
(2008) 01 AP CK 0043
In the Andhra Pradesh High Court
Case No : C.M.A. No. 1118 of 2005

M. Venkata Rao

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-01-2008

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 34, 37

Citation : (2008) 3 ALD 619 : (2008) 2 ALT 369 : (2008) 4 ARBLR 69

Hon'ble Judges : Ghulam Mohammed, J;B. Seshasayana Reddy, J

Bench : Division Bench

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

Final Decision : Dismissed

Judgement

B. Seshasayana Reddy, J.—The validity and legality of the judgment dated 1-9-2005 of XIV Additional Chief Judge, City Civil Court, Hyderabad, is assailed in this civil miscellaneous appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996, (for short, "the Act").

2. The appellant was awarded a contract for urgent repairs to open drains from Secunderabad end to Dronachallam end for disposal of sullage water. The agreement was entered into on 12-2-1996 and the work had to be completed by 11-5-1996 i.e., within a period of three months. The value of the work is Rs. 8,85,841/-. Time for completion of the work was extended from time to time and the final extension was up to 15-5-1997. While granting extension of time, once penalty was imposed on the appellant/claimant. He requested for waiver of the penalty, but the Railway (hereinafter referred to as "the Department") refused to consider his request. The appellant/claimant completed the work at Dronachallam end and when he was proceeding to take up the work at Secunderabad end, the Department prevented him from carrying out the work because of gauge conversion. The Department by letter dated 16-4-1998 asked

the appellant/claimant to submit his claim with qualified "No claim Certificate". Accordingly, the appellant/claimant submitted "No claim certificate" on 19-6-1998 along with his claims data. Since the Department did not pay the amounts as claimed by the appellant/claimant, the appellant/claimant by letter dated 10-5-2001 requested the Department either release the amounts claimed by him or refer the dispute to Arbitrator. As the Department did not oblige him, he approached the High Court by filing application seeking appointment of Arbitrator. An Arbitrator came to be appointed and the disputes came to be referred to him. The appellant/claimant claimed the amounts under four heads. The amounts claimed by him are detailed hereunder:

Claim No. 1:

Compensation for the loss caused for preventing To take up the work at a Secunderabad End, Calculated at 10% on the rescinded value of the contract. Interest @ 24% per annum from 16-5-97 till 18-1-2003 Rs. 77,217/- Total Rs. 1,35,188/- Claim No. 2:

Refund of penalty amount Rs. 57,578/- Interest @ 24% per annum from 16-5-97 till 18-1-2003 Rs. 76,694/- Total 1,34,262/- Claim No. 3:

Compensation for the loss caused due to the expenditure Rs. 1,92,000/- Incurred by way of salaries to employees etc. Claim No. 4:

Loss due to delay in payment of final bill The amount of final bill Rs. 1,761/- Interest @ 24% per annum from 16-5-07 till 18-1-2003 Rs. 2,346/- Total Rs. 4,107/- Claim No. 5:

Compensation for delay in releasing the Security Deposit Security Depost Rs. 51,792/- Interest @ 24% per annum from 16-5-97 till 18-1-2003 Rs. 68,987/- Rs. 1,20,779/- Claim No. 6:

Compensation for loss of legitimate earnings Rs. 1,13,942/- Arbitration Costs Rs. 20,000/- Grand Total of all the claims Rs. 7,20,288/-

3. The Department filed statement before the Arbitrator denying its liability. It was averred in the statement that the work was urgent in nature to be completed within three months. The claimant did not complete the work within the stipulated time and time allowed to complete the work came to be extended from time to time. The Department pleaded before the Arbitrator that the claims made by the appellant/claimant are barred by limitation.

4. The learned Arbitrator framed the following issues for consideration:

- (1) Whether the claims are barred by limitation?
- (2) Whether the claimant is entitled for the claims made?
- (3) To what relief?

5. The learned Arbitrator recorded a finding that claim No.1 comes within the

purview of excepted matter and Claim No.2 is barred by limitation. The Learned Arbitrator also rejected Claim No.3 on the ground that there was delay on the part of the appellant/claimant in executing the work. However, the learned Arbitrator allowed claim Nos.4 and 5 of the appellant/claimant and passed an award for Rs. 81,242/- with interest at the rate of 18% p.a. from the date of Award to the date of payment apart from costs of Rs. 5,000/-.

6. The claimant/appellant assailed the Award before the civil Court by filing an application u/s 34 of the Act. The civil Court, on considering the material brought on record and on perusing the reasons assigned by the Arbitrator for negating Claim Nos. 1 to 3 and 6 of the appellant/claimant, proceeded to dismiss the application, by judgment dated 1-9-2005. The said Judgment is under challenge in this civil miscellaneous appeal.

7. Heard learned Counsel appearing for the appellant/claimant and learned Standing Counsel appearing for the Department/ Respondents 1 and 2.

