A

G.C. KANUNGO

v.

STATE OF ORISSA

MAY 12, 1995

B

[A.M. AHMADI, CJ AND N. VENKATACHALA, J.]

Arbitration (Orissa Second Amendment) Act, 1991:

Legislative competence of—Held Orissa legislature was competent to
C *enact—Subject of Act covered by Entry 13—List III to Seventh Schedule—Constitution of India.*

Arbitration Tribunal—Special Arbitration Tribunal—Awards—Made Rule of Court—Held awards does not merge in the judgment and decree of Court which made it the Rule of Court—Awards—Judgments and decrees
D *making rule of Court—Held not judgments and decrees of Courts.*

Judicial Power—Judgment—Nullification by legislature—Awards made by Special Arbitration Tribunal—Abrogation of—Held awards were made in exercise of judicial power—Statute abrogating awards held encroachment on
E *judicial power and violative of basic features of the Constitution.*

State legislature—Power to make law—Attribution of mala fides or ulterior motives cannot make the law unconstitutional.

The petitioner and the respondent-State entered into two contracts.
F **As the State Government rescinded both the contracts, the petitioner instituted proceedings under the Arbitration Act, 1940 in the Court of Sub-Judge, Bhubaneswar seeking appointment of Arbitrators to decide disputes relating to his claims. The State of Orissa enacted Arbitration (Orissa Amendment) Act, 1982 providing for a forum of Arbitration**
G **Tribunal for deciding arbitral disputes arising out of the contracts. Further Arbitration (Orissa Amendment) Act, 1984 provided for referring certain disputes involving claims of Rupee one crore or above to Special Arbitration Tribunals to be constituted by the State Government. It also provided for transfer of disputes involving claims of rupee one crore or above pending before the Arbitration Tribunals constituted under the 1982**
H **Amendment Act to the Special Arbitration Tribunal constituted by the**

State Government under 1984 Amendment Act. Special Arbitration Tribunals constituted by the State Government decided the arbitral disputes by making awards in favour of the petitioners. The awards were also made Rule of the Court. Thereafter, the State of Orissa promulgated the Arbitration (Orissa Second Amendment) Act, 1991 which has the effect of nullifying the awards made in favour of the petitioners by the Special Arbitration Tribunals even after each of the Awards had been made a Rule of Court. Consequently petitions were filed before this Court challenging the constitutionality of the Arbitration (Orissa Second Amendment) Act, 1991.

A

B

On the questions:

C

1. Was the Orissa State Legislature not competent to enact the 1991 Amendment Act on the topic of 'arbitration' in the Concurrent List of Seventh Schedule to the Constitution when Parliament had already enacted on the same topic, 'the Arbitration Act, 1940' - 'The Principal Act' - extending its operation to the State of Orissa as well?

D

2. Was the Orissa State Legislature actuated by malafides in enacting the 1991 Amendment Act and hence the 1991 Amendment Act was unconstitutional?

E

3. Did the award made by Special Arbitration Tribunals merge in judgments and decrees of Courts, when by such judgments and decrees, the awards of those Tribunals were made 'Rules of Court'?

4. If the awards of Special Arbitration Tribunals did not merge in the judgments and decrees of Courts, when they were made 'Rules of Court', can it be said that the 1991 Amendment Act which nullifies the judgments and decrees of Courts by which the awards of the Special Arbitration Tribunals, were made 'Rules of Court' is enacted by the Orissa State Legislature by encroaching upon the judicial power of the State exclusively vested in courts as sentinals of Rule of Law, basic feature of our Constitution, and hence is unconstitutional?

F

G

5. If the awards of Special Arbitration Tribunals did not merge in the judgments and decrees of Courts, can it not be said that the 1991 Amendment Act which nullifies the awards of the Special Arbitration Tribunals, even where such awards were made 'Rules of Court', is enacted

H

A by the Orissa State Legislature by encroaching upon the judicial power of the State exclusively vested in Courts as sentinals of Rule of Law, a basic feature of our Constitution, and hence is unconstitutional?

Allowing the writ petitions, this Court

B HELD : 1. The Orissa State legislature's enactment viz. Arbitration (Orissa Second Amendment) Act, 1991 is that made on a subject within its legislative field and when assent of the President is obtained, for it after reserving it for his consideration it becomes applicable to the State of Orissa, notwithstanding anything contained therein repugnant to what is C in the principal Act of Parliament, it cannot be held to be unconstitutional as that made by the Orissa State legislature without any necessary legislative competence. [523-H, 524-A]

2. It is settled that mala fides or ulterior motives attributed to a State legislature in making a law within its competence can never make such law D unconstitutional. Hence the 1991 Amendment Act cannot be held to be unconstitutional because of the ulterior motive and the malafides attributed to the Orissa State Legislature. [524-C, F]

K. Nagaraj & Ors. v. *State of Andhra Pradesh & Anr.,* [1985] 2 SCR 579, relied on.

E

3. The awards of Special Arbitration Tribunals did not merge in judgments and decrees of the Courts even though the courts by their judgments and decrees made such awards 'Rules of Court' for their enforceability though the Courts availing their machinery used for execution of their decision, that is, their own judgments and decrees. [527-D]

F

Satish Kumar & Ors. v. *Surinder Kumar & Ors.,* [1969] 2 SCR 244, referred to.

