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In the Bombay High Court

Case No : Appeal No''s. 77 and 78 of 2007 in Arbitration Petition No''s. 409 and 410 of 2006

Oil and Natural Gas Corpn. Ltd. — APPELLANT

Vs

Jindal Drilling and Industries Ltd. — RESPONDENT

Date of Decision : 13-08-2008

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34, 36, 37(1), 85
Bombay Court Fees Act, 1959 — Article 1, 13, 3
Bombay General Clauses Act, 1904 — Section 8, 8(1), 9
Civil Procedure Code, 1908 (CPC) — Section 149

Citation : (2008) 6 BomCR 546

Hon'ble Judges : Mohite R.S., J;Khandepakar R.M.S., J

Bench : Division Bench

Advocate : Ravi Kadam, Gen. assisted with ., Geeta Shastri, A.G.P., R.A. Dada, assisted with ., P. Shinde, i./b., Dhruva and Co. and Himanshu Kode, assisted with ., Ravindra Lokhande, instructed by Law Point, for the Appellant; V.K. Rambhadran, for the Respondent

Final Decision : Dismissed

Judgement

Khandeparkar R.M.S., J.—Heard. In both these appeals since common question of law is raised, they were heard together and are being disposed of by this common order.

2. The facts relevant for the decision on the point which is sought to be raised are that pursuant to the award passed by the learned arbitrator, the appellants filed arbitration petitions u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter called as "the New Act" and the said petitions came to be dismissed by the orders dated 9-10-2006.

3. The appellants thereupon preferred the appeals against the said orders. The Appeal No. 77 of 2007 was admitted on 11-10-2007, leaving open the issue as to whether the appellants would be liable to pay the Court fee under Schedule I,

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Article 1 and not under Schedule II, Article 13 as is sought to be paid by the appellants. As far as the Appeal No. 78 of 2007 is concerned, the same is yet to be admitted. However, in both the appeals the issue regarding the liability to pay the Court fee has been raised and that is being considered under this order.

4.The respondents in both the appeals have raised preliminary objections about the non-maintainability of the appeals without payment of proper Court fee in terms of the provisions of law comprised under the Schedule I, Article 3 read with Article 1 of the Bombay Court-fees Act, 1959, hereinafter called as "the B.C.F. Act" in view of the decision of the Division Bench of this Court in the matter of Maharashtra Industries Development Corporation Vs. Govardhani Constructions Company, .

5. The appellants, on the other hand, referring to Section 8 of the General Clauses Act, 1897 contended that Schedule I, Article 3 of the B.C.F. Act clearly exempts the award under the New Act from the liability to pay the Court fee thereunder and, therefore, the provisions of law in that regard which would be attracted are comprised under the Schedule II, Article 13 of the B.C.F. Act.

6. Hence, according to the appellants, there is no substance in the preliminary objection and the same is to be rejected.

7. The Division Bench of this Court to which one of us was a party (Sri R.M.S. Khandeparkar, J.), in Gouardhani''s case (supra) had clearly held that the appeals preferred u/s 36 of the New Act should bear the Court fee in terms of Article 3 of the Schedule I of the B.C.F. Act and not in terms of Article 13 of Schedule II thereof. While arriving at the said finding, it was held that Article 3 of the Schedule I of the B.C.F. Act excludes from its applicability the award passed under the Arbitration Act, 1940, hereinafter called as "the Old Act", and further that after enactment of the New Act, which came into force from 22-8-1996, no amendment was made to Article 3 of Schedule I of the B.C.F. Act and the same continues to exclude from its applicability those awards which are passed under the Old Act, and not under the New Act. Considering the same, it was held in Govardhani''s case that:

the Award passed under the Arbitration and Conciliation Act, 1996 is not excluded under Article 3 of Schedule I and for the same reason, the said Article which specifically deals with the subject-matter of setting aside or modifying any award either at the original stage by filing an application or a petition in that regard, and also at the appellate stage by presenting memorandum of appeal, would naturally be applicable to all such proceedings. Needless to say that the appeal is a continuation of the proceedings at the original stage. The provision under Article 3 of Schedule I clearly speaks of plaint, application or petition including memorandum of appeal to set aside or modify any award. A memorandum of appeal to set aside or modify any award spoken of under Article 3 of Schedule I is obviously in relation to an order passed on an application or a petition to set aside or modify an award. The Arbitration and Conciliation Act,

