

(1995) 12 AP CK 0087

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 4704 of 1994

Government of Andhra Pradesh and Another

APPELLANT

Vs

A.B.C. (India) Limited

RESPONDENT

Date of Decision : 04-12-1995

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1996) 1 ALT 720

Hon'ble Judges : V. Bhaskara Rao, J

Bench : Single Bench

Advocate : Mannava Venkata Rao and Mainampati Rama Rao, for the Appellant;
S. Krishna Mohan, for the Respondent

Judgement

V. Bhaskara Rao, J.

1.This revision petition is preferred by the State of Andhra Pradesh against the order in O.P. No. 431/1993 on the file of IV Additional Judge, City Civil Court, Hyderabad, dated 6-9-1994 appointing Mr. G. Krishnaji, Chief Engineer (Retired), Irrigation Department as the sole arbitrator u/s 8 of the Arbitration Act mainly on the ground of lack of jurisdiction.

2. The respondent herein, A.B.C. (India) Limited, is the contractor to whom the work of transportation of Monoly this Buddha Statue from Raigir, Nalgonda District, to Hussain Sagar at Hyderabad and erecting the same on the Gibraltar Rock in Hussain Sagar was entrusted, as its tender having been accepted on 24-10-1987. The detailed work order was, however, issued by the concerned Superintending Engineer on 12-8-1988 and the agreement bearing No. 4/88-89 was concluded on 19-8-1988. A supplemental agreement was entered into on 29-10-1992. It is not necessary to set out the details which led to the said supplemental agreement. Suffice it to say that the contractor through its letters dated 9-7-1993 and 13-7-1993 claimed certain amounts, but the revision petitioners through their letter dated 24-7-1993 refused to pay the same and hence this dispute arose between the parties. The contractor proposed that one

Mr. T.K. Mohan Rao, Chief Engineer (Retired), be nominated to be the sole arbitrator to decide the above dispute, but the revision petitioner No. 2 did not concur with the above proposal and that led to filing of a petition u/s 8 of Arbitration Act in the Court below seeking appointment of sole arbitrator. The above petition was resisted by the State on various grounds. On a consideration of both the versions the learned IV Additional Judge, City Civil Court, Hyderabad, passed the impugned order and appointed Mr. G. Krishnaji, Chief Engineer, (Retired), Irrigation Department, as sole arbitrator.

3. Admittedly there is no arbitration clause either in the original agreement or supplemental agreement. Therefore, the respondent/contractor has invoked Clause 73 of A.P.D.S.S. (referred as P.S. 73 in A.P.D.S.S., by Padala Rama Reddi, VI Edition), which provides for arbitration clause in case of any dispute or difference between the contractor and the Department. It is also not in dispute that the Government issued G.O.Ms. No. 430, Irrigation (IRR-V) Department, dated 24-10-1983, revising the procedure contemplated by Clause 73 of A.P.D.S.S. para 2 of the above G.O., is extracted below:-

"The question of the revising the above procedure has been receiving the attention of Govt. for some time past. The Govt. after careful consideration of various aspects of issues involved direct the procedure be revised as follows:

Value of Amount

Panel of Arbitrators

1.

Claims upto Rs.13,000/-and above.

Superintending Engineer of another Circle, in the same Department.

2.

Claims above Rs. 10,000/-upto Rs. 50,000/-

(a)

Another Chief Engineer of the same Department.

(b)

Where there is only one Chief Engineer, in the Dept, the Chief Engineer will submit proposals to Govt. in the Administrative Dept. for nomination of another Chief Engineer as Arbitrator by Government.

3.

Claims above Rs.50,000/-

Court of competent jurisdiction".

Items 1 and 2 are not relevant. Since the claim in this case runs to several crores

of rupees, the relevant item is No. 3. As the Court of competent jurisdiction is mentioned in the column captioned as panel of arbitrators, the view taken by the Courts was that the concerned Court would act as a sole arbitrator in such matters. As some difficulties were being felt, the Government thought it fit to amend the same and issued G.O.Ms. No. 160, Irrigation and CAD;, (Project Wing) Department, dated 1-6-1987, and amended the aforesaid item as under:-

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

(ii) Substitute para (3) by the following:-

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

(iii) Paras 3 to 7 are renumbered as paras 4 to 8."

The Government further amended the above procedure and communicated a standard clause for incorporation in all the agreements for uniformity and to avoid any ambiguity and the same is extracted below for ready reference vide G.O.Ms. No. 20, Irrigation and CADD (Project Wing) Department, dated 31-1-1989.