4. The award of a Special Arbitration Tribunal, as that of an award of an arbitrator, is, a decision made by it on the claim or cause referred G for its decision by way of arbitral dispute. When the Court makes such award of a Special Arbitration Tribunal a 'Rule of Court' by means of its judgment and decree, it is not deciding the claim or cause as it would have done, if it had come before it as a suit for its judgment and decree in the course of exercise of its ordinary civil jurisdiction. Indeed, when such H award is made to come by a party to the dispute before Court for being

made a 'Rule of Court' by its judgment and decree, it is to obtain the super added seal of the Court for such award, as provided for under the Principal Act, to make it enforceable against the other party through the machinery of Court. Therefore, the judgment and decree rendered by the Civil Court in respect of an award is merely to super-add its seal thereon for making such award enforceable through the mechanism available with it for enforcement of its own judgments and decrees. The mere facts that such judgments or decrees of Courts by which the awards of Special Arbitration Tribunals are made 'Rule of Court' or are affirmed by judgments and decrees of superior Courts in appeals, revisions or the like, cannot make the awards the decisions of Courts. Hence, when the awards of Special Arbitration Tribunals are made by the judgments and decrees of Courts, 'Rule of Court' for enforcing them through its execution process, the awards do not merge in the judgments and decrees of Courts, as would make them the decisions of Court. [526-A-E]

5. The 1991 Amendment Act in so far as it nullifies judgments and decrees of Courts by which awards of Special Arbitration Tribunals are made 'Rules of Courts', even where they are affirmed by higher Courts, cannot be regarded as that made by the Orissa State Legislature transgressing upon the judicial power of State vested in Courts as would make it unconstitutional. [528-H]

6. For the 1991 Amendment Act to become unconstitutional on the ground that it has rendered judgments and decrees of Courts by which the Special Arbitration Tribunals' awards are made 'Rule of Court', invalid or ineffective, such judgments and decrees must be decisions of Courts rendered by them in exercise of their judicial power of decision making in respect of the subjects of dispute before them and not where they render judgments and decrees to make the awards of the Special Arbitration Tribunals 'Rules of Court' so that they could be made enforceable through the machinery of Courts. Judgments and decrees made by Civil Courts in making the awards of the Special Arbitration Tribunals the 'Rules of Court' for the sole purpose of their enforceability through the machinery of Court, cannot make such judgments and decrees of Civil Court, the decisions rendered by Civil Courts in exercise of judicial power of the State exclusively invested in them under our Constitution. Thus, when the judgments and decrees made by Civil courts in making the awards of Special Arbitration Tribunals 'Rules of Court' are not those judgments

A and decrees of Courts made in exercise of judicial power of State vested in them under our Constitution, the 1991 Amendment Act when nullifies the judgments and decrees of Courts by which awards of Special Arbitration Tribunals are made 'Rules of Court', cannot be regarded as that enacted by the Orissa State Legislature encroaching upon the judicial powers of State exercisable under our Constitution by Courts as sentinals B of Rule of law, a basic feature of our Constitution. [527-G-H, 528-F-G]

7. Sections 2 and 3 of the 1991 Amendment Act seek to nullify the awards of Special Arbitration Tribunals, made on disputes referred to them from the 26th day of March, 1983 to 24th day of February, 1990 under C the 1984 Amendment Act. Thus, the impugned 1991 Amendment Act seeks to nullify the awards made by the Special Arbitration Tribunals constituted under the 1984 Amendment Act, in exercise of the power conferred upon them by that Act itself. When, the awards made under the 1984 Amendment Act by the Special Arbitration Tribunals in exercise of the D State judicial power conferred upon the which cannot be regarded as those merged in Rules of Court or judgments and decrees of Courts, are sought to be nullified by 1991 Amendment Act, it admits of no doubt that legislative power of the State Legislature is used by enacting impugned 1991 Amendment Act to nullify or abrogate the awards of the Special Arbitration Tribunals by arrogating to itself, a judicial power. From this, it follows E that the State Legislature by enacting the 1991 Amendment Act has encroached upon the judicial power entrusted to judicial authority resulting in infringement of a basic feature of the Constitution - the Rule of Law. Thus, when the 1991 Amendment Act nullifies the awards of the Special Arbitration Tribunals, made in exercise of the judicial power conferred F upon them under the 1984 Amendment Act, by encroaching upon the judicial power of the State, Court has no option but to declare it as unconstitutional having regard to the well settled and undisputed legal position that a legislature has no legislative power to render ineffective the earlier judicial decisions by making a law which simply declares the earlier judicial decisions as invalid and not binding, for such powers, if exercised, G would not be legislative power exercised by it, but judicial power exercised by it encroaching upon the judicial power of the State vested in a judicial Tribunal as the Special Arbitration Tribunals under 1984 Amendment Act. Moreover, where the arbitral awards sought to be nullified under the 1991 Amendment Act are those made by Special Arbitration Tribunals con- H stituted by the State itself under 1984 Amendment Act to decide arbitral

disputes to which State was a party, it cannot be permitted to undo such arbitral awards which have gone against it, by having recourse to its legislative power for grant of such permission as could result in allowing the State, if nothing else, abuse of its power of legislation.

[533-C, D-H, 534-A-B]

Re : Cauvery Water Disputes Tribunal, **[1991] Supp. 2 S.C.R. 497, referred to.**

8. The Arbitration (Orissa Second Amendment) Act, 1991, in so far as it nullifies the arbitral awards made by the Special Arbitration Tribunals constituted by respondent-State under the 1984 Amendment Act, including the awards of the petitioners which are made 'Rules of Court', is struck down as unconstitutional. [534-F]

CIVIL APPELLATE JURISDICTION : Writ Petition (C) No. 1151 of 1991 Etc.

(Under Article 32 of the Constitution of India)

N. Santosh Hedge, Vinoo Bhagat, Yashank Andhyaru, J.K. Das, Millon Kanungo, R.F. Nariman, A.K. Gupta, R.K. Mehta and A.K. Panda for the appearing parties.

The Judgment of the Court was delivered by

VENKATACHALA, J. Question of constitutionality of the Arbitration (Orissa Second Amendment) Act, 1991, to be referred to hereinafter as the 1991 Amendment Act', which has amended the Arbitration Act, 1940, to be referred to hereinafter as 'the Principal Act', in its application to the State of Orissa, arises for our consideration and decision in the present writ petitions filed under Article 32 of the Constitution.

