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Delhi Development Authority Vs. Sh. S. Kumar

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Court : Delhi

Decided On : Jul-29-2008

Reported in : 2008(3)ARBLR290(Delhi); 2008(105)DRJ669

Judge : A.K. Sikri and; Manmohan Singh, JJ.

Acts : Arbitration Act, 1940 - Sections 20, 30 and 33; Arbitration and Conciliation Act, 1996 - Sections 34 and 85(2)

Appeal No. : FAO (OS) No. 367/2003

Appellant : Delhi Development Authority

Respondent : Sh. S. Kumar

Advocate for Def. : D. Moitra and ; S.K. Jain, Advs.

Advocate for Pet/Ap. : Anusuya Salwan and; Monika Sharma, Advs

Disposition : Appeal allowed

Judgement :

A.K. Sikri, J.

1. The question as to whether provisions of the Arbitration Act, 1940 (hereinafter referred to as the 'Old Act') or that of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'New Act') are applicable to the arbitration

proceedings in question between the parties from which award dated 13.7.1998 emanated.

2. We may have to take note of certain dates for answering this question. The respondent herein was awarded the contract by the appellant-DDA vide agreement No. 14/EE/SED-11/DDA/88-89. Certain disputes arose between the parties. The respondent invoked the arbitration clause and requested the Engineer Member, DDA to appoint the arbitrator vide letter dated 30.10.1992. Since no arbitrator was appointed, the respondent filed Suit No. 1744/94, which was a petition under Section 20 of the old Act. In that suit, order dated 18.1.1996 was passed by this Court directing the Engineer Member to appoint an arbitrator. As the DDA failed to take action, the respondent filed IA in the said suit seeking appointment of an independent arbitrator in which orders dated 8.8.1996 were passed by this Court appointing Sh. N. Veerabandhu as the sole arbitrator. The arbitrator entered upon reference on 15.9.1996. He made and published the award on 13.7.1998. This award was filed in this Court whereupon notice was issued to the parties of the filing of the award by the Court. This notice issued under the old Act was received by the DDA on 17.8.1998 After receiving this notice the DDA filed objections to this award under Section 30 and 33 of the old Act challenging that award. Since there was delay in filing the objection, along with the objection, application for condonation of delay was also filed.

3. The respondent herein raised a preliminary submission to the effect that the objections under Section 30/33 of the old Act were not applicable as the award was governed by the new Act. The learned Single Judge vide orders dated 14.8.2003 accepted this submission of the respondent holding that the new Act was applicable as the award is dated 13.7.1998 and it was rendered after the new Act came into force. The learned Single Judge, therefore, treated the objections as deemed filed under Section 34 of the new Act. However, on the ground that there was delay of 233 days and there was no power under the new Act to condone the delay of this magnitude the objections (treating the same as petition under Section 34 of the new Act) are dismissed as time-barred. The dates and events enumerated above would clearly indicate that when the arbitration was invoked by the respondent giving notice dated 30.10.1992, old Act was in force. Even the

petition for appointment of arbitrator was filed under the old Act, i.e., under Section 20 of the Arbitration Act. This suit was disposed of on 18.1.1996 by this Court directing the Engineer Member, DDA to appoint an arbitrator. It is after the disposal of this suit that the new Act came into force with effect from 25.1.1996. In these circumstances, it goes without saying that the proceedings, which were conducted by the arbitrator, would be governed under the old Act. Though initially there was confusion as to whether the date on which arbitration is invoked or the date when the award is rendered would be determinative of the factor as to which Act is applicable, the position in this respect is now finally put at rest by the Supreme Court. It is now categorically decided that unless the parties specifically agreed, in terms of Section 85(2)(a) of the new Act that the proceedings be governed by the new Act, old Act would continue to apply in respect of the arbitration proceedings which were initiated when old Act was in force. In Milkfood Ltd. v. GMC Ice Cream (P) Ltd. : (2004)7SCC288 , the Supreme Court laid down the principle that service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitral proceedings. In the present case, as pointed out above, the notice for appointment of arbitrator was given on 30.10.1992 and therefore, arbitration proceedings deemed to have been commenced on that date and indubitably, it is the old Act which was in operation at that time. This legal position is also contained in the following judgments:

