

(2013) 07 P&H CK 0009
In the Punjab And Haryana At Chandigarh
Case No : C.R. No. 5174 of 2003

Savita Chemicals Limited

APPELLANT

Vs

Punjab State Electricity Board

RESPONDENT

Date of Decision : 18-07-2013

Acts Referred:

Citation : (2013) 07 P&H CK 0009

Hon'ble Judges : Paramjeet Singh, J

Bench : Single Bench

Advocate : Hemant Sarin, for the Appellant;

Judgement

Paramjeet Singh, J.—Present revision petition has been filed u/s 115 of the CPC for setting aside order dated 25.08.2003 passed by learned Addl. Civil Judge (Senior Division), Patiala whereby execution application filed by the petitioner-decree holder has been dismissed. Brief facts of the case are that the petitioner is a company incorporated under the provisions of the Companies Act, 1956. The petitioner is engaged, inter-alia, in the business of manufacturing and dealing in transformer oil. The petitioner also supplies transformer oil to various electricity boards throughout India. On 21.04.1992 vide Purchase Order-cum-Contract Agreement, the respondent - Punjab State Electricity Board placed an order upon the petitioner for sale, supply and delivery of 250 Kls of transformer oil for Rs. 47,75000/-. Subsequently, the quantity of transformer oil to be sold, supplied and delivered to the respondent by the petitioner was increased to 750 Kls. In pursuance of the purchase order, the petitioner started selling, supplying and delivering transformer oil to the respondent. However, in 1993, the respondent cancelled the purchase order pertaining to the balance quantity of 375 kls. of transformer oil. The dispute arose between the petitioner and the respondent. As per clause 22 of the Contract Agreement, the case was referred to the Arbitrator. On 15.11.1995, arbitrator was appointed under the Indian Arbitration Act, 1940 (hereinafter referred to as the "Old Act"). During the pendency of the proceedings before the Arbitrator, the Arbitration and Conciliation Act, 1996

(hereinafter referred to as the "New Act") came into force w.e.f. 16.08.1996. Prior to this an Ordinance was promulgated w.e.f. 25.01.1996. In the month of March, 1996, claim and counter-claim were filed by the respective parties. Ultimately, on 11.03.1998, the arbitrator announced the award and claim of the petitioner to the extent of Rs. 11,88,414/- was accepted while the counter-claim of the respondent to the extent of Rs. 4,04,916.83 was also accepted. As a result, the respondent was directed to pay Rs. 9,26,747.17 to the petitioner within two months. The respondent did not pay the aforesaid amount to the petitioner. Thereafter, the petitioner filed execution application under the New Act to which the respondent filed objections. The Executing Court vide impugned order dated 25.08.2003, accepted the objections filed by the respondent and dismissed the execution application. Hence, this revision petition.

The operative part of the impugned order reads as under:

4.... I have given my careful consideration to the submission of both the sides and gone through the authority relied upon by the counsel for the applicant. As per the

applicant himself, the matter was referred to the Arbitrator and the Arbitrator was appointed on 15.11.1995 and the Arbitrator announced the award on 11.03.1998. The Arbitration and Conciliation Act, 1996 came into force w.e.f. 25.01.1996. As per Section 85 of the new Act, the provisions of old Act shall apply in relation to arbitral proceedings which commenced before this Act came into force. Although it is further mentioned that the provision of old Act are not applicable if the parties have agreed otherwise. As per clause 22 of the agreement, under which the matter was referred to Arbitrator, it is specifically mentioned that the award shall be final and binding on the parties under the provisions of Indian Arbitration Act, 1940 and the rules thereunder. It is also mentioned that any statutory amendment, modification or re-enactment for the time being in force, shall be deemed to apply. Therefore, although there is agreement that the re-enactment for the time being in force is to apply but it is admitted case that the matter was referred to Arbitrator

before the new Act came into force. In the case of M/s. R.K. Goel and Associates (supra) the facts were almost similar and it was observed that the provisions of new Act would apply only in the event the application for reference u/s 21 was made after the said Act had come into force. Therefore, this observation also makes it clear that the provisions of new Act are to apply when the reference rest made after the new Act had come into force. As already discussed, in the case in hand reference was made before commencement of new Act. Therefore, in the case in hand the provisions of Arbitration Act, 1940 are applicable.

