
(2015) 06 AP CK 0092

In the Andhra Pradesh High Court

Case No : C.M.A. Nos. 974 and 227 of 2011

General Manager, Central Organisation for Railway
Electrification and Others

APPELLANT

Vs

Y. Parthasarathy and Others

RESPONDENT

Date of Decision : 18-06-2015

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(4)
Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 16, 21, 31(7)
Constitution of India, 1950 — Article 136, 226, 227, 300
Criminal Procedure Code, 1973 (CrPC) — Section 79, 80

Citation : (2016) 1 ALD 185 : (2015) 6 ALT 125 : (2016) 1 ARBLR 170

Hon'ble Judges : K.C. Banu and M. Seetharama Murti, JJ.

Bench : Division Bench

Advocate : C.V. Vinitha Reddy, Counsel, for the Appellant; J. Prabhakar, Counsel, for the Respondent

Judgement

M. Seetharama Murti, J.—These two appeals are preferred against one order viz., the order dated 07.12.2010 of the learned XI Additional Chief Judge (Judge, Fast Track Court), City Civil Court, Hyderabad passed in OP. No. 2503 of 2003 whereby the learned Judge while confirming the Arbitral Award passed by the 2nd respondent herein had partly modified the award for Rs. 21,10,778/- with interest at 9% per annum simple from 15.07.2003 till date of payment. By the impugned order, the learned Judge had directed that the payment shall be made by 28.02.2011 and that failing which the principal of Rs. 21,10,778/- would carry interest at 12% per annum from 01.03.2011.

1.1 The appeal CMA. No. 974 of 2011 assailing the aforementioned order of the Court below is preferred by the unsuccessful petitioners 1 to 3 in OP. No. 2503 of 2003 and the 4th appellant i.e., Union of India. Infact, the Union of India, which is the sole respondent in the arbitral proceedings before the learned Arbitrator is added as 4th appellant herein as per orders dated 10.04.2012 in CMP. No. 407 of 2012.

1.2 The other appeal CMA. No. 227 of 2011 is preferred by the 1st respondent assailing the very same order of the Court below insofar as it related to the modification of interest. For convenience and clarity, the parties in these appeals shall hereinafter be referred to as the petitioners and the 1st respondent as arrayed in the OP before the Court below. The 4th appellant shall be referred to as the Union of India. The 2nd respondent is the learned Arbitrator. Be it noted that the 1st respondent-Y. Parthasarathy is not the claimant in the proceedings before the learned Arbitrator but the firm M/s. Y. Parthasarathy, of which the 1st respondent is the partner, is the claimant. However, the said Y. Parthasarathy was impleaded in his individual capacity in the OP before the Court below and in the appeal in CMA. No. 974 of 2011 now before this Court. Therefore, the firm M/s. Y. Parthasarathy shall hereinafter be referred to as the claimant firm as and when necessary.

2. We have heard the submissions of the learned counsel appearing for the petitioners and the Union of India and the learned counsel for the 1st respondent. We have perused the material record.

3. The introductory facts, in brief, are as follows: - "The General Manager, Central Organisation for Railway Electrification [Core], Allahabad i.e., the 1st petitioner had issued a tender for construction of electric loco shed and doing ancillary works, for the estimated value of Rs. 2,45,11,415.45 ps. For the said offer, the claimant firm had issued a letter of acceptance on 03.06.1991. After the claimant firm had furnished a bank guarantee dated 15.06.1991, the agreement was finalised and was entered into on 07.10.1991. After furnishing the bank guarantee for Rs. 24.50 Lakhs, the mobilization advance in a sum of Rs. 24,49,992/- was disbursed. The said advance is to carry interest @ 10% per annum as per clause 24 of the agreement and is to be repaid by 02.06.1993. The claimant firm having executed the work of the value of Rs. 76.93 Lakhs had sought for the increase of 80% of the contractual rates by way of a letter dated 02.06.1993, which is the date for the completion of the contracted work. The claimant firm had by a letter dated 03.04.1993 sought extension of the contract up to 02.08.1993. The said extension was given under clause 17(3) of the General Conditions of Contract ("the GCC for short) without levy of liquidated damages. The claimant firm by a further letter dated 10.06.1993 had stated that certain items are required to be negotiated by way of a fresh offer. Hence, inspections were done and a meeting was held with the claimant firm on 21.06.1993 to consider the matter in entirety. The claimant firm was unwilling to execute the balance work except on acceptance of an increase of rates. Thus, disputes had arisen. Therefore, the petitioners who had issued the tender had taken a decision to terminate the contract and have the balance work executed through another contractor with the risk and cost to the claimant firm. Accordingly, the contract was terminated on 23.07.1993 without any financial repercussions. The work done was measured and a final bill was finalised on 07.05.1994 and the amount due as per that bill was paid to the claimant firm and the same was received by the claimant firm under protest. The claimant firm

