

S.R. Engineering Construction Vs Union of India

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: July 25, 2014

Acts Referred: Arbitration and Conciliation Act, 1996 " Section 34, 36, 85, 85(2)
Civil Procedure Code, 1908 (CPC) " Section 47

Hon'ble Judges: Rajiv Narain Raina, J

Bench: Single Bench

Advocate: Suvir Sehgal, Advocate for the Appellant

Final Decision: Allowed

Judgement

Rajiv Narain Raina, J.

The petitioner approached this Court through CR No. 3921 of 2010 against the execution proceedings initiated by

the Union of India in the Military Engineer Service in satisfaction of an arbitration award passed against the petitioner under the provisions of the

Arbitration & Conciliation Act, 1996. In execution proceedings, the petitioner filed objections questioning the applicability of the new Act

contending that the provisions of the Arbitration Act, 1940 could only be applied in terms of the arbitration clause. When the matter came up

before this Court on September 13, 2010 the learned counsel for the petitioner drew the attention of the Court that the execution application had

been withdrawn by the Union of India hence the revision petition had been rendered infructuous. An anxiety was expressed before the Court that

the Union of India could well move a fresh execution application since the limitation prescribed for executing the decree remained. The Court took

note of this fact and dismissed the petition as infructuous but not without clarifying that if a fresh execution application is moved then the petitioner

shall be at liberty to challenge the applicability of the Arbitration & Conciliation Act, 1996 before the Executing Court and in case this were to

happen the same shall be decided on its own merit without being prejudiced by the order of the High Court.

2. The respondent-Union of India did file a fresh Execution Application. Thereon, the petitioner filed fresh objections raising the issue of

maintainability of the proceedings under the 1996 Act contending that the provisions of the 1940 Act alone applied to the dispute arising from the

works contract entered into between the parties in 1991. The learned Additional District Judge, Chandigarh by the order dated May 04, 2013

without any reference to the order passed by this Court supra has dismissed the objections for the reason that the objections raised earlier had

been dismissed by the then learned Additional District Judge, Chandigarh by order dated March 20, 2009 which were the objections called in

question in the aforesaid revision petition but the challenge thereto was blunted with the Union of India withdrawing the Execution Application. The

learned Additional District Judge, Chandigarh has further reasoned that there was nothing on record to show that the matter is covered under the

old Act and has held that the only remedy available to the petitioner was to file objections u/s 34 of the Arbitration & Conciliation Act, 1996 and,

therefore, the present objections preferred u/s 47 of the CPC are not maintainable. Section 36 of the new Act is a deeming provision which

provides for the enforcement of the award as if it is a decree of a civil court under the Civil Procedure Code. The learned Additional District

Judge, Chandigarh has held the award executable exclusively by Section 36 of the Act. Section 47 of the CPC deals with questions to be

determined by the Court executing decree. When the issue raised is whether the 1940 Act applies or the 1996 Act applies is albeit a matter

depending on a decision of a mixed question of law and fact. The relevant facts to be looked into are steps taken by the parties prior to the

Ordinance issued in 1995 which was converted into the Act of 1996. As to how the change-over takes place from the old to the new law and of

rights vested and accrued notwithstanding repeal is as adumbrated by the Supreme Court in Thyssen Stahlunion GmbH Vs. Steel Authority of India

Ltd., which succinctly explains the law on the subject for Courts to follow and apply. In Thyssen the Court answered three different questions

relating to the construction and interpretation of Section 85 of the Arbitration and Conciliation Act, 1996 which contains repeal and saving

provision of the three Acts, namely, the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards

(Recognition and Enforcement) Act, 1961. The Reference by the Delhi High Court to a larger bench of the High Court was reframed by the

Supreme Court to read: ""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"". The Supreme Court held on points 1, 4 to 6 of the summing up in Thyssen as follows:-

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before coming into

force of the new Act (The Arbitration and Conciliation Act, 1996).

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4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

5. Once the arbitral proceedings have commenced, it cannot be stated that right to be governed by the old Act for enforcement of the award was

an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act that

some legal proceedings for its enforcement must be pending under that Act at the time new Act came into force.

6. If narrow meaning of the phrase ""in relation to arbitral proceedings"" is to be accepted, it is likely to create great deal of confusion with regard to

the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the

New Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and

inconvenient results cannot be accepted.

3. To answer the question then arising in the present case the Court below would necessarily have also to look at the wording of the arbitration

clause and whether it contains such words as the arbitration proceedings would be conducted as per the existing law or their statutory amendments

and enactments to see which of the two Acts applies in the context of Section 85 of the new arbitration Act. In MES contracts, there are no such

recitals and, therefore, Mr. Sehgal contends that the impugned order dated May 4, 2013 is incorrect in its reasoning or the lack of it. It is a matter

of some surprise that the learned Additional District Judge, Chandigarh has proceeded to decide the matter by wishing away the order passed by

this Court on September 13, 2010 as if it did not exist. The learned Additional District Judge, Chandigarh was bound to decide the issues raised in

the objections de novo and on their merits and reference to the earlier order dated March 20, 2009 had paled into the background. Had the Union

of India not withdrawn the execution application the petition filed by the petitioner would not have been rendered infructuous. The challenge to the

maintainability of the proceedings under the new Act would have been examined by this Court. The petitioner was deprived of such an

opportunity.

4. For the foregoing reasons, there is an error found apparent on the face of the impugned order which makes it unsustainable in the eyes of law.

The order has been passed without reference to the order of this Court. It has been passed without due application of mind. It has been passed

casually and without any research of the serious legal issue arising from the objections which go to the root of jurisdiction. Therefore, the petition is

allowed and the impugned order dated May 04, 2013 is set aside. The matter is remanded to the learned Additional District Judge, Chandigarh to

pass a fresh order in accordance with law by keeping in view the liberty granted by this Court in its order dated September 13, 2010 and the law

on the subject. However, nothing said in this order is meant to be a direction to decide the issue in any particular manner. The Court must apply its

independent mind in the formation of opinion and reach a conclusion on legal principles.

5. Accordingly, the petition stands allowed.