

M/S. N.S. NAYAK AND SONS

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v.

STATE OF GOA

MAY 8, 2003

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

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Arbitration Act, 1940/Arbitration and conciliation Act, 1996—Section 37/Section 85(2)(a)—Appeals under 1940 Act—Subsequent enactment of 1996 Act—Applicability of 1996 Act to the pending appeals—Plea that 1996 Act applicable in view of arbitration agreement—Held, not applicable—Once the arbitral proceedings have commenced under 1940 Act, the same Act would apply for the award becoming decree and also for appeal arising thereunder—Right to file an appeal is accrued right and the same would be governed as per statutory provisions—Parties to arbitration agreement have no right to change the same.

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Present appeals raised question of applicability of Arbitration and Conciliation Act, 1996 to the appeals filed under Section 37 of Arbitration Act, 1940.

Appellant contended that appeals filed by the respondents under Section 37 of 1940 Act were required to be decided on the basis of the Arbitration and Conciliation Act, 1996 because the Arbitration agreement provided that the provisions of the 1940 Act 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; and that in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334 the phrase “in relation to arbitral proceedings” is given wider meaning so as to include arbitral proceedings before the arbitrator as well as the proceedings before the Court and hence once 1996 Act came into force, further proceedings including appeals were required to be dealt with and decided in accordance with 1996 Act as per the agreement.

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Dismissing the appeals, the Court

HELD: 1. On the basis of Section 85(2)(a) of Arbitration and Conciliation Act, 1996 the provisions of the Arbitration Act, 1940 would

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A apply to the arbitral proceedings which commenced on or before 1996 Act came into force. Part of the arbitration clause also provides that the provisions of 1940 Act, which were for time being in force were to apply to the arbitral proceedings between the parties. It nowhere provides that once the arbitral proceedings have commenced under 1940 Act, they should be conducted under 1996 Act as soon as 1996 Act comes into operation. Hence, in the proceedings where the award is passed under 1940 Act, the remedy of filing appeal or petition for setting aside the said award would be as per the provisions of 1940 Act. In cases where the arbitral proceedings commenced under 1940 Act, it is an accrued right to proceed in accordance with that law and it would be 1940 Act which would apply even for enforcing the award. [72-C, E, F; 74-A]

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2. *Thyssen's* case nowhere lays down that after 1996 Act came into force, even appeals filed under the provisions of 1940 Act are to be decided on the basis of the provisions contained in 1996 Act. It rather reiterates that once the arbitral proceedings have started under the 1940 Act, it would apply for the award becoming decree and also for appeal arising thereunder; and that the phrase 'unless otherwise agreed by the parties' used in various Sections namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(a) etc. of 1996 Act indicates that it is open to the parties to agree otherwise. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, arbitrator is required to follow the said procedure. However, this would not mean that in appeal parties can contend that appellate procedure should be as per their agreement. Appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. The right to file an appeal is accrued right that cannot be taken away unless there is specific provision to the contrary. There is no such provision in 1996 Act. In the present cases, the appeals were pending before the High Court under the provisions of 1940 Act and, therefore, appeals are required to be decided on the basis of the statutory provisions under the said Act.

[74-E, F; 76-D, E, F, G, H]

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G *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, (1999) 9 SCC 334, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 97 of 2002.

H From the Judgment and Order dated 27.4.2000 of the Mumbai High Court in A.A. No. 1 of 1993.

WITH

C.A. Nos. 98, 99, 100 and 101 of 2002.

S.G. Desai, Prashant Kumar, Ms. Triveni Poteker, Amarjit Singh Bedi and Aruneshwar Gupta for the Appellant.

Raju Ramachandran, Additional Solicitor General, Ms. A. Subhashini, Ashish Dholakia, U.A. Rana and Ms. Anuradha Priyadarshini for the Respondents.

The Judgment of the Court was delivered by

SHAH, J. These appeals are directed against the judgment and order dated 27th April, 2000 passed by the High Court of Bombay, Goa Bench, in Arbitration Appeal No.1 of 1993 etc. etc.

