

Union of India (Uoi) and anr. Vs. B.S. Engineering Works Co.

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Court : Delhi

Decided On : Apr-07-2005

Reported in : 119(2005)DLT503

Judge : B.A. Khan and; Anil Kumar, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 20; [Arbitration and Conciliation Act, 1996](#) - Sections 16

Appeal No. : FAO (OS) 121/2001

Appellant : Union of India (Uoi) and anr.

Respondent : B.S. Engineering Works Co.

Advocate for Def. : Nemo

Advocate for Pet/Ap. : Jagjit Singh, Adv

Disposition : Appeal allowed

Judgement :

1. A batch of petitions was filed under Section 20 of the [Arbitration Act, 1940](#) for appointment of Arbitrator and for reference of disputes to the Arbitrator. Appellants raised two fold objections to these petitions: -

- i) That most of the claims fell within the 'excepted matters' under the agreement and
- ii) That the claim for interest could also not form subject matter of reference.

2. Learned Single Judge disposed of these petitions by a common order dated 6th November, 2000 overruling the objections of Appellants and holding that the new Arbitration Act would be applicable in the matter. The learned Judge held: -

'Agreement between the parties moreover provides that the arbitration between the parties will be covered by the Indian [Arbitration Act, 1940](#) and any statutory modifications thereof shall apply to the arbitration proceedings. Since after the filing of these petitions, Arbitration Act 1940 has been repealed and [Arbitration and Conciliation Act, 1996](#) has been enacted. Since the parties had agreed that any statutory modification to [Arbitration Act, 1940](#) will apply to the arbitration proceedings and since arbitration proceedings have not yet commenced, in my opinion, the provisions of the [Arbitration and Conciliation Act, 1996](#) shall apply to the present case. Under Section 16 of the Arbitration and Conciliation Act, the arbitrator has now the power to decide on its own jurisdiction. He will, therefore, also have the power to decide the question as to whether or not a particular claim made by the petitioner arise under the agreement. That being the position, the question as to whether any dispute raised by the petitioner cannot be the subject matter of reference and as to whether or not the petitioner will be entitled to interest are matters to be decided by the arbitrator and there cannot be any objection to the same.'

3. Appellant's grievance is that learned Single Judge had gone wrong in holding that the new Act was applicable in view of the parties agreement that any statutory modifications to the old Act of 1940 would apply to arbitration proceedings and that under the new Act the Arbitrator could decide its own jurisdiction and the other issues related to 'excepted matters' and interest. It is submitted that the conclusion of the learned Judge ran counter to the settled legal position enunciated in various judgments of this Court and the Supreme Court laying down that the application of the old or the new Act would depend upon the date on which the arbitration proceedings had commenced. Since these proceedings had commenced before

the enforcement of the new Act, this Act would not thus be applicable.

4. The point in issue is no more rest integra. It has been laid at rest by this Court in DDA v. Bhai Sardar Singh [FAO (OS) No. 93/2002] decided on 20th April, 2004 and lately by the Supreme Court in Milk Food Ltd. v. GMC Ice Cream : (2004)7SCC288 .

The settled position now is that where the arbitration proceedings are found commenced under the old Act and before the commencement of the new Act, the old Act would apply. An arbitration proceedings is deemed to have commenced when one party serves a notice on the other regarding the appointment of an Arbitrator.

5. In the present case there is no dispute that the arbitration proceedings had commenced before the enforcement of the New Act. therefore, the old Act should have been held applicable. But learned Single Judge had proceeded on a wrong premise by relying on a Clause of the agreement between the parties whereby they had agreed that any statutory modification to the old Act would apply. This view has been held to be a wrong one in the judgment of this Court in Bhai Sardar Singh's case and nothing different has been shown to us to take a contrary view in the matter.

6. We accordingly hold that learned Single Judge had wrongly held the new Act applicable when the arbitration proceedings were to be governed by the old Act. The foundation having fallen the superstructure also goes and the other issues viz whether some of the claims fell under the 'excepted matters' and also the claims of interest would have to be gone into afresh while disposing of respondents application under Section 20 of the old Act. Because if some of the claims are found to be falling within the 'excepted matters', these cannot be referred to arbitration and in that case there would be no need to appoint the Arbitrator.

7. The Appeal succeeds and is affirmed. The impugned order is set aside. Respondents application under Section 20 shall revive and be decided afresh under the old Arbitration Act. Any observation made in the impugned order with regard to the issue of 'excepted matters' shall have no bearing in the fresh

disposal of the matter.

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