Chairman, Managing Director, National Thermal Power Corporation Ltd. and Another Vs V. Subbarao and Co.

Court: Andhra Pradesh High Court

Date of Decision: June 26, 2001

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11, 11(6), 85(2)

Citation: (2001) 4 ALT 432 : (2003) 113 CompCas 23

Hon'ble Judges: S.B. Sinha, C.J; V.V.S. Rao, J

Bench: Division Bench

Advocate: B. Adinarayana Rao, for the Appellant; S. Krishna Mohan, for the Respondent

Final Decision: Allowed

Judgement

S.B. Sinha, C.J.
In this writ petition the petitioner herein has prayed for issuance of a writ or in the nature of mandamus for the following

reliefs :

To issue an appropriate writ, order or direction more particularly one in the nature of writ of mandamus declaring that the provisions of the

Arbitration and Conciliation Act, 1996, have no application for settlement of disputes arising out of the letter of intent dated May 30, 1980, for the

civil works for circulating water system, Part I, Ramagundam Super Thermal Power Project, Karimnagar, executed by the respondent herein and

set aside the order passed by the designated authority in Arbitral Application No. 37 of 1997, dated December 15, 2000, and pass such other

orders in the interests of justice.

2. Pursuant to a tender notification of the petitioner issued on September 5, 1979, for execution of civil works in circulating water system, Part I

Ramagundam Super Thermal Power Project, Karimnagar, the tender of the respondent herein was accepted on May 30, 1980. After completion

of the work, the petitioner made the full and final payment on April 27, 1985, wherefor the respondent issued a no demand certificate. However,

on the very same day the respondent raised a further claim for Rs. 1,24,85,785. There were negotiations between the parties pursuant whereto the

respondent accepted settlement of the claims for Rs. 11,56,388.56 by letter dated July 18, 1991. The respondent raised further claims by letters

dated September 26, 1991, and May 15, 1993, and also sought reference of the dispute to an arbitrator. By reason of letter dated July 20, 1993,

the petitioner replied to the respondent that the contract had already come to an end and there was no subsisting arbitration agreement. Thereupon

the respondent had appointed an arbitrator and intimated the same to the petitioner by way of letter dated March 2, 1995. However, by a letter

dated March 28, 1995, the petitioner reiterated its earlier stand. Thereafter the respondent filed Writ Petition No. 8502 of 1995 seeking

appointment of an arbitrator which was disposed of on October 14, 1996, directing the respondent to avail of the remedy according to law. As

things stood thus, the respondent filed Arbitration Application No. 37 of 1997 u/s 11(6) of the 1996 Act which was disposed of on December 15,

2000, appointing a retired judge of the Andhra Pradesh High Court as the arbitral tribunal.

3. The principal question which arises for consideration in this application would be as to whether in the facts and circumstances of the present

case the Arbitration and Conciliation Act, 1996 (for short the ""1996 Act"") will have any application. The factual events as narrated hereinbefore

clearly demonstrate that all the causes of action arose prior to the coming into force of the 1996 Act. But would that take out from its purview the

applicability of the 1996 Act ? Section 85(2)(a) of the 1996 Act reads thus :

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.

4. Section 85(2)(a) of the 1996 Act saves the right accrued in favour of a party but clearly the applicability of 1996 Act would be barred only

when a proceeding has already been initiated under the Arbitration Act, 1940 (for short the ""1940 Act""). In Thyssen Stahlunion Gmbh Vs. Steel

Authority of India Ltd., , it has clearly been held that Section 85(2)(a) calls for a strict construction. In the facts of the case it was held that when

the proceeding was initiated under the 1940 Act, they could be enforced only in terms thereof. In Shetty''s Constructions Co. Pvt. Ltd. Vs.

Konkan Railway Construction and Another, , a Division Bench of the apex court clearly held (page 601) :

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 January 26, 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 aforenoted factual matrix, it at once becomes obvious that the demand for referring the disputes for arbitration was made by the petitioners in

all these cases months before January 26, 1996, in March and April, 1995, and in fact thereafter all the four arbitration suits were filed on August

24, 1995. These suits were obviously filed prior to January 26, 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 has impliedly treated them.

