Smita Conductors Ltd vs Euro Alloys Ltd on 31 August, 2001

Equivalent citations: AIR 2001 SUPREME COURT 3730, 2001 AIR SCW 3517, 2001 CLC 1447 (SC), 2002 (1) UJ (SC) 13, 2001 (9) SRJ 142, 2001 (7) SCC 728, 2002 UJ(SC) 1 13, 2001 (3) ARBI LR 275, 2001 CORLA(BL SUPP) 181 SC, 2001 (6) SCALE 128, (2001) 7 JT 358 (SC), (2002) 2 MAD LW 13, (2001) 3 ARBILR 275, (2001) 6 SUPREME 743, (2001) 6 SCALE 128, (2001) WLC(SC)CVL 792, (2002) 1 GCD 302 (SC), (2002) 2 BOM CR 715

Bench: S. Rajendra Babu, S.N. Phukan

CASE NO.:
Appeal (civil) 12930 of 1996

PETITIONER:
SMITA CONDUCTORS LTD.

Vs.

RESPONDENT:
EURO ALLOYS LTD.

DATE OF JUDGMENT: 31/08/2001

BENCH:
S. Rajendra Babu & S.N. Phukan

JUDGMENT:

RAJENDRA BABU, J. :

> A contract [bearing No. S-142] for supply of aluminum rods of 2400 metric tones @ 200 MT per shipment every month from January to December 1991 was proposed by the respondent to the appellant on 31.8.1990 containing an arbitration clause. In the letter accompanying the contract, it was stated to sign and return copy for sake of good order.

The appellant did not sign nor return the said contract. Reminders were sent in this regard from time to time. On 4.2.1991, letter from the respondent enclosing the amendment to the contract was sent to the appellant but without any result. On 25.2.1991, another contract [bearing No.S-336] was proposed by the respondent to the appellant for supply of 2,000 MT of aluminum rods @ 500 MT

per shipment. In the first contract, initially there was no arbitration clause. However, on 18.3.1991, the contract bearing the same number, i.e., S-142, was sent containing the arbitration clause with certain amendment for signature and return of the second copy. But the contract was not signed and sent by the appellant. On the basis of certain irrevocable letters of credit for US$ 243,250 opened by the appellant, shipments were made in January, February and March 1991. In the meanwhile, a circular was issued on 19.3.1991 by the Reserve Bank of India [for the sake of brevity referred to as RBI] to all scheduled commercial banks placing restrictions on import of goods. It was followed up by another letter of the same date addressed by the Executive Director, RBI to the Chairmen of all commercial banks explaining the circulate dated 19.3.1991 in relation to the foreign exchange reserve. On 22.4.1991, one more circular was issued by the RBI modifying the margins for opening letters of credit as prescribed by circular dated 19.3.1991. The appellant sent a telex on 30.4.1991 to the respondent to the effect that severe restrictions had been imposed by the RBI due to unprecedented foreign exchange crisis and the RBI had not cleared the application for letter of credit. Therefore, the appellant wanted to invoke the force majeure clause canceling April shipment for both the contracts. The respondent wrote to the appellant on 30.5.1991 to the effect that they had closed their position and initiated arbitration proceedings with reference to both the contracts. When the appellant did not respond to the same, letter was received by the appellant from London Metal Exchange appointing the second arbitrator in terms of the arbitration clause.

On 30.8.1991, a suit [bearing No.2963/91] was filed by the appellant seeking a declaration that there is no valid agreement between the parties and that arbitration before the London Metal Exchange was void. The learned Single Judge of the Bombay High Court did not grant any interim order and recorded a statement that the appellant would participate in the arbitration proceedings under protest. The appeal filed against it stood dismissed by an order on 18.12.1991. In the meanwhile, suit was treated as a petition under Section 33 of the Arbitration Act, 1940 which stood dismissed on the ground that the arbitration clause bound the parties. The arbitrators published an award on 29.7.1992 awarding damages amounting to US$ 676,000 including pre-award interest but did not award post-award interest. The appellant filed an appeal to the Appeal Board of the London Metal Exchange seeking to set aside the award as also dispensation of deposit. Since the London Metal Exchange rejected the request for waiver of deposit, the appeal could not be pursued. Thereafter, a petition was filed in the Bombay High Court by the respondent under the Foreign Awards (Recognition & Enforcement) Act, 1961 [hereinafter referred to as the Act] for enforcement of the award. The High Court allowed the petition and granted the certificate under Article 134-A of the Constitution. The High Court, while disposing the petition, awarded interest @ 15 per cent for the post-award period until payment. This order is in challenge before us.