5. As per Section 17 of the Arbitration Act, 1940 judgment is to be passed in terms of the award and a decree is also to be passed in terms of the judgment. Admittedly, in the case in hand decree holder had not approached the Court for passing of the judgement and decree as provided u/s 17 of the Act. Therefore,

the award is not executable.

2. Learned counsel for the petitioner raised following arguments at bar.

3. Learned counsel for the petitioner vehemently contended that the approach adopted by the learned Executing Court is not sustainable in the eyes of law. Learned counsel for the petitioner referred to clause 22 of the Contract Agreement which reads as under:--

22. Arbitration: (a) If at any time any question, dispute or difference, whatsoever shall arise between the purchaser/Board and the Contractor/Supplier, upon or in relation or in connection with the Purchase Order/Contract, either party may forth with give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred for Sole Arbitration of a nominee of the Purchaser/Board, who shall give a reasoned/speaking awards. The award of the Sole Arbitrator shall be final and binding on the parties under the provisions of the Indian Arbitration Act, 1940 and of the rules thereunder. Any statutory amendment, modification or re-enactment thereof for the time being in force, shall be deemed to apply to and be incorporated in the Contract/Purchase Order. It will not be objectionable if the Sole Arbitrator is an officer of the Board and he has expressed his views on all or any of the matters in question of dispute or difference.

(b) Upon every or any such reference, the cost of and incidental to the reference and award respectively shall be in the discretion of Sole

Arbitrator so appointed who may determine the amount thereof or direct the same to be taxed as between Solicitor and Client or as between party and party and shall direct by whom and to whom and in what manner the same is to be borne and paid.

(c) The work under the contract shall, if reasonably possible, continued during the arbitration proceedings and no payment due or payable by the Purchaser/Board shall be withheld on account of such proceedings.

4. The facts are not in dispute. Learned counsel for the petitioner relied upon a judgment of Hon''ble Supreme Court in Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., and contended that the award would be governed by the New Act. Consequently, the objections raised by the respondent - Punjab State Electricity Board under the Old Act are of no consequence. The Executing Court has erroneously passed the impugned order which is not sustainable in the eyes of law. Learned counsel further relied upon judgments of the Delhi High Court in Sukumar Chand Jain Vs. Delhi Development Authority and Another, and Atree Associates Vs. DDA and Another,

5. Learned counsel made a reference to the terms of the Contract Agreement and contended that any statutory amendment, modification or re-enactment thereof for the time being in force, shall be deemed to apply to and be incorporated in the Contract/Purchase Order. It will not be objectionable if the

Sole Arbitrator is an officer of the Board and he has expressed his views on all or any of the matters in question of dispute or difference.

6. I have considered the contentions raised by the learned counsel for the petitioner and perused the record.

7. From the facts and arguments raised by the learned counsel for the petitioner, the following question emerges for consideration of this Court:--

Whether the provisions of the Indian Arbitration Act, 1940 or that of Arbitration and Conciliation Act, 1996 would be applicable in respect of award dated 11.03.1998?

8. Identical issue has already been considered by the Hon''ble Supreme Court of India in the case of Thyssen Stahlunion GMBH supra). In Paragraph No. 9 of the judgment, the Hon''ble Supreme Court has discussed the case of Rani Constructions Pvt. Ltd. CA No. 61 of 1999 and the relevant paragraphs read as under:--

9. In the case of Rani Constructions Pvt. Ltd. CA No. 61 of of 1999 under the contract which was for the construction of certain works of the Himachal Pradesh State Electricity Board, there was an arbitration agreement contained in Clause 25 which, in relevant part, is as under:

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.

