

(1994) 03 AP CK 0008

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No. 143 of 1990, C.M.As. 170 and 171/90 and Oral S.L.P.

Hindustan Steel Works Construction Limited

APPELLANT

Vs

Sri N.V. Chowdhary and Another

RESPONDENT

Date of Decision : 17-03-1994

Acts Referred:

Arbitration Act, 1940 — Section 30, 39, 39(1)
Constitution of India, 1950 — Article 141

Citation : (1994) 2 ALT 620

Hon'ble Judges : Y. Bhaskar Rao, J;J. Eswara Prasad, J

Bench : Division Bench

Advocate : T. Veerabhadraiah, in LPA and A. Venkataramana and G. Krishna Murthy, in CMAs, for the Appellant; T. Veerabhadraiah, for R-1 in CMAs. and A. Venkataramana and G. Krishna Murthy for R-1 in LPA, for the Respondent

Judgement

J. Eswara Prasad, J.—These appeals arise out of the common judgment of the learned single Judge. L.P.A. No. 143/90 is by Hindustan Steel Works Construction Limited, Visakhapatnam (hereinafter referred to as "the Company") against the order in CM.P.No. 18977/88 in C.R.P. No. 3414/84. C.M.A. No. 170/90 is filed by N.V. Choudary (referred to as "the contractor") against the same order. C.M.A.No. 171/90 is also filed by the contractor against the order in C.M.P. No. 13899/88 in C.R.P.No. 3414/84 in which the first respondent is the company.

2. Visakhapatnam Steel Project Authority is engaged in the construction of steel plant at Visakhapatnam. The company is one of the Public Sector Undertakings, which was given one of the works on a turn-key basis. The company, in its turn, invited tenders for the construction of civil engineering works of various units in the blast furnace zone in the steel plant. The contractor made a tender for the civil engineering works in Group II on 21-9-82. After negotiations, the tender of the contractor was orally accepted on 6-10-82 and he was orally directed to commence work immediately. Accordingly, the contractor commenced the work on 7-10-82. The contractor was called for talks and he was persuaded to reduce

rates for certain items and the contractor agreed for such reduction and the value of the work assigned to him approximately worked out to Rs. 4.70 crores. Letter of Intent was given to him on 2-12-82 and the work was to be completed within a period of one year, time being the essence of the contract. The agreement in that regard was executed on 21-3-83.

3. During the working of the contract disputes arose between the company and the contractor and the contractor appointed late Sri Justice M. Krishnarao as arbitrator, invoking Clause 110 of the contract. The company appointed another arbitrator Sri Justice P. Jaganmohan Reddy was appointed as an Umpire. The Umpire made the award dated 22-7-85 directing payment of Rs. 20,71,690-12 to the contractor in full and final settlement of the amount, payable to him for the work done in blast furnace zone with interest at the rate of 6% p.a. from the date of award. The Umpire further awarded to the contractor a sum of Rs. 6,51,405/- towards security deposit which stood in the running account bills I to V, together with interest at 6% p.a. from the date of the award. This was in respect of the work done by the claimant under the contract till 3-8-83.

4. The company issued a notice dated 6-8-83 to the contractor alleging that he did not reach even 50% of the targets prescribed for each month, and that he abandoned the works from 3-8-83 and moved the equipment like tippers out of the plant site. He was directed to make good his defaults under Clause 109 of the Revised General Conditions of the Contract, failing which, he was informed, that the company would be constrained to take action for determining the contract. The contractor filed I.A. No. 71/83 in O.P. No. 351/83 before the First Addl. Subordinate Judge, Visakhapatnam for issuing an injunction restraining the company from terminating the contract. Injunction was granted on 9-11-83 and was later made absolute. The company questioned the order in C.R.P. No. 3060/83. At the interlocutory stage, this court by the order dated 5-12-83 issued an interim direction to the competent authority of the company to consider the request of the contractor as per his letter dated 15-11-83 for extension of time. This order was challenged by the company before the Supreme Court in SLP No. 15526/83 which was disposed of on 5-1-84 observing that the direction contained in the injunction order has already been carried out and the SLP has become infructuous and that the disposal of the SLP is not to be construed as approving the observations of this Court dated 5-12-83. The request of the contractor for extension of contract was turned down by the company.

