

Continental Construction Ltd. Vs. the Chief Engineer (Construction)

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Court : Delhi

Decided On : Oct-22-2003

Reported in : 2003VIIAD(Delhi)510; 2003(3)ARBLR673(Delhi);
110(2004)DLT340; 2003(71)DRJ644; 2004(1)RAJ187

Judge : Dalveer Bhandari and; H.R. Malhotra, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 8 and 20; [Arbitration and Conciliation Act, 1996](#) - Sections 21, 85 and 85(2); Arbitration (Protocol and Convention) Act, 1937; Foreign Awards (Recognition and Enforcement) Act, 1961

Appeal No. : CWP No. 2392 of 2002

Appellant : Continental Construction Ltd.

Respondent : The Chief Engineer (Construction)

Advocate for Def. : Jagjit Singh, Adv.

Advocate for Pet/Ap. : Chetan Sharma, Sr. Adv. and; S. Verma, Adv

Disposition : Writ petition dismissed

Judgement :

Dalveer Bhandari, J.

1. In this petition the petitioner has prayed that the impugned judgment dated 26.11.2001 passed by the learned Single Judge limited to the aspect as to the applicability of the Arbitration Act,1940 be set aside. It is also prayed that an independent and impartial sole arbitrator be appointed. The short controversy involved in this petition is whether in the facts and circumstances of the case whether the Arbitration Act,1940 would be applicable or the controversy is required to be adjudicated by the Arbitration and Conciliation Act,1996.

2. Brief facts which are not in dispute are recapitulated as under. The petitioner, M/s Continental Construction Limited entered into a contract for construction of sub-structure including well foundation and prestressed concrete box girders for road upper-structure with contractor's own design in connection with the construction of rail link between Chhitauni (U.P) and Bagah (Bihar). Certain disputes had arisen between the petitioner and the respondent Indian Railways. The General Manager, North Eastern Railways, Gorakhpur did not act upon the petitioner's request for appointment of elected arbitrator. It is prayed that the matter in question is governed by the Act, and ,therefore, the arbitrator as such may be appointed.

3. In reply preliminary objection was taken regarding jurisdiction. The Court after scrutinising the various contentions of the petitioner came to the conclusion that this Court has the jurisdiction. The petitioner did not challenge this aspect of the matter in these proceedings. It is clear from the prayer that the only contention raised by the petitioner is that the petition is governed by the Arbitration and Conciliation Act,1996 and not the Arbitration Act,1940 as observed by the learned Single Judge.

4. It is not in dispute that the petitioner had raised certain disputes in terms of the letter dated 16.8.1994. The said claim of the petitioner was rejected and he invoked arbitration clause 64 of the General Conditions of the Contract vide letter dated 16.1.1995 and had given the name of his nominee arbitrator vide letter of 11.9.1995.

5. The provisions of the Arbitration and Conciliation Act,1996 came into force from 22.8.1996. Mr. Chetan Sharma, learned Senior Counsel appearing for the

petitioner, stressed that the impugned judgment needs to be set aside because the controversy involved in the case has to be governed by the Arbitration and Conciliation Act, 1996. Mr. Sharma placed reliance on Thyssen Stahlunion GmbH vs. Steel Authority of India Ltd. AIR 1999 SC 2932. The learned Single Judge in his judgment mentioned that in Thyssen case (supra) there were three petitions. In that case the disputes had arisen and arbitral proceedings commenced on 14.9.1995 under the Arbitration Act, 1940. Before the arbitrator was appointed, the Act of 1996 had come into force. In the other case pertaining to M/s Rani Construction Pvt. Ltd. there was an agreement which provided that the matter would be governed by the Arbitration Act, 1940 or any statutory modification or re-enactment thereto. The Supreme Court in the case of Thyssen (supra) held that the Arbitration Act, 1940 would continue to prevail while keeping in view that in the case of M/s Rani Construction Pvt. Ltd. it had been agreed that the new enactment, if any, would govern the matter, it was held that the Arbitration and Conciliation Act, 1996 would be applicable.

6. On careful consideration of the aforesaid judgment it is abundantly clear that in the said case the Supreme Court has laid down as a principle of law where the arbitral proceedings have commenced before coming to the force of 1996 Act, it would be the Act of 1940 which would be applicable, but where the parties had agreed that the new enactment, if any, would govern the matter, in that case it would be the new Act which would be so applicable.

7. In the instant case the parties have not agreed that they would like to be governed by the new Act. Mr. Chetan Sharma also placed reliance on a Division Bench judgment of this Court in Rose Advertising vs. Delhi Transport Corporation 2001(2) Arb. LR 98 (Delhi) In this judgment the Court also proceeded on the basis that the parties had expressed their intention in their claims and replies that the proceedings were under the 1996 Act and following the Thyssen's judgment (supra) the Division Bench held that the parties would be governed by the 1996 Act.

8. The learned counsel appearing for the respondent Mr. Jagjit Singh, submitted that the controversy in this case is squarely covered by the judgment of the

Supreme Court in Shetty's Constructions Co. Pvt. Ltd. vs . Konkan Railway Construction and Another : AIR 1999 SC1535 . The facts of this case are quite akin to the facts of the present case. In this case claim was lodged on 6.3.1995 pursuant to the earlier demand dated 20.11.1994. A further letter in support of the earlier demand dated 6.3.1995 was also submitted on 29.5.1995 and thereafter an arbitration suit was filed in the High Court of Bombay on 24.8.1995 invoking the jurisdiction of the Court under Section 8 read with Section 20 of the Arbitration Act,1940. Their Lordships of the Supreme Court held that if request was made before coming into the force of the Arbitration and Conciliation Act,1996, the matter would be governed by the provisions of the 1940 Act. Their Lordships of the Supreme Court decided the controversy involved in that case on a conjoint reading of Section 21 and Section 85(2)(a) of the Arbitration and Conciliation Act,1996. Section 85 of the Arbitration and Conciliation Act,1996 reads as under:-

'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 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.'

9. Their Lordships of the Supreme Court observed that a mere look at sub-section (2) (a) of Section 85 shows that despite the repeal of Arbitration Act,1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 22.8.1996. The question, therefore, arises whether on that date the arbitration proceedings in the present suit commenced or

not, and for resolving the controversy their Lordships referred to Section 21 of the new Act which reads as under:-

'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.'

10. On careful analysis of both the sections it is abundantly clear that what has to be found out is whether the request by the petitioner for referring the dispute for arbitration was moved for consideration of the respondent on or after 22.8.1996 or prior thereto. If such request was made prior to that date, then on a careful reading of both Sections 21 and Section 85(2)(a) of the new Act, it must be held that these provisions will be governed by the said Act. In view of such clear enunciation by their Lordships of the Supreme Court, we have to arrive at the conclusion that proceedings in the instant case have to be governed by the Arbitration Act, 1940 because the petitioner invoked the arbitration vide clause 64 of the General Conditions of the Contract dated 16.1.1995 before the new Act came into force.

11. The learned counsel for the respondent also relied upon *Food Corporation of India vs. Dilip Kumar Dutta* AIR 1999 Cal 75 and *United Bank of India vs. Abhijit Tea Co (Pvt.) Ltd.* : AIR 1999 Cal 81. In view of the aforesaid judgment in *Shetty's Construction Company* (supra) it is not necessary to consider other judgments of the High Courts.

12. The learned Single Judge has correctly analysed the law laid down by their Lordships of the Supreme Court. In our considered opinion, no interference is called for. This writ petition being devoid of any merit is accordingly dismissed.

13. In the facts and circumstances of the case the parties are directed to bear their own costs.