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IN THE HIGH COURT OF DELHI

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FAO No.203/2005 & FAO No.253/2006

Directorate General of Supplies &
Disposal

..... Appellants

through: None

VERSUS

M/s. Machine Tools (India) Ltd.

..... Respondents

through: None

DATE OF DECISION

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14.05.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: **PRADEEP NANDRAJOG, J.**(Oral)

1. Vide FAO No.203/2005 the appellant thereof has challenged an order dated 3.1.2005 passed by the learned Additional District Judge holding that reference to arbitration under the Arbitration and Conciliation Act 1996 was invalid and as a consequence thereof the award has been set aside.

2. FAO No.253/2006 is actually a cross-objection filed by the respondent to the impugned order dated 3.1.2005.

3. Pertaining to the challenge to the order vide FAO No.203/2005 relevant findings of the learned Trial Judge are as under:-

"12. As regards other plea, the counsel for the objector filed copy of general conditions of contract, form DGS & D 68 (revised). Clause 24 therein contains arbitration clause. Sub clause (VI) thereof reads as under:-

"Subject as aforesaid, the arbitration Act 1940 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause."

13. The counsel for the objector forcefully urged that in view of the aforesaid sub-clause only Arbitration Act 1940 could apply which stood repealed by the New Act of 1996. The reference took place in 2000, long after the commencement of New Act of 1996. By that time the old Act of 1940 was no more in force and could not be invoked. There was no fresh agreement between the parties to apply new Act of 1996. Section 85 of the New Act deals with the savings of provisions of Old Act is not applicable because that is confined to proceedings commenced under the old Act. Since in the present case no proceedings commenced under the old Act, the same could not be continued and saved.

14. In support of his submissions the counsel for the objector relied upon Division Bench decision of our own Hon'ble High Court in Vijay Industries & Projects Ltd. Vs. National Thermal Power Corporation Ltd. 104(2003) DLT 171. There also the arbitration clause was provided in clause 26.6.2 of general conditions of contract and was paramateria with clause 24 (VI) of the present case. It was held that expression 'any statutory provision' would have to be read *ajusden generis* and word 'thereof', used leave no scope for doubt that any statutory modification refers to modification if any made or carried out in the arbitration Act 1940. By no stretch of imagination could it be overstretched to include New Arbitration Act.

15. The decision of Hon'ble Supreme Court in M/s.

Rani Constructions Pvt. Ltd. V/s. Himachal Pradesh State Electricity Board was noticed by DB of our own Hon'ble High Court in paras no. 5 to 7 of the above judgment. It was held in para 10 that it is noteworthy that the arbitration clause in Rani Constructions contains additional word "reenactment" which is missing in the Arbitration Clause in the present case and which makes it different. Therefore, it is not a case of two similar clauses of all fours so as to attract the application of the New Act in consonance with the observations of Hon'ble Supreme Court in M/s. Rani Constructions case.

16. The counsel for the respondent submitted that objector did not take this plea in the written statement filed before the Arbitrator. The counsel for the objector refuted the same by submitting that he took this plea in the written submissions dt. 1/3/02. He contended that the same was legal plea and could be taken at any stage, even during the court for the first time. He went on to urge that lack of objection can not confer jurisdiction on arbitrator. The only source from which arbitrator derives jurisdiction is agreement and in the absence thereof whole proceedings are null and void. In support of his arguments he relied upon Constitutional Bench Decision of the Hon'ble Supreme Court in Waverly Jute Mills V. Raymon & Co. AIR 1963 Hon'ble Supreme Court 90. It was held in head note (g) para 18, 21 and 22 that want of initial jurisdiction in arbitration proceedings make the proceedings void, defect is not cured by appearance of parties in the proceedings.

17. It was held in Oil & Natural Gas Corporation Ltd. V/s. SAW Pipes Ltd. 2003 (4) JT 171 that court can set aside an award if the party furnishes proof of the fact that it was under some incapacity or the arbitration agreement was not valid. The court may also set aside any award if the composition of tribunal was not in accordance with the agreement of the parties.

18. I find great deal of force in the submissions of counsel for the objector that the reference to the

arbitrator under the New Act was incompetent. Consequently, the award is liable to be set aside. The issue is decided in favour of the objector and against the respondent.”

4. The reference in the instant case took place in the year 2000. The date on which reference was sought for is not forthcoming on record.

5. The decision of the Hon'ble Supreme Court reported as AIR 2004 SC 3145 Milkfood Ltd. Vs. M/s. GMC Ice Cream (P) Ltd. concludes the controversy arising out of the repeal of the Arbitration Act 1940 with the promulgation of the Arbitration and Conciliation Act 1996. In a nut shell, the decision holds that where arbitration proceedings commenced, (commencing being when a party sought appointment of an arbitrator), before promulgation of the Arbitration and Conciliation Act 1996, unless parties by consent agreed to be bound by the procedure of the Arbitration and Conciliation Act 1996, all proceedings would be governed by the Arbitration Act 1940. But where proceedings commenced after the Arbitration and Conciliation Act 1996 was promulgated the procedure would be governed by the later Act.

6. Under both circumstances, the original arbitration clause binds the parties. Thus, the reasoning of the learned Trial Judge that since parties had agreed to be bound by the procedure of the Arbitration Act 1940 which stood promulgated when reference was made to the arbitrator and hence the very

appointment of the arbitrator is vitiated is a finding which is totally contrary to law.

7. In either case arbitration would be valid. The procedure for enforcement of the award would vary if the proceedings have to be treated as under the Arbitration Act 1940 or the Arbitration and Conciliation Act 1996. If proceedings has to be governed by the Arbitration Act 1940, for its enforcement, the award would have to be made a Rule of the Court. If proceedings are governed by the Arbitration and Conciliation Act 1996, objections to the award have to be considered on merits.

8. Under the circumstances both appeals stand disposed of setting aside the impugned order dated 3.1.2005. Proceedings are revived before the learned Trial Judge.

9. The learned Trial Judge would proceed to consider whether the proceedings have to be governed under the Arbitration Act 1940 or the Arbitration and Conciliation Act 1996. If learned arbitrator holds that proceedings are governed by the Arbitration Act 1940, a finding which can be returned only if learned Trial Judge finds that reference of disputes to arbitration was sought before the Arbitration and Conciliation Act 1996 was promulgated, the objections to the award would have to be dismissed as not maintainable leaving it open for the parties to take recourse for the award to be made a Rule of the court under the Arbitration Act 1940. If it is found that reference of disputes

to arbitration was sought after the Arbitration and Conciliation Act 1996 was promulgated, the objections to the award would have to be considered on merits.

10. Under both circumstances the award cannot be held to be quorum non judice.

11. At the remanded stage the learned Trial Judge would seek assistance and guidance from the decision of the Hon'ble Supreme Court in Milkfood's case (supra).

12. Since one issue on merits has been decided against Machines Tools India Ltd. but on a jurisdictional issue the award was declared to be a nullity, a finding which is reversed, it is made clear that in case Machine Tools India Ltd. do not meet with success at the remanded stage the issue raised in the cross objection would be open to be raised at the second appellate stage as well.

13. Since neither party has appeared at the hearing today, learned Trial Judge would proceed to issue notice to the respective parties when proceedings would be formally revived.

14. TCR be returned forthwith.

15. No costs.

May 14, 2008
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PRADEEP NANDRAJOG, J.