

**State of Goa Vs. M/S. Heera Constructions**

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**Court :** Mumbai

**Decided On :** May-05-2000

**Reported in :** AIR2001Bom45; 2000(4)BomCR574

**Judge :** R.M.S. Khandeparkar, J.

**Acts :** Indian Arbitration Act, 1940 - Sections 30 and 33; [Arbitration and Conciliation Act, 1996](#) - Sections 4, 14, 17 and 85; Protocol and Convention Act, 1937; Foreign Awards (Recognition and Enforcement) Act, 1961; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 151

**Appeal No. :** Civil Revision Application No. 159 of 1998

**Appellant :** State of Goa

**Respondent :** M/S. Heera Constructions

**Advocate for Def. :** S.G. Dessai, Sr.A. and ;Ms. Sulekha Kamat, Adv.

**Advocate for Pet/Ap. :** H.R. Bhare, Adv.

**Judgement :**

ORDER

**R.M.S. Khandeparkar, J.**

1. Pursuant to the acceptance of the tender submitted by the respondents, the work order was issued by the petitioners on 21-3-1991 and the work was required to be completed on 29-5-1993. As certain disputes and differences arose between the parties, the Persona Designata by his order dated 13-2-1995 appointed Shri G.R. Karandikar as the sole arbitrator and the said arbitrator, after hearing the parties, gave his award on 30-9-1996. The petitioners filed their objections to the said award in the Court of the Civil Judge, Senior Division at Panaji, under sections 30 and 33 of the Indian Arbitration Act, 1940, hereinafter called 'the old Act', while depositing in the said Court the amount of Rs. 19,07,620/-, which was awarded by the arbitrator. The respondents were allowed to withdraw the said amount by giving Bank guarantee. However, by order dated 2-5-1998, the Civil Judge, Senior Division, Panaji referring to section 85 of Indian Arbitration and Conciliation Act, hereinafter called as 'the new Act' and relying upon the decision of this Court in M/s. Reshma Constructions v. State of Goa, reported in : 1998(3)BomCR837 , dismissed the objections on the ground that the Civil Court has no jurisdiction to entertain the objections to the award in view of the applicability of the provisions of law contained in the new Act to the proceedings of the case in hand. Hence this Revision application.

2. Upon hearing the learned Advocates and on perusal of the records, and considering the facts of the case, the arbitration clause in the agreement between the parties, and the various provisions contained in the new Act including those relating to repeal and saving of the old Act, the point for determination which arises in this petition is whether the proceedings in the case in hand after 25th January, 1996 are governed by the provisions of the old Act or the new Act.

3. The arbitration clause in the agreement between the parties reads thus:

'Subject as aforesaid, the provisions of Arbitration Act, 1940 or any statutory modification and enactment thereof and the Rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.'

4. The provisions relating to repeal and saving of the old Act are contained in section 85 of the new Act and the same read as under :

Repeal and Savings.---(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed. . 4 ...  
(2) Notwithstanding such repeal -

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act,

5. The answer to the question arising for determination in this case, can be found in the decision of the Apex Court in the matter of Thyssen Stahlunion G.M.B.H. v. Steel Authority of India Ltd., reported in : AIR 1999 SC3923 read with the unreported decision of the Division Bench of this Court in State of Goa v. M/s. N.S. Nayak and Sons, in Appeal under Arbitration Act No.1 of 1993 delivered on 27-4-2000.

6. In Thysser's case (supra), the Apex Court has that once the arbitral proceedings had commenced, it cannot be stated that right to be governed by the old Act for enforcement of the award was an inchoate right. It is certainly a right accrued and it is not imperative that for right to accrue to have the award enforced under the old Act that some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force. At the same time it has been held that in cases where arbitral proceedings had commenced before coming into force of the new Act and were pending before the Arbitrator, it was open to the parties to agree that the new Act be applicable to such arbitral proceedings and they could have so agreed even before coming into force of the new Act. Simultaneously, it has also been held that the new Act would be applicable in relation to the arbitral proceedings which have commenced on or after new Act has come into force.

7. In fact, after taking stock of various decisions and arguments advanced by learned Advocates for the parties as well as various provisions of law, the Apex Court in Thyssen's case has ruled thus :

'Principles enunciated in the judgments show as to when a right accrues to a party under the repeal Act. It is not necessary that for the right to accrue that legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act.'

