

THE HON'BLE SRI JUSTICE K.C. BHANU
AND
THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

-
C.M.A.No.32 of 2008

-
-
JUDGMENT: *(per Hon'ble Sri Justice M. Seetharama Murti)*

The unsuccessful petitioners had preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 assailing the order dated 02.01.2007 in O.P.No.2127 of 2004 of the learned II Additional Chief Judge, City Civil Court, Hyderabad.

2. We have heard the submissions of the learned counsel for the petitioners/appellants/Railways and the learned counsel for the 1st respondent-claimant. The 2nd respondent is the sole Arbitrator.

3. In this appeal, the parties shall hereinafter be referred to as the petitioners and the 1st respondent for convenience and clarity.

4. The introductory facts, in brief, are as follows: 'The Union of India represented by its Divisional Railway Manager, Works (BG), Secunderabad accepted the 1st respondent's tender for the work order of construction of Type V quarters (D/S) for IRISSET Staff at Secunderabad. The total value of the contract was Rs.1,34,615/-. The work was to be completed by 11.07.1987. The 1st respondent is the Contractor. The work was completed though not within the stipulated time. On account of the disputes that had arisen between the parties, the 1st respondent had opted for the resolution of the claims/disputes through arbitration. This Court, vide orders dated 01.08.2002 passed in A.A.No.38 of 2002 had appointed the 2nd respondent as the learned Arbitrator to resolve the disputes between the parties arising out of the contract Work Order

No.45/C/MG/HYB, Dated 23-1-1987. Before the learned Arbitrator, the petitioners have raised preliminary objections in regard to lack of jurisdiction and the non applicability of the provisions of the Arbitration and Conciliation Act, 1996 ('the new Act', for brevity). The learned Arbitrator while overruling the said preliminary objections had proceeded to decide the claims on merits and had passed the award and had awarded an amount of Rs.7,04,797/- as per the 'summary of claims and award' annexed to the award. Aggrieved of the award, the petitioners had preferred the aforementioned O.P before the Court below. On merits, the Court below had dismissed the said OP. Therefore, the aggrieved petitioners are before this Court.

5. The learned counsel for the petitioners would first contend as follows: 'The claims were made by the 1st respondent even before the new Act has come into force. Admittedly, the 1st respondent had addressed a letter dated 10.01.1990 while referring to the previous letters and requested to consider the whole issue and pass necessary orders for refund of penalty imposed upon him or otherwise refer the claims for arbitration in terms of General Conditions of Contract. The contents of the said letter and other correspondence disclose that a request for the dispute to be referred to arbitration was received by the petitioners/Railways long before the new Act has come into force. Therefore, it follows that the arbitral proceedings in respect of the said dispute had commenced long before the new Act has come into force. However, after protracted correspondence and inordinate delay, the 1st respondent had filed arbitration application in the year 2002 before this court by invoking the provisions of the new Act and sought for appointment of an arbitrator and that this Court by its orders dated 01.08.2002 had appointed the 2nd respondent as the learned arbitrator. Therefore, the very appointment of the learned Arbitrator under the provisions of the new Act is not legal and tenable as the arbitral

proceedings had commenced much prior to the coming into force of the new Act i.e., on the date the request for referring the claims/dispute to arbitration was submitted by the 1st respondent and was received by the petitioners. Since the arbitral proceedings had commenced even before the new Act has come into force and in view of the provisions of Sections 21 and 85 of the new Act, the provisions of the Arbitration Act, 1940 (Act 10 of 1940), i.e., the old Act are only applicable and, that therefore, the very appointment of an arbitrator pursuant to an application filed by the 1st respondent invoking the provisions of the new Act is untenable and not legally valid. The arbitrator who was appointed by this Court had lacked jurisdiction to resolve the disputes. The award passed by the learned Arbitrator appointed under the new Act by following the procedure under the new Act is an award passed without jurisdiction and for all the reasons, the award is liable to be set aside.'

