
(2009) 12 J&K CK 0020
In the Jammu And Kashmir High Court
Case No : AA No. 8 of 2008

Union of India (UOI) and Others	Vs	APPELLANT
Engineers Builders and Asso.		RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 1997 — Section 34, 68(2)

Citation : (2010) 2 JKJ 370

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sunil Hali, J.—A contract for providing Married Accommodation for JCO's/Hav/Ors at Srinagar was allotted to the Petitioner on 14th of

December, 1979. The amount of the contract was Rs. 16,49,251.03. The work was to be completed before 25th of June, 1981, which was finally

completed on 01.12.1984. The contractor invoked condition No. 70 of the IAFW-2249, for appointment of an Arbitrator vide his letter No.

601/EBA/12 dated 02 February, 1993. The intervention of the High Court was sought for seeking appointment of an Arbitrator after

Respondents/objectors failed to refer the matter to an Arbitrator. It be noted that from 21.12.1993 till the present Arbitrator was appointed, six

Arbitrators have been appointed in the matter. The matter was finally referred to Sh. Dev Raj Sharma, retired District & Sessions Judge, who

entered into a reference and passed an award on 4th of September, 2007. The award was filed in the High Court for making it rule of the Court.

The arbitrator awarded an amount of Rs. 65,78,450/- along with litigation expenses and Arbitrator's fee fixed @ Rs. 1,00,000/-. He also awarded

18% per annum interest from the date of award till its realization. After the award was filed in this Court, notices were issued to the parties.

2. Feeling dissatisfied with the award passed by the Arbitrator, an application for setting aside the award u/s 34 of the Jammu and Kashmir

Arbitration and conciliation Act 1997 has been filed in this Court on 01.04.2008. It is contended in the application that the objectors received

summons through the District Judge, Jammu on 28.12.2007, calling upon them to appear before the court on 28.1.2008. On the said date the

copy of the award was delivered to them. The grounds taken in the application are:

(a) That the award is beyond the scope of reference. The same has been given even on matters and claims which were never in dispute between

the parties.

(b) Awarding compensation for causing delay in execution of the work was not payable and as it was in violation of Clause (II) of the contract.

3. The claimant in his objections submitted that application for setting aside the award is barred by limitation as the same has not been filed within

the period of three months as contemplated under Sub-Section 3 of Section 34 of the Arbitration and Conciliation Act, 1997.

4. I have heard learned Counsel for the parties.

5. Mr. Johal, learned Counsel for the Respondent raised a preliminary objection that present proceedings before the court cannot be conducted

under Arbitration and Conciliation Act 1997. His contention is that the Arbitration Act 2002 (1945 A.D) shall apply to the arbitral proceedings

which commenced before this Act came into force. The matter had to be decided by taking recourse to the old Act. The present application

seeking setting aside of the award u/s 34 of the Arbitration and Conciliation Act 1997 was not maintainable. The objectors were required to file an

application u/s 30 and 33 of the Arbitration Act Samvat 2002 which envisages a different procedure in the matter of making the award as rule of

the Court and the period of limitation provided for the purposes of filing an application for setting aside the award is 30 days.

6. It is not in dispute that the proceedings before the Arbitrator were initiated under the Arbitration Act Samvat 2002. The matter was referred to

the Arbitrator u/s 20 of the Arbitration Act. During the pendency of the

proceedings before the Arbitrator, the Arbitration and Conciliation Act

1997 comes into force. The award was made in year 2007 and an application for setting aside the same was filed on 01.04.2008. In order to

appreciate the controversy raised by Mr. Johal, it is important to refer to Section 68 of Arbitration and Conciliation Act 1997, which is the saving

clause of the Act. For facility of reference, Section 68 is reproduced as under: ""68 Repeal and saving.

1. The Arbitration Act, Samvat 2002 is repealed.

2. Notwithstanding such repeal:

(a) the provisions of the said enactment shall apply in relation to arbitral proceedings which commenced before this Act came into force unless

otherwise agreed by the parties but Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force.

(b) All rules made and notification published under the said enactment 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.

Section 68 Sub-clause 2 comprises of two components.

(a) That the provisions of the old Act shall apply in relation to the arbitral proceedings which were initiated before new Act came into force unless

otherwise agreed by the parties.

