
(2005) 09 AP CK 0004
In the Andhra Pradesh High Court
Case No : C.M.A. No. 410 of 2005

L. Nagi Reddy

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-09-2005

Acts Referred:

Arbitration Act, 1940 — Section 31

Arbitration and Conciliation Act, 1996 — Section 16, 16(2), 16(3), 24, 28

Citation : (2005) 6 ALT 325 : (2005) 3 ARBLR 607

Hon'ble Judges : P. Swaroop Reddy, J; D.S.R. Varma, J

Bench : Division Bench

Advocate : P. Vinayaka Swamy, for the Appellant; C.V. Vinitha Reddy, for the Respondent

Judgement

D.S.R. Varma, J.—Heard both sides.

2. Since all the Civil Miscellaneous Appeals are interrelated and arise out of a common order and decree, dated 10-12-2004, in O.P. Nos. 228 of 2002 and 66 of 2003, respectively, passed by the I Additional Chief Judge, City Civil Court, Secunderabad, they are being disposed of by this common judgment.

3. The appellants in C.M.A. No. 816 of 2005 and C.M.A. (S.R) No. 27387 of 2005 are the Railways, respondent No. 1 is the claimant and respondent No. 2 is the Arbitrator. While the appellant in C.M.A. Nos. 410 of 2005 and 875 of 2005 is the claimant, respondent Nos. 1 to 3 is the Railways and respondent No. 4 is the Arbitrator.

4. For the sake of convenience, in this common judgment, the parties will be referred to as "the Railways" and "the claimant" and "the Arbitrator".

5. C.M.A. No. 816 of 2005 and C.M.A.(S.R.) No. 27387 of 2005 are filed by the Railways challenging the common order and decrees in O.P. Nos. 66 of 2003 and 228 of 2002, respectively, passed by the Court below in remitting both the O.Ps., i.e., O.P. No. 228 of 2002 insofar as it relates to Claim No. 12 i.e., interest and

O.P. No. 66 of 2003 insofar as Claim Nos. 1 to 3 are concerned for fresh consideration and in affirming the award of the Arbitrator insofar as Claim Nos. 6 and 11 and interest from the date of award till the date of actual payment and rejecting the counter-claim of the Railways.

6. At the outset, it is to be recorded that insofar as C.MAS.R. No. 27387 of 2005 is concerned, except the interest part, the dispute relating to Claim Nos. 6 and 11 and rejection of counter-claim are not being pressed.

7. C.M.A. Nos. 410 of 2005 and 875 of 2005 are filed by the claimant aggrieved by the common order and decrees in O.P. Nos. 228 of 2002 and 66 of 2003, respectively, passed by the Court below setting aside the award of the Arbitrator granting interest from 10-5-1999 till the date of award at the rate of 18 percent per annum and in affirming the award of the Arbitrator while rejecting Claim Nos. 4, 5, 7 to 10 and 13.

8. C.M.A. No. 816 of 2005 arises out of O.P. No. 66 of 2003 and C.M.A.S.R. No. 27387 of 2005 arises out of O.P. No. 228 of 2002. C.M.A. No. 410 of 2005 arises out of O.P. No. 228 of 2002 and C.M.A. No. 873 of 2005 arises out of O.P. No. 66 of 2003.

9. The claimant and the Railways entered into a contract regarding certain works, the details of which are not worth mentioning. During the course of execution of works, certain disputes had arisen between the parties, resulting in appointment of an Arbitrator as per Clauses 63 and 64 of General Conditions of Contract (for brevity "the GCC").

10. In total, the claimant made 13 claims including claim of interest and the Railways also made counter-claim. The Award, dated 4-7-2002, was passed rejecting all the claims of the claimant except Claim Nos. 6, 11 and 12. The Arbitrator, while accepting the claims of the claimant, partially awarded interest at the rate of 18 percent per annum from the date of issuance of notice by the claimant, i.e. ,10-5-1999, till the date of actual payment.

11. The Arbitrator had rejected Claim Nos. 1, 2 and 3 on the ground that those claims were hit by Clause 17 (3) of the GCC. The Arbitrator had also rejected Claim Nos. 4, 5, 7 to 10 and 13 for want of evidence.

12. Since it has already recorded that Claim Nos. 6, 11 and 12 and the counterclaim of the Railways are not pressed, we are not going into those issues and as such they are eschewed from consideration.

13. Having felt aggrieved by the award of the Arbitrator, the Railways preferred O.P. No. 228 of 2002 insofar as Claim Nos. 6, 11 and 12 i.e. claims of interest and rejecting the counter-claim. Aggrieved by the award of the Arbitrator, the claimant preferred O.P. No. 66 of 2003 in rejecting Claim Nos. 1, 2, 3, 4, 7 to 10 and 13.

