

Ten Creative Studio Pvt. Ltd. & Ors. vs Nelson Planning & Design Pvt. Ltd. on 24 August, 2017

Author: Jayant Nath

Bench: Jayant Nath

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: August 24, 2017

+ O.M.P. 13/2017 and IA Nos. 7619/2017(stay) and 7620/2017 (delay)
TEN CREATIVE STUDIO PVT. LTD. & ORS. Petitioners
Through Mr.Yash Anand and Mr.David A.,
Advs.

versus

NELSON PLANNING & DESIGN PVT. LTD. Respondent
Through Mr. Ambar Qamaruddin and Mr.
Tejasvi Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) to impugn the order dated 11.01.2017 passed by the learned Arbitrator rejecting the counter claims filed by the petitioners as barred by limitation.

2. Some of the relevant facts as stated by the petitioners are that on 30.03.2012, two agreements were executed between the parties relating to Business and Assets Transfer Deed and Employment Agreement. Under the terms of the Business and Assets Transfer Deed, the respondent is said to have acquired the business of the petitioner Company including pending projects without taking over the movable as well as immovable assets for a sale consideration of Rs. 12 lakhs. Under the Employment Agreement Sh.Vikrant Bhatkar, petitioner No.3 is said to have joined service as an Executive Director with the said Company at a monthly salary of Rs. 2 lakhs.

3. It is the contention of the respondent that later on, it came to know that the petitioners despite entering into the said agreements has been carrying on and conducting the business in the name of the two concerns contrary to the terms of the agreement and are taking fresh projects in violation of the Transfer Deed and Employment Agreement. Mr.Vikrant Bhatkar submitted his resignation on 18.08.2013. The respondent filed a petition under Section 9 of the Act seeking a restraint order against the petitioners which was passed on 11.10.2013. In a separate application under Section 11 of

the Act, this court appointed the learned Arbitrator to adjudicate the disputes between the parties.

4. There are two separate arbitration matters which are pending. In case No.DAC/1062/10-15, the respondent/claimant has claimed an amount of Rs.34 lakhs for breach of the terms and conditions of the agreement and a sum of Rs.10 lakhs towards damages. The petitioners have filed a counter claim on 19.07.2016 setting up a claim of Rs. 22,50,000/- being the alleged incentives payable on the overall profit for the year 2012-13 and a sum of Rs.2 lakhs being the salary for the month of August, 2013 of petitioner No.3.

5. In case No. DAC 1069/10-15, the respondent/claimant has claimed Rs.51,60,000/- as dues on account of pending projects carried out and completed by the respondent and the amount received by the petitioners from British Airways & M/s. Wipro Limited in violation of the said Agreement dated 30.03.2012. Damages and interest have also been sought. The petitioners have filed a counter claim on 01.12.2016 setting up a claim of Rs. 3.5 crores being the vendors dues which as per the petitioners/counter-claimant have not been paid by the respondent. Sum of Rs. 8 lakhs has been claimed towards balance agreed amount as per the Agreement dated 30-3-2012 and Rs.20 lakhs towards damages suffered on account mental agony.

6. The learned Arbitrator framed a preliminary issue on 11.01.2016 as follows:

"(a) Whether the claim filed by the claimant is hopelessly barred by time? OPR

(b) Whether the counter claim filed by the respondents/counter-claimants hopelessly barred by limitation?"

7. Arguments were confined to maintainability of the counter-claims preferred by the petitioners.

8. A perusal of the Award would show that the learned Arbitrator has relying upon the judgment of the Supreme Court in the case of State of Goa vs. Praveen Enterprises (2012) 12 SCC 581 and Voltas Ltd. Vs. Rolta India Ltd. (2014) 4 SCC 516 has held that while computing the period of limitation, the period up to filing of the counter claims would be the relevant date for commencement of arbitral proceedings. In the case of first counter claim being DAC-1062/10-15, the Award notes that the counter claim was filed on 19.07.2016. Sum of Rs.22,50,000/- was claimed along with interest for the financial year 2012-13 for the alleged incentive. Hence, the limitation would start running from 01.04.2013. The counter claim having been filed on 19.07.2016, the said prayer was held to be barred by limitation. The second prayer pertained to recovery of Rs.20 lakhs towards outstanding amount of monthly salary for the month of August, 2013. This claim was held to be within limitation period.