5. The contractor by the letter dated 7-5-84 demanded payment of Rs. 1.25 crores towards damages for the loss suffered by him within ten days, failing which the company was informed that the dispute will be referred to an arbitrator under Clause 110 of the Revised General Conditions of the Contract, treating it as notice u/s 8 of the Indian Arbitration Act. The contractor appointed Sri J. Narasimharao as his nominee arbitrator. The company appointed Sri M.G. Singh as their arbitrator. With regard to the appointment of an Umpire, both parties could not arrive at a common name. O.P. No. 96/84 was filed before the

First Addl. Sub-Judge, Visakhapatnam. The Court appointed Sri Justice C. Kondaiah, retired Chief Justice of High Court of A.P. as an Umpire by the order dated 25-10-84. The said order was questioned by the Company in this Court in C.R.P. No. 3414/84. This Court by order dated 5-9-84 appointed Sri Justice K. Ramachandra Rao retired Chief Justice of this court - as Umpire in the place of Sri Justice C. Kondaiah. The direction was that the Umpire will make an award within six months from the date of receipt of reference made by the arbitrators. The contractor communicated the order dated 5-9-84 in C.R.P. No. 3414/84 to both the arbitrators by his letter dated 28-9-85, which was received by the arbitrators on 3-10-85 and 8-10-85. The contractor addressed a letter dated 2-11-85 to the arbitrators requesting them to enter on reference and to call for early adjudication of the disputes. One of the arbitrators Sri J. Narsing Rao addressed a letter dated 15-12-85 to the other arbitrator Sri M.G. Singh for fixing dates for the meeting of the arbitrators at Visakhapatnam. Sri M.G. Singh issued a notice dated 30-12-85 to the company enquiring whether it had filed its counter claim and to file the same within 15 days, if one such was not filed. The arbitrator Mr. J. Narsing Rao was informed that the dates were not suitable and the venue would be at Calcutta, unless both the arbitrators mutually agreed otherwise. Mr. Narsing Rao by the letter dated 12-1-86 addressed to Sri M.G. Singh objected to the unilateral action in calling upon the parties to file counter claims, fixing dates etc., Sri Singh was called upon to inform his concurrence to meet at any convenient place on 23rd, 24th or 25th January, 1986 either at Visakhapatnam or at Calcutta. The company sent its counter on 17/18-1-86 to the arbitrators. On 29-1-86, Mr. M.G. Singh addressed a letter to the other arbitrator agreeing to the course suggested by him.

6. Finding that there was no further communication to him from the arbitrators, the contractor addressed a letter dated 17-3-86 to the Umpire calling upon him to enter upon reference as provided in Para 4 of the First Schedule to the Arbitration Act, as the arbitrators had allowed four months time to lapse after being called upon to act as per his letter dated 2-11-85. The Umpire entered upon reference and telegraphically communicated to the parties to appear on 29-3-86.

7. The company took the stand before the learned Umpire with regard to the question of jurisdiction that he cannot go into the question without reference from the arbitrators. It was also contended that the award of Sri Justice P. Jaganmohan Reddy operated as res judicata and that there was no subsisting contract after its expiry. The learned Umpire rejected the contentions of the company holding that inasmuch as the arbitrators had failed to enter upon reference within four months from 2-11-85, the Umpire had the jurisdiction to proceed with the arbitration proceedings. It was further held that the period of contract was extended by five months from 2-12-83 as per the orders in LA. No. 71 /83 and that the award of Sri Justice Jaganmohan Reddy, which covered the earlier reference, did not operate as res judicata and that the award was passed without giving reasons and awarded a sum of Rs. 35 lakhs to the contractor,

