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

*Date of Decision: 14<sup>th</sup> March, 2023*

+ ARB.P. 608/2022

PRIME INTERGLOBE PRIVATE LIMITED

..... Petitioner

Through: Mr. Sameer Jain, Mr. Suvigya Awasthy, Mr. Vivek Joshi, Mr. Rohan Gulati, Ms. Radha Gupta, Advocates.

versus

SUPER MILK PRODUCTS PRIVATE LIMITED

..... Respondent

Through: Mr. Ashish Dholakia, Senior Advocate with Mr. Aseem Chaturvedi, Mr. Shivank Diddi, Mr. Milind Jain, Ms. Abhipriya, Mr. Arpit Kumar Singh, Advocates.

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**CORAM:**

**HON'BLE MR. JUSTICE PRATEEK JALAN**

**JUDGMENT**

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"], the petitioner seeks appointment of an arbitrator to adjudicate claims raised by it against the respondent arising out of an agreement dated 03.10.2016, entitled "*Master Franchise Agreement*" [hereinafter, "MFA"].

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A. Facts:-

2. By way of the MFA, the petitioner was appointed as the “*Master Franchisee*” in respect of the trademark “KEVENTERS”, which the respondent claimed to have the right to use, and for the purpose of selling milkshakes under “*kiosk franchise model*” in designated territories.

3. The detailed terms of the MFA are irrelevant for the purposes of the present petition. Suffice it to say that the MFA contains an arbitration clause in Clause 28. The arbitration clause provides for a sole arbitrator to be appointed by the franchisee [the petitioner herein], out of a panel of three people suggested by the franchisor [the respondent herein]. New Delhi has been designated as the place of arbitration. By virtue of Clause 30.2 of the MFA, Courts in Delhi have been vested with exclusive jurisdiction over all matters arising out of the MFA.

4. Disputes having arisen between the parties, the petitioner addressed a notice dated 21.05.2019 to the respondent, whereby it *inter alia* invoked the arbitration clause and proposed the name of an arbitrator.<sup>1</sup> It claimed an amount of Rs. 5.93 crores from the respondent. In the said communication, reference was also made to an earlier notice dated 20.05.2019, in which it appears that the petitioner’s claims were identified. However, that notice is not on record in these proceedings.

5. The respondent, through counsel, replied by a legal notice dated 28.05.2019 disputing the petitioner’s contentions and also making

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<sup>1</sup> Document P-5(colly) of the petitioner’s list of documents.

allegations of breach against the petitioner.<sup>2</sup> Three names were proposed, from which the petitioner was called upon to select the arbitrator. The petitioner, through counsel, responded by a letter dated 09.06.2019, asserting its own choice of arbitrator.<sup>3</sup>

6. By a communication dated 14.06.2019, learned counsel for the respondent once again called upon the petitioner to select one of the three names suggested by it. Learned counsel for the petitioner, by his reply dated 21.06.2019, again disputed the respondent's contentions.

7. In these circumstances, the respondent filed ARB.P. 474/2019 before this Court for appointment of an arbitrator "*for adjudication of the disputes between the parties*".<sup>4</sup>

8. By an order dated 26.07.2019, the petition was disposed of in the presence of learned counsel for both sides. The order reads as follows<sup>5</sup>:-

*"This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Master Franchises Agreement dated 03.10.2016 executed between the parties. The Arbitration Agreement between the parties is contained in Clause 28 of the Agreement.*

*Clause 28.2 of the Agreement provides for procedure for appointment of an Arbitrator.*

*As the parties could not agree on the appointment of an Arbitrator, the present petition has been filed.*

*Out of names proposed by the petitioner, learned counsel for the respondent submits that, subject to disclosure under Section 12 of Act, the respondent has no objection on appointment of Mr. Sudhanshu Batra, Senior Advocate as a Sole Arbitrator.*

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<sup>2</sup> Ibid.

<sup>3</sup> Document-4 in the respondent's list of additional documents.

<sup>4</sup> Prayer Clause (a) in ARB. P. 474/2019.

<sup>5</sup> Document P-6 of the petitioner's list of documents.

