
(1998) 03 AP CK 0037
In the Andhra Pradesh High Court
Case No : AAO No. 634 of 1997

APSRTC, Musheerabad, Hyd. and Another	APPELLANT
Vs	
Reddi and Company, Nizamabad	RESPONDENT

Date of Decision : 24-03-1998

Acts Referred:

Arbitration Act, 1940 — Section 28, 39, 8, 8(1)

Citation : (1998) 3 ALD 437 : (1998) 3 ALT 458 : (2000) 3 APLJ 463

Hon'ble Judges : P. Venkatarama Reddy, J;B.V. Ranga Raju, J

Bench : Division Bench

Advocate : Mr. C.V. Ramulu, SC for APSRTC, for the Appellant; Mr. Sanjeeva Rao, for the Respondent

Judgement

P. Venkatarama Reddy, J.—This appeal u/s 39 of Arbitration Act arises out of the Judgment of the I Additional Judge, City Civil Court in O.P. No. 150 of 1993. The O.P. was filed u/s 8 of the Arbitration Act to appoint a sole arbitrator to adjudicate the disputes between the parties. That petition was allowed and an arbitrator proposed by the respondent-contractor was appointed as sole arbitrator. Challenging the same, the present CMA is filed by the A.P. State Road Transport Corporation (hereinafter referred to as "the Corporation"), who is the respondent in the O.P.

2. The undisputed facts are that the petitioner was awarded a contract for the construction of a garage with adjacent room at the Bus Depot. Banswada and in this connection, Agreement No.10/CCE-II of 1988-89 was entered into between the appellant-corporation and the respondent-contractor. The value of the contract is Rs.8.07 lakhs. The Contractor inter alia claimed payment at extra rates on account of the escalation in costs, putting the blame on the Corporation for prolongation of the contract period. As the claim was not acceded to, the Contractor invoked the arbitration clause provided for in the agreement and filed the claim-petition before the named arbitrator i.e., Managing Director of the Corporation (1st respondent herein). According to the Contractor, the named

arbitrator entered into reference on 7-10-1992, but he did not pass the award within the statutory period of 4 months and therefore became functus officio on and from 7-2-1993. Thereafter, the contractor gave notice to the appellant informing that the vacancy in the office of arbitrator had arisen and calling upon the Corporation to concur in the appointment of Sri K.Krishna Murthy, Retired Chief Engineer. The Corporation did not concur in the proposed appointment. A reply was sent on 17-2-1993 denying the allegations in the notice. Thereafter, the O.P. was filed in the City Civil Court.

3. In the counter filed by the appellant (Respondents 1 & 2 in the O.P.), objection was first taken as regards the territorial jurisdiction of the City Civil Court. It was then contended that there was no occasion to invoke Section 8 of the Arbitration Act. It is the case of the Corporation that the Arbitrator entered upon the reference on 7-1-1993 (but not on 7-10-1992, as alleged by the petitioner) and the period for making the Award expired on 6-5-1993. The Contractor failed to attend the hearing on 9-3-1993. The arguments on behalf of the Corporation were heard and the Award was actually passed on that day. The stand of the Corporation therefore is that the petitioner-Contractor himself abandoned the Arbitration proceedings without any reason and there was no refusal nor incapacity to act on the part of the Arbitrator.

4. As regards the date of entering into reference, it was found by the learned trial Judge, on a perusal of the record, that the 2nd respondent in the OP i.e., Managing Director of Corporation issued a notice to the Contractor on 7-10-1992 informing him that he entered into reference. The stand taken by the Corporation that the named Arbitrator actually entered on reference on 7-1-1993 was found to be wrong. Even before us, no material is placed to attack the said finding. We, therefore, accept the finding and affirm the view of the trial Court that the Award should have been passed by 7-2-1993, i.e., before the expiry of statutorily prescribed period of four months and thereafter the arbitrator becomes functus officio unless the period is extended by the Court u/s 28 of the Act as held in Hari Shankar Lal Vs. Shambhunath Prasad and Others, . The Award, even if had been passed subsequent to the expiry of four months - regarding which no proof has been adduced, would remain ineffective in the absence of any extension of time by the Court. No application for extension has admittedly been filed.

5. The next question is whether by virtue of the fact that the named arbitrator failed to pass the Award within the prescribed statutory time-limit, the Court gets jurisdiction u/s 8 to appoint an Arbitrator when one of the parties did not concur in the appointment proposed by the other party?

6. Before we proceed to consider this question, let us refer to the Arbitration clause in the agreement. We would like to make it clear that although the Agreement has not been filed in the lower Court, the Counsel for both parties have expressed no objection for looking into the agreement, which has been produced before us.

"The Arbitrator for fulfilment of duties set forth in the arbitration clause of the standard preliminary specifications shall be the Managing Director, APSRTC whose decision is final and binding on the contractor and no other arbitrator other than the M.D. will be accepted."

It may be noted that the preliminary specifications of the A.P. Detailed Standard Specifications form part of the contract. The arbitration clause as contained therein in the Standard Preliminary Specifications is as follows:

"P.S.73. Arbitration :--In case of any dispute or difference between the parties to the contract either during the progress or after the completion of the works or after the determination, abandonment, or breach of the contract, as to the interpretation of the contract, or as to any matter or thing arising thereunder except as to the matters left to the sole discretion of the Executive Engineer under clauses 20, 22, 27 (c), 29, 36, 37 and 40 of the preliminary specification or as to the withholding by the Executive Engineer of payment of any bill to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration of the Superintending Engineer of the nominated circle mentioned in the "Articles of agreement"" (herein after called the "Arbitrator") and the award or such Arbitrator shall be final and binding of the parties unless contested by either party in a Court of law."

