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Kirloskar Computer Services Ltd. Vs. Lakshmi General Finance Ltd. and anr.

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Court : Chennai

Decided On : Jun-17-2006

Reported in : 2007(1)ARBLR156(Madras)

Judge : S. Rajeswaran, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 4, 9, 17, 34 and 85(2); Contract Act - Sections 74; [Arbitration Act, 1940](#); Foreign Awards (Recognition and Enforcement) Act, 1961; General Clauses Act - Sections 8

Appeal No. : O.P. Nos. 491, 492, 493 and 501 of 2003

Appellant : Kirloskar Computer Services Ltd.

Respondent : Lakshmi General Finance Ltd. and anr.

Advocate for Def. : Radha Krishnan, Adv. for ;Sarvabhauman Associates

Advocate for Pet/Ap. : Krishna Srinivas, Adv. for ;Ramasubramanian Associates

Disposition : Petition dismissed

Judgement :

S. Rajeswaran, J.

OP No. 491 of 2003

1. This original petition has been filed to set aside the award of the second respondent dated 28.04.2003 in Arbitration Case No. 43 of 2002.

2. This original petition has been filed to set aside the award of the second respondent dated 28.04.2003 in Arbitration Case No. 41 of 2002.

OP No. 493 of 2003

3. This original petition has been filed to set aside the award of the second respondent dated 28.04.2003 in Arbitration Case No. 44 of 2002.

OP No. 501 of 2003

4. This original petition has been filed to set aside the award of the second respondent dated 28.04.2003 in Arbitration Case No. 40 of 2002.

5. In all the above four original petitions, the dispute involved, the parties to the agreement and the facts of the cases are one and the same excepting a few deviation on facts. Therefore, a common order is passed. In fact, the petitioner company in all the four original petitions have filed a common counter statement before the arbitrator in the four separate claims made by the first respondent. For the sake of convenience, I am referring to the facts available in Original Petition No. 491 of 2003.

6. The petitioner company entered into a lease agreement with the first respondent for a period of five years commencing from 21.12.1998 and ending with 01.12.2003 for the purchase of 1998 Model IMP telecom equipment. The total rental lease amount is Rs. 73,10,405, under this agreement which was repayable in 60 monthly instalments. The petitioner company has been regular in making the lease rent payments on a monthly basis. However, due to recession in the telecom industry and drastic fall in the export market, the petitioner company could not meet its obligations in making the lease rent payments since February 2001.

7. The first respondent sent a notice dated 20.07.2001 for settlement of the outstanding rental lease amount and in the event of failure to pay the amount, the first respondent threatened to recover the equipment financed by them. The

petitioner sent a reply by its letter dated 02.08.2001 and the first respondent sent another letter dated 05.10.2001 claiming a sum of Rs. 46,29,265 on account of lease rentals to be paid to them. As disputes arose between the petitioner and the first respondent, it was referred to the second respondent for arbitration as per Clause 33 of the lease agreement. In the meanwhile, the first respondent filed Section 9 application in this Court and this Court appointed an Advocate-Commissioner to seize the equipments and now the said equipments are in possession of the Advocate-Commissioner. The second respondent, after perusing the documentary evidence adduced before him, passed an award on 28.04.2003 in favour of the first respondent for Rs. 51,94,443 together with interest at 18% per annum.

8. Challenging the award dated 28.04.2003, the above original petition has been filed under Section 34 of the [Arbitration and Conciliation Act, 1996](#).

9. The following grounds were raised in the petition to assail the award:

- (1) The second respondent is wrong in passing the award that the lessor, the first respondent herein, is eligible for the benefit of future lease rentals and also for the equipment, which is not in the possession of the petitioner;
- (2) The petitioner is only a bailee and the hire charges are payable only for such period during which the equipment is in the possession of the petitioner-bailee;
- (3) The first respondent ought to have terminated all the agreements as equipment was repossessed and hence the claim made by the first respondent was untenable in law;
- (4) The second respondent erred in passing 30% compensation charges, when there is no need for the same;
- (5) The second respondent has failed to note that Clauses 24(e)(i) and 24(e)(ii) in the agreement are mutually exclusive and both cannot be invoked together;
- (6) The award granting liquidated damages is clearly against Section 74 of the Contract Act.

10. A counter statement has been filed by the first respondent supporting the award.

11. Learned Counsel for the petitioner, while reiterating the grounds made in the petition, raised a new plea that Clause 33 of the lease agreement refers to Indian [Arbitration Act, 1940](#) only, and in such circumstances, the above lease agreement is not valid as the same was entered into after the new Act came into force and consequently, the award was passed without jurisdiction and the same is liable to be set aside on this ground also. He relied on the judgment of the Hon'ble Supreme Court reported in Thyssen Stahlunion GMBH v. Steel Authority of India Ltd. : AIR 1999 SC3923 .