Petitioner in Writ Petition No. 1151 of 1991 had entered into two contracts with the Orissa Government in the years 1969 and 1970 for construction of 'high level bridges' - one over the river Daya and another over the river Rushikulya. Any dispute to arise between the parties under the said contracts, was required to be resolved by having recourse to arbitration under the Principal Act because of the arbitration clause that stood incorporated in each of them, by agreement of parties. The Orissa Government which rescinded both the contracts - one in the year 1974 and

A another in the year 1975, it appears, did not concede to the petitioner's claim, exceeding rupees one crore made in relation to each of them. This situation appears to have led the petitioner to institute two separate proceedings under the Principal Act in the Court of Sub-Judge, Bhuvaneshwar—'the Court of Sub-Judge' seeking appointment of ar-
B bitrators to decide the disputes relating to his claims made in respect of the said two contracts. The appointment of a separate arbitrator for deciding each of the said disputes, it appears, was made by the Court of Sub-Judge in the year 1981. But, in the year 1982 when the Principal Act, as applicable to the State of Orissa, was amended by the Arbitration (Orissa Amendment) Act, 1982—'the 1982 Amendment Act, providing a
C forum of Arbitration Tribunal for deciding arbitral disputes arisen or arising from contracts as those of the petitioner, a controversy appears to have cropped up, as to whether the arbitrators appointed by the Court of Sub- Judge, in the proceedings before it, had to be replaced by an Arbitration Tribunal to be constituted according to 'the 1982 Amendment Act'.
D When the said controversy had still to be resolved, the Arbitration (Orissa Amendment) Act, 1984—'The 1984 Amendment Act', it is said, came into force amending the Principal Act insofar as it became applicable to the Orissa State by providing for a Special Arbitration Tribunal to be constituted by the State Government, for deciding arbitral disputes arisen or
E arising in relation to the contracts, as those of the petitioner, where claim involved was, of rupees one crore or above. The aforesaid controversy, whether the arbitrators earlier appointed by the Court of Sub-Judge, should be replaced by Special Arbitration Tribunals to be appointed by the State Government as required under the 1984 Amendment Act, which had
F cropped up because of the coming into force of the said two Amendment Act, it is said, ultimately ended in this Court, with the replacement of arbitrators who had been appointed by the Court of Sub-Judge, by Special Arbitration Tribunals constituted by the State Government with power conferred on those Special Arbitration Tribunals to decide the arbitral disputes raised by the petitioner in respect of his two contracts which had
G been entered into with the State Government but rescinded by the latter. Two Special Arbitration Tribunals which were so constituted by the State Government, it is said decided the arbitral disputes of the petitioner referred to them, by the making of awards - one in the year 1988 and another in the year 1989. The Court of Sub-Judge, before which those two
H awards had come to be placed for making them 'Rules of Court', are said

to have been made 'Rules of Court' by its judgments and decrees. The 'Rules of Court' so made in relation to each award by the Court of Sub-Judge, is said to have been affirmed by the High Court of Orrisa. When the 'Rules of Court' so affirmed by the High Curt in both the matters were brought up before this Court by the Orissa Government in S.L.P's, one of them has been dismissed while in the other leave has been granted, however, allowing the petitioner to take Rs. 25 lakhs out of the amount payable under the concerned award made in his favour by one of the Special Arbitration Tribunals. It appears, one of those awards which was made a 'Rules of Court' by the Sub- Judge and unsuccessfully challenged upto this Court by the Orissa Government, is under execution in an execution proceeding before the Court of Sub-Judge. Thus, when the amount payable under the award which was made a 'Rules of Court' was pending realisation before the Executing Court and another arbitral award which was made a 'Rules of Court' by the Court of Sub-Judge, was pending consideration by this Court in a Civil Appeal, the State Government, it is said, promulgated the Arbitration (Orissa Amendment) Ordinance, 1991, amending the Principal Act as amended by the earlier amendment Acts, in its application to the State of Orissa. However, that Ordinance came to be replaced by the 1991 Amendment Act. As the 1991 Amendment Act has in effect nullified the aforesaid two awards made in favour of the petitioner by two Special Arbitration Tribunals constituted by the State Government under the 1984 Amendment Act, even after each of them had been made a 'Rules of Court' and directed the petitioner to get the arbitral disputes raised by him, resolved afresh by the Arbitration Tribunal constituted under the Principal Act as stood amended by the 1982 Amendment Act, the constitutionality of the 1991 Amendment Act, has been challenged by the petitioner by filing the Writ Petition.

Coming to the petitioner in Writ Petition No. 491 of 1992, he is a contractor who had entered into two contracts in the year 1972 with the Orissa Government for improving two sections of the National Highway No. 5. In the year 1974 certain disputes having arisen between the parties in relation to execution of works concerned in the said contract, the petitioner who was a party to such contracts, appears to have instituted a proceeding before the Court of Sub-Judge, seeking reference of the disputes to an arbitrator to be appointed by it under the Principal Act, since the arbitration clause found in each of those contracts required reference of such arbitral disputes to an Arbitrator. Thereafter, the Court of Sub-

A Judge appears to have appointed a retired District Judge as an arbitrator and referred the arbitral disputes to him for being decided by him. That arbitrator, appears to have, accordingly, decided the arbitral disputes by his awards made in the year 1981, itself. Though the Court of Sub-Judge appears to have refused to make each of the said awards a 'Rules of Court', B the High Court is said to have made each of them a 'Rules of Court' in the year 1990. The S.L.P's of the Orissa Government filed before this Court against the judgment of the High Court, it is said, came to be dismissed in the year 1991. When the amounts payable under the awards which had been made 'Rules of Court' were sought to be realised in execution of 'Rules of Court', directions appear to have been given to the State Govern- C ment by the Executing Court to pay all the amounts payable under the said awards to the petitioner. Some proceedings taken by the Orissa Government before the Court of Sub-Judge under section 47 of the Code of Civil Procedure, 1908 questioning the orders made in execution proceedings appear to have proved futile, all through. The 1991 Amendment Act, D according to the petitioner, has the effect of nullifying the awards made in his favour by their arbitrator, even though each of them is made a 'Rules of Court' by the High Court and affirmed by this Court and making him have his arbitral dispute resolved by the Arbitration Tribunal constituted under the Principal Act as amended by the Amendment Acts. That is the reason, it is said, as to why the petitioner has filed the writ petition to E challenge the constitutionality of the 1991 Amendment Act.

The petitioners in the present Writ Petitions have since challenged the constitutionality of the 1991 Amendment Act, which is found in the notification published in the Orissa Gazette Extra-Ordinary on 22nd January 1991, that Notification itself, for the sake of convenience, is F reproduced:

> No. 1117-Legis.-The following Act of the Orissa Legislative Assembly having been assented to by the President on the 22nd January, 1992 is hereby published for general information.

