

Atree Associates Vs. Dda and anr.

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SooperKanoon Citation : sooperkanoon.com/709739

Court : Delhi

Decided On : Sep-04-2001

Reported in : 2001(60)DRJ663; 2002(1)RAJ68

Judge : A.K. Sikri, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 30 and 33

Appeal No. : Suit No. 535-A/98 and IA. 1139/2001

Appellant : Atree Associates

Respondent : Dda and anr.

Advocate for Def. : Anusuya Salwan, Adv.

Advocate for Pet/Ap. : S.K. Chandwani, Adv

Judgement :

A.K. Sikri, J.

1. The question which falls for determination in this case is as to whether the provisions of Indian Arbitration Act, 1940 (hereinafter referred to as the old Act, for short) or that of [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as the new Act, for short) would be applicable in respect of award dated 11th February, 1998 made and published by respondent No. 2 as sole Arbitrator. While

the reference to Arbitrator was made by Order dated 20th February, 1995, when the old Act was in operation, hearings also started at that time but continued even after the new Act came into force (initially as Ordinance w.e.f. 25th January, 1996 and thereafter as an Act w.e.f. 16th August, 1996). The award was given on 11th February, 1998 when the New Act was in force. Relevant dates for appreciating the controversy may be noted first:-

20.2.1995 Reference made to the Arbitrator. 25.1.1996 Ordinance promulgated (which became New Act.) 16.8.1996 New Act came into force. 28.11.1996 Last hearing held by the Arbitrator. 11.2.1998 Award made and published by the Arbitrator. 16.3.1998 Application u/s. 14 and 17 under the Old Act filed by the petitioner. 7.10.1999 Judgment in the case of Thyssen reported in 1999 (9) SCC 334 pronounced by the Supreme Court which has bearing on this aspect. 12.9.2000 Execution petition No. 197/2000 filed by the petitioner seeking to enforce the award under Section 36 of the New Act.

2. Thus, when the award was given it is the petitioner who in the first instance filed application under Sections 14 and 17 of the old Act seeking a direction to the Arbitrator to file the award and for making this award rule of the Court. On this application Order was passed directing the Arbitrator to file the award and proceedings. When the same were filed the notice thereof was given to both the parties and the respondent-DDA filed objections to the award under Sections 30 and 33 of the Old Act by means of IA. 1139/2001.

3. However, after the judgment of the Supreme Court in the Thyssen Stahlunion GMBH v. Steel Authority of India : AIR 1999 SC 3923 petitioner now contends that the award would be governed by the New Act and on that basis the submission of the petitioner is that present proceedings are not maintainable. Consequently, objections of the respondent-DDA filed under the old Act are also of no consequence. It was required by DDA to challenge the award by filing petition under Section 34 of the New Act within three months from the receipt of the copy of the award from the Arbitrator. Having not done so the award has become enforceable on the expiry of the aforesaid period of three months and that is the *raison-d'être* for the petitioner to file petition under Section 36 of the New Act for

enforcement of the award.

4. On the other hand, DDA maintains that the instant award would be governed by the provisions of the old Act and therefore objections filed by the DDA are competent and proper which should be examined and decided on merits. Arguments in this case were heard on 26th July, 2001. After oral submission were made by both the parties, judgment was reserved. However, counsel for both the parties took leave of the Court to file written statement and two weeks time for this purpose as prayed for by them was granted. While the petitioner has submitted its written synopsis on 10th August, 2001, no such written submission are filed by the DDA even when further two weeks have passed. therefore, I proceed with the Order taking into consideration the oral submissions made by both the parties.

5. It is a common case of the parties that law on this point has now been clarified by the Supreme Court in the case of Thyseen (supra). therefore, the only exercise which is needed is to find out as to what Thyseen (supra) decides. Before looking into this case, it would be appropriate to reproduce the provisions of Sections 21 and 85 of the New Act which were considered by the Supreme Court in the Thyseen (supra) case while answering the same question which is posed in this case as well.

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 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.

7. Relying upon Section 21 of the New Act it was contended by learned counsel for the respondent-DDA that proceedings for arbitration commenced when request is made for reference to arbitration and it is received by the other party. In the instant case, since reference itself was made on 20th February, 1995 when the old Act was in operation, consequently proceedings should be treated to have been commenced under the old Act and continued under the old Act. Thus, coupled with the provisions stipulated in Clause (a) of Sub-section (2) of Section 85 it was submitted that provisions of old Act shall continue to apply in relation to arbitral proceedings which commenced before the new Act came into force. As admittedly, there was no agreement by the parties before the Arbitrator to the effect that provisions of the new Act shall apply. However, this argument lose sight of the arbitration clause in the Agreement entered into between the parties. Relevant portion of the arbitration clause 25 reads as under:-

CLAUSE 25:

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 proceeding under this clause.

