

Ten Creative Studio Pvt Ltd & Ors. vs Nelson Planning & Design Pvt Ltd. on 4 July, 2018

Author: C.Hari Shankar

Bench: C.Hari Shankar

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*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FA0(OS) 30/2018 & CM No.6801/2018

% Date of decision : 4th July, 2018

TEN CREATIVE STUDIO PVT LTD & ORS.. Appellants
Through : Mr. Yash Anand, Mr. David A.
and Mr. Rahul Kumar, Advs.
versus

NELSON PLANNING & DESIGN PVT LTD .. Respondent
Through : Mr. Ambar Qamaruddin, Mr.
Ajay Talesara, Mr. Varun
Nischal and Ms. Vandana
Varshney, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR
JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE FA0(OS) 30/2018

1. By way of this petition, the appellants have assailed the order dated 24th January, 2017 dismissing O.M.P. No.18/2017 in which order dated 11th January, 2017 passed by the Id. Arbitrator rejecting the counter claim filed by the appellants herein as barred by limitation was challenged under Section 34 of the Arbitration Act.

2. It is undisputed that the proceedings before the Id. Arbitrator pertain to two agreements both dated 30th March, 2012 relating to Business and Asset Transfer Deed and Employment Agreement. As per the terms of the Business and Asset Transfer Deed, the respondent had acquired the business of the petitioner/appellant company including pending projects without taking over any of the movable as well as immovable assets for the total sale consideration of Rs.12,00,000/-. As per the Employment agreement, Mr. Vikrant Bhatkar, appellant no.3 herein had joined as Executive Director of the respondent's company at the monthly salary of Rs.2,00,000/-.

3. Mr. Vikrant Bhatkar admittedly submitted his resignation from service vide letter dated 18th August, 2013 to the respondent company. This resignation was premised on reasons of ill health of

his son. This resignation letter was not accepted by the respondents, who responded to the same vide letter dated 26th August, 2013 setting out reasons as to why the services of the appellant no.3 were being terminated. The respondents made extensive allegations regarding the working of the appellant no.3 and set up a financial claim against all the appellants placing reliance on the terms of the two agreements between the parties.

4. Based on the same assertions, the respondent filed a petition on 11th October, 2013 being O.M.P. No.1034/2013, Nelson Planning and Design Private Limited vs. Ten Creative Studio Private Limited & Ors. under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim orders against the appellants herein. Ad-interim ex- parte relief was granted to the respondents whereby the appellants were restraint from entering into any fresh contract with a third party.

The appellants filed a reply dated 28th May, 2014 to this petition (page

150).

5. Our attention is drawn to the order dated 4 th September, 2014 whereby the ld. Single Judge has disposed of the petition filed under Section 9 of the Arbitration and Conciliation Act for the reason that the prayer of the petitioner became infructuous by reasons of efflux of time.

6. The respondents filed two arbitration petitions being Arb.P.No.114/2015 and Arb.P.No.115/2015 under Section 11 of the enactment seeking reference of the disputes to arbitration.

7. On 7th October, 2015, when these petitions were came up, a submission was made by ld. counsel for the respondents that "in terms of the arbitration clause, an arbitrator may be appointed". In these circumstances, by an order of the same date, a former judge of this court was appointed as an Arbitrator and the petitions were disposed of.

8. The respondents filed its statement of claim before the Delhi Arbitration Centre on 16th January, 2016 in case bearing reference DAC/1062/10-15. The appellant also filed its detail reply to the statement of claim on 27th May, 2016. The respondent had also filed an application under Section 17 which was registered with case reference DAC/1069/10-15. Thereafter on 19th July, 2016, the appellant herein filed its counter claim in case reference no.DAC/1062/10-15 against the respondent based on the allegations of loss, dues and humiliation suffered by it at the hands of the respondents. The respondents also filed its statement of claim in case reference no.DAC/1069/10-15 on 17th September, 2016. The second counter claim in DAC/1069/10-15 was filed by the appellant only on 1st December, 2016.

9. The respondents objected that the counter claims filed by the appellants were grossly barred by time. The ld. Arbitrator sustained this objection of the respondents vide order dated 11th January, 2017 and rejected all the counter claims of the appellants in both the case references as being barred by limitation. In case reference no.DAC/1062/10-15, the ld. Arbitrator held that the counter claim of the appellants only to the extent of Rs.2,00,000/- towards the outstanding amount of the monthly salary for the month of August, 2013 was within limitation, which dispute is pending consideration

before the Id. Arbitrator.

10. As noted above, aggrieved by the rejection of the counter claims, the appellants filed a petition under Section 34 of the Arbitration and Conciliation Act being O.M.P. No.13/2017. These objections have been dismissed by the impugned order dated 24th August, 2017 passed by the Id. Arbitrator, holding that the date on which the counter claim is made before the arbitrator would be the date of institution of the counter claim unless the case falls within the exception where the respondent who makes the counter claim also sought arbitration by serving a notice on the claimant.

