State of U.P. Vs. Allied Construction Engineers and Contractors

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SooperKanoon Citation : sooperkanoon.com/463799

Court : Allahabad

Decided On : Feb-06-2009

Reported in : 2009(85)AWC1953

Judge : Amitava Lala and ;Shishir Kumar, JJ.

Appellant : State of U.P.

Respondent : Allied Construction Engineers and Contractors

Disposition : Appeal dismissed

Judgement :

Amitava Lala, J.

1. This appeal has been preferred by the State of U.P. under Section 39 of the Arbitration Act, 1940 (hereinafter in short called as the 'Act, 1940') challenging the judgment and order dated 20th February, 2001 passed by the learned District Judge, Bulandshahr in Original Suit No. 6 of 2000, State of U.P. v. Allied Construction, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as the 'Act, 1996'). By the order impugned the Court below dismissed the application for setting aside the arbitral award dated 8th May, 1998 passed by one Sri K.K. Sahanan Chief Engineer, Irrigation Department, U.P.

2. The State-appellant has already acted upon the award by paying the principal sum, so determined by the arbitrator, to the respondent-contractor but raised a dispute with regard to interest. As per the award, rate of interest for the pre-reference period is fixed @ 15% per annum, whereas for the pendente lite and subsequent period is fixed @ 18% per annum.

3. At the initial stage when the appeal was not open for hearing, a prayer was made by the State-appellant to reduce the rate of interest though as per Section 31(7)(b) of the Act, 1996, a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest @ 18% per annum from the date of the award till the date of payment. However, without prejudice to the rights and contentions of the parties at that stage, we had called upon the respondent-contractor whether he is ready and willing to compromise with the State by accepting any reduced rate of interest or not, to which it agreed. Time has been granted to the State accordingly. Hearing of the appeal was postponed for a considerable period but the State never come forward with any proposal, on the contrary, wanted to contest the cause without any settlement, as a result whereof we have called upon the parties to make their respective submissions.

4. The moot point as argued by the State-appellant is whether the proceeding which continued before the arbitrator under the Act, 1996 as per the agreement between the parties in accordance with Section 85(2) (a) of the Act, 1996 is binding upon the parties only for the arbitration proceedings before the arbitrator or also for the proceedings before the Court arising out of said proceeding.

5. According to the appellant, the arbitration proceeding commenced on 3rd March, 1995/25th March, 1995 i.e., prior to coming of the Act, 1996 in force. Therefore, as per Section 21 read with Section 85 of the Act, 1996 arbitration proceeding will be governed by the Act, 1940. The arbitration clause as referred to in Clause 52 of the general conditions of the contract speaks that the arbitration shall be conducted in accordance with the provision of the Act, 1940, or any statutory modification thereof. The decision of the arbitrator shall be final and binding on the parties thereto. Such arbitration clause of the agreement is as follows:

52. Arbitration. - All the disputes or differences in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows:

Within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration the Chief Engineer, Irrigation Department shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The contractor shall within fifteen days of receipt of this list-select and communicate to the Chief Engineer the name of one officer from the list who shall then be appointed as the sole arbitrator. If contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within thirty days, as stipulated, the contractor shall send a similar list to the Chief Engineer within fifteen days. The Chief Engineer shall then select one officer from the list and appoint him as the sole arbitrator within fifteen days. If the Chief Engineer fails to do so the contractor shall communicate to the Chief Engineer the name of one officer from the list, who shall then be the sole arbitrator.

The arbitration shall be conducted in accordance with the provision of the Indian Arbitration Act, 1940, or any statutory modification thereof. The decision of the arbitrator shall be final and binding on the parties thereto....

6. Both the sections, being Sections 21 and 85 of the Act, 1996, are quoted hereunder:

21. Commencement of arbitral proceedings.-Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

85. Repeal and saving.-(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.

(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 in 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.

