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DELHI TRANSPORT CORPORATION LTD.

v.

ROSE ADVERTISING

APRIL 17, 2003

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[ M.B. SHAH AND ARUN KUMAR, JJ.]

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*Arbitration Act, 1940/Arbitration and Conciliation Act, 1996—Applicability of—One of the parties filing application for enforcement of award under 1996 Act—Other party taking plea that proceedings commenced under 1940 Act, thus 1940 Act would continue to govern the proceedings—Single Judge of High Court holding 1940 Act applicable—However, Division Bench holding 1996 Act applicable—Correctness of—Held: Parties agreeing to be governed by law as in force at the relevant time and Section 85(2) recognizing such agreement—Conduct of arbitration proceedings and participation of parties showing that parties acted under 1996 Act—Hence order of Division Bench correct—Arbitration and Conciliation Act, 1996—Section 85(2).*

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**Appellant-Delhi Transport Corporation and respondent-contractor entered into an agreement. Agreement contained an arbitration clause. Dispute arose between the parties and arbitrator was appointed in 1996 in terms of the agreement. Arbitrator conducted the arbitration proceedings and passed an award. Respondent filed an execution application under the Arbitration and Conciliation Act, 1996 for enforcement of award. Appellant challenged the application on the ground that the proceedings had commenced under the Arbitration Act, 1940 and the said Act would continue to govern the proceedings. Single Judge of High Court held that 1940 Act continued to apply and dismissed the application. Aggrieved respondent filed an appeal. Division Bench allowed the appeal holding that 1996 Act would apply in view of the fact that the arbitrator was appointed after coming into force of the 1996 Act and the arbitration proceedings were conducted under the said Act; and also the parties had expressed their intention in the arbitration proceedings to be governed by the 1996 Act. Hence the present appeal.**

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**Dismissing the appeal, the Court**

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**HELD: 1. By virtue of Section 85 of the Arbitration and Conciliation**

Act, 1996, the Arbitration Act, 1940 stands repealed. In the instant case, arbitration clause 25(d) of the agreement 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 upon 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 is unassailable. [681-E, G, H]

*Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, AIR [1999] SC 3923, relied on.

2. The question whether time for making an application for setting aside an award can be extended will have to be decided as and when an application for that purpose is made. Then alone the stage for a judicial decision on the point will arise. Therefore, at this stage, the same is left open to be decided as and when occasion arises. [682-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 105 of 2002.

From the Judgment and Order dated 2.2.2001 of the Delhi High Court in E.E.A. (OS) No. 3 of 2000.

Raju Ramachandran, Additional Solicitor General, Ms. A Subhashini for the Appellant.

Ms. Meenakshi Arora, Ms. Mona Chhetri and Anshul Singal for the Respondent.

The Judgment of the Court was delivered by

**ARUN KUMAR, J.** The main question for consideration in the present appeal is as to whether Arbitration Act, 1940 (hereinafter referred to "the old Act") would apply in the facts and circumstances of the case or the case will have to be dealt with under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act").

Briefly the facts as gathered from the impugned judgment of the High Court are that the parties had entered into an agreement on 15.1.1993 regarding