9. Disputes having arisen, these were referred to the sole arbitrator on December 4, 1993. The arbitrator gave his award on February 23, 1996 after the new Act had come into force. On account of difference of opinion in two judgments of the Himachal Pradesh High Court, both rendered by single Judges, as to whether it is old or new Act will apply, a learned single Judge of the High Court referred the following question to a larger Bench:

Whether the agreement referred to in Section 85(2)(a) of the Act of 1996 for the purpose of applicability of the said Act to the pending arbitral proceedings which had already commenced under the Act of 1940 is one necessarily to be entered into after the commencement of the Act of 1996 or any clause to that effect in an agreement already entered into between the parties before the enforcement of the Act of 1996 would be sufficient for that purpose.

10. In paragraph Nos. 35, 36 and 37 of the said judgment, the Hon''ble Supreme Court has held as under:--

35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the, language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after

the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal 61 of 1999) uses the expression for the time being in force in meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force of the relevant time when arbitration proceedings are held. We have been referred to two decisions - one of Bombay High Court and the other of Madhya Pradesh High Court on the interpretation of the expression for the time being in force and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. Expression unless otherwise agreed as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Construction that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions unless otherwise agreed and law in force it does give option to the parties to agree that new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.

36. Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by single Judge i M/s. Reshma Constructions Vs. State of Goa, . In that case arbitration clause in the contract provided as under:

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.

37. The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutory changes that may be brought about in such law This is how the High Court considered the issue before it:

Considering the scheme of the Act, harmonious reading of the said provision contained in Sub-section (2) of Section 85 thereof would disclose that the

reference otherwise agreed "necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreements. It provides that though the law provides that the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Section 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be followed - other in terms of the new Act or the old Act - is certainly in consonance with the scheme of the Act, whereunder most of the provisions of the new Act, the procedure regarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample freedom to the parties to decide about the procedure to be followed in such proceedings; being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference otherwise agreed by the parties" in Section 85(2)(c) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression Otherwise agreed do not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act.

We agree with the High Court on interpretation put to the arbitration clause in the contract.

11. The Hon''ble Delhi High Court has also considered identical issue in the case of Sukumar Chand Jain (supra), and held as under:

While coming to the aforesaid conclusion the Hon''ble Supreme Court referred to a similar clause in a case before the Bombay High Court in M/s. Reshma Constructions Vs. State of Goa, wherein a similar clause as that of the present one and that of Rani Construction came up for consideration which was to the following effect:

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 proceedings under this clause.

12. In the light of the above settled position of law, Now I would like to examine clause 22 of the Purchase Order-cum-Contract Agreement dated 21.04.1992. The relevant part of the clause reads as under:--

...The award of the Sole Arbitrator shall be final and binding on the parties under the provisions of the Indian Arbitration Act, 1940 and of the rules thereunder. Any statutory amendment, modification or re-enactment thereof for the time being in force, shall be deemed to apply to and be incorporated in the Contract/ Purchase Order.

13. From the perusal of the above clause, it is clear that any statutory amendment, modification or re-enactment thereof for the time being in force, shall be deemed to apply to and to be considered as part of the Purchase Order-cum-Contract Agreement. This clause clearly shows that if during the pendency of the proceedings or after or before passing of award, new Act had come into being, then the provisions of new Act would apply. In the present contract agreement, it is specifically mentioned that statutory amendments will be applicable.

14. In the light of this and the ratio of law laid down in Thyssen Stahlunion GMBH's case (supra) and Rani Constructions Pvt. Ltd.'s case (supra), provisions of the new Act would apply in the instant case.

15. No doubt in this case every body acted initially on the presumption as if the provisions of old Act are applicable and that the matter has been settled by the Hon'ble Supreme Court in the case of Thyssen (supra), holding that the provisions of the new Act will be applicable in such cases only where parties have agreed that any statutory amendment from time to time will be applicable and read as part of the agreement. Now, since the legal position has been clarified by the Hon'ble Supreme Court in the case of Thyssen (supra), this Court has no option but to set aside the impugned order and remand the case to the Executing Court for fresh decision in accordance with law. In view of this, present petition is allowed. Impugned order is set aside. Case is remanded to the Executing Court for fresh decision in accordance with law. Parties are directed to appearing before the Executing Court on 12.08.2013.