

**Writ Petition No.17021/2015****16.06.2016**

Ms.Kanak Gaharwar, learned counsel for petitioner.

Ms.Amrit Ruprah, learned counsel for respondent.

Rejection of an objection against the executability of Arbitration Award under Arbitration and Conciliation Act, 1996 has led the objector–Union of India and its functionaries to file this writ petition seeking quashment of order.

Undisputed facts are that in a dispute which arose from the contract bearing No.CEJZ/JBP/ of 86–87 for “Provision of Certain Technical Buildings at Jabalpur, sole Arbitrator was appointed by the Engineer–in–Chief, Army Head Quarter, New Delhi vide his letter No.13600/CC/718/E8 Dated 19.03.2001. An Award was passed on 16.02.2002 whereagainst present petitioner preferred an objection under Section 34 of 1996 Act, wherein, the trial Court while accepting the preliminary objection raised by respondent that since the Arbitrator was appointed and proceeded under the Arbitration Act, 1940 (i.e. Old Act), the provisions of 1996 Act are not applicable; declined to entertain the objection vide order dated 15.04.2009.

Pertinent it is to note that the Arbitration and Conciliation ordinance, 1995 was promulgated on 25.01.1996. It was replaced on 26.03.1996 by the Arbitration and Conciliation (Second Ordinance) 1996. The said ordinance was replaced by the Arbitration and Conciliation (Third) ordinance, 1996 on 26.06.1996. The 1996 Act came into force with effect from 22.08.1996 and is made applicable from 26.01.1996.

Section 85 of 1996 makes provisions regarding Repeal and savings. Clause (a) of Sub-Section (2) of Section 85 envisages that :

“(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.”

– which means that despite the repeal of Arbitration Act, 1940 the provisions of said Act shall be applicable in relation to arbitration proceedings which have commenced prior to coming into force of the new Act, i.e. Act of 1996.

In the case at hand as is evident from the findings in

paragraph 4 of the order dated 15.04.2009, passed by the trial Court that arbitration clause was invoked on 22.06.1992, under the Act of 1940. Arbitrator was appointed on 26.05.1999. The Arbitrator appointed by order dated 26.05.1999 resigned on 30.01.2001 whereon new Arbitrator was appointed on 08.03.2001 who passed the Award on 16.02.2002.

In the case of State of West Bengal vs. Amritlal Chatterjee AIR 2003 SC 4564 relying upon the judgments in Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd. AIR 2001 SC 2293; Thyssen Stahlunion GMBH vs. Steel Authority of India AIR 1999 SC 3923; Shetty's Constructions Co.Ltd. vs. Konkan Railway Construction AIR 1999 SC 1535 and Hari Shankarlal vs. Shombhunath Prasad AIR 1962 SC 78, their Lordships has been pleased to hold :

“13. The Court having regard to the duty imposed upon the arbitrator held that the arbitrators enter on the reference as soon as they have accepted their appointment and have communicated to each other about the reference. If the Arbitrator fails in his duty to enter on the reference or make a public award during the period stipulated under Rule 3 of the First Schedule indisputably a cause of action will arise for his removal or appointment of a new arbitrator in terms of

Section 11 and 12 of the 1940 Act. The words "commencement of the arbitration proceedings" have not been defined in the 1940 Act. They have to be given their ordinary meaning having regard to the provisions contained in Chapter II thereof.

14. Furthermore, Section 85(2)(a) of the new Act may have to be construed keeping in view the provisions contained in Section 21 of the new Act."

In the present case, the proceedings having originated under the old Act i.e. Act of 1940 and the parties having agreed to continue under the same Act, even after the resignation of first Arbitrator, the provisions of 1940 Act would be applicable even when the Award is to be executed. Since under the Act of 1940 the Award, ipso facto is not executable unless made Rule of Court under Section 14 (2), 17 and 29 of 1940 Act, the petitioner herein were well within their right in raising an objection against maintainability of the execution proceedings brought under 1996 Act. The impugned order, therefore, cannot be given stamp of approval.

Reliance though is placed on the decision by a Division Bench of this High Court in Northern Coal Fields Ltd. vs. M/s Raj Kishan and Company reported in 2003 (9) MPHT 15 but is of no assistance to the respondent because of the findings in paragraph 14 that "the Arbitrator entered upon reference

after the first Arbitration Ordinance had come into force.”  
Whereas, in the case at hand the parties agreed that the Arbitration proceedings were under 1940 Act.

In view whereof, while setting aside the impugned order dated 25.07.2015, the application preferred by respondent on 07.03.2013 for execution of Award dated 16.02.2002 under 1996 Act is dismissed. The respondent however, would be at liberty, if the limitation permits, to invoke the provision of 1940 Act.

In the result, petition is **allowed** to the extent above.  
Interim order made absolute. Parties to bear their own costs.

(SANJAY YADAV)  
JUDGE

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