8. The Apex Court in the said Thyssen's case (supra) after taking judicial notice of numerous matters pending all over the country where the award made prior to the coming into force of the new Act were sought to be enforced or set aside under the provisions of the old Act, observed that the courts cannot construe any provision of law in such a manner that it would lead to anomalous situation where the parties seeking to have the award set aside would be left without any remedy. It has been held by the Apex Court that the provisions of the old Act would apply to the enforcement proceedings of the award passed under the old Act. The Apex Court ruled thus :

'This construction put by us is consistent with the wordings of section 85(2)(a) using the terms 'provision' and 'in relation to arbitral proceedings' which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well.'

9. Accordingly, the law applicable to the proceedings which had commenced prior to 25-1-1996 in terms of the provisions under Arbitration Act, 1940 would be the old Act. However, the Apex Court has also held in the said Thyssen's case that the parties can very well agree to the applicability of the new Act to the pending proceedings either before the commencement of the proceedings or even thereafter. The relevant observation in that regard is to be found in paragraph 35 of the said judgment which reads thus:

'Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of section 85(2)(a) which bars the parties from so agreeing.'

10. It therefore follows that even in case of pending proceedings, the applicability of the provisions of the new Act is not totally ruled out and it is entirely left to the will of the parties to decide about the same. If the agreement entered into between the parties either before or after the commencement of the proceedings provides for the applicability of the new Act from the time it comes into force, nothing prevents the applicability of the new Act even to those proceedings which had commenced under the old Act prior to enforcement of the new Act. However, in the absence of any such agreement, once the proceedings had commenced prior to the enforcement of the new Act and in terms of the provisions of the old Act, the same has to proceed in accordance with the provisions of law contained in the old Act even after the enforcement of the new Act, and in such proceedings the enforcement of the awards would be in terms of the old Act. In fact, the conclusion No. 5 in para 22 of the said decision in Thyssen's case clearly holds that once the arbitral proceedings commence under the old Act a right is accrued in favour of the parties for enforcement of the award passed therein in terms of the provisions of the old Act.

11. In Thyssen's case dispute and differences having arisen, the arbitration proceedings commenced on September 14, 1995 under the old Act. Mr. Cecil Abraham of the Malaysian Bar was appointed sole arbitrator on November 15, 1995. Terms of reference in the arbitration were finalised on May 13, 1996. Hearing before the sole arbitrator took place from January 7, 1997 till January 28, 1997. Award was given on September 24, 1997. By this time on January 25, 1996 the new Act had come into force. On October 13, 1997 Thyssen filed a petition in the Delhi High Court under sections 14 and 17 of the old Act for making the award rule of Court (Arbitration Suit No. 352-A/ 97). While these proceedings were pending in the High Court, Thyssen, on February 12, 1998, filed an application under section 151 of the Code of Civil Procedure for stay of the proceedings. On the following day Thyssen filed an application in the High Court for execution of the award under the new Act (Execution Petition No. 47/98). The ground taken

was that the arbitration proceedings had been terminated with the making of the award on September 24, 1997 and, therefore, the new Act was applicable for enforcement of the award. The respondent, Steel Authority of India Ltd. (SAIL) opposed the maintainability of the execution petition. The question which arose for consideration was whether the award would be governed by the new Act for its enforcement or whether provisions of the old Act would apply. A learned Single Judge of the Delhi High Court by judgment dated September 21, 1998 held that proceedings would be governed by the old Act. Thyssen Stahlunion G.M.B.H. feeling aggrieved filed this appeal (CA 6036/98). Considering these facts of the case of Thyssen Stahlunion G.M.B.H., it was observed by the Apex Court that :

'As a matter of fact appellant Thyssen in Civil Appeal No. 6036/98 itself understood that the old Act would apply when it approached the High Court under sections 14 and 17 of the old Act for making the award rule of the Court. It was only later on that it changed the stand and now took the position that new Act would apply and for the purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. Appellant itself led the respondent SAIL on believing that the old Act would apply. SAIL had filed objections to the award under section 30 of the old Act after notice for filing the award was received by it on the application filed by the Thyssen under sections 14 and 17 of the old Act.'

