

State Of Goa vs M/S Praveen Enterprises on 4 July, 2011

Equivalent citations: AIR 2011 SUPREME COURT 3814, 2012 (5) AIR BOM R 93, (2011) 7 MAD LJ 775, (2011) 2 CLR 328 (SC), 2012 (12) SCC 581, (2011) 104 CORLA 314, (2011) 3 ARBILR 209, (2011) 5 ALLMR 446 (SC), (2011) 7 SCALE 131, (2011) 2 WLC(SC)CVL 360, (2011) 4 ALL WC 3918, (2011) 112 CUT LT 659, (2011) 104 ALLINDCAS 50 (SC), (2011) 3 KER LT 130, (2013) 1 ANDHLD 29, (2011) 87 ALL LR 889, 2012 (4) KCCR SN 292 (SC)

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Bench: A K Patnaik, R V Raveendran

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4987 OF 2011

[Arising out of SLP [C] No.15337 of 2009]

State of Goa

... Appe

Vs.

Praveen Enterprises

... Resp

J U D G M E N T

R.V.RAVEENDRAN, J.

Leave granted.

2. Under an agreement dated 4.11.1992, the appellant (State of Goa) entrusted a construction work (Farm Development Works in Command Area of Water Course No.3 and 3A of minor M-3 of SIP in

Salcette Taluka) to the respondent. Clause 25 of the agreement provided for settlement of disputes by arbitration, relevant portions of which are extracted below:

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Central Public Works Department in charge of the work at the time of dispute.....It is a term of contract that the party invoking arbitrations shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes."

As per the contract, the work had to be commenced on 16.11.1992 and completed by 5.5.1994. On the ground that the contractor did not complete the work even by the extended date of completion (31.3.1995), the contract was terminated by the appellant.

3. Respondent raised certain claims and gave a notice to the appellant to appoint an arbitrator in terms of the arbitration clause. As the appellant did not do so, the respondent filed an application under section 11 of the Arbitration and Conciliation Act, 1996 ('Act' of 'new Act' for short) for appointment of an arbitrator. By order dated 4.12.1998 the said application was allowed and Mr. S.V.Salilkar, retired Adviser, Konkan Railway Corporation was appointed as the sole arbitrator. The arbitrator entered upon the reference on 22.2.1999 and called upon the parties to file their statement.

4. The respondent filed its claim statement before the arbitrator on 15.4.1999. The appellant filed its Reply Statement with counter claim on 30.6.1999. The arbitrator considered the fourteen claims of the contractor and four counter claims of the appellant. The Arbitrator made an award dated 10.7.2000. He awarded to the respondent, Rs.1,00,000/- towards claim No.2 with interest at 12% per annum from 26.8.1998 to 19.2.1999;

Rs.3,63,416/- towards claim No.3 with interest at 12% per annum from 18.9.1995 to 22.2.1999; and Rs.59,075/- towards claim No. 14 (additional claim No. ii) with interest at 12% per annum from 18.9.1995 to 22.2.1999.

In regard to the counter claims made by the appellant, the arbitrator awarded to the appellant Rs.2,94,298/- without any interest in regard to counter claim No.3. The arbitrator rejected the other claims of respondent and appellant.

He awarded simple interest at 18% per annum on the award amount from the expiry of one month from the date of the award and directed both parties to bear their respective costs.

5. Feeling aggrieved the respondent filed an application under section 34 of the Act, challenging the award insofar as (i) rejection of its other claims;

and (ii) award made on counter claim No.3. The civil court (Adhoc Additional District Judge, Fast Track Court No.1, South Goa) disposed of the matter upholding the award in regard to the claims of the respondent but accepted the objection raised by the respondent in regard to award made on the counter claim. The court held that the arbitrator could not enlarge the scope of the reference and entertain either fresh claims by the claimants or counter claims from the respondent.

6. The appellant challenged the said judgment by filing an arbitration appeal before the High Court. The High Court of Bombay dismissed the appeal by judgment dated 31.8.2007. The High Court held that the counter claims were bad in law as they were never placed before the court by the appellant (in the proceedings under section 11 of the Act for appointment of arbitrator) and they were not referred by the court to arbitration. The High Court held that in such circumstances arbitrator had no jurisdiction to entertain a counter claim. The High Court followed its earlier decision in Charuvil Koshy Verghese v. State of Goa - 1998 (2) SCC 21. In that case, an application was made by a contractor under Section 20 of the Arbitration Act, 1940 ('old Act' for short), for filing the arbitration agreement and referring the disputes to the arbitrator. In its reply statement to the said application, the respondent did not assert its counter claim. The court allowed the application under section 20 and appointed an arbitrator to decide the disputes raised by the contractor. However when the matter went before the arbitrator, the respondent therein made a counter claim, which was allowed by the arbitrator. The Bombay High Court held that the arbitrator had no jurisdiction to entertain or allow such a counter claim as the same had neither been placed before the court in the proceedings under section 20 nor the court had referred it to the arbitrator. The said judgment of the High Court is challenged in this appeal by special leave.