"Except as otherwise provided in the contract, all disputes and differences arising out of or relating to the contract shall be referred to adjudication as follows:-

(1) (i) Settlement of all claims upto Rs. 50,000/- in value and below by way of Arbitration to be referred as follows:-

(a) Claims upto Rs. 10,000/- Superintending Engineer of in value another Circle in the same Department. (b) Claims above Rs. 10,000/- Another Chief Engineer and upto Rs. 50,000/- in value. of the same Department. The arbitration proceedings will be conducted in accordance with the provisions of the Arbitration Act, is to be prepared from time to time. The Arbitrator shall invariably give reasons in the award,

(ii) Settlement of all claims above Rs. 50,000/- in value:- All claims above Rs. 50,000/- in value shall be decided by the Civil Court of competent jurisdiction by way of a regular suit and not by arbitration."

Thus, Clause 73 of APDSS stood modified in terms of the above G.Os.

4. In para 19 of the counter affidavit filed on behalf of the revision petitioners in the lower Court it is specifically averred as under-

"After conclusion of the Agreement the petitioner was informed of the change on the application of arbitration clause by the Respondent No. 2 vide Lr. No. DB/D4/W3/44/89/4204, dt. 11-9-89 indicating as follows: In accordance with the terms and conditions stipulated in the work orders and agreement No. 4/88, dt. 19-8-89 the following arbitration clause shall form part of General terms and conditions of the work order. Any disputes and differences arising out of or relating to the contract shall be referred to adjudication as follows:

Settlement of all claims upto Rs. 50,000/-on value and below by way of arbitration to be referred as follows:-

A. Claims upto Rs. 10,000/-. The superintending Engineer, Irrigation Circle, Red Hills, Hyderabad-4. B. Claims above Rs. 10,000/- and Another Chief Engineer of the same upto Rs. 50,000/- in value. Department i.e., Officer special duty, Telugu Ganga Project. The arbitration proceedings will be conducted in accordance with the provisions of the Arbitration Act, 1940.

(ii) Settlement all above Rs. 50,000/- in value shall be decided in Civil Court of competent authority."

Be it noted that, no reply is filed controverting the above averment. In other words, the letter referred to above is not challenged before the lower Court. However, Mr. M.S.K. Sastry, learned Senior Counsel for the respondent/contractor contended that such a letter was not received at his end. I am afraid, such a contention cannot be raised when a specific averment made by the revision petitioners in the lower Court is not controverted by filing a reply affidavit. The above background has to be kept in view while appreciating the contentions raised by both sides in this matter.

5. The learned Counsel for the revision petitioners Mr. M. Venkata Rao contended that Clause 73 of APDSS has been amended and the amendment has been brought to the notice of the respondent/contractor by a letter dated 11-9-1989 and the same has been reiterated in another letter bearing No. DB/Dr/W3/44/Claims/1158, dated 2-9-1993, a copy of which is filed as a material paper in this Court, and that therefore the lower Court did not have the power to appoint an arbitrator in this matter as the claim runs into Rs. 4 crores. According to him, the only course open to the respondent/contractor is to file a civil suit in a Civil Court of competent jurisdiction in respect of the above claim. He, therefore, urged that the impugned order may be set aside.

6. On the other hand, Mr. M.S.K. Sastry, learned Senior Counsel for the respondent/contractor contended that the so-called amendments to G.O.Ms. No. 430 which are said to have been effected in G.O.Ms. No. 160, dated 1-6-1987 have not been brought on record and the same is not reflected in the relevant clauses of the agreement or supplemental agreement and the letter dated 11-9-1989 relied on by the State was not received and therefore, the learned IV Additional Judge was justified in allowing the petition in terms of G.O. Ms. No. 430 in its un-amended form.

7. I carefully considered the contentions of both sides. A perusal of work order dated 12-8-1988 would show that some special terms and conditions were incorporated and Clause 16 thereof provides that the contractor shall be bound by all relevant clauses in the standard specifications in the APDSS. Hence, Clause 73 of APDSS is undoubtedly applicable. A combined reading of G.O.Ms. No. 160, dated 1-6-1987 and G.O.Ms. No. 430, dated 24-10-1983 leaves no doubt that all claims above Rs. 50,000/- have to be decided by the Civil Court of competent

jurisdiction in a regular suit. It is, however, to be borne-in-mind that the above amendment effected by G.O.Ms. No. 160, dt.1-6-1987 is prospective and hence it is applicable to all claims arising after 1-6-1987. This question came up for consideration by a Division Bench of this Court in Govt. of A.P, v. United Construction Company 1990 (2) ALT 495, where in it is held that,

"Applications u/s 8 of the Arbitration Act would be maintainable if the Court of competent jurisdiction which is to be the arbitrator under the old G.O.Ms. No. 430, refuses to arbitrate. It is only in cases of agreements on or after 1-6-1987 raising disputes which exceed Rs. 50,000/- in monetary value that the parties have to go for a regular civil suit. G.O.Ms. No. 160, dt.1-6-1987 is prospective in operation."

