

(2012) 07 KAR CK 0054

In the Karnataka High Court

Case No : Civil Revision Petition No. 240 of 2011

Central Ware Housing Corporation

APPELLANT

Vs

M/s Ravi Constructions and Sri L. Nagaraj

RESPONDENT

Date of Decision : 04-07-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37, 43 (3)
Contract Act, 1872 — Section 28, 28 (b)

Citation : AIR 2013 Kar 18 : (2013) ILR (Kar) 2183

Hon'ble Judges : H.G. Ramesh, J

Bench : Single Bench

Advocate : M. Aswathanarayana Reddy, for the Appellant; Aditya Sondhi, Advocate for R-1, for the Respondent

Final Decision : Dismissed

Judgement

H.G. Ramesh, J.—This revision petition by the Central Ware Housing Corporation is directed against the judgment dated 18.04.2011 passed by the Appellate Court namely the Court of the VI Additional City Civil Judge, Bangalore City, in Arbitration Case no. 1/2005. By the impugned judgment, the Appellate Court has allowed the appeal filed by respondent no. 1 u/s 37 of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act" for short) by setting aside the order dated 20.10.2004 passed by the sole Arbitrator and remitting the matter to the Arbitrator to decide the matter on merits. The Arbitrator had dismissed the claim of respondent no. 1 made in connection with a contract relating to construction of a godown and ancillary buildings etc., at the Central Warehouse, Whitefield, Bangalore, as not maintainable on the ground that respondent no. 1 did not invoke the arbitration clause (clause 25 of the Contract) within 90 days from the date stipulated therein and as there was no extension of time u/s 43(3) of the Arbitration Act by the jurisdictional court, respondent no. 1's claim was deemed to have been waived and barred as per Clause 25 of the Contract. Being aggrieved, respondent no. 1 preferred an appeal u/s 37 of the Arbitration Act. The Appellate Court, by the judgment impugned herein, has held that the clause

in the Contract seeking to extinguish the right of respondent no. 1 on expiry of the specified period is void as contrary to Section 28(b) of the Contract Act, 1872. It also held that this was a fit case wherein it could extend the time to submit the dispute to arbitration in exercise of the power u/s 43(3) of the Arbitration Act on the ground of undue hardship. Accordingly, it has set aside the order of the sole Arbitrator and has remitted the matter to the Arbitrator to consider the matter on merits.

2. I have heard Sri M. Aswathanarayana Reddy, learned counsel appearing for the petitioners and Sri Aditya Sondhi, learned counsel appearing for respondent no. 1, perused the impugned judgment and the record of the Appellate Court.

Learned counsel for the petitioners, in support of the revision petition, relied on the judgment of the Hon'ble Supreme Court in H.P. State Forest Company Ltd. Vs. United India Insurance Co. Ltd., He submitted that the impugned judgment of the Appellate Court is contrary to the law laid down by the Hon'ble Supreme Court in H.P. State Forest Company Ltd. and sought to justify the order of the Arbitrator. He also submitted that no extension of time u/s 43(3) of the Arbitration Act is permissible unless the application for extension of time was filed in Court before commencement of arbitral proceedings. In support of his submission, he referred to a judgment of the Madras High Court in Dr. E. Muralidharan Vs. Venkataraman and Company and Another, ; he specifically referred to para 15 thereof.

Learned Counsel for respondent no. 1 supported the impugned judgment by relying on the amendment to Section 28 of the Contract Act by Act 1 of 1997 and also by relying on several judgments of various High Courts.

3. The only question that requires to be determined in this revision petition is as to whether Clause 25 of the Contract is void as being contrary to Section 28 of the Contract Act, 1872?

It is relevant to state that Clause 25 of the Contract provides for extinguishment of the right to claim, if no demand for arbitration relating to the claim is made within 90 days from the date referred to therein. Relevant portion of Clause 25 of the Contract reads as follows:

.....It is also a term of the contract that if the Contractor(s) does/do not make any demand for Arbitration in respect of any claim/s in writing within 90 days of receiving the intimation from the Corporation that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the corporation shall be discharged and released of all liabilities under the contract in respect of these claims.....

4. To examine the aforesaid question, it is necessary to refer to Section 28 of the Indian Contract Act, 1872 before and after the amendment. Before the amendment, the Section read as follows:

Section 28. Agreements in restraint of legal proceedings void.-

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1. - Saving of contract to refer to arbitration dispute that may arise - This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2. - Saving of contract to refer questions that have already arisen - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Section 28 was amended by Indian Contract (Amendment) Act, 1996 (Act 1 of 1997) with effect from 8.1.1997 and the amended Section 28 reads as follows:

28. Agreements in restraint of legal proceedings, void. - Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Exception 1.- Saving of contract to refer to arbitration dispute that may arise - This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.- Saving of contract to refer questions that have already arisen - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

(Emphasis supplied to the amendment)

A perusal of the amended Section 28 of the Contract Act extracted above would show that both kinds of agreements i.e. agreements which restrict the period of limitation within which claims could be referred, as also agreements which extinguish the right of a party to prefer a claim or discharges any party from any liability under a contract on expiry of a specified period, are void to that extent.

5. Before the amendment of Section 28 in 1997, the agreements reducing the period of limitation were distinguished from those which did not limit the time within which a party might enforce his rights, but which provided for a release or forfeiture of rights, if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, being outside the scope of the section, were held to be binding between the parties. Thus, in *National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co.* and another, the Supreme Court drew a clear distinction between an agreement which curtails the period of limitation and an agreement which provides for forfeiture or waiver of the right itself, if no action is commenced within the period stipulated by the agreement. The first was held to be void as offending Section 28 but the later was held not falling within the mischief of Section 28. It was, thus, held that curtailment of the period of limitation was not permissible in view of Section 28 but extinction of the right itself, unless exercised within the specified time, was permissible and can be enforced.

