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**"A NOTICE ON COUNTER-CLAIM NOT MANDATORY AT  
THE PRE-ARBITRAL STAGE" DECODING THE APEX  
COURT'S DECISION AT NATIONAL HIGHWAY  
AUTHORITY OF INDIA VS TRANSSTROY (INDIA)  
LIMITED, (2022) 15 SCC 91**

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Manoj V Amirtharaj, Tamil Nadu Dr. Ambedkar Law University, Chennai

## **I. INTRODUCTION**

The Honorable Supreme Court has unequivocally established recently that a party's counter-claim cannot be dismissed solely on the grounds that the claim was not notified prior to the initiation of arbitration proceedings.

A Division Bench comprising Justice M.R. Shah and Justice Sanjiv Khanna emphasized the nuanced distinction between the terms "claim" and "dispute." The Court noted that while a "claim" may represent a unilateral assertion, a "dispute," by its very nature, involves opposing contentions. Furthermore, the Bench clarified that once conciliation efforts have failed, the full spectrum of the controversy, including counter-claims or set-offs, becomes part of the arbitrable matters.

## **II. FACTUAL MATRIX OF THIS CASE**

The parties entered into an Engineering, Procurement, and Construction Agreement dated 13.11.2014, under which the respondent, Transstroy, undertook the improvement and augmentation of a National Highway in the State of Tamil Nadu.

The appellant, National Highways Authority of India (NHAI), alleged that the respondent was in continuous breach of its contractual obligations, prompting the issuance of a cure period notice requiring the respondent to rectify the defects within 60 days. Subsequently, NHAI served a notice of its intention to terminate the agreement, pursuant to Clause 23.1.2, followed

by a formal termination notice. In this notice, the appellant expressly reserved its right to seek damages.

Dissatisfied with the appellant's decision, the respondent invoked the dispute resolution mechanism outlined in Clause 26 of the agreement, seeking an amicable settlement. On the occasion of the failure of the attempts at settlement, the respondent originated during arbitration by appointing its arbitrator, leading to the constitution of the arbitral tribunal.

On 15.05.2017, the respondent submitted its Statement of Claim (SOC), and the appellant filed its Statement of Defence (SOD) on 11.07.2017, reiterating its right to claim damages and expressing its intent to file a counter-claim. The appellant later sought an extension from the tribunal to file the counter-claim, which was denied.

At the Onset proceeding, the appellant escalated an application under Section 23(2A) of the Arbitration and Conciliation Act to set on the table its counter-claim. However, the tribunal rejected the counter-claim on the basis that Clause 26 required prior notification of claims and an attempt at amicable settlement before invoking arbitration, which the appellant had failed to do.

Aggrieved by the tribunal's decision, the appellant appealed to the High Court of Delhi, which upheld the tribunal's ruling on the same grounds. The appellant then filed a Special Leave Petition (SLP) challenging the High Court's order.

### **III. CONTENTIONS OF THE PARTIES**

#### **III-A. The appellant contested the High Court's order on several grounds:**

1. The appellant argued that both the claim and the counter-claim arose from the same cause of action—namely, the termination of the agreement. As such, fragmenting the dispute into separate proceedings would be unnecessary and could result in a multiplicity of litigation, contrary to the principles of judicial economy.
2. The appellant contended that the term "dispute" under Clause 26 of the agreement is inherently bilateral, encompassing not only the respondent's claims but also the

appellant's right to file a counter-claim<sup>1</sup>.

3. It was further asserted that since both parties had the right to invoke Clause 26, the appellant had no obligation to initiate a separate invocation after the respondent had already done so. Such an approach, according to the appellant, would merely duplicate the arbitration process that was already underway.
4. The appellant maintained that, given the shared cause of action, it would be unjust to allow only the respondent's claims while precluding the appellant from presenting its counter-claim. This would result in an inequitable application of the arbitral process.
5. The appellant also emphasized that it had expressly reserved the right to claim damages in both the notice of termination and the Statement of Defence (SOD). Therefore, the argument that the counter-claim was merely a retaliatory tactic ("**counterblast**") was unfounded and lacked merit.<sup>2</sup>
6. Additionally, the appellant submitted that procedural provisions should not be construed in an excessively technical or rigid manner, especially when doing so would contravene the underlying objectives and spirit of the Arbitration and Conciliation Act.
7. Finally, the appellant highlighted that Section 23(2A) of the Arbitration Act explicitly affirms the right to file a counter-claim, and thus, the decisions of both the tribunal and the High Court were in violation of this statutory mandate.

### **III-B. The respondent strongly opposed the petition on several grounds:**

**Firstly**, the respondent argued that the petitioner had failed to comply with the mandatory pre-arbitral requirement of attempting an amicable settlement concerning its claims. Under Clause 26 of the agreement, the appellant was obligated to notify and crystallize its claims before invoking arbitration. The respondent asserted that, having failed to adhere to this procedure, the appellant could not maintain its counter-claim within the same arbitral proceedings.