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*In view of the above, Mr. Sudhanshu Batra, Senior Advocate (A1/212, Safderjung Enclave, New Delhi, Mob. No.9811035392) is appointed as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the abovementioned Agreement. He shall give disclosure under Section 12 of the Act before proceeding with the reference.*

*The petition is allowed in the above terms, with no order as to cost.*

*Dasti,<sup>6</sup>*

9. In the proceedings before the learned arbitrator, the respondent was designated as the “claimant” and petitioner was designated as “respondent/counter-claimant”. By a procedural order dated 21.08.2019, the learned arbitrator gave directions for filing of the statement of claims by the respondent herein, reply/counter-claims by the petitioner and further pleadings pursuant thereto. The petitioner did not file its statement of defence and counter-claims by the appointed date, and instead sought several extensions of time for this purpose.

10. On 11.12.2019, the petitioner filed an application under Section 16 of the Act before the learned arbitrator, challenging his jurisdiction. It was stated therein that the statement of defence and counter-claims was ready, but was not filed due to its challenge on account of jurisdiction of the learned arbitrator. Further time was thereafter granted, but the petitioner filed its statement of defence only on 08.06.2020. No counter-claims were filed.

11. On 19.08.2020, the petitioner informed the tribunal that it was unable to pay the arbitral fee, which has since been borne by the respondent.

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<sup>6</sup> Emphasis in the original.

12. Ultimately, evidence was concluded on 05.01.2022 and the case was fixed for arguments before the learned arbitrator on 10.02.2022 and 11.02.2022.

13. At this stage, the petitioner moved an application dated 08.02.2022 before the tribunal seeking permission to file its counter-claims.<sup>7</sup> Explaining the delay in filing of counter-claims, it was stated in the application that the petitioner's application under Section 16 of the Act was dismissed on 25.02.2020, following which it approached this Court under Section 14 of the Act by way of O.M.P. (T) (COMM) 18/2020, which was dismissed on 11.03.2020. The petitioner further contended that its business was put in jeopardy due to the actions of the respondent herein and, therefore, it could not meet the costs of prosecuting its counter-claims. The petitioner claimed that it was able to raise its counter-claims only at this stage because its financial hardships had been mitigated.

14. The application was opposed by the respondent on the ground that sufficient opportunities had been granted to the petitioner and that during the same period, the petitioner had, in fact, filed petitions before this Court and the National Company Law Tribunal against the respondent.

15. The petitioner's application was dismissed by the learned arbitrator vide order dated 14.03.2022. The relevant observations of the arbitral tribunal are as follows<sup>8</sup>:-

*“9. A perusal of the record shows that this Tribunal granted opportunity to the Respondent to file Counter Claim on 21.08.2019*

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<sup>7</sup> Document P-9 of the petitioner's list of documents.

<sup>8</sup> Document P-12 of the petitioner's list of documents.

and 29.11.2019. The Respondent then filed an application under Sections 12 & 16 of the Arbitration and Conciliation Act, 1996 which was dismissed by a detailed order passed by this Tribunal on 25.02.2022. Thereafter, another opportunity was given to the Respondent to file Counter Claim on 25.02.2022. Till then neither the Statement of Defence nor the Counter Claim was filed. Vide emails dated 11.03.2020 and 26.03.2020, the Respondent again sought further time to file Statement of Defence but did not seek any opportunity to file Counter Claim. The Statement of Defence was filed around 08.06.2020 but the Respondent chose not to file the Counter Claim nor did it seek liberty to file the same later.

10. Pleadings were completed on 03.07.2020 and after issues were framed on 17.07.2020, trial could only commence on 12.12.2020 due to intervening applications filed by the Respondent and delay in filing affidavits by way of evidence by the parties. Trial concluded on 05.01.2022 and the matter was listed for final arguments for two consecutive days i.e. 10.02.2022 and 11.02.2022. **However, the present application has been filed at this belated stage on 08.02.2022 seeking permission to file Counter Claim. It is relevant to mention here that neither at the time of filing Rejoinder has the Claimant filed the proposed Counter Claim.**

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15. As is seen above, none of the judgments referred to by the Respondent show that the Counter Claim can be filed as late as at the time of final arguments and after completion of the trial between the parties as a matter of right or such discretion should be exercised by the Tribunal in granting permission to file Counter Claim at the final stage of the case.