made up under claim No. 1 relating to idle charges, due to suspension of the machinery and labour etc., for the period from 2-2-84 to 30-4-84 in a sum of Rs. 16,50,000/- loss of material due to suspension of work in a sum of Rs. 11,50,000/- and for deterioration of materials due to weather conditions and rain in a sum of Rs. 7,000/-. The contractor filed C.M.P. No. 13899/88 in C.R.P. No. 3414/84 under Sections 14 and 17 of the Indian Arbitration Act, 1940 read with Section 151 CPC to make the award the Rule of the Court and to pass a decree in terms of the award and for awarding interest at 24% p.a. on the amount of award from the date of decree u/s 29 of the Arbitration Act till date of realisation. C.M.P. No. 18977/88 was filed by the Company u/s 30 of the Arbitration Act to set aside the award. The learned Single Judge rejected claim No. 1 holding that the contract was not enforceable after 2-12-83. With regard to claim Nos. 2 and 3, the matter was remitted back to the learned Umpire on the ground that no reasons are given and as such, it was not possible for the Court to make any exercise to find out what prompted the learned arbitrator to allow those claims. CM.P. No. 13899/88 was dismissed and CMP No. 18777/88 was allowed in part. The award in respect of Rs. 16,50,000/- in regard to claim No. 1 was set aside and the award of Rs. 11,50,000/- and Rs. 7,00,000/- in regard to claim Nos. 2 and 3 was also set aside and remitted back to the learned Umpire for passing a fresh award by giving reasons in support of the award, leading to the filing of these appeals.

8. Sri T. Veerabhadrayya, learned Counsel for the company contended that the Umpire had no jurisdiction to proceed with arbitration in the absence of any reference from the arbitrators. He further contended that the award of Sri Justice Jaganmohan Reddy operated as res judicata and the award of Sri Justice K. Ramachandrarao is hit by the principles of constructive res judicata. The further contention of the learned Counsel is that there was no subsisting contract between the parties for the period covered by the award of Sri Justice K. Ramachandra Rao and therefore, there was no justification for the learned single Judge to remit the matter back to the learned Umpire with regard to Claims 2 and 3. Sri A. Venkataramana, learned Counsel appearing for the contractor contended that the Umpire had the jurisdiction to proceed with arbitration, inasmuch as the arbitrators failed to enter upon reference as prescribed by law. He further contended that the question of res judicata does not arise, as both the award proceedings of Sri Justice Jaganmohan Reddy and Sri Justice K. Ramachandrarao, relate to different periods. He lastly submitted that the contract was subsisting by virtue of the orders of the Court which were not reversed by the Supreme Court in Special Leave Petition.

9. Out of the contentions raised by the learned Counsel, the points which arise for consideration are:

(1) Whether Sri Justice Ramachandrarao had the jurisdiction to proceed with the arbitration in the absence of a reference of difference of opinion between the arbitrators ?

(2) Whether the award of Sri Justice. P. Jagan Mohan Reddy operates as res judicata and barred the award proceedings before Sri Justice Ramachandrarao?

(3) whether the contract was subsisting, covering the period of the second reference.

10. Sri Veerabhadraiah vehemently contended that the arbitrators entered reference by applying their minds to the disputes and by issuing notices to the parties and were conscious of the matter. The Umpire gets jurisdiction only if the arbitrators failed to enter upon reference within the time prescribed by law or if the arbitrators are unable to arrive at an agreement and refer the matter to the Umpire and that in the absence of either of these two situations, it is not open to the Umpire to proceed with the matter. To appreciate the contentions of the learned Counsel the relevant portions of the order appointing Sri Justice Ramachandrarao, the relevant provisions of law, and the relevant dates have all to be looked into. The direction was:

"copies of these orders shall be communicated by the parties to the arbitrators. Six months" time is given to the Umpire to make the award from the date of receipt of any reference made by the arbitrators".

From the above extract of the order, the Umpire has to make an award within six months from the date of any reference to be made by the arbitrators. Admittedly, there was no reference by the arbitrators. The learned Umpire observed that by virtue of the provisions contained in Paras 3 and 4 of Schedule I to the Arbitration Act, which is extracted hereunder, he has jurisdiction to proceed under the Arbitration Act.

"Para 3: The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators." As per Para 3 of the first Schedule, the arbitrators shall make an award within four months after entering on the reference or from the date of their being called upon to act by a notice in writing from any party to the arbitration agreement or within such extended period as the Court may allow. Para 4 comes into operation if the arbitrators failed to make an award within the time prescribed in para 3, or failed to arrive at an agreement in making the award and issue a notice to the umpire in writing stating that they cannot agree, in which event, the umpire gets jurisdiction to enter on the reference in lieu of arbitrators. Under Clause 110 of the General Conditions of the Contract, questions or disputes arising out of the contract, shall be referred to the arbitrators to be nominated by the umpire and the contractor and in the event of the arbitrators not agreeing with regard to the award, to refer the

matter to an umpire to be appointed by the arbitrators.