11. We have heard Id. counsels for the parties and also perused the available records.

12. Id. counsel for the respondents has placed reliance on the pronouncement of the Supreme Court reported at (2014) 4 SCC 516 *Voltas Limited vs. Rolta India Limited* contending that the said judgment applies squarely to the issues which arose for consideration in the present case.

13. The sole question which has to be considered by this court is as to whether the counter claim filed by the appellants falls within the exceptions envisaged under Sections 21 and 43 of the Arbitration and Conciliation Act.

14. For expediency, we may extract provision of Section 21, which provides for the dates of commencement of arbitral proceedings as well as Section 43 which provides for limitations under the enactment. The same reads as follow:-

"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."

xxx xxx xxx "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."

(Emphasis by us)

15. On a bare examination of the statutory provisions, we are of the view that ld. Single Judge has rightly noted that in view of Section 21 and 43(2) of the enactment, arbitration is deemed to commence on the date referred to under Section 21. This statutory provision clearly stipulates 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 respondents.

16. So far as filing of the counter claim is concerned, the date of limitation thereof fell for consideration before the Supreme Court of India in a pronouncement reported at (2012) 12 SCC 581 State of Goa vs. Praveen Enterprises wherein it was 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.

(Emphasis by us)

17. The Supreme Court therefore clearly laid down the law that date of making of the counter claim is date of its institution unless the case falls under the exception above, i.e., where the respondent who makes the counter claim also sought arbitration by serving a notice on the claimant.

18. In the later decision in Voltas Limited vs. Rolta India Limited, the Supreme Court has clearly laid down the twin tests which has to be satisfied. The same reads as follows :

"24. 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."

(Emphasis by us)

19. In the present case, Id. counsel for the appellants has vehemently relied on the assertions made in the appellant's reply dated 25th May, 2014 to O.M.P. No.1034/2013 and submitted that the appellant had extensively set out its entitlement and claims against the respondents. We have perused this reply in detail. This reply was filed by the appellant in opposition to the application of the respondents for interim relief. In this reply, the appellants have claimed entitlement to amounts under the Employment Agreement and have also asserted that the respondent was trying to escape its liabilities from paying of the contractors dues to the tune of Rs.62 lakhs and from handing over incentives to respondent no.3 under the employment agreement for achieving the target in financial year 2012-13.

20. It is not disputed by Mr. Yash Anand, Id. counsel for the appellants that the twin test laid down by the Supreme Court in Voltas's case have to be satisfied.

21. A close reading of the reply filed by the appellants would show that there is not a whisper that appellants sought reference of any claims or disputes to arbitration. Therefore, filing of the reply to O.M.P. No.1034/13 by no way notified the respondents that the appellant was seeking arbitration of its claims and same cannot be construed as service of notice to the respondent with regard to making of claims or seeking reference to arbitration as envisaged by law.

22. Mr. Yash Anand, Id. counsel for the appellants has further submitted that order dated 7th October, 2015 records the submission on behalf of appellants regarding reference of disputes to the arbitrator. It is submitted by Mr. Anand that the order dated 7th October, 2015 in fact made reference of disputes of both sides to arbitration and therefore, the limitation for filing the counter claim has to be construed from the date of this order.

23. Unfortunately, we are unable to agree with Mr. Anand, Id. counsel for the petitioner. On 7th October, 2015, there was no request for reference of the disputes of the appellant to arbitration. It is the respondent who had filed a petition under Section 11 of the Arbitration and Conciliation Act seeking reference of the dispute raised by them to arbitration. The appellant did not even bother to file a response therein setting out their disputes nor made a prayer for reference of any dispute to arbitration.

24. The order dated 7th October, 2015 only records the submission of counsel for the appellant that in terms of the arbitration clause, the arbitrator may be appointed. The appellant neither sought nor ld. Single Judge had recorded in the order dated 7 th October, 2015 the reference of the claims of the appellant to arbitration.

25. In this background, on 7th October, 2015, the ld. Single Judge has passed the order and appointed a sole arbitrator and directed that the arbitration shall be conducted under the Rules of and before the Delhi International Arbitration Centre. The reliance of the appellant on the order dated 7th October, 2015 for computation of the limitation qua filing of the counter claim is also misconceived.

In view of the above, the order dated 24th August, 2017 of the ld. Single Judge cannot be faulted on any legally tenable ground. The present appeal is completely misconceived and is hereby rejected.

In view of the order passed in the appeal, this application does not survive for adjudication. The same is hereby dismissed.

ACTING CHIEF JUSTICE C.HARI SHANKAR, J JULY 04, 2018 mk