J. KODANDA RAMI REDDY

v.

STATE OF A.P. & ORS.

(Civil Appeal Nos. 1401-1405 of 2002)

NOVEMBER 11, 2010

[R.V. RAVEENDRAN AND DALVEER BHANDARI, JJ.]

Arbitration Act, 1940 – ss. 8, 30 and 33 – Application u/s. 8 for appointment of arbitrator by bidder company – Objection raised by State that in view of GOM No. 430 dated 24.10.1983 all claims above Rs. 50,000/- would be decided by the civil court of competent jurisdiction – Appointment of arbitrator by Sub-ordinate Judge – Order attaining finality – Passing of award by arbitrator – Award filed before Sub-ordinate Judge – Application u/ss. 30 an 33 by State for setting aside the award – Award made rule of the court – Appeal and revision petitions – High Court setting aside the appointment of arbitrator holding that dispute to be resolved by the competent civil court – Held: Not justified – GOM dated 24.10.1983 does not contain any provision for arbitration in regard to claims exceeding Rs. 50,000/- – However, the State did not challenge the order of appointment of arbitrator – State participated in the arbitration proceedings without protest – No submission to the effect that there was no arbitration agreement nor the award challenged on the said ground – Thus, State estopped from subsequently contending that there was no arbitration agreement and the remedy was only by way of suit — Also, it cannot be challenged belatedly – Adjudication was by court of competent jurisdiction, thus, award was not a nullity – Also, order appointing the arbitrator not a nullity, even though it might be erroneous – Order of appointment of arbitrator had attained finality – Thus, order passed by High Court set aside and that of trial court restored – Matter remanded to High Court to consider order rejecting

A *the application u/ss. 30 and 33 – Government order – GOM No. 430 dated 24.10.1983 – Estoppel – Delay – Res judicata – Rule of finality.*

The first respondent-State entered into an agreement dated 22.6.1987 with the appellant in regard to execution of certain work. The appellant raised claims in regard to the said work with the first respondent. The claims were not settled. The appellant filed a petition under Section 8 of the Arbitration Act, 1940 before the Sub-ordinate Judge, seeking appointment of an arbitrator. The first respondent resisted the petition on basis of the GOM No. 430 dated 24.10.1983 which was clarified by the GOM dated 01.06.1987 that all claims above Rs. 50,000/- would be decided by the civil court of competent jurisdiction by way of regular suit. The Sub-ordinate Judge, by order dated 25.03.1991, appointed the arbitrator under Section 8(2) of the Act. The first respondent did not challenge the said order. The arbitrator passed an award. The arbitrator then filed the award before the Sub-ordinate Judge. The first respondent filed a petition under Sections 30 and 33 of the Act for setting aside the award. The Sub-ordinate Judge, by order dated 08.04.1993, dismissed the petition and made the award a rule of the court. Aggrieved, the first respondent filed CMA No. 1251/1993 challenging the dismissal of its application under Sections 30 and 33 of the Act; CRP No. 4055/1993 challenging the direction that a decree be made in terms of the award under Section 14(2) of the Act; and CRP No. 134/1995 challenging belatedly the order dated 25.03.1991 under Section 8(2) of the Act appointing the arbitrator. The High Court by order dated 05.10.1999 held that the disputes relating claims of more than Rs.50,000/- would not be adjudicated by appointment of an arbitrator under Section 8 of the Act, but should be resolved by a competent civil court. Therefore, the appellant filed the instant appeals.

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Allowing the appeals, the Court A

HELD: 1.1 The GOM No. 430 dated 24.10.1983 does not contain any provision for arbitration in regard to claims exceeding Rs.50,000/- though the said GOM was in fact interpreted in many cases prior to 1995, as a provision for arbitration. [Para 11] [767-D] B

State of Andhra Pradesh vs. Obulu Reddy **2001 (10) SCC 30 – relied on.**

State of Andhra Pradesh vs. *I. Devendra Reddy* **1999 (9) SCC 571;** *Vishakhapatnam Urban Development Authority v. V. Narayana Raju* **1999 (9) SCC 572;** *State of Andhra Pradesh vs. Obulu Reddy* **1999 (9) SCC 568 – referred to.** C

