IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

C.R. No.8521 of 2014
Date of Decision.23.04.2018

M/s ESS ESS KAY Construction Company ......Petitioner

Vs

State Bank of Patiala .....Respondent

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Karan Gupta, Advocate
for the petitioner.

Mr. K.D. Sachdeva, Advocate
for the respondent.

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AMIT RAWAL J.

The Contractor-Ess Ess Kay Construction Company (hereinafter called the "contractor") knocked the door of this Court under Article 227 of the Constitution of India for quashing the impugned order dated 26.08.2014 (Annexure P-1) whereby the objections of the Bank with regard to execution of the award dated 20.03.2012 (Annexure P-15) has been allowed and execution application has been dismissed.

Mr. Karan Gupta, learned counsel appearing on behalf of the petitioner submitted that an agreement dated 11.02.1992 was entered into between the petitioner and State Bank of Patiala for construction of additional accommodation in the existing building of State Bank of Patiala at Sangrur. The aforementioned agreement contained Clause 41 for adjudication of the dispute through arbitration. Clause 41 is reproduced in para 3(a) of the petition, which provides that all the disputes or differences would be subject matter of arbitration and the General Manager

(Operations) of the State Bank of Patiala shall be the sole arbitrator, however, with a caveat that in case, the sole arbitrator was unable or unwilling to act or refuses to be the sole arbitrator due to any reason, another sole arbitrator shall be appointed in the following manner:-

1. Employer i.e. Bank will send within thirty days of receipt of the notice to the contractor a panel of three names of persons who shall be presently unconnected with the organization for which the work was executed and the contractor on receipt of names of any one of the persons named to be appointed as sole arbitrator and communicate his name within 30 days of the receipt of the name so that the employer without any delay appoint such person as Sole Arbitrator. But in case failure of the contractor to communicate such selection within the period specified, the competent authority would make the selection and appoint the selected person as sole arbitrator.
2. If the employer fails to send the contractor, the panel of three names as aforesaid within the period specified, the contractor shall send to the employer a panel of three names of persons who shall be unconnected with either party and the employer on receipt of names of aforesaid persons, select any one of the person named and appoint him as sole arbitrator. But in case, the employer fails to select any of the persons as sole arbitrator within a period of 30 days, the contractor shall be entitled to appoint one person from the panel of persons as sole arbitrator and the arbitrator shall be

deemed to have entered on the reference on the date he issues notice to both parties fixing the date of the first hearing and with the consent of the parties may enlarge the time but he had to pronounce the award with a period of 40 days and the proceedings of the arbitrator shall be subject to provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and Rules made therein.

Since the dispute regarding the payment as per the provisions of the agreement arose between the parties, the petitioner vide communication dated 4.8.1994 (Annexure P-2) requested the employer to make the full payment of the same, failing which it will be presumed that they were disputing the preparation of the final bill and in that eventuality, there would be no other alternative except for adjudication of the claim through arbitration.

Vide letter dated 20.1.1995 (Anneure P-3), the petitioner contractor requested the General Manager (Operations), the sole arbitrator, to enter into reference and adjudicate the dispute as per terms and conditions of the contract.

Vide letter dated 27.05.1995 (Annexure P-4), the sole arbitrator communicated to the contractor informing the dates for arbitration as 16.06.1995 at 11 AM at Head Office, Patiala.

Vide letter dated 19.8.1996 (Annexure P-5), the contractor requested the arbitrator to expedite the proceedings. Since the arbitrator failed to adjudicate the dispute within four months, in view of the provisions of the agreement, the contractor submitted list of three persons to the employer for the purpose of appointment as arbitrator vide communication dated 30.9.1996 (Annexure P-6).

No action was taken by the Bank on receipt of the communication (Annexure P-6), insisting the petitioner-contractor to send legal notice dated 10.03.1997 (Annexure P-7). However, during the interregnum, the sole arbitrator vide letter dated 9.4.1997 (Annexure P-8) directed the petitioner-contractor to appear on 24.04.1997.

