

(2002) 06 UK CK 0001
In the Uttarakhand High Court
Case No : Civil Revision No. 46 of 2001

National Hydroelectric Power Corporation Ltd.	APPELLANT
Vs	
Asian Techs Rani Constructions Joint Venture and Others	RESPONDENT

Date of Decision : 21-06-2002

Acts Referred:

Arbitration Act, 1940 — Section 8, 9
Arbitration and Conciliation Act, 1996 — Section 2(1), 34, 36, 85(2)
Limitation Act, 1963 — Section 14

Citation : AIR 2003 Utt 1 : (2003) 2 UC 1252 : (2003) 1 UD 74

Hon'ble Judges : Irshad Hussain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Irshad Hussain, J.—This revision is directed against the impugned finding on preliminary issue No. 1 and order dated 9-8-2000 passed by Civil Judge (S.D.), Nainital in Civil Misc. Case No. 5 of 2000, arising out of an application u/s 14(2) of the Arbitration Act, 1940 (hereinafter referred to as the "old Act" for short) moved by the petitioner for direction to the arbitrator to file the award in the Court. It was held that the Court has no territorial jurisdiction to hear and decide the matter in controversy.

2. Heard Sri Ajit Pudussery Advocate with Sri Anurag Bisaria Advocate for the petitioner and Sri George Thomas Advocate with Sri S.K. Posti, Advocate for the respondents.

3. Briefly stated the facts of the case are as follows :--

An agreement was entered into between the petitioner and the Respondents Nos. 1, 2 and 3 for executing the work of construction of Power Channel for the Tanakpur Hydro Electricity Project. Disputes arose between the parties. On an application u/s 8 of the old Act the learned Civil Judge (S.D.), Nainital on 22-7-1995 appointed Justice Awadh Behari Rohtagi, a retired Judge of the Delhi

High Court as the arbitrator in the matter. During the pendency of the proceedings, the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "new Act" for short) came into force on 25-1-1996. The award in question by the arbitrator was made and signed on 13-11-1999. From written submissions filed by the respondents, it is evident that the notice was given by the arbitrator to the parties and signed copy of the award was also sent with the notice. The same was received by the petitioner on 15-11-1999. The petitioner, however, on 14-1-2000 sent a letter to the arbitrator requesting him to file the award in the Court and on 1-2-2000 preferred an application as stated above u/s 14(2) of the old Act. These submissions were not disputed at the bar from the side of the petitioner.

4. The respondents filed objections and raised the pleas that the application u/s 14(2) of the old Act is, in view of the new Act now being applicable, not maintainable and that the Court has also no territorial jurisdiction in the matter. On the preliminary issue of territorial jurisdiction the learned Civil Judge accepted the contention that the application is not maintainable in the Court at Nainital. The reason was that on 3-8-1998, the new Judgeship of Udham Singh Nagar at Rudrapur was carved out of the parent judgeship of Nainital and the project for which the parties entered into an agreement was situated at Banbasa within the jurisdiction of the newly created Judgeship of Udham Singh Nagar. It needs to be mentioned that the respondents have meanwhile filed an application under Order XXI CPC read with Section 36 of the new Act in the Court of Civil Judge (S.D.) Udham Singh Nagar at Rudrapur to have the award executed as a decree.

5-6. From the submissions of the parties, following questions fall for determination in this case :

(1) Whether the old Arbitration Act (Arbitration Act, 1940) or the new Act (Arbitration and Conciliation Act, 1996) would be applicable in respect of the award and which Court shall have the jurisdiction to enforce the same?

(2) Whether in the event of a finding that provisions of the new Act apply, the petitioner will be entitled to benefit of the provisions of Section 14 of the Limitation Act, 1963 for the purpose of calculation of limitation period in relation to the objections to be preferred u/s 34 of the new Act?