G

> ORISSA ACT 3 OF 1992
>
> THE ARBITRATION (ORISSA SECOND AMENDMENT) ACT, 1991

H An Act to amend the Arbitration Act, 1940 in its application to

the State of Orissa. A

Be it enacted by the Legislature of the State of Orissa in the Forty-second year of the Republic of India as follows :-

1. (i) This Act may be called the Arbitration (Orissa Second Amendment) Act, 1991. B

(2). It shall be deemed to have come into force on the 24th day of September, 1991.

2. In the Arbitration Act, 1940 in its application to the State of Orissa (hereinafter referred to as the principal Act), in section C 41-A, after sub-section (1), the following sub-section shall be deemed to have been inserted with effect from the 26th day of March, 1983 and in force during the period between the said date and the 24th day of January, 1990 (both the days inclusive), namely:- D

'(1-a) No reference to arbitration of any dispute specified in sub-section (1) involving a claim of rupees one crore or above shall be made under the said sub-section to a Special Arbitration Tribunal, unless the amount agreed to by the parties in the contract out of which such dispute has arisen is more than half the amount E of such claim'.

3. Notwithstanding anything to the contrary in the principal Act, or in any award made by Special Arbitration Tribunal in relation to any dispute, or in any Judgment, decree or order passed by any Court in relation to any such dispute or award, - F

(i) the amendment made by section 2 shall apply to and in relation to every dispute in respect of which award has been made by Special Arbitration Tribunal, whether such award has been, or is pending to be, made the rule of the Court under section 17 of G the principal Act;

(ii) any reference made to Special Arbitration Tribunal in respect of a dispute referred to in clause (i) inconsistently with the provision of sub-section (1-a) of section 41-A of the principal Act as inserted by section 2 of this Act shall be deemed to be invalid H

as if the said sub-section (1-a) of section 41-A was in force at the time when such reference was made; and

(iii) in the case of every dispute, the reference in respect of which is so deemed to be invalid under clause (ii), a fresh reference to arbitration shall be made to the Arbitration Tribunal within ninety days from the date of publication of the Arbitration (Orissa Amendment) Ordinance, 1991 in the official Gazette.

Explanation - For the purposes of this section, the expression 'Special Arbitration Tribunal' shall mean a Special Arbitration Tribunal constituted under sub-section (1) of section 41-A of the principal Act as it stood prior to the 25th day of January, 1990.

4. (1) The Arbitration (Orissa Amendment) Ordinance, 1991 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act as amended by the said Ordinance shall be deemed to have been done or taken under the principal Act as amended by this Act.

By order of the Governor
Sd/-
P.K. PANIGRAHI
Secretary to Government."

The 1991 Amendment Act, as seen from its provisions, makes it abundantly clear that every reference made to a Special Arbitration Tribunal between 26th March, 1983 and 24th January, 1990 in respect of a dispute involving a claim of rupees one crore or above, if such claim was more than double the amount agreed to by the parties in the contract out of which such dispute arose, becomes invalid and a fresh reference of such arbitral dispute shall be made to the Arbitration Tribunal within the stipulated period, notwithstanding anything to the contrary in the Principal Act or in any award made by a Special Arbitration Tribunal in relation to any dispute or any judgment, decree or order passed by any court in relation to any such dispute or award and also notwithstanding whether such award of the Special Arbitration Tribunal has been or has to be, made the 'Rules of Court' under Section 17 of the Principal Act.

Arguments addressed before us against the constitutionality of the said 1991 Amendment Act by Shri Vinoo Bhagat and Shri R.F. Nariman, learned counsel for the petitioners, briefly put, are these:

The 1991 Amendment Act is unconstitutional as it relates to the topic of arbitration, in the Concurrent List of Seventh Schedule to the Constitution, which was already covered by parliamentary legislation, 'the Principal Act'. The 1991 Amendment Act being the result of mala fide exercise of power by the Orissa State Legislature, the same was unconstitutional. The awards of Special Arbitration Tribunals constituted according to the provisions of the Principal Act as applicable, to the State of Orissa, when are made 'Rules of Court' by judgments and decrees of Courts, such awards get merged in judgments and decrees of the Courts. Therefore, awards of Special Arbitration Tribunals, cease to have any independent existence when they are made by judgments and decrees of Courts 'Rules of Court'. When that is so, no legislature under our Constitution, of which Rule of Law is a basic feature has the power to nullify the awards of the Special Arbitration Tribunals which had become 'Rules of Court' by judgments and decrees of Courts, for such nullification would amount to nullification of judgments and decrees of Courts. Therefore, when the Orissa State Legislature by enacting the 1991 Amendment Act has nullified the awards made by the Special Arbitration Tribunals, which had merged in the judgments and decrees of Courts they having been made 'Rules of Court', the 1991 Amendment Act was unconstitutional being that made by the Orissa State Legislature not in exercise of legislative power of the State vested in it under our Constitution but by encroaching upon the judicial power of the State which was exclusively exercisable according to our Constitution, of which Rule of Law is its basic feature, only by Tribunals or Courts. Even otherwise, the 1991 Amendment Act was unconstitutional since it was made encroaching upon the judicial power of the State, when it has nullified the awards (decisions) of Special Arbitration Tribunals constituted by the State Government under the 1984 Amendment Act, which had conferred upon with the judicial power of the State of adjudication of disputes between parties. In any event, the 1991 Amendment Act being arbitrary and unreasonable for the reason that it nullifies arbitral disputes relating to the year 1983, the same was violative of Article 14 of the Constitution and hence unconstitutional.

On the other hand, Shri M. Santosh Hedge, the learned counsel, who

A addressed arguments before us for the State of Orissa urged that every argument made by learned counsel for the petitioners against the constitutionality of the 1991 Amendment Act lacked merit and did not warrant our acceptance.