The respondent-Bank vide letter dated 22.04.1997 (Annexure P-9) informed the petitioner-contractor with regard to postponement of the date of hearing. Vide letter dated 23.04.1997, the petitioner-contractor requested the sole arbitrator not to proceed further in the case. Since no action was taken by the sole arbitrator, the petitioner-contractor on 09.05.1997 (Annexure P-12) informed the Bank with regard to appointment of Mr. T.P. Goel, SE (retd) as sole arbitrator.

The respondent-Bank vide letter dated 16.05.1997 (Annexure P-13) refused to accept appointment of Mr. T.P. Goel as sole arbitrator. The aforementioned arbitrator entered into reference on 16.5.1997. The respondent-Bank filed a petition under Section 9 & 11 of the Arbitration Act, 1940 challenging the appointment of Mr. T.P. Goel as sole arbitrator. The said petition was dismissed by the Court vide order dated 28.04.2011 (Annexure P-14). Thereafter, the arbitrator appointed by the petitioner-contractor passed the award dated 20.03.2012 (Annexure P-15). Keeping in view the fact that the award was a decree as it was passed during the subsistence of the Arbitration and Conciliation Act, 1996, which had come into force by repealing the 1940, the petitioner-contractor moved the application (Annexure P-16) for execution of the same. The said execution application was objected by the Bank vide objections dated 10.12.2012 (Annexure P-17 and P-18) but the same had erroneously been allowed.

He submitted that the Arbitrator's appointment under Arbitration Act, 1940 and Arbitration and Conciliation Act, 1996 had been a point of determination/consideration before the Hon'ble Supreme Court in ***Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd. (1999) 9 SCC 334*** wherein while interpreting the provisions of Section 85(2)(a) of the 1996 Act and dealing with the repealing of the 1940 Act, it has been held that notwithstanding the repeal of 1940 Act where arbitration proceedings commenced before coming into force of 1996 Act but the award was rendered during the subsistence of the 1996 Act, the provisions of 1940 Act would be applicable. In other words, parties cannot agree to be governed by the old Act once the 1996 Act came into force and the proceedings had not commenced.

He further submitted that vide letter dated 20.01.1995 (Annexure P-3), the petitioner-contractor requested the sole arbitrator to enter into reference but did not proceed ahead, necessitating the petitioner to invoke the latter part of Clause 41 of the agreement by sending its panel of arbitrators i.e. T.P. Goel, who entered into reference on 09.04.1997 (Annexure P-8). The reference would be taken to be commenced in 1997 and at that time, Arbitration and Conciliation Act, 1996 was in operation, thus, finding of the trial Court in accepting the objection and dismissing the execution application was wholly erroneous and liable to be set aside.

He also submitted that the aforementioned judgment came to be again considered by Full Bench of Hon'ble Supreme Court in ***Milkfood Ltd. Vs. M/s GMC Ice Cream (P) Ltd. (2004) 7 SCC 288; 2004(2) RCR (Civil)***

642 whereby it has been held that the law settled in ***Thyssen Stahlunion GMBH's*** case (supra) was not correct position of law and the proceedings to have commenced would be taken from the plain and simple language of Section 21 as well as Section 85(2)(a) of the Arbitration and Conciliation Act, 1996 but the minority view expressed by the third Judge did not agree with the majority view, therefore, the judgment rendered into ***Milkfood Ltd.'s case*** (supra) was deemed to have been rendered by two judges vis-a-vis the judgment rendered in ***Thyssen Stahlunion GMBH's*** case (supra), thus, this Court had option to apply the ratio which it deem appropriate to be applicable on the facts and circumstances of the case.