7. According to the respondent, factually the Chief Engineer of the appellant authority appointed one Sri Raj Pal Singh, as sole arbitrator, on 25th March, 1993 under Clause 52 of the general conditions of contract. Said Sri Raj Pal Singh did not enter into reference, consequently the contractor had filed an application under Section 8 (1) (b) of the Act, 1940 before the appropriate Court when such appointment was made only on 5th August, 1997 i.e., after commencement of the Act, 1996. Hence, it is needless to mention that commencement of the arbitration proceeding is hit by Section 21 read with Section 85 of the Act, 1996.

8. According to us, there is a gulf difference between commencement and agreement. The Act, 1996 is very clear to that extent. Commencement is to be understood when agreement is to be seen. In a case of commencement there might be two interpretations but in a case of agreement there is no question of any interpretation. In National Aluminium Co. Ltd. v. Pressteel and Fabrications (P) Ltd. and Anr. : (2004)1SCC540 , when the affected party approached the Supreme Court under Article 142 of the Constitution of India taking the similar plea, the Supreme Court categorically held that since the parties had agreed to the procedure under the Act, 1996 to be followed by the arbitrator for the post-award proceedings also, the provisions of the said Act would prevail and the said statute having specifically provided for a remedy under Section 34 of the Act, 1996, it would not be proper to exercise its jurisdiction under Article 142 of the Constitution of India to adjudicate upon the objections filed by both the parties to the award. Such reference of judgement expressly or impliedly meant that one cannot agree to proceed under the Act, 1996 only before the arbitrator. Once the parties agreed

before the arbitrator to proceed under the Act, 1996, all subsequent proceedings arising out of arbitral proceedings will be governed by the new Act. In further, the State has challenged the award before the Court below also under Section 34 of the Act, 1996. Therefore, the State-appellant cannot be allowed to turn around and take the plea at the stage of appeal that the Court is not bound to hear it under the new Act. It will be hit by the principles of approbate and reprobate too. The appellant has very much relied upon the majority view of a three Judges' Bench judgement of the Supreme Court in Milkfood Ltd. v. G.M.C. Ice Cream (P) Ltd. AIR 2004 SC 3145 to establish its case. The majority view dealt with the commencement of the arbitration proceeding by holding that it is one thing to say that the parties agree to take recourse to the procedure of the 1996 Act relying on or on the basis of tenor of the agreement as regard applicability of the statutory modification or re-enactment of the 1940 Act but it is another thing to say, as has been held by the High Court (therein), that the same by itself is a pointer to the fact that the appellant had agreed thereto. If the arbitral proceedings commenced for the purpose of the applicability of the 1940 Act in September, 1995 (as therein), the question of adopting a different procedure laid down under the 1996 Act would not arise. In the said judgment another Division Bench judgment of the Supreme Court in Delhi Transport Corporation Ltd. v. Rose Advertising : [2003]3SCR678 was taken note of and upheld. In the said judgement the Supreme Court categorically held that the conduct of the arbitral proceedings and participation of the parties therein show that the parties acted under the Act, 1996. Even the arbitrator proceeded with understanding and gave his award in pursuance of the Act, 1996, therefore, the impugned judgement of the High Court (therein) appears to be totally unassailable. In National Aluminium Co. Ltd. (supra) the Supreme Court has categorically dealt with the question whether the dispute having arisen prior to coming into force the Act, 1996 and the proceedings having continued under the provisions of the Act, 1996, would the provisions of Act, 1940 still be applicable for making an application for the modification of the award, and if so, before which Court. It is categorically held by the Supreme Court that:

First part of this issue need not detain us because of the admitted fact that by consent of the parties provisions of the 1996 Act have been made applicable to the proceedings, which is in conformity with Section 85(2) (a) of 1996 Act, hence,

it is futile to contend that for the purpose of challenge to the award the 1940 Act will apply. Hence, we reject this contention.

9. According to us, the argument as advanced by the State seems to be less abstract more absurd in nature. Commencement under repealing provisions of the Act, 1996 clarify which disputes will be governed by the Act, 1940 and which disputes will be governed by the Act, 1996. Section 21 of the Act, 1996 clearly speaks about the date of commencement when Section 85 thereof clarifies and excludes the proceedings prevailing prior to the new Act i.e., Act, 1996 save only one exception i.e., choice of the parties to proceed under the Act, 1996 by agreement. Such agreement is a statutory agreement. Therefore, if the parties choose to proceed in accordance with the Act, 1996. they cannot be debarred and after passing of the award whatever consequences will arise, those will definitely be governed by the Act, 1996. A party under a statutory agreement cannot be allowed to accept one part and refuse to accept the other part. Once they have proceeded under the Act, 1996, there is no scope for such agreeing parties to deviate from the statutory compulsion.

