

(2001) 10 DEL CK 0154
In the Delhi High Court
Case No : Suit No. 1582A of 2001

Housing and Urban Development Corporation	APPELLANT
Vs	
DSA Engineers (Bombay) and Others	RESPONDENT

Date of Decision : 04-10-2001

Acts Referred:

Arbitration (Amendment) Act, 1985 — Section 85, 85(1), 85(2)
Arbitration (Amendment) Act, 1996 — Section 10, 34, 4
Arbitration Act, 1940 — Section 14, 30, 32
Arbitration and Conciliation Act, 1996 — Section 7
Contract Act, 1872 — Section 28

Citation : (2002) 95 DLT 656

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : P.N. Kumar and Anurag Kumar, for the Appellant; Chetan Sharma, D. Moitra and B.S. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

J.D. Kapoor, J.—This petition u/s 14 of the Arbitration Act, 1940 for filing of the award dated 30.6.2001 has been thrown up interesting question of law - whether the provisions of Act of 1940 or Act of 1996 are applicable in respect of the award in question which is dated 30.6.2001 though arbitral proceedings were commenced in 1993 and conducted under the procedure of Act of 1940.

2. In order to appreciate proposition of law in proper perspective, following facts are relevant and germane:-

i) Clause 91.4 of the agreement dated 10.7.1992 between the parties provided as under :-

"subject as aforesaid, the provision of the Arbitration Act 1940 or any statutory modification or re-enactment thereof and rule made there under shall apply to the Arbitration proceedings under this clause."

(ii) Admittedly Arbitration and Conciliation Act of 1996 came into operation during the pendency of the arbitral proceedings and before making of the award.

iii) Admittedly arbitral tribunal compromised of two arbitrators as there was no statutory requirement under the Act of 1940 for appointment of odd numbers of arbitrators as contemplated u/s 10 of the Act of 1996 which is as under :-

10. Numbers of arbitrators:- (1) of parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in Sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."

(iv) Section 85 of Arbitration Act of 1985 relates to the effect of repeal of the old Act which is 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 appeal:-

(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.

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v) The relevant extract of the minutes of the meeting held on 2.2.2000 by the Arbitrator is as under :-

"Respondents made a request for a reasoned award. Parties were informed that a decision will be taken in terms of Arbitration Act, 1940."

While defending the action taken by the petitioner by way of instant application u/s 14 of the old Act of 1940 for filing of the award made and published by the arbitrators along with documents, Mr. P.N.Kumar, learned counsel for the petitioner contended that once the parties were informed vide minutes of the meeting held on 2.2.2000 that the decision will be taken in terms of Act of 1940 though it was the petitioner who made a request for reasoned award the award has to be dealt with in accordance with the provisions of old Act of 1940 though it has been made and published after the enactment of Act of 1996, Clause 90.1 of the agreement any statute or re-enactment of the Act of 1940 and rules made there under shall apply to the arbitral proceedings became redundant and inapplicable.

3. On the contrary, Mr. Chetan Sharma, learned counsel for the respondent has refuted this contention by analysing the effect and meaning of the minutes of the meeting held on 2.2.2000 which according to him is that petitioner alone who made a request for a reasoned award and since both the parties did not consent

in writing as contemplated u/s 7 of the Act of 1996 that they would be governed in terms of Act of 1940, it was Clause 90.1 of the agreement which governed the parties. Section 7 of the Act of 1996 makes it mandatory that arbitration agreement shall always be in writing and as the tenor of the observations of the arbitrators in the minutes of the meeting shows that arbitrators merely informed the parties that they will take the decision in terms of the Act of 1940 does not either amount to the consent of the parties to be governed under the Act of 1940 or waiver by the parties. It is further contended that any information or even the decision of the Arbitrators that they will take the decision in terms of the Act of 1940 cannot by any stretch of imagination deemed as agreement as contemplated u/s 7 of the Act of 1996 or "agreement" in writing. Once the parties had agreed in writing that the provisions of Act of 1940 or rules and statutory rules made there under shall apply to the arbitration proceedings, no kind of proceedings or oral agreement or intimation to the parties that the decision will be as per Act of 1940 could have superseded the original contract.

4. However, Mr.Kumar countered it by contending that even if this interpretation is accepted, the whole proceedings stand vitiated as in terms of Section 10 of Act of 1996 it is mandatory that the number of arbitrators has to be odd and not even. Mr. Kumar further contended that if Clause 90.1 was to be given effect to, it was incumbent upon the parties for that purpose to appoint an umpire being the third arbitrator because of the requirement of law that the number of arbitrators have to be odd numbers but the respondent participated in the arbitration proceedings without insisting for appointment of umpire and this leads to inference or consent of the respondent that the parties had agreed to be governed by the provisions of Act of 1940 and moreover the arbitrators also informed them in specific terms that they will take the decision in terms of Act of 1940.

