$~10 (Original)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(T) (COMM.) 32/2020 & I.As. 5832-5833/2020

SHRI PANKAJ ARORA ..... Petitioner

Through: Mr. Nishit Kush and Ms. Mercy Hussain, Advs.

versus

AVV HOSPITALITY LLP & ORS. .... Respondents

Through: Mr. Deepak Dhingra and Ms. Rachita Garg, Advs.

CORAM:
HON'BLE MR. JUSTICE C .HARI SHANKAR

JUDGMENT (ORAL)

% 20.07.2020

(video-conferencing)

O.M.P. (T) (COMM.) 32/2020

1. This petition, under Section 14 and 15 of the Arbitration & Conciliation Act, 1996, seeks termination of the mandate of the learned Sole Arbitrator, arbitrating on the disputes between the petitioner and the respondents. However, towards the conclusion of his submissions, Mr. Kush, learned Counsel for the petitioner has submitted that his only request was that the learned Sole Arbitrator be directed to decide the application, preferred by his client under Section 16 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act").

2. The contention of the petitioner, in the aforesaid application, under Section 16 of the 1996 Act, was that the learned Sole Arbitrator did not possess the jurisdiction to adjudicate on the counter-claims of the respondent. *Vide* order dated 15th June, 2020, the learned Sole Arbitrator has disposed of the said application, keeping the issue regarding his jurisdiction, as ventilated in the said application, open, to be decided after recording of evidence and at the stage of final arguments.

3. Essentially, therefore, all that this Court is required to decide, in the present petition, is whether the learned Sole Arbitrator has mandatorily to be directed to adjudicate on the issue of his jurisdiction (to entertain the counter claims of the respondents) at this stage itself, without deferring the issue to the stage of final arguments.

4. In view of the limited nature of the controversy, a brief allusion, to the facts, would suffice.

5. Respondents 2 and 3, in this petition, are partners in the Respondent 1-firm, which runs a restaurant, under the name and style of "Firki Bar". Disputes arose, between the petitioner and Respondents 2 and 3, in connection with a document which, according to the petitioner, was a Memorandum of Understanding (MoU), dated 28th September, 2017, to which the petitioner and said respondents were parties, and whereunder the petitioner was required to be inducted as a partner in the said firm. Clause 9 of the MoU constituted the Arbitration Agreement and read thus :

> "9. That all the disputes/differences, of any nature arising between the parties regarding their rights, obligation, the interpretation of these presents, and all matters arising under this agreement, will be resolved through co-operation and consultation. If the said disputes etc. cannot be resolved by co-operation and consultation, the said matter shall be referred to an arbitrator, who shall be appointed with the mutual consent of all the parties to this MOU. The arbitrator under this clause will be an arbitrator under the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof."

6. It is not necessary to enter into the details of the dispute. Suffice it to state that, disputes having arisen, this Court was approached, for appointment of an arbitrator and that, ultimately, the learned Sole Arbitrator, a retired Judge of this Court, was appointed under the aegis of the Delhi International Arbitration Centre (DIAC).

7. Before the learned Sole Arbitrator, statement of claim was filed by the petitioner and statement of defence, along with certain counter claims, was filed by the respondents. The counter claims were predicated on an undated 'receipt-cum-agreement', allegedly executed between the petitioner and the respondents. Respondents 2 and 3 sought to contend that, under the said receipt-cum-agreement, the petitioner had undertaken to pay an amount of ₹ 1.39 crores to Respondents 2 and 3, of which the petitioner had paid only ₹ 21 lakhs, with a balance of ₹ 1.18 crores remaining to be paid. This amount constituted the substratum of the respondents' counter-claims.

8. Before the learned Sole Arbitrator, the petitioner contended that, as there was no arbitration clause in the aforesaid receipt-cum-agreement, the learned Sole Arbitrator did not possess the jurisdiction

to adjudicate on the counter claims of Respondents 2 and 3. Reliance was placed, in this context, on Clause 8 of the receipt-cum-agreement, which envisaged resort to a court of law, by way of a suit for specific performance, to enforce the covenants thereof.

9. Respondents 2 and 3 have, in their replication to the reply, of the petitioner, to their counter claims, denied this assertion of the petitioner.

10. The petitioner moved an application, before the learned Sole Arbitrator, under Section 16 of the 1996 Act, praying that the counter claims of Respondents 2 and 3 be dismissed, for want of maintainability, as the cause, canvassed therein, did not constitute an arbitrable dispute, amenable to the jurisdiction of the learned Sole Arbitrator.

11. The said application stands disposed of, by order, dated 15th June, 2020, of the learned Sole Arbitrator. To a query as to why the petitioner has not chosen to challenge the said order under Section 34 of the 1996 Act, if the petitioner is aggrieved thereby, Mr. Kush submits that, in his opinion, Section 16(5) of the 1996 Act mandated allowing, by the learned Sole Arbitrator, of his application under Section 16, prior to the recording of evidence and that, therefore, the learned Sole Arbitrator was *de jure* incompetent to adjudicate on the counter claims of the respondents. For this reason, submits Mr. Kush, the petitioner chose to move the present petition, for termination of the mandate of the learned Sole Arbitrator, to adjudicate on the counter

claims of the respondents, instead of filing a formal challenge, under Section 34 of the 1996 Act, to the order dated 15th June, 2020.