10. Once again in the instant case not only the parties proceeded before the arbitrator in accordance with the new Act i.e., Act, 1996 but the proceeding for setting aside the arbitral award was also initiated before the appropriate Court below under Section 34 of the Act, 1996. This appeal is a creature of the statute from such arbitration proceeding as well as the proceeding before the Court of first instance as per Act, 1996. Hence, the appeal under Section 39 of the Act, 1940 against the order under Section 34 of the Act, 1996 is unsustainable in nature. Moreover, it is not a bona fide mistake on the part of the appellant but an intentional approach to bypass Section 31(7) or 23(b) of the Act, 1996, which fixed rate of interest being 18% per annum from the date of award to the date of payment. Learned Additional Advocate General wanted to establish before this Court by citing a judgement in Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Anr. : AIR 2007 SC817 that rate of interest can be minimized for the pre-arbitration period, pendente lite and for future. He has shown the relevant portion, which is as follows:.that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed

and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.

11. However, neither the appellant can canvass the cause on merit in an unsustainable proceeding nor we can override the parliamentary enactment of 1996 in respect of the interest awarded on 8th May, 1998 in such unsustainable proceeding.

12. Coming back to the question of maintainability and/or sustainability of the cause before us in the appeal we have to hold that an appeal under Section 39 of the Act, 1940 and an appeal under Section 37 of the Act, 1996 stand on slightly different footing about setting aside or refusing to set aside the award. When former law prescribes setting aside or refusing to set aside an award in general, the later law says setting aside or refusing to set aside an arbitral award under Section 34. Admittedly, the appellant proceeded before the Court of first instance under Section 34 of the Act, 1996. Therefore, obviously an appeal is to be made under Section 37 of the Act, 1996 but not under Section 39 of the Act, 1940. It is needless to say that even by preferring such appeal the points, which the appellant wanted to agitate herein, can be agitated and in such case only the Court can consider the entire cause inclusive of merit but not in the unsustainable appeal as made herein.

13. The next question is connected with the question of maintainability, therefore, discussed hereunder. Learned Additional Advocate General has contended whether the consent, as has been given by the Executive Engineer of the State authority before the arbitrator, is valid consent or not. According to the learned Additional Advocate General, consent should be given in conformity with Article 299(1) of the Constitution of the India. Article 299(1) of the Constitution says that all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

14. The appellant has cited two judgments of the Supreme Court in Union of India v. A.L. Rallia Ram : [1964]3SCR164 (paragraph-13) and Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd. : [1963]3SCR209 in support of its contentions. From the first judgment we find a three Judges' Bench of the Supreme Court held that the view of the High Court (therein) that the Government of India having agreed to refer the differences to arbitration and having taken part in the proceeding before the arbitrators and the umpire, had waived the objection as to the illegality of the contract and could not, therefore, raise any such objection in the application for setting aside the award cannot be said to be acceptable view because there was a requirement under Section 175(3) of the Government of India Act (therein) was mandatory. No such case is available herein. In the second judgment a five Judges' Bench of the Supreme Court held that either by agreement or by appearance or by consent cannot confer jurisdiction of an arbitrator or arbitrators. The Supreme Court further held that there will be a difference between the cases where the parties have entered into an arbitration agreement as defined under Section 2 (a) of the Act, 1940 or have merely taken steps in the conduct of the proceedings assumed or believed to be valid. In the former case the award will be valid but in the latter a nullity.

15. According to us, jurisdiction of the arbitrator and effect of participation under the new Act i.e., Act, 1996 has given a new outlook. The submissions as made by the appellant with the support of such judgments cannot be applicable in the present case. Firstly, the Act, 1996 is much comprehensive in nature than the Act, 1940. An arbitrator can decide its own jurisdiction under Section 16 of the Act, 1996, which was totally unavailable under the old Act. Moreover, the case before us is not of agreement to create an arbitration agreement but to proceed with the arbitration agreement in accordance with law. As soon as the parties have statutorily agreed to proceed with the arbitration under the Act, 1996, applicability of Act, 1940 evaporates.