As our decision on the question of constitutionality of the 1991 B Amendment Act has to depend on the answers to be given by us on the points which have emerged from the arguments of learned counsel for the opposing parties, those points could be formulated, for their proper consideration and determination, thus:

C 1. Was the Orissa State Legislature not competent to enact the 1991 Amendment Act on the topic of 'arbitration' in the Concurrent List of Seventh Schedule to the Constitution when Parliament had already enacted on the same topic, 'the Arbitration Act, 1940' - 'the Principal Act', extending its operation to the State of Orissa as well?

D

2. Was the Orissa State Legislature actuated by mala fides in enacting the 1991 Amendment Act and hence the 1991 Amendment Act was unconstitutional?

E 3. Did the awards made by Special Arbitration Tribunals merge in judgments and decrees of Courts, when by such judgments and decrees, the awards of those Tribunals were made 'Rules of Court'?

4. If the awards of Special Arbitration Tribunals did not merge in F the judgments and decrees of Courts, when they were made 'Rules of Court', can it be said that the 1991 Amendment Act which nullifies the judgments and decrees of Courts by which the awards of the Special Arbitration Tribunals, were made 'Rules of Court' is enacted by the Orissa State Legislature by encroaching upon the judicial power of the State exclusively vested in G Courts as sentinals of Rule of Law, a basic feature of our Constitution, and hence is unconstitutional?

5. If the awards of Special Arbitration Tribunals did not merge in the judgments and decrees of Courts, can it not be said that the H 1991 Amendment Act which nullifies the awards of the Special

Arbitration Tribunals, even where such awards were made 'Rules of Court', is enacted by the Orissa State Legislature by encroaching upon the judicial power of the State exclusively vested in Courts as sentinals of Rule of Law, a basic feature of our Constitution, and hence is unconstitutional? A

6. Is the nullification brought about by the 1991 Amendment Act of awards made by Special Arbitration Tribunals on arbitral disputes referred to them as early as in the year 1983 was arbitrary and unreasonable, as would attract the inhibition of Article 14 of the Constitution and make that Act unconstitutional? B C

We shall not proceed to consider and answer each of the said points in their serial order.

Point-1:

D

Want of legislative competence on the part of the Orissa State Legislature to enact the 1991 Amendment Act was indeed not argued very seriously by learned counsel for the petitioners. Subject of arbitration finds place in Entry 13 of List III, i.e., the Concurrent List of VII Schedule to the Constitution on which the legislation could be made either by Parliament or the State legislature. When there is already the legislation of Parliament made on this subject, it operates in respect of all States in India, if not excepted. Since it is open to a State legislature also to legislate on the same subject of Arbitration, in that, it lies within its field of legislation falling in an entry in the Concurrent List and when a particular State Legislature has made a law or Act on that subject for making it applicable to its State, all that becomes necessary to validate such law is to obtain the assent of the President by reserving it for his consideration. When such assent is obtained, the provisions of the State Law or Act so enacted prevails in the State concerned, notwithstanding its repugnancy to an earlier. Parliamentary enactment made on the subject. It was not disputed that insofar as the 1991 Amendment is concerned, it has been assented to by the President of India after it was reserved for his consideration. Hence, the Orissa State legislature's enactment, the 1991 Amendment Act is that made on a subject within its legislative field and when assent of the President is obtained, for it after reserving it for his consideration it becomes applicable to the State of Orissa, notwithstanding anything con- E F G H

A tained therein repugnant to what is in the principal Act of Parliament, it cannot be held to be unconstitutional as that made by the Orissa State legislature without the necessary legislative competence.

Point-2:

B The argument advanced on behalf of the petitioners that the 1991 Amendment Act was enacted by the Orissa State legislature which was actuated by mala fides and hence the same is unconstitutional, is difficult of acceptance. That mala fides or ulterior motives attributed to a State legislature in making a law within its competence can never make such law C unconstitutional, is well settled. In *K. Nagaraj & Ors.* v. *State of Andhra Pradesh & Anr.*, [1985] 2 SCR 579, while dealing with the mala fides attributed to a legislature in which it had competence to make the law, this Court said thus :

> "The legislature, as a body, cannot be accused of having passed D a law for an extraneous purpose. If no reasons are so stated as appear from the provisions enacted by it. Its reasons for passing a law or those that are stated in the Objects and Reasons. Even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law mala fide. This kind of 'transferred malice' is unknown in E the field of legislation."

Hence, we have no hesitation in finding that the 1991 Amendment Act cannot be held to be unconstitutional because of the ulterior motive and the mala fides attributed to the Orissa State Legislature.

F *Point-3:*

This point concerns merger of awards of Special Arbitration Tribunals in the judgments and decrees of Courts when such awards are made 'Rules of Court'.

G Section 41-A of the Principal Act was inserted in the Principal Act by the 1982 Amendment Act so as to make it applicable to the State of Orissa. The provision therein required the reference of arbitral disputes in all cases where the State Government, a local or other authority controlled by the State Government, a statutory corporation or a Government com- H pany was a party, to be made to the Arbitration Tribunal comprised of

three members—one member chosen from among the officers belonging to the Orissa Superior judicial Service (Senior Branch) and another member chosen from among the officers of the Public Works Departments of the State Government not below the rank of a Superintending Engineer and a third member chosen from among the officers belonging to the Orissa Finance Service not below the Superior Administrative Cadre in Class-I. But, by its provisions the 1984 Amendment Act required that arbitral disputes referred to or referable to the Arbitration Tribunal, shall be referred to Special Arbitration Tribunals comprised of one or more retired High Court Judges to be constituted by the State Government from time to time, if any of such disputes involved a claim of rupees one crore or above. When the arbitral dispute involving a claim of rupees one crore or above, was referred to Special Arbitration Tribunal for deciding it by making an award thereon, what was so referred in the form of arbitral dispute was the claim or cause which one party had against the other in respect of the contract entered into by them, admits of no controversy. Again, when Special Arbitration Tribunal decided such arbitral dispute by making an award in respect of it, the claim or cause of a party arisen against the other party in relation to the contracts entered into by them and which had given scope for raising an arbitral dispute and getting it referred to the Special Arbitration Tribunal for its decision merges in the award so made by it, cannot also admit of any controversy. If that be so, when a Special Arbitration Tribunal makes an award, it, as ought to be, binds the parties to the dispute and their privies. Such awards of the Special Arbitration Tribunals bind the parties and their privies cannot be controverted, in that, condition 7 of the implied conditions of arbitration agreements, contained in the First Schedule to the Principal Act, recognises the position by declaring that the awards shall be final and binding on the parties and persons claiming under them, respectively. No doubt, it is open to any of the parties to the award, if so chosen, to cause the Special Arbitration Tribunal, as provided for under section 14 of the Principal Act, to file such award in court for making it a 'Rules of Court', by its judgment and decree to be rendered or made under section 17 of the Principal Act. Such Court is a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, as becomes clear from the definition clause (c) of Section 2 of the Principal Act.