8. Similar clause, almost identically worded, came up for interpretation in Thyseen (supra) case. A group of cases has come up for consideration before the Supreme Court . In the case of Rani Construction Pvt. Ltd. with which we are presently concerned a contract was for construction of certain works of Himachal Pradesh State Electricity Board. Disputes had arisen between the parties and referred to arbitration on 4th October, 1993. Arbitrator gave this award on 23rd February,

1996 after the new Act had come into force. The short question is as to whether old or the new Act would apply. Agreement between the parties was that matter would be governed by any enactment or rules that may have been framed. The Supreme Court held that matter would be governed by the provisions of the Arbitration and Conciliation Act, after the award was pronounced. The Court made the following observation:-

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 provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions - one of the Bombay High Court and the other of the Madhya Pradesh High Court on the interpretation of the expression 'for the time being in force' and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the enforcement of the award as well. The expression 'unless otherwise agreed' as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Constructions in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the 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 Constructions 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 the 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 give an option to the parties to agree that the new Act would apply to the pending arbitration proceedings. 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 the coming into force of the new Act.

9. The Court examined the same aspect from various angles as well and ultimately concluded that the provisions of the new Act shall apply by recording the following findings:-

'We also hold that clause 25 containing the arbitration agreement in the case of Rani Constructions (P) Ltd. v. H.P. SEB (Civil Appeal No. 61 of 1999) does admit of the interpretation that the case is governed by the provisions of the [Arbitration and Conciliation Act, 1996](#).'

10. As already pointed out above, the present arbitration clause and the clause interpreted in the case of Rani Construction (P) Ltd. is identically worded. therefore, the interpretation given by the Supreme Court in Thyseen (supra) case would apply to the instant case also. Inevitably, the conclusion would also be the same i.e. provisions of the new Act would apply in the instant case.

11. It may be mentioned that this very Clause-25 of the terms and conditions in DDA contract came for interpretation before this Court in the case of Bhai Sardar Singh v. Delhi Development Authority being Suit No. 2560-A/98 and by judgment and Order dated 2nd August, 2001 the Court (per V.S. Aggarwal, .1.) has opined that the new Act would be applicable on the interpretation of this clause. Arguments forwarded by the DDA on Section 21 of the new Act was repelled by observing as under:-'Similarly recourse to Section 21 of the Arbitration Act would also be of Fit-tie avail and consequence for DDA. Section 21 of the said Act provides that unless agreed by the parties arbitration proceedings in respect of particular dispute commences on the date on which a recourse for that dispute to be referred to arbitration is received by the other side. Obviously, the provisions of Section 21 would be prospective in nature. It has not been given retrospective effect. The proceedings commenced before the [Arbitration and Conciliation Act, 1996](#) or Arbitration and Conciliation (Third) Ordinance 1996 was made applicable. As a necessary consequent the proceedings had already commenced and provisions of Section 21 have no role to play in the facts of the present case.'

12. I am in respectful agreement with the aforesaid opinion. In Bhai Sardar Singh (supra) case the Court also observed that may be objections were filed after notice for filing of the award was given by the Court under the new Act, that would be of

no consequence and the law must take its own course. In that view of the matter, such objections would not be maintainable under the old Act when the provisions of old Act are not applicable. Following observations of the Court in this respect are worth quoting:-

'Once the award had been pronounced and as referred to above it has to be in terms of the [Arbitration and Conciliation Act, 1996](#), the remedy of the Delhi Development Authority obviously would be to have a recourse under Section 34 of the Act. Even if incidentally by mistake the notice has been issued by the court still it will not permit this court to run contrary to the plain language of law. Any other interpretation even if equitable would mean doing injustice to the plain language of Sections 34 and 36 of the [Arbitration and Conciliation Act, 1996](#). If the law does not permit the court will not take recourse to the Arbitration Act, 1940 and consequently the contention raised by the learned counsel for Delhi Development Authority must fail. The objection in the present form thereforee would not be maintainable and it must follow that notice given by the Joint Registrar (O) in pursuance of the filing of the award to the parties would also be null and void.'

13. No doubt in this case every body acted initially on the presumption as if the provision of old Act are applicable. The petitioner filed application under Sections 14 and 17 of the old Act. Even the Registry of this Court issued notice thereon and entertained the application. When the notice was served upon the respondent for filing objections to the award, respondent also acted pursuant thereto and filed the objections. This happened before the judgment in the case of Thyseen (supra). Everybody was under the illusion that the provision of old Act would be applicable. However, the parties acted contrary to law as the judgment in the case of Thyseen (supra) now reveals that it is the provision of the new Act which are applicable in such cases. Since this is the legal position which amply stands clarified by the Supreme Court judgment in the case of Thyseen (supra), this Court has no option but to deal with the case on the touchstone of this legal provision and the consequences thereof has to follow. In the instant case, it may be somewhat harsh to the respondent but that cannot be helped.

14. In view of the aforesaid discussion, objections filed by the DDA (being IA.1139/2001) under Sections 30 and 33 of the old Act are not maintainable in view of the applicability of the new Act to the arbitral proceedings in this award, and the same are hereby dismissed. The Suit filed by the petitioner under Sections 14 and 17 of the Old Act also stands dismissed.

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