QUESTION NO. 1

7. The arbitration proceedings commenced in 1995 when the old Act was in force. The award in question was made and signed on 13-11-1999, i.e. after the new Act came into force on 25-1-1996. There is a saving clause in Section 85 of the new Act which reads 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 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".

8. The contention of learned counsel for the petitioner was that in view of the saving clause under Sub-section (2) (a) pending proceedings initiated under the old Act shall be dealt with according to the old Act. It was also contended that the only remedy available to the petitioner was to file an application u/s 14(2) of the old Act before the learned Civil Judge (S.D.), Nainital for a direction to the arbitrator to file the award in the Court. The submission made on behalf of the respondents was that the proceedings after the commencement of the new Act on 25-1-1996 shall be governed by the provision of the new Act because the parties to proceedings have otherwise agreed in view of the arbitration clause of the agreement as provided under the saving clause in Sub-section 2(a) of the Act. They relied upon the judgment of the Supreme Court in the case of Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., .

9. With reference to the provision of the saving clause, the import of the arbitration clause in the agreement requires consideration. Clause 55.8 of the arbitration agreement reads as under :

"55.8. Subject to aforesaid modifications, Arbitration Act 1940 or any statutory modifications, or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the Arbitration proceedings under this clause".

10. In Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., three different cases were considered by the Supreme Court. One of these was civil appeal No. 61 of 1999, M/s. Rani Constructions Pvt, Ltd. v. Himachal Pradesh State Electricity Board. The arbitration agreement In the said case contained a Clause No. 25, which is as below :

"Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian 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 all arbitration proceedings under this clause".

11. In the said case the above clause is identical to the Clause 55.8 of the arbitration agreement in the Instant case. In that case also the arbitration proceedings were initiated when the old Act was applicable and in exactly the similar set of circumstances, the Supreme Court interpreted Section 85(2)(a) of the new Act and identical arbitration clause and held that wherever such an agreement is in force, the arbitra- tion proceedings shall be governed by the

provisions of the new Act from the date when it came into force. The Supreme Court has rejected the contention that the parties could not agree to the application of the new Act when the same was not even in existence or has not come into force. It was thus observed in Paragraph 38 : (Para 47 of Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., of the judgment that :

"Section 28 of the Contract Act contains provision regarding agreements in restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing all that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that, Thus, construing Clause 25 in Rani Constructions (Civil Appeal No. 61 of 1999), new Act will apply".

12. In view of the above, the submission made on behalf of the respondents that the arbitration proceedings are governed by the new Act from the date of the commencement of that Act has to be accepted. On behalf of the petitioner it was submitted that since the Supreme Court in Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., did not consider the import of the words "thereof; "re-enactment" and "for the time being in force" as appearing in the arbitration clause, as such the law declared by the Supreme Court cannot be deemed to have a binding effect as is contemplated by the Article 141 of the Constitution and further that the judgment is hit by the principle of sub-silentio and is also per incuriam. Reliance was placed on the decisions of the Supreme Court in the case of State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, and in Arnit Das Vs. State of Bihar, . In the first case it was observed that a decision which is not expressed and is not founded on reasons, nor it proceeded on consideration of issue, cannot be deemed to be a law declared to have the binding effect as is contemplated by Article 141. In the other case it was held that a decision not expressed and accompanied by reasons and not proceeded on a conscious consideration of issue cannot be deemed to be a law declared to have a binding effect as contemplated under Article 141 of the Constitution. Applying these tests to the instant case, it can safely be said that in exactly the identical set of facts and circumstances, the Supreme Court interpreted Clause 25 of the arbitration agreement in the case of M/s. Rani Constructions Pvt. Ltd. (Civil Appeal No. 61 of 1999) and wherein the import of the words "thereof; "re-enactment" and "for the time being in force" were also in issue and relevant and therefore the conclusion was based on a conscious consideration of the same and the law thereby declared have a binding effect as contemplated under Article 141 of the Constitution. It can also be said that the judgment of the Supreme Court is not hit by the principle of sub-silentio and the same also is not per incuriam.