(b) That the new Act will apply in relation to the arbitral proceedings which commenced on or after the Act came into force.

7. The first limb can be bifurcated into two parts. The old Act shall apply in relation to all arbitral proceedings commenced before the new Act

came into force. That the old Act will cease to apply where the parties agreed in relation to the arbitral proceedings which commenced before the

new Act came into force. The expression ""in relation to"" has to be given wide amplitude which would mean that the Act will apply to the whole

gambit of the arbitration culminated in the enforcement of the award and this would mean proceedings which are before the arbitrator as also

before the Court. Regarding the second component, it emphasizes that the old act will not apply in such cases where the parties to the arbitral

proceedings have"" agreed with the said proceedings would be governed by the new Act. This clause would apply only in relation to the procedure

which is required to be followed before the Arbitrator during the arbitral proceedings. If there is an agreement between the parties with regard to the procedure to be followed by the Arbitrator, the Arbitrator is required to follow the same. The reason being the arbitrator is appointed on the basis of contract between the parties and is required to act as per the contract. This, however, would not apply in respect of the arbitral proceedings which are to be conducted before the Court. The procedure in such matters would be governed by the statutory provision and the parties have no right to change the same. The right to file an application for setting aside an arbitral award or to file an appeal is an accrued right and cannot be taken away unless there is a specific provision to the contrary. To sum up, the following facts emerge:

- (a) That the old Act shall apply in relation to the arbitral proceedings which commenced before the new Act came into force.
- (b) That the arbitral proceedings would encompass the whole gambit of arbitration culminated in the enforcement of the award and would not only include the proceedings before the Arbitrator.
- (c) That unless agreed to by the parties would only mean the matter relating to the procedure to be followed by the Arbitrator and not the procedure before the Court which is governed by the statutory provision which the parties have no right to change.

8. At this stage, it would be apt to refer the observation made by the Apex Court reported in N.S. Nayak and Sons, Heera Constructions and

Rani Constructions Pvt. Ltd. Vs. State of Goa and Another, , which read as under:

Section 85(2)(a) of the new Act specifically provides that; (1) the provisions of the old Act shall apply in relation to arbitral proceedings which

commenced on or before the new Act came into force, unless otherwise agreed to by the parties and (2) it also provides that the new Act shall

apply in relation to arbitral proceedings which commenced on or after the new Act came into force. In all these matters arbitrators were appointed

prior to 25.1.1996, arbitral proceedings commenced before that date and even the awards (except in CA No. 98 of 2002) were passed before

25.1.1996. On the basis of Section 85(2)(a) the provisions of the old Act would apply to the arbitral proceedings which commenced on or before

the new Act came into force. Further, even the arbitration clause also provides

that the provisions of the Arbitration Act, 1940 which were for the time being in force were to apply to the arbitral proceedings between the parties. It nowhere provides that once the arbitral proceedings have commenced under the old Act, they should be conducted under the new Act as soon as the new Act comes into operation. Hence, in the proceedings where the award is passed under the old Act, the remedy of filing appeal or petition for setting aside the said award would be as per the provisions of the old Act.

9. The contention of the learned Counsel for the Appellant has to be examined in the context of the principle discussed above. This principle is based upon the fact that once the proceedings have been initiated under the old Act, under that very Act a right has accrued to the parties, the award is required to be enforced under the said Act. According to Mr. Pangotra, learned ASGI, the said expression connotes that if the parties agreed by their conduct to make the Act of 1997 applicable, the operation of the old Act can be waived of. He states that this Court vide its order passed on 20th of September, 2007 observed that the award passed under the Jammu and Kashmir Arbitration and Conciliation Act, 1997, is not required to be made rule of the Court and can be executed as a decree of Civil Court. The parties have been contesting the present proceedings under new Act thereafter. This according to him is a matter which has been agreed by the parties thereby taking it out of the purview of the old Act.