6. After the 1997 amendment to Section 28 of the Indian Contract Act, 1872, not only the curtailment of the period of limitation is void, but also the extinction of right, if sought to be brought by the agreement within a specific period, which period is less than the period of limitation prescribed for the suit under the Contract in question, is also rendered void. In other words, after the amendment to Section 28 of the Indian Contract Act, 1872 by Act 1 of 1997, the distinction between curtailing of the period of limitation and extinction of the right itself, after the specified period, no longer exists.

7. Before concluding, let me refer to the judgment of the Supreme Court in *H.P. State Forest Company Ltd. Vs. United India Insurance Co. Ltd.*, relied on by the Counsel for the petitioners. In the said judgment, the effect of amendment to Section 28 of the Contract Act is not considered. The said judgment is explained by the Punjab & Haryana High Court in *Sunil Goyal Vs. Haryana State Agriculture Marketing Board and Others*, wherein it was held that Act No. 30 of 2001 does not have the effect of repealing the amendment to Section 28 of the Contract Act by Act 1 of 1997. The following observations made in *Sunil Goyai's* case at paras 12 to 15 are relevant:

12. It appears that in *H.P. State Forest Company Ltd.* case a statement was made that the amendment has been repealed. Therefore, the provisions, as it existed prior to the amendment have to be examined. In fact, such statement made by the counsel for the appellant before the Hon'ble Supreme Court was under a mistaken belief. Indian Parliament Act No. 1 of 1997 amended Section 28 of the Act. Later by Indian Parliament Act No. 30 of 2001, the enactments

specified in the first schedule were repealed to the extent mentioned in 4th column thereof. Indian Parliament Act No. 1 of 1997 has been repealed, but such repeal does not affect any other enactment in which repealed enactment has been applied, incorporated or referred to in terms of the repealing Act. In terms of Section 6-A of the General Clauses Act, 1897, the amendment in the Act incorporated by the Amending Act does not stand repealed by such Repealing and Amending Act, 2001. The periodical process of repealing is carried out to prune statutes on the statute book.

13. Section 6-A of the General Clauses Act, 1897 has been interpreted in *Jethanand Betab Vs. The State of Delhi (Now Delhi Administration)*, wherein identical provision of Repealing and Amending Act, 1952 came up for consideration. It was held to the following effect:

.....The substance of the aforesaid provisions may be stated thus: The Act of 1949 inserted Section 6(1-A) in the Act of 1933. The 1949 Act was repealed by the 1952 Act, but the latter Act saved the operation of other enactments in which the repealed enactment has been applied, incorporated or referred to. The first question that arises for consideration is whether the amendments inserted by the 1949 Act in the 1933 Act were saved by reason of Section 4 of the 1952 Act.

The general object of a Repealing and Amending Act is stated in Halsbury's Laws of England, 2nd Edn., Vol. 31, at p. 563, thus:

A Statute Law Revision Act does not alter the law, but simply strikes out certain enactments which have become unnecessary. It invariably contains elaborate provisos.

In *Khuda Bux Vs. Manager, Caledonian Press, Chakravartti*, CJ neatly brings out the purpose and scope of such Acts. The learned Chief Justice says at p. 486:

Such Acts have no legislative effect, but are designed for editorial revision, being intended only to excise dead matter from the statute book and to reduce its volume. Mostly, they expurgate Amending Acts, because having imparted the amendments to the main Acts, those Acts have served their purpose and have no further reason for their existence. At times, inconsistencies are also removed by Repealing and Amending Acts. The only object of such Acts, which in England are called Statute Law Revision Acts, is legislative spring-cleaning and they are not intended to make any change in the law. Even so, they are guarded by saving clauses drawn with elaborate care,....

It is, therefore, clear that the main object of the 1952 Act was only to strike out the unnecessary Acts and excise dead matter from the statute book in order to lighten the burden of ever increasing spate of legislation and to remove confusion from the public mind. The object of the Repealing and Amending Act of 1952 was only to expurgate the Amending Act of 1949, along with similar Acts, which had served its purpose.

14. In *India Tobacco Co. Ltd. Vs. The Commercial Tax Officer, Bhavanipore and*

Others, the Hon"ble Supreme Court held:

17..... Broadly speaking, the principal object of a Mohindar Singh Vs. Mst. Harbhajan Kaur,

15. In view of the above, the Indian Parliament Act No. 30 of 2001 does not have the effect of repealing the amendment carried out by Indian Parliament Act No. 1 of 1997.....

(Emphasis supplied)

In view of the amendment to Section 28 of the Contract Act by Act 1 of 1997 (w.e.f. 8.1.1997) as explained above, I am of opinion that Clause 25 of the Contract which seeks to extinguish the right to claim, on expiry of the specified period, offends Section 28(b) of the Contract Act and hence is void, as rightly held by the Appellate Court. In my opinion, the revision petition is devoid of merit and it is accordingly dismissed but with no order as to costs. In view of dismissal of the Revision Petition, IA No. 2/2011 filed for interim stay also stands dismissed. However, all contentions of both the parties are kept open to be adjudicated by the Arbitral Tribunal, except the question decided herein.

Revision petition dismissed.