1.2 The issue whether there was an arbitration agreement between the parties and, therefore, the disputes were arbitrable, was adjudicated and by order dated 25.3.1991, the Sub-ordinate Judge allowed the application under Section 8(2) of the Arbitration Act, 1940 holding that there was an arbitration agreement and consequently, appointed the arbitrator. The said order dated 25.3.1991 was not challenged and attained finality. The arbitrator entered upon the reference on 11.4.1991. The first respondent participated in the arbitration proceedings fully and contested the claims of the appellant, on merits without challenging the jurisdiction of the arbitrator. The first respondent did not even plead or contend before the arbitrator that there was no arbitration agreement or that the entire proceedings were invalid. The failure of the first respondent to raise any such contention was because the said contention had already been expressly raised in the proceedings under Section 8 of the Act and rejected by the Sub-ordinate Judge in its order dated 25.3.1991 appointing the arbitrator and that order had been *accepted and had* attained finality. [Para 12] [767-F-H; 768-A-D] D E F G H

A 1.3 When the arbitrator made the award dated 8.6.1992, the award was challenged by the first respondent by filing a petition under Sections 30 and 33 of the Act. The first respondent did not challenge the award on the ground that there was no arbitration
B agreement and that consequently, the award was invalid. On the other hand, the first respondent clearly admitted that it had raised such a contention in its objection statement to the application under Section 8 of the Act and that was rejected by the Sub-ordinate Judge.
C Thereafter, the first respondent specifically admitted that the arbitrator was appointed in terms of the agreement between the parties. [Para 13] [768-E-G; 769-E]

1.4 Having failed to contend that there was no arbitration agreement in the proceedings under Sections
D 30 and 33 of the Act, and on the other hand having *specifically conceded that the arbitrator was appointed in terms of the agreement*, the first respondent was estopped from subsequently contending in the appeal filed against the order dated 8.4.1993 rejecting the
E challenge to the arbitration award, that there was no arbitration agreement and the remedy of the contractor was only by way of a suit. Such a contention would be barred by the principle of res judicata as it was directly and substantially in issue in the proceedings under
F Section 8(2) of the Act and the decision therein had attained finality. [Para 13] [769-H; 770-A-C]

1.5 The first respondent having allowed the order dated 25.3.1991 to remain unchallenged and
G implemented, and having participated in the arbitration proceedings before the arbitrator without protest and without raising the contention that there was no arbitration agreement, and without challenging the award on the ground that there was no arbitration agreement, could not raise the issue in an appeal against the rejection
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of the application under Sections 30 and 33 of the Act. The first respondent could not challenge the order dated 25.3.1991, appointing the arbitrator, which had attained finality, belatedly on 17.4.1993 by contending that there was no arbitration agreement between the parties. [Para 14] [770-D-F]

State of Andhra Pradesh vs. Obulu Reddy **2001 (10) SCC 30 – distinguished.**

State Bank of India vs. Ramdas **2003 (12) SCC 474 – referred to.**

Russell on Arbitration **22nd Edn. p 382 – referred to.**

1.6 The order under Section 8(2) of the Act, by the Sub-ordinate Judge was not challenged and was allowed to attain finality. It was challenged only after the award was made and that award was made a rule of the court. In such circumstance, the rule of finality would come into play in regard to the order under Section 8(2) of the Act appointing the arbitrator. [Para 16] [772-H; 773-A]

1.7 In the instant case, though the first respondent had initially contended that there was no arbitration agreement, when the civil court held that there was an arbitration agreement and appointed the arbitrator, the first respondent did not challenge the decision, but accepted the said position and participated in the arbitration proceeding without protest. When the award was made by the arbitrator, the first respondent filed an application for setting aside the award wherein it admitted specifically that the appointment of the arbitrator was in terms of the agreement between the parties, but challenged the award on other grounds. In the circumstances, when there was an adjudication by a court of competent jurisdiction that there was an arbitration agreement and when that was not challenged

A and the arbitrator was allowed to proceed on the basis that there was an arbitration agreement, and when it was specifically conceded that the appointment of arbitrator is in terms of the agreement between the parties, the award would not be a nullity. [Para 17] [773-C-F]

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1.8 The order dated 25.3.1991 appointing an arbitrator was also not a nullity, even though it may be erroneous. A decree would be a nullity only if it is passed by a court usurping a jurisdiction it did not have. But a mere wrong exercise of jurisdiction or an erroneous decision by a C court having jurisdiction, would not result in a nullity. An order by a competent court, even if erroneous, is binding, unless it is challenged and set aside by a higher forum. [Para 18] [773-F, G]

D *D. Ranganayakulu vs. Superintending Engineer* NSRC CA No. 1087-1088 of 2008 decided on 7.2.2008 – referred to.