had sent a notice dated 27.01.1994 raising a dispute for 12 items. By a further notice dated 10.06.1994 the said claims were increased by another six items. However, no arbitrator was appointed. Therefore, the claimant firm had filed OS. No. 44 of 1995 before the Court of the learned HI Additional Chief Judge. City Civil Court, Secunderabad on 27.12.1994 for appointment of an arbitrator under Section 20 of the Arbitration Act, 1940 ("the Old Act" for short). While so, after the new Arbitration and Conciliation Act, 1996 ("the New Act" for brevity) had come into force, the claimant firm had approached this Court under Section 11(5) of the new Act by filing an Arbitration Application 2 of 1996 on 30.09.1996 against the petitioners 1 and 2. The earlier OS. No. 44 of 1995 was dismissed on 18.12.1996 as withdrawn in view of the filing of the above application. This Court by orders dated 18.03.1997 had appointed an Arbitrator in the above said AA. No. 2 of 1996. Aggrieved of the said orders, the Union of India and another had preferred Civil Appeal No. 7663 of 1997 before the Hon"ble Supreme Court. The said civil appeal was dismissed by the Supreme Court by orders dated 13.03.2002. The said order of the Supreme Court reads as under:

"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 by the impugned judgment, the said application was allowed. In *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, , the Constitution Bench of this 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 therefore, it is not open to challenge under Article 136 of the Constitution. In view of the above law laid down, the present appeal is dismissed as not maintainable. However, the learned counsel for the appellants has prayed that liberty may be given to avail remedies in accordance with the said decision of the Constitution Bench. If so advised, appellant may do so." Later, this Court by further orders dated 19.04.2002 in Application No. 456 of 2002 in AA. No. 2 of 1996 had appointed the 2nd respondent herein as the learned Arbitrator as the Arbitrator appointed earlier had declined to enter the reference. On the 2nd respondent entering the reference, the claimant firm made its claims. The Union of India had filed objections and the claimant firm had filed its rejoinder. Ultimately, the learned Arbitrator had passed an award awarding a sum of Rs. 55,30,238/- to be paid by the Union of India to the claimant firm on or before 15.10.2003. The learned Arbitrator had directed in the Award that the same be paid on or before 15.10.2003 and that failing such payment the awarded amount shall carry interest at the rate of 18% per annum with quarterly rests from 15.07.2003 till payment. Aggrieved of the said Award, the petitioners 1 to 3 had alone preferred the OP. No. 2503 of 2003 before the Court below as mentioned supra by impleading the 1st respondent-Y. Parthasarathy in his individual capacity and not the claimant firm as a party. However, the OP was disposed of by the impugned order and the Court below had partly confirmed the Award of the learned Arbitrator for Rs. 21,10,778/- with interest at 9% per annum simple from 15.07.2003 till date of payment. By the impugned order, the Court below

