National Aluminium Co.Ltd vs M/S.Pressteel & Fabrications Pvt. Ltd. ... on 18 December, 2003

Equivalent citations: AIR 2005 SUPREME COURT 1514, 2004 AIR SCW 7500, 2004 (2) COM LJ 28 SC, (2004) 1 CTC 141 (SC), (2004) 2 COMLJ 28, 2004 (3) SRJ 471, 2004 (1) SLT 336, 2003 (10) SCALE 1062, (2004) 5 JT 582 (SC), 2004 (1) ARBI LR 67, 2004 (1) CTC 141, 2004 (14) INDLD 610, 2004 (2) MPLJ 400, 2004 (1) LRI 152, 2004 (1) SCC 540, (2004) ILR (KANT) (3) 2962, (2004) 1 MAD LJ 167, (2004) 2 MAH LJ 870, (2004) 2 PAT LJR 16, (2004) 1 ARBILR 67, (2004) 2 ANDHLD 17, (2003) 8 SUPREME 876, (2004) 1 RECCIVR 511, (2004) 1 JLJR 312, (2004) 2 CIVLJ 32, (2004) 1 CURCC 214, (2004) 98 CUT LT 167

Bench: N. Santosh Hegde, B.P. Singh

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           CASE NO.:
Appeal (civil)  2522 of 1999

PETITIONER:
National Aluminium Co.Ltd.

RESPONDENT:
M/s.Pressteel & Fabrications Pvt. Ltd. & Anr.

DATE OF JUDGMENT: 18/12/2003

BENCH:
N. Santosh Hegde & B.P. Singh.

JUDGMENT:
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J U D G M E N T SANTOSH HEGDE,J.

The original appeal from which this application arises for our consideration namely, C.A. No.2522/99 was preferred by the respondent herein questioning the unilateral appointment of an arbitrator made by the present applicant under the Arbitration Act, 1940. This Court in the said appeal after hearing the parties and with the agreement of the parties appointed Hon. Mr. Justice A.M. Ahmadi, former Chief Justice of India as the sole arbitrator. Before the said arbitrator both the parties by consent agreed that the proceedings should be governed by the provisions of the Arbitration & Conciliation Act, 1996. It is on that basis the learned arbitrator proceeded and gave a final award.

In this application, namely, I.A. No.2 in C.A. No.2522/99 made under sections 15, 17 and 29 of the Indian Arbitration Act, 1940 praying for modification of the said award made by the arbitrator, the applicant contends that since the dispute between the parties and the agreement of the parties to

refer such dispute to an arbitrator was prior to the coming into force of the 1996 Act, all further proceedings subsequent to the award should be governed by the 1940 Act and under the said Act an aggrieved party which wants to seek modification has to move the court which appointed the arbitrator, hence, the applicant contends that this is the only Court before which such an application is maintainable.

It is to be noted at this stage that the respondent in this application was appellant in C.A. No.2522/99. The said respondent being aggrieved by this award, itself has filed objections to the said award before the appropriate Civil Court under section 34 read with section 2(e) of the 1996 Act.

On the facts of this case, 2 primary questions arise for our consideration. They are : (i) whether the proceedings in which an impugned award has come to be made, are governed by the 1940 Act or the 1996 Act ? and (ii) whether the appropriate court for the purpose of challenging the said award or seeking modification of the said award is this Court, being the court which appointed the arbitrator or an appropriate court as contemplated under Section 34 of the 1996 Act read with section 2(e) of the said Act which contemplates said court to be the principal civil court of original jurisdiction ?

As stated above, the argument of learned counsel appearing for the applicant is that since this Court has appointed the sole arbitrator in the abovesaid civil appeal under the provisions of the 1940 Act, this Court alone has the jurisdiction to modify the impugned award. While the respondent in this application contends that the proceedings before the arbitrator admittedly having proceeded under the provisions of the 1996 Act by consent of parties, for the purpose of seeking modification of the award in such proceedings, it will only be a court contemplated under the 1996 Act.

It is an admitted fact that after the arbitrator was appointed by this Court, the parties by consent agreed before the arbitrator that the proceedings should go on under the provisions of the 1996 Act though the dispute arose prior to coming into force of this Act. Such a procedure is permissible under section 85(2)(a) of the 1996 Act. In the normal course having agreed to this procedure, the applicant should not be permitted to raise a plea at this stage that the provisions of the 1940 Act would apply for challenging or seeking modification of the award made under the 1996 Act. But the learned counsel placed reliance on two judgments of this Court in State of M.P. etc. v. M/s. Saith & Skeleton (P) Ltd. (1972 1 SCC 702) and M/s. Guru Nanak Foundation v. M/s. Rattan Singh and Sons (1981 4 SCC 634) wherein according to the applicant, this Court entertained an award for the purpose of making it a rule of the Court because it had appointed the arbitrator hence for the purpose of making an award a rule of the Court it can only be the court which appointed the arbitrator in view of the provisions of sections 2(e) and 14(2) of the 1940 Act.