5.1 In support of the said contentions, reliance was placed on the decisions in (i) **Shetty's Constructions Co. Pvt. Ltd., v. Konkan Railway Construction and another**^[1]; (ii) **Milkfood Ltd., v. GMC Ice Cream (P) Ltd.**,^[2]; (iii) **U.P. State Sugar Corporation Ltd., v. Jain Construction Co. and another**^[3]; (iv) **Dhirubai D. & Company, Engineers & Contractors, Secunderabad v. Nizam Sugar Factory Limited, Hyderabad**^[4]; and (v) a Division Bench Judgment of this Court dated 01.05.2007 in CMA.No.2625 of 2003 between **M/s. Standard Industrial Engineering Company., v. A.P. Power Generation Corporation Limited and others.**

5.2 Per contra, the learned counsel for the 1st respondent while neither disputing the facts nor the ratios in the precedents would contend as follows: - 'In the case on hand, the Arbitrator was appointed by this Court and not by the parties directly. As the Arbitrator was appointed

with the intervention of the Court, the proceedings commence from the date of the appointment of the Arbitrator but, not from the service of notice of the claims as in the case of appointment of an Arbitrator with the consent of the parties. Since the Arbitrator was appointed by a competent Court and as the said order appointing the Arbitrator had become final, the law as on the date the Arbitrator was appointed and the law as on the date the Arbitrator had entered the reference and passed the Award has to be applied. The order appointing the Arbitrator was allowed to become final; and, the said order was challenged only before the learned Arbitrator and the learned Arbitrator had ruled on his jurisdiction holding that the contention of the Railways that the Tribunal lacked jurisdiction is not tenable. The said finding of the learned arbitrator was confirmed by the court below. Therefore, there is no merit in the contentions of the petitioners/Railways on the aspect of lack of jurisdiction or the non-applicability of the provisions of the new Act.’ In support of the contentions, reliance was placed on the decision in **Sudhir G.Angur and others v. M.Sanjeev and others**^[5]. He would further contend that on account of the Tribunal following the provisions of the new Act, no prejudice has been caused to the Railways and that the Award need not be set aside in the absence of the Railways showing that any prejudice has been caused.

5.3 In reply, the learned counsel for the petitioners/Railways would contend as follows: ‘The application under Section 11 of the Arbitration and Conciliation Act, 1996 was filed before the learned Chief Justice of High Court of Andhra Pradesh and the said application was allowed by a learned Designated Judge. In the decision in **Konkan Railway Corporation Ltd., & Anr. Vs. Rani Construction Pvt. Ltd., [(2002) 2 SCC 388]**, the Constitution Bench of the Supreme Court has held that the Order passed by the learned Chief Justice or his designate is not an order passed while exercising judicial function and that

therefore, it is not open to challenge under Article 136 of the Constitution. In view of the above law laid down, the contention of the 1st respondent that the order appointing an arbitrator has become final is untenable. As the parties by then were controlled by the ratio in the above decision, which is holding the field, the petitioners are entitled to avail the remedies in accordance with the ratio in said decision of the Constitution Bench and raise the issue of jurisdiction before the learned arbitrator. Section 16 of the new Act also permits such a course.

6. Therefore, the first and important vital issue is as under: 'Whether the appointment of the learned Arbitrator under the provisions of the new Act is itself not legal and tenable? Whether the provisions of the new Act have no application as contended by the Railways? And, if so, whether the award was one passed without jurisdiction? And, if so, whether the Award passed by the learned Arbitrator by following the procedure under the new Act instead of following the procedure under the old Act is liable to be set aside being unsustainable, invalid and not legal under facts and in law?'

6.1 In the light of the facts and the contentions of the learned counsel for the Railways and also the contentions of the learned counsel for the 1st respondent, it is necessary to first advert to the provisions of law and the ratios in the precedents relied upon by the learned counsel for the petitioners/Railways.

Section 85 of the new Act which deals with 'Repeal and Savings' 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) **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) 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.

Section 16 of the new Act, which deals with 'competence of the Arbitral Tribunal to rule on its jurisdiction' reads as under:

16. Competence of Arbitral Tribunal to rule on its jurisdiction.—

(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the Arbitral proceedings.

(4) The Arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The Arbitral Tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the Arbitral Tribunal takes a decision rejecting the plea, continue with the Arbitral proceedings and make an Arbitral award.

(6) A party aggrieved by such an Arbitral award may make an application for setting aside such an Arbitral award in accordance with section 34.

Section 21 of the new Act, which deals with the 'commencement of the arbitral proceedings', reads as follows:

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.

In **Shetty's Constructions Co. Pvt. Ltd., v. Konkan Railway Construction and another (1 supra)** the test to determine as to which Act would apply was considered. The Supreme Court having referred to sub-section (2)(a) of Section 85 had held as follows: - **'A mere look at sub-section (2)(a) of Section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act.'** The Supreme Court having also considered the provision of Section 21 of the new Act had held as follows: - **'Therefore, it must be found out whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26.01.1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of Section 21 and Section 85(2)(a) of the new Act, it must be held that these proceedings will be governed by the old Act.'**

In the case of **Milkfood Ltd., (2 supra)** the Supreme Court

having referred to various precedents had held that if the arbitral proceedings commenced for the purpose of the applicability of the 1940 Act in September 1995 the question of adopting a different procedure laid down under 1996 Act would not arise. Having regard to the facts and the law laid down, the Supreme Court concluded in that case that the 1940 Act shall apply and not the 1996 Act.

