

(2009) 07 AP CK 0084

In the Andhra Pradesh High Court

Case No : C.M.A. No. 2718 and C.R.P. No. 4184 of 1999

A.P.S.R.T.C.

APPELLANT

Vs

SEW Constructions Limited Engineers and Constructions and
Others

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Arbitration Act, 1940 — Section 17, 30, 39

Citation : (2010) 1 ALT 676

Hon'ble Judges : B. Seshasayana Reddy, J;B. Prakashrao, J

Bench : Division Bench

Advocate : Nanda R. Rao, for the Appellant; M. Sudheer Kumar, for the Respondent

Judgement

B. Seshasayana Reddy, J.—The appeal and the civil revision petition arise from a common order dated 12-4-1999 passed in O.P. No. 306 of 1994 and O.P. No. 293 on the file of IV Senior Civil Judge, City Civil Court, Hyderabad, making the award dated 25-05-1994 a rule of court and dismissing the petition filed for setting aside the award.

2. More precisely C.M.A. No. 2718 of 1999 is filed against the order passed in O.P. No. 293 of 1994 and C.R.P. No. 4184 of 1999 is filed against the order passed in O.P. No. 306 of 1994, on the file of IV Senior Civil Judge, CCC, Hyderabad.

3. Since the order impugned in these two proceedings is one and the same and as the parties are common and questions that arise for consideration are also common, they were heard together and are being disposed of by this common judgment.

4. Background facts in a nutshell leading to filing of these two proceedings by A.P. State Road Transport Corporation (hereinafter called as "the Corporation"), represented by its Managing Director are:

The Corporation called for tenders for construction of bus terminal complex at Guntur. M/s. SEW Constructions (hereinafter called as the claimant) participated in the tender and ultimately work came to be entrusted on a net contract amount of Rs. 1,87,45,216/-. An agreement came to be executed between the parties vide agreement No. 19 CCE 87-88, dated 9-7-1987. The work was to be completed within 18 months i.e. by 1st week of January 1989. The claimant completed the construction of the complex by December, 1990. Of course, the claimant contended that delay in execution of the work was because of delay in handing over site and supply of material by the Corporation. After the work was completed, disputes arose between the parties with regard to the amount payable to the claimant. The agreement stipulated the settlement of disputes by way of arbitration. Therefore, the claimant and the Corporation nominated their respective arbitrators. The claimant nominated T.K. Mohan Rao, Chief Engineer (Retd.) and whereas the Corporation nominated K. Yagnanarayan, CE (Retd.). The claimant and the Corporation submitted their respective statements and counter statements before the arbitrators. The claimant put in claims under 9 (nine) heads viz.

- (1) For extra quantities and above Agreement quantities 463812.54
- (2) Towards recovery of excess Cost of steel 138967.23
- (3) Towards escalation for work done beyond agreement period 1423782.00
- (4) Towards cyclone damages 14261.00
- (5) Execution of several new items not covered by agreement 32403.40
- (6) Tender percentage over excess Amount used in changed Specifications for RCC items 6623.60
- (7) Non-application of rebate of 1.57% of new items 43390.00
- (8) For overhead and establishment Expenses 2499360.00
- (9) Interest on the amount due 1355669.00

5. Before the arbitrators, the claimant marked 47 documents and whereas the Corporation marked 14 documents. During the pendency of the proceedings before the arbitrators, claimant withdrew his claim in respect of claim Nos. 4 and 6. The arbitrators, on considering the material brought on record and on hearing the representatives of the parties, allowed the claims of the claimant in respect of claim No. 1 (in part), claim No. 3 and claim No. 9 (in part), while rejecting the claims of the claimant in respect of Claim Nos. 2, 5, 7 and 8. The claims allowed by the arbitrators are:

Claim No. 1 3,59,081.00 Claim No. 3 14,23,782.00

Claim No. 9 interest @ 18% pending lit while rejecting interest for pre-reference period.