7. The appellant contends as a respondent in arbitration proceedings, in the absence of a bar in the arbitration agreement, it was entitled to raise its counter claims before the arbitrator, even though it had not raised them in its statement of objections to the proceedings under section 11 of the Act. It further contends that section 11 of the Act does not contemplate 'reference of disputes' by the Chief Justice or his designate; and the High Court committed a serious error in holding that in the absence of a reference by the court, the arbitrator had no jurisdiction to entertain a counter claim, by following its earlier decision in Charuvil Koshy Verghese (supra), rendered with reference to section 20 of the old Act, which is materially different from section 11 of the new Act. The respondent supported the decision of the High Court, contending that having regard to the provisions of section 21 of the Act, an arbitrator will have jurisdiction to decide only those disputes which were raised and referred to him by the court.

8. Therefore the question that arises for our consideration is as under:

Whether the respondent in an arbitration proceedings is precluded from making a counter-claim, unless

a) it had served a notice upon the claimant requesting that the disputes relating to that counter-claim be referred to arbitration and the claimant had concurred in referring the counter claim to the same arbitrator;

and/or

b) it had set out the said counter claim in its reply statement to the application under section 11 of the Act and the Chief Justice or his designate refers such counter claim also to arbitration.

What is 'Reference to arbitration'

9. 'Reference to arbitration' describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate.

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the 'reference' contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the 'reference' contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of arbitrator/s as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

10. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where 'all disputes' are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

11. Though an arbitration agreement generally provides for settlement of future disputes by reference to arbitration, there can be 'ad-hoc' arbitrations relating to existing disputes. In such cases, there is no prior arbitration agreement to refer future disputes to arbitration. After a dispute arises between the parties, they enter into an arbitration agreement to refer that specific dispute to arbitration. In such an arbitration, the arbitrator cannot enlarge the scope of arbitration by permitting either the claimant to modify or add to the claim or the respondent to make a counter claim. The arbitrator can only decide the dispute referred to him, unless the parties again agree to refer the additional disputes/counter claims to arbitration and authorize the arbitrator to decide them.

12. 'Reference to arbitration' can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While section 11 contemplates appointment of arbitrator [vide sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the arbitration agreement [vide sub-section (6)], section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration.

When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application under section 11 of the Act for appointment of an arbitrator. The judicial authority 'referring the parties to arbitration' under section 8 of the Act, has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator.

Sections 21 and 43 of the Act

13. Section 21 provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Taking a cue from the said section, the respondent submitted that arbitral proceedings can commence only in regard to a dispute in respect of which notice has been served by a claimant upon the other party, requesting such dispute to be referred to arbitration; and therefore, a counter claim can be entertained by the arbitrator only if it has been referred to him, after a notice seeking arbitration in regard to such counter claim. On a careful consideration we find no basis for such a contention. The purpose of section 21 is to specify, in the absence of a provision in the arbitration agreement in that behalf, as to when an arbitral proceedings in regard to a dispute commences. This becomes relevant for the purpose of section 43 of the Act. Sub-section (1) of section 43 provides that the Limitation Act 1963 shall apply to arbitrations as it applies to proceedings in courts. Sub-section (2) of section 43 provides that for the purposes of section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in section 21 of the Act. Having regard to section 43 of the Act,

any claim made beyond the period of limitation prescribed by the Limitation Act, 1963 will be barred by limitation and the arbitral tribunal will have to reject such claims as barred by limitation.

14. Section 3 of the Limitation Act, 1963 provides for bar of limitation and is extracted below:

"3. Bar of Limitation. (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

(2) For the purposes of this Act,-

(a) a suit is instituted,-

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted-

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

(emphasis supplied)

15. In regard to a claim which is sought to be enforced by filing a civil suit, the question whether the suit is within the period of limitation is decided with reference to the date of institution of the suit, that is, the date of presentation of a plaint. As Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of 'institution' for arbitration proceedings. Section 21 of the Act supplies the omission. But for section 21, there would be considerable confusion as to what would be the date of 'institution' in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the

limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under section 11 of the Act. In view of section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "the request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore the purpose of section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not.