12. I am unable to agree with this submission of Mr. Kush. In my opinion, the order dated 15th June, 2020, being in the nature of an interim order passed by the learned Sole Arbitrator, was amenable to challenge under Section 34 of the 1996 Act. Without ventilating such a challenge, the petitioner could not have preferred the present petition, for termination of the mandate of the learned Sole Arbitrator. Such a termination of the mandate of the learned Sole Arbitrator cannot be directed, even while the order dated 15th June, 2020, remains undisturbed – and, in fact, unquestioned.

13. Be that as it may, I am of the opinion that the present petition cannot succeed, even otherwise, as no case is made out, to direct the learned Sole Arbitrator to take a decision on the application, of the petitioner under Section 16 of the 1996 Act, at this stage itself, without deferring the issue for decision after recording of evidence. The procedure to be followed, in arbitral proceedings, is essentially the province of the arbitrator, or the arbitral tribunal. Unless the decision, in that regard, falls foul of any mandatory stipulation, contained in the 1996 Act, this Court would be loath to interfere, the autonomy of the arbitral proceedings, and of the arbitrator, being statutorily pre-eminent.

14. Mr. Kush had sought to submit that Section 16(5) of the 1996 Act stood violated by the decision, of the learned Sole Arbitrator, to defer the issue of his jurisdiction, to adjudicate on the counter claims

of the respondents, to a stage after recording of evidence. I am unable to agree with this contention, either. Be it noted, Mr. Kush was candid in admitting that he was not aware of any judicial authority, to the effect that such an objection had necessarily to be decided before evidence was recorded.

15. Section 16 of the 1996 Act reads as under :

> "**16. Competence of arbitral tribunal to rule on its jurisdiction.—**
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
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> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
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> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
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> (4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

> (5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
>
> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

16. I am unable to read sub-section 5 of Section 16 as casting a mandate, on the arbitrator, or the arbitral tribunal, to decide the objection, to its/his jurisdiction, to adjudicate on any claim/counter claim, necessarily before recording of evidence. No doubt, issues of jurisdiction are, ordinarily, to be addressed at the outset. That, however, is more a rule of prudence than one of inflexible procedure. Legally, so long as the said decision is taken prior to the making of the final arbitral award, in my view, no infraction of Section 16 could be said to have occurred. Significantly, in case the learned Sole Arbitrator exercises jurisdiction and adjudicates on the counter claims of the respondents, and the petitioner is aggrieved thereby, sub-section (6) of Section 16 specifically envisages the right, of the petitioner, to pray for setting aside of such an award, in accordance with Section 34 of the 1996 Act.

16. Even on merits, I cannot subscribe to the submission that the learned Sole Arbitrator was unjustified in deferring the issue of his jurisdiction, to adjudicate on the counter claims of the respondents, till the stage of final arguments. A reading of the order, dated 15th June, 2020, of the learned Sole Arbitrator, reveals that this decision has not been taken mechanically, without application of mind, but for good

and sound reasons. The case of the petitioner, before the learned Sole Arbitrator, was that the MoU, dated 28th September, 2017, required Respondents 2 and 3 to hand over, to the petitioner, the entire charge of operation of "Firki Bar" for a consideration of ₹ 35 lakhs, which, according to the petitioner, already stood paid. The petitioner's contention was that, on 1st October, 2017, he had taken possession of the said premises. The dispute related to certain alleged losses, suffered by the petitioner, on account of non-fulfilment, by the respondents, of the MoU, dated 28th September, 2017. Respondents 2 and 3 relied, *per contra*, on the undated receipt-cum-agreement, stated to have been executed between the petitioner and the respondents (though Mr. Kush would seek to point out that the said document was between the petitioner and Respondents 2 and 3). According to Respondents 2 and 3, this receipt-cum-agreement required the claimant to pay ₹ 1.39 crores, for the purchase of "Firki Bar", of which only ₹ 21 lakhs had been paid, with ₹ 1.18 crores remaining outstanding. It was further alleged, by Respondents 2 and 3, that, as the petitioner was facing financial difficulties, he had approached the respondents in September, 2017, for execution of an MoU, so that his lenders could be satisfied, and that it was for this reason that, in the said MoU, the sale consideration of "Firki Bar" was reflected as ₹ 35 lakhs. According to Respondents 2 and 3, an amount of ₹ 88 lakhs remains outstanding from the petitioner.

17. Needless to say, these allegations of Respondents no. 2 and 3 stand controverted, in writing, by the petitioner, before the learned Sole Arbitrator. The petitioner has sought to contend that the aforesaid receipt-cum-agreement related to the first floor of House No. 312,

Block C-2, Janakpuri, and had nothing to do with "Firki Bar". The dispute, relating to the aforesaid Janakpuri property, it was further pleaded, stood settled, between the petitioner and Respondents 2 and 3. In fact, contended the petitioner, the cheque issued by Respondents 2 and 3, consequent to the said settlement, was dishonoured, as a result of which the petitioner had initiated proceedings, against them, under Section 138 of the Negotiable Instruments Act, 1881. The counter claim, as preferred by Respondents 2 and 3 before the learned Sole Arbitrator, was for recovery of the aforesaid amount of ₹ 88 lakhs, alongwith damages of ₹ 1 crore.