13. It was next urged that since the parties have consented to the time extension for submission of the award despite the new Act came into force on 25-1-1996, the stand and conduct of respondents should be taken as waiver of the new Act and intention to be governed by the repealed Act. The above submission in view of the provision of the arbitration agreement carry no conviction. Arbitration agreement Clause 55.4 provide that the arbitrator with the consent of the parties can enlarge the time, from time to time, to make and publish his award and in view thereof by extending the time, parties have merely acted according to the condition of the arbitration agreement. In such a situation question of any waiver does not arise. Moreover, there is nothing to indicate that there was an intentional relinquishment of a known right by the respondents while agreeing to the extension of time in making and publishing the award. In this connection it shall not be out of place to mention that in the case of Rani Constructions Pvt. Ltd., (1998) 2 Arbitration LR 322 referred above, the arbitration proceedings between the parties have been held under the old Act and the High Court while considering concept of waiver, held that in order to apply the principle of waiver, it has to be kept in mind that the parties intended to waive their rights with complete knowledge of the consequences as well as law. As mentioned earlier the matter went to the Supreme Court but contrary view was not taken by the Court. In the instant case by extending the time the parties were only following the condition of the arbitration Clause 55.4 and there has not been conscious lelinquishment of the right by the respondents.

14. On behalf of the petitioner decision of the case of Inder Sain Mittal Vs. Housing Board, Haryana and Others, was pressed into service in support of the above contention. In the said case Court appointed Superintending Engineer, P.W.D. Faridabad as the arbitrator and after commencement of the proceedings, Superintending Engineer, P.W.D. Faridabad was transferred to Chandigarh, but notwithstanding the transfer, the arbitrator continued to proceed and gave the award. The award was challenged on the ground that the arbitrator had no authority and jurisdiction to continue with the proceedings after his transfer because in such a situation, only the successor Superintending Engineer, Faridabad should have taken over the proceedings. The Court held that if a party acquiesced to the invalidity by his conduct by participating in the proceedings and taking a chance therein, it cannot be allowed to turn round after the award goes against him and is estopped from challenging validity or otherwise of reference, arbitration proceedings or award in as much as right of such a party to take objection is defeated. This principle cannot be applied to the facts of the instant case because there has not been any disregard of any provision of law. In other words, the cited decision also does not help the cause of the petitioner and it cannot be held that respondents have waived their legal right of application of the provisions of the new Act to the arbitration proceedings, the award and its enforcement in accordance with the existing law.

15. As regards the question as to which Court shall have the jurisdiction to have the award in question enforced in accordance with law is concerned, the term

"Court" has been defined u/s 2 (1) (e) as below ;

""Court means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of grade inferior to such principal civil Court, or any Court of Small Causes".

16. From the above it is clear that principal civil Court of original jurisdiction in a district will be the Court where an application for enforcement of the award as decree shall have to be filed. It is not in dispute that Court of Civil-Judge (Senior Division) has unlimited pecuniary jurisdiction. Consequently the Court of Civil Judge (Senior Division) has to be held as the principal Civil Court of original jurisdiction in a district as contemplated by the definition of Court" u/s 2 (1) (e) of the Act as reproduced above. Views taken by the Delhi High Court in the matter of Kinetic Capital Finance Ltd. v. Anil Kumar Misra, 2000 (3) Rent Arbitration Judgments 272 and also by the Patna High Court in the matter of Bhopal Singh v. Nagendra Narayan Singh 2001 2 Arb LR 602 are also to this effect.