16. There can be claims by a claimant even without a notice seeking reference. Let us take an example where a notice is issued by a claimant raising disputes regarding claims 'A' and 'B' and seeking reference thereof to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said claims 'A' and 'B'. Subsequently if the claimant amends the claim statement by adding claim 'C' [which is permitted under section 23(3) of the Act] the additional claim 'C' would not be preceded by a notice seeking arbitration. The date of amendment by which the claim 'C' was introduced, will become the relevant date for determining the limitation in regard to the said claim 'C', whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in regard to Claims 'A' and 'B'.

Be that as it may.

17. As far as counter claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the counter claim is made in court shall be deemed to be the date of institution of the counter claim. As Limitation Act, 1963 is made applicable to arbitrations, in the case of a counter claim by a respondent in an arbitral proceedings, the date on which the counter claim is made before the arbitrator will be the date of "institution" in so far as counter claim is concerned. There is, therefore, no need to provide a date of 'commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counter claims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under section 11 of the Act, the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim.

Scope of sections 11 and 23 of the Act

18. Section 11 refers to appointment of arbitrators. Sub-sections (4), (5), (6) and (9) of section 11 relevant for our purpose are extracted below:

"(4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution Designated by him. (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution Designated by him. (6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution Designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

xxx xxx xxx (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities."

(emphasis supplied)

19. Section 23 relating to filing of statements of claim and defence reads thus:

"23. Statements of claim and defence.- (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having

regard to the delay in making it."

(emphasis supplied) Section 2 contains the definitions. Sub-section (9) clarifies that except in sections 25(a) and 32(2)(a), any reference in the Act to a 'claim' will apply to a 'counter-claim'. The said sub-section reads thus:

"(9) Where this Part, other than clause (a) of section 25 or clause (a) of sub-section (2) of section 32, refers to a claim, it shall also apply to a counterclaim, and where it refers to a defence, it shall also apply to a defence to that counterclaim."

20. In contrast, section 20 of the old Act which provided for applications to file the arbitration agreement in court, read as under:

"20. Application to file in Court arbitration agreement. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

(emphasis supplied)

21. Section 20 of the old Act required the court while ordering the arbitration agreement to be filed, to make an order of reference to the arbitrator. The scheme of the new Act requires minimal judicial intervention.

Section 11 of the new Act, on the other hand, contemplates the Chief Justice or his designate appointing the arbitrator but does not contain any provision for the court to refer the disputes to the arbitrator. Sub-sections (4), (5) and (9) of section 11 of the Act require the Chief Justice or his designate to appoint the arbitrator/s. Sub-section (6) requires the Chief Justice or his designate to 'take the necessary measure' when an application is filed by a party complaining that the other party has failed to act as required under the appointment procedure. All these sub-sections contemplate an applicant filing the application under section 11, only after he has raised the disputes and only when the respondent fails to co-operate/concur in regard to appointment of arbitrator.

22. Section 23 of the Act makes it clear that when the arbitrator is appointed, the claimant is required to file the statement and the respondent has to file his defence statement before the Arbitrator. The claimant is not bound to restrict his statement of claim to the claims already raised by him by notice, "unless the parties have otherwise agreed as to the required elements" of such claim statement. It is also made clear that "unless otherwise agreed by the parties" the claimant can also subsequently amend or supplement the claims in the claim statement. That is, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the claimant can while filing the statement of claim or thereafter, amend or add to the claims already made. Similarly section 23 read with section 2(9) makes it clear that a respondent is entitled to raise a counter claim "unless the parties have otherwise agreed" and also add to or amend the counter claim, "unless otherwise agreed". In short, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the respondent can file counter claims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both the claimant and respondent are entitled to make any claims or counter claims and further entitled to add to or amend such claims and counter claims provided they are arbitrable and within limitation.

23. Section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator/s. It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed under section 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures under section 11(6) of the Act to ensure compliance by the parties with such procedure. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the Arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under section 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application under section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes raised by the applicant under section 11 of the Act and not the counter claims of the respondent.

