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## STATE OF WEST BENGAL

v.

AMRITLAL CHATTERJEE

SEPTEMBER 3, 2003

B

[V.N. KHARE, C.J. AND S.B. SINHA, J.]

*Arbitration Act, 1940:*

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*Ss. 5, 11 and 12—Application for removal of arbitrator and appointment of new arbitrator—High Court allowed the application and appointed new arbitrator—Meanwhile 1996 Act came into force—Order of High Court challenged as without jurisdiction on account of the new Act coming into force—Held, the earlier arbitrator was appointed prior to the new Act came into force—In view of s. 21 of the new Act, unless otherwise agreed by the parties, arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitrator is received by the respondent—In view of s. 85(2)(a) of the new Act, provisions of the 1940 Act would apply in relation to arbitration proceedings which commenced before the new Act came into force, unless otherwise agreed by the parties—The words “commencement of the arbitration proceedings” have not been defined in the Act—They have to be given their ordinary meaning having regard to the provisions contained in Chapter II thereof—Invoking the arbitration clause by a party and appointment of arbitrator pursuant thereto and in furtherance thereof are proceedings which are required to be taken under the 1940 Act—Such steps are necessary in terms of Chapter II thereof as is evident from the fact that even in terms of sub-section (i) of s. 20 of the Act, an application thereunder would be maintainable by a person who does not intend to proceed under Chapter II praying for filing of arbitration agreement in court—Furthermore, s. 85(2)(a) of the new Act may have to be construed keeping in view the provisions contained in s. 21 of the new Act—Arbitration and Conciliation Act, 1996—Ss. 21 and 85(2)(a).*

*Shetty's Construction Co. Pvt. Ltd. v. Konkan Railway Construction and Anr., [1998] 5 SCC 599, relied on.*

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*Thyssen Stahlunion, GMBH v. Steel Authority of India Ltd., [1999] 9 SCC 334, held inapplicable.*

*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, [2001] 6 SCC 356 and *Hari Shankar Lal v. Shambhunath Prasad and Ors.*, [1962] 2 SCR 720, referred to. A

*Words and Phrases:*

*“commencement of the arbitration proceedings”*—Meaning of in the context of Arbitration Act, 1940 and Arbitration and Conciliation Act, 1996. B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2477 of 1997.

From the Judgment and Order dated 22.8.96 of the Calcutta High Court in A.P. No. 40 of 1996. C

WITH

C.A. No. 2478 of 1997. D

Tapas Ray, Satish Vig, Chinmoy Khaladkar and S.K. Nandy for the Appellant.

Bhaskar P Gupta, Raj Kumar Gupta, Sheo Kumar Gupta and A.N. Bardiya for the Respondent. E

The following Order of the Court was delivered :

As a result of an agreement between the parties certain work orders were given to the respondent herein. It is alleged that the respondent completed the construction work on 3rd July, 1990. Subsequently, on 20th October, 1993, the respondent raised a demand on account of additional work that it carried out to the Executive Engineer. It appears that the demand was not accepted by the Executive Engineer and as a result thereof the respondent sought reference for adjudication of disputes by an arbitrator. F

Consequently on 7th September, 1994, the Chief Engineer of Irrigation and Waterways Directorate appointed one Shri K.P. Choudhary, former Secretary of the said Directorate as an arbitrator and referred the disputes raised by the respondent to the arbitrator. Since for a considerable period of time the arbitrator did not enter upon the reference, the respondent filed an application under Sections 5, 11 and 12 of the Arbitration Act, 1940 H

A for removal of the arbitrator and appointment of a new arbitrator in his place before a learned Single Judge exercising original jurisdiction before the Calcutta High Court. The learned Single Judge by an order dated 22nd August, 1996 allowed the said application and appointed Shri Sibaji Mitra, Bar-at-Law as an arbitrator by replacing Shri K.P. Choudhary. It is against the said order of the High Court, the appellant is in appeal before us.

B Shri Tapas Ray, learned senior counsel appearing for the appellant urged that the order passed by the learned Single Judge of the High Court was illegal, inasmuch as it was without jurisdiction on account of the fact that the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the new Act") came into force on 25.1.1996. We do not find any merit in the contention.

C It may be noticed that the earlier arbitrator was appointed by the Chief Engineer on 7th September, 1994 under the Arbitration Act, 1940. The new Act came into force with effect from 25.1.1996. Section 21 of the new Act provides that 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. Clause (a) of sub-section (2) of Section 85 of the new Act provides that notwithstanding repeal of the Arbitration Act, 1940, the provisions of the said enactment 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.