14. The Court below, by a common order and decrees in both the above

mentioned O.Ps., allowed O.P. No. 228 of 2002 in part by setting aside the award of the Arbitrator in granting interest from 10-5-1999 till the date of award at the rate of 18 percent per annum and confirmed the award insofar as Claim Nos. 6 and 11 are concerned. However, the Court below also confirmed the award of interest from the date of award till the date of actual payment.

15. Similarly, the Court below allowed O.P. No. 66 of 2003 preferred by the claimant by setting aside the award of the Arbitrator insofar as Claim Nos. 1,2 and 3 are concerned and remitted the matter back to the Arbitrator for reconsideration of the said claims, following the decision rendered by a Division Bench of this Court in T.A. Choudhary Vs. State of A.P. and Others, Aggrieved thereby, C.M.A. No. 816 of 2005 (and C.M.A. (S.R) No. 27387 of 2005 have been preferred by the Railways and C.M.A. Nos. 410 of 2005 and 875 of 2005 have be) ALD en preferred by the claimant.

16. In the backdrop of the above facts, three points would fall for consideration:

(1) Whether the Arbitrator was right in rejecting Claims 1, 2 and 3 of the claimant and consequently, whether the Court below was right in remitting the matter back to the Arbitrator for fresh consideration?

(2) Whether the Arbitrator was right in rejecting Claim Nos. 4,5,7 to 10 and 13 as confirmed by the Court below? And

(3) Whether the Court below was justified in awarding the interest at the rate of 18% per annum from the date of award till the date of actual payment, while rejecting the claim of the claimant for interest from 10-5-1999 on which date the claimant addressed a letter raising a dispute claiming interest till the date of award?

17. In Re Point No. 1:- In this regard, it is essential for better appreciation of the facts to extract Clause 17 (3) of the GCC inasmuch as Claim Nos. 1,2 and 3 were rejected by the Arbitrator on the ground that those claims were hit by Clause 17 (3) of GCC:

"In the event of any failure or delay by the Railway to hand over the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the work or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damages or compensation therefore but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable".

18. A plain reading of the said Clause of the GCC makes it abundantly clear that delay on the part of the Railways in any respect cannot be a ground for making any claim towards damages or compensation by the claimant. However, the Railways may grant extension of time for completion of the work as deemed

reasonable. Therefore, it is obvious that latter part of the clause is only by way of a concession accorded by the Railways to the claimant; to the limited extent of extending the time for completing the works; perhaps keeping in view, the reasons for the delay that can be attributed to the Railways. However, the same does not entitle the claimant to seek damages or any compensation. It is rather a solace to the Contractor for the delay occurred because of commissions or omissions on the part of the Railways; time would be extended for completion of work.

19. When this condition of the contract is so clear, we are of the view that, basically the claims ought not to have been referred to the Arbitrator at all. However, having regard to the authority conferred upon the Arbitrator in almost all the areas including that of the jurisdiction of the Arbitrator himself, it may not be necessary for us to deal with that aspect in detail any further.

20. It is to be further seen that the Arbitrator, in categorical terms with cogent reasoning, found that there might be some delay on the part of the Railways and the claimant might have incurred an expenditure of about Rs. 3,00,000/- and though the claim is much higher, however recorded a finding rejecting those claims on the ground that those claims are attracted by Clause 17 (3) of the GCC.

21. Though this Court cannot and need not go into the details of the evidence on record, still a cursory glance of the facts relating to these claims makes it clear that the said claims are connected with delay on the part of the Railways. The Arbitrator had noticed the delay on the part of the Railways and rejected all the claims of the claimant on the sole ground that the claimant cannot raise any claim because those claims apparently are not connected with the delay on the part of the Railways, and in which event the same is hit by Clause 17 (3) of the GCC. It is to be further noted that the Arbitrator had appraised the entire evidence on record and made an assessment of the expenditure incurred and in spite of which, rejected those claims in the light of Clause 17 (3) of the GCC.

22. It is settled principle of law that when once the Arbitrator, acting as a fact-finding authority, records his findings, on a careful assessment of the entire evidence available on record, the Courts, particularly this Court, in normal course, is not obliged and entitled to re-appraise the whole evidence on record in order to arrive at a different conclusion than the one arrived at by the Arbitrator. However, this does not mean that in exceptional cases and for good and weighty reasons, the Courts are not precluded to undertake such an exercise, if interests of justice so demand and require, in a given case depending upon the facts and circumstances.