Mr. K.D. Sachdeva, learned counsel appearing on behalf of the respondent-Bank submitted that the finding rendered by the trial Court in dismissing the execution application by accepting the objection is perfectly legal and justified, as the ratio decidendi culled out in ***Milkfood Ltd.'s case*** (supra) has been followed by another bench of Hon'ble Supreme Court in ***Neeraj Munjal and others Vs. Atul Grover (Minor) and another (2005) 5 SCC 404; 2005(2) RCR (Civil) 644***.

He further submitted that even in case the first arbitrator had entered into reference but entailed into his removal, the effect of 1996 Act replacing 1940 Act had been noticed by Hon'ble Supreme Court in ***State of West Bengal Vs. Amritlal Chatterjee (2003) 10 SCC 572; 2004(1) RCR (Civil) 252*** wherein it has been held that the provisions of 1940 Act would apply in relation to the arbitral proceedings which commenced before coming into force of 1996 Act unless otherwise agreed by parties. In the instant case, the Bank never agreed to enter into reference under the 1996 Act. Even the objections had also been filed under the old Act of 1940, thus, urges this Court for upholding the finding under challenge.

I have heard learned counsel for the parties and appraised the paper book. Before answering to the question raised before this Court vis-a-vis application of Arbitration Act, 1940 or Arbitration and Conciliation Act, 1996, it would be apt to reproduce clause 41 of the agreement, Section 21 and 85(2)(a) of the Arbitration and Conciliation Act, 1996, which are as under:-

> "*41. Arbitration*
>
> *a) All disputes or differences of any kind whatsoever shall at any time arisen between the parties hereto touching or concerning the work of the execution or maintenance thereof of this contract or the rights touching or concerning the works or the execution or maintenance thereof of this contract or the construction remaining operation or effect thereof or to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after determination, foreclosure or branch or breach of the contract (other than those in respect of which the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them and to the employer hereinafter mentioned be referred for adjudication to a Sole Arbitrator. The General Manager (Operations) of State Bank of Patiala shall be the sole arbitrator.*
>
> *b) If the sole arbitrator aforesaid is unable or unwilling to act or refuses to be the sole arbitrator due to any reason, another sole arbitrator shall be appointed as under:-*

i) For the purpose of appointing sole arbitrator referred to above, the employer will send within thirty days of receipt of the notice, to the contract a panel of three names of persons who shall be presently unconnected with the organisation for which the work is executed.

The contract shall on receipt of the names as aforesaid any one of the persons named to be appointed as a Sole Arbitrator and communicate his name to he employer within thirty days of receipt of the names. The employer shall there upon without any delay appoint the said person as the Sole Arbitrator. If the contractor fails to communicate such selection as provided above within the period specified, the competent authority shall make the selection and appointed the selected person as the Sole Arbitrator.

(ii) If the employer fails to send the contractor the panel of three names as aforesaid within the period specified, the contractor shall send to the employer a panel of three names of persons who shall be inconnected with either party. The employer shall on receipt of the names of aforesaid select any one of the person named and appoint him as the Sole Arbitrator. If the employer fails to select the person and appoint him as the Sole Arbitrator within 30 days of receipt of the panel and inform the contractor and accordingly

the contractor shall be entitled to appoint one of the persons from the panel as the Sole Arbitrator.

The work under the contract shall, however, continuing during the arbitration proceedings and no payment due or payment to the contractor determined by the employer/Architects shall be withheld on account of such proceedings.

The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both parties fixing the date of the first hearing.

The Arbitrator may from time to time, with the consent of the parties enlarge the time for making and publishing the award. The Arbitrator shall give a separate award in respect of each dispute or difference to him. The Arbitrator shall decide such dispute in accordance with the terms of the contract and give a reasoned award. The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion. The fees, if any, of the Arbitrator, shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The costs of the reference and of the award including the fees, if any, of the Arbitrator who may direct to and by whom and on what men, such costs or any part thereof shall be paid and may fix or settle the amount of costs to be paid.

The award of the Arbitrator shall be final and binding on both the parties.