A display of advertisements on the body of DTC buses. DTC is the Delhi Transport Corporation which runs the public road transport for commuters in the city and outskirts of Delhi. The agreement was for a period of 3 years commencing from 15.1.1993 upto 14.1.1996. The agreement contained an arbitration clause. Dispute and differences arose between the parties. A request was made by the contractor on 9.1.1995 for appointment of arbitrator to settle the disputes that had arisen between the parties. This was followed by another letter dated 26th November, 1995 containing similar request. On 16th January, 1996 the contractor filed in Court a petition under Section 20 of the old Arbitration Act. The notice of the petition was issued to the opposite party i.e. the appellant herein. The counsel appearing for the appellant made a statement in Court on 19th July, 1996 that an arbitrator had already been appointed on 4th July, 1996 as per the terms of the agreement. The petition thus became infructuous. The arbitrator conducted the arbitration proceedings and ultimately made an award on 6th October, 1998. To enforce the award the appellant filed an application under the 1996 Act which was registered as an Execution Application. The appellant DTC contested the said application on grounds including maintainability of the execution petition. The question of maintainability was raised on the basis that the 1996 Act was not applicable to the proceedings and therefore execution application did not lie. The contention of the appellant before the High Court was that the proceedings had commenced under the old Act and the said Act would continue to govern the proceedings. The learned Single Judge upheld the objection regarding maintainability of the application. It was held that the Arbitration Act 1940 continued to apply. This was based on the view that the arbitration proceedings commenced on the date when request for appointment of arbitrator was made and that was prior to the coming into force of the 1996 Act. Once the arbitration proceedings commenced, Section 85 of the 1996 Act read with Section 21 would lead to the conclusion that the old Act would continue to apply. Reliance was placed on the judgment of this Court in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, AIR (1999) SC 3923. The contractor went in appeal against the said order of the learned Single Judge. The Division Bench noted in its judgment that the parties went for arbitration with clear understanding and belief that the proceedings were being conducted under the 1996 Act. It was noted that the appointment of arbitrator was made after the new Act had come into force and the parties participated in the arbitration proceeding with the understanding and belief that the proceedings are governed under the 1996 Act. In the award itself the arbitrator noted that "both the parties submitted claims before me under the Arbitration & Conciliation Act, 1996". He concluded the award by observing "I further award that the

advertiser shall also be entitled for future interest at the rate of 18% p.a. on all payments awarded in accordance with Section 31 (7)(b) of the Arbitration & Conciliation Act, 1996 from the date of award till the date of payment.” A

While referring to the judgment in *Thyssen's* case (supra) the Court noted that parties can always agree that provision of law prevailing at the relevant time would apply to arbitral proceedings. The case of Rani Construction Pvt. Ltd. decided in *Thyssen's* case (supra) was held to squarely cover the present case. In view of the fact that the arbitrator was appointed after coming into force of the 1996 Act and the arbitration proceedings were conducted in pursuance of the provision of the said Act, it was held that the case would be governed by the 1996 Act. It also weighed with the High Court that the parties had expressed their intention in the arbitration proceedings to be governed by the 1996 Act. The Division Bench thus allowed the appeal and set aside the judgment of the Single Bench. B C

The Delhi Transport Corporation has come up in appeal against the said judgment of the High Court. The learned Additional Solicitor General who argued the matter on behalf of the appellant was unable to persuade us to hold that the impugned judgment of the High Court was liable to be set aside. As per the facts noted above and the judgment of this Court in *Thyssen's case* (supra) we are unable to differ with the view taken by the High Court. By virtue of Section 85 of the 1996 Act, the Arbitration Act 1940 stands repealed. 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, clause 25 of the agreement is the arbitration clause. Sub-clause (d) of clause 25 has a bearing on the controversy in hand and therefore same is re-produced as under: D E

“Subject 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.” F

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 G H

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

Faced with the above situation the learned Additional Solicitor General prayed that the appellant be granted time to file objections against the award. This request is opposed by the learned counsel appearing for the respondent.

B Section 34 of the 1996 Act prescribes a time limit within which an application for setting aside an award can be made. In view of this provision the learned counsel for the respondent submitted that time for making such an application prescribed under the statute having expired, this Court cannot extend time. On the other hand, the learned counsel for the appellant submitted that the basic question whether the old Act applied in the facts of the present case or the case is governed by the 1996 Act, was subject matter of controversy throughout. The learned Single Judge of the High court held that the old Act governs the proceedings while the Division Bench of the High Court held that the proceedings are governed by the 1996 Act. If the old Act applied the respondent would have had to make an application for making the award rule of the Court and a decree being passed in terms thereof. When such an application would have been made, the appellant would have got an opportunity to file objections against the award. It is the Division Bench of the High Court which took the view that the 1996 Act applied in the facts of the case. Against the said view of the Division Bench of the High Court this Court entertained the present appeal. Therefore, the matter having remained subjudice, there was no occasion for the appellant to apply for setting aside the award.

The question whether time for making an application for setting aside an award can be extended will have to be decided as and when an application for that purpose is made. Then alone the stage for a judicial decision on the point will arise. Therefore, at this stage we need not go into this question, the same is left open to be decided as and when occasion arises. This appeal is dismissed leaving the parties to bear their respective costs.

N.J.

Appeal dismissed.