In those facts of the case, and taking note of all the provisions of law applicable thereto as well as the scheme of the new Act and also the overall situation in the country regarding pending cases where awards passed in similar circumstances are sought to be enforced or challenged, it was ruled by the Apex Court that :

'We therefore, cannot adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on the section 85(2)(a) would only lead to the confusion and hardship.'

12. The facts of the case in hand are almost similar to those of the case of Thyssen Stahlunion G.M.B.H. As already noted above, in the case in hand, the sole arbitrator was appointed on 13th May, 1995. The date of the first hearing before the Arbitrator was 30-9-1995. The Arbitrator delivered his award on 30-9-1996. The objections under sections 30 and 33 of the old Act were filed by the petitioners in Civil Court on 13-11-1996. The reply to the said objection along with the request for making the award rule of the Court was filed by the respondents on 12-3-1997. The affidavit-in-rejoinder was filed by the petitioners on 11th July, 1997. It was only when the matter came up before the Civil Court for final arguments in the year 1998, that the respondents, placing reliance upon the judgment of this Court in M/s. Reshma Constructions case sought to raise the dispute about the maintainability of the proceedings under the old Act. Therefore, the case in hand is squarely covered by the decision of the Apex Court in Thyssen's case. Mr. Dessai, learned Senior Counsel appearing for the respondents however, immediately points out the arbitration clause in the agreement between the parties whereby the parties had agreed for the applicability of the provisions of the new Act to the proceedings and further relied upon the decision in M/s Reshma Construction case (supra).

13. In the Reshma Constructions' case (supra) it was held that the law on the subject clearly gives ample freedom to the parties to agree for the applicability of the provisions of the new Act even to the pending proceedings and such agreement could have been entered into even prior to enforcement of the new Act. The said conclusion was arrived at after making the following observations :

'Considering the scheme of the Act, harmonious reading of the said provision contained in sub-section (2) of section 85 thereof would disclose that the reference 'otherwise agreed' necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreement. It provides that though the law provides that the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in section 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be

followed-either in terms of the new Act or the old Act-is certainly in consonance with the scheme of the Act, the procedure regarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample freedom to the parties, to decide about the procedure to be followed in such proceedings being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference 'otherwise agreed by the parties' in section 85(2)(a) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act. Such a conclusion is but natural since the expressions 'otherwise agreed' do not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act.'

The Apex Court in Thyssen's case (supra) has duly approved the said observations and the interpretation put to the arbitration clause in the contract between the parties.

14. Shri Bharne, the learned Government Advocate for the petitioners therefore, is certainly justified in contending that the lower Court has totally erred in applying the ratio of the decision in Reshma Constructions' case [supra] to the matter in hand. It is to be always borne in mind that a decision is only an authority for which it actually decides and it is not everything that is said by a Judge while delivering the judgment that constitutes a precedent. 'What is of essence in a decision is its ratio and not every observation found therein nor which logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expression which may be found there is not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found,' is the ruling of the Apex Court in Union of India v. Dhanwanti Dew, reported in : (1996)6SCC44 . In the facts and circumstances of the case of Reshma Constructions the point for determination was whether the parties could have entered into an agreement for the applicability of the provisions of the new Act to the pending proceedings even prior to the

enforcement of the new Act or whether such agreement was necessarily to be entered into after coming into force of the new Act. The lower Court therein had held that such an agreement was necessarily to be entered into after the enforcement of the new Act. The said decision of the lower Court was rejected by this Court and the ruling of this Court in that regard was up held by the Apex Court in Thyssen's case. The point for determination which arises in the case in hand was not before this Court in M/s. Reshma Constructions case. Therefore, it cannot be said that the case in hand is covered by the decision of this Court in Reshma Constructions case (supra).

15. There is one more factor which is to be considered and that is section 4 of the new Act. The same provides that 'a party who knows that (a) any provision of this Part from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.' In other words, when a party knows that in terms of the agreement under which the arbitration proceedings have commenced, the same are to be governed by the provisions of the new Act does not raise objection for the applicability of the provisions of the old Act to such proceedings on or after 25-1-1996 and allows the proceedings before the Arbitrator to be concluded in accordance with the provisions of the old Act and further even while answering the objections filed by the other side under section 30 or 33 in the Court to such award asserts the applicability of the provisions of the old Act to the proceedings, then such party could be deemed to have waived his right to applicability of the provisions of the new Act to such proceedings. Similar is the decision of the Division Bench of this Court in M/ s N.S. Nayan and Sons (supra).