Shri K.K.Venugopal, learned Senior Advocate appearing for the appellant, raised three contentions. The first contention is to the effect that the foreign award could be enforced if it is in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule to the Act applies as per Section 2(a) of the Act and inasmuch as the Schedule pertains to the Convention on the recognition and enforcement of foreign arbitral awards, otherwise known as the New York Convention. It is submitted that the arbitration in the present case is not pursuant to an agreement in terms of Article II of the Schedule to the Act. Shri Venugopal submitted that an agreement has to be in writing under which the parties undertake to submit to arbitration any differences which have

arisen in respect of any legal relationship arising out of a contract or otherwise and capable of settlement by arbitration and the expression agreement in writing would include an arbitral clause in a contract or an arbitration clause signed by the parties or contained in the exchange of letters or telegrams. He submitted that in the present case there being no written contract either in contract bearing No.S-142 or contract bearing No. S-336 because the contracts were signed by the respondent but not signed by the appellant and thus resulting only an oral agreement between the parties for supply of goods; such an agreement cannot be termed to be one made in writing to attract paras 1 and 2 of Article II of the Schedule to the Act and that there has been no exchange of letters or telegrams between the parties so as to include the arbitral clause. In this context, he referred to the decisions of different courts reported in the Yearbook Commercial Arbitration, Vol.II, 1977. Referring to the decision in the court of Oberlandesgericht Dusseldorf on 8.11.1971 between a Dutch seller and a German buyer [Yearbook Commercial Arbitration, Vol.II, 1977, p.237] wherein it was held that Article II of the Convention requires the arbitration agreement to be in writing and signed by the parties, including an exchange of letters or telegrams. In any case, therefore, a declaration in writing of both sides is required. A one-sided confirmation does not suffice and that the lack of a declaration in writing by the other party cannot be cured by his appearance before the arbitrator. Enforcement can, therefore, be granted under the New York Convention. In a case decided by the United States District Court between Sen Mar, Inc.[US] v. Tiger Petroleum Corporation N.V., [Yearbook Commercial Arbitration, Vol.XVIII, 1993, p.493] in which the respondent had contended that the purported arbitration clause does not satisfy the Conventions writing requirement, which defines in Art.II(2), a writing as an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters. It was held that the respondents responsive telexes are not only devoid of arbitration language they also disavow the entire contents of the Petitioners 17 July telexes. Shri Venugopal next referred to the decision of the Italian Court of appeal in Finagrain Compagnie Commerciale Agricole et Financiere S.A. vs. Patano snc(Italy) [Yearbook Commercial Arbitration, Vol.XXI, 1996, p.571]. In that case, the three contracts were concluded for sale of colzaseed oil. One of the contracts was concluded in writing, was signed by the parties and contained a specific reference to FOSFA Contract No.54 and the arbitration clause therein contained. The other two contracts were concluded through telexes sent to the parties by a broker and not signed by them. The telexes also referred to FOSFA Contract No.54 which had the arbitration clause. In those circumstances, the Court granted enforcement to award No.2912 which was based on the contract signed by the parties, but found that no valid arbitration agreement under the Convention had been concluded as to the further two contracts and, therefore, denied enforcement to the other two awards pertaining to the rest of the two contacts. Shri Venugopal next relied upon the decision of the Swiss Court in Gaetano Butera (Italy) v. Pietro e Romano Pagnan (Italy) [Yearbook Commercial Arbitration, Vol.IV, 1979, p. 296]. The Court of Appeal considered that the validity of the arbitration clause had to be determined by the Italian law under which the clause would have had to be in writing. But on appeal against the decision of the Court of Appeal, the Supreme Court stated that no valid agreement existed because the terms of the New York Convention had not been applied. It was noticed therein that the arbitral clause was inserted in writing in the contract of sale and was completed by the reference to the Arbitration Rules of the LCTA. This reference was not a reference, which is invalid according to Italian case law. In the case under consideration, however, the arbitration agreement was contained and explicitly mentioned in the sales contract itself. The reference had as sold object the procedural regulation of the arbitration