5. To further fortify this view Mr.Kumar took refuge u/s 85(2)(a) of the Act that "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."

6. Mr.Kumar introduced the Doctrine of Waiver by contending that the respondent has waived the right of raising the objection as to the composition of the arbitrator by participating in the proceedings and also by not raising this objection before the arbitrators. Had the respondent not waived this objection he would have insisted for appointment of the umpire. But he did not do so. It is no more open to the respondent to raise this objection particularly when both the parties were fully aware that the arbitral proceedings were being conducted under the provisions of old Act of 1940. Further that in the minutes of meeting held on 2nd February, 2000, the fact of applicability of the Act of 1940 was categorically brought to the notice of the parties.

7. Mr.Kumar also referred to Section 4 of 1996 act which according to him is restricted to part I from which parties may derogate and it no where spells out the provisions of part I from which no derogation is permitted. According to Mr.Kumar the parties can not derogate even if both agree to do so in case of mandatory provisions of Section 10.

8. It is contended that the provision of Section 10 are mandatory in nature and if the composition of the arbitral tribunal is in conflict with Section 10, then the award is void, even if the parties have not objected earlier. In support of his proposition Mr.Kumar has relied upon Atul R. Shah Vs. M/s. V. Vrijlal Lalloobhai and Co. and another, wherein following observations were made with regard to the nature of provisions of Section 10:-

"... the provisions of Section 10 of the 1996 act are mandatory and if the composition of the arbitral tribunal is in conflict with Section 10, then the Award is void, even if the parties have not objected earlier."

9. Thus according to Mr. Kumar the provisions of Section 10 of the Act have rendered Clause 91.4 of the agreement ineffective and redundant, though as per this clause parties agreed that the provision of Arbitration Act of 1940 or statutory modification or re-enactment thereof and rule made there under shall apply to the arbitration under this clause. While referring to the provision of Section 7 of the Act Mr. Kumar contended that this Section requires an arbitration agreement to be in writing and Sub-section (4) describes the kind of that writing and this Section nowhere indicates the requirement of number of Arbitrators as a part of the arbitration Agreement. The number of arbitrators is dealt with separately in Section 10.

10. However, on the point that once the parties had proceeded under the provision of the old Act of 1940 before the Arbitrators and one of the parties had requested the arbitrator to decide as per Act of 1940 i.e. by way of reasoned award and no objection was raised before the arbitrators about their composition in terms of Section 10 of the Act of 1996 was waived, the parties can not be allowed to blow hot and cold and as composition of the arbitrators in terms of Section 10 of the Act 1996 was waived, Mr.Kumar relied upon Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, wherein following observations were made:

"Even in a case where initial order was not passed by consent of the party by participation and acquiescence can preclude future challenges".

11. Another case relied upon is Radheshyam Kedia Vs. Srinivas Pandit and another, wherein similar observations were made:

"The right to object can be said to have been waived when the party proceeds with the arbitration without objecting and acts of such "proceedings" would include for example appearance at a hearing or a communication to the arbitral tribunal or the other party".

12. However, as regards the effect of Section 85 of the 1996 Act which provides that the provisions of the repealed enactments shall apply in relation to arbitral proceedings which commenced before this 1996 act came into force Mr. Kumar has countered that it is a saving clause and it exempts the old act from complete obliteration so far as pending arbitration proceedings are concerned.

13. In support of this proposition contention Mr. Kumar has placed reliance upon *Thyseen Stahlunion GMBH v. Steel Authority of India* AIR 1999 SC 3933 wherein the following observations were made:

38. Section 85(2) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act until the time of the enforcement of the award. This Section 85(2) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. There is presumption that Legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. It is correct that the new Act is a remedial statute and, Therefore, Section 85(2) calls for strict construction, it being a repealing provision. But then as stated above were one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favor of the latter.

39. Enforcement of the award, Therefore, has to be examined on the touchstone of the proceedings held under the old Act.

40. Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue that legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly on accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody i.e. arbitrators and the parties that the award given should not fall foul of Sections 30 & 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act."

