

NEERAJ MUNJAL AND ORS.
v.
ATUL GROVER MINOR AND ANR.

MAY 5, 2005

[N. SANTOSH HEGDE AND S.B. SINHA, JJ.]

Arbitration and Conciliation Act, 1996: ss. 21 and 85—Commencement of arbitration proceedings—Effect of repealing provision—Arbitrator appointed by order dated 19.5.1995—Award made on 19.8.1996—Parties neither accepted nor proceeded on the basis of 1996 Act—Held, provisions of 1940 Act would govern the proceedings—High Court would consider objections under ss. 30 and 33 of 1940 Act on merits—Arbitration Act, 1940—ss. 30 and 33—Res-judicata—Consumer Protection Act, 1986.

In a complaint filed before the National Consumer Disputes Redressal Commission, the National Commission, at the request of the parties referred the dispute for consensual adjudication by arbitration. The arbitrator was appointed by order dated 19.5.1995. Award was made on 19.10.1996. The National Commission accepted the award. The appellants filed an appeal before the Supreme Court. The Court by its order dated 16.1.2003 held that the Commission was required to decide the complaint on the basis of evidence and not by referring it to arbitrator. However, the Court observed that it would be open to the “respondent to enforce the award under the provisions of Arbitration and Conciliation Act, 1996. The respondent filed an application for execution. The appellant filed objections. The Single Judge of the High Court rejected the objections on the ground, *inter alia*, that the Supreme Court in its order dated 16.1.2003 did not grant liberty to challenge the award. It was also observed that the Arbitration and Conciliation Act, 1996 having been passed on 19.10.1996 would apply. On appeal, the Division Bench of the High Court directed the parties to seek clarification of the order dated 18.1.2003. Aggrieved, the appellants filed the present appeal.

Allowing the appeal and remanding the matter to the High Court, the Court

HELD: 1.1. A court of law has no jurisdiction to direct a matter to

A be governed by one statute when provisions of another statute are applicable. This Court merely directed the parties to enforce the said award which would mean that the same should be enforced in accordance with law. If a party to the lis has a right to question an award in terms of the Arbitration Act, 1940, no court has the requisite jurisdiction to deprive him therefrom. [16-G]

B *Skypak Couriers Ltd. etc. v. Tata Chemicals Ltd. etc.*, [2000] 5 SCC 294, relied on.

C 1.2. It is not a case where the parties accepted or proceeded on the basis that the Arbitration and Conciliation Act, 1996 would govern the arbitral proceedings. The reference admittedly was made prior to coming into force of the 1996 Act. The provisions contained in the 1940 Act would govern the proceedings arising out of the award and not the 1996 Act. Reference to the 1996 Act was a mere inadvertence on the part of this Court. The Single Judge of the High Court was also not correct in holding D that as no leave to challenge the award was granted by this Court, the appellants could not avail the remedies provided for under the 1940 Act.

[16-C; 18-F, G]

E 2. It is not in dispute that the question as regards applicability of the 1940 Act and the 1996 Act has not been gone into by this Court or the Division Bench of the High Court. The order of this Court dated 25.7.2003 would not be a bar for the appellants to approach this Court again; particularly in view of the fact that the Division Bench itself has refused to go into the said question and asked the parties to file an application before this Court for clarification. The principle of *res-judicata* F in a situation of this nature cannot be said to have application.

[18-H; 19-A]

Milkfood Ltd. v. GMC Ice Cream (P) Ltd., [2004] 7 SCC 288 and *U.P. State Sugar Corporation Ltd. v. Jain Construction Co. and Anr.*, [2004] 7 SCC 332, relied on.

G *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334 and *Furest Day Lawson Ltd. v. Jindal Exports Ltd.*, [2001] 6 SCC 356, referred to.

H 3. The High Court would consider the appellants' objections under Sections 30 and 33 of the 1940 Act by a bench having requisite

determination thereover on its own merit. [19-C]

Shakuntla Devi v. Kamla and Ors., (2005) 4 SCALE 21, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3100 of 2005.

From the Judgment and Order dated 8.2.2005 of the Delhi High Court in F.A.O. (OS) No. 177 of 2004.

K.T.S. Tulsi, Rishi Malhotra and Prem Malhotra with him for the Appellants.