24. Section 23 of the Act enables the claimant to file a statement of claim stating the facts supporting his claim, the points at issue and the relief or remedy sought by him and enables the respondent to state his defence in respect of those claims. Section 2(9) provides that if any provision [other than section 25 (a) or section 32(2)(a)], refers to a "claim", it shall apply to a "counter claim" and where it refers to a "defence", it shall also apply to a defence to that counter claim. This would mean that a respondent can file a counter claim giving the facts supporting the counter claim, the points at issue and the relief or remedy sought in that behalf and the claimant (who is the respondent in the counter claim) will be entitled to file his defence to such counter claim. Once the claims and counter claims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counter claims) and if the answer is in the affirmative, proceed to adjudicate upon the same.

25. It is of some relevance to note that even where the arbitration proceedings were initiated in pursuance of a reference under section 20 of the old Act, this Court held (in *Indian Oil Corporation Ltd. vs. Amritsar Gas Service and Ors.* - 1991(1) SCC 533) that the respondent was entitled to raise counter claims directly before the arbitrator, where all disputes between parties are referred to arbitration. This Court observed :

"The appellant's grievance regarding non-consideration of its counter- claim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit under Section 34 of the Arbitration Act and their reference was made of all disputes between the parties in the suit, the occasion to make a counter-claim in the written statement could arise only after the order of reference. The pleadings of the parties were filed before the arbitrator, and the reference covered all disputes between the parties in the suit. Accordingly, the counter-claim could not be made at any earlier stage. Refusal to consider the counter- claim for the only reason given in the award does, therefore, disclose an error of law apparent on the face of the award."

(emphasis supplied)

26. A counter claim by a respondent pre-supposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject matter of the counter claim) by issuing a notice seeking reference to arbitration and follow it by an application under section 11 of the Act for appointment of Arbitrator, instead of raising a counter claim in the pending arbitration proceedings. The object of providing for counter claims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a respondent in an arbitration proceedings being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceedings or raise the dispute by way of a counter claim, in the pending arbitration proceedings.

Respondent's contentions

27. The respondent submitted that this Court in SBP & Co. vs. Patel Engineering Ltd. -- 2005 (8) SCC 618 and National Insurance Co.Ltd. v Boghara Polyfab Private Ltd. -- 2009 (1) SCC 267, has observed that while deciding an application under section 11 of the Act, the Chief Justice or his designate can decide the question whether the claim was a dead one (long time barred) that was sought to be resurrected. According to appellant the logical inference from this observation is that an application under section 11 should sufficiently enumerate and describe the claims to demonstrate that they are within limitation. Extending the same logic, respondent contends that any counter claim by the respondent should also be described in his statement of objections with relevant particulars so that the Chief Justice or his designate could consider and pronounce whether such counter claim is barred by limitation. The respondent therefore argues that every claim unless specifically mentioned in the application under section 11 of the Act, and every counter claim unless specifically mentioned in the statement of objections, cannot be the subject matter of arbitration.

28. The aforesaid contention of the respondent is based on the erroneous premises that whenever an application is filed under section 11 of the Act, it is necessary for the Chief Justice or his Designate to consider and decide whether the claims or counter claims are barred by limitation or not. In SBP & Co. and Boghara Polyfab, this Court classified the questions that may be raised in an application under section 11 of the Act into three groups : (i) those which the Chief Justice/his designate shall have to decide; (ii) those which the Chief Justice/his designate may choose to decide or alternatively leave to the decision of the Arbitral Tribunal; and (iii) those which the Chief Justice/his designate should leave exclusively for the decision of the Arbitral Tribunal. This Court held that the issue whether a claim is dead claim (long barred claim) is an issue which the Chief Justice or his designate may choose to decide or leave for the decision of the Arbitral Tribunal. The difference between a dead/stale claim and a mere time barred claim was explained by this Court in Indian Oil Corporation Ltd. v. M/s SPS Engineering Ltd. [2011 (2) SCALE 291] thus : -

"When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act."

29. The issue of limitation is not an issue that has to be decided in an application under section 11 of the Act. SBP & Co. and Boghara Polyfab held that the Chief Justice or his designate will not examine issues relating to limitation, but may consider in appropriate cases, whether the application was in regard to a claim which on the face of it was so hopelessly barred by time, that it is already a dead/stale claim which did not deserve to be resurrected and referred to arbitration. The said decisions do not support the respondent's contention that the details of all claims should be set out in the application under section 11 of the Act and that details of all counter claims should be set out in the statement of objections, and that a claim or a counter claim which is not referred to or set out in the pleadings in the proceedings under section 11 of the Act, cannot be entertained or decided by the arbitral tribunal.