In pending appeals, a contention was raised by the appellant that appeals filed by the respondents under Section 37 of the Arbitration Act, 1940 (hereinafter referred to as the 'Old Act'), are required to be decided on the basis of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'New Act') because the arbitration agreement provides as under:-

“Subject as aforesaid the 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 this clause.”

That contention was rejected by the High Court. Hence, these appeals.

In support of aforesaid contention, learned senior counsel Mr. Desai for the appellant relied upon the decision in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334.

Before referring to the decision in *Thyssen's* case, we would first refer to Section 85 of the New Act, which reads as under:

“85. *Repeal and saving* - (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 (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 (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.”

C Section 85 (2) (a) specifically provides that - (1) the provisions of the Old Act shall apply in relation to arbitral proceedings which commenced on or before the New Act came into force, unless otherwise agreed by the parties; (2) it also provides that the New Act shall apply in relation to arbitral proceedings which commenced on or after the New Act came into force.

D In all these matters arbitrators were appointed prior to 25th January 1996. Arbitral proceedings started before that date and the awards in CA No.97/2002, CA No.99/2002, C.A. No.100/2002 and C.A. No.101/2002 were passed on 20.12.1991, 17.5.1994, 7.5.1992, 3.2.1989 respectively, i.e. prior to 25th January, 1996, and in CA No.98/2002, the award was passed on 30.9.1996, i.e. after 25th January, 1996. On the basis of sub-section 2(a), the provisions of the Old Act would apply to the arbitral proceedings which commenced on or before the New Act came into force.

F Further, the part of the arbitration clause which is quoted above also provides that the provisions of Arbitration Act, 1940 which were for time being in force were to apply to the arbitral proceedings between the parties. It nowhere provides that once the arbitral proceedings have commenced under the Old Act, they should be conducted under the New Act as soon as the New Act comes into operation. Hence, in the proceedings where the award is passed under the Old Act, the remedy of filing appeal or petition for setting aside the said award would be as per the provisions of the Old Act.

G Further, the complete answer to the contention of the learned counsel for the appellant is in the following paragraph (para 32) of *Thyssen's* case wherein the Court has specifically held that once the arbitral proceedings commenced under the Old Act, it would be Old Act which would apply in arbitral proceedings and also for enforcing the award:-

H “32. Principles enunciated in the judgments show as to when a right

accrues to a party under the repealed Act. It is not necessary that for the right to accrue legal proceedings must be pending when the new Act comes into force. *To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act.* Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., the arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No.6036 of 1998 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the court. It was only later on that it changed the stand and now took the position that the new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. The appellant itself led the respondent SAIL in believing that the old Act would apply. SAIL had filed objections to the award under Section 30 of the old Act after notice for filing the award was received by it on the application filed by Thyssen under Sections 14 and 17 of the old Act. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. *We, therefore, cannot adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No.6036 of 1998.* Any other construction on Section 85(2)(a) would only lead to confusion and hardship. This construction put by us is consistent with the wording of Section 85(2)(a) using the terms "provision" and "*in relation to arbitral proceedings*" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well."

A The highlighted portion in terms emphasizes that in such cases where the arbitral proceedings commenced under the Old Act, it is an accrued right to proceed in accordance with that law and it would be the Old Act which would apply even for enforcing the award.

B Learned senior counsel Mr. Desai submitted that in *Thyssen's* case, the phrase 'in relation to arbitral proceedings' is given wider meaning so as to include arbitral proceedings before the arbitrator as well as the proceedings before the Court and once New Act came into force, further proceedings including appeals are required to be dealt with and decided in accordance with the New Act as per the agreement. For this purpose, he placed reliance
C on paragraph 22 of the said judgment.