8. The clause as extracted above does not contain the changes that were brought about subsequently in regard to the panel of arbitrators.

9. Obviously, Section 8 has no application, as the arbitrator is a named person. It has been held in more than one decision that sub-section (1) (a) has no application where the arbitrator is named, vide M/s. Harbans Singh Tuli and Sons Builders Pvt. Ltd. Vs. Union of India, and Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, . If at all, it is Section 8 that comes into play. Clause (b) of sub-section (1) covers such of those cases where the arbitration is pending, as observed by the Supreme Court in M/s. H.S. Tuli 's case (supra) and a vacancy arises in any of the following four contingencies: .

(i) Death, (ii) Incapacity, (iii) Refusal, (iv) Neglect to act.

10. Before the Court gets jurisdiction to fill up the vacancy by the appointment of another arbitrator, two more conditions have to be fulfilled:-

(i) The arbitration agreement does not indicate that the vacancy was not intended to be filled up.

(ii) The parties could not concur in the choice.

11. It is the contention of the learned Counsel for the respondent that an arbitrator who fails to pass the award within the time limit of 4 months and thereby becomes functus officio, must be deemed to have been incapacitated to

act. It is true, as contended by the learned Counsel for the respondent-contractor, the term "incapacity to act" is of wide amplitude and is not confined only to physical incapacity. We will assume for the time being that an arbitrator who fails in his duty to pass the award within the time limit suffers from an incapacity to act and we will farther assume that the same person cannot be appointed by the Court. But, then, in our considered view, the first condition mentioned above is not satisfied in the instant case. The arbitration agreement, in our view, indicates iii clear and unmistakable terms that the vacancy was not intended to be filled up. The words "no other arbitrator other than the Managing Director will be accepted" are very crucial. The clear meaning and purport of these words is either the Managing Director will arbitrate or none else. The intention of the parties to the agreement is clearly manifested in these words and it is not permissible to one of the parties to ignore this crucial stipulation in the Agreement and request the Court to appoint a third party as an arbitrator. In State of West Bengal Vs. M/s. Naional Builders, , the Supreme Court succinctly explained the implications of the aforementioned condition. The Supreme Court observed:

"Mere neglect or refusal to act alone is not sufficient to empower the Court to intervene. The agreement must not further show that the parties intended that the vacancy shall not be supplied. To put it affirmatively, in absence of clear words or explicit language to the contrary, the Court may appoint another arbitrator. The true effect of the word is that it extends jurisdiction of the Court to exercise power, if the agreement does not specifically debar it from doing so. To put it simply the Court's power to interfere and appoint an arbitrator comes into operation if the arbitrator refuses to act and the agreement does not show that the parties did not intend that the vacancy shall not be supplied. In Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., it was held by this Court, "that the language of the provision is not "that the parties intended to supply the vacancy" but on the other hand it is that "the party did not intend to supply the vacancy". In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of Section 8 what is required is not the intention of the parties to supply the vacancy but their intention is not to supply the vacancy.""

12. Since, in that case, Clause 25 of the Agreement did not indicate that the parties did not intend to supply the vacancy, the Supreme Court held that the lower Court was justified in exercising jurisdiction u/s 8 to appoint another arbitrator. It may be noted that in clause 25, The crucial words pointed out above are absent. The trial Court is therefore not justified in placing reliance on National Builders Case, which far from supporting the Respondent's case, goes against him. We are, therefore, of the view that the learned I Additional Judge acted without jurisdiction in appointing the arbitrator proposed by the Contractor himself, purporting to act u/s 8 of the Arbitration Act. On this ground, the appeal has to be allowed.

13. In view of our conclusion, it is not necessary to go into the plea of territorial jurisdiction raised by the appellants. However, as it has been argued, we would like to deal with it in brief. The agreement has been entered into admittedly at Hyderabad where the principal office of the Corporation is situate. Arbitration proceedings were initiated and further steps taken within the jurisdiction of the City Civil Court, though they later became in fructuous. The unwholesome plea of lack of territorial jurisdiction is raised by the Corporation merely on the ground that the work was executed outside the jurisdiction of City Civil Court. On the admitted facts of the case, it cannot be disputed that a part of cause of action has arisen within the city of Hyderabad. The reliance placed by the learned Counsel for the appellants on M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company, is wholly misconceived. We, therefore, reject this contention.

14. Before we part with the case, we would like to mention that in reply to a query by this Court whether the Managing Director of the Corporation would consent to arbitrate in the matter again, the learned Standing Counsel, after getting due instructions from his client, fairly stated that the appellants have no objection for such a course and the arbitrator is willing to act again. We, therefore, consider it just and proper to record this offer so that the respondent will not be left without remedy at this distance of time. Further, we would like to observe that the arbitrator will decide the matter afresh independently without being influenced by his previous award, if any. The respondents may approach the appellants for taking necessary steps in this regard and the appellants will act with utmost promptitude in this behalf.

15. The appeal is allowed, subject to the above observations. No costs.