17. An application u/s 8 of the old Act was initially filed before the Civil Judge (S.D.) Nainital for appointment of an arbitrator in pursuance of the arbitration agreement. On 3-8-1998 new judgship of Udham Singh Nagar at Rudrapur was carved out of the parent judgship of Nainital and the project for which there was agreement between the parties was then situate at Banbasa within the jurisdiction of the newly created judgship. The award was given by the arbitrator after creation of the said new judgship. Considering the nature of the proceedings u/s 8 of the old Act, the proceedings came to a logical end after the application was finally decided in terms of appointment of an arbitrator. The award was given after the creation of the new judge-ship of Udham Singh Nagar and since dispute in regard to the award was different and distinct, the learned Civil Judge (S.D.) Nainital has rightly held that this court has no territorial jurisdiction to hear and decide the matter in controversy. This is also not in dispute that meanwhile the respondents have filed an application under Order XXI, Rule 11 (2) CPC read with Section 36 of the new Act for execution of the award dated 13-11-1999 as a decree, before the Civil Judge (S.D.). Udham Singh Nagar at Rudrapur and the petitioner has put in appearance in these proceedings and sought adjournments from time to time. Considering the creation of the new judgship then having territorial jurisdiction in the matter, the impugned finding and order dated 9-8-2000 is legally just and in proper exercise of the jurisdiction vested in the said Court and the same, therefore, does not warrant any interference under the revisional jurisdiction.

Question No. 2

18. In view of the above finding on question No. 1, the award of the arbitration could have been challenged by taking recourse to the provision of Section 34 of

the new Act. The relevant extract of Section 34 reads as below:

"34. Application for setting aside arbitral award

(1) & (2) xx xx xx

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the arbitral tribunal :

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

19. Sections 33 and 34 of the Act provide limitation period for taking recourse under the said sections from the date of the receipt of the copy of the arbitration award. Supreme Court in the matter of Union of India Vs. M/s Popular Construction Co., has held that the time limit prescribed u/s 34 to challenge an award is absolute and unextendable by Court u/s 5 of the Limitation Act. Considering the said mandate the learned counsel for the petitioner urged that the petitioner being a public undertaking and the public money involved under the award, an opportunity need to be given to the petitioner to take recourse u/s 34 of the Act and the period spent by it under the bona fide belief that proceedings were governed by old Act, be excluded for the purpose of calculation of limitation period in terms of Section 14 of the Limitation Act, 1963. Learned counsel pressed into service the decision of the Bombay High Court in the matter of Reshma Constructions Goa v. State of Goa 1999 1 Mah LJ 462. In the said case, the arbitration proceedings were initiated when the old Act was applicable, but in view of arbitration clause in the agreement, identical to the arbitration clause in the instant case, it was held that new Act will be applicable to the proceedings from the date of the enforcement i.e. 25-1-1996. Since the objections were not preferred within the specified period as enjoined u/s 34 of the new Act, the benefit of the provision of Section 14 of the Limitation Act for the purpose of the calculation of the limitation period was extended in the peculiar facts and circumstances of the case.

20. In the said case the arbitrator had filed original award in the Court with forwarding letter dated 9-8-1996 in terms of Section 14 of the old Act. The parties were, however, found to have definitely collected the signed copies of the award prior to 9-8-1996 in response to the notice given by the arbitrator on 30-7-1997. The respondent preferred to file the objections in September. 1996 and further application challenging the appointment of the arbitrator in December, 1996. In any case, the objection was filed within three months from the date of receipt of the copy of the signed award by the respondent. Being so, having held that the provisions of the new Act would apply to the proceedings in question it was found unjust to deny the opportunity to the respondent to take

recourse u/s 33 and/or Section 34 of the new Act if it so desires. Since the respondent was found to have been prosecuting the matter with due diligence in the civil Court under the bona fide belief that the proceedings were governed by the provisions of the old Act. the period spent from 7-9-1996 till the date of the said judgment was required to be excluded by extending the benefit of Section 14 of the Limitation Act, 1963 for the purpose of calculation of the limitation period u/s 33 and/or Section 34(3), in case the respondent preferred to take recourse under any of these sections of the new Act.