16. The Division Bench of this Court in State of Goa v. M/s. N.S. Nayak and Sons (supra) after taking into consideration various provisions of the new Act including section 4 and 85 thereof as well as those of old Act and also the scheme of the new Act, so also the decision of the Apex Court in Thyssen's case (supra), has held that the law applicable to the proceedings which had commenced under the

old Act and arising from the award passed therein either prior to or on or after 25-1-96 would be the old Act, subject, however, to any agreement to the contrary between the parties. It has been further held therein that inspite of such agreement for applicability of the new Act, if the parties allow the proceedings to continue even after 25-1-96 in accordance with the provisions of the old Act without raising any objection in that regard at the earliest available opportunity, then the parties would be deemed to have waived their right to object to the applicability of the old Act to such proceedings irrespective of their agreement to the contrary and the matter would proceed as per provisions contained in the old Act till the final disposal.

17. There is no dispute between the parties to the proceedings of the case in hand that the arbitration clause in their agreement does provide for applicability of the provisions of the new Act to the pending proceedings. The same is also clear from the said clause reproduced herein above. However, the fact remains that the proceedings in the case in hand continued even after 25-1-1996 in accordance with the provisions of law contained in the old Act and neither of the parties objected to the same till the matter came up for hearing the objections filed by the petitioners before the Civil Court under sections 30 and 33 of the old Act. As already noted above the award was delivered on 30-9-96, the objections under sections 30 and 33 were filed by the petitioners on 13-11-96 and the reply to the same was filed by the respondents on 12-3-97. All throughout, there was no objection raised to the applicability of the provisions of the old Act to the proceedings and on the contrary the applicability, of those provisions was affirmatively asserted by the respondents themselves even in the said reply before the Civil Court. In the affidavit-in-reply filed by the respondents in the Civil Court in answer to the application under sections 30 and 33 of the old Act by the petitioners, it was stated in paragraph 9 thereof thus :

'With reference to para 8 of the said application, I say that it is true that this Hon'ble Court has jurisdiction to entertain the present application.'

Further in paragraph 10 thereof, it was stated that: 'I further say that the said award dated 30-9-96 made by the learned Arbitrator is liable to be made a rule of

this Hon'ble Court. I further say that a decree in terms of award ought to be passed in favour of the respondents.'

18. It cannot be disputed that no amount of consent by the parties can give jurisdiction to the Court that has none. However, it is not the case of total absence of jurisdiction. Section 85 of the new Act clearly saves the provisions of the old Act and the applicability thereof to the pending proceedings unless the parties agree for the applicability of the provisions of the new Act to proceedings. It is only in a case where the parties had already agreed for the applicability of the provisions of the new Act to the pending proceedings that the question of right of the parties to object to the applicability of the provisions of the old Act to such proceedings would arise. As already observed above, inspite of the agreement between the parties for applicability of the new Act to the proceedings, the parties preferred to remain content with the procedure under the old Act till March 1997 and even prayer for the award to be made the rule of the Court in terms of the provisions of the old Act was made by the respondents.

19. Bearing in mind the decision of the Apex Court in *Thiysen's case* (supra) and that of the Division Bench of this Court in *State of Goa v. N. S. Nayak and Sons'* (supra), the case in hand being clearly covered by those decisions and the decision in *Reshma Constructions case* (supra) being not applicable to 'the facts of this case in hand, the impugned order cannot be sustained and is liable to be quashed and set aside, and the matter is to be remanded to the lower Court to proceed with the same in accordance with the provisions of law contained in the old Act.

20. In the result, therefore, the revision application succeeds, the impugned order is hereby quashed and set aside and the matter is remanded to the Lower Court to proceed with the same in accordance with the provisions of law contained in the old Act. Rule is made absolute in above terms with costs of Rs. 2000/- to be paid by the respondents to the petitioners.

21. Revision application succeeds.