1.9 The impugned order dated 5.10.1999 in CRP E No.134 of 1995 setting aside the order dated 25.3.1991 appointing an arbitrator under Section 8(2) of the Act passed by the Sub-ordinate Judge, is set aside and the order dated 25.3.1991 is restored. As a consequence, the order dated 5.10.1999 allowing CMA No.1251/1993 and CRP No.4055/1993 is set aside. CMA No. 1251/1993 and F CRP No.4055/1993 are remanded to the High Court for fresh consideration and disposal in accordance with law on merits. Thus, the order dated 28.4.2000 dismissing the review CMP Nos.5446/2000 and 5447/2000 is set aside. [Para 21] [775-A-D]

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Case Law Reference:

1999 (9) SCC 571	Referred to	Para 10, 12
1999 (9) SCC 572	Referred to	Para 10, 16

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1999 (9) SCC 568	**Referred to**	**Para 11**	A
2001 (10) SCC 30	**Relied on**	**Para 11**	
2003 (12) SCC 474	**Referred to**	**Para 15**	
2001 (10) SCC 30	**Distinguished**	**Para 16, 17**	B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1401-1405 of 2002.

From the Judgment & Order dated 05.10.1999 of the High Court of Andhra Pradesh in CMA No. 1251 of 1993, CRP No. 4055 & 134 of 1995. C

L. Nageswara Rao, V. Sridhar Reddy, V.N. Raghupathy for the Appellant.

R. Sundarawardhan, Manoj Saxena, Rajneesh Kr. Singh, Rahul Shukla, T.V. George for the Respondents. D

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. The first respondent (State of A.P.) entered into an agreement dated 22.6.1987 in regard to execution of the work "Ongole Water Supply Improvement Scheme with NS canals as a source" in pursuance of acceptance of appellant's tender on 31.3.1987. E

2. By GOM No. 430 dated 24.10.1983, the first respondent issued the following revised procedure in regard to arbitration introduced by GOM dated 31.7.1975. The relevant portions of the revised procedure (paras 2, 3 & 4) are extracted below: F

GOM No. 430 [Irrigation (IRA V) Dept, dated 24.10.1983 G

" x x x x x

2. The question of revising the above procedure has been receiving the attention of government for some time past.

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A The government, after careful consideration of various aspects to issues involved direct the procedure be revised as follows :

Value of Amount	*Panel of Arbitrators*
1. Claims upto Rs. 10,000/-	Superintending Engineer of another Circle
2. Claims above Rs. 10,000/- upto Rs.50,000/-	(a) Another Chief Engineer of the same Depaı tment (b) Where there is only one Chief Engineer, in the Dept., the Chief Engineer will submit proposals to Govt. in the Administrative Dept. for nomination of another Chief Engineers as Arbitrator by Govt.
3. **Claims above Rs. 50,000/-**	**Court of competent jurisdiction.**

E 3. Claims means all claims in the contract.

4. The orders referred to in paras 2 and 3 above shall be applicable to all the agreements entered into by Govt. from the date of issue of this order and will be applicable to all F the Engineering Departments, in the State Govt. referred to para (6) ."

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The above GOM dated 24.10.1983 was revised by GOM G No.160 dated 1.6.1987 as follows:

"ORDER

Govt., after careful consideration of various aspects, issued orders in para (2) of the G.O. read above H prescribing the revised procedure for arbitration.

2. It has come to the notice of the Govt., that some of the contractors are approaching Courts to decide the claims above Rs. 50,000/- under the provisions of the Arbitration Act taking advantage of para 2(3) of the G.O. read above. The intention of the Govt. incorporating the above provision is to dispense with the Arbitration proceedings in respect of claims above Rs. 50,000/- and leave the parties to have their remedy in Civil Court. As some of the contractors have misconstrued that the claims above Rs. 50,000/- have to be decided under the Arbitration Act and not under ordinary Law in a regular civil Court, the Govt., direct that the following amendments to G.O.MS. No. 430, I(Irr.V) Deptt., dated 24-10-1983 be issued by way of clarification :-

(i) Item (3) of para (2) may be deleted.

(ii) Substitute para (3) by the following.

"All claims above Rs. 50,000/- shall be decided by the Civil Court of competent jurisdiction by way of a regular suit."

(iii) Para 3 to 7 are renumbered as para 4 to 8."