and, therefore, validly completed the arbitral clause mentioned above as it ascertained the existence and the specific contents of that regulation. But the Supreme Court, however, held that the arbitral clause was null and void because it was signed only by the seller who invoked the clause. Shri Venugopal referred to another decision of the Italian Court in Corte Di Cassazione in Begro B.V. vs. Ditta Voccia & Ditta Antonio Lamberti [Yearbook Commercial Arbitration, Vol.III, 1978, 278]. The court interpreted Art.II, paras 1 and 2 of the Convention, as requiring a specific agreement to submit to arbitration signed by the parties or contained in an exchange of letters or telegrams. According to the court, such a specific agreement could not be found in an arbitration clause printed on the contract-form and signed by the parties and, therefore, held that the arbitration clause to be without effect. Shri Venugopal next referred to the decision of Corte Di Cassazione in Societa Atlas General Timbers v. Agenzia Concordia Line, [Yearbook Commercial Arbitration, Vol.III, 1978, 267]. It was held therein that the validity of the arbitral clause in question had to be judged under the New York Convention. According to Art.II, para 2 of the Convention, the arbitration clause in writing means an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. This provision, therefore, requires clearly the signature as a minimum element for the effectiveness of the contract containing the arbitral clause. The court concluded that not the arbitration clause itself, but the contract in which it is contained must be signed by both parties under Art.II, para 2 of the Convention. The court examined whether the requirement was met in the present case and found that the signature of the agent of the carrier was not sufficient since his power of attorney was not in writing and that the signature of the other party was also lacking and his endorsement does not replace the signature, since the former concerns only a transfer of title, whilst the latter is necessary for the formation of the contract.

In reply Dr.A.M.Singhvi, learned Senior Advocate appearing for the respondent, submitted that this contention is not available to the appellant inasmuch as the Bombay High Court had already decided the case when a suit had been filed by the appellant and that the conclusion reached by the Bombay High Court while dismissing the suit treating the same as an application filed under Section 33 of the Arbitration Act, 1940 amounts to res judicata and, therefore, it is not open to the appellant to urge that point again in these proceedings. He further submitted that the correspondence between the parties and the conduct of the appellant clearly establish that there existed an arbitration clause between the parties and, therefore, there was full compliance with Art.II, paras 1 and 2 of the Convention which forms part of the Schedule to the Act. He submitted that the definition of what constitutes a written arbitration agreement given in Art.II(2) can be deemed to be an internationally uniform rule which prevails over any provisions of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable. The courts in the contracting states have generally affirmed the uniform rule character of Art.II(2). The Italian courts formed an exception to this general affirmation as they determined the formal requirements for the arbitration agreement on the basis of a municipal law which they found applicable according to Italian conflict of rules and in even the Italian Supreme Court has in recent decisions affirmed the uniform principle of Art.II(2) as well and has placed reliance upon certain decisions of other courts in support of the proposition made by him.

This Court in Renusagar Power Co. Ltd. vs. General Electric Company, 1994 Supp (1) SCC 644, held that the New York Convention controls the proceedings in arbitration. Even the plain language of

Section 2(a) of the Act makes it clear that the Act is applicable in respect of a foreign award made in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies and the terms of the Convention are available in the Schedule to the Act. Art.II, paras 1 and 2 pertain to this aspect of the matter and they read as under:

> Article II
>
> 1. Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
>
> 2. The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of Article II. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the Bank to which we shall presently refer to. There is no correspondence between the parties either disagreeing with the terms of the contract or arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message on 23.4.1990 in which there is a reference to two contracts bearing Nos.S-142 and S-336 in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. May be, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard.

Shri Venugopal seriously objected to this line of approach on the basis that what we are spelling out is only a course of conduct on the part of the appellant and not a written agreement emanating out of a contract or correspondence between the parties. When the appellant and the respondent agreed to deal in certain goods, certain terms had to be agreed between them. Those terms were set out in

the contracts referred to as S-142 and S-336. If those are the two contracts pursuant to which the appellant is trading with the respondent, the conclusion is obvious that those terms are reduced to writing and acknowledged by reason of opening of letters of credit of which reference is made in these two contracts. It would be illogical to contend that those letters of credit though not addressed to the respondent would indicate that they were not acting in pursuant to the contracts [S-142 and S-336] with the respondent and now it is not possible for the appellant to wriggle out of the same. It cannot be said that what is agreed to by them is only regarding the supply of goods and not in regard to other terms. Therefore, the contention advanced by Shri Venugopal in this connection stands rejected.