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20. **In the present case, that there has not only been an inordinate delay in filing the Counter Claim but despite repeated opportunities granted to the Respondent it did not chose to file the Counter Claim nor sought liberty to file the same later on account of unavailability of funds.** In any event, the guidelines provided by the Hon'ble Supreme Court in Ashok Kalra (supra) deals with such a situation. It clearly holds that filing of the Counter Claim at a later stage could be allowed but the same ought be allowed in after considering the factors mentioned in para 21 of the said judgment and "in any event, after the framing of issues", it ought not to be allowed.

21. **It is true that the permission to file Counter Claim at the belated stage is at the discretion of the Tribunal but such discretion ought to be exercised keeping in mind the aforesaid**

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factors as laid down in the aforesaid judgment as well as the conduct of the Respondent throughout the proceedings.

22. Accordingly, I find no merit in the application, dated 08.02.2022, the same is dismissed.”<sup>9</sup>

16. The petitioner did not challenge the aforesaid order, but instead served a legal notice dated 09.04.2022 upon the respondent for appointment of an arbitrator to adjudicate its claims under the MFA.<sup>10</sup> The respondent replied, through counsel, on 09.05.2022 *inter alia* taking the position that the petitioner’s request was bad in law and barred, as a second arbitration would not lie in respect of disputes which have already been referred to arbitration.<sup>11</sup>

17. It is in these circumstances that the petitioner has filed the present petition before this Court.

**B. Proceedings before the Court:-**

18. Notice was issued in this petition on 19.05.2022. By an order dated 14.10.2022, this Court disposed of an application for early hearing filed by the petitioner with the following order: -

“1. Notice of this application for early hearing was issued on 15.09.2022. Although it was directed that the application will be listed alongwith the arbitration petition today, Mr. Aseem Chaturvedi, learned counsel for the respondent- non-applicant, seeks an adjournment.

2. **Mr. Suvigya Awasthy, learned counsel for the petitioner, submits that the ongoing arbitration proceedings between the parties under the same agreement, in which certain claims raised by the respondent herein are being adjudicated, and that an urgency arises because that arbitration is at its fag end.**

3. **Mr. Chaturvedi submits that the relief sought in the present petition is entirely independent of the ongoing arbitration proceedings, and the possibility of an award being rendered**

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<sup>9</sup> Emphasis supplied.

<sup>10</sup> Document P-13 of the petitioner’s list of documents.

<sup>11</sup> Document P-14 of the petitioner’s list of documents.

**therein will have no effect upon the petitioner's rights in the present petition.**

4. As far as merits of the matter is concerned, the petitioner seeks appointment of an arbitrator to adjudicate its claims under the contract dated 03.10.2016 entitled "Master Franchise Agreement". The principal ground taken by the respondent to resist appointment of an arbitrator is that the petitioner has failed to file its counter claims in the ongoing arbitration proceedings, and his obligation to do so has been rejected by the learned Arbitrator vide an order dated 14.03.2022.

5. **I am prima facie of the view that, the said order rejecting the petitioner's request to file counter claims on the ground that the request was belated, does not foreclose the petitioner's right to raise its claims in independent proceedings. In any event, it has been put to learned counsel for the respondent that an arbitrator may be appointed leaving all legal defences as to the maintainability, and the merits of the petitioner's claims, open for adjudication in the arbitration proceedings.** Mr. Chaturvedi will take instructions on this aspect also.

6. I.A. No. 15128/2022 stands disposed of in these terms."<sup>12</sup>

19. On the next date of hearing i.e., 30.11.2022, Mr. Ashish Dholakia, learned Senior Counsel for the respondent, raised a new submission, that the present petition under Section 11 of the Act was not maintainable as the disputes raised by petitioner herein had already been referred to arbitration in ARB.P. 474/2019. Parties were, therefore, directed to place a copy of the said petition before this Court. This Court also clarified that "*pendency of the present petition will not come in the way of the proceedings in the ongoing arbitral proceedings.*"<sup>13</sup>

20. It may be mentioned that, during the pendency of this petition, proceedings in the ongoing arbitration were concluded and the award was reserved. Mr. Dholakia then raised the grievance that, despite the

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<sup>12</sup> Emphasis supplied.

