

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 23.09.2014
% Judgment delivered on: 14.10.2014

+ **CS(OS) 2340/2013**

DELHI DEVELOPMENT AUTHORITY Plaintiff

Versus

M/S BANSAL TRADERS & ANR. Defendants

Advocates who appeared in this case:

For the Plaintiff: Ms Geeta Mehrotra & Ms Divya Gupta, Advocates.

For the Defendants: Mr N.K. Jha, Advocate for defendant no.1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,,J

CS(OS) 2340/2013 & IA No. 19132/2013 (u/s 151 CPC)

1. This is a suit filed under Section 14(2) of the Arbitration Act, 1940 in short (1940 Act). The prayer made in the suit is that a direction be issued to the arbitrator, i.e., defendant no.2, to file the award along with complete arbitral record in this court. Notice in the matter was issued on 11.12.2013. Since then defendant no.1 has entered appearance in the matter. The arbitral record has also been received.

2. The counsel for defendant no.1 evidently raised objection to the jurisdiction of the court, at the hearing held on 28.07.2014. My predecessor on that date recorded the objection of defendant no.1, qua pecuniary jurisdiction, by noting that the award in question is of the value of

Rs. 5.70 lacs.

2.1 At the hearing held today, the learned counsel for defendant no.1 expanded the contours of its objections, by articulating that the suit under Section 14(2) of the 1940 Act is not maintainable in view of the enactment of the Arbitration & Conciliation Act, 1996 (in short the 1996 Act), which has repealed the 1940 Act. This, of course, is de hors the other objection taken with regard to the pecuniary jurisdiction of this court. According to the learned counsel, since the value of award is less than Rs. 20 lacs, the court which could entertain objections to the award, if filed, could certainly not have been this court.

3. In this context two issues arise for consideration. First, as to which of the two Acts would apply to the instant case, i.e., whether the 1940 Act or the 1996 Act? Second, as to whether this court would have the pecuniary jurisdiction to entertain the present suit?

4. In this context, the following broad facts need to be noticed :-

4.1 The defendant herein was awarded a contract for construction of 336 MIG dwelling units at Jahangirpuri, which included provision for water supply, sanitary installation and internal development.

4.2 Since, disputes arose between the parties herein, defendant no.1 filed a petition under Section 20 of the 1940 Act. This petition was numbered as suit 303A/1984.

4.3 By an order dated 16.10.1984, this court directed the Engineer-Member (E-M) of the Delhi Development Authority (in short DDA), i.e., the petitioner herein, to appoint an arbitrator in terms of clause 25 of the agreement obtaining between the parties.

4.4 It may be relevant to note that clause 25 of the agreement contained an explicit provision that the provisions of the 1940 Act or any other

statutory modifications or re-enactment thereof shall be applicable to the arbitration proceedings under the said clause. The relevant extract of clause 25 is noted hereinbelow for the sake of convenience:

: CLAUSE 25:

..... Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the Arbitration proceedings under this clause. It is a term of the contract that the party invoking arbitration shall specify the disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes.....”

(emphasis is mine)

4.5. Based on the directions issued by this court E-M, DDA vide letter dated 14.12.1984 appointed an arbitrator for deciding claims and counter-claim arising between the parties.

4.6 Vide communication dated 13.03.1985 DDA submitted its claim to EM, DDA for reference to the arbitrator. The EM, DDA, on his part, vide communication dated 23.04.1985 referred 11 claims to the arbitrator, one Mr. V.R. Vaish. It is not in dispute that number of arbitrators changed hands, and finally, the award was passed by one, Mr K.S. Chauhan, SE (Arbitration)-II. This award was passed on 29.07.2004.

4.7. Admittedly, both parties assailed the award dated 29.07.2004. However, the challenge to the award by both parties was made by taking recourse to the provisions of Section 34 of the 1996 Act. The plaintiff's petition was numbered as OMP 31/2005, while that of defendant no.1 was numbered as OMP 414/2004. Both these petitions came up for hearing before a Single Judge of this court; who by an order dated 07.11.2007 set aside the award and, with the consent of parties, appointed a new arbitrator.

It was also directed that the new arbitrator would hear the final arguments in the matter, on the basis of records already available.

4.8 The basic ground on which the award dated 29.07.2004 was set aside was that on crucial issues, which were germane to the decision in the award, contradictory findings had been recorded by the erstwhile arbitrator qua claims and counter-claims, though the reasoning was similar. In nutshell, this court felt that the conclusions reached by the arbitrator vis-a-vis claims and counter-claim, could not be reconciled.