3. By letter dated 15.2.1990 the appellant lodged fourteen claims (of which claims 12, 13 and 14 related to pre-reference, pendente lite and future interest respectively) in regard to the said work, with the first respondent and demanded payment. As the first respondent did not settle the claims, the appellant filed a petition before the Sub-ordinate Judge, Nellore, under Clause 73 of the A.P. Standard Specifications, requesting the said court to act as the arbitrator and settle the claims, in terms of the provision for arbitration, contained in the contract dated 22.6.1987. This was on the assumption that Item (3) of para 2 of GOM dated 24.10.1983 required all claims above Rs.50,000/- to be decided by arbitration, the named Arbitrator being 'the court of competent jurisdiction'. The Sub-ordinate Judge, by order dated 17.4.1990, held that he could not act as an

A arbitrator. Thereafter, the appellant issued a notice dated 6.6.1990, under section 8 of the Arbitration Act, 1940 ('Act' for short) seeking reference of the disputes to arbitration and furnished a panel of three names with a request to the State Government to concur in the appointment of any one from that B Panel as sole arbitrator for adjudicating the disputes raised in his claim letter dated 15.2.1990. As there was no response, appellant filed OP No. 62/1990 under Section 8 of the Act in the Court of Sub-ordinate Judge, Nellore, seeking appointment of a sole arbitrator from out of the panel of three names C suggested by him, to decide the disputes arising out of agreement dated 22.6.1987.

4. The first respondent filed a counter to the said application disputing the claims and contending that as per the terms of GOM dated 24.10.1983 as clarified by the GOM dated D 1.6.1987, all claims over and above Rs.50,000/- shall have to be decided by civil court of competent jurisdiction by way of regular suit and not by way of arbitration. We extract below para 11 of the counter statement filed by the first respondent in the proceedings under section 8 of the Act :

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> "11. As per the conditions of the agreement, the settlement of all claims over and above Rs.50,000/- shall be decided by the Civil Court of the competent jurisdiction by way of regular suit only and not by arbitration. As per Government F order in G.O.Ms No.430, Irrigation (I&PD) Dept. dated 24.10.1983 an as clarified in subsequent G.O.Ms No.160 Irrigation & CAD (project Wing) Department dated 1.6.1987 wherein it is clearly stated that all claims above Rs.50,000/- shall be decided by civil court of competent G jurisdiction, by way of regular suit for the alleged claims by paying advalorem court fee. The Petitioner can not invoke the provisions of the Arbitration Act, for the appointment of sole arbitrator."

The Sub-ordinate Judge, Nellore by his order dated 25.3.1991 H allowed the said application and appointed Sh. HS Bhat,

retired Chief Engineer as the sole arbitrator under Section 8(2) of the Act. The civil court accepted the contentions of the appellant that the contract was concluded by acceptance of his tender on 31.3.1987 and the subsequent execution of the agreement on 22.6.1987 was merely a formality; that the clarificatory GOM dated 1.6.1987 was prospective in operation and therefore, did not apply to the contract between appellant and respondent; and that GOM dated 24.10.1983 alone applied, which was capable of being interpreted as providing for arbitration in regard to claims exceeding Rs.50,000/-. The learned Sub-ordinate Judge then proceeded to nominate the Arbitrator, on the ground that under GOM dated 24.10.1983, in regard to claims above Rs.50,000/-, there was no named Arbitrator and the court of competent jurisdiction had to appoint the arbitrator.

5. The first respondent did not challenge the said order dated 25.3.1991 appointing an arbitrator under Section 8(2) of the Act. The arbitrator appointed by the court entered upon the reference on 11.4.1991 and after due hearing made an award dated 8.6.1992. The arbitrator allowed claims 2, 3, 4 and 9 and rejected claims 1, 5, 6, 7, 8, and 10 of the appellant. The arbitrator also allowed claim 11 by directing release of the final bill amount and security deposit with interest @18% per annum on the final bill amount from 15.2.1990 and on the security deposit amount from 1.10.1991 upto date of payment or decree, whichever was earlier. The arbitrator also granted a simple interest at 18% per annum on the amounts awarded under claim Nos. 2, 3, 4 and 9 for the pre-reference period (15.2.1990 to 10.4.1991), pendente lite (11.4.1991 to 8.6.1992) and also as future interest (9.6.1992 to date of decree).

6. The Arbitrator filed the award before the Sub-ordinate Judge, Nellore under Section 14(2) of the Act which was registered as OP No. 56/1992. The first respondent filed OP No. 81/1992 under Sections 30 and 33 of the Act for setting aside the award. The Sub-ordinate Judge, Nellore by common

A order dated 8.4.1993 dismissed OP No. 81/1992 filed by the first respondent for setting aside the award, and allowed OP No.56/1992 filed under Section 14(2) of the Act and made the award, a rule of the court, and awarded further interest at 18% per annum from the date of decree till the date of realization.

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7. Feeling aggrieved, on 17.4.1993, the first respondent filed an appeal and a revision against the order dated 8.4.1993. CMA No. 1251/1993 was filed challenging the dismissal of its application under Sections 30 and 33 of the Act. CRP No. 4055/1993 was filed challenging the direction that a decree be C made in terms of the award under Section 14(2) of the Act. Along with the said appeal and revision, it filed another revision petition (CRP No. 134/1995) on 14.7.1993 challenging belatedly the order dated 25.3.1991 made in OP No. 62/1990 under Section 8(2) of the Act appointing the arbitrator.