6. The claimant filed O.P. No. 306 of 1994 u/s 17 of the Arbitration Act 1940 on the file of IV Senior Civil Judge, CCC, Hyderabad to make the award dated 25-5-1994 as a rule of court and whereas the Corporation filed O.P. No. 293 of 1994 u/s 30 of the Arbitration Act, 1940 on the file of IV Senior Civil Judge, CCC, Hyderabad to set aside the award dated 25-4-1994. Learned Senior Civil Judge allowed the O.P. No. 306 of 1994 and dismissed the O.P. No. 293 of 1994 and thereby made the award dated 25-5-1994 as a rule of Court by an order dated 12-4-1999. Hence, the Civil Miscellaneous Appeal and the Civil Revision Petition.

7. Heard Sri K. Madhava Reddy, learned Standing Counsel appearing for the appellant/Corporation and Sri M.R.K. Chowdary, learned senior counsel appearing for the respondent/claimant.

8. (a) Sri K. Madhava Reddy, learned Standing Counsel appearing for the Corporation submits that the arbitrators traveled out side the terms of the contract and allowed claim No. 3 relating to escalation of rates for the work done beyond the agreement period and thus, the amount allowed under Claim No. 3 is liable to be set aside. He would further submit that Clause 59 of Standard Preliminary Specifications formed part and parcel of the articles of agreement entered into between the parties and in which case it is impermissible for the arbitrators to ignore the said clause and award compensation in respect of the claims which stand excluded from their purview by virtue of the said clause. A further contention has been advanced by him that interest awarded by the arbitrators as confirmed by the civil court is excessive in view of the depletion of interest rates by the financial institutions like banks etc.

(b) The learned Standing Counsel contended that the civil Court also failed to note the purport of Clause 59 of the APDSS, which forms part of the agreement and thereby committed error in making the award as a rule of court. He would further contend that there is no consistency in the findings recorded by the arbitrators and therefore, the findings recorded by the arbitrators in respect of Claim No. 3, suffers from serious infirmity. In elaborating his arguments, he would contend that the arbitrators rejected claim No. 8 relating to over-head and establishment charges on the ground that Clause 59 of the APDSS bars such a claim. Whereas, in respect of claim No. 3 relating to price escalation during the extended period of agreement the arbitrators opined that Clause 59 of the APDSS does not prohibit such claim. To buttress his submissions, learned Standing Counsel placed reliance on various judgments of the Supreme Court and this Court. It is suffice to refer the decisions of the Supreme Court in Ch. Ramalinga Rddy v. Superintending Engineer; Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, and the Division Bench of this Court in The Continental Construction Company Vs. The Board of Trustees, Visakhapatnam Port Trust, .

9. (a) Sri M.R.K. Chowdary, learned senior counsel appearing for the claimant strenuously contended that the issue as to applicability of Clause 59 of the APDSS for the works done beyond the agreement period is required to be

resolved by a Full Bench in view of the conflicting views expressed by the two Division Benches of this Court. He would also contend that the arbitrators interpreted the clauses of the agreement and arrived at a finding that Clause 59 of APDSS does not bar them, in the given facts and circumstances of the case, to consider the claims of the claimant in respect of escalation of rates for the works done beyond the agreement period and the interpretation of the clauses of the agreement is within the domain of the arbitrators and therefore, their interpretation does not call for interference either by the civil court or by this Court.

(b). Learned senior counsel contended that the powers of this Court u/s 39 of the Arbitration Act, 1940 cannot be more than the powers of the civil court u/s 30 of the Arbitration Act, 1940 and as the interference of the award by the civil Court on the ground of mis-interpretation of the terms of the contract is impermissible and so also by this Court. He would further contend that the prohibition of escalation was, if at all, would be during the contract period only and such embargo would not be carried beyond that period as the time was the essence of contract. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. Learned senior counsel pursued, many a time, during the course of arguments to refer the matter to the Full Bench on the issue of applicability of Clause 59 of the APDSS for the works done beyond the agreement period.