D On the arguments of the learned senior counsel for the appellant, the question that arises is as to when the proceedings commence.

E In *Shetty's Construction Co. Pvt. Ltd. v. Konkan Railway Construction and Another*, [1998] 5 SCC 599, it was held that the arbitration suit in respect of arbitration dispute shall be deemed to have commenced on the date on which the request for referring the dispute for arbitration is received by the respondent.

F In *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334, which was passionately relied upon by the learned senior H counsel for the appellant, has, in our view, no application to the facts of

the present cases. The Bench concluded :

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

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.”

There cannot be any doubt that invoking the arbitration clause by a party and appointment of arbitrator pursuant thereto and in furtherance thereof are proceedings which are required to be taken under the 1940 Act. Such steps are necessary in terms of Chapter II thereof as is evident from the fact that even in terms of sub-section (1) of Section 20 of the Act, an application thereunder would be maintainable by a person who do not intend to proceed under Chapter II praying for filing of arbitration agreement in court.

In *Thyssen Stahlunion GMBH* case (supra), this court was concerned with enforcement of a foreign award and execution thereof. In respect of a foreign award, the purpose of making an award rule of court, *i.e.* a decree, has been dispensed with. The said decision, therefore, has no application in the instant case. (See also *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, [2001] 6 SCC 356). Paragraphs 41 and 42 of *Thyssen Stahlunion GMBH* case (supra) read as under :

“41. Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have taken place in a foreign country. The provisions of Section

A 85(2)(a) insofar these apply to the Foreign Awards Act and the 1937 Act, would appear to be quite superfluous. A literal interpretation would render Section 85(2)(a) unworkable. Section 85(2)(a) provides for a dividing line dependent on “commencement of arbitral proceedings” which expression would necessarily refer

B as to when arbitral proceedings commence in the case of *Shetty’s Constructions Co. (P) Ltd. v. Konkan Rly. Construction*. Section 2(2) read with Section 2(7) and Section 21 falling in Part I of the new Act make it clear that these provisions would apply when the place of arbitration is in India, *i.e.*, only in domestic proceedings.

C There is no corresponding provision anywhere in the new Act with reference to foreign arbitral proceedings to hold as to what is to be treated as “date of commencement” in those foreign proceedings. We would, therefore, hold that on a proper construction of Section 85(2)(a) the provision of this sub-section must be confined to the old Act only. Once having held so it could be said that Section 6 of the General Clauses Act would come into play and the foreign award would be enforced under the Foreign Awards At. But then it is quite apparent that a different intention does appear that there is no right that could be said to have been

E acquired by a party when arbitral proceedings are held in a place resulting in a foreign award to have that award enforced under the Foreign Awards Act.”

“42. We, therefore, hold that the award given on 24-9-1947 .... when the arbitral proceedings commenced before the Arbitration and Conciliation Act, 1996 came into force on 25-1-1996, would be enforced under the provisions of the Arbitration Act, 1940. ....”

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Mr. Ray would contend that Section 21 of the 1996 Act would not be applicable in the instant case. He would submit that the words “in relation to arbitral proceedings” which commenced for the purpose of the 1940 Act must be given the same meaning as contained in Rule 3 of the First Schedule appended thereto.

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Rule 3 of the First Schedule of the 1940 Act reads thus :

H “The arbitrators shall make their award within four months after

entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.” A

The said rule was enacted for a different purpose. The words employed therein are “enter on the reference”. In *Hari Shankar Lal v. Shambhunath Prasad and Others*, [1962] 2 SCR 720 whereupon Mr. Ray relied upon, a four-judge Bench of this Court held that the words “enter on the reference” occurring in the said rule are not synonymous with the words “to act” which is more comprehensive and of a wider import. B

Rule 3 of the First Schedule to the 1940 Act imposes a duty on the arbitrators to make their award within one or other of the three alternative period mentioned therein. C

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. D E

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. F

For the aforesaid reasons, we do not find any merit in the appeals. They are, accordingly, dismissed. The interim order stands vacated. There shall be no order as to costs. G

The arbitrator is directed to give award within four months from the date of service of this order upon him. It is understood that the parties shall cooperate before the arbitrator and shall not seek unnecessary adjournments.

R.P.

Appeals dismissed.