had further directed that the payment shall be made before 28.02.2011 and that failing such payment the principal sum shall carry interest at 12% per annum from 01.03.2011. Assailing the said order, the petitioners 1 to 3 alone had initially preferred the appeal in CMA. No. 974 of 2011 by impleading the 1st respondent-Y. Parthasarathy in his personal capacity as a party and without impleading the claimant firm as a party. The Union of India was not added as one of the appellants. However, during the pendency of the appeal, the Union of India, represented by General Manager of the Railways concerned was permitted to be impleaded as the 4th appellant in the said appeal as per the orders of this Court dated 10.04.2012 in CMP. No. 407 of 2012. Since the claimant firm is not impleaded and in its place the 1st respondent-Y. Parthasarathy was impleaded in his individual capacity, the petitioners had also filed a petition to amend the cause title for substitution of the firm M/s. Y. Parthasarathy as the 1st respondent in the place of Sri Y. Parthasarathy. Such substitution was sought not only in this appeal but also in the OP, which was disposed of by the Court below. A counter was filed in the said petition by the 1st respondent and the said application which is also coming up along with the appeal is allowed in part vide separate orders made in the said miscellaneous petition and the claimant firm is substituted in the appeal viz., CMA. No. 974 of 2011 only in the place of the 1st respondent-Y. Parthasarathy, who is its managing partner. As already noted, the 1st respondent and not the claimant firm had preferred the other appeal insofar as it related to modification of interest. No amendment was sought in that appeal- CMA. No. 227 of 2011 to substitute the firm in the place of the appellant-Y. Parthasarathy and it is contended that since firm is not a party to the OP before the Court below, no such substitution is necessary."

4. In this factual milieu, the Union of India, which is now impleaded as 4th appellant, is seeking to set aside the award of the learned Arbitrator as modified and confirmed by the Court below by raising various contentions on merits besides the issue of lack of jurisdiction and the non-application of the provisions of the Arbitration and Conciliation Act, 1996. The 1st respondent while supporting the award is requesting for the dismissal of the appeal of the Railways for the reason that the Union of India had not preferred the OP before the Court below and that as the Union of India has not originally preferred the appeal-CMA. No. 974 of 2011 and that as the Union of India was subsequently impleaded as 4th appellant after the time allowed under law for preferring the said appeal had expired.

5. Therefore, before we go into the merits of the matter, there are two important issues, which are to be considered and determined, as our decisions on the said issues are likely to go to the root of the matter and therefore, may obviate the necessity of dealing with the other issues concerning the merits of the matter. The said two issues broadly stated are as follows: (i) The first issue raised by the Union of India is that the very appointment of the learned Arbitrator under the provisions of the new Act is not legal and tenable and that the learned Arbitrator though appointed as per the provisions under the new Act has no jurisdiction to

adjudicate the dispute as per the provisions under the new Act as the proceedings had already commenced under the old Act and as the provisions of the new Act would not apply and that the dispute is arbitrable as per the provisions of the old Act and that for the said reasons, the Award passed is not valid and legal. (ii) The second issue as raised by the 1st respondent has two facets. The first one is the non-impleadment of the claimant firm in the OP before the Court below and also in the appeal-CMA. No. 974 of 2011, which according to the 1st respondent is fatal to the case of the Union of India. The second facet is the non-impleadment of Union of India as one of the petitioners in the OP before the Court below and also the non-impleadment of the Union of India at the inception in the appeal-CMA. No. 974 of 2011 preferred by the Railways and its subsequent impleadment as the 4th appellant in the said appeal beyond the period of limitation allowed under law for preferring the appeal against the order of the Court below.

6. Therefore, the first important and 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 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 not legal, valid and sustainable under facts and in law?"

6.1 The introductory facts leading to the filing of these two appeals and the chronology of events are already stated *supra*, in detail. Admittedly, at the time when the disputes had arisen in the year 1993-94, the new Act has not seen the light of the day and the old Act was holding the field. The new Act has come into force with effect from 22.08.1996. After the disputes, the final bill was prepared on 23.01.1994. The claimant firm had raised 12 claims by letter dated 27.01.1994 which was addressed to the General Manager, Railway Electrification, Allahabad. In that letter, a request was made for resolution of the disputes by having a reference to arbitration as per clause 64 of the General Conditions of the Contract ("the GCC for brevity). According to the petitioners 1 to 3, the claimant firm was informed on 20.06.1994 that the claims were rejected as none of the claims are fit for resolution through arbitration. The claimant firm had also issued a legal notice dated 10.06.1994 stating that if the claims are not settled the claimant firm would be constrained to initiate appropriate proceedings. Thereafter, the claimant firm had first brought the suit OS. No. 44 of 1995 on the file of the III Additional Judge, City Civil Court, Secunderabad against Union of India and the 2nd petitioner under Section 20 of the old Act, with the following among other prayers: "To order reference of the dispute to the arbitrators under section 20(4) of the Arbitration Act to an Arbitrator or Arbitrator appointed by the parties or where the parties cannot agree upon an arbitrator to an arbitrator appointed by the Court". While the said suit was pending, the new Act was enacted and had come into force. Without prosecuting the said suit that was

