

(2000) 04 BOM CK 0085
In the Bombay High Court
Case No : Arbitration Petition No. 65 of 2000

Union of India

APPELLANT

Vs

M/s. R.K. Goel and Associates

RESPONDENT

Date of Decision : 04-04-2000

Acts Referred:

Arbitration Act, 1940 — Section 23, 24, 31(3), 33
Arbitration and Conciliation Act, 1996 — Section 21, 85(2)
Limitation Act, 1963 — Section 14

Citation : (2000) 3 BomCR 666 : (2000) 3 MhLj 616

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : S.M. Shah, Ms. S.V. Bharucha, instructed by K.B. Rao, for the Appellant; Y.T. John, for the Respondent

Judgement

F.I. Rebello, J.—Rule. Respondents waive service. Heard forthwith.

2. On behalf of the respondents their learned Counsel has raised a preliminary objection that the Award has been made under the provisions of the Arbitration & Conciliation Act, 1996. It is contended that the Award was made on 14th January, 1999. Though the exact date is not available on record, the copy of the Award was served on the parties by the end of January, 1999. The petition is filed on 19th November, 1999. In these circumstances it is contended that the petition is barred by the law of limitation.

Learned Counsel for that purpose relies on the judgment in the case of Thyssen Stahlunion GMBH v. Steel Authority of India Ltd. 1999(3) Arb LR 532.

3. A few facts.

The Arbitrator appointed having resigned a second Arbitrator was appointed on 21st November, 1995. He also resigned and thereafter a third Arbitrator came to be appointed on 25th June, 1998. The Award has been passed by the third Arbitrator.

For the purpose of deciding the issue certain terms of the Arbitration Agreement need to be referred to. Part of Clause 25 of the Arbitration Agreement reads 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 proceedings under this clause."

Another part of the same clause reads as under :---

".....The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer or administrative head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in, accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor."

In the petition the petitioners have averred in para 42 as under :---

"42. The petitioner say that, the petitioners have not received any notice so far from the Prothonotary & Senior Master of the High Court informing the filing of the award which is required under the rules of the Original Side of the Bombay High Court. However we are advised to file this petition." Hence the petition is within time."

Learned Counsel for the petitioner has also referred to letter dated 14th January, 1999 by the Arbitrator addressed to the parties. Para 2 of the said letter reads as under :---

"2. The Award together with documents and pleadings have been retained in this office and the interested parties are directed to initiate the proceedings in the Court of competent jurisdiction, if they so desire, to make this award a rule of the Court and the award together with all the documents and pleadings will be sent to the said Court, if so directed by the Court."

4. From the above documents and the fact that the respondents had applied for reference before the Arbitration & Conciliation Act, 1996 came into force, learned Counsel for the petitioner contends that it must be held that the proceedings were initiated and continued under the provisions of the Indian Arbitration Act, 1940. That being the case as no notice has been received from this Court as required under the rules framed, the petition filed by the petitioners is within limitation and consequently cannot be dismissed on that ground.

Referring to the judgment of the Apex Court in the case of Thyssen Stahlunion GMBH (supra) the learned Counsel contends that the issue before the Apex Court in that case was, about execution of an award as a decree. What would be the position if arbitral proceedings had commenced under the old Act, but the Award was passed when the new Act had come into force. The issue which has arisen in the present proceedings it is contended was not directly is issue before the Apex

Court. It is also pointed out that it is no doubt true that the wordings of the Arbitration clause in the Agreement in the present case and the case of Thyssen Stahlunion (supra) are similar. In Thyssen (supra) the arbitration clause in so far as M/s. Rani Construction read 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."

