

(1997) 08 GUJ CK 0001
In the Gujarat High Court

Case No : Appeal from Order No. 224 of 1996 with Civil Application No. 4269 of 1996

Varun Seacon Ltd.

APPELLANT

Vs

Bharat Bijlee Ltd.

RESPONDENT

Date of Decision : 14-08-1997

Acts Referred:

Arbitration Act, 1940 — Section 20, 34
Arbitration and Conciliation Act, 1996 — Section 11(5), 8, 85
General Clauses Act, 1897 — Section 6

Citation : AIR 1998 Guj 99 : (1997) 3 GLR 2553

Hon'ble Judges : M.S. Shah, J

Bench : Single Bench

Advocate : A.C. Gandhi, for the Appellant; G.N. Shah, for the Respondent

Judgement

M.S. Shah, J.—This appeal is directed against the order dated March 11, 1996, passed by the learned Civil Judge (S.D.), Nadiad, below application Ex. 5 in Civil Misc. Application No. 113 of 1995, which was filed by the respondent herein u/s 34 of the Arbitration Act, 1940 for staying the proceedings of Special Civil Suit No. 114 of 1995 filed by the appellant herein for recovering an amount of Rs. 5 lacs.

2. The respondent-defendant herein had supplied certain equipments including transformers to the appellant-plaintiff in the year 1995. There were disputes between the parties. The respondent supplier claimed Rs. 19 lacs (Approx.) being the balance amount of consideration whereas the case of appellant plaintiff was that because of the defects in the machines, the appellant had suffered damage of Rs. 24 lacs. The appellant therefore, prayed for a decree of Rs. 5 lacs from the respondent herein by filing Special Civil Suit No. 114 of 1995 in the Court of the learned Civil Judge (S.D.), Nadiad on Sept. 4, 1995.

3. In the aforesaid suit, the respondent-defendant appeared and on Nov. 22, 1995, filed Civil Misc. Application No. 113 of 1995 u/s 34 of the Arbitration Act,

1940 (hereinafter referred as "the old Act"), praying for stay of the suit on the ground that the disputes between the parties were required to be referred to arbitration. In the said Civil Misc. Application, the respondent-defendant also filed application Ex. 5 for staying the suit proceedings pending the decision of the said Civil Misc. Application. By the order under appeal, delivered on March 11, 1996, the trial Court has stayed the suit proceedings pending the final decision of Civil Misc. Application No. 113 of 1995.

4. Of course, the order under appeal is confined to interim stay application Ex. 5 in Civil Misc. Application No. 113 of 1995, but looking to the nature of the controversy and in order to save delay and multiplicity of proceedings, learned Counsel for the parties have requested the Court to dispose of the said Civil Misc. Application No. 113 of 1995 along with the present appeal.

5. Mr. A. C. Gandhi, learned Counsel for the appellant-plaintiff has challenged the aforesaid order on the following grounds :-

(1) The application u/s 34 of the Old Act was required to be filed in Special Civil Suit No. 114 of 1995. Civil Misc. Application No. 113 of 1995 was not filed by the respondent-defendant in the suit, but was an independent application and therefore, was not maintainable u/s 34 of the Old Act.

(2) The application was filed by the respondent defendant under the Old Act and therefore, the provisions of the Old Act alone are required to be considered while testing the order under appeal.

(3) The respondent-defendant had appeared in the above suit and had filed applications for adjournment for filing written statement and therefore, as per the settled legal position, the respondent-defendant having taken steps in the proceedings, the application u/s 34 of the Old Act ought to have been rejected.

(4) Arbitration Application No. 1 of 1996, purporting to be an application u/s 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the New Act"), is in the nature of the application u/s 20 of the Old Act and therefore, it was not open to the respondent defendant to pursue two independent separate proceedings by filing such an application u/s 11(5) of the New Act and also pursuing the application u/s 34 of the Old Act.

6. In reply, Ms. Minoo Shah, learned Counsel for the respondent-defendant has made the following submissions :

(i) Although, Civil Misc. Application No. 113 of 1995 was technically not an application in Special Civil Suit No. 114 of 1995, the said Civil Misc. Application was filed before the same judicial authority before whom the Special Civil Suit was pending and therefore, there was no bar either u/s 34 of the Old Act or u/s 8 of the New Act for the learned Civil Judge (S.D.), Nadiad, to entertain the application.

