

Sukumar Chand Jain Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Mar-19-2002

Reported in : 2003(1)ARBLR174(Delhi); 99(2002)DLT3

Judge : Mukundakam Sharma, J.

Acts : Arbitration Act of 1940 - Sections 14, 17, 30, 33, 34 and 34(1); ;Arbitration and Conciliation Act of 1996 - Sections 21, 85 and 85(2); Limitation Act - Sections 5; [Arbitration \(Protocol and Convention Act\), 1937](#); Foreign Awards (Recognition and Enforcement) Act, 1961; ;Contract Act - Sections 28

Appeal No. : Suit Nos. 976 and 2502-A/1996 and 819-A/1998

Appellant : Sukumar Chand Jain;k.R. Builders;suresh Kumar Goel

Respondent : Delhi Development Authority and anr.;delhi Development Authority;delhi Development Authority and anr

Advocate for Def. : C.Mohan Rao, ; K.K. Buchar and ;Ansuya Salvan Advs.

Advocate for Pet/Ap. : Girish Aggarwal,; Raman Kapur and B.M. Sehgal Advs

Disposition : Petitions dismissed

Judgement :

Dr. Mukundakam Sharma, J.

1. The question that falls for determination in these cases being similar, I took up all these matters together and heard the counsel appearing for the parties. I now proceed to dispose of the same by this common judgment and order.

2. The point that arises for determination in these cases is whether these proceedings are governed under the Arbitration Act of 1940 or the Arbitration and Conciliation Act of 1996. The respondent authority in all these suits have filed their objections against the Award passed by the Arbitrator under Sections 30 & 33 of the Arbitration Act of 1940 whereas according to the petitioners the objections/petitions, if any, should have been filed only under the provisions of Section 34 of the Arbitration and Conciliation Act of 1996. The awards in all these three cases were passed after coming into force of the Arbitration and conciliation Act, 1996.

3. Under the provisions of the said Section 34 of the Act, the period of limitation for filing a petition/ application under Section 34 of the Arbitration and Conciliation Act, 1996 praying for setting aside the Arbitration Award on any of the grounds mentioned therein is three months. However, if there be sufficient cause for not filing the said petition/ application under Section 34 within a period of three months as stated under the said provision, the application could be entertained by the Court within a further period of thirty days but not thereafter.

4. Section 34 of the Arbitration and Conciliation Act (hereinafter called the new Act) itself makes the aforesaid legal position clear when it provides that an application for setting aside the arbitral Award may not be made after a three months period had elapsed from the date of receipt of a copy of the arbitral award by the party making that application or when request had been made under Section 33, from the date on which that request had been disposed of by the arbitral Tribunal. A proviso is added to the said provision, wherein it is enacted that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

5. In view of the aforesaid provisions the Supreme Court in the case of Union of India v. Popular Construction Co., reported in 2001(3) Arbitration Law Reporter

345(SC) has held that by virtue of Section 34(1) recourse to a Court against an arbitral award cannot be made beyond the period prescribed. It was also held that the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the Court and that if there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favor of curtailment of the Court's powers by the exclusion of the operation of Section 5 of the Limitation Act. Consequently, recourse to the Court against an arbitral Award could be taken by a party aggrieved within a period of three months from the date of receipt of the copy of the arbitral award and in case there is sufficient cause for not taking such recourse within the period of three months, an application could be made within a further period of thirty days but not beyond. thereforee, there can be no recourse against an arbitral award in the Court beyond the period of four months from the date of receipt of a copy of the order. This is settled in the light of the provisions in the enactment and also in view of the interpretation given by the Supreme Court to the aforesaid provisions.

6. In the present cases the respondent authority has taken recourse against the arbitral award by filing objections under Sections 30 & 33 of the Arbitration Act of 1940 but all the aforesaid objections are beyond the period of four months from the date of receipt of a copy of the arbitral award. According to the Respondent Authority further proceedings as against the arbitral awards in these cases would lie under the provisions of the 1940 Act whereas according to petitioners further proceedings as against the arbitral awards shall be governed by the Arbitration and Conciliation Act of 1996. thereforee, it is relevant and material for us to scrutinise and examine whether the present proceedings are governed by the provisions of the old Arbitration Act or the new Arbitration Act. The answer to the aforesaid question would be relevant and material for deciding the present cases for if it is found that the provisions of the New Arbitration Act is applicable to the proceedings in question int hat case the objections/petitions would not be maintainable having been filed beyond the statutory period.

7. The arbitration proceedings in these cases were initiated on the basis of the arbitration clause in the agreement entered into between the parties. Relevant

portion of the arbitration Clause 25 reads as under :-

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

The aforesaid arbitration clause in the agreement entered between the parties shall have to be considered in the light of the provisions of Section 21 and Section 85 of the Arbitration and Conciliation Act to answer the question as to whether the Arbitration Act of 1940 or the Act of 1996 would apply. Section 21 reads as follows, whereas Section 85 reads hereunder :-

'Section 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.

'Section 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 his 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.

8. A similar clause as that of Clause 25 as also the provisions of Section 21 and Section 85 came up for consideration before the Supreme Court in the case of Thyssen Stahl union GMBH v. Steel Authority of India Ltd., reported in 1999 (3) Arb LR 532 The agreement in the said case also contained an arbitration agreement. Clause 12 was one of the relevant provisions which dealt with the legal interpretation and Clause 13 dealt with the settlement of disputes. They read as follows :-

'Clause 12: Legal Interpretation

12.1. This contract shall be governed and construed in accordance with the Laws in India for the time being in force.

12.2. To interpret all commercial terms and abbreviations used herein which have not been otherwise defined, the rules of 'INCOTERMS 1990' shall be applied.'