already instituted under the provisions of the old Act, the claimant firm had filed the Arbitration Application No. 2 of 1996 before this Court against the petitioners 1 and 2 invoking the provisions of the new Act for appointment of a sole Arbitrator for resolution of the disputes. Since the said arbitration application was filed for appointment of an arbitrator under the provisions of the new Act, the earlier suit OS. No. 44 of 1995 on the file of the Court of the III Additional Judge, City Civil Court, Secunderabad which was filed under the provisions of the old Act for appointment of an Arbitrator was withdrawn by the claimant firm. The said AA. No. 2 of 1996 was allowed by this Court by a judgment dated 18.03.2007 (sic. 1997) and an Arbitrator was appointed though the said Arbitration Application was resisted stating that the provisions of the old Act are applicable and that the application seeking the appointment of an Arbitrator under the provisions of the new Act is not maintainable. Assailing the orders appointing the Arbitrator in AA. No. 2 of 1996, the Union of India and another had preferred a Civil Appeal No. 7663 of 1997 before the Hon''ble Supreme Court. As already noted, the Hon''ble Supreme Court had taken note of the fact that a Constitution Bench of the Supreme Court in *Konkan Railway Corporation Ltd.*, and another (supra) has held that the order passed by the learned Chief Justice is not an order passed while exercising judicial functions and that, therefore, the said order is not open to challenge under Article 136 of the Constitution. Having so taken note of the decision of the Constitution Bench, the Supreme Court dismissed the appeal of the Railways as not maintainable. Nevertheless, while dismissing the appeal, the Hon''ble Supreme Court in its orders had observed as follows: - "However, the learned counsel for the appellants has prayed that liberty may be given to avail remedies in accordance with the said decision of the Constitution Bench. If so advised, appellant may do so." Therefore, an objection was raised by the Union of India (Railways) before the learned Arbitrator that the appointment of the Arbitrator under the provisions of the new Act is untenable and that the provisions of the new Act have no application and that he has no jurisdiction to arbitrate. Having over-ruled the said objections, the learned Arbitrator had proceeded to resolve the dispute on merits and had passed the award. In the OP filed by the petitioners 1 to 3 before the court below, though the contention in regard to the jurisdiction was raised on behalf of the petitioners 1 to 3, the said issue was not adverted to and no finding on merits was recorded by the Court below on the said issue by observing that the High Court had appointed the learned Arbitrator.

6.2 In this background of facts and events, on the issue of lack of jurisdiction, the learned counsel for the Railways would contend as follows: -

"The claims were made by the claimant firm by a letter dated 27.01.1994. A legal notice was issued by the claimant firm on 10.06.1994. According to the Railways, the claims were rejected on 20.06.1994 as not fit for arbitration. The claimant firm had instituted a suit before the Additional Chief Judge, City Civil Court for appointment of an arbitrator by invoking the provisions of the old Act. Subsequently, the new Act had come into force. Without prosecuting the suit

filed under the provisions of the old Act for appointment of an Arbitrator, the said suit was withdrawn after filing a fresh Arbitration Application before this Court by invoking the provisions of the new Act. Since the claims were made and the claims were rejected and as a request to refer the claims for arbitration was also made and as a suit was filed invoking the provisions of the old Act for appointment of an Arbitrator, it is evident that the Arbitration proceedings had commenced prior to the coming into force of the new Act. Further, in view of the provisions of Sections 21 and 85 of the new Act, the provisions of the old Act are only applicable and the very appointment of the Arbitrator under the provisions of the new Act is not legal and tenable. The Award passed by the Arbitrator appointed under the new Act by following the procedure under the new Act is an Award passed without jurisdiction and as the Arbitrator had lacked jurisdiction, the Award is liable to be set aside being not valid, sustainable and legal. In support of the said contentions, he had placed reliance on the decisions in (i) Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, ; (ii) Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd., ; (iii) U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and Another, ; (iv) Dhirubai D. and Company, Engineers and Contractors Vs. Nizam Sugar Factory Limited and Others, ; 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."