(ii) Section 85 of the New Act provides for repeal of arbitral proceedings under

the Old Act and does not affect the pending judicial proceedings including application for stay of suit proceedings. Hence, the Civil Misc. Application filed u/s 34 of the Old Act was not required to be dismissed on the ground of repeal of the Old Act, but the application did survive and the same was required to be decided as per the provisions of Section 8 of the New Act.

(iii) Under the provisions of Section 8 of the New Act, there is a material change in the legal position inasmuch as mere filing of application for adjournment in order to file written statement does not debar the respondent-defendant from applying for stay of the suit.

(iv) The respondent has filed Arbitration Petition No. 1 of 1996 under the provisions of sub-section (5) of Section 11 of the New Act since the appellant plaintiff was served with the notice dated April 3, 1996 by the respondent defendant, for appointment of an Arbitrator. An amount of Rs. 5,000/- has also been deposited by the respondent defendant pursuant to the order passed by the learned Acting Chief Justice requiring the parties to deposit Rs. 5,000/- each. The application u/s 11(5) of the New Act was filed after and pursuant to the order of the trial Court u/s 8 of the New Act. Hence, there is no question of the respondent-defendant pursuing two mutually exclusive remedies.

CONTENTION NO. (1)

7. The first ground urged by Mr. Gandhi that Civil Misc. Application u/s 34 of the Old Act or even u/s 8 of the New Act is not maintainable and that an application for stay must be made in the suit itself, cannot be accepted. All that the provisions of Section 34 of the Old Act and Section 8 of the New Act require is that the defendant should invite the attention of the judicial authority hearing the suit to the arbitration agreement and pray for the suit proceedings to be stayed so as to enable the arbitration agreement to be carried out. Whether this is done by filing an application in the same suit or through a so called independent application before the same Court is a matter of no consequence.

CONTENTIONS NOS. 2 AND 3 :

8. However, the moot question is whether the application was required to be decided under the provisions of Section 34 of the Old Act or under the provisions of Section 8 of the New Act.

The provisions of the New Act came into force on Jan. 25, 1996, Section 85 of the New Act, provides for repeal, inter alia, of the Arbitration Act, 1940 (i.e. the Old Act.) Saving clause containing sub-section (2) thereof reads as under :-

"(2) Notwithstanding such repeal :

(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 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.

In the instant case, the appellant-plaintiff had given a notice for appointment of an Arbitrator to the respondent-defendant on April 3, 1996 and therefore, the arbitral proceedings had not commenced before the commencement of the New Act.

The learned Counsel for the respondent defendant is right in contending that sub-section (2) of Section 85 of the Act saves the applications of the provisions of the Old Act to arbitral proceedings which had commenced before the commencement of the New Act, but as far as the judicial proceedings are concerned, though the same would continue, the law applicable to such judicial proceedings would be the provisions of the New Act w.e.f. January 25, 1996.

9. In this connection, it is necessary to take note of the following well settled rule of interpretation, which is also reiterated by the Supreme Court in the case of *Gajraj Singh etc. Vs. The State Transport Appellate Tribunal and others etc.*, , (Para 23) :-

"Whether an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of the Parliament as if it had never been passed, it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law"

However Section 6 of the General Clauses Act 1897, provides, inter alia, that where the Act repeals any enactment, unless a different intention appears, the repeal shall not.

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed of anything duly done or suffered thereunder; or

(c) effect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced.

In the case of *Gajraj Singh*, (supra), therefore, the Supreme Court has held that (Para 25) :-

"When there is a repeal and simultaneous re-enactment, Section 6 of the General Clauses Act would apply to such a case unless contrary intention can be gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the Section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act. Therefore, when the repeal is

followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and reenactment is to obliterate the Repealed Act and to get rid of certain absolute matters."

10. Looking to the provisions of sub-section (2) of Section 85 of the New Act, it is clear that the New Act, while repealing the Old Act, intended to save the repealed Act only for the pending arbitral proceedings. Thus, an intention inconsistent with the provisions of Section 6 of the General Clauses Act is clearly manifested insofar as the question of applicability of Section 34 of the Old Act to pending judicial proceedings is concerned and, therefore, applications u/s 34 of the Old Act which are pending in a Civil Court on the date of commencement of the New Act are governed by the New Act and not by the Old Act.