It is, however, contended that at no point of time before the Arbitrator did the parties proceed under the provisions of the new Act. It is pointed out that by virtue of the provisions of the new Act there are various requirements which were not there under the provisions of the old Act. Learned Counsel draws my attention to section 10 of the new Act. u/s 10 of the new Act the parties are free to determine the number of Arbitrators provided that such number shall not be even number. Learned Counsel further draws my attention that u/s 31(3) the Arbitrator is bound to give reason unless the parties have agreed that no reasons are to be given. It is further pointed out that under the new Act there is no power to refer the matter back to the Arbitral Tribunal. There is a limited power u/s 33 whereby the Court can direct the parties back to the Tribunal for correction of an error to bring the Award within the jurisdiction. It is further pointed out that there are various other steps like Tribunal ruling on its own jurisdiction. Under sections 23 and 24 provisions are contemplated within time frame for filing claims of defence. Section 24 contemplates for oral hearing unless the parties agree that no oral hearing shall be held. In the event the parties seek to lead oral evidence the Tribunal is bound to give such opportunity. Also the power in the Court to condone delay is controlled by the proviso to section 34(7) of the new Act unlike the old Act. The challenge to the award is also restricted. Many existing contracts provide for two arbitrators. Section 85(2)(a) it is contended would apply if there is a conscious decision by the parties to proceed under the old Act. The language of the Arbitration clause in the Agreement it is contended was for an entirely different purpose. It is contended that if such a clause did not exist, then on the repeal of Arbitration Act, 1940 there would be no clause for Arbitration. By the clause as provided in the agreement, all that is ensured is that the parties agree that disputes which arose on the new Act coming into force, would be governed by the provisions of the new Act. It is contended, therefore, that the proceedings commenced before the new Act came into force would continue under the provisions of the old Act. On these grounds it is contended that the judgment of the Apex Court can be differentiated.

5. Before answering the said Issue, I may proceed to consider some of the paragraphs of the said judgment. Before that I may also point out that learned Counsel for the respondent refers to a letter dated 22nd September, 1997. It is contended that the letter should be considered to be an application by the parties requesting that the dispute be referred to arbitration and if so understood it can

only mean that it is the new Act that would apply.

From the judgment of Thyssen Stahlunion GMBH it is essential that paras 9 to 12 are reproduced, which read as under :--

"9. In the case of M/s. Rani Constructions Pvt. Ltd., CA No. 61 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."

10. 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 entertained 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 sufficient for that purpose."

11. Reference question does not appear to have been happily worded. What it means is that when Clause (a) of section 85(2) of the new Act uses the expression "unless otherwise agreed by the parties" can the parties agree for the applicability of the new Act before the new Act comes into force or they have necessarily to agree only after the new Act comes into force.

12. The Division Bench of the High Court by the impugned judgment dated July 16, 1998 held that Clause 25 of the agreement "does not admit of interpretation that this case is governed by Act of 1996."

Similarly, paragraphs 36 and 37 are relevant, which read as under :

"36. Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by Single Judge in Reshma Construction v. 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, as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression "otherwise agreed" to 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."

On consideration of the paragraphs reproduced, the following emerges. The dispute had arisen and reference was made to the Arbitrator before the Act had come into force. The Arbitrator gave his award on 13th May, 1996 i.e. after the new Act had come into force. A Division Bench of the Himachal Pradesh High Court held that the matter would be governed by the provisions of the Old Act. The Apex Court considered similar language in the Arbitration clause as in the present case. On the consideration of the language of the clause in the case of M/s. Rani Construction Put. Ltd. which is similar to the language in the instant case the Apex Court has held that considering section 85 the Award is deemed to have been passed under the provisions of the new Act.

6. In M/s. Reshma Constructions Vs. State of Goa, , in which judgment the language of section 85(2) of the Act was construed and which found favour with

the Apex Court, a few facts may be noted. Reference to Arbitrator was made pursuant to a suit filed in the Court under the 1940 Act sometime in the year 1994. Award was given by the Arbitrator on 30th July, 1996 i.e. after the new Act came into force on 25th January, 1996. The Arbitrator filed his Award in the trial Court in terms of section 14 of the Old Act. The respondent therein first raised an objection that the very appointment of the Arbitrator was illegal as the Arbitrator had to be appointed by the persona designata and not by the Court. Thereafter a fresh application came to be moved to contend that as the Award was made after the new Act had come into force and considering Clause 25 of the Arbitral Agreement which is similar as extracted in Thyssen's case the entire proceedings were without jurisdiction. The objections were dismissed. A revision was preferred before the High Court. In the revision proceedings, a learned Single Judge held that considering the language of section 85(2) and Clause 25 the award would have to be executed in terms of the new Act. To save time the learned Judge proceeded to hold that section 14 of Limitation Act, 1963 would be applicable. I need not pronounce on the said issue in the present matter. However, it seems that Apex Court while confirming the note did not take note the aspect of limitation.