11. On 5-9-85 Sri K. Ramachandrarao was appointed as an umpire. On 29-5-85 the contractor issued a notice to the arbitrators to enter on the reference followed by another letter dt. 2-11-85 to the same effect. On 15-12-85, one of the arbitrators Sri Narsing Rao, wrote to the other arbitrators Mr. M.G. Singh for fixing either 5th or 6th January, 1986 for holding arbitration proceedings at Vizag. On 30-12-85, Sri Singh sent a letter to the company to file a counter-claim if not already filed. A copy of the said letter was communicated to Sri Narsing Rao stating that the dates mentioned in his letter dated 15-12-85 are not convenient and the venue should be at Calcutta only. Sri Narsing Rao wrote on 12-1-86 to Mr. M.G. Singh to the effect that it was not proper to file a counterclaim and suggesting 24th, 25th or 26th January, 1986 as dates convenient for him for holding the proceedings. On 18-1-86 the Company sent a counter-claim to the arbitrators. Sri Singh agreed to the course suggested by Mr. Narsing Rao in his letter dated 29-1-86. But, when the matters stood at that stage, the contractor sent a letter dated 17-3-86 to the umpire to assume jurisdiction as per Para 4 of Schedule I to the Act. The learned umpire issued notice on 24-3-86 to appear before Court on 29-3-86 and sent copies of the notice to the arbitrators. Thereafter, the arbitrators took no further action, nor replied to the notice issued by the umpire. On 17-4-86, the Company filed a petition before the umpire stating that the matter is premature as the arbitrators have not entered on the reference. The learned umpire by the order dated 27-4-86 held that he has jurisdiction to proceed with the matter, as the arbitrators have not entered on the reference, within the period prescribed.

12. From the events narrated above, we have to examine whether the arbitrators entered on the reference, and if so, on what date they have entered on the reference.

13. A division Bench of the Calcutta High Court in *Bharati Mukherjee Vs. Shiva Trading Co. and Others*, held that Para 3 of Schedule I of the Act does not say that the arbitrator shall make his award within a period of four months from the date of his being called upon to act or called upon to enter on the reference.

14. A Division Bench of the Bombay High Court in *Jolly Steel Industries Pvt. Ltd., Poona Vs. Union of India and Another*, held that the arbitration proceedings consists of two stages. One such stage consists of merely ministerial acts while the second stage consists of effective adjudicative acts in furtherance of the work of arbitration, namely of proceedings to decide controversies in between the parties, whether arising out of the main dispute or procedural aspects in the disposal thereof. The arbitrators cannot be said to have entered on the reference unless the second stage can be said to have been reached somehow or the other. Only on application of mind and doing some act in furtherance of the arbitration, can one come to a conclusion that the arbitrators have entered on the reference. These views are held by various High Courts, including in *M. George and Others Vs. Raju M. Mathew*, ; *Kalinga Otto (P) Ltd. Vs. Charanjit Kochhar*, ; *Ramsahai*

Sheduram Vs. Harishchandra Dullchandji and Another, and Soneylal Thakur Vs. Lachhminarain Thakur and Another, .

15. In *Iossifoglu v. Coumantaros* (1941) 1 K.B. 396 it was held by the Court of Appeals that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference, and the Court is entitled to appoint an umpire when there is a disagreement between the arbitrators.