Dr. Singhvi, however, contended that the scheme of the Act would indicate that the agreement need not be signed by the parties at all nor even para 2 of Art.II of the Schedule would arise for consideration at all. According to him, under Section 2(a) of the Act, if there is an award in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, the court has jurisdiction to enforce the same and each contracting State shall recognise an agreement in writing which does not refer to any signature by the parties nor refer to exchange of letters or telegrams and, therefore, submitted that even in the absence of the signatures of the parties or exchange of letters an agreement in writing simplicitor if the contract contains such arbitration clause is enough to hold that the arbitration clause is binding on the parties. His contention is that there is an agreement in writing though not signed by both the parties but by the course of conduct between the parties can be spelt out that such an agreement in writing is enough and he further submitted that para 2 of Art.II only explains the meaning of the expression agreement in writing which includes contracts or agreements signed by parties or contained in exchange of letters or telegrams. If really, as contended by Dr. Singhvi, the position is clear, then there is no need for para 2 of Art.II at all. Para 1 of Art.II would have been enough. When the expression agreement in writing is sought to be explained and indicates that it may be in the nature of a contract then obviously the parties have got to sign the same or it may be in the nature of exchange of letters or telegrams, an agreement similarly signed by the parties or resulting as a consequence of exchange of letters or telegrams. Therefore, when the position is not that clear, we would not wish to hazard a decision on this aspect of the matter but rest our conclusion on the principle applicable to the facts emerging in the case and not widen the scope of consideration in this case.

Shri Venugopal next contended that the decision in the arbitration suit No.2963/91 which was treated as an arbitration petition under Section 33 of the Arbitration Act, 1940 made on January 20, 1992 by the Bombay High Court holding that there is an arbitration agreement between the parties and the petition having been dismissed is binding on the parties and, therefore, clearly the principle of res judicata would be applicable to them and thus it is no longer open to the appellant to raise this contention over again. Shri Venugopal submitted that the occasion to recognise or enforce a foreign award would arise only on an award being passed which is sought to be recognised or enforced in terms of the Act. It is only in those circumstances that such consideration could be made and not earlier and, therefore, he submitted that the principle of res judicata would not be attracted at all inasmuch as the Bombay High Court had no jurisdiction to deal with a question prior to determination of the rights of the parties because the Act is applicable to an award made on

differences between persons not considered as domestic awards and, therefore, an application under Section 33 of the Arbitration Act, 1940 and consideration of the same will not amount to a decision in the case as to be binding on the parties much less can such a decision be treated as a bar on further proceedings on the principle of res judicata. This Court in Renusagars case [supra] had occasion to consider the schemes of the provisions of the Act and the Arbitration Act, 1940. It was noticed therein that the schemes of the Act and the Arbitration Act, 1940 materially differ on several aspects and an examination was made of Sections 3, 4 and 7 of the Act in comparison with Sections 32, 33 and 34 of the Arbitration Act, 1940 to bring out such differences. However, it was noticed that the scheme under Sections 3 and 7 of the Act contemplates that questions of existence, validity or effect of the arbitration agreement differ in cases where such an agreement is wide enough to include within its ambit such questions which could be decided by the arbitrators but their determination is subject to the decision of the court and such decision of the court can be had either before the arbitration proceedings commence or during their pendency if the matter is decided, or can be had under Section 7 of the Act after the award is made and filed in the court and is sought to be enforced by the parties thereto. Thus this Court made it clear that the existence, validity or effect of an arbitration agreement can be determined by the court at three stages : (1) before the arbitration proceedings commence, (2) during their pendency, and (3) after the award is made and filed in the court. If that is so and the question in this regard was raised before the court in a proceeding and that aspect was determined by the court, it cannot be said that such decision is not binding on the parties. Independent of application of the principle of res judicata, we have arrived at the conclusion that we can spell out the existence of an arbitration clause between the parties in terms of the New York Convention to result in an arbitration and that further gets reinforced by the decision of the High Court in the original suit inasmuch as that High Court took the view that there is an arbitration agreement between the parties which is enforceable.

In the light of this discussion, we are firmly of the view that the appellant cannot any longer challenge the existence of an arbitration agreement between the parties and such an agreement was not covered by the New York Convention.

This Court in Renusagars case [supra], examined the scope of enquiry in proceedings for recognition and enforcement of foreign award under the Act and after referring to the concepts in private international law, Geneva Convention of 1927 and the New York Convention on Arbitration of 1958, held that it is limited to the grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

Shri Venugopal next contended that the award is contrary to public policy of India and Reserve Bank of India had issued certain circulars imposing restrictions on imports and, therefore, attracted the force majeure clause. The question of what is the public policy has been considered by this Court in Renusagars case [supra] by interpreting the words in Section 7(1)(b)(ii) of the Act to mean public policy of India and not of the country whose law governs the contract or of the country of place of arbitration. In doing so, this Court took note of the fact that under Arbitration (Protocol and Convention) Act, 1937 the expression public policy of India had been used, whereas the expression public policy is used in the Act; that after the decision of this Court in V/O Tractoroexport, Moscow v. Tarapore & Co., 1970 (3) SCR 53, Section 3 was substituted to bring it in accord with the

