



IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Arbitration Appeal No. 10 of 2016.

Reserved on : 5th April, 2023.

Date of Decision : 12th April, 2023.

Graviss Foods Private Limited

...Appellant.

Versus

M/s Ice Cream Garden & Anr.

....Respondents.

Coram:

The Hon'ble Ms. Justice Sabina, Acting Chief Justice.

The Hon'ble Mr. Justice Satyen Vaidya, Judge.

Whether approved for reporting?¹ Yes.

For the Petitioner:

Mr. K.D. Sood, Senior Advocate,
with Mr. Rahul Gathania, Advocate.

For the respondents:

Mr. Mohit Thakur, Advocate.

Satyen Vaidya, Judge.

By way of instant appeal, the appellant has assailed order dated 18.04.2016 passed by learned Single Judge in OMP No. 221 of 2015 in Civil Suit No. 16 of 2015, whereby the application of appellant filed under Section 8 of the Arbitration

¹ Whether reporters of the local papers may be allowed to see the judgment?

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and Conciliation Act, 1996 (for short "1996 Act") has been rejected.

2. Brief facts necessary for adjudication of this appeal are that respondents herein have filed a suit for recovery of Rs.60,00,000/- on account of damages against the appellant herein. The suit was registered as Civil Suit No. 16 of 2015 in this Court. The appellant/defendant filed an application under Section 8 of 1996 Act in Civil Suit No. 16 of 2015 seeking reference of the matter to arbitration, basing its claim on an arbitration clause allegedly existing in an agreement between the parties. Respondents/plaintiffs resisted the application and finally learned Single Judge dismissed the application of appellant/defendant and held the suit to be maintainable.

3. Respondents/plaintiffs at the out set have challenged the maintainability of instant appeal. As per respondents/plaintiffs, order refusing to refer the parties to Arbitration under Section 8 of 1996 Act has been made appealable w.e.f. 23.10.2015, whereas the application under

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Section 8 of 1996 Act was filed by the appellant/defendant on 10.07.2015, therefore, the court proceedings out of which the instant appeal has arisen, had commenced prior to inclusion of right of appeal. By virtue of Section 26 of Act No.3 of 2016, the amendments made in 1996 Act have been made applicable prospectively.

4. Learned Senior Counsel representing the appellant/defendant has contested the plea of respondents/plaintiffs by contending that the impugned order was passed by learned Single Judge on 18.04.2016 i.e. after coming into force of Amendment Act No. 3 of 2016. As per his contention, the right to file an appeal had accrued in favour of appellant/defendant on 18.04.2016 i.e. after commencement of Amendment Act No. 3 of 2016 and thus, the appellant/defendant had a right to maintain the instant appeal.

5. We have heard Mr. K.D. Sood, Senior Advocate, for the appellant/defendant and Mr. Mohit Thakur, Advocate, for the

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respondents/plaintiffs and have also gone through the entire record carefully.

6. It is not in dispute that the appellant/defendant filed an application under Section 8 of 1996 Act in Civil Suit No. 16 of 2015 on 10.07.2015.

7. Before 23.10.2015, there was no provision in 1996 Act under which an appeal could be filed against an order refusing reference of matter to Arbitration, passed under Section 8 of 1996 Act. It was after coming into force of Arbitration and Conciliation Amendment Act 2015 that an order refusing to refer the matter to Arbitration under Section 8 of 1996 Act was made appealable under Section 37 (1)(a) of Act *ibid.*

8. Section 26 of Amendment Act of 3 of 2016 reads as under:-

“26. Nothing contained in this Act shall apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in

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relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

9. On the strength of aforesaid provisions of Amendment Act No. 3 of 2016, the respondents/plaintiffs contend that the right to appeal under Section 37(1)(a) of 1996 Act is not available to the appellant/defendant as the proceedings had commenced on 10.07.2015, when an application under Section 8 of 1996 Act was filed in Civil Suit No. 16 of 2015. Section 26 of Amendment Act No. 3 of 2016 clearly made the amendments incorporated in the principal Act prospective in nature and would apply only to those arbitration and court proceedings, which have commenced after coming into force of Act No.3 of 2016 w.e.f. 23.10.2015.

10. Learned counsel for the respondents/plaintiffs to support his arguments has placed reliance upon a judgment passed by the Hon'ble Supreme Court in a case titled as ***Board of Control For Cricket in India vs. Kochi Cricket Private Limited & Ors., reported in (2018)6 SCC 287.*** He has drawn

our attention to para 39 of above noted judgment which reads as under:-

“39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings - arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, “arbitral proceedings” having been subsumed in the first part cannot re-appear in the second part, and the expression “in relation to arbitral proceedings” would, therefore, apply only to Court proceedings which relate to the arbitral

proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force."