After noticing the order of the Supreme Court in Civil Appeal No. 3570/1989, dated 2-3-1990 (State of A.P. v. I. Devender Reddy,(Civil Appeal No. 3570/1989,dated 2-3-1990(SC)) it is further held that,

" In view of the above said judgment of the Supreme Court, as also the judgment of the Division Bench of this Court referred to above, it is clear that G.O.Ms. No. 160, dated 1-6-1987 is prospective in operation. It is, therefore, clear that applications u/s 8 of the Arbitration Act would be maintainable if the Court of competent jurisdiction which is to be the arbitrator under the old G.O.Ms. No. 430 refuses to arbitrate. It is only in cases of agreements on or after 1-6-1987 raising disputes which exceed Rs. 50,000/- in monetary value that the parties have to go for a regular civil suit."

When a Division Bench of this Court held that in the cases of agreements on or after 1-6-1987 raising disputes which exceed Rs. 50,000/- in monetary value, the parties have to go for a regular civil suit, basing the above finding on the interpretation of G.O.Ms. No. 160, dated 1-6-1987 by the Supreme Court in I. Devender Reddy's case,1-A, it cannot be contended that the amendment to Clause 73 of APDSS or G.O.Ms. No. 430 is not given effect to even if it is not published in the Commentary by Padala Rama Reddi. This Court as well as the Supreme Court are of the view that the amendment in question is binding on all the parties. In this case, the Agreement as well as Supplemental Agreement are subsequent to 1-6-1987 and the contractor was informed of the above amendment through a letter dt.11-9-1989. Hence, it can be said that the contractor is bound by the amendment.

8. It is also contended by Mr. M. Venkata Rao that G.O.Ms. No. 160, dated 1-6-1987 is a mere clarification in respect of claims above Rs. 50,000/- and that the original G.O. Ms. No. 430, dated 24-10-1983 itself envisages adjudication of the dispute by a Civil Court. He relied on the latest judgment of the Supreme Court reported in V. U.D.A. v. Narayana Rnju (1995 (2) SCALE 49), wherein it is held that,

"Having perused G.O.Ms. No. 430 dated 24th October, 1983, we have no doubt that it clearly provides for arbitration in respect of claims only upto Rs. 50,000 /

- and not above that amount, making it clear in paragraph 2 that the claims above Rs. 50,000/- are to be adjudicated by the Court of competent jurisdiction. No doubt the expression "Court of competent jurisdiction" is mentioned under the head "panel of arbitrators" since the same para deals with "claims upto Rs. 10,000/- as well as "claims above Rs. 10,000/- and upto Rs. 50,000/-". That is however, in an artistic drafting of the G.O. Ms. but it cannot be construed to mean that claims above Rs. 50,000/- are to be adjudicated by arbitration in which the Judge presiding over the Court of competent jurisdiction is to act as the arbitrator. It would be absurd to make such a construction of that part of the G.O.Ms. which would oblige the Judge to act as the arbitrator. The subsequent G.O.Ms. No. 160 dated 1-6-1987 merely clarifies this fact on account of an attempt by some contractors to misconstrued the earlier G.O.Ms. as clearly stated in the subsequent G.O.Ms. The contention of the respondent is wholly untenable."

9. As already indicated above, there is no specific clause either in the agreement or the supplemental agreement providing for arbitration. In such a case, another judgment of the Supreme Court reported in K. Sasidharam v. Kerala State Film Development Corporation (1994(2) APLJ 77 (SC)), is relied on and it is contended by Mr. M. Venkata rao that the impugned order can be set aside on this ground also. In the judgment supra 3 cited, it is held that,

"The appellant and the respondent having specifically excluded the arbitration clause in the contract, by necessary implication they excluded the Clause 73 in MDSS. If it were to be contract it must expressly and specifically be incorporated in the contract which admittedly was not done. When the parties to the agreement, in terms of the documents, have not incorporated the arbitration agreement in Clause 73 of MDSS, it cannot by implication, be imported by interpretation that the terms of Clause 73 including arbitration clause therein stands attracted. By necessary implication, it conflicts with the expressly agreed terms of the contract. Thereby, it is manifest that what the terms in the MDSS, referred to in Clause 12 is only of the terms referable to the execution of the work, etc., and not one concerned with an agreement to refer any dispute arising between the parties to an arbitration, at a later point of time, or during the course of the execution of the work or after the completion thereof of any dispute arising between the parties in relation to the contract.

Therefore, the High Court is right in its conclusion that there is no arbitrable agreement for reference to the Arbitrator. The Civil Court in the circumstances cannot exercise its power u/s 20 of the Act to appoint an arbitrator and refer the dispute for arbitration".

10. Having regard to the ratio laid down by the Supreme Court in the above cases, I find force in the contentions raised by the revision petitioners and I am satisfied that the learned IV Additional Judge, City Civil Court, Hyderabad, exceeded in his jurisdiction in passing the impugned order and in appointing an arbitrator and hence this is a fit case calling for interference u/s 115 of Code of

Civil Procedure.

11. In the result, the revision petition is allowed with costs and the impugned order is set aside. The respondent/contractor is directed to institute a regular suit in respect of his claim in a competent Court, if he is so advised.