6.3 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 that was prevailing as on the date the Arbitrator was appointed and the law that was in force as on the date the Arbitrator had entered the reference and passed the Award has to be applied. The Hon"ble Supreme Court by referring to the Konkan Railway's case, which laid down the law applicable as on that date, had dismissed the appeal of the Union of India and had confirmed the orders of this Court appointing an Arbitrator under the provisions of the new Act. Liberty no doubt was given to the Railways to avail the remedies in accordance with the said decision of the Constitution Bench of the Supreme Court in case the appellant was advised to do so. The order appointing the Arbitrator though was not considered as an order made by the High Court while exercising judicial functions and though liberty was given to avail the remedies in accordance with the ratio in the above decision of the Constitution Bench, the said order was not challenged before this Court by invoking the provisions of the Constitution of India like Article/s 226 /227 dealing with judicial review. The order was allowed to become final; and, the order was challenged 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." In support of the contentions, reliance was placed on the decision in Sudhir G. Angur and Others Vs. M. Sanjeev and Others, . 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.

6.4 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 Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., , the Constitution Bench of this (sic. 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 the instant case as already urged on behalf of the petitioners the Hon"ble Supreme Court while disposing of the Civil Appeal No. 7663 of 1997 had given liberty to the petitioners/Railways to avail the remedies in accordance with the said decision of the Constitution Bench which by then was governing the rights of the parties. In view of the above law laid down and the liberty given to the petitioners/Railways, the contention of the 1st respondent that the order appointing an arbitrator has become final is untenable. As the parties by then were being controlled by the ratio in the above decision, which is holding the field, and as liberty was given to the petitioners, they are entitled to avail the remedies in accordance with the ratio in the said decision of the Constitution Bench and also the decision in the aforementioned appeal and raise the issue of jurisdiction before the learned arbitrator. Section 16 of the new Act also permits such a course.

6.5 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 claimant, 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 "commencement of 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 (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., (supra) the Supreme Court having referred to various precedents 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., (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 Vs. Steel Authority of India Ltd., ; M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., and State of West Bengal Vs. Amritlal Chatterjee, had held that in respect of the arbitral proceedings that had commenced before coming into force of the 1996 Act, the provisions of the 1940 Act shall apply.

In Dhirubai D. & Company (supra) the facts show that arbitral proceedings had commenced under 1940 Act before the coming into 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 had held that the resolution of the dispute between the parties by the Tribunal under 1940 Act is not improper though one of the parties had appointed the arbitrator in the year 1997.

In Union of India (UOI) and Another Vs. G.G. Satyanarayana and Others, 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 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 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.

6.6 The first contention of the first respondent is 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 and as the order appointing the learned Arbitrator was not assailed and has become final, the provisions of the new Act only would apply. On the other hand, the reply contention of the petitioners is that the order of this Court appointing the Arbitrator had not attained finality as the Supreme Court did not consider it as an order passed while exercising judicial functions as per the law laid down by the Constitution Bench of the Supreme Court and which was applicable at that time. It is also the further submission that even though the appeal preferred by the Railways was dismissed by the Supreme Court, the Hon"ble Supreme Court had given the liberty to the Railways to avail the remedies in accordance with the Constitution Bench decision in Konkan Railway Corporation Ltd., and another v. Rani Constructions Pvt. Ltd., (supra) and that therefore, the contention that the Arbitrator was appointed by this Court and the said order has become final cannot be countenanced. It is to be noted that availing the liberty that was given to the petitioners/Railways, a jurisdictional issue was raised before the learned Arbitrator and the learned Arbitrator having regard to the legal position had dealt with this objection and had overruled the said objection stating that the ignored notice of claims cannot be considered as a pending proceeding attracting the provisions of the old Act. But, the fact remains that not only a letter making a request for claims was addressed but, also a legal notice dated 27.01.1994 was got issued even by the year 1994 and a further notice dated 10.06.1994 was also got issued by increasing the original claims by another six items. Later a suit was also instituted by invoking the provision of Section 20 of the old Act for appointment of an Arbitrator before approaching this Court by filing an

Arbitration Application under the provisions of the new Act for appointment of an Arbitrator. 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 on 22.08.1996. The appellants/Railways did not waive its defence on the issue of jurisdiction and/or lack of it and had consistently raised this defence in all the proceedings till date.