10. The contention of Mr. Pangotra, cannot be accepted. The agreement, if any, as stated here-in-above, cannot apply to the proceedings before the Court. An application for setting aside the award has been filed before this Court under the new Act. Admittedly, the proceedings are not before the Arbitrator. It is the case where an award is sought to be enforced in which the proceedings were initiated under the old Act and therefore, all the rights which accrued, would be under the said Act. The right to contest the genuineness of the award initiated under the old Act has to be judged under the same Act. The grounds for setting aside the award are entirely different under the old Act and that under the new Act.

As already stated that the objector has to file an application u/s 30 and 33 of the Arbitration Act Samvat 2002 for setting aside the award within

the period of 30 days from the date notice is issued. The contention of learned ASGI that the proceedings would be deemed to have been

conducted under new Act cannot be accepted. This will be contrary to the statutory provisions governing the field.

11. The Principles enunciated on the subject show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right

to accrue legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings

commenced under the old Act under that very Act is certainly a right which has accrued. Consequences for the party against whom award is given

after arbitral proceedings have been held under the old Act though given after the new Act came into force, would be quite grave if it is debarred

from challenging the award under the provisions of the old Act.

12. This in essence is the object and purpose of saving clause in the repeal provision of 1997. The saving provisions under new Act preserve the

existing right accrued under old act unless language of the Act clearly indicates to the contrary. The parties, however, can agree to the applicability

of the Act of 1997 even before the Act of 1997 came into force while the Act of 2002 was still in force.

13. Now examining the connotation ""unless otherwise agreed"" gives an option to the parties to opt for procedure as per their claim during the

arbitral proceedings before the Arbitrator. If there is an agreement between the parties with regard to the proceedings to be followed by arbitrator,

the Arbitrator is required to follow the said procedure. However, this would not mean that any such agreement would include for setting aside of

arbitral award of proceedings in the appeal. Such provisions would be applied as per the statutory provisions and the parties have no right to

challenge the same. The net result is that proceedings for setting aside the arbitral award were required to be initiated under the Arbitration Act

Samvat 2002 by filing an application u/s 30 and 33 of the said Act.

14. For setting aside an award under the Act of 2002, an application u/s 30 is required to be made within a period of 30 days from the date

service of the notice of filing of the award is given to the parties. This is contained in Fourth Schedule of the Arbitration Act, 2002 (1945 A.D).

For facility of reference, Schedule Fourth is reproduced as under:

Year No. Short title Amendments

1995 IX The Jammu (i) for Article 153, the following shall be
and Kashmir substituted, namely:-

Act, Svt. -----

1995 158. Under Thirty days The date of
the Jammu and service of the
Kashmir notice of filing
Arbitration to of the award.

set aside an
award or to
get an award
remitted for
reconsideration

15. The plain reading of the provisions clearly indicates that the objections to the
award have to be filed within thirty days from the date service of
the notice within the meaning of Sub-section (b) of Section 153 of the Limitation
Act read with Section 14(2) of the Act. The time will start running
from the date notice of filing of the award is given to the party concerned. This
period of thirty days cannot be extended.

16. In the present case, the objectors have received summons through the
District Judge, Jammu on 28.12.2007, calling upon them to appear
before the court on 28.01.2008, copy of the award was delivered to them on that
day. They were required to file objections within one month
from the date of service of the notice. The date of service as contemplated here-
in-above would be the date when the party enter into appearance
in the court in pursuance to the notice issued by the court. The application for
setting aside the award had to be made within 30 days from
28.01.2008. The present application has been filed on 01.04.2008, admittedly
beyond the period of thirty days.

I, therefore, hold as follows

(a) That an application for setting aside the award was required to be filed under the Arbitration Act, 2002 and not under the new Act as it is

violative of Section 68 Sub-clause 2 of the J&K Arbitration and Conciliation Act 1997.

(b) That the enforcement of the award was required to be done under the old Act as right had accrued to the party under the said Act.

(c) The expression ""unless otherwise agreed"" as contained in Section 68 Sub-clause 2 would apply only in such cases which relate to the

proceedings before the Arbitrator and not to the proceeding before the Court.

(d) That since the application for setting aside the award has been filed after the expiry of 30 days, the same cannot be considered in; view of the

Schedule Fourth which specifies the period of 30 days.

In view of the above, this application is dismissed. The award filed by the Arbitrator is made rule of the Court. Decree sheet is accordingly

directed to be prepared.