

(1999) 09 BOM CK 0026

In the Bombay High Court

Case No : Misc. Civil Applications No"s. 286, 287 and 288 of 1999

H.S. Kothadia and Company

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-09-1999

Acts Referred:

Citation : (1999) 09 BOM CK 0026

Hon'ble Judges : J.N. Patel, J

Bench : Single Bench

Advocate : P.N. Kothari, P.P. Kothori, R.G. Agarwal and A.S. Agarwal, for the Appellant;

Judgement

J.N. Patel, J.—A common question arises in these three applications and that is why these are being disposed of by a common order. The only question required examination is as to whether the petitioner has remedy under the Arbitration Act, of 1940 or under to Arbitration and Conciliation Act, 1996.

2. It is not disputed that the petitioner, in all the three cases, was entrusted with contract of construction of Navodaya Vidyalaya at three places for which the parties entered into an agreement. Clause 25 of the agreement, which is common in all the three cases, clearly provides that in case of dispute, the matter would be referred to the sole Arbitrator of the person appointed by the Chief Engineer, C.P.W.D. in charge of the work at the time of dispute or if there be no Chief Engineer, the Administrative Head of the said C.P.W.D. at the time of such appointment. As there was a dispute in respect of the claims made by the petitioner-Contractor, the Chief Engineer, in terms of the agreement, referred the matter for arbitration and in the three claims made by the petitioner-Contractor, the arbitration proceedings have been concluded and the Award was been declared recently.

3. While the arbitration proceedings were pending, the petitioner found that the respondent has not referred the claims as alleged by the petitioner i.e., Claim

No. 14 in Miscellaneous Civil Applications No. 286, Claim No. 12 in Miscellaneous Civil Application No. 287 and Claim No. 10 in Miscellaneous Civil Application No. 288 and, therefore, the petitioner was required to approach this Court for seeking direction of appointment of Arbitrator on failure of the respondents to have referred the respective claims made in the applications for the purposes of arbitration in terms of the Clause 25 of the agreement.

4. Initially, the claim made by the petitioner came to be contested on the ground that these claims being incidental to Clause 2 of the agreement, cannot be referred for arbitration. Further it was contended that as the arbitration proceedings had commenced before coming into force of the Arbitration Act of 1996, the Chief Justice or the person delegated by him would have no jurisdiction over the matter in referring the claim or for that purpose appointing an Arbitrator for adjudication of such claims.

5. On hearing the learned counsel for the parties, this Court finds that if Court takes a view that the claims now made by the petitioner before this Court for referring it for arbitration being of the nature that they were not earlier referred by the respondents to the arbitration, cannot be entertained by this Court, then there is no reason why the Court should examine other aspects of the claim such as whether the nature of the claim is such that it is incidental to Clause 2 of the agreement or they are not preferred within the prescribed period of limitation and so on. Therefore, this Court heard the learned counsel on the preliminary point as to the jurisdiction.

6. Mr. Kothari, the learned counsel for the petitioner submitted that Clause 25 of the agreement clearly provides "Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause". Therefore, according to him, by virtue of this provision in the Clause 25 of the agreement, after coming into force of the Arbitration and Conciliation Act, 1996, the petitioner is justified in approaching this Court by invoking the new Act as the Arbitration Act, 1940 stands repealed. The learned counsel has relied upon the case of *M/s. Reshma Constructions Vs. State of Goa*, in which it has been held by this Court that in respect of proceedings pending under the old Act, it is not left to the Will of the parties to adopt the procedure of their choice old or new Act but such proceedings are necessarily to be governed by the provisions of the new Act. But one thing is clear from this that the provisions of the new Act are made applicable even to the proceedings which commence after coming into force of the new Act, but under the agreement executed before coming into force of the new Act. Bearing this in mind, it will be thus clear that the expression "otherwise agreed by the parties" necessarily refer to the intention of the parties regarding applicability of the provisions of the new or old Act and not to the time factor. And, therefore, the Court held that as the terms in the agreement disclose that the parties had unequivocally agreed to be governed, in the matter of procedure of the

proceedings relating to the arbitration, by the law which was in force at the time of execution of the agreement as well as by any further statutory changes those may be brought about in such law. After coming into force of the new Act, it is the procedure provided under the new Act, i.e., Arbitration and Conciliation Act, 1996, which shall be applicable. It is, therefore, submitted that this Court has jurisdiction to entertain the application for referring the claim for arbitration.