In **U.P. State Sugar Corporation Ltd.**, (3 supra) the facts of the reported case show that the disputes and differences had arisen between the parties in respect of an agreement entered into on or about 11.04.1988 and the respondents therein had filed an application under Section 20 of the 1940 Act in the Court of the Civil Judge, Dehradun for appointment of an Arbitrator. In this factual background, the Supreme Court having referred to the above two decisions (1 and 2 supra) and also the decisions in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd* [(1999) 9 SCC 334]; *Fuerst Day Lawson Ltd., v. Jindal Exports Ltd.*, [(2001) 6 SCC 356 and *State of W.B v. Amritlal Chatterjee* [(2003) 10 SCC 572] had held that in respect of the arbitral proceedings that commenced before coming into force of the 1996 Act, the provisions of the 1940 Act shall apply.

In **Dhirubai D. & Company** (4 supra) the facts show that arbitral proceedings had commenced under 1940 Act before the coming force of the 1996 Act. In view of the provision of Section 21 of the new Act that arbitral proceedings shall commence on the date on which the request for referring the dispute to arbitration is received by the other party, this Court held that the resolution of the dispute between the parties by the Tribunal under 1940 Act is not improper though one of the parties appointed the arbitrator in the year 1997.

In **Union of India v. G.G.Satyanarayana and others** [2002(5) ALD 810 (DB)] the facts show that the respondent had applied for

arbitration before the commencement of the new Act, but the arbitrators expressed their willingness only on 24.04.1997 and hence, this Court held that there is no scope for commencement of proceedings prior to the commencement of the new Act, since the Arbitrators had expressed their willingness only on 24.04.1997. In the very decision, the Division Bench of this Court having referred to the provisions under Section 21 and Section 85(2)(a) of the new Act had held that the provision under Section 85(2)(a) applies only in such cases where the proceedings have already been commenced by the date the new Act has come into force.

In a Division Bench Judgement of this Court dated 01.05.2007 in CMA.No.2625 of 2003 between **M/s. Standard Industrial Engineering Company v. A.P. Power Generation Corporation Limited and others** the question that was considered was this: – ‘Whether the arbitral proceedings commenced prior to 26.01.1996 or thereafter?’ In this cited case, this Court having referred to the decisions of the Supreme Court which are referred to supra and the other decisions of the Supreme Court and having regard to the fact that the suit was instituted for appointment of an arbitrator prior to the commencement of the new Act, had held that the arbitration proceedings had commenced prior to the commencement of the new Act, though the arbitrator was appointed after the commencement of the new Act.

6.2 The basic facts, which are relevant for consideration on this issue, are as follows: The parties entered into a contract (exhibit C2) on 23.01.1987. The agreed date for commencement of the work was 12.01.1987 and the agreed date for completion of the work was 11.07.1987. Admittedly, the site selected for the work was not clear and free from obstructions. As per the case of the 1st respondent, there was a PWD pipeline passing across the building for a length of 55 mts besides a big tree that came in the way of the proposed stair case and that there was shortage of electricity supply as well and that

considerable time was taken for removal of the same, which are major obstructions and that the site was not handed over till 21.07.1987, i.e., till ten days after the expiry of the agreement period and that therefore, the 1st respondent had addressed a letter (exhibit C3) dated 11.07.1987 for grant of extension of time till 31.12.1987 and that by (exhibit C5) letter dated 09.10.1987 time was extended, however, with penalty. As per the further case of the 1st respondent, a further letter (exhibit C7) dated 30.11.1987 was addressed raising protest and stating that there is no justification in imposing the penalty and that the officer concerned of the Railways had addressed a letter that the penalty amount would be refunded in case the 1st respondent completes the work by 31.03.1988 and the work was completed by 31.12.1988 and that the defects pointed out were rectified and correspondence was exchanged in that regard. The 1st respondent received the final bill amount on 10.01.1990; but, made a protest by letter (exhibit C15) dated 10.01.1990. However, the penalty was not refunded. As the penalty amount was not refunded, the 1st respondent had addressed the said letter dated 10.01.1990 (exhibit C15). The 1st respondent had also submitted a qualified no claim certificate dated 07.10.1992 putting forward his claims. The 1st respondent having addressed a letter (exhibit C17) dated 23.11.1992 and a telegram (exhibit C18) dated 19.06.1998 had finally addressed a letter (exhibit C20) dated 17.08.2001 requesting for appointment of an arbitrator for resolving the disputes. As there was no response, the 1st respondent approached this court and had filed A.A.No.38 of 2002 for appointment of an arbitrator.