<sup>13</sup> Paragraph 4 of order dated 30.11.2022.

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orders of the Court dated 14.10.2022 and 30.11.2022, the petitioner had filed an application before the learned arbitrator for deferment of the award to await the result of the present petition. The following order was passed on 06.03.2023:-

“\*\*\*\*\* \*\*\*\*\* \*\*\*\*\*

6. *The petitioner has filed a further application dated 03.03.2023 before the learned arbitrator seeking a deferment of the passing of the arbitral award until the present petition is decided. I am informed that the learned arbitrator has fixed a hearing on that application on 10.03.2023.*

7. *I have put it to Mr. Sameer Jain, learned counsel for the petitioner, that filing of such an application before the learned arbitrator is really an attempt to overreach the order of this Court dated 30.11.2022. He submits that this is not the case and the petitioner, in fact, participated in the proceedings before the learned arbitrator thereafter. He further draws my attention to an order dated 27.08.2022 passed by the learned arbitrator, whereby the learned arbitrator has observed as follows: -*

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9. *In view of the repeated attempts of the petitioner to defer the conclusion of the pending arbitral proceedings, in which the respondent's claims are being adjudicated, I have requested learned counsel for the parties to address me on the question as to whether the award being published in those proceedings would have any affect upon the right of the petitioner to relief in this petition. Curiously, Mr. Jain states that the petitioner's right to seek appointment of an arbitrator in the present proceedings, i.e. to adjudicate the claims of the petitioner, would not be affected by the pendency or conclusion of the ongoing arbitral proceedings, in respect of the respondent's claims.*

10. *Mr. Dholakia takes the same position. He, however, submits that some of the questions which may arise in the arbitration proceedings proposed by the petitioner are the very same questions which are being decided in the proceedings arising out of the respondent's claims. In such an event, he reserves the right of the respondent, in the event the present petition succeeds, to raise contentions regarding abandonment of claims, issue estoppel, res judicata, etc., which the respondent may be entitled to raise in defence to the petitioner's claims Mr. Jain does not dispute that these issues would be open for consideration by the learned arbitrator in the prospective arbitral proceedings in either event,*

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Signing Date: 14.03.2023  
19:13:30

*i.e. whether the award is rendered before or after the conclusion of the present petition.*

*11. In these circumstances, it appears to me that this issue is really akin to a storm in a teacup. If the petitioner does succeed in the present application, the rights of the parties to argue before the learned arbitrator on the question of abandonment of claims, issue estoppel, res judicata or any other consequence of the ongoing arbitral proceedings, whether or not the award has been rendered yet, will remain reserved to them. It is, therefore, made abundantly clear that this Court has not passed any orders with respect to the ongoing arbitral proceedings.*

*12. Mr. Dholakia also submits that, subject to the reservations noted herein, the only question which requires consideration in the present petition is whether the petitioner's request for appointment of an arbitrator is barred on the ground that an arbitrator had already been appointed in ARB.P. 474/2019, and the petitioner was obliged to prosecute its claims only in those proceedings.*

*13. Learned counsel for the parties have concluded their submissions on this aspect. Judgment is reserved."<sup>14</sup>*

**C. Submissions of Counsel:-**

21. Mr. Sameer Jain, learned counsel for the petitioner, submitted that the parties are not in dispute regarding the existence of the arbitration clause or the arbitrability of the substantive claims raised by the petitioner. He concluded that the refusal of the learned arbitrator, in the ongoing arbitration proceedings, to entertain the petitioner's counter-claims on account of delay ought not to bar it from availing of independent remedies.