What is of importance and requires our examination is, whether such

A Court when makes an award of the Special Arbitration Tribunal filed before it, a 'Rules of Court' by its judgment and decree, as provided under Section 17 of the Principal Act, does such awed of the Special Arbitration Tribunal merge in the judgment and decree, as argued on behalf of the petitioners. We find it difficult to accede to the argument. What cannot be
B overlooked is, that the award of a Special Arbitration Tribunal, as that of an award of an arbitrator, is, as we have already pointed out, a decision made by it on the claim or cause referred for its decision by way of arbitral dispute. When the Court makes such award of a Special Arbitration Tribunal a 'Rules of Court' by means of its judgment and decree, it is not
C deciding the claim or cause as it would have done, if it had come before it as a suit for its judgment and decree in the course of exercise of its ordinary civil jurisdiction. Indeed, when such award is made to come by a party to the dispute before Court for being made a 'Rules of Court' by its judgments and decree, it is to obtain the super added seal of the Court for such award,
D as provided for under the Principal Act, to make it enforceable against the other party through the machinery of Court. Therefore, the judgment and decree rendered by the Civil Court in respect of an award is merely to super-add its seal thereon for making such award enforceable through the mechanism available with it for enforcement of its own judgments and decrees. The mere fact that such judgments of decrees of Courts by which
E the awards of Special Arbitration Tribunals are made 'Rules of Court' or are affirmed by judgments and decrees of superior Courts in appeals, revisions or the like, cannot make the awards the decisions of Courts. Hence, when the awards of Special Arbitration Tribunals are made by the judgments and decrees of Court, 'Rules of Court' for enforcing them
F through its execution process, they (the awards) do not merge in the judgments and decrees of Courts, as would make them the decisions of Court. The legal position as to non-merger of awards in judgments and decrees of Courts, which we have stated, receives support from certain observations in the decision of this Court in *Satish Kumar & Ors.* v. *Surinder*
G *Kumar & Ors.*, [1969] 2 SCR 244. There, this Court was confronted with the question, whether an award made by an arbitrator which had become unenforceable for want of registration under the Registration Act, ceased to be a decision of the arbitrator, which binds the parties or their privies. In that context, this Court observed that an award is entitled to that respect
H which is due to the judgment and decree of last resort. And if the award

which had been pronounced between the parties has become final, a second reference of the subject of the award becomes incompetent. It further observed that if the award is final and binding on the parties, it can hardly be said that it is a waste paper unless it is made a 'Rules of Court'. Hegde, J. who agreed with the above observations of Sikri, J. (as His Lordship then was) while speaking for Bachawat, J. also, observed that the arbitration has the first stage which commences with arbitration agreements and ends with the making of the award, and then a second stage which relates to the enforcement of the award. He also observed that it was one thing to say that a right is not created by the award but it is an entirely different thing to say that the right created cannot be enforced without further steps.

Therefore, our answer to the point is that the awards of Special Arbitration Tribunals did not merge in judgments and decrees of the Courts even though the Court by their judgments and decrees made such awards 'Rules of Court' for their enforceability through the Courts availing their machinery used for execution of their decisions, that is, their own judgments and decrees.

Point-4

It is true, as argued on behalf of the petitioners, that a legislature has no legislative power to render ineffective the earlier judicial decisions by making a law which simply declares the earlier judicial decisions as invalid or not binding, for such power if exercised would not be a legislative power exercised by it but a judicial power exercised by it encroaching upon the judicial power of the state exclusively vested in Courts. The said argument advanced, since represents the correct and well-stated position in law, we have thought it unnecessary to refer to the decisions of this Court cited by learned counsel for the petitioners, in that behalf and hence have not referred to them.

For the 1991 Amendment act to become unconstitutional on the ground that it has rendered judgments and decrees of Courts by which the Special Arbitration Tribunals' awards are made 'Rules of Court', invalid or ineffective, such judgments and decrees must be decisions of Courts rendered by them in exercise of their judicial power of decision making in respect of the subjects of dispute before them and not where they render judgments and decrees to mark the awards of the Special Arbitration

A Tribunals 'Rules of Court' so that they could be made enforceable through the machinery of Courts. Thus, the awards of the Special Arbitration Tribunals when get the super-added seals of Courts for such awards, by the Courts making them 'Rules of Court' by their judgments and decrees such awards do not get merged in judgments and decrees of Courts so as to make them the decisions of Courts, rendered in exercise of State's B judicial power of decision making, as it happens in the causes directly brought before them by way of suits for their decisions. As we have already pointed out, question of claim or cause of a party which gets merged in the award of a Special Arbitration Tribunal, in turn, getting merged in judgment and decree made by Civil Court, for the purpose of making the C award a 'Rules of Court', so as to make it enforceable, can not arise. What needs to be noted is, that Courts even if render their judgments and decrees for making the awards 'Rules of Court', those judgments and decrees cannot substitute their own decisions for the decisions of Special Arbitration Tribunals contained in their awards. This situation makes it clear that power exercised by the Civil Courts in making the awards of D Special Arbitration Tribunals 'Rules of Court' by their judgments and decrees is not their judicial power exercised in rendering judgments and decrees, as Civil Courts exercise their powers vested in them for resolving disputes between parties. To be precise, judgments and decrees made by Civil Courts in making the awards of the Special Arbitration Tribunals the 'Rules of Court' for the sole purpose of their enforceability through the E machinery of Court, cannot make such judgments and decrees of Civil Court, the decisions rendered by Civil Courts in exercise of judicial power of the State exclusively invested in them under our Constitution. Thus, when the judgments and decrees made by Civil Courts in making the awards of Special Arbitration Tribunals 'Rules of Court' are not those judgments and decrees of Courts made in exercise of judicial power of F State vested in them under our Constitution, the 1991 Amendment Act when nullifies the judgments and decrees of Courts by which awards of Special Arbitration Tribunals are made 'Rules of Court', cannot be regarded as that enacted by the Orissa State legislature encroaching upon the judicial powers of State exercisable under our Constitution by Courts as sentinals of Rule of Law, a basic feature of our Constitution. Hence, the G 1991 Amendment Act in so far as it nullifies judgments and decrees of Courts by which awards of Special Arbitration Tribunals are made 'Rules of Court', even where they are affirmed by higher Courts, cannot be regarded as that made by the Orissa State Legislature transgressing upon the judicial power of State vested in Courts as would make it unconstitu- H tional.