Before considering the said argument of the applicant and the two decisions referred to hereinabove, it is necessary for us to note the contents of the Order whereby this Court had appointed Hon. Mr. Justice A.M. Ahmadi as the sole arbitrator. That order was made by this Court on 23.4.1999 in the abovesaid civil appeal and the relevant portion of the order reads thus :

> "Parties agree that Mr.Justice A.M. Ahmadi, former Chief Justice of this Court, be appointed as an Arbitrator. In view of this agreement between the parties we allow this appeal, set aside the judgment of the High Court and appoint Mr.Justice A.M. Ahmadi as sole Arbitrator. The fees and expenses of the Arbitrator shall be fixed by the Arbitrator in consultation with the parties. The learned Arbitrator is requested to conclude the proceedings within four months from the day he enters upon the Arbitration. No order as to costs."

It is to be noted that as per the above order, this Court has not retained any power or control over the arbitration proceedings while appointing the arbitrator by consent of parties, on the contrary, it seems this Court has merely recorded a submission of the parties as to their agreement in appointing a particular arbitrator. Even the time limit fixed therein is only a request to the learned arbitrator to conclude the proceedings within 3 months from the day he enters upon the arbitration and it is not a mandate in the sense that the failure to do so would have entitled the parties to approach this Court for suitable remedy. On facts, it is admitted that the learned arbitrator has extended the time suo motu a few times before making the award, without reference to this Court, therefore, it is clear on facts of this case that it is the arbitrator who had the control over the proceedings and not this Court. Therefore, in our opinion, the two judgments relied on by the applicant do not help the applicant because in those judgments this Court had held that while appointing an arbitrator this Court had retained control over the arbitral proceedings, therefore, under the provisions of the 1940 Act, it was this Court which could entertain an application for making the award a rule of the Court and not any other court.

The next question to be considered by us in this application is whether the dispute having arisen prior to the coming into force of the 1996 Act and the proceedings having continued under the provisions of the 1996 Act, would the provisions of the 1940 Act still be applicable for making an application for the modification of the award, and if so, before which court. First part of this issue need not detain us because of the admitted fact that by consent of the parties provisions of 1996 Act have been made applicable to the proceedings which is in conformity with Section 85(2)(a) of 1996 Act, hence, it is futile to contend that for the purpose of challenge to the Award 1940 Act will apply. Hence, we reject this contention. In regard to the forum before which the application for modification or setting aside the award is concerned, we find no difficulty in coming to the conclusion that in view of the provisions of section 34 read with section 2(e) of the 1996 Act that it is not this Court which has the jurisdiction to entertain an application for modification of the award and it could only be the principal civil court of original jurisdiction as contemplated under section 2(e) of the Act, therefore, in our opinion, this application is not maintainable before this Court.

Learned counsel for the applicant then contended that nearly 16 years have gone-by since the dispute between the parties arose and since the said dispute was first referred to an arbitrator. After the passage of such a long time, the applicant has been able to get only a partial award in his favour, but still he is unable to enjoy the fruits of that award also because of the proceedings initiated under section 34 of the 1996 Act. In this factual background, he prays that to do complete justice, we should consider the objections of both the parties to the said award and decide the same in these proceedings. Since we have come to the conclusion that the parties having agreed to the procedure

under the 1996 Act to be followed by the arbitrator for the post-award proceedings also, the provisions of the said Act would prevail and the said statute having specifically provided for a remedy under section 34 of the 1996 Act, it may not be proper for us to exercise our jurisdiction under Article 142 of the Constitution to adjudicate upon the objections filed by both the parties to the award. Learned counsel then prayed that at least the amount representing that part of the award which is in their favour should be directed to be deposited in the competent civil court by the respondents herein so that the applicant could enjoy the fruits of the said award during further proceedings. At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the court below so that the applicant can withdraw it on such terms and conditions as the said court might permit them to do as an interim measure. But then we noticed from the mandatory language of section 34 of the 1996 Act, that an award, when challenged under section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant.

However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.

For the reasons stated above, this application fails and the same is dismissed with a direction to the applicant to file its objections to the award before the court concerned and if the same are filed within 30 days from today, the delay in regard to the filing of the objections as contemplated under section 34 of the 1996 Act shall be condoned by the said court since the time consumed was in bona fide prosecution of the application in a wrong forum.

With the above observations, this application fails and the same is dismissed.