Another submission on behalf of the petitioners is that even if the construction given to section 85(2) by the Apex Court is accepted, nonetheless the record must bear out that the parties proceeded in terms of the new Act. In other words, the party followed the procedure under the new Act. This would contemplate that the parties were aware that the new Act is applicable to them. The Arbitral Tribunal was so aware. The Arbitral Tribunal and the parties thereafter proceeded to dispose of the matter in terms of the provisions of the new Act. If this is not evidenced by the document and/or is contrary to the record, then even though clause as reproduced above existed will not bring the proceedings started under the Act of 1940 under the provisions of the new Act.

7. Learned Counsel for the petitioners may have grounds to contend that unless there is conscious decision of the parties to proceed under the new Act considering the various provisions of the new Act it cannot be said that the provisions of the new Act will apply. His other contention was that the Union of India would have to face grave consequences in such matters, as in many cases Union of India has proceeded on the footing that the reference was entered into under the old Act and it is the provisions of the old Act that would apply. In the instant case it is pointed out that the averments in para 42 of the petition itself is an indication that all throughout the parties proceeded on the footing that it was the old Act that would apply. 8. Section 85(2)(a) of the new Act had come up for consideration before the Apex Court in the case of Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, . In that case after considering section 85 read with section 21 the Apex Court has observed as under :---

"A mere look to 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. Therefore, it must be found out whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26-1-1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of section 21 and section 85(2)(a) of the new Act, it must be held that these proceedings will be governed by the old Act. As seen from the aforementioned factual matrix, it at once becomes obvious that the demand for referring the dispute for arbitration was made by the petitioners in all these cases months before 26-1-1996, in March and April, 1995 and in fact thereafter all the four arbitration suits were filed on 24-8-1995. These suits were obviously filed prior to 26-1-1996 and hence they had to be decided under the old Act of 1940. This preliminary objection, therefore, is answered by holding that these four suits will be governed by the Arbitration Act, 1940 and that is how the High Court in the impugned judgments had impliedly treated them."

It thus becomes clear from the said judgment that the provisions of the new Act would apply only in the event the application for reference u/s 21 was made after the new Act had come into force. If this test is applied admittedly the Award will have to be held as if passed under the provisions of the Arbitration Act, 1940. The Apex Court has however considered the judgment in Thyssen (supra).

9. However, in the case of Thyssen Stahlunion GMBH (supra) the clause which was considered for arbitration was similar as contained in the present petition. There the Apex Court has been pleased to construe section 85(2). For the sake of argument sub-section (2)(a) needs to be reproduced and it reads as under :---

"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."

What emerges, therefore, is that in so far as new Act is concerned, it is the provisions of the new Act which will apply. In so far as the old Act is concerned, if the proceedings had commenced they would be continued u/s 85(1). The exception carved out is unless otherwise agreed by the parties. Unless otherwise agreed by the parties has been construed to mean that if there is a prior agreement in writing then even though the proceedings have commenced under the old Act and even though expressly the new Act will not apply by virtue of the Agreement the provisions of the new Act are made applicable.

10. The contention of the learned Counsel may have required consideration if the point was not decided. On reading of the judgment in the case of Thyssen Stahlunion GMBH (*supra*) wherein similar language was employed in the arbitration clause and further considering the date of entering into reference and the date of the Award I must hold that the Award was passed under the provisions of the new Act. Once I hold that the Award was passed under the provisions of the new Act, then the provisions of section 34(3) of the new Act would apply. Once the provisions of section 34(3) of the new Act would apply the contention as raised on behalf of the respondents must be accepted and consequently petition must be dismissed being barred by limitation. Hence, petition dismissed.

11. Learned Counsel for the petitioners seeks stay of the order for 16 weeks. Considering that the Summer Vacation is ensuing the order is stayed for a period of 16 weeks from today.

P. A. to issue ordinary copy of this judgment to the parties. Certified copy expedited.

12. Petition dismissed