22. As noted in order dated 06.03.2023, extracted above, the question which requires to be adjudicated in this petition is whether the petitioner is barred from moving this Court under Section 11 of the Act in view of the reference in ARB.P. 474/2019. In this context, Mr. Dholakia submitted that the said petition was the culmination of an

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<sup>14</sup> Emphasis supplied.

exchange of correspondence between both parties and their counsel, in which their respective claims were sought to be agitated. He argued that, consequently, although ARB.P. 474/2019 was filed by the respondent herein, it was in effect a petition in which both parties stood as petitioners. Mr. Dholakia drew my attention to a reference in the said petition to “*adjudication of the disputes between the parties.*”<sup>15</sup> He submitted that this evidenced the intention of the respondent herein to incorporate disputes raised by the petitioner also.

23. Mr. Dholakia submitted that, in these facts, the petitioner and the respondent were both in the position of claimants before the learned arbitrator and Section 25(a) of the Act would lead to the conclusion that the proceedings in respect of the respondent’s claims have already been terminated. Section 25(a) reads as follows:-

*“25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—  
(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;”*

Mr. Dholakia, however, very fairly pointed out that this provision is inapplicable to counter-claims, by virtue of Section 2(9) of the Act, which is in the following terms: -

*“2. Definitions  
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(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.”*

<sup>15</sup> Paragraph 24 and the prayer clause (a) of ARB. P. 474/2019.

24. In support of his contention that successive petitions under Section 11 of the Act are impermissible, Mr. Dholakia relied upon the judgment of the Division Bench of this Court in *Hero Wind Energy Pvt. Ltd. vs. Inox Renewables Ltd. and Anr.*<sup>16</sup>, wherein the Court held that although there can be multiple claims and multiple references at multiple stages of a contract, “*if a particular issue is included in the terms of reference, the parties would be estopped by the doctrine of res judicata from raising that issue in subsequent arbitration proceedings even though the Arbitrator had made no award in relation to that issue.*”<sup>17</sup>

25. Mr. Dholakia also cited the judgment of a coordinate Bench in *National Highways Authority of India vs Abhijeet Angul Sambalpur Toll Road Ltd.*<sup>18</sup>, wherein the Court has held that a refusal to entertain counter-claims amounts to an interim award capable of challenge under Section 34 of the Act.

**D. Analysis: -**

26. While Mr. Dholakia is right in submitting that parties had each raised their claims against each other in correspondence exchanged between them, however, from a reading of the petition filed by the respondent [ARB.P. 474/2019], it appears that the respondent, in fact, sought reference of *its own claims* before the learned arbitrator. While recounting the correspondence in some detail, the respondent herein specifically asserted that the petitioner’s notice dated 21.05.2019 was

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<sup>16</sup> 2020 SCC OnLine Del 720.

<sup>17</sup> Paragraph 30 of the judgment.

<sup>18</sup> 2022 SCC OnLine Del 664.

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Signing Date: 14.03.2023  
19:13:30

“void ab initio”.<sup>19</sup> The reference to “disputes between the parties” does not necessarily imply that the claims of the petitioner herein were also the subject matter of ARB. P. 474/2019, filed by the respondent. Indeed, disputes commonly arise because one party asserts claims, which the other party denies. The matter is one which requires a contextual determination. In the present case, the respondent averred in ARB.P. 474/2019 that the petitioner’s invocation of arbitration was “void ab initio”<sup>20</sup> and also stated as follows: -

*“34. As elaborated in the aforementioned paragraphs, the Petitioner has a strong prima facie case in its favour and the balance of convenience also lies in its favour and against the Respondent. **Further, irretrievable losses would be caused by the Petitioner in the event the relief sought in the present Petition is not granted. The Petitioner has been unlawfully and illegally deprived of the monies due to it under the MFA, that the Respondent has illegally withheld the legitimate dues of the Petitioner and thereby caused immense financial losses to the Petitioner.**”*

*35. **The Petitioner is in the process of computing its claims** which are including, but not limited to the sum claimed by the Petitioner in the notice dated 28 May 2019 i.e. INR 1,41,39,522 (Rupees One Crore Forty-One Lacs Thirty-Nine Thousand Five Hundred Twenty-Two Only) along with interest as per terms of the Agreement, which sum the Respondent is liable to remit in favour of the Petitioner.*

*36. That it is further submitted that the present Application is **without prejudice to the right of the Applicant to raise additional claims/pleas** before the Arbitral Tribunal to be constituted in accordance with the Agreements”<sup>21</sup>*

27. In the context of these averments, it is not possible to hold that the respondent intended the petitioner’s claims also to be referred to

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<sup>19</sup> Paragraph 18 of ARB. P. 474/2019.