5. The new arbitrator rendered his award. This award is dated 12.10.2012. Against this award, execution proceedings, have been taken out by defendant no.1 herein, who is the decree holder in the District Court, Tis Hazari, Delhi. The said execution petition is numbered as : EX. 21/2013. In the execution proceedings, the plaintiff herein, had raised an objection to its maintainability. It was articulated that the execution proceedings could not go on as award dated 12.10.2012 had to be made a rule of court. Obviously, this objection was predicated on plaintiff's view that the proceedings were governed by the 1940 Act.

6. In the background of these facts, arguments have been advanced by Ms Geeta Mehrotra on behalf of the plaintiff, while on behalf of defendant no.1 arguments have been advanced by Mr N.K. Jha.

6.1 Ms Mehrotra, learned counsel for the plaintiff, submitted that in view of the fact that the arbitration proceedings commenced under the 1940 Act by virtue of an application filed under Section 20 of the 1940 Act, these proceedings were saved upon repeal of that Act with the enactment of the 1996 Act and, therefore, the present suit filed under Section 14(2) of the 1940 Act, was maintainable.

6.2 In so far as the pecuniary jurisdiction of the court was concerned, Ms

Mehrotra submitted that having regard to the fact that counter-claim had been preferred by the plaintiff, this court would have to take the value of the counter-claim into account in adjudging as to whether the suit had been filed in the appropriate court. In support of her submissions, the learned counsel placed reliance on a judgement of the Division bench of this court in the case of ***Delhi Development Authority vs S. Kumar 2008 (105) DRJ 669 (DB)***.

6.3 In this behalf she also made a submission, though she was not able to bring to my notice the specific provision, that since the initial order of reference was made by this court, all subsequent proceedings would lie in this court.

7. Mr Jha, on the other hand, brought to my attention the proceeding sheet dated 08.04.1997 and the communication dated 29.07.2004, sent by the then arbitrator Sh. K.S. Chauhan, which accompanied the award. Based on the aforesaid, it was argued that parties were clearly conscious and agreed that the 1996 Act was applicable to the proceedings.

7.1 Furthermore, Mr Jha submitted, as is also indicated above by me, that both parties had preferred their objections against the earlier award dated 29.07.2004 under Section 34 of the 1996 Act.

7.2 Mr Jha, in support of this submission, referred to the judgement of the Supreme Court in the case of ***Delhi Transport Corporation Ltd. vs Rose Advertising AIR 2003 SC 2523***.

7.3 As regards which court would have pecuniary jurisdiction in the matter, Mr Jha submitted that the matter would have to lie before the Principal Civil Court having jurisdiction in the matter. For this purpose, he relied upon the judgement of the Supreme Court in ***National Aluminium Co. Ltd. vs Pressteel and Fabrications Pvt. Ltd. & Anr. AIR 2005 SC***

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8. Having heard the learned counsels for the parties and perused the record, in so far as the first issue is concerned, one would have to look at provisions of Section 85 of the 1996 Act. By this provision the 1940 Act was repealed. While repealing the 1940 Act, what was saved, were those arbitration proceedings which had already commenced under the said Act. For commencement of arbitration proceedings, one would necessarily have to look at Section 21 of the 1996 Act. The said provision clearly provides that unless it is otherwise agreed by the parties, arbitral proceedings, in respect of a particular dispute, commence on the date on which a request for that dispute, to be referred to arbitration, is received by the respondent.

8.1 Undoubtedly, in the present case, arbitration proceedings were commenced under the 1940 Act by virtue of an order passed by this court on 16.10.1984 under Section 20 of the 1940 Act. The question, therefore, is did the parties agree to be bound by the 1996 Act after its enactment and coming into force w.e.f 22.08.1996. In this context, reference may be had to the following relevant provisions of Section 85 of the 1996 Act.

“85. **Repeal and savings.** – (1). The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(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) xxxx....”

(emphasis is mine)

8.2 As indicated above, clause 25 of the agreement obtaining between the parties clearly stipulates that the parties would be bound by the 1940 Act and any statutory modifications or re-enactments thereof. In view of the aforesaid provision contained in clause 25 of the agreement, the parties, clearly, appear to have agreed to be bound by the 1996 Act.