1. Shetty Construction Co. v. Konkan Railway : AIR 1999 SC1535

2. State of West Bengal v. Amritlal Chatterjee : AIR 2003 SC4564

3. N.S. Nayak v. State of Goa : (2003)6SCC56

4. This Court has reiterated and followed the same view in the following cases:

1. Ashi (P) Ltd. v. Union of India 2002 VII AD (Delhi) 655

2. Jupitor Chit Fund (P) Ltd. v. Shiv Narain Mehra and Ors. (2002) 3 SCC 364

3. Continental Construction Ltd. v. Chief Engineer 2002 III AD (Delhi) 277.

4. DDA v. Bhai Sardar Singh : 115(2004)DLT415 .

5. It is not necessary to even discuss the aforesaid cases in detail inasmuch as the learned Counsel for the respondent could not dispute the aforesaid legal position and was candid in conceding the same. However, he still ventured to resist the present appeal by raising the following arguments:

I. The respondents had filed Execution Petition No. 274/1998 in which orders dated 4.4.2003 were passed categorically observing that the new Act was applicable and thus, objections filed under Section 33 of the old Act would be deemed to have been filed under Section 34 of the new Act. He submitted that no challenge was laid to the said order and therefore, it was not open to the appellant to now challenge the order dated 14.8.2003 which reiterated the same view.

II. There was no provision under which the appeal was maintainable against order dated 14.8.2003.

III. The appellant had not come to this Court with clean hands.

IV. The appellant had amended the appeal which was not permissible inasmuch as, issue of applicability of the old Act was raised for the first time in the appeal.

6. We do not find any merit in any of the aforesaid contentions. In so far as the first argument is concerned, as per the respondents own showing order dated 4.4.2003 is passed in execution petition. In that order, no doubt, some observations are made that new Act is applicable and therefore, objection shall be treated as having been filed under Section 34 of the new Act, the order further proceeds to state that since there is an application for condonation of delay, that application is to be taken up for consideration and the matter was simply adjourned for that purpose for 27.5.2003. This would not prejudice the appellant or preclude the appellant from challenging the impugned order which is filed in the application/objections filed by the appellant under Section 30/33 of the Arbitration Act. In fact, it is by order dated 14.8.2003 passed in the said objections filed in CS(OS) No. 1581/1998 that objections are dismissed for the first time as time-barred after applying the provisions of the new Act. The proper and conclusive determination of the issue is by the orders dated 14.8.2003 only which gave cause of action to the appellant to challenge the said order.

7. In so far as the second contention is concerned, it is based on the plea that appeal is not provided against the orders passed under Section 34 of the new Act. Not only this contention is misconceived, even otherwise such a contention is not available to the respondent. It amounts to begging the question itself. The contention proceeds on the basis that new Act is applicable whereas this itself is the bone of contention as to whether it is the new Act or the old Act which is applicable. Once it is held that old Act is applicable, provision of appeal under the old Act would be available to the appellant. Third objection is noted to be rejected. The allegation that the appellant did not come to the court with clean hands is again on the premise that the appellant had agreed that the proceedings be governed by the new Act. However, nothing could be shown in this behalf by the respondent.

8. In so far as the last contention is concerned, again the same is meritless. It is not in dispute that the appellant had made an application for amendment of the appeal, which was allowed by this Court vide orders dated 26.10.2004. Thus, it is the amended appeal which has now to be considered as order allowing the amendment has become final as the respondent did not challenge that order.

9. In any case, we are of the view that the question as to whether the provisions of the new Act or the old Act are applicable is a legal question and there is no estoppels against law. Therefore, ignoring the aforesaid technical objections, it is necessary for the court to determine this question so that proceedings are conducted after applying the provisions of relevant law. Once it is not in dispute that provisions of old Act are applicable, the obvious consequence would be that the learned Single Judge could not have dismissed the objections after treating the same as petition under Section 34 of the new Act and holding that it is time-barred. This order, which is contrary to law, affects the rights of the appellant prejudicially and therefore, the appellant has right to maintain this appeal and seek redressal of the grievance. We, therefore, allow this appeal and set aside the impugned judgment dated 14.8.2003 of the learned Single Judge. As a consequence, we restore both the applications (objections of the DDA under Section 30/33 of the Arbitration Act as well as application for condonation of delay). The learned Single Judge shall deal with these applications on merits. Parties shall appear before the

learned Single Judge on 16.10.2008.

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