18. Issues were framed, by the learned Sole Arbitrator, Issue No. 11 was framed as under:

> "11. Whether the Receipt-cum-Agreement (undated) is for sale of First Floor of House No. 312, Block C-2, Janakpuri or for sale of Fikri Bar, subject matter of Memorandum of Understanding? Onus on parties"

19. The learned Sole Arbitrator has, after taking stock of the aforesaid arguments and the controversies that arose as a consequence thereof, noted that there was no categorical denial of the existence and execution, either of the MoU dated 28th September, 2017, on which the petitioner relied, or the undated receipt-cum-agreement, which constitutes the mainstay of the submissions of Respondents 2 and 3. Thereafter, paras 12 to 14 of the order, dated 15th June, 2020, of the learned Sole Arbitrator, read thus :

> "12. The parties are still to produce their respective evidence to prove their respective cases. This Tribunal is of the view that, at this stage, the rival assertions of both the parties can't be decided. The controversy whether both the

> documents i.e. Receipt-cum-Agreement and MOU pertain to different properties or only to one property i.e. 'Firki Bar' can be adjudicated only after getting evidence of the parties. It is pre-mature to brush aside the assertions of the non-applicants. The burden shall be upon the non-applicants to establish during trial that both these documents relate to the subject property. If both the documents pertain to the property in question as urged by the non-applicants, definitely, the dispute in the Counter-claim could be within the jurisdiction of this Tribunal by virtue of arbitration agreement in the MOU dated 28.09.2017. The issue regarding jurisdiction of this Tribunal will remain open and both the parties will be at liberty to address arguments over it at the time of final disposal after evidence of the parties is obtained.
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> 13. In view of the above discussion, the application of the claimant is disposed off with liberty to both the parties to address arguments on the jurisdiction of this Tribunal at the time of final arguments.
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> 14. Observations in the order shall have no impact on the merits of the case."

20. In my opinion, given the above facts, it cannot be said that the learned Sole Arbitrator has materially or fundamentally erred, in deferring the issue, relating to his jurisdiction, to adjudicate on the counter claims of Respondents 2 and 3, to the stage after recording of evidence. Given the nature of the controversy, he has deemed it appropriate to do so, and his autonomy, in that regard, has to be respected. I cannot agree with Mr. Kush that the learned Sole Arbitrator has necessarily to be directed, at this stage itself, to adjudicate on the application, of the petitioner, under Section 17, without proceeding to record evidence.

21. Mr. Kush submits that his grievance is that, if the learned Sole Arbitrator does not possess jurisdiction to adjudicate on the counter

claims of Respondents 2 and 3, it would be unnecessary for the petitioner to lead evidence in that regard. That, however, is a call which is entirely for the petitioner to take. If the petitioner is sanguine that he is bound to succeed in his submission that the learned Sole Arbitrator has no jurisdiction to adjudicate on the counter claims of Respondents 2 and 3, he is free, if he so chooses, not to lead any evidence in that regard; needless to say, at his own risk. I am unable to convince myself that, at this stage, any occasion arises, for this Court to step in and to direct the learned Sole Arbitrator to mandatorily adjudicate on his jurisdiction, qua the counter claims of Respondents 2 and 3, before recording of evidence. If, given the severely disputed factual issues, raised before him, the learned Sole Arbitrator thought it appropriate to record evidence before adjudicating on his jurisdiction to decide the counter claims of Respondents 2 and 3, no such error, as would justify interference by this Court, can be said to have been committed.

22. Far less, needless to say, does any occasion arise for this Court, at this stage, to terminate the mandate of the learned Sole Arbitrator. If the learned Sole Arbitrator is convinced with the merits of the application of the petitioner, under Section 16 of the 1996 Act, it would always be open to him, to so hold and, therefore, to reject the counter claim of the respondents as not maintainable. In case he holds to the contrary, and the petitioner is aggrieved, it would, equally, be open to the petitioner to raise the said ground, in his challenge to the award, under Section 34 of the 1996 Act.

23. In my view, the present petition is essentially pre-mature, and no occasion arises, for this Court to terminate the mandate of the learned Sole Arbitrator, qua the counter claims of the respondents, especially as the issue has been kept alive by the learned Sole Arbitrator, to be decided at a later stage.

24. This petition is, therefore, completely devoid of merits and is dismissed accordingly, with no orders as to costs.

25. Needless to say, this Court has not opined, one way or the other, on the jurisdiction, of the learned Sole Arbitrator, to adjudicate on the counter claims raised, before him, by Respondents 2 and 3, and no observation, in this order, may be regarded as an expression of opinion by this Court, even tentative, in that regard.

C. HARI SHANKAR, J.

JULY 20, 2020/kr