Where the question if arbitrator had jurisdiction over a counter claim depended on questions of fact, the arbitrator should not have summarily rejected that claim? (Supreme Court)

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Bharat Corporation Petroleum Limited v. Go Airlines (India) Limited

Court: Delhi High Court| **Case number**: Civil Appeal No. 8227 2019 | **Citation**: 2019 SCC OnLine SC 1382|**Bench**: R. Banumathi, A.S. Bopanna and Hrishikesh Roy, JJ| **Date**: 23 October 2019

Under an agreement of January 2007, BPCL supplied aviation fuel to Go Airlines. Some dispute arose and BPCL invoked arbitration raising a claim for interest on delayed payments. Go Airlines raised a counter claim alleging BPCL did not issue tax invoices because of which Go Airlines was unable to claim CENVAT credit of the input tax paid by it to BPCL, resulting in a loss.[1]

BPCL contested the arbitrator's jurisdiction to hear the counterclaim, and filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 ("**ACA**"). The arbitrator ruled she did not have jurisdiction. She reasoned that the credit issue was not in dispute before arbitration had commenced, it was brought up only later. Also, it was not covered under the terms of the contract.

Go Airlines appealed and a single judge of the Bombay High Court ruled (on 07 December 2011) that the matters raised did not affect the inherent jurisdiction of the arbitrator but the merits, which the arbitrator could very well decide.

BPCL went to the Supreme Court (in around February 2012).

The Supreme Court decided that to reject the counterclaim at the threshold was not proper. Whether the dispute on CENVAT invoices fell outside the agreement, or beyond the scope of reference could be determined only during the arbitration proceedings, after hearing. It may be that "after enquiry", the Court added, the counterclaim is rejected as not arbitrable, or beyond reference and/or the agreement.

Though the court notes that the point to be considered was whether the "…counter claim … was beyond the scope of reference… and whether the arbitrator had jurisdiction", the judgement first notes the respective arguments and then sets out its conclusion without expressly addressing their relative merit. It may be useful, therefore, to summarize those arguments for the interested reader.

BPCL's submissions had focused around the following arguments: –

1. The counter claim does not arise from the terms and conditions of the contract/agreement.
2. The arbitrator can reject the counterclaim at an initial stage if it is beyond the jurisdiction.

[1] Under the erstwhile Central Excise law (also known as CENVAT), goods supplied by a manufacturer/seller was subject to levy of central excise duty and VAT. Every manufacturer/seller supplying taxable goods was required to raise an invoice on the buyer containing details of tax charged from the buyer. The tax paid by the buyer to the seller was available as credit to the buyer. This credit (also known as CENVAT credit) could be utlised by the buyer to pay its own tax.

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3. The need for issuing CENVAT credit invoices arose arises only after 01 April 2010 and the counter claim could not be considered having arisen out of the agreement which expired in March 2009! 31.03.2009.
4. There was no requirement to do so and Go Airlines never demanded the invoices before arbitration commenced.

On the other hand, Go Airlines argued that: –

1. The counterclaim was not beyond the agreement. Even if not expressly included, it should be read as an implied term of the contract. In any case, it was a question of fact and could be decided after due enquiry.
2. There was a dispute about matters counterclaimed because request for invoices had been made orally to BPCL.
3. Go Airlines had accepted BPCL's nominee as sole-arbitrator expressing hope "that she would be able to adjudicate the issues appropriately considering our claims against BPCL". Merely because the nature of the 'claims' were not specified the counterclaim could not be rejected at the threshold

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