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8. The said appeal and two revision petitions were disposed of by the High Court by a brief common order dated 5.10.1999, which is the subject matter of challenge in these appeals. The High Court held that having regard to decision of E this Court in *State of Andhra Pradesh vs. Obulu Reddy* (Civil Appeal No. 7246/1993 decided on 21.9.1999) holding that disputes relating claims of more than Rs.50000/- shall not be adjudicated by appointment of an Arbitrator under section 8 of the Act, but should be resolved by a competent civil court, the F revision petition challenging the order dated 25.3.1991 appointing the arbitrator (CRP No. 134/1995), had to be allowed. Consequently, the High Court allowed CMA No. 1251 of 1993 filed against the dismissal of the application under Sections 30 and 33 of the Act and CRP No. 4055/1993 filed against the order making the award a rule of the court and G permitted the appellant to convert OP No.62/1990 filed under Section 8 of the Act into a regular civil suit by carrying out necessary amendments and by payment of necessary court fee. The appellant filed two petitions for reviewing the order allowing CMA 1251/1993 and CRP 4055/1993 and the said review

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petitions were dismissed by an order dated 28.4.2000. Feeling aggrieved, the appellant has filed these five appeals challenging the common order dated 5.10.1999 of the High Court made in CMA No.1251/1993, CRP No.4055/1993 and CRP No.134/1995 and the common order dated 28.4.2000 dismissing the review petitions in CMP Nos. 5446/1993 and 5447/2000.

9. On the contentions urged, the following questions arise for consideration in this case :

(i) Whether the GOM dated 24.10.1983 provided for arbitration?

(ii) Whether the order dated 25.3.1991 appointing an arbitrator under section 8 (2) of the Act, could be challenged by the State Government, two years later, after participating in the arbitration proceedings without protest and after the arbitral award being made a rule of the court?

(iii) Whether the High Court was justified in setting aside the order dated 25.3.1991 appointing the arbitrator under section 8(2) of the Act and the common order dated 8.4.1993 rejecting the first respondent's application for setting aside the award and making the award, a rule of the court.

Re : Question No.(i)

10. The GOM dated 24.10.1983 first came up for consideration of this Court in *State of Andhra Pradesh* vs. *I. Devendra Reddy* (decided on 2.3.1990 and reported in 1999 (9) SCC 571). This Court held that the provisions of the GOM dated 24.10.1983 were vague and uncertain and consequently if a reference to arbitration had been made under section 8(2) of the Act, the same should not be interfered with. It was also held that the GOM dated 1.6.1987 revising the GOM dated 24.10.1983 by providing that all claims above Rs.50,000 shall be decided not by arbitration, but by way of a regular suit by the civil court of competent jurisdiction, was prospective in application and did not apply to the contracts entered prior to

A its date (1.6.1987). However in a subsequent decision in *Vishakhapatnam Urban Development Authority v. V. Narayana Raju* [decided on 16.2.1995 reported in 1999 (9) SCC 572], this Court held that GOM dated 24.10.1983 clearly provided that the arbitration was available only in regard to B claims upto Rs.50,000/- and not in regard to claims above Rs.50,000/- which had to be adjudicated by the court of competent jurisdiction; that though the expression "court of competent jurisdiction" was mentioned in the GOM dated 24.10.1983 under the heading of "panel of arbitrators", that was C only a defective drafting of the GOM and could not be construed to mean that the claims above Rs.50,000/- were to be adjudicated by arbitration. The decision in *Vishakapatnam Urban Development Authority* did not notice the earlier decision in *Devendra Reddy*.

D 11. The divergence between the two decisions was noticed by this Court in *State of Andhra Pradesh vs. Obulu Reddy* – 1999 (9) SCC 568 and the matter was referred to a larger Bench on 1.9.1999. Subsequently, a three Judge Bench of this Court decided the issue in *State of Andhra Pradesh vs. Obulu* E *Reddy* – 2001 (10) SCC 30, upholding the view expressed in *Vishakapatnam Urban Development Authority*. This Court held :

> "But having examined GOMs No.430, we have no F hesitation to agree with the conclusions arrived at in Vishakapatnam case and hold that under the said GOMs question of deciding claims above Rs.50,000/- by way of arbitration does not arise. It merely provided that disposal of claims up to Rs.50,000/- by way of arbitration indicating G as to who would be the arbitrator depending upon the claims and all claims above Rs.50,000/- are to be filed before the civil court of competent jurisdiction. This being the position, the second GOMs No.160 is nothing but a clarificatory one and was required to be issued because of the confusion arising in the minds of some of the H

claimants as well as the civil court, inasmuch as the civil court did entertain application under section 8 and appoint arbitrator in respect of claims above Rs.50,000/-. The earlier judgment of this Court in D. Reddy case has interpreted GOMs No.430 in a manner which is not the correct interpretation according to us. The orders appointing arbitrator under section 8 in the two appeals filed by the State are set aside. The appeals filed by the State are allowed.