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1996 nowhere provides any appeal against the award itself. On the contrary, it specifically provides for a petition u/s 34 for setting aside the arbitral award and Section 37(1)(b) entitles the aggrieved party to file an appeal against the order passed u/s 34 either to set aside or to refuse to set aside the arbitral award. Once it is apparent that Article 3 of Schedule I nowhere excludes from its applicability any award passed under any other statutes including the Arbitration and Conciliation Act, 1996 and further it relates to a petition as well as an appeal to set aside or modify "any award", it would obviously include and award passed under the Arbitration and Conciliation Act, 1996 or any order in relation thereto.

8. The contention on behalf of the appellants, however, is that Section 8 of the General Clauses Act clearly provides that on repeal of the Old Act and on enactment of the New Act in its place, any reference to the Old Act in any other statute will have to be considered as reference to the provisions in the newly enacted Act. Considering the same, while reading Article 3 of Schedule I, which refers to the Old Act, it should be read as if referring to the New Act and, therefore, the Article 3 of Schedule I which reads that "Plaint, application or petition (including memorandum of appeal), to set aside or modify any award otherwise than under the Arbitration Act, 1940" should be read as "Plaint, application or petition (including memorandum of appeal), to set aside or modify any award otherwise than under the Arbitration and Conciliation Act, 1996" and having so read, the applicability of the provisions of law comprised under Article 1 of Schedule I would not arise.

9. Referring to Section 85 of the New Act, it was sought to be contended that inspite of repeal of the Old Act, the proceedings commenced under the Old Act have been saved. No intention is disclosed to save reference to the Old Act in various statutes and, therefore, it cannot be said that Section 8 would not be attracted in the matter in hand. The expression "re-enactment" in Section 8 cannot be narrowly construed to exclude reference to the New Act in Article 3 of Schedule I of the B.C.F. Act.

10. The learned Advocate General, however, referring to Section 8 of the General Clauses Act submitted that the said provision of law speaks of "repeal and re-enactment". The term "re-enactment" would imply a legislation not only with certain modifications on the same subject but it would be an enactment brought into force, though on the same subject, but based on different sources and with a totally different scheme.

11. According to the learned Advocate General, the fact that the New Act is totally different from the Old Act is well-settled pursuant to the decisions of the Apex Court in the matters of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., , Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another, , Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., and Union of India Vs. M/s Popular Construction Co.,

12. Considering the scheme of the New Act being totally different from the Old

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Act, according to the learned Advocate General, the New Act cannot be said to be a re-enactment within the meaning of the said expression u/s 8 of the General Clauses Act or Section 9 of the Bombay General Clauses Act and, therefore, taking recourse to Section 8 of the General Clauses Act or Section 9 of the Bombay General Clauses Act, Article 3 of Schedule I of the B.C.F. Act cannot be read to refer to the New Act in place of the Old Act.

13. The Section 8(1) of the General Clauses Act, 1897 provides that where the said Act, or any Central Act or Regulation made after the commencement of the said Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provisions so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted. Plain reading of the said provision, therefore, would undoubtedly disclose that as a result of repeal and re-enactment of a statute, any reference to any of the provisions in the repealed Act in any other enactment or any other instrument will have to be construed as referring to the corresponding provision in the re-enacted statute.

14. There is no dispute that the Old Act has been repealed. There is no dispute that what is saved u/s 85 of the New Act are the proceedings which had commenced under the Old Act as well as all the notifications issued under the Old Act to the extent they arc not repugnant to the provisions of law comprised under the New Act. The question, however, which arises is whether the New Act can be said to be a statute of the nature of re-enactment on repeal of the Old Act.