21. The petitioner in the instant case had received copy of the award before filing of the petition u/s 14(2) of the old Act. Assertion to this effect was made by the petitioner itself as is evident from the narration of the fact in the impugned order dated 9-8-2000. This fact had not been disputed either in the grounds taken to challenge the impugned order or at the bar when the submissions were made by the learned counsel of the petitioner. With reference to this peculiar aspect, it is relevant to mention that the petitioner had filed an application u/s 151 CPC to have the execution proceedings, meanwhile initiated by the respondents and pending before the Civil Judge (SD), Udham Singh Nagar at Rudrapur, stayed. The petitioner filed affidavit of Sri Harish Mul Chandani, its Deputy Manager in support of the said stay application and the copy of the execution petition No. 6 of 2000 together with its annexures was made Annexure VI to the said affidavit dated 13-9-2000. From the perusal to the Annexure VI it is evident that copy of the notice dated 13-11-1999 given by the arbitrator to the parties was filed with the execution application. By this notice, the arbitrator gave information to the petitioner that he has made and signed the award on 13-11-1999 and signed copy of the award was also sent with the notice as per execution application. By this notice, the arbitrator gave information to the petitioner that he has made and signed the award on 13-11-1999 and signed copy of the award was also sent with the notice. As per the endorsement of the office of the petitioner this notice was received on 15-11-1999. Not only this, the respondents also sent information about the award by letter dated 15-11-1999 and called upon the petitioner to honour the award and pay the amount under it. Reference in it about latest decision of the Supreme Court rendered on 7-10-1999 on the similar dispute in the Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., was also made.

22. It is of significance that the petitioner in the affidavit has not disputed the existence and remittance to him of the notice and the letter relating to the award and enforcement of the same as a decree under the provisions of the new Act. Therefore the fact of receiving the copy of the award by the petitioner before preferring the application u/s 14 of the old Act stand further established. The petitioner later on on 20-11-2000 through the affidavit of its Deputy Manager tried in vain to assert that the petitioner was not given signed copy of the award up to now and the arbitrator acted in collusion with the respondents. There is no material on record to displace the earlier stand of the petitioner before the learned Civil Judge (SD), Nainital and also the conclusion arrived at above. In

short the petitioner had received signed copy of the award prior to filing of the petition u/s 14 of the old Act in the Court and he was made aware of the legal aspect relating to the execution of the award as a decree under the provision of the new Act. Objections against the award in any manner were, however, not filed within three months from the date of the receipt of the copy of the signed award. In the case relied upon on behalf of the petitioner, the facts were as mentioned above, quite different in as much as the objections against the award were filed within three months and taking into account, the conduct of the respondent in the said case, it was found that the respondent had been prosecuting the matter with diligence in the civil Court under the bona fide belief that the proceedings were governed by the provisions of the old Act. There can be no gain saying that in the instant case the stand and conduct of the petitioner does not at all warrant drawing of similar inference in favour of the petitioner. In other words, in the facts and circumstances of the case, for the purpose of calculation of the limitation period as contemplated u/s 34(3) of the new Act, the benefit of the provision of Section 14 of the Limitation Act, 1963 cannot be legally extended to the petitioner even assuming that the said provision of the Limitation Act is applicable to the facts of the case. As a consequence thereof, the award has to be enforced as a decree under the provisions of Section 36 of the new Act by the Court of a competent jurisdiction, which is the Court of Civil Judge (SD) Udham Singh Nagar at Rudrapur as held by the impugned order.

23. In the face of the facts of the case, I do not think that it is necessary to refer in the judgment the other case law cited at the bar and mentioned in the written submissions of the parties, as these judgments appear to have no bearing on the matter in controversy and for the purpose of answering the above questions.

24. In view of the aforesaid discussion, the revision filed by the petitioner has no force and the same is hereby dismissed. The stay order dated 14-9-2000 against the execution case No. 6 of 2000 in the Court of Civil Judge (SD), Udham Singh Nagar at Rudrapur is hereby vacated.