S.V. Deshpande for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

This appeal is directed against a judgment and order dated 8.2.2005 passed by a Division Bench of the High Court of Delhi in F.A.O.(OS) No. 177 of 2004 whereby and whereunder the parties herein had been asked to approach this Court for seeking clarification of an order dated 16.1.2003 passed in Civil Appeal No. 1920 of 1997 which is to the following effect:

“The respondent herein filed a complaint before the National Consumer Dispute Redressal Commission, New Delhi (in short ‘the Commission’) for recovery of compensation from the appellants herein for deficiency in service. It appears when the matter came up before the Commission, the appellant and the respondent agreed for a consensual adjudication by an Arbitrator. Consequently, the commission referred the matter to retired judge of the High Court for arbitration. It is not disputed that the Arbitrator gave an Award and the same was remitted to the Commission. The Commission, in terms of the Award decided the complaint of the respondent. Aggrieved, the appellants have preferred this appeal.

We have heard learned counsel for the parties and are of the view that this case stand covered by a decision of this Court in *Skypak Couriers Ltd. v. Tata Chemicals Ltd.*, reported in [2000] 5 SCC 294, wherein it was held that the complaint filed under Section 22 of the Consumer Protection Act requires the Commission to decide the matter in accordance with the evidence, documents and the respective case of the parties including the submission made before it and not by

A referring the matter to an Arbitrator by giving an Award. In view of the said decision, this appeal deserves to be allowed. Consequently, the judgment under challenge is set aside. The appeal is allowed. There shall be no order as to costs.

B We may clarify that it will be open to the respondent to enforce the Award under the provisions of the Arbitration and Conciliation Act, 1996. Any amount deposited by the appellants shall be refunded to them forthwith."

The basic fact of the matter is not in dispute.

C The Appellant Nos. 2 and 3 herein had been working as stock brokers in the Delhi Stock Exchange Limited and governed by the rules and bye laws framed under the Securities Contract Regulations Act, 1956. In relation to trading in shares through the Appellants by Shri Ramesh Grower, father of the First Respondent, resulting in filing of a complaint by him through his mother Mrs. Amita Grower in National Consumer Disputes Redressal Commission which was marked as complaint No. 129 of 2004. The dispute at the request of the parties was referred for consensual adjudication by arbitration in terms whereof Shri Avadh Bihari Rohtagi, a former Judge of the Delhi High Court was appointed as the sole arbitrator in terms of an order dated 19.5.1995. He made an award on 19.8.96. The said award was accepted by the National Commission by an order dated 23.10.1996, the correctness whereof came to be questioned by the Appellants herein before this Court. By reason of an order dated 16.1.2003, the appeal preferred by the Appellants herein was allowed on the premise that the question of law arising therefrom is covered by the judgment of this Court in *Skypak Couriers Ltd. etc. v. Tata Chemicals Ltd. etc.*, [2000] 5 SCC 294. This Court, however, issued directions which have been noticed hereinbefore.

F The Respondents herein filed an execution petition wherein a warrant of attachment was issued by an order dated 5.2.2003. The Appellants herein filed their objections in respect of the award before the High Court of Delhi on 21.4.2003.

G An interlocutory application being I.A. No. 4 in Civil Appeal No. 1920 of 1997 for clarification of the said order dated 16.1.2003 was moved in this Court by the Appellants but in terms of an order dated 25.7.2003 it was observed that no order was required to be passed therein.

H A learned Single Judge of the High Court dismissed the objections to

the award filed by the Appellants herein as being not maintainable, *inter alia*, on the premise that this Court in its order dated 16.1.2003 did not grant any liberty to them to challenge the award of the sole arbitrator by filing an application/objections either under Sections 30 and 33 of the 1940 Act or under the 1996 Act. It was, however, also observed that the arbitration award dated 19.8.1996 having been passed by the arbitrator after enforcement of the 1996 Act, the 1996 Act shall apply. On an appeal preferred by the Appellants herein before the Division Bench, the impugned order was passed.

Mr. K.T.S. Tulsı, learned senior counsel appearing on behalf of the Appellants, has raised a short question in support of this appeal. The learned counsel would contend that keeping in view of the fact that the dispute was referred to the arbitrator by an order dated 19.5.1995 having regard to Section 21 of the 1996 Act, the provisions of the 1940 Act would apply. Strong reliance in this behalf has been placed on *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*, [2004] 7 SCC 288.

Mr. S.V. Deshpande, learned counsel appearing on behalf of the Respondent, on the other hand, would contend that the 1996 Act having come into force on 22nd August, 1996 and the award sought to be questioned having been passed on 19th August, 1996, the 1996 Act shall apply. The learned counsel in support of the said contention relied upon on the decisions of this Court in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334 and *Furest Day Lawson Ltd. v. Jindal Exports Ltd.*, [2001] 6 SCC 356.