15. The Apex Court in Sundaram Finance'' case (supra) clearly observed that prior to the promulgation of the New Act, the law on arbitration in India was substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It is further observed that in the Statement of Objects and Reasons appended to the Bill in respect of the New Act, it was stated that the Old Act which contained the general law or arbitration had become outdated. The said Objects and Reasons noticed that the United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly had recommended that all countries should give due consideration to the said Model Law which, along with the Rules, was stated to have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contained provisions which were designed for universal application. Having so observed, the Apex Court held that:

The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of the 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather

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than the 1940 Act.

16. The Apex Court thereafter has elaborately discussed the differentiation between two statutes.

17. In Mehul Construction''s case (supra), while dealing with the question about the intention of the Legislature in repealing the Old Act and enacting the New Act and bearing in mind the object of the New Act, the Apex Court while enumerating the difference between the provisions of law comprised under the New Act vis-a-vis the Old Act clearly held that:

A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that the 1996 Act limits intervention of Court with an arbitral process to the minimum and it is . certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject-matter of judicial scrutiny of a Court of law.

18. The said view was reiterated by the Apex Court in Shin-etsu Chemical''s case (supra). In Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, , and while highlighting the difference between the two enactments, it was pointed out that Section 34 of the New Act is based on Article 34 of the UNCITRAL Model Law.

19. In Popular Construction''s case {supra), it was held that by virtue of Section 34(1) of the New Act, recourse to the Court against an arbitral award can be had within the period prescribed. The importance of the period fixed u/s 34 has been emphasised by the provisions of Section 36 which provides that:

Where the time for making an application to set aside the arbitral award u/s 34 has expired..... the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.

Having so observed, it was further ruled by the Apex Court that:

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the Court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (section 17).

Now the consequence of the time expiring u/s 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the Court.

20. The above decisions of the Apex Court clearly lay down the law that the New Act is not a mere re-enactment of the Old Act. In fact, the very preamble of the New Act provides that whereas the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985 and the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law and in view of the desirability of uniformity of the law of arbitral procedures and the

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specific needs of international commercial arbitration practice, the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980 and the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation and the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations and it was, therefore, found expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and rules. The Statement of Objects and Reasons for the New Act clearly read thus:

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation rules. The General Assembly of the United Nations has recommended the use of these rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

21. The Apex Court having already considered and declared that the New Act is different from the Old Act, the contention that the New Act is a re-enactment within the meaning of the said expression u/s 8 of the General Clauses Act, cannot be accepted. The New Act has been enacted not merely by way of an amendment to the Old Act but the entire scheme of the New Act has been totally different and this has been elaborately discussed and clearly held by the Apex Court in the matters of Sundaram Finance, Mehul Construction as well as in Popular Construction and Olympus Superstructures (supra).

22. In the facts and circumstances as stated above, therefore, it is difficult to accept the contention on behalf of the appellants that Article 3 in Schedule I of the B.C.F. Act is required to be read as referring to the New Act in place of the Old Act consequent to enforcement of the New Act.

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23. As rightly submitted on behalf of the respondents, all the aspects of the matter in relation to non-applicability of Article 13 of Schedule II to the proceedings under the New Act has been elaborately discussed in Govardhani''s case by this Court and it was held that the Court fee payable on appeals arising out of the orders passed u/s 34 of the New Act would be in accordance with Article 3 of Schedule I read with Article 1 thereof and not in terms of Article 13 of Schedule II. The Article 3 cannot be read as referring to the New Act and, therefore, any challenge either by way of petition or by way of an appeal to get the award set aside or modified passed under the New Act will have to carry the Court fee in terms of Article 3 read with Article 1 of Schedule I of the B.C.F. Act.

24. For the reasons stated above, therefore/the objection raised in this regard on behalf of the respondents is upheld. The appellants would be liable to pay the Court fee as has been held hereinabove.

25. Considering the provisions of Section 149 of the Code of Civil Procedure, the time to pay the Court fee or the difference in Court fee is extended by four weeks, within which period the appellants will have to pay the Court fee, failing which the appeals shall stand dismissed for non-prosecution. On payment of the Court fee as above within the specified period, both the appeals shall be listed for further proceedings in accordance with law.

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