In the decision in *Sudhir G. Angur (supra)* while dealing with a case, the facts of which are governed by the Mysore Religious and Charitable Institutions Act, the Hon"ble Supreme Court 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 Moti Ram Saraoji Vs. Onkarmal Ishar Dass and Others*, 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 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. The Railways, which is the answering respondent before the Arbitral Tribunal, did not give consent for the proceedings under the new Act and had contended that the Tribunal had lacked jurisdiction. Therefore, the Railways have not waived its defence or 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 substantive provisions of the law and is, therefore, patently illegal. 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 had erroneously 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 claimant firm moved the request for consideration of the claims and reference of the dispute to arbitration well before the new Act came into force and had also filed the suit invoking the provisions of the old Act for appointment of an Arbitrator and had later withdrawn the said suit after filing the Arbitration Application for appointment of the Arbitrator under the provisions of the new Act. Since the request for claims and reference to arbitration was made long before the new Act has come into force, i.e., well before 22.08.1996 and as a suit was also filed under the old Act, though withdrawn, 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 claimant/1st respondent.

6.7 There is one more aspect, which needs to be adverted to before concluding the discussion on this issue. It is pertinent to note that when the arbitration

application in AA. No. 2 of 1996 seeking the appointment of an Arbitrator was filed before this Court by the claimant firm, the claimant firm did not implead the Union of India as a party to the said application, as could be seen from the copy of the order dated 18.03.1997 of this Court in the above said proceeding. It appears that the General Manager, Railway Electrification, Allahabad and the Chief Project Manager, Railway Electrification, Vijayawada were only made party respondents and the Union of India represented by the officer concerned of the Railways was not made a party. In suits/proceedings against Central Government where it relates to Railways, the Union of India represented by its General Manager of the Railways concerned must be named as a defendant/respondent. But, the Union of India was not made as a party in the said Arbitration Application. Therefore, without notice and opportunity of hearing to the Union of India, the learned Arbitrator was appointed. The very order appointing the Arbitrator in the facts and circumstances of the case cannot be said to be binding on the Union of India. However, the learned counsel for the 1st respondent would contend that since Union of India had preferred an appeal to the Supreme Court, the non-impleadment of the Union of India as a party to the Arbitration Application before the High Court is not fatal. No relief could have been granted against the Railway administration when the Union of India represented by the appropriate authority of the Railways is not impleaded. In the decision in Member Board of Revenue and others v. Sourendra Narayan Bhanja Deo and others () the facts show that an eviction petition was filed without impleading the State as a party. While dealing with the said question as to the maintainability of the proceeding, the Hon"ble Supreme Court held as follows:

"The issue has been dealt with time and again by this Court even in writ petitions applying the principle enshrined in Sections 79 and 80 of the Code of Civil Procedure, 1908, which mandatorily require the impleadment of State or the Union of India.

In Shri Ranjeet Mal Vs. General Manager, Northern Railway, Baroda House, New Delhi and Another, , the Railway Ministry was impleaded and not the Union of the India.

This Court held that the suit/petition was not maintainable. A similar view has been re-iterated by a Constitution Bench of this Court in State of Punjab Vs. Okara Grain Buyers Syndicate Ltd. and Others, .

A similar view had been re-iterated by this court in Kali Prasad Agarwalla v. Bharat Coking Coal Ltd., AIR 1989 SC 1530 ; Sangamesh Printing Press Vs. Chief Executive Officer, Taluk Development Board, ; Chief Conservator of Forests, Govt. of A.P. Vs. The Collector and Others, ; and The District Collector, Srikakulam and Others Vs. Bagathi Krishna Rao and Another, .

