
(2005) 08 AP CK 0023

In the Andhra Pradesh High Court

Case No : C.M.A. (S.R) . No. 83606 of 2000

National Thermal Power Corporation Limited

APPELLANT

Vs

Prefab Granites Limited and Another

RESPONDENT

Date of Decision : 16-08-2005

Acts Referred:

Arbitration Act, 1940 — Section 17

Arbitration and Conciliation Act, 1996 — Section 11, 11(10), 11(4), 11(5), 11(6)

Arbitration Rules, 1940 — Rule 3

Citation : (2006) 1 ALD 135 : (2005) 6 ALT 347 : (2006) 1 ARBLR 399 : (2005) 4 RCR(Civil) 742

Hon'ble Judges : G. Rohini, J; D.S.R. Varma, J

Bench : Division Bench

Advocate : G. Sudha, for the Appellant; None, for the Respondent

Judgement

D.S.R. Varma, J.—This case has a chequered history.

2. Parties to the present appeal invoked the arbitration clause, and got the matter referred to an arbitrator. It is not in dispute that the cause of action for such invocation of arbitration clause arose prior to coming into force of the Arbitration and Conciliation Act, 1996, which came into force with effect from 22-8-1996. The award also was passed. To make the award rule of the Court, the appellant herein filed the suit u/s 17 of the Arbitration Act, 1940, before the District Court Karimnagar as having jurisdiction. This aspect was also not in dispute nor any objection was taken by the District Court. However, in view of Rule 3 (i) (c) of the Judicial Notification bearing No. 104-A, dated 31-8-2000, issued by the High Court of Andhra Pradesh, the District Court returned the papers of the suit to the appellant herein holding that the suit filed by the appellant before the Court below was not maintainable.

3. The appellant faithfully took the suit papers back and filed CMA before this Court upon which the Registry had taken an objection with regard to the maintainability of the CMA supposedly on the ground that only a suit could be

maintainable as per the old law i.e. Arbitration Act 1940 (Old Act). Hence the office objection is placed before this Court. That s how the matter is before us.

4. It is not in dispute that the cause of action in this case arose prior to coming into force of the Arbitration and Conciliation Act 1996 (Act 26 of 96) (New Act). Invocation, appointment of Arbitrator, continuation of arbitral proceedings and passing of the award took place as per the procedure prescribed under the old Act. In that view of the matter, the only recourse open for the appellant is u/s 17 of the old Act.

5. It is rather incomprehensible as to how the District Court, Karimnagar, could return the suit papers for the purpose of filing an appeal before this Court on the basis of the Judicial Notification dated 31 -8-2000 issued by the High Court.

6. In this context, it is necessary to refer to the provisions of Sections 21 and 85(2) of the New Act (The Arbitration and Conciliation Act, 1996, which came into force on 22-8-1996), which read thus:

"Section 21: Commencement of arbitral proceedings:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

"Section 85. Repeal and saving:

(1) ...

(2) ...

(2) (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."

7. A conjoint reading of the above two provisions makes it abundantly clear that the proceedings of the arbitration that were initiated or the date of commencement of the arbitration as provided u/s 21 would be from the date on which the appointment of arbitrator was sought for. This invocation of the arbitration clause in the instant case had taken place prior to the commencement of the new Act (22-8-1996). Therefore, the scheme/notification issued by the High Court and published in the Gazette on 31-8-2000, in our considered view, is inapplicable to the facts and circumstances of this case for the simple reason that the said notification refers to the proceedings initiated or arisen subsequent to the date of commencement of the new Act.

8. Our view is fortified by the apex Court in Milk Food Ltd. v. GMC Ice Cream (P)

Ltd., 2004 AIR SCW 2235. wherein the effect of Section 21 and the non-obstante clause contained in Section 85(2)(a) of the Act were elaborately dealt with, at paragraph No. 71, which is thus:

"Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non-obstante clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would not apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act where for also necessity of reference to Section 21 would arise. The Court is to interpret the repeal and savings clauses in such a manner so as to give an pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the fact of each case as that would be subject to the agreement between the parties. It is also another thing to say that expression "commencement of arbitration proceedings" must be understood having regard to the context in which the same is issued, but it would be a totally different thing to say that the arbitration proceedings commences only for the purpose of limitation upon issuance of a notice and for no other purpose. The; statute does not say so. Even the case laws do not suggest the same. On the contrary the decisions of this Court operating in the field beginning from Shetty Construction Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2) of the Act. There is no reason, even if two views are possible to make a departure from the decisions of this Courts referred to hereinbefore."

9. Therefore, insofar as the proceedings that were initiated prior to coming into force of the new Act are concerned, they shall be governed by the old Act only and, therefore, it is obvious that only a suit is maintainable u/s 17 of the old Act but not an appeal. In other words, appeal under the new Act is not maintainable merely on the ground that the suit was filed subsequent to coming into force of the new Act.

10. On the other hand, as already pointed out, the further proceedings pursuant to the award are governed by the provisions of the old Act only, particularly in view of Section 17 of the new (sic. old) Act.

11. Furthermore, it is to be seen that under the new Act, the question of invocation of Section 17 for the purpose of making the award as rule of the Court does not arise at all. Apart from this, under Sub-section (10) of Section 11 of the new Act, the Chief Justice is empowered to make a scheme for dealing with the matters referred to in Sub-sections (4) or (5) or (6) of Section 11 of the new Act. The entire scheme u/s 11 of the new Act deals with the procedure for the very

appointment of an Arbitrator.

12. Accordingly, we uphold the office objection raised by the Registry of the Court, that the appeal is not maintainable. We further hold that the District Court, Karimnagar, was in serious error, in returning the papers, which amounts to refusal to exercise the jurisdiction vested in it under the old Act, totally oblivious of the settled legal position.

13. In the result, the office is directed to return the papers forthwith to the appellant for presenting the same before the proper Court having jurisdiction and the appellant is given two weeks time from the date of receipt of a copy of this Order to present the same before the proper Court.

14. Ordered accordingly.