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**(2003) 09 AP CK 0066**

**In the Andhra Pradesh High Court**

**Case No :** CMP No. 19168 of 2002 and and Rev. CMP No. 22550 of 2002 in CMA No. 1338 of 1991

K. Venkulu

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

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**Date of Decision :** 10-09-2003

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 89

**Citation :** AIR 2004 AP 85 : (2004) 1 ALD 315 : (2003) 2 AnWR 635 : (2004) 1 ARBLR 481

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

**Bench :** Division Bench

**Advocate :** M. Sivananda Kumar, for the Appellant; Government Pleader for Civil Supplies/Arbitration for Respondent Nos. 2 and 3, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

J. Chelameswar, J.—CMP No. 19168 of 2002 in Rev. CMP No. 73795 of 2001 in CMA No. 1338 of 1991 is filed with a prayer to condone the delay of 2892 days in filing the review petition Rev. CMP No. 22550 of 2002 is filed with a prayer to review the judgment in CMA No. 1338 of 1991 dated 30-9-1994.

2. The review petitioner entered into a contract with the respondents herein on 28-5-1987 for execution of certain works the further details of which may not be necessary for the present purpose. It appears that the value of the contract was Rs. 6,92,496/- and the same is required to be completed within a period of one and half months. It appears that there were some disputes between the parties. Eventually the petitioner filed OS No. 759 of 1988 on the file of the learned Subordinate Judge (as he then was called), Miryalaguda, for recovery of certain amounts on the basis of the above mentioned contract. One fact that is required to be taken note of at this stage, is that the petitioner himself styled his suit as "arbitration suit" and paid a fixed Court fee of Rs. 250/-. The respondents defended the suit by filing a written statement. Issues were framed and a regular

trial was held and as many as 3 witnesses for the petitioner/plaintiff and one witness for the respondents were examined and as many as 30 documents were marked on either side. The suit was decreed for an amount of Rs. 4,61,470,78 ps.

3. Challenging the decree, the respondents herein filed an appeal in CMA No. 1338 of 1991 on the peculiar ground that the learned Subordinate Judge, Miryalaguda, treated the proceedings before him as if it was regular civil suit, but in fact, he was required to act as arbitrator in view of certain clause in the contract. The relevant portion of which reads as follows:

"(c) Claims above Rs. 50,000/- Court of competent Jurisdiction. Claim means all claims in that contract. The Arbitrator should state the reasons in passing award."

4. A Division Bench of this Court was pleased to allow the appeal by its order dated 30-9-1994 holding that:

".....Since it was not indicated in the judgment whether the learned Subordinate Judge was acting as an Arbitrator or not, we are forced to set aside the judgment and decree of the learned Subordinate Judge. We are of the opinion that the very fact that the judgment and decree passed by the learned Subordinate Judge, is an indication of the fact that he was not conscious of the fact that he was acting as an Arbitrator etc. allowed the CMA and remitted back the matter to the learned Subordinate Judge, Miryalaguda, with a direction to the learned Judge to act as an Arbitrator appointed by the parties and proceed to pass an award as an arbitrator on the material available on record before him within a period of 3 months from the date of receipt of a copy of the said judgment.

5. The matter of remand was once again placed before the learned Subordinate Judge, Miryalaguda. By an order dated 21-4-1995, the learned Subordinate Judge, Miryalaguda passed an order of dismissal Though the logic adopted by the learned Subordinate Judge is utterly dissatisfactory, we do not propose to go into that aspect any further, for the reasons that should be given later in this judgment. Aggrieved by the said dismissal order, the petitioner herein again approached this Court by way of AAONo.841 of 1995. Another Division Bench of this Court, by cryptic order dated 12-7-1995 was once again pleased to dismiss the AAO apparently on a concession made by the learned Counsel who appeared for the appellant therein that the appeal itself was not maintainable and hence the present two applications.

6. It is an unfortunate case where a citizen, who has a claim, whether it is justified or not, (a matter to be decided on merits of the case) was rendered remediless, partially as the petitioner himself was misguided.

7. The agreement in the background of which all the disputes, arose contained an arbitration clause, the relevant portion of which has already been extracted earlier in this judgment. For a longtime views were expressed that such a clause would confer a jurisdiction on the appropriate civil Court to decide the disputes

between the parties to a contract which contained such an arbitration clause not as the civil Court but in its capacity as an arbitrator. At a later point of time in view of the conflicting views on the interpretation of the above mentioned clause, the Government of Andhra Pradesh came up with a G.O. Ms. No. 160 dated 1-6-1987 purporting to clarify to position by saying that the Court under the arbitration clause referred to earlier is required to deal with the dispute only as civil Court but not an arbitrator. The order under review is one of those orders, which took the view that the Court is required to act as an arbitrator, but not as a civil Court.

8. Whatever be the understanding of the various parties to the present proceedings or all others, we fail to understand as to how the Government or for that matter any party could compel or obligate a civil Court to arbitrate the matters between the parties on the strength of an agreement entered into between the parties. In our view, the fact that Government is one of the parties to the arbitration agreement makes no difference. Courts are created or established by law in this country and function in accordance with the jurisdiction conferred on them by the enactments which confer a jurisdiction and function in accordance with the procedural law that regulates the proceedings of the Court.

9. We are unable to imagine the situation nor anything brought to our notice to demonstrate that such conferment of power by agreement of parties on the civil Court is permissible in law. The only provision with which we are concerned is Section 89 of the Code of Civil Procedure, which was initially, repealed by Act 10 of 1940 and re-inserted by Act 46 of 1999 with effect from 1-7-2002. Therefore, the said provisions has no application to the facts and circumstances of the present case, as it was not in operation at that relevant point of time. Even Section 89 of the CPC does not obligate the Court to conduct arbitration, but enables the Court wherever it is satisfied obviously with reference to the dispute in a pending suit that there is a possibility of settlement either by way of arbitration or conciliation etc., the Court is required to refer the same to the arbitration or conciliation etc.

10. For the above mentioned reasons, we are of the view that the order under review proceeded on a wrong premise that the obligation to arbitrate the dispute could be created on the civil Court by an agreement of parties and therefore arrived at a consequential conclusion to remand back the matter.

11. With utmost respect to the learned Judge, we express our inability to agree with the view taken by the learned Judges and a manifest error of law resulting in injustice. The order dated 30-9-1994 is therefore required to be reviewed as indicated above.

12. The result is that the decree in O.S. No. 759 of 1988 on the file of the learned Subordinate Judge, Miryalaguda, is revived, subject to the condition that the petitioner herein pays appropriate Court fee within a period of 2 weeks from the date of the receipt of this order.

13. In all this confusion and in view of the orders passed by us the net result would be that now the Government is deprived of an appeal on merits against the decree in O.S. No. 759 of 1988. Therefore we deem it appropriate to permit the respondents to convert the CMA No. 1338 of 1991 into a regular appeal, if and only the petitioner plaintiff pays the Court fee as indicated earlier. In view of the extraordinary facts of this case we desire that the learned Counsel for the appellant-petitioner herein should keep the learned Government Pleader informed about the actual date of payment of the Court fee by the petitioner herein so as to enable the learned Government Pleader to take further necessary steps in preferring the appeal in the meanwhile, if they are ultimately required to prefer a regular appeal. It is open for the respondents to take such additional grounds in the appeal.

14. In the circumstances, the delay condonation petition is allowed. The review petition is allowed as indicated above.