

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 28.09.2015

+ **FAO(OS) 545/2015**

M/S BUNDELA BANDHU CONSTRUCTION CO ... Appellant

versus

**NATIONAL PROJECT CONSTRUCTION
CORPORATION LTD**

... Respondent

Advocates who appeared in this case:

For the Appellant : Mr K. K. Tyagi with Mr Iftekhhar Ahmed and Mr Anup Kumar
For the Respondent : Mr Anup J. Bhambhani, Sr Advocate with Mr Rajat
Arora and Mr Jaypreet Singh

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)
CM 21134/2015

Allowed subject to all just exceptions.

CM 21135/2015

They delay in filing the appeal is condoned.

The application stands disposed of.

FAO(OS) 545/2015

1. We have heard the learned counsel for the appellant. We have also heard Mr Bhambhani, the learned senior counsel, who appeared for the respondent on advance notice.

2. This appeal seeks the setting aside of the impugned judgment and/or order dated 03.08.2015 in OMP 261/2004 and the order dated 11.09.2015 passed in the Review Petition No. 429/2015.

3. The said OMP 261/2004 was filed by the respondent under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') in respect of the Award dated 20.01.1997 passed by a learned Arbitrator.

4. The arbitration proceedings were commenced some time in 1993 under the Arbitration Act, 1940. The Award was made on 20.01.1997. Thereafter, the appellant herein filed an Execution Petition, purportedly under the 1996 Act, being Execution Petition No. 4/2004. Shortly thereafter, perhaps on receipt of notice of the Execution Petition, the respondent herein filed the said OMP 261/2004 under Section 34 of the 1996 Act. That petition was initially dismissed by a learned Single Judge of this Court on 09.12.2004 on the point of limitation. An appeal was preferred by the respondent against the said order dated 09.12.2004, being FAO(OS) 47/2005. Since certain directions had been passed in the

execution proceedings, an appeal was also preferred against those directions, being EFA(OS) 9/2005 by the respondent.

5. Both the appeals were disposed of by the judgment dated 18.04.2007 delivered by a Division Bench of this Court. The operative portion of the said decision was that the said OMP 261/2004 was not barred by time and the question of delay had not at all arisen as the time for filing of the objections had not commenced to run. The Division Bench, therefore, directed that OMP 261/2004 be decided on merits in accordance with law. The impugned order dated 09.12.2004 was set aside and it was also directed that the Execution Petition No. 4/2004 be also simultaneously decided along with OMP 261/2004. That is how, both the petitions, namely, Execution Petition 4/2004 and OMP 261/2004 were, once again, before the learned Single Judge. The learned Single Judge disposed of the petitions by an order dated 03.08.2015.

6. We may point out that the appellant has not filed any appeal in respect of the order passed by the learned Single Judge dismissing the Execution Petition 4/2004. The present appeal has been filed only in respect of the

order relating to OMP 261/2004 being the original order dated 03.08.2015 and the order in Review being order dated 11.09.2015.

7. The main reason why the learned Single Judge has rejected OMP 261/2004, which was filed by the respondent, was that the proceedings were under the Arbitration Act, 1940 and consequently, an application under Section 34, challenging the Award, was not maintainable. A reference was made to Section 85 of the Arbitration and Conciliation Act, 1996, which reads as under:-

“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) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

Section 85(2)(a) clearly stipulated that notwithstanding repeal of the 1940 Act, the provisions thereof would continue to apply in relation to ‘arbitral proceedings’ which commenced before the 1996 Act came into force ‘unless otherwise agreed by the parties’. The learned Single Judge found as a fact that there was no agreement between the parties for applying the provisions of the 1996 Act to the arbitral proceedings which had commenced in 1993, that is, prior to the commencement of the 1996 Act.

8. Consequently, the learned Single Judge held that the provisions of the 1996 Act, including Section 34 thereof, would be inapplicable and it is only the provisions under the 1940 Act which would apply. This meant that the Execution Petition No. 4/2004, filed by the appellant herein under the 1996 Act, was not maintainable nor was OMP 261/2004 filed under Section 34 of the 1996 Act by the respondent herein.

9. The sum and substance was that the proceedings had to be continued under the 1940 Act and that the appellant herein was required to move an application under Section 14 of the 1940 Act to make the award a rule of the Court and thereafter apply for execution in terms of the 1940 Act.

10. The learned Single Judge in deciding OMP 261/2004 has concluded that the 1996 Act would not be applicable. We agree with the decision of the learned Single Judge. This is so because unless and until there was an agreement between the parties that the new Act, i.e., the 1996 Act, would apply, the provisions of the 1940 Act would continue to be applicable, which included the provisions of Section 14 and 17 of the 1940 Act.

11. Paragraph 6 of the impugned order dated 03.08.2015 passed by Valmiki J. Mehta, J. reads as under:-

“In view of the above, this petition is disposed of for the time being with liberty to the petitioner to revive the petition in case it is found that at any stage that the Award dated 20.01.1997 was made into a rule of the Court as per 1940 Act and consequently as executable decree.”

We find that, while the rest of the decision dated 03.08.2015 of the learned Single Judge as also confirmed by him in the review order dated 11.09.2015 is correct in law, the above observation in paragraph 6 of the order dated 03.08.2015 cannot be supported in law. The reason being that the petition, which was under Section 34 of the 1996 Act, has definitively been held not to be maintainable because the 1996 Act would not apply and it was the 1940 Act which would apply. Therefore, there was no question of the said petition being disposed of only for the ‘time being’. There was also no

question of granting any liberty to the respondent herein to revive the said petition in case it was found, at any stage, that the Award dated 20.01.1997 was made into a rule of the Court as per the 1940 Act and was consequently, an executable decree. One relevant point which was missed out by the learned Single Judge is that if the award was made a rule of the Court under the 1940 Act, it could not be objected to under Section 34 of the 1996 Act. The objections or remedies would have been under the 1940 Act itself either under Sections 30/33 of the 1940 Act. Therefore, the observations and directions given by the learned Single Judge in paragraph 6 of the order dated 03.08.2015 are set aside. This does not mean that the respondent is without any remedy. In case the award is made a rule of the Court as per the 1940 Act, then all the remedies available to the respondent under the 1940 Act could be availed of by the respondent.

12. The appeal stands disposed of as above. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SEPTEMBER 28, 2015
SR

SANJEEV SACHDEVA, J