7. On the other hand, the learned counsel appearing for the respondents, submitted that once arbitration proceedings have commenced during the currency of the old Act, i.e., Arbitration Act, 1940, all matters arising out of the disputes will have to be referred and decided as per the procedure laid down under the old Act and, therefore, the petitioner cannot approach this Court by invoking Section 11 of the Arbitration and Conciliation Act, 1996. For that purpose, the learned counsel relied upon the case of Shetty's Constructions Co. Ltd. v. Konkan Railway Construction and another 1998 9 SLT 79 : 1999(3) Arb. LR 676.

8. There is no dispute about the fact that at the time when the agreement between the parties came to be signed and acted upon, the Arbitration Act, 1940 was in force as the three agreement are dated 17-9-1998. Further it is also not in dispute that in terms of Clause 25, the respondents had referred the claims made by the petitioner for adjudication to the Arbitrator prior to 26-6-1996. The whole controversy arose when the petitioner realised that some of his claim have not been referred to arbitration and this was after coming into force of the new Act of 1996. This Court is already informed that the Arbitrator in all the three cases, after filing of these applications has declared the Award. Considering the fact that the claims which are now being agitated before this Court are part of the disputes which were referred to the Arbitrator under the old Act in terms of Clause 25 of the Agreement, and, therefore, part of the claims which are not referred far arbitration according to the petitioner, are required to be considered under the new Act or will have to be adjudicated by following the procedure prescribed under the Act of 1940, has to be resolved.

9. In the case of Shetty's Construction Co. Pvt. Ltd. (supra), the Apex Court laid down the test to determine the applicability of old or new Act : and dealt with the question as under.

"(3) The answer to this question is found from Section 85 of the new Act which reads as under :

"85. Repeal and savings for the (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 enactment 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."

(4) A mere look at sub-section (2)(a) of Section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 26-1-1996. The question, therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or not. For resolving this controversy we may turn to Section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents."

10. In case of Reshma Constructions, Goa, though this Court had taken a view that in view of the fact that the parties had agreed to refer the dispute to the arbitration, concluded that it necessarily refer to the intention of the parties are regards the proceedings to be followed at the time of arbitration and not to the time factor as regards the execution of the agreement. The words "Otherwise agreed by the petitioners" would include an agreement already entered into between the parties and, therefore, after coming into force of the new Act, the parties will have to refer to the procedure under the new Act. With due respect, I disagree with the aforesaid view as I find that at the time when this Court took this view, the decision of the Supreme Court in the case of Shetty's Construction was not before the Court. This Court is bound to follow the decision of the Supreme Court.

11. Considering the fact that the petitioner having invoked the dispute and the same having been referred to arbitration prior to the commencement of the new Act, it is the Act of 1940 which will govern the arbitration proceedings. The contention of petitioners is non-reference of some of the claims made by them which are part of the original dispute, this in my opinion, will be required to be dealt with as per the old procedure and governed by the Arbitration Act of 1940. It is not the petitioner's case that the claims now sought to be referred rate other than what came to be specified for reference to arbitration. Question is not consideration of part of the claim by respondents for referring them to arbitration. Therefore, the issue in the controversy does not require any further discussion as the same is covered by the decision of the Supreme Court. In the facts and circumstances, this Court will have to dismiss the applications filed by the petitioner.

12. Mr. Kothari the learned counsel for the petitioner, submits that as the Court

has taken this view and the petitioner having been bona fide prosecuting the three applications before this Court that it is the new Act of 1996 which would be applicable insofar as the claim now being agitated by the petitioner, rather than passing an order of dismissal, this Court may direct that the applications be presented before the Civil Court so that the petitioner can prosecute the same and also protect the petitioner insofar as the period lost by the petitioner in prosecuting the matter in this Court, is concerned, so that they do not come in the way of the petitioner in agitating the matter in the Civil Court in accordance with the old Act of 1940. Mr. Agarwal, the learned counsel appearing for the respondents, submits that this matter be kept open for the decision of the Civil Court and if at all the petitioner is entitled for any such consideration, it is only when the petitioner filed the application in this Court and till it was decided, would be the time period for consideration by the Civil Court under the Limitation Act and that Court can pass an appropriate order.

13. In the result, this Court finds that the petitioner in all the three cases, will have to be directed to approach the Civil Court and, therefore, the applications filed by the petitioners are directed to be returned to the petitioner for presentation of the same before the Competent Civil Court as contemplated under the old Act of 1940. The petitioner is directed to present these applications before the Civil Court on or before 30th September, 1999. Needless to say that the petitioner would be entitled to move before the Civil Court an application for condonation of delay and the Civil Court would take into consideration the time spent by the petitioner in this Court for condoning such delay, if any. Applications stand disposed of accordingly.