23. However, there may be certain areas where the Court below or this Court may examine the issues like jurisdiction and nature of the dispute for the purpose of reference to the Arbitrator or whether there is any apparent error on the face of the record or if the finding recorded by the Arbitrator is so palpably illegal and that such a conclusion cannot be arrived at basing on the evidence on

record.

24. The Arbitration and Conciliation Act, 1996 (for brevity "the new Act"), specifically incorporated Sections 16 and 34.

25. Section 16 of the new Act is equivalent to Section 31 of the Arbitration Act, 1940 (for brevity "the old Act").

26. For ready reference, Section 16 of the new Act is extracted, which is as under:

"16. Competence of arbitral tribunal to rule on its jurisdiction:-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for the purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34".

27. By virtue of this Section, the power of the Arbitrator is enlarged. Therefore, when the Arbitrator passes an award with reasons, in normal course, it is not desirable for the Court to interfere with the same except under the conditions mentioned in Section 34 of the new Act.

28. For ready reference, Section 34 of the new Act is extracted, which is as under:

"34. APPLICATION FOR SETTING ASIDE ARBITRAL AWARD:-

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if,-

(a) the party making the application furnishes proof that,-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement was not in accordance with this Part; or

(b) the Court finds that,-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation:- Without prejudice to the generality of sub-clause (ii), of Clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but

not thereafter.

(4) On receipt of an application under Sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award".

29. Most important conditions for setting aside the award are, firstly, if the matter in dispute is not capable of settlement and secondly, the arbitral award is in conflict with the public policy of India".

30. Insofar as the first clause is concerned, there is no need to go into that aspect since no such dispute exists in the present case.

31. The only aspect that remains is - the arbitral award is in conflict with "the public policy of India".

32. The expression "Public Policy of India" is not defined. But, it has been explained by the apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., The relevant paragraphs in the said decision are as under:

"12. The question, therefore, which requires consideration is whether the award could be set aside. If the Arbitral Tribunal has not followed the mandatory procedure prescribed u/s 24, 28 or 31(3), which affects the rights of the parties? Under Sub-section (1) (a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be-whether such award could be set aside? Similarly, under Sub-section (3), Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside u/s 34.

14. Result is - if the award is contrary to the substantive provisions 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 34. However, such failure of procedure should be patent affecting the rights of the parties.

15. The next clause which requires interpretation is Cl. (ii) of Sub-section (2)(b) of Section 34 which inter alia provides that the Court may set aside arbitral award if it is in conflict with the "Public Policy of India." The phrase "Public Policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "Public Policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "Public Policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and constitutional provisions.

22. The aforesaid submission of the learned senior counsel requires to be accepted. From the judgment discussed above, it can be held that the terms "Public Policy of India" is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of, enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under CPC that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or nullity. But in a case where the judgment and decree is challenged before the appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term "Public Policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned senior counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract."

31. Therefore, in our view, the phrase "Public Policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter, which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to

time. However, the award, which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice".

33. From the abovementioned decision of the apex Court, it is obvious that the concept "Public Policy" is to be understood in the context of each and every case. To illustrate, if the mala fides are attributed to the Arbitrator or dispute referred to the Arbitrator, on the face of it, is not capable of being referred to arbitration or if the Arbitrator goes beyond the scope of the reference and the adjudicatory process of the Arbitrator is again beyond the scope of the GCC. Therefore, it is further obvious that the Arbitrator has to necessarily confine his jurisdiction and adjudicate the matter only within the scope of the GCC and also the substantive laws of the land. Strict adherence to General Conditions of Contract is essential.

34. Hence, we are of the view that when once the Arbitrator had recorded a finding that Claim Nos. 1, 2 and 3 are hit by Clause 17 (3) of the GCC, we have no hesitation to agree with the said finding of the Arbitrator. However, the judgment relied upon by the Court below in T.A. Chowdhary's case (1 supra), is not applicable to the present set of facts. In the said case, a similar clause under the A.P. Detailed Standard Specifications i.e. Clause-59 had been interpreted since the clause of the said contract and the clauses of the contract between the parties to the present litigation are different and the facts are also different. Furthermore, the reasons recorded by the Arbitrator while rejecting the claims are also different.

35. In view of the matter, as we have already expressed our view that the claims made under Claim Nos. 1, 2 and 3 by the claimant are hit by Clause 17 (3) of the GCC, we uphold the award passed by the Arbitrator rejecting Claim Nos. 1, 2 and 3 as hit by Clause 17 (3) of the GCC and set aside the finding recorded by the Court below remitting the matter back insofar as the said claims to the Arbitrator for fresh consideration as wholly unwarranted.