6.3 Be it noted that as on the date the learned arbitrator was appointed, the decision of the Constitution Bench of the Supreme Court in **Konkan Railway Corporation Ltd., & Anr. Vs. Rani Construction Pvt. Ltd., [(2002) 2 SCC 388]** is controlling the rights of the parties and

therefore, the order appointing the arbitrator was by then not open to challenge under Article 136 of the Constitution of India; nevertheless, the aggrieved party is having liberty to raise the issue of jurisdiction before the learned Arbitrator and the learned Arbitral Tribunal by virtue of the provision of section 16 of the New Act is having 'competence to Rule on its Jurisdiction'. Therefore, and in view of the law that was governing the rights of the parties at the relevant time, the contention of the 1st respondent that the order of this Court appointing the arbitrator has become final is devoid of merit. Thus, the order of this Court appointing the Arbitrator had not attained finality as the order appointing an arbitrator is not an order passed while exercising judicial functions as per the law laid down by the Constitution Bench of the Supreme Court, which was applicable at that time. Therefore, the first contention of the 1st respondent that the arbitrator was appointed by this Court under the provisions of the new Act and that since the arbitrator was appointed with the intervention of the Court, the provisions of the new Act only would apply cannot be countenanced. Be it noted that availing the liberty that was available to the Railways, a jurisdictional issue was raised before the learned Arbitrator and the learned Arbitrator having regard to the facts and the legal position had dealt with this objection and had over ruled the said objection. But, the fact remains that letters making requests for claims were addressed; and, even before the new Act has come into force a request also was made to refer the claims/dispute for arbitration in terms of the General Conditions of contract. Apart from the other letters, the 1st respondent had addressed a letter dated 10.01.1990; and, in that letter the 1st respondent had requested to consider the whole issue and pass necessary orders for refund of the penalty imposed upon him or otherwise refer the claims for arbitration in terms of General Conditions of Contract. Thus, a request for the dispute to be referred to arbitration was made by the 1st

respondent and was received by the petitioners/Railways long before the new Act has come into force. As per Section 21 of the Act, which is extracted supra, 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 opposite party. Therefore, from the facts of the case, it is clear that the arbitral proceedings in respect of the subject dispute had commenced even before the coming into the force of the new Act as the request to refer to arbitration was received by the petitioners long before the new Act came into force.

6.4 In the decision relied upon by the learned counsel for the 1st respondent namely the decision in **Sudhir G.Angur** (5 supra) the Hon'ble Supreme Court while dealing with a case, the facts of which are governed by the Mysore Religious and Charitable Institutions Act, had held as follows: -

'In our view, Mr. G.L. Sanghi is also right in submitting that it is a law on the date of trial of the suit which is to be applied. In support of this submission, Mr Sanghi relied upon the judgment in the case of *Shiv Bhagwan v. Onkarmal* [AIR 1952 Bom 365] wherein it has been held that no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well settled that all procedural laws are retrospective unless the legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repealed. It could not be denied that now the Court has jurisdiction to entertain this suit.'

In our well considered view, this decision has no application to the facts

of the present case as the change in law in the present context is in regard to substantive law but, not procedural law. Even the new Act by virtue of the provision of Section 85(2) (a), which deals with 'Repeal and Savings', saved the old enactment in relation to arbitral proceedings, which commenced before the new Act came into force. Further, the provision of Section 21, which is extracted supra, lays down that the arbitral proceedings in respect of a particular dispute commence on the date on which a request for the dispute to be referred to the arbitration is received by the opposite party. In the case on hand, the request was sent by the 1st respondent and was received by the petitioners long before the new Act had come into force, as already stated supra. The Railways, which is the answering respondent before the Tribunal, did not give consent for the proceedings under the new Act and had contended that the Tribunal had lacked jurisdiction. Therefore, the Railways had not waived its defence/contest on these issues. Be it noted that when the law specifically declares that a dispute is governed by a particular statute and when the facts of the case show that the dispute is governed by the old Act, the appointment of the arbitrator under the new Act and the resolution of the dispute by the learned Arbitrator by invoking the provisions of the new Act is not legal and valid. Further, when the Award is not in compliance with the provisions of the statute, which is applicable, then the award can be said to be contrary to the substantive provisions of the law and is, therefore, patently illegal. Therefore, the award and the order of the Court confirming the award of the Tribunal are liable to be set aside being opposed to "fundamental policy of Indian law" in view of the precedential guidance in **Oil And Natural Gas Corporation Limited v. Western Geco International Limited** [(2014)9 SCC 263]. Coming to the contention of the 1st respondent that by following the procedure under the new Act, no prejudice has been caused to the Railways, what is to be noted is that there is a vast difference between the provisions of the two enactments. Under the old law, there