Subject to the aforementioned provisions 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 the clause. The employer and the contractor hereby also agreed that arbitration under clause shall be condition precedent to any right to action under the contract with regard to the matter hereby expressed agreed to be so referred to the arbitration."

Section 21 of the Arbitration and Conciliation Act, 1996.

21. Commencement of arbitral proceedings.*—Unless otherwise agreed by the parties, the 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.*

Section 85(2)(a) of the Arbitration and Conciliation Act, 1996.

85. Repeal and savings.—
xxxx xxxx xxxx
(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;

Admittedly, the petitioner vide communication dated 20.01.1995 (Annexure P-3) requested the General Manager (Operations) to enter into reference. For the sake of brevity, the relevant content of the request reads as under:-

> *"As certain disputes have arisen and are still persisting under the subject contract, you are requested to enter upon reference to adjudicate the same in terms and conditions of contract. Notice of claims for arbitration has already been served on Chief Manager (Premises) vide our letter No.SSK/SBOP dated 04 Aug 1994. Copy enclosed."*

In response, the Sole Arbitrator i.e. the General Manager (Operations) vide letter dated 27.05.1995 communicated the contractor to be available on 16th June, 1995 at 11 A.M. At Head Office, Patiala. The relevant content of the letter reads as under:-

> *"We may advise you that your case has been fixed for arbitration 16th June, 1995. You are, therefore, requested to be available on 16th June, 1995 at 11 A.M. at Head Office, Patiala."*

It is a matter of record that the aforementioned Arbitrator did not ultimately decide the *lis* between the parties in terms of the arbitral provisions whereby the petitioner-contractor vide letter dated 09.05.1997 (Annexure P-12) written to the Chief General Manager of having appointed T.P. Goel, SE (retd) as sole arbitrator. The contents of letter dated 09.05.1997 reads as under:-

" ESS KAY Construction Co.

H.O.	*B.O.*
Guru Nanak Pura	*86, New Lal Bagh*

Sunami Gate
Sangrur
Ph.01672-32391

Patiala
Ph.0175-79583

Date 9 May 97

To

Chief General Manager,
State Bank of Patiala
Head Office, The Mall, Patiala.

Subject: Arbitration or dispute pertaining to addition alteration and renovation main branch Sangrur.

Sir,

This has reference to Telegram dt 22 Apr 97 from Asst General Manager, Premises to us. On the failure of the G.M. (Operation), (not legible) was the Sole Arbitrator as per Clause 41(a) on page 95 of the Contract Agreement, to decide the case within a statutory period of 4 months, we had vide our letter No.SSK-7/96-97 dt 30 Sep 96 submited a panel of 3 Arbitrators as required vide Clause 41(b)(iii) on page 95 of the Contract agreement to enable you to appoint any one of them as Sole arbitrator. However, in spite of a legal notice dated 10 Mar 97 issued through our Advocate Sh. Rakesh Gupta and subsequent reminder vide out Letter No.SSSK-92/93-21B dt. 23 Apr 97, you have failed to appoint an arbitration out of the panel submitted by us.

In view of above, we hereby appoint Sh. T.P. Goel SE (retd) House No.14, Sector 8, Panchkula as sole arbitrator to adjudicate the disputes under Clause 41(b)(ii) of Contract agreement.

Yours faithfully,
sd/- M/s Ess Ess Kay Const. Co."