provisions of the New York Convention on Arbitration of 1958 which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration; that to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of double exequatur; that the scope of enquiry is restricted before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon; that enlarging the field of enquiry to include public policy of the country whose law governs the contract or of the country of place of arbitration would run counter to the expressed intent of the legislation. Therefore, it was held that the words public policy is intended to broaden the scope of enquiry so as to cover the policy of other countries, that is, the country whose law governs the contract or the country of the place of the arbitration. In the absence of a definition of the expression public policy, it is construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced and this Court referred to a large catena of cases in this regard. Therefore, we will proceed on the basis that the expression public policy means public policy of India and the recognition and enforcement of foreign award cannot be questioned on the ground that it is contrary to the foreign country public policy and this expression has been used in a narrow sense must necessarily be construed as applied in private international law which means that a foreign award cannot be recognised or enforced if it is contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. Shri Venugopal strongly attacked the correctness of the conclusions reached by the Arbitrators on the effect of force majeure clause.

In the award it is stated:

> .Under the force majeure clause the respondents did not have the right to cancel April 1991 and May 1991 quota under contracts S142 and S336 and neither by the same reasoning did the seller have the right to close out the June through November 1991 quotas against contract number S142 and the June quota against contract No. S336.
>
> It may be seen as a commercial oversight, nevertheless the force majeure clause as it is constructed in both contracts, would require both parties to maintain the contracts in being for an indefinite period of time until the force majeure clause had ended, failing alternative arrangements between the parties for delivery and payment.
>
> Further, the arbitrators had held that having considered the March 1991 Reserve Bank of India circular imposing restrictions on the imports of certain categories of goods due to difficult balance of payments position prevailing at the relevant time and letter of credit of Rs. 25 lakhs and above should be referred by the local bank branch to the head office for prior approval and in excess of Rs. 50 lakhs and above should be referred by the banks to the Controller, Exchange Control Department, Central Office, Reserve Bank of India, for clearance, and there is no time limit so far as these restrictions are concerned. The arbitrators noticed that the restrictions set by the Reserve Bank of India had created a situation in which the appellants had difficulty in arranging the opening of letters of credit so as to conform with the terms

of the contract although it could be noted that many applications were submitted by the appellant to the Bank of Baroda after the contractual deadline; that several shipments were made against the letter of credit opened after the contractual deadline; that thus it has been established by the documentary evidence to both contracts Nos. S142 and S336 that declaration of force majeure clause was present though belatedly. The arbitrators ultimately concluded that the Reserve Bank of India directives interfered with the contracts Nos. S142 and S336 which would have the effect of delaying the opening of the letters of credit by the buyer under the specified contracts. The arbitrators were of the opinion that the force majeure clause had no limitation on the period of suspension of the contract while the execution was affected by a valid force majeure; that it had been accepted by both the parties and that the restriction and requirements imposed by the Reserve Bank of India directives must be construed as having caused interference in and/or hindrance to the execution of the contract time wise; that though time had been considered to be of the essence condition, the inclusion of the force majeure clause which provided no time limit to the suspension of the contract caused by conditions envisaged herein though unusual it was accepted that the earlier contracts would be negotiated and executed successfully by the parties to the dispute.

The view taken by the arbitrators on the effect of the force majeure clause in the light of the Reserve Bank of India directives is a plausible view and cannot be ruled out as impossible of acceptance, and, therefore, question of substituting our view for that of the arbitrators would not arise. Question of public policy would have arisen if there was complete restriction on the implementation of the terms of the contract. There was no such restriction imposed. But, on the other hand, certain restrictions were imposed which could have been worked out by resorting to appropriate measures in terms of the contract as held by the arbitrators. In that view of the matter, we do not think any question of public policy as such arises for consideration in a situation of this sort. The argument is almost a red-herring and does not constitute a valid reason for interference with the award. Therefore, we reject the contentions raised on behalf of the appellant.

It is lastly contended that the interest awarded by the arbitrators needs interference and gave a break-up of the details. Interest has been awarded from period prior to reference in 1991 and after reference till termination of the proceedings before the arbitrators, pendente lite and after decree. This Court in Renusagars case [supra], held that award of such interest after the Interest Act, 1978 is permissible, however, on the facts of the case the High Court not having given a direction to the payment of interest pendente lite did not modify that part of the order.

We do not find that it is appropriate to modify the award made by the arbitrators or decree passed pursuant to it as no exceptional circumstances arise. The fact that there is fluctuation in the exchange rate is no reason for us to interfere with the same.

The appellant having failed on all points we dismiss this appeal, however, with no order as to costs.

.J. [S. RAJENDRA BABU] J. [S.N. PHUKAN] AUGUST 31, 2001.