10. Indeed a Division Bench of this Court to which one of us a member (BPR, J.) in C.M.A. No. 479 of 1990 and batch noticed the conflicting views expressed by the two Division Benches of this Court and referred the matter to the Full Bench for an authoritative pronouncement. However, the Full Bench after taking into consideration the fact of the reference being only on the ground that the said later decision [T.A. Choudhary Vs. State of A.P. and Others,] which runs contrary to the decision of the Apex Court, opined that it was always open for the court to consider each case and apply the principles laid down by the Apex Court aptly. For better appreciation, we may refer the relevant portion of the order passed by the Full Bench, which reads as hereunder:

From a perusal of the referral order, it is clear that the Division Bench was not confronted with a situation where there is a conflict in the views taken by coordinate benches of this Court. The learned Judges of the Division Bench having referred to the decision of the Supreme Court including the decision in Rajasthan State Mines" case 1999 (2) SCC 283 (1 supra), wherein, even according to the learned Judges, the apex Court has laid down the guidelines as to how the reasoned awards should be dealt with. That if the decision in T.A. Chowdary's case is "in conflict" with the decision of the apex Court in Rajasthan State Mine's case (1 supra), it is needless to observe that the law declared by the Supreme Court prevails and binding upon all the Courts and the same is required to be followed. We are unable to discern any reason from the referral order as to why the matters have been referred for the consideration by the Full

Bench. The questions referred, noted supra, are required to be gone into by the Division Bench hearing the matters. It is not as if the Division Bench is not competent to decide the questions that are referred to the Full Bench for its consideration. That in case of any conflict between the decisions rendered by coordinate benches, the matter could have been referred to Full Bench for its consideration.

In the present case, the Bench of two learned Judges has not doubted the correctness of the decision of the Division Bench in T.A. Chowdary's case. But, on the other hand, observed that On a close reading of the decisions of the Supreme Court, "it is apparent that either way the principles as laid down are quite contrary and runs away from the decisions reported". Nothing precluded the Division Bench from applying the guidelines and the principles enunciated by the Supreme Court in the decisions referred in the referral order, particularly, in the light of its own observation that the principles laid down in T.A. Chowdary's case by a Division Bench "runs away from the decisions reported". The learned Judges of the Division Bench were obviously referring to the Supreme Court judgment upon which reliance has been placed by the counsel appearing on either side. When a decision, in law, is well settled as a result of judicial pronouncement of the Supreme Court, all the Courts including the High Courts cannot ignore the settled position and then pass a judicial order contrary to the settled legal position. The question of there being a conflict between the decisions of the Supreme Court and the High Court does not arise.

11. In view of the decisions of the Supreme Court in Ramnath International Construction Pvt. Ltd. v. Union of India's case (2 supra) and Union of India v. Chandalavada Gopalakrishna Murthy and Ors. (4) 2008 (4) SCJ 849 : 2009 (1) ALT 19 (DNSC), wherein a three Judge Bench of the Supreme Court in Ch. Ramalinga Reddy's case (1 supra) has been referred with approval, we are of the view that there is no need to refer the matter to the Full Bench once again on the issue stated supra.

12. In Ch. Ramalinga Reddy's case (1 supra) the Supreme Court while considering the claim for payment of extra rates for work done beyond the agreement time observed thus:

Claim 8 was for "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". The arbitrator awarded the sum of Rs. 39,540/-. Clause 59 of the A.P. Standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim falls outside the defined exceptions. When extensions of time, were granted to the appellant to complete the work, the respondents made it clear that no claim for compensation would lie. On both counts, therefore, claim 8 was impermissible and the High Court was right in so holding.

13. Before dwelling deep into the rival contentions of the parties, we deem it appropriate to note some of the well recognized grounds on which interference with the awards passed by the arbitrators is permissible. While interpreting Section 30 of the Arbitration Act, 1940, the Courts have laid stress on limitation of exercise of jurisdiction for setting aside or interfering with an award in umpteen number of cases. Some of the well recognized grounds on which interference is permissible are: (i) Violation of principles of natural justice; (ii) An error apparent on the face of the record; (iii) The arbitrator has ignored or deliberately violated a clause in the agreement prohibiting the dispute of the nature entertained; and (iv) The award on the face of it based on a proposition of law, which is erroneous. If the arbitrator has mis-conducted himself of the proceedings, then the impugned award is certainly liable to be set aside. If the award is contrary to the substantive propositions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal which could be interfered u/s 30 of the Arbitration Act, 1940. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. His authority is derived from the contract and is governed by the Arbitration Act.