16. Mr. Manoj Misra, learned Counsel appearing for the respondent contractor, contended before this Court that no ground about the competency of the Executive Engineer or about his authorisation is taken by the appellant either before the court below or before the arbitrator. The appellant no where challenges the

authority of the Executive Engineer in consenting to the applicability of the Act, 1996. Now for the first time before the appellate Court such plea has been taken. He further submitted that in number of decisions it has been held that grounds that have not been taken earlier cannot be permitted to raise after the time prescribed by Section 34 of the Act, 1996. In support of his contentions Mr. Misra relied upon a Division Bench judgment of the Bombay High Court in Thanikkudam Bhagwati Mills Ltd. v. Reena Ravindra Khona of Mumbai and Ors. 2007 (3) Arb LR 161. The Division Bench judgment speaks that in absence of ground being specifically raised in the petition filed under Section 34 of the Act, 1996, the petitioner is not entitled to canvass any ground extraneous to those grounds enumerated in such petition and those which are not reflected from the pleadings in the petition. Apart from that, arbitration clause itself provided that the arbitration shall be conducted in accordance with the provisions of Act, 1940 or any statutory modification thereof. The words 'statutory modification' include new enactment and in any view of the matter the provision of Section 85(2)(a) of the Act, 1996 permits the parties to give consent about applicability of the new Act. In view of the fact it cannot be said that the Executive Engineer, who was representing the department before the arbitrator, had no authority to give consent about applicability of the new Act. In any event, factually the authority made his first appearance in the arbitral proceedings on 3rd October, 1997 and consented to the applicability of the new Act even before filing the objection. It may be noted that their objection dated 29th September, 1997 was filed on 3rd October, 1997 as is evident from the minutes of the meeting. This submission has been made in addition to the fact that the arbitrator, who proceeded to pass the award, was appointed after commencement of the new Act whereas the arbitrator, who was appointed earlier, never entered into the reference. Thus, the right to proceed under the Act, 1940 could not have been deemed to have accrued or vested with the appellant. Therefore, after giving such consent, the appeal under Section 39 of the Act, 1940 is misconceived and is liable to be rejected.

17. According to us, there is a difference between bureaucratic representation and technocratic representation of the cause before the appropriate forum. Normally, arbitration proceeding arises out of technocratic work and payment in connection thereto, in which an Executive Engineer is an appropriate representative to

conduct the cause being conversant and competent. Therefore, if any consent is given to proceed under the new Act particularly when it is not extraneous in the subject context, we are of the view that such consent cannot be said to be without any authorization, as alleged or at all. In Krishna Bhagya Jala Nigam Ltd. (supra) it has been held by the Supreme Court that when no issue has been raised either in the pleading or in the argument by the Executive Engineer of the concerned authority of the State before the arbitrator even about jurisdiction of the arbitrator in absence of arbitration clause but participated in the arbitration proceedings and thereby submitted to the jurisdiction of the arbitrator even giving consent to the appointment of the Chief Engineer as an arbitrator and did not invoke Section 16 of the Act, 1996 challenging the competency of the arbitral Tribunal, it is made not open to the appellant for the first time in the appeal before the High Court to say that there is no arbitration clause. In the referred case, the Supreme Court held about the negative impact of not making pleading or argument by the Executive Engineer representing the State before the arbitrator, whereas in the present case the arbitrator proceeded with the representation of the Executive Engineer and consent to proceed under the new Act having a positive impact. Therefore, principally one aspect is clear that the Executive Engineer representing the case cannot be said to be an unauthorized representative. Thus, even such point is unsustainable before the Court.

18. Therefore, on the totality of the issues, which we have discussed in the judgment hereinabove, the appeal cannot be said to be sustainable and, as such, the same is dismissed. Interim order, if any, stands vacated.

However, no order is passed as to costs.

Shishir Kumar, J.

19. I agree.