On perusal of the provisions of Section 85(2)(a) of the Arbitration and Conciliation Act, 1996, it is evident that 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. On the other hand, Section 21 of the 1996 Act also envisage that arbitration proceedings shall be deemed to have commenced as and when request is made by one of the parties for appointment of the Arbitrator in terms of the arbitration agreement. Therefore, Section 21 is to be construed having related to Section 85(2)(a) of the 1996 Act. Thus, under these circumstances, both the provisions of the Act leaves no manner of doubt that service of notice or issuance of request for appointment of arbitrator in terms of the agreement must be held to be the homogeneity of the commencement of the arbitration proceedings. The trial Court accepted the objection by holding that once the petitioner himself requested the General Manager (Operations) for appointment of arbitrator on 20.01.1995 by then 1996 Act had not come into force and the appointment of subsequent arbitrator would not be construed to be a fresh request for appointment of the arbitrator in consonance with the previous one. The aforementioned view of mine is derived from the ratio decidendi culled out in paragraph 35 of the ***Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd. (1999) 9 SCC 334***. The same reads as under:-

> *"35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing.*

There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions - one of Bombay High Court and the other of Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. Expression "unless otherwise agreed" as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Construction that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it *does give option to the parties to agree that new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act."*

In ***Milkfood Ltd. Vs. M/s GMC Ice Cream (P) Ltd.*** (supra) by construing the provisions of Section 85 and 21 of the 1996 Act as well as the ratio decidendi culled out in T***hyssen Stahlunion GMBH*** (supra), the Hon'ble Supreme Court in paragraph 62 and 80 held as under:-

"Applicability of 1940 Act or 1996 Act :

62. Commencement of Arbitration proceeding for the purpose of limitation or otherwise is of great significance. If a proceeding commences, the same becomes relevant for many purposes including that of limitation. When the Parliament enacted the 1940 Act, it was not in its contemplation that 46 years later it would re-enact the same. The Court, therefore, while taking recourse to the interpretative process must notice the scheme of the concerned legislations for the purpose of finding out the purport of the expression 'commencement of arbitration proceeding'. In terms of Section 37 of the 1940 Act, law of limitation will be applicable to arbitrators as it applies to proceedings in court. For the purpose of invoking the doctrine of lis pendens, section 14 of the Limitation Act, 1963 and for other purposes presentation of plaint would be the date when a legal proceeding starts. So far as the Arbitral Proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set the ball in motion whereafter only the arbitration proceeding commences. Such commencement of arbitration proceeding although in terms of Section 37 of the Act is for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply. It is relevant to note that it is not mandatory to approach the court *for appointment of an arbitrator in terms of Sub-Section (2) of Section 8 of the 1940 Act. If the other party thereto does not concur to the arbitrator already appointed or nominate his own arbitrator in a given case, it is legally permissible for the arbitrator so nominated by one party to proceed with the reference and make an award in accordance with law. However, in terms of Sub-Section (2) of Section 8 only a legal fiction has been created in terms whereof an arbitrator appointed by the Court shall be deemed to have been nominated by both the parties to the arbitration proceedings.*

xxxx xxxx xxxx

Conclusion :

80. For the reasons aforementioned, we are of the view that in this case, the 1940 Act shall apply and not the 1996 Act. However, it is accepted at the Bar that the learned arbitrators had already entered into the reference. The proceedings before the arbitrators were not stayed. Only making of the award was stayed. In that view of the matter, in the peculiar facts and circumstances of this case, we are of the opinion that although the old Act would apply, the entire arbitral proceedings need not be reopened and the arbitrators may proceed to give their award. The award shall be filed in the court having jurisdiction whereafter the parties may proceed in terms of the old Act. We hope and trust that the award shall be made and all the legal proceedings shall come to an end at an early date and preferably within a period of four months from the date of the communication of this order. This order has been passed in the interest of justice and in the peculiar facts and circumstances of this case."

As an upshot of my finding, the finding arrived at by the Court below in accepting the objection and rejecting the execution application by noticing the the fact that the objector had already filed objections under Sections 14, 30 and 33 of the 1940 Act against the award dated 20.03.2012 is perfectly legal and justified. I do not find any illegality and perversity in the order under challenge and the same cannot be said to be passed without jurisdiction. No ground for interference is made out. The revision petition stands dismissed.

(AMIT RAWAL)
JUDGE

April 23, 2018
Pankaj*

Whether reasoned/speaking	Yes
Whether reportable	No