

## **Shetty'S Constructions Co. Pvt. Ltd. vs Konkan Railway Construction And Anr. on 2 April, 1998**

**Equivalent citations: AIR1999SC1535, 1998(2)ARBLR314(SC), 1998(3)CTC233, JT1998(6)SC643, (1998)5SCC599, AIR 1999 SUPREME COURT 1535, 1998 AIR SCW 4004, 2000 (6) COM LJ 187 SC, (2000) 6 COM LJ 187, (1998) 6 JT 643 (SC), 1998 (2) ARBI LR 314, 1998 (5) SCC 599, 1998 (6) JT 643, (1998) 2 ARBILR 314, (1999) 1 CIVLJ 222, (1999) 1 BOM CR 58**

**Bench: S.B. Majmudar, M. Jagannadha Rao**

### **ORDER**

1. In these matters, two common decisions rendered by the Division Bench of the High Court of Bombay in four arbitration proceedings have been brought on the anvil of scrutiny.

2. Before dealing with the merits of these proceedings, one point which, in our view, requires to be decided at the threshold is to the effect whether the present arbitration proceedings are governed by the earlier Arbitration Act, 1940 or by the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as "the new Act"). For resolving this question, a few relevant facts will have to be mentioned at the outset. In SLPs (C) Nos. 1238-39 of 1997, according to the petitioner, the dispute was sought to be referred to arbitration by lodging a claim in that connection by the petitioner-contractor with the respondent-authorities on 6-3-1995 pursuant to the earlier demand dated 20-11-1994. A further letter in support of the earlier demand dated 6-3-1995 was also submitted on 29-5-1995 and thereafter an arbitration suit was filed in the High Court of Bombay on 24-8-1995 invoking the jurisdiction of the Court under Section 8 read with Section 20 of the Arbitration Act, 1940. So far as SLPs (C) Nos. 1240-41 of 1997 are concerned, a demand for arbitration was lodged with the respondents on 24-4-1995. That was with reference to the earlier claim lodged, according to the petitioner under clause 62 of the Arbitration Agreement on 5-1-1995. This demand for arbitration came to be rejected by the respondent-authorities on 5-7-1995 and that resulted into another arbitration suit which was filed on even date, i.e., 24-8-1995 invoking the very same provisions of the Arbitration Act, 1940. In SLPs (C) Nos. 1242-43 of 1997, according to the petitioner clause 62 of the Arbitration Agreement was invoked on 30-11-1994. The petitioner's case is that the said claim was rejected on 2-1-1995 and then a demand was made for referring the dispute for arbitration as per clause 63 of the Arbitration Agreement on 6-3-1995. A reminder was sent on 29-5-1995. Ultimately, that demand came to be rejected on 25-7-1995 by the authorities and that is how the third suit came to be filed on 24-8-1995 invoking the same Section 8 read with Section 20 of the Arbitration Act, 1940. The last two SLPs, i.e., SLPs (C) Nos. 1244-45 of 1997 pertain to a claim which was lodged, according to the petitioner, on 30-12-1994 and that claim was rejected on 24-1-1995 and the petitioner made a demand for referring the dispute for arbitration on 15-3-1995 and thereafter as there was no response from the respondents, arbitration suit was filed on 24-8-1995 under Section 8 read with Section 20 of the Arbitration Act, 1940.

3. In the light of the aforesaid factual data about the dates on which such claims were rejected the present question will have to be decided. The High Court in the impugned judgment has proceeded on the ground that the demands lodged under clause 63 of the Arbitration Agreement, were premature. We are not concerned with that controversy at this stage. Therefore, without expressing any opinion on the merits of that ground we proceed to decide this short question whether the new Act applies or the old Act applies on the facts of the present proceedings. The answer to this question is found from Section 85 of the new Act which reads as under:

"85. Repeal and savings.--(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."

4. 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 new Act came into force on 26-1-1996. The question therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or not. For resolving this controversy we may turn to Section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. 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 26-1-1996 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. As seen from the affronted factual matrix, it at once becomes obvious that the demand for referring the disputes for arbitration was made by the petitioners in all these cases months before 26-1-1996, in March and April 1995 and in fact thereafter all the four arbitration suits were filed on 24-8-1995. These suits were obviously filed prior to 26-1-1996 and hence they had to be decided under the old Act of 1940. This preliminary objection, therefore, is answered by holding that these four suits will be governed by the Arbitration Act, 1940 and that is how the High Court in the impugned judgments has impliedly treated them.

5. After we resolved this preliminary controversy between the parties, learned counsel for the respondents on our suggestion requested us to give some more time to the respondents to give

further response on the aspect whether on the peculiar facts and circumstances of the case, in these four arbitration suits which are governed by the old Act as held by us, and which have nothing to do with the other arbitration proceedings between the respondents and other contractors which may be pending under the new Act, to put an end to the simmering controversy about the qualification of the arbitrator, any retired Chief Justice of this Court or retired Judge of the Supreme Court or any other retired Judge of the High Court stationed at Bombay or elsewhere as found acceptable to parties can be requested to be such an arbitrator. It is of course true that earlier the respondents had expressed their inability to accede to this suggestion but in view of our present decision and in view of the fact that the controversy will be confined to only the present four proceedings, which are governed by the 1940 Act, learned counsel for the respondents agreed to once again get the response from the respondent-authorities on this suggestion. At his request, adjourned to 28-4-1998.