This Court in a Constitution Bench judgment in Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, , has held that if necessary party is not impleaded and an order is passed adversely affecting it, it has a right to

ignore."

6.8 This Court in the decision in Chief Work Shops Engineer, South Central Railway, Secunderabad and Others Vs. J. Krishna Babu and Another, while dealing with an application filed by the 1st respondent therein who is an employee of South Central Railway before the Central Administrative Tribunal challenging the order passed against him in the disciplinary proceedings had noticed that in the OA the said applicant had failed to implead the Union of India as a party; therefore, this Court had held that no relief could have been granted against the Railway administration under whose name and authority orders inflicting the applicant with punishment pursuant to a disciplinary enquiry were passed, when the Union of India represented by the appropriate authority of the Railways is not impleaded and that the order of the Tribunal is therefore inexecutable against the South Central Railway. In this cited decision, this Court had followed the law declared in Ranjeet Mal's Case and District Collector, Srikakulam's case and the Constitutional mandate of Article 300 of the Constitution of India re-iterated in Section 79 of the Code. In this cited case, it was held as follows: "In the light of the law declared in Ranjeet Mal's case and District Collector, Srikakulam v. Bagati Krishna Rao and the Constitutional mandate of Article 300 of the Constitution of India; reiterated in Section 79 of the Code of Civil Procedure, it is axiomatic that Railways being a department of Union of India, the Union in its constitutionally mandated juristic persona must be impleaded in every application, writ or proceedings, whether before a Tribunal or any other forum, whenever relief is sought against the Railways. Any practice that is contrary to the principle of the binding law supra, would be a wholly irregular practice." Following the precedential guidance in the decisions supra, we hold that the order appointing an Arbitrator by this Court in AA. No. 2 of 1996 is not binding on the Railways since the Union of India represented by an appropriate authority of the Railways is not impleaded in the said application.

7. The second of the issues raised by the 1st respondent is that the original petition before the Court below assailing the Award of the Arbitrator was not filed by the Union of India and that in that Original Petition, the claimant firm is not impleaded as a party respondent and that the said defects are fatal and incurable since the OP was already disposed of by the Court below. On this issue, what is to be noted is that this Court had already held supra under the first issue that the very appointment of the Arbitrator in an application, which is filed under the provisions of the new Act, to which the Union of India is not a party is itself not legal and tenable and that the Union of India/Railways has a right to ignore the same and that the provisions of the new Act have no application and that the award was one passed without jurisdiction; as the said findings under the first issue go to the root of the matter and are sufficient to set aside the Award of the Arbitrator itself, the irregularities or illegalities, if any, in filing the Original Petition by the Railways are of no avail and do not merit consideration as the award in any view of the matter is liable to be set aside being opposed to the fundamental policy of Indian law as laid down in Oil and Natural Gas Corporation

Ltd. Vs. Western Geco international Ltd., .

8. Be it noted that neither the Tribunal nor the Court below had considered the vitally important factual aspects and the provisions of law and the ratios in the precedents in the correct perspective and had therefore, 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 Arbitral Tribunal and confirmed by the Court below vide the impugned order.

9. 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. Accordingly, the appeal in CMA. No. 974 of 2011 is allowed and the impugned order and the Award of the Tribunal are set aside. As a sequel, the appeal in CMA. No. 227 of 2011 is dismissed. There shall be no order as to costs. Since the Award is set aside having regard to the law concerning jurisdictional issue only and without going into merits of the claims, it is needless to say that it would be open to the 1st respondent/claimant firm to take appropriate legal proceedings for the revival of the original suit on the file of the Additional Chief Judge, City Civil Court, Secunderabad, which was dismissed as withdrawn, and make a request for appointment of an Arbitrator to resolve the lis/disputes/claims on merits and in accordance with the procedure established by law. In case, any such request is made to the Court concerned, the same shall be considered on merits and in accordance with law after giving an opportunity of hearing to the Union of India and other respondents.

Miscellaneous petitions, pending if any, in these appeals shall stand closed.