. The appellant also made one counter claim arising out of four deliveries. An Award was made in favour of the respondent. The appellant applied for setting aside the Award which was dismissed by order dated 4.8.66 against which this appeal was preferred. On behalf of the appellant it was submitted that the Arbitrators ought to have treated the four deliveries as four separate contracts and should have directed for four references in accordance of the Rules of Bengal Chamber of Commerce and in not doing so, the Arbitrators misconducted themselves. The Appeal Court observed that the Appellant himself had made one counter claim in respect of all four delivery instead of making four references and as such he was not entitled to challenge the jurisdiction of the arbitrator on the ground agitated before the Appeal Court. The conduct of the arbitrator may amount to a mere irregularity without any miscarriage of justice and as such the award was not liable to be challenged on that ground. In ([Union of India \(UOI\) Vs. Raman Iron Foundry,](#)) there were mutual claims for damages arising out of the same contract and claim and counter claim were pending before the Arbitrator. It is clear from the Judgment that disputes regarding the claim and the counter claim were already in existence as will appear from page 1267 paragraph 2 :

The performance of this contract ran into difficulties and a dispute arose between the parties giving rise to claims by either party against the other.

10. In this case, the Supreme Court held that during the pendency of the reference the appellant was not entitled to withhold payment due to the respondent under other contracts and to appropriate the same towards alleged damages claimed in the reference. The order of injunction passed by the Trial Court restraining the respondent from doing so was held to be fully justified. In all the cases relied on by Mr. Justice Roy Chowdhury the disputes were in existence and in none of the cases referred to above, the question raised before me was considered. It is true that the judgment of Roy Chowdhury J. does not indicate existence of any dispute regarding counter claims Nos. (2) and (3). It may be said that this will go to show that a counter claim arising out of the same contract, without having any dispute in existence can be referred to arbitration. But then the submission that a counter claim cannot be maintained without having a dispute in existence was never made before the learned Judge and he was not called upon to decide that point. Hence all these cases are clearly distinguishable from the facts of the present cases, considering the issue raised before me, I find that none of the cases relied on by the respondent's counsel is helping the respondent or has any application on the facts of this case. Then what will be the fate of this counter claim ? The petitioner's counsel submitted that this may be the subject matter of a fresh reference. He relied on (Balmukund

Ruia v. Gopiram Bhotica 24 C. W. N. 775) in support of his contention that there might be successive references in respect of different disputes arising out of the same contract at different stages. It is true that if mutual claims could be decided in one reference, that would save money, time, energy and trouble for both the parties. I am fully aware of the facts that a separate reference will mean inconvenience for the parties, further expresses and delay but then the law of the land has to be followed. Absence of a "dispute" regarding a "claim" means "complete absence of jurisdiction" of the arbitrator to try that matter. In the premises, I hold that the counter claims in question cannot be entertained by the arbitrator. I further hold that the Managing Director of the respondent No. 1 had no authority to direct the arbitrator to consolidate the claim and the counter claim and to proceed with the arbitration as purported to have been done by his letter dated 5, 6, 79. In the premises there will be orders in terms of prayers (b), (c), (d) and (e) : Cost in the arbitration proceeding.