The respondent further contended that Clause 26 establishes a three-step dispute resolution

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<sup>1</sup> Gujarat State Cooperative Land Development Bank Ltd. Vs. P.R. Mankad and Ors., (1979) 3 SCC 123 (para22)

<sup>2</sup> Major (Retd.) Inder Singh Rekhi VS. Delhi Development Authority, (1988) 2 SCC 338 (para 4)

process. The first step requires the notification of disputes, wherein each party is required to formally state its respective claims. The second step involves an attempt at mediation, and only upon the failure of mediation do the parties proceed to arbitration, which is the third and final stage of the process.

According to the respondent, the appellant had bypassed the first two procedural stages—notification and mediation—by directly raising its claims before the arbitrator. Therefore, the appellant's counter-claim could not be maintained without fulfilling these preliminary conditions.

Moreover, the respondent emphasized that the term "dispute" under Clause 26 refers exclusively to disputes that have been properly notified. Arbitration, as per the clause, is confined to disputes that have been formally raised in accordance with this requirement.

The respondent also argued that the pre-arbitral steps of notification and mediation are essential and cannot be bypassed. The courts, it was submitted, are bound to uphold the contractual terms agreed upon by the parties. Therefore, the clause should be interpreted narrowly and given its plain, ordinary meaning.

**Lastly**, the respondent maintained that, by failing to notify its claims as required under Clause 26, the appellant had effectively waived its right to file a counter-claim in the arbitration initiated by the contractor.

#### **IV. TECHNICAL OBSERVATIONS AND CRITICAL ANALYSIS MADE BY THE APEX COURT:**

The Court, in its analysis, focused on the core issue between the parties—namely, the appellant's termination of the agreement—holding that the reference to conciliation pertained primarily to the termination, rather than any specific claim or counter-claim. This distinction formed the basis of the Court's reasoning.<sup>3</sup>

The Court carefully examined the correspondence and notice of arbitration issued by the respondent and concluded that the respondent had consistently characterized the termination

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<sup>3</sup> State of Goa Vs. Praveen Enterprises, (2012) 12 SCC 581;  
Bharat Petroleum Corporation Limited Vs. Go Airlines (India) Limited, (2019) 10 SCC 250;  
Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and Anr., 2021 SCC Online SC 439.

of the agreement as the central dispute. Consequently, it was held that the respondent could not later object to the appellant's counter-claim, as it too emanated from the same cause of action—the termination. This reasoning is grounded in the legal maxim “**ex turpi causa non oritur action**” (no action arises from a dishonourable cause), implying that once a dispute has arisen from the termination, both claims and counter-claims associated with it should be treated equitably within the arbitral process.

The Court further clarified that, upon a fair and comprehensive interpretation of Clause 26, any claim stemming from the termination of the agreement, whether from the respondent or the appellant, was subject to arbitration. The Court underscored that the term "dispute" inherently implies a bilateral conflict, while a "claim" may be unilateral. Thus, once conciliation failed, all related issues, including counter-claims and set-offs, should be subsumed under the arbitration, “**res integra**” (an open question under law), ensuring the finality of adjudication within a single proceeding.

Additionally, the Court pointed out that the appellant had, from the outset, expressly reserved its right to seek damages from the respondent, invoking the principle of “**res judicata**” (a matter already adjudicated), ensuring that the appellant's counter-claim could not be precluded based on procedural oversight.

In a pointed critique of the arbitral tribunal's decision, the Court found that the tribunal had adopted an unduly restrictive interpretation of the arbitration clause. By excluding the appellant's counter-claim, the tribunal undermined the appellant's “**locus standi**” (standing to bring claims) and risked fragmenting the dispute into multiple forums. This, the Court held, would lead to a **multiplicity of proceedings**, violating the principle of “**res inter alios acta**” (a matter between others does not affect a third party), and could result in inconsistent and piecemeal adjudication.<sup>4</sup>

Accordingly, the Court ruled that denying the appellant the opportunity to file its counter-claim would result in parallel proceedings before various forums, a situation that conflicts with the objective of **finality in dispute resolution**. It thus set aside the impugned judgment of the

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<sup>4</sup> Kolkata Metropolitan Development Authority Vs. Hindustan Construction Co. Ltd., 2017 SCC OnLine Cal 18978 (against which Special Leave Petition (C) Nos. 18443-18444 of 2018

tribunal, restoring the appellant's right to file its counter-claim in the ongoing arbitration proceedings.

## V. HISTORICAL EDIFICE OF THIS CASE

The case of **National Institute of Banking Studies & Corporation Management (NIBSCOM) V. M/S. Vij Construction Ltd**<sup>5</sup>. delves into the jurisdictional purview of the arbitral tribunal under the Arbitration & Conciliation Act, 1996, specifically Section 16, addressing the non-entertainability of counterclaims due to the absence of a notified dispute. At the core of this case is the fundamental question of whether the rejection of counterclaims on the grounds of improper notification constitutes a jurisdictional issue, which falls within the arbitral tribunal's authority.

