
(2003) 09 AP CK 0100
In the Andhra Pradesh High Court
Case No : Writ Petition No. 17646 of 2003

M. Venkata Rao	Vs	APPELLANT
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 24-09-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)
Constitution of India, 1950 — Article 226

Citation : (2004) 1 ALD 328

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : K. Someswara Kumar, for the Appellant; C.V. Vinitha Reddy, SC for Railway, for the Respondent

Final Decision : Allowed

Judgement

V.V.S. Rao, J.—The petitioner is a railway contractor. According to him second respondent awarded contract for construction of retaining wall in place of damaged and leaning retaining wall between Makudi and Sirpur Town (Down Line) on 8.12.1995. Whatever be the reason the petitioner could not complete the work within stipulated time and railways authorities did not grant any extension. The petitioner again sent a communication on 10.5.2001 as well as on 15.6.2001 requesting the second respondent to make urgent arrangement for completion of work in vain. Therefore, he requested the second respondent to finalise the contract and release final amounts including security deposit and earnest money deposit. As he did not give a favourable reply, petitioner addressed second respondent on 11.12.2001 to refer the matter to arbitration. As there is no response, petitioner initially filed application under subsection (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (for short, the Act) being Arbitration Application No. 70 of 2002. At the time of preliminary hearing said Arbitration Application was dismissed as withdrawn presumably for the reason that the value of the contract being less than Rs. 5,00,000/- (Rupees five lakhs) jurisdiction lies with the Chief Judge, City Civil Court, Hyderabad. The

petitioner filed an application u/s 11(6) of the Act before the learned Chief Judge, City Civil Court, Hyderabad. The learned Chief Judge dismissed the same at S.R. stage by order dated 7.1.2003 in O.P. SRNo. 16122 of 2003 by passing the following order:

In order to attract Arbitration Act, there should be a clause in the agreement. Hence, this petition is to be rejected as it is not maintainable under the Act as admittedly there is no clause in the Agreement entered into between the parties and legal notice cannot be treated as a clause of the agreement. The petition is rejected.

2. The present writ petition is filed assailing the order passed by the learned Chief Judge, and also for a direction to the learned Chief Judge to appoint Arbitrator to settle claims of petitioner and disputes under the provisions of the Act.

3. This Court entertained a doubt whether Writ Petition is maintainable having regard to the decision of the Supreme Court in *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, (KONKAN-HI), as well as Division Bench judgment of this Court, to which I was a member, in *Union of India Vs. Vengamamba Engineering Co., Juputi, Krishna Dist. and another*, Learned Standing Counsel for Railways Mr. C.V.Rajeev Reddy has brought to the notice of this Court a latest judgment of the Supreme Court in *State of Orissa and Others Vs. Gokulananda Jena*, and fairly submits that in view of latest judgment of the Supreme Court Writ Petition would lie. As this question is cropping up repeatedly, shall refer to these judgments, briefly.

4. In *Konkan-III (supra)*, a question arose whether an SLP under Article 136 of the Constitution of India would lie against order passed by a learned Judge of High Court in appointing Arbitrator or refusing to appoint Arbitrator. The Supreme Court considered its earlier decisions in *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., (Konkan-I)*, and *M/s. Konkan Railway Corpn. Ltd. and Another Vs. M/s. Rani Construction Pvt. Ltd., (Konkan-II)*, and laid down as under:

.... Section 11 did not require the Chief Justice or his designate to perform any adjudicatory function. All that the Chief Justice or his designate was required to do was to nominate an arbitrator if a party to an arbitration agreement had failed to do so within the specified time after a request to it to do so had been made, and in so nominating an arbitrator the Chief Justice or his designate was to have regard to the qualifications that were required of the arbitrator by the agreement of the parties and to other considerations which were likely to secure the appointment of an independent and impartial arbitrator. This the Chief Justice or his designate had to do on an ex facie basis; no element of adjudication came into it.

5. In *Union of India v. Vengamamba Engineering Co., Jupati (supra)*, this Court considered the question as to what extent Writ Petition would be maintainable

against order passed by Chief Justice or the nominee of the Chief Justice appointing Arbitrator in terms of Sub-section (6) of Section 11 of the Act. After referring to judgments in Konkan-I (supra) and Konkan-II (supra) this Court laid down as under:

But, decision on a question as to whether an arbitration agreement exists at all or not inasmuch may attract the ambit of jurisdiction as even an administrative order can only be exercised provided the Chief Justice or his nominee satisfies himself as regards his jurisdiction u/s 11(6) of the Act or not. A question as regards maintainability of a writ petition may further arise as would appear from one of those cases when an anomaly may be created by appointing an arbitrator where another arbitrator had validly been appointed..... In a situation of the first nature when an arbitrator is refused to be appointed on the ground that there does not exist any arbitration clause, the same may not be held to be strictly administrative in nature..... Yet again in a case of the second nature where appointment of an arbitrator may instead of facilitating early statement of the claim may give rise to a situation where further litigation would be a near certainty, a writ of certiorari, assuming that such order would be an administrative order, may issue.