In CA No.7246 of 1993 filed by the State, it is brought to our notice that not only an arbitrator was appointed by the Sub-ordinate Judge, but an award has already been given. In view of our aforesaid decision, the said award is a nullity and stands annulled."

Therefore it has to be held that the GOM dated 24.10.1983 does not contain any provision for arbitration in regard to claims exceeding Rs.50,000/- though the said GOM was in fact interpreted in many cases prior to 1995, as a provision for arbitration.

Re : Questions (ii) and (iii)

12. In the application under section 8(2) of the Act, the appellant had specifically contended that there was an arbitration agreement between the parties and therefore, the disputes were arbitrable. The first respondent resisted the said petition by specifically contending that there was no arbitration agreement between the parties. The issue was adjudicated, and by order dated 25.3.1991, the Sub-ordinate Court, Nellore, held that there was an arbitration agreement and consequently appointed the arbitrator. The said court in allowing the application under Section 8(2) of the Act filed by the appellant, by order dated 25.3.1991, followed the decision of this Court in *State of Andhra Pradesh v. I. Devender Reddy* [C.A. No.3578/1989 decided on 2.3.1990] and several decisions of the Andhra Pradesh High Court and held that the GOM dated

A 1.6.1987 was prospective in operation, that in regard to contracts concluded prior to 1.6.1987, GOM No.403 dated 24.10.1983 alone applied and consequently disputes involving claims of more than Rs.50,000/- had to be referred to Arbitration by the court of competent jurisdiction under section 8(2) of the
B Act. The said order dated 25.3.1991 was not challenged and attained finality. The Arbitrator entered upon the reference on 11.4.1991. The first respondent participated in the arbitration proceedings fully and contested the claims of the appellant, on merits without challenging the jurisdiction of the arbitrator. More
C importantly, the first respondent did not even plead or contend before the Arbitrator that there was no arbitration agreement or that the entire proceedings were invalid. The failure of the first respondent to raise any such contention was obviously because the said contention had already been expressly raised
D in the proceedings under section 8 of the Act and negatived by the Sub-ordinate Court in its order dated 25.3.1991 appointing the Arbitrator and that order had been accepted and had attained finality.

13. Ultimately, when the arbitrator made an award dated
E 8.6.1992, the award was challenged by the first respondent by filing a petition (OP No.81/1992) under sections 30 and 33 of the Act, on the following grounds: (i) the Arbitrator had travelled beyond the terms of the agreement; (ii) that as the contractor had himself terminated the contract on 28.10.1989, he was
F disentitled to make any claim under the contract; and (iii) that the contractor was not entitled to any of the amounts claimed under the contract. The first respondent did not challenge the award on the ground that there was no arbitration agreement and that consequently, the award was invalid. On the other hand,
G the first respondent clearly admitted that it had raised such a contention in its objection statement to the application under section 8 of the Act and that was negatived by the Sub-ordinate Court. We extract below the relevant portion of para (4) of the petition under sections 30 and 33 of the Act:

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"As the petitioner rejected the said claims the 1st respondent filed a petition before this Hon'ble Court in O.P. No.62 of 1990 under Section 8 of the Arbitration Act for the appointment of sole arbitrator to adjudicate the disputes raised by him. The petitioner opposed the said petition on the ground that the arbitration clause termed in the agreement do not empower the 1st respondent/contractor to file a petition before this Hon'ble Court under the provisions of the Arbitration Act and that they can only file a civil suit before this Hon'ble Court on payment of *ad valorem* Court fee on the amounts claimed by him. However, this Hon'ble court was pleased to allow the petition and appointed the 2nd respondent herein as sole arbitrator under Section 8 of arbitration Act to adjudicate the disputes raised by the 1st respondent. The 2nd respondent entered into the reference and was pleased to pass the Award dated 8.6.1992."

Thereafter, the first respondent specifically admitted that the arbitrator was appointed in terms of the agreement between the parties. We extract below the relevant portion of Para 5 of the said petition under sections 30 and 33 of the Act.