11. In **Kochi Cricket's case (supra)** Hon'ble Supreme Court while considering the question as to construction of Section 26 of Act No.3 of 2016, observed as under:-

"36. All learned counsel have agreed, and this Court has found, on a reading of Section 26, that the provision is indeed in two parts. The first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The question is what exactly is contained in both parts. The two parts are separated by the word 'but', which also shows that the two parts are separate and distinct. However, Shri Viswanathan has argued that the expression "but" means only that there is an emphatic repetition of the first part of Section 26 in the second part of the said Section. For this, he relied upon the Concise Oxford Dictionary on Current English, which states:

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“introducing emphatic repetition; definitely (wanted to see nobody, but nobody)”.

Quite obviously, the context of the word “but” in Section 26 cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

37. *What will be noticed, so far as the first part is concerned, which states-*

“Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree...”

is that: (1) “the arbitral proceedings” and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is “to” and not “in relation to”; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, “...but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act” makes it clear that the expression “in relation to” is used; and the expression “the” arbitral proceedings and “in accordance with the provisions of Section 21 of the principal Act” is conspicuous by its absence.

38. *That the expression “the arbitral proceedings” refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:*

“Conduct of Arbitral Proceedings”

*The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. Section 29A of the Amendment Act provides for time limits within which an arbitral award is to be made. In *Hitendra Vishnu Thakur v. State of Maharashtra* (1994) 4 SCC 602 at page 633, this Court stated:*

"26....(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary

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implication.” It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29A of the Amendment Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.”

In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable “in relation to” arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings “in relation to” arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words “in relation to the arbitral proceedings” in the second part are not controlled by the application of Section 21 of the 1996 Act.”

After the aforesaid observations, it was specifically held that “the scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act and to court

proceedings which have commenced on or after the Amendment Act came into force.”

12. Thus, there remains no doubt as to the construction of Section 26 of Act No. 3 of 2016. Undoubtedly, the amendment carried in principal Act by virtue of Act No. 3 of 2016 including amendment in Section 37 thereof, are prospective and by necessary implications will apply to court proceedings which have commenced on or after the Amendment Act came into force.

13. The question, thus, arises whether for the purpose of present appeal, the court proceedings will be taken to have commenced on 10.07.2015 i.e. on the date of filing of application under Section 8 of 1996 Act or on the date, when impugned order was passed?

14. In our considered view, there is no escape from the conclusion that the date of commencement of court proceedings, in the instant case shall be 10.07.2015 when the application under Section 8 of 1996 Act was filed by the

appellant/defendant in Civil Suit No.16 of 2015, for the reason that the appeal is continuation of original proceedings. Reference in this regard can be made to para-13 of the judgement passed by Hon'ble Supreme Court in ***Malluru Mallappa (dead) through Legal representatives vs. Kuruvathappa and others***, reported in ***(2020)4 SCC 313***, which read as under:-

"14. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see: Santosh Hazari v.

Purushottam Tiwari (Deceased) By Lrs. (2001)3 SCC 179, Madhukar and others v. Sangram and Others (2001)4 SCC 756, B. M. Narayana Gowda v. Shanthamma (Dead) By Lrs. and Another(2011) 15 SCC 476, H. K. N. Swami v. Irshad Basith (Dead) By Lrs. (2005)10 SCC 243 and M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar (1980) 4 SCC 259."

15. Viewed from another angle, there is no difficulty to uphold the contention of respondents/plaintiffs as the appeal is a right created by a statute. Section 37(1)(a) was incorporated in the principal Act w.e.f. 25.10.2015, meaning thereby that before the said date no right existed to file an appeal against the order refusing to refer the parties to arbitration under Section 8 of the 1996 Act.

16. In view of the interpretation provided to Section 26 of the Amendment Act 6 of 2016 by the Hon'ble Supreme Court in ***Kochi Cricket's case (supra)***, the appellant/defendant had no right to file an appeal at the time of commencement of court proceedings on 10.07.2015.

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17. In the light of above discussion, the instant appeal filed by the appellant/defendant is held to be not maintainable and is accordingly dismissed.

(Sabina)
Acting Chief Justice

(Satyen Vaidya)
Judge

12th April, 2023.
(jai)

High Court of HP