Point-5: A

If the awards made by Special Arbitration Tribunals which are sought to be nullified by the 1991 Amendment Act enacted by the Orissa State legislature, are regarded as those made by the Special Arbitration Tribunals in exercise of Judicial power of the State conferred upon them, by an enactment of the State Legislature, the 1984 Amendment Act, was B it open to the State Legislature to enact the 1991 Amendment act to simply nullify such awards without encroaching upon the judicial power of the State especially conferred on Special Arbitration Tribunals in the matter of adjudicating upon arbitral disputes not coming before them at the instance of parties, is the point. C

When awards are made in disputes between the parties by the arbitrators of their choice or arbitrators who may be appointed by the Court on their behalf, as provided for under the Principal Act, such awards, can never be regarded as those made by the arbitrators in exercise of the judicial power of the State conferred upon them. However, if D reasoned awards are made by Special Arbitration Tribunals constituted under a legislative enactment in exercise of the power conferred upon them under such enactment in the matter of adjudicating upon disputes between the parties according to accepted norms of judicial procedure, can such awards be not regarded as those rendered by the arbitration tribunals in E exercise of the judicial power of the State conferred upon them under the legislative enactment, is the principal question.

As the Objects and Reasons annexed to the Bill on the basis of which the impugned 1991Amendment Act has been enacted for constituting Special Arbitration Tribunals by the State and for conferring power of F adjudicating disputes between parties referred to them, furnishes the historical background in which the Bill was introduced in the State Legislature, it would be useful to reproduce the same thus:

> "Section 41-A of the Arbitration Act, 1940 as it applies to the State of Orissa was amended with effect from 26.3.1983 by the G Arbitration (Orissa Amendment) Act 1984, whereby, a proviso to sub-section (1) of the said section was inserted to the effect that reference to arbitration of disputes specified in the said sub-section involving claims of rupees one crore or above may be made to a Special Arbitration Tribunal comprising one or more retired High H

A Court Judges, as may be constituted by the State Government from time to time. In the course of operation of this proviso it was experienced that a tendency has developed among the Contractors to seek constitution of Special Arbitration Tribunals by inflating their claims to rupees one crore and above, inter alia, to avoid depositing the security money required for reference to the Ar-
B bitration Tribunal. Therefore, the said proviso was deleted with effect from 25.1.1990 by the Arbitration (Orissa Amendment) Act 1989 (Orissa Act 1 of 1990). While so deleting the proviso, the cases which were pending before the Special Arbitration Tribunal for disposal, whereas the cases in which award was already passed
C were left unaffected in view of prospective operation of the amendment.

Later it came to the notice of the Government that in some of the cases, in which award was made by a Special Arbitration
D Tribunal, not only the Contractors inflated their claims abnormally but also the awards passed in respect thereof are surprisingly high and unreasonable. This is a matter of serious concern for the Government since the amounts involved in such awards, besides being unreasonable and assessed improperly and inaccurately for the reason that the one man Special Arbitration tribunals were not
E assisted by any technical and Finance members as in the case of the Arbitration Tribunal, put a heavy and undesirable burden on the public exchequer to which the government, in view of its serious responsibility to the people as well as the obligation to the Constitution cannot close their eyes.

F

Accordingly, it is considered necessary in the public interest to make the provision relating to reference of disputes to the Special Arbitration Tribunals during the period of operation of the proviso to sub-section (1) of section 41-A i.e., between 26.3.1983 and
G 24.1.1994, subject to one more condition so that any reference to arbitration made to a Special Arbitration Tribunal during the said period inconsistently with the proposed new condition shall be invalid and, in every such case, a fresh reference shall be made to the Arbitration Tribunal within the stipulated period for adjudica-
H tion of the dispute.

For the above purpose, the Arbitration (Orissa Amendment) Ordinance, 1991 (Orissa Ordinance No. 7 of 1991) was promulgated to amend section 41-A of the Arbitration Act, 1940 as applicable to the State of Orissa and necessary consequential provision was made in such Ordinance. The said Ordinance is required to be replaced by an Act of the State Legislature. A B

The Bill seeks to achieve the above object."

What are the Special Arbitration Tribunals, adverted to in the above Objects and Reasons of the Bill, the awards of which are sought to be invalidated by the Amendment Act to be made pursuant to that Bill requires mention here for understanding as to how they have come into existence, as to what is the power exercised by them in resolving the disputes referred to them and as to how they are resolved by making the award. Under the 1982 Amendment Act, a Special provision had been made empowering the State Government to constitute Arbitration Tribunals consisting of three members and referring certain disputes for decision by those Arbitration Tribunals. When 1984 Amendment Act was enacted by the State Legislature, it provided for referring certain disputes involving claims of Rs. 1 crore or above, to Special Arbitration Tribunals to be constituted by the State Government comprised of one or more retired High Court Judges, from time to time. It also provided for transfer of disputes involving claims of Rs. 1crore or above pending before the Arbitration Tribunals constituted under the 1982 Amendment Act to the Special Arbitration Tribunal to be constituted by the State Government under 1984 Amendment Act. One of the provisions in the 1984 Amendment Act read thus: C D E F

"The business of the Arbitration Tribunal or Special Arbitration Tribunal shall be conducted in such manner as the tribunal may determine and awards made and signed shall be supported by reasons."