'Clause 13: Settlement of Disputes

All disputes of differences whatsoever between the parties hereto arising out of or relating to the construction, meaning or operation or effect of this contract or the breach thereof shall unless amicably settled between the parties hereto; be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC), Paris, France by a sole Arbitrator appointed by the Chairman of the Arbitral Tribunal of the Court of Arbitration of ICC and the Award made in pursuance thereof shall be binding on both the parties. The venue for the arbitration proceedings shall be new Delhi, India.'

9. In paragraph 4 the Supreme Court in the context of the aforesaid clause and the provisions of the Act framed the following question of law that arose for consideration in the said case.

'Whether the Award would be governed by the new Act for its enforcement or whether the provisions of the old Act would apply.'

10. In paragraph 32 of the said judgment it was laid down as follows :-

' Principles enunciated in the judgment show as to when a right accrues to a party under the repealed 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 it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., Arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. 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 that 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 in 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 of the award was received by it on the application filed by the Thyssen under Sections 14 & 17 of the old Act. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. 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. This construction put by us is consistent with the wording 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.'

11. In paragraph 35 of the said judgment, the Supreme Court has held as follows:-

'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. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal No. 61 of 1999) uses the expression 'for the time being in force' meaning thereby that provisions of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held.'

'Expression 'unless otherwise agreed' as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Construction that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions 'unless otherwise agreed' and 'law in force' it does given option to the parties to agree that new Act would apply to the pending arbitration proceeding.s That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.

12. While coming to the aforesaid conclusion the Supreme Court referred to a similar clause in a case before the Bombay High Court in Reshma Construction v.

State of Goa, reported in 1999 (1) MLJ 462 wherein a similar clause as that of the present one and that of Rani Construction came up for consideration which was to the following effect:

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

The Bombay High Court interpreted the said clause and thereafter in the light of the provisions of Section 85 of the Arbitration and Conciliation Act it was held 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 and that 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, whereunder most of the provisions of the new 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. The aforesaid interpretation of the High Court was accepted by the Supreme Court in the case of Thyssen Stahl union GMBH (supra).

13. In that context the Supreme Court further held in paragraph 38 that the parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings and that it is not necessary for the parties to know what law would be in force at the time of the conduct of arbitration proceeding and that they can always agree that provisions that are in force at the relevant time would apply. Having held thus, it was further held that considering the nature of Clause 25 in Rani Constructions (CA 61/99), the New Arbitration Act would apply.

14. I have analysed the aforesaid Supreme Court decision in Thyssen Stahl union GMBH (supra). The ratio laid down therein would give a complete answer to the issue raised herein. Counsel appearing for the respondent relied upon the principles laid down in paragraph 32 of the said judgment whereas the counsel

appearing for the petitioner relied upon the ratio laid down by the Supreme Court in paragraph 35 of the said judgment. Paragraph 32 was rendered by the Supreme Court in the context of the Arbitration clause as appearing in Thyssen's case whereas paragraph 35 was referred by the Supreme Court in the context of the arbitration clause of Rani Construction. It is true, as submitted by the counsel appearing for the respondent that in the present cases also the parties proceeded as if the arbitration award was passed under the old Arbitration act and on the basis of the said reasoning and belief petitions were filed in this Court under Section 14 & 17 of the old Act and objections were filed under Sections 30 & 33 of the old Act. thereforee, counsel for the respondent stated that in that view of the matter, the conclusions of the Supreme Court as given in paragraph 32 in the context of Thyssen's case should be applicable to the present case. It could be said that if the interpretation given by the Supreme Court in Rani Construction is found to be applicable to the present case that would create an anomalous situation as in that case the respondent authority would be without any remedy as the objections filed by them are beyond the period of limitation as provided under Section 34 of the Arbitration and Conciliation Act. The arbitration clause in Thyssen's case is differently worded then that of Rani Construction. In that context in Thyssen the Supreme Court held that the old Arbitration Act is applicable to the facts of the said case whereas in M/s. Rani Construction on the basis of Arbitration clause therein it was held that the new Arbitration Act is applicable.

15. However, I am bound by the ratio of the decision of the Supreme Court. The Rani Construction case was rendered in respect of a clause of arbitration which is similar to that of Clause 25 of the Agreement. thereforee, the interpretation given in respect of the same in Rani Construction in Civil Appeal No. 61/99 would only be applicable to the facts and circumstances of the case. It cannot be said that while rendering the said decision the Supreme Court was not aware of the position that a similar situation as that of Thyssen's case may also arise in a case like Rani Construction. Being conscious of the said position the decision was rendered holding that the provisions of the new Act would apply. When Clause 25 of the present case is thus construed in the light of the decision given by the Supreme Court in Rani Construction, I have no other option but to hold that the provisions of the new Act would apply to the facts and circumstances of the present cases and,

therefore, it was required by the respondent to file petition in accordance with the provisions of Section 34 of the new Arbitration and Conciliation Act. No such application/ petition was filed within the statutory period and, therefore, the said objections/ petitions are not maintainable in view of the aforesaid discussions. Accordingly, the same are dismissed. The suit filed by the petitioner herein under Sections 14 & 17 of the old Act also stands dismissed.

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