11. Even other wise, even if one were to apply the provisions of Section 6 of the General Clauses Act, what the said provisions save are rights, privileges, obligations and liabilities but not any procedural disabilities. In the case of *Qudrat Ullah Vs. Municipal Board, Bareilly*, (Paras 20 and 21) the Supreme Court has laid down that where a party to the proceedings had no right or privilege under the repealed Act, which imposed a procedural restriction or a procedural disability on the other side, repeal of the Old Act and simultaneous reenactment without that disability does not continue the procedural disability, even on application of Section 6 of the General Clauses Act. It is clear that the restriction contained in Section 34 of the Old Act that the party should not have taken any other step in the proceedings was a procedural disability on the defendant rather than a right on the plaintiff. This Court is, therefore, justified in taking the view that pending applications u/s 34 of the Old Act such as Civil Misc. Application No. 113 of 1995 in the present case are covered by the provisions of Section 8 of the New Act and not by Section 34 of the Old Act.

12. Looking to the provisions of Section 8 of the New Act and comparing the same with the provisions of Section 34 of the old Act, it is clear that the legislature intended to make a clear departure from the provisions contained in Section 34 of the Old Act as would be clear from a bare reading of Section 34 of the Old Act and Section 8 of the New Act.

Section 34 of the Old Act :

"Power to stay legal proceedings where there is an arbitration agreement. - Where any party to an arbitration agreement of any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and such authority may make an order staying the proceedings."

Section 8 of the New Act :

Power to refer parties to arbitration where there is an arbitration agreement. -

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

Now, the underlined words in sub-section (1) of Section 8 make a clear departure from the legal position as contained in Section 34 of the Old Act, under which if the defendant had filed an application for adjournment for filing written statement, it was treated as taking a step in the suit proceedings and therefore, it was held that in such a case the suit was not required to be stayed at the instance of a defendant who had displayed an intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the plaintiff, namely filing of the suit and thereby indicated that it had abandoned its right under the arbitration agreement to get the dispute resolved by arbitration. Realizing that such an interpretation was bringing about anomalous results and frustrating the laudable object of the arbitration law, the legislature has advisedly made a clear departure from the earlier position and, therefore, now a party is disentitled from getting stay of the suit only if the party has earlier submitted its statement on the substance of the dispute, that is, if earlier the defendant has filed its reply on merits.

13. In the instant case, admittedly the respondent defendant had not filed any written statement on merits and had submitted Civil Misc. Application No. 113 of 1995 with a prayer to stay the proceedings of the suit on the ground that the disputes between the parties were required to be referred to arbitration. Hence mere filing of applications for adjournment to file Written Statement did not debar the defendant from prosecuting application u/s 8 of the New Act.

CONTENTION NO. 4 :

14. The submission urged on behalf of the appellant that the respondent-defendant was prosecuting two mutually exclusive remedies also cannot, be accepted in view of the fact that the application u/s 11(5) of the New Act was filed after the trial Court stayed the suit and after service of notice given by the respondent-defendant to appellant-plaintiff for appointment of Arbitrator, which was not responded to.

15. In view of the aforesaid discussion, the Appeal From Order deserves to be dismissed. In view of the joint request of learned Counsel for the parties, since the same arguments would be required to be considered while deciding the Civil Misc. Application, this order in appeal arising from the order below application Ex. 5 in Civil Misc. Application No. 113 of 1995 shall also be treated as final order on Civil Misc. Application No. 113 of 1995 which hereby deserves to be allowed.

16. Mr. Gandhi submits that since the appellant plaintiff was pursuing the present

remedy of appeal, appellant plaintiff had not responded to the notice given by the other side in April, 1996 and that since that controversy has been resolved only today, the appellant plaintiff be given one month's time to appoint their Arbitrator.

17. The request made by Mr. Gandhi seems to be reasonable in view of the fact that till now, the controversy whether the suit proceedings were required to be stayed or not was pending before this Court. The appellant-plaintiff shall therefore reply to the respondent-plaintiffs notice for appointment of an Arbitrator within one month from today. It will be open to the parties to arrive at an agreement for appointing a common Arbitrator, failing which each party shall appoint its own Arbitrator. Thereafter, the matter shall proceed in accordance with the provisions of the New Act. In view of the above, the hearing of Arbitration Petition No. I of 1996 shall stand adjourned to Sept. 22, 1997.

18. In the result, Appeal From Order No. 224 of 1996 is hereby dismissed. Civil Misc. Application No. 113 of 1995 on the file of the Court of learned Civil Judge (S.D.), Nadiad is hereby allowed and the proceedings of Spl. Civil No. 114 of 1995 shall remain stayed during the pendency of the arbitration proceedings.

Since the appeal is disposed of, Civil Application for stay also stands disposed of.

There shall be no order as to costs.

Order accordingly.