9. Regarding the second claim petition being DAC-1069/10-15, the Award notes that the petitioners have claimed 9% of the gross profit earned by the respondent from the projects generated in the year 2012-13. Again for the said claim, limitation would run from 01.04.2013. The counter claim having been filed on 01.12.2016, the counter claim was held to be barred under the Limitation Act. Similar was the fate of claim of Rs. 8 lakhs said to be the remaining amount payable under the

Business and Assets Transfer Deed dated 30.03.2012. As aforementioned prayers were rejected, the counter claim for mental agony, harassment and humiliation of Rs. 20 lakhs as sought in the counter claim were also rejected. Accordingly, the counter claim was partly rejected.

10. I may note that there appears to be some typographical error in the Award though no such error was pointed out by the petitioner. A perusal of the prayer „A of the counterclaim filed by the petitioner in DAC1069/10-15 shows that in prayer „A the petitioners have filed a counterclaim of Rs.3.5 Crores being the vendors dues along with interest from the date of entering into the agreement i.e. 30.03.2012 till resignation from the respondent company i.e. 18.08.2013. The claim „A is not for 9% of gross profit as noted in the Award. However, this would not make any difference to the conclusion of the learned Arbitrator that the above claim which was filed on 01.12.2016 is time-barred.

11. I have heard learned counsel for the parties.

12. Learned counsel for the petitioners has vehemently argued that in his reply to the petition under Section 9 of the Act filed by the respondent, a detailed narration of the counter claims of the petitioners have been stated. He also relies upon his reply to the application filed by the respondent under Section 17 of the Act before the learned Arbitrator where again the submissions regarding counter claims have been made. He further states that in the petition filed under Section 11 of the Act for appointment of an arbitrator by the respondent, the learned Arbitrator was appointed by the consent of the parties indicating willingness on the part of the petitioners to refer the claims to arbitration. He also relies upon an exception carved out by the Supreme Court in its judgment in the case of Voltas Ltd. Vs. Rolta India Ltd.(supra) to contend that the case of the petitioners would fall within the exceptions and the counter claim would be within limitation as the arbitration would commence from the date the petitioner agitated its counter claim.

13. Section 21 and Section 43 of the Act read as follows:-

"21. Commencement of arbitral proceedings.--Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

"43. Limitations.--

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court. (2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a

dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

14. Hence, in view of Section 21 and 43(2) of the Act for the purpose of the Limitation Act, the arbitration is deemed to commence on the date referred to under Section 21. Section 21 states that unless otherwise agreed by the parties arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

15. The Supreme Court in the State of Goa vs. Praveen Enterprises(supra) regarding limitation for the purpose of a counter claim held as follows:-

"20. 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.

16. Hence in view of the above judgment, the date on which the counter claim is made before the arbitrator will be the date of institution of the counter claim unless the case falls within the exception above i.e. where the respondent who makes the counter claim also sought arbitration by serving a notice on the claimant.

17. Similarly, the Supreme Court in Voltas Ltd. Vs. Rolta India Ltd.(supra) noted as follows:-

"25. On a careful reading of the verdict in Praveen Enterprises (supra), we find that the two-Judge Bench, after referring to, as we have stated hereinbefore, Sections 21 and 43 of the Act and Section 3 of the Limitation Act has opined, regard being had to the language employed in Section 21, that an exception has to be carved out. It saves the limitation for filing a counter claim if a Respondent against whom a claim has been made satisfies the twin test, namely, he had made a claim against the claimant and sought arbitration by serving a notice to the claimant. In our considered opinion the said exception squarely applies to the case at hand inasmuch as the Appellant had raised the counter claim and sought arbitration by expressing its intention on number of occasions. That apart, it is also perceptible that the Appellant had assured for appointment of an arbitrator. Thus, the counter claim was instituted on 17.4.2006 and hence, the irresistible conclusion is that it is within limitation.

That was a case in which on account of two communications sent by the other side, the court on facts came to the conclusion that the respondent had particularized and specified its claim and sought arbitration for the same.

18. In the present case an attempt has been made to particularize the nature of the claim in the pleadings in the petition filed by the respondent under Sec.9 of the Act and under Sec.17 of the Act. However, the petitioners failed to seek arbitration. The crucial aspect of Section 21 is that the petitioner had to make a request for reference of disputes to arbitration and not merely give particulars of its claim. In the absence of any specific notice on the part of the petitioners to seek arbitration of the claims which it has particularized, the commencement of the arbitration proceedings under Section 43 read with Section 21 of the Act would be from the date of filing of the counter claim.

19. This court in the case of Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd., 2017 SCC OnLine Del 7228, held as follows:

"30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law."

20. The learned Arbitrator has rightly in the present Award taken the dates of the filing of the counter claims as the dates of commencement of the proceedings. There is not merit in the present petition and the same is dismissed.

21. All pending applications also stand dismissed.

(JAYANT NATH) JUDGE AUGUST 24, 2017/rb