14. The arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. The arbitrator is the creature of the agreement between the parties, he has to operate within the four corners of the contract and if he ignores the specific terms of the contract, it would be question of jurisdictional error on the face of the award falling within the ambit of legal mis-conduct which would be corrected by the Court. We may however hesitate to add that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders out side the contract and deals with the matters not allotted to him, he commits a jurisdictional error (vide *Associated Engineering Co. v. Government of A.P.* 1991 AIR SCW 2960 and *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises* and Anr. 1999 AIR SCW 3644

15. The core issue involved is whether the claimant is barred to claim compensation because of escalation in rates for the work down beyond the agreement period? It is a matter of record that the agreement period was 18 months and the work was to be completed by 1st week of January, 1989. Actually, the claimant completed the work in December, 1990. There was a delay of 24 months in completing the work. The claimant sought for extension of time for completing the works. The arbitrators referred the letters, wherein the claimant sought for extension of time for completing the works, in para 21.2 of the award. There was no reply from the corporation. However, the Corporation allowed the claimant to complete the works and admitted the bills submitted by him. Since the bills submitted by the claimant came to be admitted after the original agreement period, the only irresistible conclusion is that the period allowed to the claimant to complete the work stood extended. Therefore, it can be said without any controversy that the claimant completed the works during

the extended period of contract.

16. The contention of Sri M.R.K. Chowdary, learned senior counsel appearing for the appellant is that inasmuch as, admittedly, there was delay in handing over the sites and as the cost of work went up, the claimant is entitled to be compensated thereof. Because of the delay in handing over the site, the completion of the work entrusted to the claimant came to be delayed which meant extra cost to the claimant and it must be meted by the corporation, which is responsible for the delay.

17. The contention of the learned Standing Counsel appearing for the Corporation, on the other hand, is that no such compensation is contemplated, or provided for, either in the contract or by the correspondent between the parties. Even if there is any delay in handing over the site, no claim for compensation can be made since any such claim is barred by Clause 59 of the APDSS. He would also submit that the contract does not provide for any such compensation and hence, the arbitrators who had to operate within the four corners of the contract, had no power to award any compensation on this count.

18. As per articles of agreement entered into between the parties, Clause 59 of the Standard Preliminary Specifications forms part and parcel of the contract. Clause No. 3 of the articles of agreement reads as hereunder:

(3) Time shall be considered as the essence and part of the agreement and the contractor hereby agrees to commence the work as soon as this agreement is accepted by competent authority and the site or premises is handed over to him as provided for in the said good conditions and agrees to complete the work within 18 months from the date of such handing over of the site (or premises) and to Progress; subject never the less to the provisions for extension of time contained in Clause 59 of the standard preliminary specifications.

19. Clause 59 of the standard preliminary specifications reads as hereunder:

Delays and extension of time: No claim for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except, as hereinafter defined. Reasonable extension of time will be allowed by the executive Engineer or by the officer competent to sanction the extension for unavoidable delays, such as may result from causes, which, in the Opinion of the Executive Engineer, are undoubtedly beyond the control of the contractor. The Executive Engineer shall assess the period of delay or hindrance caused by any written instructions issued by him, at twenty five per cent in excess of the actual working period so lost.

In the event of the Executive Engineer failing to issue necessary instructions and thereby causing delay and hindrance to the contractor, the latter shall have the right to claim an assessment of such delay by the superintending Engineer of the Circle whose decision will be final and binding. The contractor shall lodge in writing with the Executive Engineer a statement of claim for any delay or

hindrance referred to above, within fourteen days from its commencement, otherwise no extension of time will be allowed.

Whenever authorized alterations or additions made during the progress of the work are of such a nature in the opinion of the Executive engineer as to justify an extension of time in consequence thereof, such extension will be granted in writing by the Executive Engineer or other competent authority when ordering such alterations or additions.

