

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Civil Revision No.953 of 2014 (O&M)

Date of decision:21.07.2015

Union of India and others

.... Petitioners

versus

M/s S.R. Engineering Construction and another

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Pankaj Jain, Advocate,
for the petitioners.

Mr. Ghanshyam Dass Dhiman, respondent in person.

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

K.Kannan, J. (Oral)

1. The revision petition is against the order passed by the court that entertained an application to set aside the award filed by a contractor under the Arbitration Act of 1940 (for short, '1940 Act'). The arbitral award which was the subject of challenge by a building contractor was subject to a reference made to him by the Chief Engineer with a specific understanding that the arbitration will be under the Arbitration and Conciliation Act of 1996 (for short '1996 Act'). This reference in turn was subsequent to an earlier order

passed by a civil court on an application filed under Section 20 of the Arbitration Act of 1940. The application had been filed under Section 20 on 08.08.1994, prior to the commencement of 1996 Act and the Ordinance that preceded it. The order passed by the civil court on 05.01.2001 was no doubt subsequent to the passing of the 1996 Act but it should have been possible for the reference to the Arbitrator and the conduct of arbitral proceedings under the 1940 Act itself in the light of the language employed under Section 85(2) which states that the provisions of the 1940 Act shall apply in relation to arbitral proceedings which commenced before the Act came into force, unless otherwise agreed by the parties.

2. In this case, although the civil court did not say or record any concession between parties that the 1996 Act would be applicable, the Chief Executive Engineer who made the reference to Arbitrator in terms of the arbitral agreement specifically stated that the arbitral proceedings will be under the 1996 Act. It appears that the contractor himself did not make any objection that the arbitral proceedings and the Arbitrator must be one under the 1940 Act, but strangely the Union through its officer himself stated before the Arbitrator that his proceedings will be only under the 1940 Act. Under such circumstances, the Arbitrator, therefore, dealt with the issue of his own power and how the proceedings will be treated and he held that the reference itself stipulated that the proceedings would

be under the 1996 Act and he passed an award treating it to be one under the 1996 Act.

3. The contractor being not satisfied with the award filed a petition under Sections 30 and 33 of the 1940 Act to set aside the award. At the time of arguments, the petitioners made a representation in court that the petition filed under the 1940 Act could be treated as a petition to set aside the award under Section 34 of the 1996 Act. The court, however, observed that by virtue of the decision in **Delhi Development Authority Versus S. Kumar-2008 (3) Arb. LR (Delhi) 290 (DB)** that a petition under the 1940 Act cannot be treated as a petition under the 1996 Act. He, therefore, directed through the impugned order that the petitioners may apply through an independent petition before a court of competent jurisdiction and directed the matter to be presented before the court where it should have been instituted. The Union has now made a volte-face and would have no objection to the matter being treated as a petition under the Arbitration Act of 1996. However, it is a contractor's term now to take a different stand and resile from what it had agreed before the court below to contend that the proceedings must be one brought under the 1940 Act and the concession made by his counsel before the court below was wrong and without authority. The petition was filed under the 1940 Act correctly and it should have been dealt with as a petition under the 1940 Act only.

4. I find the whole exercise of what is now sought to be done will advance justice for neither party. As far as the Union is concerned, they have no objection to give effect to the terms of the award in the manner it has been drawn up. Indeed there was no attempt on their part to set aside the award and it was the contractor who objected to the court to set it aside. There is no mention anywhere in the award of the Arbitrator that the contractor had at any time objected to his functioning under the 1996 Act. As I have observed that it was the Union who made a statement that reference must be under the old Act and the Arbitrator has dealt with it specifically to hold that his own functions must be taken as only under the 1996 Act. Section 85(2) of the 1996 Act which allows for the arbitral proceedings which commenced before the Act to be governed by the 1940 Act itself carves out an exception with the expression “unless otherwise agreed by the parties”. It is, therefore, possible for the parties to agree notwithstanding the arbitral reference being done prior to the commencement of the Act. We have only the conduct of the parties to assess whether the parties had agreed for the reference under the 1996 Act. In the letter of the Engineer-in-Chief issued on 17.11.2003 making appointment of an Arbitrator, the expression used are as follows:-

“Arbitration proceedings in this case shall be governed
as per Arbitration & Conciliation Act 1996.”

Before the Arbitrator, the contractor made his claim statement and as I have observed the contractor made no contention before the Arbitrator that the proceedings shall be only under the 1940 Act, I would, therefore, accord to the proceedings before the Arbitrator as brought by consent of parties under the 1996 Act, for, that is a situation that has been specifically dealt with by the Supreme Court in **Delhi Transport Corporation Limited Versus Rose Advertising- (2003) 6 Supreme Court Cases 36**. The Supreme Court was holding that the parties can agree that the law prevailing at the relevant time would apply. We have already seen that the order passed by the civil court in petition filed under Section 20 of the 1940 Act was passed after the 1996 Act came in the year 2001. The Supreme Court's observations further were to the effect that Section 85(2) recognizes such an agreement for the application of the new law request for appointment of an Arbitrator could have been made, while the old Act was still in force. The Arbitrator appointed after the institution of the new Act and the manner in which the Arbitrator's proceedings were definitely show that the parties acted under the new Act. The Supreme Court also observed that the manner of how the award was drawn up would also determine whether it was done under the old Act or the new Act. The court was considering the case on an application filed by the contractor though under the old Act only under the new Act by virtue of

submissions to that effect by the contractor's counsel. The Judge did the mistake of understanding the decision in **Delhi Development Authority** (supra) to mean that if the application had been referred to as an application under the old Act, it cannot be continued any longer. There is abundant authority to the effect that the statement of a wrong provision of a law cannot take away the substantial right of parties and the court will apply the correct provision and proceed to pass the order. If the award was passed under the 1996 Act and when the Arbitrator declared himself to have been appointed under the 1996 Act and the contractor himself also submitted before the court that his objection must be taken as an objection under the 1996 Act, the court was bound to render an adjudication on the grounds set forth. Having held that 1996 Act was applicable, the court was committing a mistake in directing that it should be presented before some other court. The subject matter of dispute was a contract awarded for the contracts at Chandimandir within the jurisdiction of the civil court at Chandigarh. Section 2(e) of the 1996 Act reads as under:-

“Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-

matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.”

The court of jurisdiction as per the said section would be the court which will have jurisdiction over the subject matter of suit. The subject matter being Chandimandir within the jurisdiction of the court at Chandigarh, the petition filed was competent before the said court only. The order returning the petition was, therefore, incompetent.

5. Before directing the order to be passed, I asked the respondent who appears in person to spell out the prejudice that could be caused for continuing the proceedings before the court at Chandigarh where the petition had been filed for setting aside the award. The party, who argues in person and who articulates well, has a strange reason to offer that he is comfortable under the 1940 Act and not under the 1996 Act. It cannot be a matter of comfort for parties of what the Act would be comfortable. The grounds available for assailing the award under the 1996 Act are substantial. I would, therefore, find not even a prejudice for the petitioners to continue with the proceedings before the court where the petition was originally filed.

6. Under the circumstances, I set aside the order passed by the court below, allow the civil revision and direct the matter to be

taken up by the court before which the petition was filed. The court will examine the award under the parameters set down under the relevant provisions of 1996 Act and proceed to dispose of the petition as expeditiously as possible and preferably within a period of 4 months from today.

(K.KANNAN)
JUDGE

21.07.2015
sanjeev