In our view, paragraph 22 nowhere lays down that after the New Act came into force, even appeals filed under the provisions of Old Act are to be decided on the basis of the provisions contained in the New Act. Paragraphs 22 and 23 are as under:-

D "The Conclusions

22. For the reasons to follow, we hold:

E 1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

F 2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under *Section 17 thereof and also appeal arising thereunder.*

G 3. In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

H 4. The new Act would be applicable in relation to arbitral proceedings

which commenced on or after the new Act comes into force. A

5. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force. B

6. If a narrow meaning of the phrase "in relation to arbitral proceedings" is to be accepted, it is likely to create a great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted. C

7. A foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act [Foreign Awards (Recognition and Enforcement) Act, 1961]. D

23. Section 85(2)(a) of the new Act is in two limbs: (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties and (2) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two: (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of the widest import as held by various decisions of this Court in *Doypack Systems (P) Ltd.*, *Mansukhlal Dhanraj Jain*, *Dhanrajamal Gobindram and Navin Chemicals Mfg.* This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. *That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award.* If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in E F G H

A relation to”, a proper meaning has to be given. This expression does not admit of restrictive meaning. The first limb of Section 85(2)(a) is not a limited saving clause. *It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act.*”

B As stated in paragraph 22, Conclusion-1 without any reservation provides that the provisions of Old Act shall apply in relation to arbitral proceedings which have commenced before coming into force of the New Act. Conclusion-2, in our view, is required to be read in context with Conclusion-1, that is to say, the phrase ‘in relation to arbitral proceedings’ cannot be given a narrow meaning to mean only pendency of the proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder. Hence, conclusions-1 and 2 are to be read together which unambiguously reiterate that once the arbitral proceedings have started under the Old Act, the Old Act would apply for the award becoming decree and also for appeal arising thereunder.

E Conclusion-3 only reiterates - what is provided in various Sections of the Arbitration Act, which gives option to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. The phrase ‘unless otherwise agreed by the parties’ used in various Sections namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(a) etc. indicates that it is open to the parties to agree otherwise. During the arbitral proceedings, right is given to the parties to decide their own procedure. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, arbitrator is required to follow the said procedure. Reason being, arbitrator is appointed on the basis of the contract between the parties and is required to act as per the contract. However, this would not mean that in appeal parties can contend that appellate procedure should be as per their agreement. Appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. It is also settled law that the right to file an appeal is accrued right that cannot be taken away unless there is specific provision to the contrary. There is no such provision in the New Act. In the present cases, the appeals were pending before the High Court under the provisions of the Old Act and, therefore, appeals are required to be decided on the basis of the statutory provisions under the said

Act. Hence, there is no substance in the submission made by the learned A
counsel for the appellant.

Learned counsel for the appellant however relied upon paragraph 35 of
Thyssen's case. In our view, it nowhere lays down anything contrary to what
we have stated above. Relevant portion of the said discussion is as under:-

“.....The expression “unless otherwise agreed” as appearing in B
Section 85(2)(a) of the new Act would clearly apply in the case of
Rani Constructions 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 C
accept the submission of the appellant Rani Constructions 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 D
substance in the submission of the 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 E
an option to the parties to agree that the 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 the coming into force of
the new Act.”

The aforesaid discussion only deals with the contention that parties F
could not have agreed to the application of the New Act till they had the
knowledge about the provisions thereof and, therefore, the agreement to the
effect that to the arbitral proceedings, the provisions of the Arbitration Act,
1940 or any statutory modification or re-enactment thereof would be
applicable, is not valid. The Court negated the said contention by interpreting G
the expression ‘unless otherwise agreed’. The Court held that such agreement
could be entered into even before coming into force of the New Act. However,
it nowhere lays down that in a pending arbitral proceeding, which was being
conducted as per the procedure prescribed under the Old Act, the parties have
option of changing the procedure. G

A In this view of the matter, there is no substance in these appeals and they are accordingly dismissed. The appellant in each case shall pay the costs of Rs.10,000 to the respondent within a period of three months from today.

K.K.T.

Appeals dismissed