is no provision for awarding interest whereas under the new Act there is a provision under Section 31(7) in regard to award of interest by the Tribunal. Under the new Act, the Tribunal is obliged to state the reasons upon which its Award is based unless the parties have agreed that no reasons are to be given. Under the old Act, the Award is to be made a Rule of the Court. There is no such requirement under the new Act. Even the provisions regarding the statutory right of appeal under the two enactments are different and the appeals under the old Act can only be entertained against the types of orders specifically mentioned in Section 39 thereof and on the settled principles based on the decisions of the Supreme Court rendered over the years having regard to the provisions of the old Act. Hence, the Railways need not show that any prejudice has been caused to it on account of the fact that the Arbitrator invoked the provisions of the new Act. Therefore, the submissions made on behalf of the 1st respondent in support of the contention that the Arbitral Tribunal did not lack jurisdiction and the distinction sought to be placed on the ratios in the decisions of the Supreme Court, cannot be accepted. The new Act has come into force on 22.08.1996 is not in dispute. In the case on hand, the 1st respondent/claimant had moved the request for consideration of the claims and reference of the dispute to arbitration well before the new Act came into force. Since the request for the claims and reference to arbitration was made and was received long before the new Act came into force, by applying the test laid down by the Supreme Court and having regard to the provisions of law referred to supra, it must be held that the *lis/disputes* will be governed by the provisions of the old Act. Therefore, it follows that the petitioners contentions that the appointment of the learned Arbitrator under the provisions of the new Act is itself not legal and tenable and that the provisions of the new Act have no application and that the award was passed without jurisdiction and hence, the Award passed by the learned

Arbitrator by following the procedure under the new Act instead of following the procedure under the old Act is liable to be set aside are all sustainable under facts and in law. The vital questions under this issue are accordingly answered in favour of the petitioners/Railways (appellants herein) and against the 1st respondent.

7. Be it noted that neither the Tribunal nor the Court below had considered the vitally important factual aspects, the provisions of law and the ratios in the precedents in the correct prospective and that both the Tribunal and the court below had failed to properly and correctly appreciate the jurisdictional issue. In the light of the fact that we have arrived at a conclusion that the provisions of the old Act would apply and not the new Act and that the appointment of the Arbitrator is not legal and that the Arbitral Tribunal lacked jurisdiction and that, therefore, the Award is liable to be set aside, there is no need to deal with the other issues concerning the merits of the claims that were awarded by the learned Arbitral Tribunal and confirmed by the Court below *vide* the impugned order.

8. Having regard to the reasoned discussion coupled with findings *supra*, we hold that the Award passed by the Arbitral Tribunal as well as the order impugned are liable to be set aside.

9. Accordingly, the appeal is allowed and the impugned order and the Award of the Tribunal are set aside. There shall be no order as to costs. Since the Award is set aside having regard to the law concerning jurisdictional issue without going into the merits of the claims, it is needless to say that it would be open to the 1st respondent/claimant to take appropriate legal proceedings and make a fresh request for appointment of an Arbitrator under the provisions of the Old Act to resolve the dispute in regard to the claims on merits and in accordance with the procedure established by law. It is needless to

mention that in case, any such request is made to the Court concerned, the same shall be considered on its merits after giving an opportunity of hearing to the Union of India and other respondent/s.

Miscellaneous petitions pending, if any, in this appeal shall stand closed.

K.C. BHANU, J

M. SEETHARAMA MURTI, J

18th June 2015
RAR

[\[1\]](#) 1998(5) SCC page 599

[\[2\]](#) (2004) 7 Supreme Court Cases 288

[\[3\]](#) (2004) 7 SCC 332

[\[4\]](#) 2010(1) ALT 721 (DB)

[\[5\]](#) (2006)1 SCC 141