The learned counsel would contend that in any event, the application for clarification filed by them having been dismissed by this Court, this appeal is not maintainable.

Sections 21 and 85 of the 1996 Act read as under:

“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.”

“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.

A (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;

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(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

It is not a case where the parties accepted or proceeded on the basis that the 1996 Act would govern the arbitral proceedings. The reference admittedly was made prior to coming into force the 1996 Act. The question before this Court in Civil Appeal No. 1920 of 1997 was as to whether the National Consumer Disputes Redressal Commission had the jurisdiction to refer the dispute to an Arbitral Tribunal, whether by consent of the parties or otherwise. In view of the decision of this Court in *Skypak Couriers Ltd.* (supra), it was held that it had no such jurisdiction. In the meantime, however, as the parties before the Commission had agreed to such a reference to the arbitrator, the arbitrator had entered into a reference and passed an award; this Court allowed the parties to enforce the said award. This Court did not have any jurisdiction to direct that the award should be enforced in terms of the provisions of the 1996 Act which was not applicable. This Court also could not have deprived the parties from a remedy which is otherwise available to them in law. It is true that this Court did not pass an order when such an application was filed by the Appellants herein being I.A. No. 4 in Civil Appeal No. 1920 of 1997 but the same was not necessary to do as the parties were at liberty to raise the said question before the High Court.

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A court of law has no jurisdiction to direct a matter to be governed by one statute when provisions of another statute are applicable. This Court merely directed the parties to enforce the said award which would mean that the same should be enforced in accordance with law. If a party to the lis has a right to question an award in terms of the 1940 Act, no court has the requisite jurisdiction to deprive him therefrom.

H

The decisions of this Court in *Thyssen Stahlunion GMBH* (supra) and *Furest Day Lawson Ltd.* (supra) whereupon Mr. Deshpande relied upon were

considered by a 3-Judge Bench of this Court in Milkfood Ltd. (supra). This Court upon taking into consideration a large number of decisions observed:

“45. “Commencement of an arbitration proceeding” and “commencement of a proceeding before an arbitrator” are two different expressions and carry different meanings.

46. A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons was charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedures required therefor. If the provisions of the 1940 Act apply, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common-parlance meaning given to the expression “commencement of an arbitration” which, admittedly, for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regards the procedure under the one Act or the other required to be followed. It is only in that limited sense the expression “commencement of an arbitration” qua “a notice of arbitration” assumes significance.”

Noticing that *Thyssen Stahlunion GMBH* (supra) and *Furest Day Lawson Ltd.* (supra) were concerned with the enforcement of a foreign award and further noticing that the former itself is an authority for the proposition that in relation to a domestic arbitration proceeding, commencement thereof shall coincide with service of request/notice, held:

“70. Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non obstante clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force

A of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act wherefor also necessity of reference to Section 21 would arise. The court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression "commencement of arbitration proceedings" must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from *Shetty's Constructions* are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore."

E In view of the fact situation obtaining therein this Court held that the 1940 Act shall apply and not the 1996 Act.

Milkfood Ltd. (supra) was followed by this Bench in *U.P. State Sugar Corporation Ltd. v. Jain Construction Co. and Anr.*, [2004] 7 SCC 332.

F We, therefore, are clearly of the opinion that the provisions contained in the 1940 Act would govern the proceedings arising out of the award and not the 1996 Act. Reference to the 1996 Act was a mere inadvertence on the part of this Court. The learned Single Judge of the High Court was also not correct in holding that as no leave to challenge the award was granted by this Court, the Appellants could not avail the remedies provided for under the 1940 Act.

H It is not in dispute that the question as regard applicability of the 1940 Act and the 1996 Act has not been gone into by this Court or the Division Bench of the High Court. The order of this Court dated 25.7.2003, in our opinion, would not be a bar for the Appellants to approach this Court again;

particularly in view of the fact that the Division Bench itself has refused to go into the said question and asked the parties to file an application before this Court for clarification. The principle of res judicata in a situation of this nature cannot be said to have an application. A

In *Shakuntla Devi v. Kamla and Ors.*, [2005] 4 SCALE 21 this Court has clearly laid down the law that principle of res judicata has certain exceptions, one of which would be a case where the earlier declaration obtained by the court is established to be contrary to an existing law. B

For the reasons aforementioned, this appeal succeeds which is allowed and the matter is remitted to the High Court for considering the Appellants' objections under Sections 30 and 33 of the 1940 Act by a bench having requisite determination thereover on its own merit. The parties are directed to bear their own costs. C

R.P.

Appeal allowed.