12. Per contra, learned Counsel for the first respondent, while reiterating the averments made in the counter statement, submitted that the abovesaid Hon'ble Supreme Court judgment would not apply to the facts of the present case and a close reading of Clause 33 of the agreement and Sections 4 and 85(2)(a) of the Act of 1996 and the conduct of the petitioner would clearly prove that there is no merit in the contention of the petitioner and the award is to be upheld. Learned Counsel for the first respondent further submitted that the Advocate-Commissioner seized part of the equipment only and other parts could not be taken for want of identification and they are still in the possession of the petitioner only.

13. Heard the learned Counsel for the petitioner and the learned Counsel for the first respondent. I have also perused the documents filed by them and the judgments referred to by them in support of their submissions.

14. The petitioner company herein have raised the very same ground before the second respondent in the common counter filed by them. The second respondent, after going through the entire evidence, has come to the conclusion that the first respondent is a lessor and the petitioner is a lessee and rejected the contention of the petitioner that they are only a bailee and not a lessee. Insofar as the petitioner's claim that equipment taken over by the Advocate-Commissioner is the telecommunication instrument leased to them only, is concerned, the second respondent has observed, on the basis of the evidence adduced before him, that if the petitioner herein got any grievance in identifying the equipment taken over by

the Advocate-Commissioner, they ought to have filed objections before this Court and having not filed any objections, now they could not contend that the Advocate-Commissioner seized the equipment in full.

15. With regard to the enforcement of Clauses 24(e)(i) and 24(e)(ii) is concerned, the second respondent has rightly observed that Clause 24(e)(i) gives power to the first respondent to retake and remove the equipment and Clause 24(e)(ii) gives power to the first respondent to claim by way of liquidated damages, arrears of lease rentals and also rentals for the remaining unexpired period. The second respondent did not accept that once the first respondent/ claimant had taken possession of the equipment, they are not entitled to claim future rentals, when it is admitted by the petitioner that they are bound by the terms and conditions of the agreement.

16. Insofar as the liquidated damages are concerned, the second respondent, after referring to Exhibits A3 and A4, has held that the first respondent is entitled to liquidated damages and it is not hit by Section 74 of the Indian Contract Act. Similarly, the second respondent awarded compensation charges as per Clause 26 of the agreement which cannot be found fault with. Clause 22 deals with residual value and if the petitioner company have not discharged their burden to show that the claim of residual value is illegal as contained in Clause 22, they cannot be aggrieved if the claim of residual value is granted by the arbitrator/second respondent herein.

17. Thus, the second respondent has passed the award on the basis of terms of the agreement, which was agreed upon by both the parties, and the same cannot be assailed by the petitioner under Section 34 of the Act. This Court is not an appellate court to re-evaluate the evidence and even otherwise this Court cannot rewrite the agreement at the instance of the petitioner company. Learned Counsel for the petitioner has strenuously contended that the arbitration clause contained in Clause 33 is not valid and consequently the award is passed without jurisdiction and nullity in the eye of law and is liable to be set aside.

18. Clause 33 of the lease agreement reads as follows:

All disputes, differences and/or claims arising out of this lease agreement, whether during its subsistence or thereafter, shall be settled by arbitration in accordance with the provisions of the Indian [Arbitration Act, 1940](#) or any statutory amendments thereof and shall be referred to the sole arbitrator.

19. Admittedly, the lease agreement was entered into between the parties on 21.12.1998, that is, well after 25.01.1996, when the new Act, that is, the [Arbitration and Conciliation Act, 1996](#) came into force, but the agreement referred only to Indian [Arbitration Act, 1940](#).

20. Taking advantage of the wrong mentioning of the old Act in Clause 33 of the lease agreement, learned Counsel for the petitioner submitted that the entire proceedings initiated under the new Act is without jurisdiction and ought to be set aside.

21. In Thyssen Stahlunion GMBH v. Steel Authority of India Ltd. (supra), the Hon'ble Supreme Court while interpreting Section 85(2)(a) of the Act of 1996 held as follows:

22. For the reasons to follow, we hold:

(1) The provisions of the old Act ([Arbitration Act, 1940](#)) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act ([Arbitration and Conciliation Act, 1996](#)).

(2) The phrase 'in relation to arbitral proceedings' cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder.

(3) In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

(4) The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act came into force.

(5) Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force.

(6) If a narrow meaning of the phrase 'in relation to arbitral proceedings' is to be accepted, it is likely to create a great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Acts. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

(7) A foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act [Foreign Awards (Recognition and Enforcement) Act, 1961].

22. From the above, it is very clear that the old Act of 1940 shall apply in relation to arbitration proceedings which have commenced before the coming into force of the new Act.