<sup>20</sup> Ibid.

<sup>21</sup> Emphasis supplied.

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NAGPAL  
Signing Date: 14.03.2023  
19:13:30

arbitration, or that the order of this Court dated 26.07.2019 in ARB. P. 474/2019 so implied. Of course, when arbitration proceedings are invoked at the instance of one party, it is generally open to the other party to file its counter-claims in the same proceedings, but this does not *per se* signify that the Court has referred the claims of the prospective counter-claimant, so as to bar its right to assert its claims at a future date.

28. Having come to the conclusion that the reference in ARB.P. 474/2019 was only in respect of the respondent's claims, I am also unable to accept Mr. Dholakia's contention regarding applicability of Section 25(a) of the Act. I am instead of the view that Section 2(9) of the Act clearly protects the petitioner.

29. Mr. Dholakia's reliance upon *Abhijeet Angul Sambalpur Toll Road Ltd.*<sup>22</sup> is misplaced. The said judgment is inapplicable to the present case, as the petitioner has not sought to challenge the order of the tribunal dated 14.03.2022, but seeks independent reference of its claims. The petitioner was not required to challenge the said order before filing proceedings for arbitration in respect of its claims, as the order only declined the petitioner's application for filing of its counter-claims on the ground of delay. It did not suggest that the counter-claims were not maintainable, or reject them on merits, so as to require setting aside of that order, prior to adjudication of the petitioner's claims.

30. The present case, in my view, is much closer to the judgment of a coordinate Bench in *Airone Charters Pvt. Ltd. vs Jetsetgo Aviation*

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<sup>22</sup> Supra (note 18).

*Services Pvt. Ltd.*<sup>23</sup>, cited by Mr. Jain, wherein also the petitioner's counter-claims in ongoing arbitral proceedings were not permitted to be filed, and the petitioner thereafter approached this Court under Section 11 of the Act. While acknowledging the general principle that a legal right carries with it a remedy in law, the Court observed as follows:-

**“61. There are well-recognized exceptions to the principle that the right to legal redress carries, with it, a remedy. Considerations such as limitation, constructive res judicata and the like can render the remedy unavailable, though the right subsists. These, however, are considerations, which the Court (or arbitrator) would take into account, once it is in seisin of the dispute. They do not foreclose the claimant, or petitioner, from placing its dispute before the Court, or arbitrator. Moreover, these are considerations which are essentially intended to balance equities, and prevent prosecution of claims which, owing to passage of time or other circumstances, would render grant of relief to the claimant entirely inequitable to the opposite party. Balancing of equities is, therefore, the raison d' etre behind these conceptual exceptions to the ubi jus ibi remedium principle.**

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65. No doubt, the petitioner had initially sought to agitate the present claims as counterclaims before the learned Arbitral Tribunal and on the petitioner's failing to do so within the time granted by the learned Arbitral Tribunal, the counterclaims were struck off the record. That cannot, however, be a ground to deny the petitioner the right to arbitration, treating them as substantive claims....

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**68. The striking off, from the record, of the counter-claims of the petitioner does not, in my view invite, in its wake, rejection of the request of the petitioner to refer the claims to arbitration under Section 11 of the 1996 Act.** The counterclaims were filed by the petitioner on 6th July, 2019. (Though Mr. Sibal disputed this fact, the learned Arbitral Tribunal has, by “striking the counterclaims off the record” recognized that the counterclaims were on record at the time they were struck off.) The learned Arbitral Tribunal refused to take the counterclaims on record unless six months' extension of its mandate was obtained from this Court. The

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<sup>23</sup> 2021 SCC OnLine Del 4693.