36. In Re Point No. 2:- Apropos the other claims made by the claimant i.e., Claim Nos. 4, 5, 7 to 10 and 13, it is to be seen that the Arbitrator had recorded a finding rejecting the said claims solely on the ground that there is no evidence put forth by the claimant in that regard. It is rather rudimentary aspect that mere making a claim is not sufficient. All the claims made shall be substantiated to the satisfaction of the Arbitrator. When the Arbitrator recorded reasoning that while making the claims no evidence was pressed into service, there was no other go for the Arbitrator except to reject those claims.

37. In other words, a claim cannot be accepted for mere asking and the Arbitrator should also bear in mind that it is the public interest and money that is involved in every payment made to any claimant in matters of Government contracts. That is precisely what had been done by the Arbitrator in the instant case and the Court below had rightly affirmed the view taken by the Arbitrator in rejecting the said claims. Hence, we are of the firm view that no interference is

called for by this Court by way of re-appreciating the entire reasoning recorded by the Arbitrator and the Court below once again. In fact, "the said views expressed by the Arbitrator, as confirmed by the Court below, are in conformity with the judgment rendered by a Full Bench of the apex Court in M/s. Sikkim Subba Associates Vs. State of Sikkim, , wherein it was held by their Lordships:

"14. It is also, by now, well settled that an arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. An arbitrator was held not entitled to ignore the law or misapply it and he cannot also act arbitrarily, irrationally, capriciously or independently of the contract (see Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, .

15...the arbitrator could not have awarded any damage whatsoever and, at any rate, such a fabulous and astronomical sum on mere conjectures and pure hypothetical exercises, absolutely divorced from rationality and realities, inevitably making law, equity and justice, in the process a casualty....The arbitrator who is obliged to apply law and adjudicate claims according to law, is found to have thrown to the winds all such basic and fundamental principles and chosen to award an astronomical sum as damages without any basis or concrete proof of such damages, as required in law.

16...

(a)...

(b)...

(c) ...

(d) ...

(e) The award of an arbitrator cannot be opposed to law and what is not permissible in law cannot be granted or even approved by courts merely because it was an arbitrator who granted it.

17. Consequently, we have no hesitation to set aside the award of the arbitrator, as affirmed by the District Judge, insofar as it purports to award damages to the tune of Rs. 37.75,00,000/- in favour of the appellants, as wholly uncalled for and illegal."

38. For the foregoing, we answer point No. 2 in favour of the Railways (appellants in C.M.A. No. 816 of 2005 and respondent in C.M.A. No. 410 of 2005) and against the claimant (appellant in C.M.A. No. 875 of 2005 and respondent in C.M.A. (S.R) No. 27387 of 2005).

39. In Re Point No. 3:- In this regard, it is to be seen that awarding interest is more or less discretionary unless specifically mentioned in the GCC. In fact, there is a prohibition under Clause 16.3 of the GCC for payment of interest. But, the

same has been treated almost as a discretionary jurisdiction and accordingly, this aspect had been considered by two Division Benches of this Court in Union of India (UOI) and Another Vs. G.G. Satyanarayana and Others, . and N.G. Gunani Vs. The Union of India (UOI) and Another, .

40. Having regard to the aforesaid settled legal position, the contentions of the Railways have to be rejected and accordingly they are rejected.

41. Accordingly, Point No. 3 is held in favour of the appellants in C.M.A. No. 410 of 2005 and 873 of 2005 and respondent in C.M.A. No. 816 of 2005 C.M.A. (S.R) No. 27387 of 2005 and against the appellants in C.M.A. No. 873 of 2005 and C.M.A. (S.R) No. 27387 of 2005 and respondent in C.M.A. Nos. 410 of 2005 and 873 of 2005.

42. However, having regard to the facts and circumstances, we deem it appropriate to modify the rate of interest awarded by the Arbitrator as well as the Court below and we further deem it appropriate to award interest on the claims from 10-5-1999 on which date a letter had been addressed by the claimant seeking payment of claims till the date of realization at the rate of 9% per annum, as noticed by the apex Court in several cases and various situations like the depletion in the rates of interest of the financial institutions like Banks etc.

43. Mrs. C.V. Vinitha Reddy, learned Counsel appearing for the Railways, for the valuable assistance rendered, is to be paid fee at the rate of Rs. 7,500/- (Rupees seven thousand and five hundred only) in each Appeal.

44. In the result, the appeal C.M. A. No. 816 of 2005 is allowed, the appeal C.M.A. No. 410 of 2005 and C.M.A.S.R. NO. 27387 of 2005 are partly allowed and the appeal C.M.A. No. 873 of 2005 is dismissed. However, there shall be no order, as to costs.