30. Reliance was next placed on the following passage from the Law and Practice of Commercial Arbitration in England [Mustill & Boyd - (1989) Second Edn. Page 131] to contend that the counter claim ought to have been submitted to the Arbitrator when he is appointed:

"The fourth situation, in which both the claim and the cross-claim are arbitrable, is the one most commonly encountered in practice. The arbitrator should carefully consider whether the subject matter of the counter claim was one of the matters submitted to him at the time of the appointment. If it is, then it is up to him whether to allow the matter to be raised by counter claim or made the subject of a separate arbitration. In practice, we have never known the second course to be followed. If, on the other hand, the cross-claim was not a dispute which was submitted to him, he should not entertain it unless it raises a pure defence, or unless the parties clearly agree that he is to have jurisdiction over it."

(emphasis supplied) The said observations were made with reference to the Arbitration Law prevailing in United Kingdom in the year 1989, prior to the enactment of (English) Arbitration Act, 1996. Further the observations obviously related to an arbitration where specific disputes were referred to arbitration and consequently the arbitrator was bound to restrict himself to the disputes referred. We have already adverted to this aspect earlier.

31. The respondent lastly contended that the Court is required to ascertain the precise nature of the dispute which has arisen and then decide whether the dispute is one which falls within the terms of the arbitration clause, before appointing an arbitrator; and that could be done only if the claims are set out in the application under section 11 of the Act and the counter claims are set out in the statement of objections and court had an opportunity to examine it. It is therefore submitted that a dispute (relating to a claim or counter claim) not referred in the pleadings, is not arbitrable. Reliance was placed upon certain observations in the decision of the House of Lords in *Heyman v. Darwins Ltd.*-- 1942 AC 356. We extract below the paragraph containing the relied upon observations :

"The law permits the parties to a contract to include in it as one of its terms an agreement to refer to arbitration disputes which may arise in connection with it, and the court of England enforce such a reference by staying legal proceedings in respect

of any matter agreed to be referred "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission." Arbitration Act, 1889, sec. 4. Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

(emphasis supplied) The said observations were made while examining whether a suit should be stayed at the instance of the defendant on the ground that there was an arbitration agreement between the parties. If a party to an arbitration agreement files a civil suit and the defendant contends that the suit should be stayed and the parties should be referred to arbitration, necessarily, the court will have to find out what exactly is the subject matter of the suit, whether it would fall within the scope of the arbitration clause, whether the arbitration clause was valid and effective and lastly whether there was sufficient reason as to why the subject matter of the suit should not be referred to arbitration.

The observations made in *Heymen*, in the context of an application seeking stay of further proceedings in a suit, are not relevant in respect of an application under section 11 of the Act. This Court has repeatedly held that the questions for consideration in an application under section 8 by a civil court in a suit are different from the questions for consideration under section 11 of the Act. The said decision is therefore of no assistance.

Summation

32. The position emerging from above discussion may be summed up as follows:

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage earlier to the stage of pleadings before the Arbitrator.

(c) Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counter claims which are not part of the disputes specifically referred to arbitration.

The position in this case

33. The arbitration clause in this case contemplates all disputes being referred to arbitration by a sole arbitrator. It refers to an Appointing Authority (Chief Engineer, CPWD), whose role is only to appoint the arbitrator. Though the arbitration clause requires the party invoking the arbitration to specify the dispute/s to be referred to arbitration, it does not require the appointing authority to specify the disputes or refer any specific disputes to arbitration nor requires the Arbitrator to decide only the referred disputes. It does not bar the arbitrator deciding any counter claims. In the absence of agreement to the contrary, it has to be held that the counter claims by the appellant were maintainable and arbitrable having regard to section 23 read with section 2(9) of the Act.

34. Counter claim no.(3) in regard to which Rs.2,94,298/- has been awarded by the Arbitrator relates to the cost of pipes entrusted by the appellant for carriage from store to site, which were not accounted for by the respondent. It is not shown to be barred by limitation. We find no error in the reasoning of the arbitrator in awarding Rs.2,94,298/- under counter claim no.(3).

Conclusion

35. In view of the above, this appeal is allowed and the order of the High Court affirming the judgment of the trial court in regard to counter claim No.3, is set aside. Consequently the award of arbitrator is upheld in its entirety and the challenge thereto by the respondent is rejected.

.....
(R V Raveendran)

New Delhi;

July 4, 2011.

.....J.
(A K Patnaik)