*petitioner, accordingly, filed OMP (Misc) (Comm) 290/2019, seeking extension of the mandate of the learned Arbitral Tribunal by six months. For reasons unknown, the petitioner withdrew the said petition on 26th September, 2019. Even so, this Court reserved liberty to the petitioner “to pursue the appropriate remedy that may be available to him in law”. In view of the withdrawal, by the petitioner, of OMP (Misc) (Comm) 290/2019, the learned Arbitral Tribunal struck the petitioner's counterclaims off the record. Even while doing so, the learned Arbitral Tribunal reserved liberty, with the petitioner, to avail such remedy as was available to it in law.*

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**72. It is not, therefore, as if the learned Arbitral Tribunal had held the petitioner not to be entitled to prefer its claims.** *The counterclaims, which were earlier on record, were struck off the record only because of the time constraint within which the learned Arbitral Tribunal would have to render its award and the withdrawal, by the petitioner, of OMP (Misc) (Comm) 290/2019. That impediment does not apply, where the petitioner desires to agitate the claims substantively in arbitral proceedings. The independent right of the petitioner, to do so, stands recognized by the Supreme Court in Praveen Enterprises and by this Court in A.K.M. Enterprises.*

*73. I cannot, therefore, accept the submission of Mr. Sibal that, the petitioner was barred from seeking reference of its claims to arbitration under Section 11 of the 1996 Act, owing to its counterclaims having been struck off the record by the learned Arbitral Tribunal.”*

31. The position in present case is analogous to the facts in *Airone Charters Pvt. Ltd.*,<sup>24</sup> as the learned arbitrator has not permitted the petitioner to raise its counter-claims in the arbitral proceedings.

32. I also bear in mind that an elaborate enquiry into the maintainability of the claims sought to be agitated by the petitioner is not appropriate at the stage of proceedings under Section 11 of the Act. While the judgments of the Supreme Court on the scope of Section 11 of the Act, including inter alia *Vidya Drolia and Others vs.*

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<sup>24</sup> Ibid.

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*Durga Trading Corporation*<sup>25</sup> and *BSNL v. Nortel Networks (India) (P) Ltd.*<sup>26</sup>, permit the Court to weed out entirely spurious claims, such jurisdiction is to be sparingly exercised, limited to cases in which the proceedings are really in the nature of “*deadwood*”.<sup>27</sup> The Court has made it clear that the default position, even in doubtful cases, is to refer the disputes to arbitration rather than to enter into an elaborate analysis at this stage.

33. Having regard to these principles, I am of the view that the appropriate course in the present case is to refer the petitioner’s claims to arbitration, leaving all rights and contentions reserved for adjudication by the learned arbitrator. As noted in orders dated 14.10.2022 and 06.03.2023, these would include arguments with regard to the effect of the arbitration proceedings/award rendered by the learned arbitrator, appointed by this Court *vide* order dated 26.07.2019 in ARB.P. 474/2019. All issues arising therefrom are left open for adjudication by the learned arbitrator appointed today.

**E. Conclusion:-**

34. For the aforesaid reasons, the petition is disposed of with the following directions:-

- A. The disputes between the parties arising out of the petitioner’s claims under the Master Franchise Agreement dated 03.10.2016 are referred to the arbitration of Hon’ble Mr. Justice Jayant Nath, a former Judge of this Court [Tel: 8527959494].

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<sup>25</sup> (2021) 2 SCC 1.

<sup>26</sup> (2021) 5 SCC 738.

<sup>27</sup> Paragraph 134 of *Vidya Drolia* (*supra* note 20).

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19:13:30

B. The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi [“DIAC”], and will be governed by the Rules of the DIAC, including as to the remuneration of the learned arbitrator.

C. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

35. It is made expressly clear that this order is without prejudice to the rights and contentions of the parties with regard to the maintainability of the claims before the learned arbitrator, including on grounds of abandonment of claims, issue estoppel, *res judicata*, limitation, etc. and on merits. The parties will be entitled to raise these contentions before the learned arbitrator and also seek appropriate orders in light of the proceedings taken at the instance of the respondent, and the award rendered therein.

36. There will be no order as to costs.

**PRATEEK JALAN, J**

**MARCH 14, 2023**

‘vp’/Ananya/

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Signing Date: 14.03.2023  
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