From what we have stated hereinbefore, it becomes obvious that the Special Arbitration Tribunals had been constituted by the State Government in accordance with the 1984 Amendment Act to adjudicate upon or decide the disputes referred to them under that Act, by making reasoned awards. The power of deciding the disputes conferred upon those Special Tribunals was not conferred upon them by the parties to the disputes. G H

A Instead such power had been conferred upon them by the State under the provisions of the 1984 Amendment Act. Such Arbitration Tribunals had to make the reasoned awards because they were enjoined to do so under that Amendment Act itself. Though the Special Arbitration Tribunals themselves are entitled under the provisions of the said Amendment Act to evolve their own procedure or conducting its proceedings, ordinary norms of B judicial procedure had to be adopted by them so as to conform to the principles of natural justice being Tribunals constituted under a legislative enactment with power conferred upon them to adjudicate upon disputes between parties.

C Thus, when under the 1984 Amendment Act, the Special Arbitration Tribunals had been constituted by the State Government and were conferred by that enactment the power of adjudicating upon the disputes between parties referred to them, conforming to the normal judicial procedure and by making reasoned awards, the awards so made by Special Arbitration Tribunals, we cannot but hold are those made in exercise of D State's judicial power conferred upon them under the 1984 Amendment Act for deciding the disputes between the parties by having recourse to normal judicial process.

No doubt, by the 1989 Amendment Act, referred to in the Objects E and Reasons of the Bill, the provision relating to constitution of Special Arbitration Tribunals introduced in the principal Act by the 1984 Amendment Act was deleted and a provision was made therein for transfer of matters pending consideration before such Special Arbitration Tribunal to the Arbitration Tribunals constituted under the 1982 Amendment Act and F decision to be made thereon. But, for getting rid of the awards which had already been made by the Special Arbitration Tribunals referred for their decision under the 1984 Amendment Act, by the State Government, 1991 Ordinance was promulgated by the State and the same is subsequently replaced by the 1991 Amendment Act.

G The 1991 Amendment Act which is reproduced by us earlier contains hardly four Sections. Out of them Sections 2 and 3 alone are material. Insofar as Section 2 is concerned by its deemed retrospective operation between 26th day of March 1983 and 24th day of February, 1990 forbids the making of reference under sub-section (1) of Section 42-A of the H Principal Act, involving a claim of Rs. 1 crore of more unless the amount

agreed to by the parties in the Contract exceeds the amount of such claim. A

Then, coming to Section 3 it declares that all the awards made by the Special Arbitration Tribunals on references made to it under the 1984 Amendment Act during the period adverted to under Section 2 invalid even where those awards were made 'Rules of Court', i.e., judgments and decrees of Courts. Further, that Section requires the making of fresh references to arbitration of such dispute to the Arbitration Tribunals constituted under the 1982 Amendment Act. Thus, Sections 2 and 3 of the 1991 Amendment Act seek to nullify the awards of Special Arbitration Tribunals, made on disputes referred to them from the 26th day of March, 1983 to 24th day of February, 1990 under the 1984 Amendment Act becomes obvious. B C

Thus, the impugned 1991 Amendment Act seeks to nullify the awards made by the Special Arbitration Tribunals constituted under the 1984 Amendment Act, in exercise of the power conferred upon them by that Act itself. When, the awards made under the 1984 Amendment Act by the Special Arbitration Tribunals in exercise of the State judicial power conferred upon them which cannot be regarded as those merged in Rules of Court or judgments and decrees of Courts, are sought to be nullified by 1991 Amendment Act, it admits of no doubt that legislative power of the State Legislature is used by enacting impugned 1991 Amendment Act to nullify or abrogate the awards of the Special Arbitration Tribunals by arrogating to itself, a judicial power. (See Re: *Cauvery Water Disputes Tribunal* [1991] Supp. 2 SCR 497. From this, it follows that the State Legislature by enacting the 1991 Amendment Act has encroached upon the judicial power entrusted to judicial authority resulting in infringement of a basic feature of the Constitution - the Rule of Law. Thus, when the 1991 Amendment Act nullifies the awards of the Special Arbitration Tribunals, made in exercise of the judicial power conferred upon them under the 1984 Amendment Act, by encroaching upon the judicial power of the State, we have no option but to declare it as unconstitutional having regard to the well settled and undisputed legal position that a legislature has no legislative power to render ineffective the earlier judicial decisions by making a law which simply declares the earlier judicial decisions as invalid and not binding, for such powers, if exercised, would not be legislative power exercised by it, but judicial power exercised by it encroaching upon the judicial power of the State vested in a judicial Tribunal as the Special D E F G H

A Arbitration Tribunals under 1984 Amendment Act. Moreover, where the arbitral awards sought to be nullified under the 1991 Amendment Act are those made by Special Arbitration Tribunals constituted by the State itself under 1984 Amendment Act to decide arbitral disputes to which State was a party, it cannot be permitted to undo such arbitral awards which have
B gone against it, by having recourse to its legislative power for grant of such permission as could result in allowing the State, if nothing else, abuse of its power of legislation.

Point-6:

C The argument on this point is that the provisions in the 1991 Amendment Act are arbitrary and unreasonable being violative of Article 14 of the Constitution, and it is, therefore, unconstitutional.

Since, we have found the impugned 1991 Amendment Act as unconstitutional in answering Point-5, for the reason that it is made, encroaching
D upon the judicial power of the State invested in Courts and tribunals, we have considered it unnecessary to decide on this point.

As the answer we have given on Point-5 goes against the constitutionality of the Arbitration (Orissa Second Amendment) Act, 1991, the Rules issued in Writ Petitions are required to be made absolute.

E

In the result, we allow the writ petitions, make the 'Rules' issued in them absolute and strike down the Arbitration (Orissa Second Amendment) Act, 1991, in so far as it nullifies the arbitral awards made by the Special Arbitration Tribunals constituted by respondent-State under the 1984 Amendment Act, including the awards of the petitioners which are
F made 'Rules of Court', as unconstitutional. No costs.

T.N.A. Petitions allowed.