6. In a recent judgment delivered by me in Principal Secretary to Government of A.P., Transport, Roads and Buildings Department and Others Vs. P. Prabhakar Reddy and Another, (1) Decisions Today (AP) 148, following the relevant recent case law, I laid down as under:

Therefore, the law may be taken as well settled that when the Chief Justice or his nominee appoints an arbitrator, ordinarily, a writ petition would not be maintainable to challenge such an order. However, when the Chief Justice or his nominee refuses to appoint an arbitrator, the same amounts to not exercising jurisdiction in which event a writ petition would be maintainable under Article 226 of the Constitution to compel public authority to pass orders in exercise of powers vested in him.

7. Thus when the Chief Justice or his nominee refused to appoint Arbitrator, the same amounts to exercising jurisdiction in which event writ petition would be maintainable under Article 226 of the Constitution to compel public authorities to pass orders in exercise of powers vested in him. In *State of Orissa v. Gokulananda Jena* (supra) State challenged the order of Judge designated by the Chief Justice of High Court of Orissa, before the High Court, for appointing Arbitrator u/s 11(6) of the Act. The High Court placing reliance on Konkan-III (supra) held that the Writ Petition would not be maintainable. The Supreme Court reversed the same holding thus:

We think this view of the High Court as to the non-maintainability of a writ petition against an order made by the Designated Judge u/s 11(6) of the Act cannot be sustained.....It is to be noted that an administrative order is amenable to the writ jurisdiction under Article 226 of the Constitution of India

and we find such an order made by the Designated Judge u/s 11(6) of the Act is not an exception to this rule. The power of the High Court under Article 226 to entertain a writ petition cannot be equated with the power of the Supreme Court to entertain an appeal under Article 136 of the Constitution of India. The power of the High Court to entertain a writ petition is an original power while power of this Court while entertaining an appeal under Article 136 of the Constitution is an appellate power.....The Constitution Bench in the case of M/s. Konkan Railway (supra) itself has held that an order which is the subject matter of the petition for special leave to appeal under Article 136 must be an adjudicatory order, that is, an order which has adjudicated upon the rival contentions of the parties. In that context, this Court in M/s. Konkan Railways case has held that an order made by the Designated Judge u/s 11(6) of the Act is not an order in which the Designated Judge adjudicates parties rights, hence, it is in the nature of an administrative order against which an appeal under Article 136 does not lie. This Court in that judgment has not stated that an order being an administrative order, same cannot also be challenged under Article 226 of the Constitution for good and valid reasons. Therefore, in our opinion, the High Court was wrong in coming to the conclusion that an order made by the Designated Judge u/s 11(6) of the Act is not amenable to the writ jurisdiction of the High Court.

8. The Supreme Court further observed that even though Writ Petition would be maintainable against order of the Chief Justice or his Designate or Judge designated by the Chief Justice under Article 226 of the Constitution in view of the fact that almost all the questions including question as to appointment of Arbitrator can be raised before the Arbitrator which amounts to effective and efficacious alternative remedy, the Court normally would not entertain the challenge by an order of the Designated Judge made u/s 11(6) of the Act. It would be relevant to extract the following observations:

However, we must notice that in view of Section 16 read with Sections 12 and 13 of the Act as interpreted by the Constitution Bench of this Court in the M/s. Konkan Railway (supra) almost all disputes which could be presently contemplated can be raised and agitated before the Arbitrator appointed by the Designated Judge u/s 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the Arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy is available before the Arbitrator, writ Court normally would not entertain a challenge to an order of the Designated Judge made u/s 11(6) of the Act which includes considering the question of jurisdiction of the Arbitrator himself. Therefore, in our view, even though a writ petition under Article 226 of the Constitution is available to an aggrieved party ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself.

9. In view of the latest judgment of the Supreme Court, it may be taken as well settled that when an order is passed appointing Arbitrator u/s 11(6) of the Act,

though writ petition is maintainable, ordinarily same cannot be interfered with in exercise of powers under Article 226 of the Constitution for there is alternative efficacious remedy before the Arbitrator himself to raise all the grounds and contentions. Whether an application u/s 11(6) of the Act is not accepted and Hon''ble Chief Justice or Judge designated by Hon''ble Chief Justice refuses to appoint Arbitrator, writ petition would be maintainable under Article 226 of the Constitution. As observed by this Court in *Union of India v. Vengamamba Engineering Co., Juputi* (supra), and explained by me in *Government of Andhra Pradesh v. P. Prabhakar Reddy* (supra), a direction can be issued by the High Court to compel public authority to pass orders vested in him.

10. Learned Counsel for the petitioner brought to my notice the tenders submitted by the petitioner to President of India acting through the Chief Administrative Officer (Construction)/Chief Engineer (Construction). The tender submitted is subject to general and special conditions of contract entered into by the petitioner and the railways. The contract entered into by the petitioner and the railways on 8.12.1995 in Clause 64 of the General Conditions of the Contract provides for reference of all the disputes to Arbitrators designated by the Chief General Manager. The learned Chief Judge lost sight of this and passed orders rejecting the application on the ground that there is no such clause. The order passed by the learned Chief Judge, impugned in the writ petition suffers from perversity and requires rectification.

11. Accordingly, the writ petition is allowed. There shall be a mandamus directing the learned Chief Judge City Civil Court, Hyderabad, to entertain O.P. SR No. 16122 of 2003, and issue notice to all the contesting parties and pass appropriate orders within a period of four weeks from the date of receipt of this order. It shall be open to the respondents herein to raise all the objections before the learned Chief Judge, City Civil Court, Hyderabad. There shall be no order as to costs.