"The Hon'ble Arbitrator has travelled beyond the terms of agreement and allowed the above said claims. The Arbitrator travelled outside the terms of the Agreement in awarding the claims and thereby mis-conducted himself and also the proceedings. *It is submitted that the 2nd respondent was appointed as sole arbitrator as per the terms of the agreement entered into between the parties.* Since the arbitrator is the creature of the agreement, he must operate his proceedings within the confines of the terms of the said agreement. His right emanates from the terms of the agreement only."

(emphasis supplied)

Having failed to contend that there was no arbitration

A agreement in the proceedings under sections 30 and 33 of the Act, and on the other hand having *specifically conceded that the Arbitrator was appointed in terms of the agreement*, the first respondent was estopped from subsequently contending in the appeal (filed against the order dated 8.4.1993 B rejecting the challenge to the arbitration award), that there was no arbitration agreement and the remedy of the contractor was only by way of a suit. Such a contention would be barred by the principle of res judicata as it was directly and substantially in issue in the proceedings under section 8 (2) of C the Act and the decision therein had attained finality.

14. The next question is whether the first respondent could have challenged the order dated 25.3.1991 passed under section 8(2) of the Act appointing an arbitrator by filing a belated petition in 1993 two years later. The issue is not one D relating to merely delay. The issue is whether the first respondent having allowed the order dated 25.3.1991 to remain unchallenged and implemented, and having participated in the arbitration proceedings before the arbitrator without protest and without raising the contention that there was no E arbitration agreement, and without challenging the award on the ground that there was no arbitration agreement, could raise the issue in an appeal against the rejection of the application under sections 30 and 33 of the Act. The answer is clearly in the negative. The first respondent could not challenge the order F dated 25.3.1991, appointing the Arbitrator, which had attained finality, belatedly on 17.4.1993 by contending that there was no arbitration agreement between the parties.

15. We may in this context refer to the following passage G from Russell on Arbitration, (22nd Edn., page 382):

"**Loss of right to object.**

A party who objects to the award on the ground that the Tribunal lacks substantive jurisdiction, should not only act

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promptly but should also take care not to lose his right to object. A party who takes part or continues to take part in the proceedings is in a different position from someone who takes no part in the proceedings. The latter cannot lose his right to object as long as he acts promptly to challenge the award once it is published. The former must however state his objection to the Tribunal's jurisdiction either forthwith or within such time as is allowed by the agreement or the Tribunal. That statement which should be recorded in writing and sent to the Tribunal and the other parties should not only mention the jurisdiction objection but also make clear that any further participation in the arbitration will be without prejudice to the objection. If that is not done, the party concerned may not be able to raise that objection before the Court ...."

We may also refer to the following observations of this Court in *State Bank of India vs. Ramdas* [2003 (12) SCC 474] :

"It is an established view of law that where a party despite knowledge of the defect in the jurisdiction or bias or malice of an arbitrator participated in the proceedings without any kind of objection, by his conduct it disentitles itself from raising such a question in the subsequent proceedings. What we find is that the appellant despite numerous opportunities made available to it, although it was aware of the defect in the award of the umpire, at no stage made out any case of bias against the umpire. We, therefore, find that the appellant cannot be permitted to raise the question of bias for the first time before this Court."

16. Strong reliance was placed by the first respondent on the decision in *State of Andhra Pradesh vs. Obulu Reddy* – 2001 (10) SCC 30 wherein a three-Judge Bench of this Court had observed that even if an award had been made after the appointment of the arbitrator by the Sub-ordinate Judge, the award would be a nullity and stands annulled if there was no arbitration agreement. The said decision is clearly

A distinguishable and is inapplicable to the facts of this case. In *Obulu Reddy*, this Court was considering four appeals – two appeals preferred by the State of Andhra Pradesh and the other two preferred by the contractors. The appeals filed by the State Government related to cases where the contractors had B made an application before the Sub-ordinate Judge for appointment of an arbitrator in terms of GOM dated 24.10.1983 and the learned Sub-ordinate Judge had appointed an arbitrator which were assailed by the State in the High Court contending that even under the GOM dated 24.10.1983, claims for more C than Rs.50,000/- were required to be decided by filing a suit and not by arbitration. The High Court rejected the said appeals of the State. Consequently, the State filed the two appeals and by the time the matters were heard by this Court, in one of those two appeals, the Arbitrator appointed by the Sub-ordinate D Judge, had even made an award. In the other two appeals filed by the contractors, there was a slight variation. The Sub-ordinate Judge had appointed arbitrators in terms of the GOM No.403 dated 24.10.1983 as the claims were of more than Rs.50,000/-. The State assailed the appointment of arbitrators before the E High Court. By the time, the matters came up for hearing before the High Court, this Court had rendered its decision in *Vishakapatnam Urban Development Authority*. Following the said decision, the High Court allowed the appeals and set aside the appointments of the arbitrator made by the Sub-ordinate Judge in those two cases. Those orders were challenged by F the contractors before this Court. The crucial difference is that all the four appeals considered by this Court in *Obulu Reddy*, related to cases where the order of the Sub-ordinate Judge under Section 8 of the Act, appointing the arbitrator had been challenged by the State without any delay and the High Court G in two of the matters had accepted the challenge and in other two matters rejected the challenge and that is how all four appeals came up before this Court. But in this case, as noticed above, the order under section 8(2) of the Act, by the Sub-ordinate Judge was not challenged and was allowed to attain H finality. It was challenged only after the award was made and