5. Keeping in view the facts and circumstances of this case we are of the opinion that having regard to the fact that as proceedings under the 1940

Act having earlier been initiated, the 1996 Act would not be applicable in the instant case.

6. A question has been raised as to whether having regard to the provisions contained in Section 16 of the said Act, the arbitral tribunal would

have jurisdiction to decide a question as to whether the 1940 Act applies or 1996 Act applies. But such question is not academic one ; having

regard to the provisions of 1996 Act such a question is required to be determined only by the court at the time of passing of order in terms of

Section 11 thereof. Although in this case such a question has become academic as the same has been argued at length we will deal therewith.

However, the very fact that arbitral tribunal can enter into the question whether it has jurisdiction or not, we are of the opinion that even such a

question would fall for its consideration. In Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, , the apex court considered a

question where there existed different arbitral clauses in the connecting agreements. Speaking for the Bench, Jagannadha Rao, J held (page 602) :

It will be noticed that under the Act of 1996 the arbitral tribunal is now invested with power under Sub-section (1) of Section 16 to rule on its

own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement and for that purpose, the

arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract and any decision

by the arbitral tribunal that the contract is null and void shall not entail ipso jure affect the validity of the arbitration clause. This is clear from Clause

(b) of Section 16(1) which states that a decision by the arbitral tribunal that the main contract is null and void shall not entail ipso jure the invalidity

of the arbitration clause.

In the present context Sub-sections (2) and (3) of Section 16 are relevant. They refer to two types of pleas and the stages at which they can be

raised. Under Sub-section (2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submissions of the

statement of defence : however, a party shall not be precluded from raising such a plea merely because he has appointed or participated in the

appointment of an arbitrator. Under subsection (3) a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as

the matter alleged to be beyond the scope of its authority is raised during the"" arbitral proceedings. These limitations in Sub-sections (2) and (3)

are subject to the power given to the arbitrator under Sub-section (4) of Section 16 that the tribunal may, in either of the cases referred to in Sub-

section (2) or Sub-section (3), admit a later plea if it considered the delay justified. Sub-section (5) requires the arbitral tribunal to decide on the

pleas referred to in Sub-section (2) or Sub-section (3) at that stage itself. It is further provided that if either of the pleas is rejected and the arbitral

tribunal holds in favour of its own jurisdiction, the tribunal will continue with the arbitral proceedings and proceed to make the arbitral award. Then

comes Sub-section (6) which states that the party aggrieved by such an arbitral award may make an application for setting aside such an arbitral

award in accordance with Section 34.

7. A Division Bench of this court in Union of India Vs. Vengamamba Engineering Co., Juputi, Krishna Dist. and another, held :

But, decision on a question as to whether an arbitration agreement exists at all or not inasmuch may attract the ambit of jurisdiction as even an

administrative order can only be exercised provided the Chief Justice or his nominee satisfied himself as regards his jurisdiction u/s 11(6) of the Act

or not. A question as regards maintainability of a writ petition may further arise as would appear from one of those cases when an anomaly may be

created by appointing an arbitrator where another arbitrator had validly been appointed.

8. It is true, as was contended before us, that the learned single judge did not advert to the question as to whether the claim of the claimant is

barred by limitation or not. But the question of limitation being a mixed question of law and fact it has to be determined by the arbitral tribunal itself

and it is not for this court, while exercising its jurisdiction u/s 11 of the 1996 Act to enter into the same unless it is found that undisputed facts leave

no room whatsoever for coming to a conclusion that the claim of the claimant is clearly barred by limitation.

9. It may be that some settlements had been entered into by the parties as regards their claims but unless it is clearly shown that the parties have

given a clear go-by to the earlier agreement which would include the collateral contract contained therein, viz., the arbitration agreement, a party

thereto will have the right to take recourse thereto.

10. For the reasons aforementioned, this application is allowed. There shall be no order as to costs.

11. That rule nisi has been made absolute as above.