### V-A. Section 16 – Arbitrator's Competence to Rule on Jurisdiction

Pursuant to Section 16 of the Arbitration and Conciliation Act, 1996, the arbitral tribunal possesses broad powers to rule on its jurisdiction, including determinations as to whether a claim or counterclaim constitutes a "dispute" within the meaning of the arbitration agreement. The respondent, in this case, filed an application under Section 16, seeking the deletion of certain counterclaims on the basis that no prior notice was issued by the appellant, thus contending that no "dispute" had arisen as required under the contractual terms.

The arbitrator upheld this contention, ruling that the appellant's failure to issue a notice for the counterclaims prior to filing rendered those claims non-arbitrable. The appellant's subsequent challenge raised the key issue of whether such rejection of counterclaims falls under the tribunal's jurisdictional powers. The Court concurred with the arbitrator's decision, affirming that the tribunal has the authority to adjudicate on the very existence of a "dispute" within the meaning of the arbitration agreement, and thus, to determine its own jurisdiction over counterclaims.

This decision reflects the legal maxim **kompetenz-kompetenz**, which empowers arbitrators to rule on their own jurisdiction, including the question of whether the submitted claims or counterclaims fall within the scope of the arbitration agreement. However, the appellant retains

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<sup>5</sup> ILR (2005) 1 Delhi 718.

the right to challenge the arbitral award under Section 34 of the Act, should the award exceed the scope of matters submitted for arbitration.

### **V-B. Section 23 – Counterclaims and the Scope of Arbitration**

The appellant further contended under Section 23 of the Act that the tribunal was unjustified in limiting the counterclaims solely to those mentioned in the appellant's letter dated 8.5.2000. The appellant argued that counterclaims, which are usually supplemented or amended during the arbitral proceedings, should not be restricted to the scope of this letter, especially in light of the contractual provision for arbitration to address all disputes and differences arising out of or in connection with the contract.

The Court, setting aside the impugned order, observed that the restriction of counterclaims solely to those referred to in the letter dated 8.5.2000 would undermine the essence of arbitration as a comprehensive dispute resolution mechanism. The principle of “**audi alteram partem**”, or ensuring both parties are heard, mandates that disputes raised by both parties under the same contract must be addressed through arbitration. To suggest otherwise would be inconsistent with the objective of arbitration, which is to provide a conclusive resolution to all disputes between the parties arising out of a particular contractual relationship.

### **V-C. This Case Drive us at**

This case underscores the wide amplitude of powers conferred on arbitrators under Section 16, affirming their competence to determine jurisdictional issues and to adjudicate upon whether a claim or counterclaim constitutes a "dispute" under the arbitration agreement. Furthermore, the judgment reinforces the principle that once arbitration has been chosen as the mode of dispute resolution, it must address all disputes or differences arising out of or in relation to the contract, without undue restriction or procedural technicalities. The case serves as a critical precedent in upholding the autonomy of arbitral proceedings and ensuring that arbitration remains a comprehensive mechanism for the resolution of contractual disputes.<sup>6</sup>

## **VI. CONCLUSION**

The Supreme Court's decision in *National Highway Authority of India v. Transstroy (India)*

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<sup>6</sup> VOL I, Justice R S Bachawat, *Law of Arbitration & Conciliation*, 1467, Lexis Nexis, 2017.

Limited has significantly clarified the legal landscape surrounding the filing of counterclaims in arbitration proceedings. The Court's ruling establishes that a party's counterclaim need not be notified prior to the initiation of arbitration proceedings. This decision is a departure from previous interpretations that had suggested otherwise.

The Court's analysis hinged on the distinction between "claims" and "disputes." It emphasized that while a "**claim**" may represent a unilateral assertion, a "**dispute**" involves opposing contentions. Consequently, once conciliation efforts have failed, the full scope of the controversy, including counterclaims or set-offs, becomes part of the arbitrable matters.

This decision has far-reaching implications for arbitration practice. It reinforces the principle that arbitration should be a comprehensive dispute resolution mechanism, capable of addressing all related claims arising from a single contractual relationship. By allowing counterclaims to be filed without prior notification, the Court has promoted efficiency and avoided the potential for multiple parallel proceedings.

In fore-set proceedings, the Court's ruling underscores the significance of interpreting arbitration clauses broadly and pragmatically. It cautions against overly technical or rigid interpretations that could undermine the objectives of arbitration. By emphasizing the substantive nature of the dispute, the Court has ensured that procedural requirements do not become an obstacle to justice.

In deriving the comment on the case of **National Highway Authority of India v. Transstroy (India) Limited** decision represents a significant advancement in arbitration law. It clarifies the position on counterclaims, promotes efficiency, and reinforces the principles of substantive justice in arbitration proceedings. This decision is likely to have a lasting impact on the practice of arbitration in India and beyond.