that award was made a rule of the court. In such circumstance, the rule of finality would come into play in regard to the order under section 8(2) of the Act appointing the Arbitrator.

17. The observation in *Obulu Reddy* that when there was no arbitration agreement the award is a nullity, was made as the state government had not accepted the existence of the arbitration agreement at any stage and had all along challenged the order under section 8 of the Act appointing the Arbitrator. In this case, though the first respondent had initially contended that there was no arbitration agreement, when the civil court held that there was an arbitration agreement and appointed the arbitrator, the first respondent did not challenge the decision, but accepted the said position and participated in the arbitration proceeding without protest. More importantly, when the award was made by the Arbitrator, the first respondent filed an application for setting aside the award wherein it admitted specifically that the appointment of the arbitrator was in terms of the agreement between the parties, but challenged the award on other grounds. In the circumstances, when there was an adjudication by a court of competent jurisdiction that there was an arbitration agreement and when that was not challenged and the arbitrator was allowed to proceed on the basis that there was an arbitration agreement, and when it was specifically conceded that the appointment of arbitrator is in terms of the agreement between the parties, the award will not be a nullity.

18. The order dated 25.3.1991 appointing an Arbitrator was also not a nullity, even though it may be erroneous. It is well settled that a decree will be a nullity only if it is passed by a court usurping a jurisdiction it did not have. But a mere wrong exercise of jurisdiction or an erroneous decision by a court having jurisdiction, will not result in a nullity. An order by a competent court, even if erroneous, is binding, unless it is challenged and set aside by a higher forum. Be that as it may.

19. We are fortified in our view by the decision in *D. Ranganayakulu vs. Superintending Engineer* NSRC (CA No. 1087-1088 of 2008 decided on 7.2.2008). This Court dealing with an identical situation held :

> "Mr. Anoop Choudhary, learned senior counsel appearing for the respondents, however, referred to a decision of three-Judge Bench of this Court rendered in *State of A.P. & Anr. Vs. Oburu Reddy* - (2001) 10 SCC 30. We are of the view that the facts of that case is not applicable in the present case. In the case referred to by Mr. Anoop Choudhary, learned senior counsel, it clearly appears that the appointment of arbitrator was challenged in the High Court contending, inter alia, the jurisdiction of the arbitrator. As already pointed out, in the present case, the respondent did not challenge the order of the Court dated 30/04/1993 appointing Mr. Justice Punniah, retired Judge of the High Court as sole arbitrator. They participated in the entire proceedings before the arbitrator without any demur till the award was passed on 02/03/1995.
>
> In the facts and circumstances as recited above, the respondents waived their rights to file an objection at the time when the award was made Rule of the Court."

Conclusion :

20. Therefore, the order of the High Court dated 5.10.1999 in CRP No.134 of 1995 setting aside the order dated 25.3.1991 is liable to be set aside. When the order dated 25.3.1991 stands restored, the consequential direction in the order dated 5.10.1999 of the High Court allowing CMA No.12590 and CRP No.4055 of 1990, becomes unsupportable and requires to be set aside. The High Court has to now consider on merits the challenge to the order rejecting the application under sections 30 and 33 of the Act.

21. Therefore these appeals are allowed as follows :

(a) The impugned order dated 5.10.1999 in CRP No.134 of 1995 (setting aside the order dated 25.3.1991 under section 8(2) of the Act in O.P. No. 62/1992 on the file of Sub-ordinate Court, Nellore), is set aside and the said order dated 25.3.1991 stands restored. A

(b) As a consequence, the order dated 5.10.1999 allowing CMA No.1251/1993 and CRP No.4055/1993 is set aside. B

(c) CMA No. 1251/1993 and CRP No.4055/1993 are remanded to the High Court for fresh consideration and disposal in accordance with law on merits. C

(d) Consequently, the order dated 28.4.2000 dismissing the review CMP Nos.5446/2000 and 5447/2000 is set aside.

N.J. Appeals allowed. D