

(2008) 02 BOM CK 0155

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 4849 of 2007

Radhey Shyam Associates
(Engineers and Contractors)

APPELLANT

Vs

The State of Maharashtra, Public
Works Department and The
Superintending Engineer

RESPONDENT

Date of Decision: Feb. 11, 2008

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 85

Citation: (2008) 3 ARBLR 216 : (2008) 4 BomCR 865 : (2008) 3 MhLj 926

Hon'ble Judges: A.H. Joshi, J

Bench: Single Bench

Advocate: J.N. Singh, for the Appellant; V.H. Dighe, Assistant Government Pleader for Respondent Nos. 1 to 3, for the Respondent

Judgement

A.H. Joshi, J.

Rule. Rule is made returnable and is heard by consent.

2. Petitioner herein is a contractor. Admittedly, there is a written contract. The contract contains an arbitration clause. Parties had agreed upon appointment of arbitrator. Arbitrator entered the arbitration and started the proceedings. The arbitration award was rendered in favour of the petitioner.

3. Petitioner then filed application for execution thereof treating it to be an award passed under the Arbitration and Conciliation Act, 1996. The application for execution of award as a decree was opposed by the respondents. The civil court ruled that the arbitration was not commenced and concluded under the provisions of new Act rather was governed by the provisions of Arbitration Act, 1940, and unless it was made a rule of court, it could not be acted upon.

4. It is an admitted position, that the arbitrator has issued a communication informing the parties that he proposes to proceed under the new Act. This notice was disputed by the employer though without specific objection as to arbitration being taken and continued under the provisions of new Act.

5. Therefore limited question that falls for consideration is whether two situations namely:

(i) The text of Clause 55 which states that the "arbitration shall be conducted in accordance with the provisions of Arbitration Act, 1940, or any specific modifications therein" is by themselves sufficient to govern the arbitration which was commenced during the Indian Arbitration Act, 1940, under the provisions of the Arbitration and Conciliation Act, 1996, and;

(ii) Notice by Arbitrator informing the parties about his intention to conduct the arbitration as per provisions of the Arbitration and Conciliation Act, 1996 would transform the status of proceedings to be under new Act.

6. In the impugned order, learned Civil Judge has dealt with the aspect of notice by arbitrator as well as the part of arbitration clause relied upon by the petitioner.

7. It is a common ground and there is no express agreement between the parties to continue arbitration already commenced when Act of 1940 was governing the field as an arbitration under the provisions of Act of 1996. It is also not in dispute that in the absence of any agreement to the contrary that notwithstanding the repeal of the Act of 1940, the provisions of old Act shall apply in relation to the proceedings which were commenced before the Act of 1996. It is clear that Section 85 provides that the arbitration already commenced to be governed by the old law and notifications made thereunder.

8. The civil court then found that Clause 55 cannot be stretched to include re-enacted to apply automatically. Court also found that notice of arbitrator of his intention was not sufficient to apply new Act.

9. Petitioner has challenged this order relying on various reported judgments. The entire thrust of reliance is on

(i) failure to object the notice of arbitrator, and

(ii) implied application of new Act by virtue of Clause 55 of the arbitration clause.

10. Petitioner has placed reliance on following judgments:

(1) Judgement of this Court in case of [M/s. Reshma Constructions Vs. State of Goa](#) .

(2) Judgement of Delhi High Court in case of Minny Enterprises v. The General Manager, ITDC and Anr. 2004(1) Arb.LR 64 .

(3) Judgment of Supreme Court in case of [Delhi Transport Corporation Ltd. Vs. Rose Advertising, .](#)

(4) Judgment of this Court in case of [Executive Engineer, Upper Painganga Project Vs. M.V. Panse and others, .](#)

(5) Judgment of Delhi High Court in case of Morgan Securities & Credits Pvt. Ltd. v. Morepen Laboratories Ltd. and Ors. 2006(3) Arb. LR 159

(6) Judgment of Supreme Court in case of Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors. AIR 2002 SCW 898.

11. This Court has perused all judgments and heard Mr. J.N. Singh, learned Advocate for the petitioner.

12. All that is seen common in all judgments relied upon by the petitioner is that it is open to the parties to agree upon to proceed with the existing arbitration commenced under the provisions of Arbitration Act 1940 or commenced, to be held as proceedings under the provisions of Arbitration and Conciliation Act, 1996.

13. That there is no controversy as to whether such recourse can be had.

14. The question which is involved is whether on the basis of what parties have agreed upon there exists in fact an agreement to proceed with the arbitration under the new Act.

15. In the case in hand, notice to proceed under new Act is given by the arbitrator. It is not that the respondent has not at all responded to. The said notice has been replied by communication dated 30th April 2004 and a general protest has been lodged. This is adequate enough to infer lack of agreement. It is thus clear that there are no grounds justifying why the proceedings of arbitration commenced under old Act should proceed under the new Act.

16. It has to be noted that choice to proceed under new Act has to be of the parties and not to the arbitrator.

17. The petitioner who wants the benefit of the award to be enforced as a decree and wants to have escape from the procedure of having award made a rule of court, has preferred to rely on this ambiguous situation. Even now, petitioner's remedy to have the award made rule of court is not lost.

18. In this background, no interference is called for. Rule is discharged with costs.