It is evident from Clause 3 of the articles of agreement, that Clause No. 59 of the standard preliminary specifications forms part and parcel of the contract. Coming to Clause 59 of the standard preliminary specifications. It provides that neither party to the contract shall claim compensation "on account of delays or hindrances to the work for any cause whatever". That delays and hindrances contemplated by Clause 59 included the stoppage, hindrance and delays on the part of the department as well is clear from the following sentence in the first part of the said clause viz., "the Executive Engineer shall assess the period of delay or hindrance caused by any written instructions issued by him, at twenty five percent in excess of the actual working period so lost". Indeed, the second para of the clause also contemplates delays and hindrances being caused on account of the failure of the Executive Engineer to issue necessary instructions. In such a case, the claimant has a right to claim the assessment of such delay by the Superintending Engineer of the Circle whose decision will be final and binding on parties. The arbitrators having referred Clause 59 of the APDSS proceeded to ignore the same on the premise that the said clause does not bar the claimant to claim compensation for the work done beyond the agreement period due to defaults of the Corporation. Such a construction, in our considered view, is impermissible. The reason being the only benefit conferred on the claimant, in the event of unavoidable delays either because of his fault or the Corporation's fault, is extension of period for completion of the work entrusted under the contract. There is no other construction possible by reading Clause 59. Indeed this issue fell for consideration Ch. Ramalinga Reddy's case (1 supra), wherein it has been held that Clause 59 of APDSS bars grant of any compensation even if any delay in handing over the site. Once Clause 59 of the APDSS the claimant from claiming any compensation for the work done during the extended period of contract, the arbitrators have no jurisdiction to award compensation under Claim No. 3.

20. Now in the case before us the question is not whether the award suffers from any error apparent on its face, but whether the arbitrators have exceeded jurisdiction in awarding the compensation when agreement specifically prohibits the same.

21. It is pertinent to note in this behalf that the claimant did not choose to terminate the contract on account of Corporation's delay in handing over the sites. He requested for extension of period of contract and completed the work. It is not the claimant's case that by allowing him to proceed with the work after

the expiry of the original agreement period, he expressed his intention to claim compensation on that count. Hence, the award passed by the arbitrators under Claim No. 3 is bad in law and cannot be sustained and accordingly, the same is hereby set aside.

22. Indisputably, the claimant did not avoid the contract on account of delays and defaults on the part of the Corporation. He carried out extra quantum of work over and above the agreed work. He submitted the bills quoting standard scheduled rates. The Corporation admitted the bills upto 37th bill on 30-07-1991. It was only at the time of payment of final bill the Corporation sought to regulate the bills as per clause 47.3 of the agreement. The Arbitrators after noticing the relevant clauses in the agreement recorded a finding, which reads as hereunder:

Normally, till such a time as a rate for the additional work or supplemental Item is got approved by the competent authority, in terms payment is made to the contractor at a provisional rate to minimize hardship. In this case, there is no indication that the rates that were paid by the Executive Engineer for almost two years were treated as provisional rates, as is done by writing the words (P.R.) against these rates. Further these provisional rates are generally less than the rates that the contractors will not have a claim for payment of higher rates at a later date. This procedure does not appear to have been followed in this case. When the executive Engineer has been paying consistently at the agreement rates, the claimants had reason to believe that they would be paid at the agreement rates only for the extra quantities. It is for the Executive Engineer to get the required approvals from the higher authorities and it is not the responsibility of the claimants.

Since the Corporation allowed the agreed rates for excess quantities without there being any indication while releasing the amounts that the rates are being provisional, the arbitrators are justified in allowing Rs. 3,59,081/- under Claim No. 1.

23. With regard to quantum of interest, a Division Bench of this Court, to which one of us is a member (BSSR, J.) in Continental Construction Co's case (3 supra) having taken note of substantial reduction of interest rates and in view of the judgment of the Supreme Court in Sreemanthula Kesavachari (died) per L.R. Sreemanthula Rajeswaramma Vs. Yavyavuru Vallama (died) per L.Rs.,], reduced the rate of interest awarded by the arbitrators to 9% p.a. Accordingly, the award amount shall carry interest at 9% p.a. from the date of reference i.e., 07-05-1993 till the date of payment.

24. In the result, both the CMA and the CRP are partly allowed modifying the award passed by the arbitrators as confirmed by the civil Court to the extent indicated above. Accordingly, the quantum of amount allowed by the arbitrators is reduced from Rs. 17,82,863/- to Rs. 3,59,081/- with interest at the rate of 9% from the date of reference i.e., 07-05-1993 till the date of payment. There shall be no order as to costs.