8.3 This is an aspect which arose quite distinctly, while, the arbitration proceedings were on even in the first round. It is for this reason that at the hearing held on 03.04.1997, as recoded in order sheet dated 08.04.1997, the learned arbitrator made a reference to clause 25 of the agreement. The relevant extracts from the proceeding is extracted below:

“...1. Sh. Narender Bansal 1. Sh. Joginder Paul, EE, ND-8

Claimant present along with his counsel.

Respondent present.

The parties were informed that in terms of Arbitration clause-25 of the agreement, there is provision that arbitration proceedings will also be subjected to any enactment of new act. The President of India has issued for Enactment of Arbitration and Conciliation Ordinance 1996 which is in force with effect from 26.1.1996.

The time for making and publishing the award is enlarged till making and publishing the award with the consent of both parties.....”

8.4 Having regard to the above, when finally the award was passed by Mr K.S. Chauhan, in his covering letter of even date of the award dated 29.07.2004, he specifically adverted to the fact that the award was rendered by him under the 1996 Act. The parties having proceeded on such agreed basis, it was logical for them to assail the award under Section 34 of the 1996 Act to agitate their grievance qua the earlier award dated 29.07.2004. As noted above, two cross-objections were filed by parties, which were,

numbered as : OMP 31/2005 and 414/2004. These objections were disposed of by a Single Judge of this court vide order dated 07.11.2007.

8.5 Therefore, in my view, not only clause 25 of the agreement, which reflected the inbuilt consent of the parties to be bound by the new enactment, but also, their subsequent conduct, during the arbitration proceedings, is demonstrable of the fact that they chose to have arbitration proceedings conducted under the 1996 Act.

8.6 A similar situation arose in the case titled : ***Delhi Transport Corporation Ltd. vs Rose Advertising***, wherein the Supreme Court relying upon a provision, which is similar to clause 25 of the instant agreement, came to a similar conclusion. The relevant extract from the judgement is reproduced hereinafter for the sake of convenience.

“.... However, as noted earlier it is always open to the parties to agree as to which law will continue to govern their relationship. In the present case, Cl. 25 of the agreement is the arbitration clause. Sub-clause (d) of Cl. 25 has a bearing on the controversy in hand and, therefore, same is reproduced as under:

“Subjected to as aforesaid, the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause”

5. The above clause shows that the parties agreed to be governed by the law as in force at the relevant time. Section 85(2) of the 1996 Act recognizes such an agreement between the parties. The conduct of the arbitration proceedings and the participation of the parties therein shows that the parties acted under the 1996 Act. Even the arbitrator proceeded on that understanding and gave his award in pursuance of the 1996 Act. Therefore, the impugned judgment of the High Court appears to be totally unassailable. We are unable to

find any ground or reason to differ with the view taken by the High Court on the main issue....”

8.7 The judgement of Division Bench of this court in *DDA vs S. Kumar* is on the same lines, which clearly adverts to the fact that unless parties have specifically agreed in terms of Section 85(2)(a) of the 1996 Act, they would be governed by the old Act. As indicated above, the agreement of the parties is encapsulated in clause 25 of the agreement obtaining between them. Therefore, the said judgement does not, in any manner, support the submissions of the learned counsel for the plaintiff.

9. In view of the above, accordingly, my opinion, with regard to the first issue is that the proceedings ought to be governed by the 1996 Act and not the 1940 Act.

10. The second issue, therefore, in one sense, has been rendered superfluous; but since arguments were raised, I may only record that if the old 1940 Act were to apply, then having regard to the provisions of Section 31(4) of the said Act, the institution of the instant proceedings in this court would have been in conformity with law as the order making reference to arbitration under Section 20 of the 1940 Act, was made by this court. This position would have obtained notwithstanding the fact that the value of the award was less than the pecuniary jurisdiction of this court. (See the judgement of the Supreme Court in the case of *Kumbha Mawaji vs Union of India 1953 SCR 878*). However, de hors this aspect, that is, if no application had been filed in this court, then the award could only have been filed in such civil court, which would have jurisdiction to decide the questions forming subject matter of the reference, if the same had been a subject matter of a suit.

11. Accordingly, the suit is returned to the plaintiff. This would not,

however, come in the way of the plaintiff in filing a petition under Section 34 of the 1996 Act, if it would otherwise be maintainable in law.

RAJIV SHAKDHER, J

OCTOBER 14, 2014

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