23. In the present case, the agreement itself was entered into on 21.12.1998, that is, well after the new Act of 1996 came into force and in such circumstances the reliance placed on the above judgment is misconceived.

24. Apart from that, the conduct of the petitioner company and their intention would also prove that they are willingly subjecting themselves to the arbitration proceedings under the new Act only. That is why, no objection, whatsoever, was raised before this Court, when Section 9 application under the new Act of 1996 was filed by the first respondent and also before the arbitrator at the time of filing

the counter statement or even thereafter. Having participated without raising any objection in the entire proceedings before the High Court and also before the second respondent, the petitioner company is estopped from making such last minute desperate arguments.

25. In *Ramakishorelal v. Kamalnarayan* : AIR 1963 SC890 , the Hon'ble Supreme Court held that the golden rule of construction of a deed is to ascertain the intention of the parties to the instrument, after considering all the words, in their ordinary, natural sense.

26. In *United Industrial Engineers, Madurai v. Sundaram Finance Services Ltd., Chennai* : (2003)2MLJ367 , this Court held that the intention of the parties plays a vital role in deciding the issue, whether the parties can have remedy through civil court or through arbitration.

27. In Clause 33 of the agreement, words used are Indian [Arbitration Act, 1940](#) or any statutory amendments thereof (emphasis supplied). So, it is very clear that the parties intended to settle the dispute, difference and claim in accordance with the provisions of the old Act of 1940 or any statutory amendments thereof. The word amendments has broader meaning and it includes repealment also. When the old Act has been repealed and the new Act came into existence, the intention of the parties is that the repealed Act would not apply and only the new Act would apply.

28. Under Section 85(2)(a) of the new Act of 1996 also, the provisions of the repealed enactment shall apply in relation to arbitral proceedings which commenced before the new Act came into force, unless otherwise agreed by the parties and only the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force.

29. In *Bhagat Ram Sharma v. Union of India* : [1988]1SCR1034 , the Hon'ble Supreme Court held that it is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision is substituted. Such deletion has the effect of repeal of the existing provision. Such a law also may provide for the introduction of a new provision. There is no real distinction between a repeal and an amendment.

30. In *Interstate Equipment (India) Private Ltd. v. Bharat Aluminium Company Limited* 2004 1 RAJ 656 Del : 2004 1 Arb. LR 456 (Del), the Delhi High Court has held that although the word re-enactment does not exist in the arbitration clause, the expression any enactment used in the clause would definitely mean and include the word re-enactment also and further held that in such cases new Act would automatically apply to such arbitral proceedings which have commenced on or after coming into force of a new Act.

31. In the present case, the words used in Clause 33 are 'Act, 1940 or any statutory amendments thereof' and applying the principles laid down in the above judgment, it is very clear that only the new Act would apply and, therefore, the entire proceedings are within the jurisdiction.

32. This Court also in a similar situation in the case of *Tata Finance Ltd. v. Md. Madar* (1999) 3 MLJ 551 : , held as follows (p. 557 of MLJ):

20. In terms of Section 8 of the General Clauses Act and by legal fiction, as well as the repealed [Arbitration Act, 1940](#), and by the provisions of the [Arbitration and Conciliation Act, 1996](#), it is obvious that in the place of the [Arbitration Act, 1940](#) the provisions of the [Arbitration and Conciliation Act, 1996](#) gets attracted and it applies. This is axiomatic Section 85 of the [Arbitration and Conciliation Act, 1996](#) provides that notwithstanding such a repeal, the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the 1996 Act came into force unless otherwise agreed by the parties and the provisions of the new enactment shall apply in relation to arbitral proceedings which commenced on or after the 1996 Act came into force. Merely because the [Arbitration Act, 1940](#) had been repealed, it cannot be said that Clause 25 has become ineffective or rendered otiose. Such a contention cannot be accepted.

33. From the above, it is very clear that only the provisions of the new Act of 1996 would apply and in fact the same was applied in the entire proceedings both before this Court and before the arbitrator.

34. Yet another reason for rejecting the arguments of the learned Counsel for the petitioner in this regard is that under Section 4 of the Act of 1996 they are deemed

to have waived to object to the jurisdiction and the applicability of the new Act, as the same was not raised at the earliest point of time and participated in the arbitration proceedings with a definite intention that only the new Act would apply.

35. It is also not in dispute that no question was ever raised with regard to the jurisdiction of the tribunal before the arbitrator and in such circumstances the petitioner should not be permitted to make such desperate arguments for the first time in this Court, that too, at the eleventh hour.

36. Hence, considering the totality of the facts and circumstances and the law on this aspect, there is no merit in all the above four original petitions and they are liable to be dismissed.

37. Accordingly, all the above four original petitions are dismissed. No costs.

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