16. The above decision of King's Bench was quoted with approval by Raghubar Dayal, J., while agreeing with the majority decision in *Hari Shankar Lal Vs. Shambhunath Prasad and Others*, . Sri Venkataramana contended that the learned judge made an observation, while approving the decision of the King's Bench, stating that it was not necessary to decide in that case as to when the arbitrators can be said to enter on a reference, or what is meant by "their being called upon to act" by notice under Rule 3 of the First Schedule. We are unable to accept this contention for the reason that the learned Judge while stating that though it was not necessary to decide in that particular case as to when the arbitrators can be said to enter on the reference observed, "I simply note that I agree with the view expressed in *Iossifoglu v. Coumantaros*, (1941) 1 K.B. 396 that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference." We are unable to accept the contention that the views expressed by Raghubar Dayal, J., as being the view of the minority and not binding on this Court, in view of the fact that the question did not arise for consideration in that case. We have to note that Justice Raghubar Dayal, J. agreed with the order proposed, but delivered a separate judgment for different reasons. When the learned Judges agreed with the order proposed by the majority of Judges, the views expressed by Raghubar Dayal J, have to be treated as the views of the Supreme Court and binding on this Court. Relying on a Full bench decision of the Calcutta High Court in *Ramanath Agarwalla Vs. Goenka and Co. and Others*, Sri Venkata Ramana Contended that an arbitrator enters on the reference only when he first applies his mind to the dispute and not when he engages in ministerial acts, such as, communicating with the parties, sending notices, fixing dates etc., He further contends that the decision in *Hari Shankar Lal v. Shambhu Nath* (8 supra) was referred to by the Full Bench of the Calcutta High Court. With great respect to the learned Judges, we are unable to subscribe to the view expressed by them that the observations of Subbarao, J., alone constituted the majority decision in that case. We have already mentioned the reasons for coming to the conclusion that the observations of Raghubar Dayal, J. in that case are not the views of the minority, but are the views expressed by the Supreme Court, which are binding on this Court.

17. In *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, which is next relied upon by the learned Counsel, it was held that when the company had participated in the arbitration proceedings and after having taken a

chance of a decision, should not be permitted to contend that the reference was without prejudice to the right of the company to the contrary. It is to be noticed that the company took the stand throughout that the proceedings before the umpire were without jurisdiction, as the arbitration proceedings were still pending before the arbitrators, who had sufficient time for passing an award and that in the absence of a difference of opinion between the arbitrators, the umpire had no jurisdiction to proceed with the reference. We are unable to agree with the contention of the learned Counsel that the company took a chance of a decision and that the company cannot be permitted to raise the question of jurisdiction.

18. We have no hesitation in holding that the arbitrators enter on the reference as soon as they have accepted their appointment and have communicated with each other about the reference. That will be a stage earlier than their starting the proceedings in the presence of parties or on some preemptory order compelling them to conclude the hearing *ex parte*. We further hold that participation of the company in the proceedings before the umpire while taking the plea that the umpire had no jurisdiction, does not bar the company from raising the question of jurisdiction which goes to the root of the matter.

19. Keeping in mind the law as laid down by the Supreme Court, we have to examine the facts of the present case to see, whether the arbitrators have entered on the reference by communicating with each other about the reference.

20. By the letters dated 12-1-86 and 29-1-86 the arbitrators have communicated with each other about the reference. This shows that the arbitrators have applied their mind to the dispute, arising out of the agreement dated 30-12-85. We therefore, hold that the arbitrators have entered on the reference as there was application of the mind to the dispute arising out of the agreement, and have made the award within four months time from the date of entering on the reference as per Para 3 of Schedule I to the Act. The umpire entered on the reference on 24-3-86 before the expiry of four months after the arbitrators entered on the reference. We, therefore, hold that the umpire had no jurisdiction to proceed with the matter without there being a disagreement between the arbitrators or a reference by the arbitrators or before the expiry of four months period from the date on which the arbitrators entered on the reference.

21. Having come to the conclusion that the proceedings before the umpire are without jurisdiction, it is not necessary to go into the other contentions raised by the learned Counsel. It follows that the award of the learned Umpire has to be set aside in toto. L.P.A.No. 143/90 is accordingly allowed. C.M.A. Nos. 170/90 and 171 /90 are dismissed. No order as to costs. The arbitrators will proceed with the arbitration proceedings and pass an award within four months from the date of receipt of this order and the records. In the event of the arbitrators failing to pass an award as directed above, the learned Umpire will enter on the reference and pass an award within four months thereafter. In the event of the arbitrators not agreeing with each other, they shall make a reference to the

learned Umpire within two weeks from the date of disagreement and the learned Umpire will enter on the reference and pass the award within four months thereafter.

21. Sri A. Venkataramana made an oral request for leave to appeal to the Supreme Court. We see no substantial question of law of public importance. In view of the fact that we have followed the decision of the Supreme Court, the leave is refused.