15. In nutshell Mr.Kumar has contended that since the parties in the instant case participated up to the last hearing without raising any objection and also were informed by the Arbitrators that the proceedings are being conducted under the old Act of 1940, the right to raise such objection stands forfeited. The very fact that the composition of the arbitral tribunal was even numbered showed that the arbitral proceedings were conducted under the 1940 Act and not 1996 Act.

16. Mr. Chetan Sharma has questioned the applicability of the ratio of *Thyseen*

Judgment as cited above as according to him the observations are in respect of civil appeal wherein the facts were different as in Thyssen Judgment there was no such clause in the agreement as 91.4 that Act of 1940 or any statutory modification or re-enactment thereof and rule made there under shall apply to the arbitration proceedings.

17. However, the observations of the Supreme court in the same judgment which is in relation to the case of Rani Construction, Civil appeal 61/99 are relevant as the facts in Rani construction case were akin to the facts of the instant case.

18. The relevant observations of the Supreme Court in this regard are as under:

"That the parties can agree to the applicability of new Act even before the new Act comes into force and the expression "unless other 85(2)(a) of the new Act would clearly apply to a case where the parties have agreed" as appearing in Section de-agreed to the applicability of the old Act even before the new Act came into force as the parties were clear in their minds that it would be the old Act or re-enactment of the Act would govern the arbitration. It was observed that the parties anticipated that the new enactment may come into operation at the time the disputes arise and Therefore it cannot be said that such an agreement is in restraint of legal proceedings as the agreement can be entered into even before or after the new Act come into force."

19. While distinguishing the provisions of Section 10 being procedural, Mr. Kumar contended that had there been a sole arbitrator than these provisions were not applicable but where there are two arbitrators, the provisions of Section 10 are mandatory in nature and any deviation or non-compliance of these provisions would itself vitiate the award if it is challenged under the new Act particularly when not only the arbitrators but the parties proceeded on conscious knowledge that the proceedings were being conducted under the Act of 1940.

20. I am afraid no distinction can be made in the matter of procedure. Once it is found that the parties agreed to the applicability of the new Act even before the Act came into force and where the right to challenge exists under the New Act, provision of appointment of an umpire in the case where two arbitrators are appointed assume the character of a procedure of non-mandatory nature.

21. In Thyssen Case, the Supreme Court has held that :- "There is no right in procedure. Right to challenge the award is still there in the new Act though now in the restricted form. It cannot be said that any prejudice shall be caused to a party when it has to challenge the award under the New Act. The High Court was wrong that the arbitration clause was hit by Section 28 of the Contract Act and that the agreement for the application of the new Act has to be entered into only after the coming into force of the new Act."

22. The Supreme Court's observations that if the literal meaning "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 Act. 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." It was further observed that parties cannot agree to the applicability of the old Act if the new Act has come when the arbitral proceedings under the new Act have not commenced. It was Clause 25 contained in the arbitration agreement in the case of Rani Constructions (P) Ltd. which is identical to Clause 91.4. It was held that this clause admits interpretation that the case is governed by the provisions of the Arbitration and conciliation Act of 1996.

23. The above view as subscribed by the Supreme Court in National Aluminium Company Ltd. v. Metalimpex Ltd. 2000 (3) Arb.L.R. 422(SC) Wherein it was held that the party cannot travel beyond the terms of the agreement.

24. Section 7 of the Arbitration Act provides that every terms of the agreement shall be in writing. Clause 91.4 of the agreement is all pervading clause and any order of the arbitrator including the proceedings conducted under the old Act of 1940 could not have superseded Clause 91.4 nor could it over-ride Clause 91.4 as no party either through the doctrine of waiver or theory of acquiescence can forego the terms of the agreement. Had any of the parties agreed to the conducting of the proceedings under the old Act of 1940, the Arbitrator should have insisted the parties to enter into such agreement in writing by removing or superseding Clause 91.4 of the agreement. Merely that umpire was not appointed did not cause any prejudice to any of the parties so far as the procedural aspect of the proceedings by the arbitrator was concerned.

25. No party including the arbitrator can be allowed to travel beyond the arena of the agreement as terms of the agreement have almost a statutory force and do not admit waiver or acquiescence or any of the terms either through the conduct of the party or conduct of the arbitrator in holding the proceedings. Not only the parties but the arbitrators are bound by the terms of the agreement. Conduct of the proceeding and parties and for that purpose of arbitrator by no stretch of imagination can render the terms of the agreement between the parties nugatory or tantologous.

26. Having held up the matter in all its possible aspect, I find that the petition is not maintainable as the parties are governed by the new Act in view of Clause 91.4 of the agreement between the parties and by the Old Act of 1940.