8. Learned Counsel appearing for the appellant/claimant submits that the finding of the Arbitrator on the issue of limitation is contrary to the material brought on record and therefore, the same is liable to be set aside. He further submits that Claim No. 1 does not come within the meaning of excepted matter and therefore, the appellant/claimant is entitled to the amount claimed by him under Claim Nos. 1 to 3 and 6. In support of his submissions, reliance has been placed on the decisions of the Supreme Court in J.G. Engineers Pvt. Ltd. v. Calcutta Improvement Trust 2002 (3) ALT 6 (SC) : 2002 (2) ALD 43 (SC) and General Manager Northern Railways and Another Vs. Sarvesh Chopra, .

9. In J.G. Engineers Pvt. Ltd. v. Calcutta Improvement Trust 2002 (3) ALT 6 (SC) : 2002 (2) ALD 43 (SC), the Supreme Court held that a specific plea had to be taken before the Arbitrator that the aspect of termination was not arbitrable. Paras 12 and 13 of the judgment need to be noted and they are hereunder:

12. The issue of termination of the contract in question, on the facts under consideration before us, does not relate to the jurisdiction of the arbitrator. Without going into the scope of clause 1.9 of the Information and Instructions to Tenders or that of clause 15 of the contract and assuming that issue of termination of contract can be brought within the scope of the said clauses* and, thus, made an excepted matter but that would depend upon the fact whether Engineer's certificate under clause 1.9 has been issued or not. Therefore, specific plea had to be taken that such a certificate was issued and, therefore, the aspect of termination-was not arbitrable. As already noticed, no such fact was pleaded or contention urged in the counter statement of facts. In this view, it is not necessary to decide whether the issue of termination of the contract could be brought within the ambit of the excepted matter or not or that the Engineer's certificate could be conclusive only as to the quality or measurement of the work done.

13. The Division Bench was, thus, not correct in coming to the conclusion that

the fundamental terms of the agreement between the parties prohibited the arbitrability of the excepted matters. The first ground on the basis of which the judgment of the learned single Judge was reversed is, thus not sustainable.

10. In *General Manager, Northern Railway v. Sarvesh Chopra* (2 supra), the Supreme Court held that while deciding a petition u/s 20 of the Arbitration Act, 1940, the Court is obligated to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or an "in-house" remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, and (iii) an issue as to arbitrability of claim is available for determination at all the three stages - while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the court.

11. Learned Standing Counsel appearing for the Department/Respondents 1 and 2 submits that the arbitrator has gone into the material brought on record in great detail and recorded a finding that the claim No. 2 is barred by limitation, Claim No. 1 comes within the purview of excepted matter and claimant No. 6 is redundant and therefore, the findings recorded by the arbitrator need no interference. He would also submit that once interest is awarded, it takes care of the compensation on account of delay in completion of work. In support of his submissions, reliance has been placed on the following decisions:

(1) *Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another*, .

(2) *Union of India (UOI) and Others Vs. Satyanarayana Construction Co. and Another*, .

(3) *L. Nagi Reddy Vs. Union of India (UOI) and Others*, .

(4) *Superintending Engineer and Another Vs. Kehar Singh*, .

12. In *Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another*, the Supreme Court held that grant of compensation on account of delay in completion of work if specifically barred by the contract clause amounts to misconduct on the part of the arbitrator and that the arbitrator acted in excess of his jurisdiction.

13. In *Satyanarayana Construction's case* 2005 (3) ALT 460 (D.B.), a Division Bench of this Court held that when time is essence of the contract entered into between the parties and when the contractor failed to complete the work within the stipulated time or extended time, a direction by the arbitrator to refund the penalties imposed in the contract is not valid.

14. In *Nagi Reddy's case* (5th cited), a Division Bench of our High Court held

that when the arbitrator passes an award with reasons, in the normal course it is not desirable for the Court to interfere with the same except under the conditions mentioned in Section 34 of the Arbitration and Conciliation Act, 1996.

15. In Kehar Singh's case (6th cited), a Division Bench of this Court held that awarding damages by the arbitrator on the claims made by the contractor that he would have earned more profit if money due to him is unsustainable as it is too remote a claim to be allowed.

16. The contractor claimed Rs. 7,20,288/- under different heads. The learned arbitrator disallowed claim Nos. 1 to 3 and 6 while allowing claim Nos. 4 and 5. The learned Arbitrator disallowed claim No. 1 on the ground that it is an excepted matter and therefore it is beyond the scope of arbitration. Clauses 61 and 63 of General Conditions of Contract have been referred to by the learned arbitrator in arriving at a conclusion that claim No. 1 is an excepted matter. It is a matter of record that the contractor did not commence the work till 8-11-1996. Therefore, a notice came to be issued by the Department on 8-11-1996 to commence the work. Exs. R-3, R-5, R-7, R-8, R-12, R-13 and R-15 are the letters addressed to the contractor pointing out delay on his part in commencing the work. The learned arbitrator considered the entire material brought on record in right perspective and recorded a finding that there is a delay on the part of the contractor in commencing the work.

17. Under clause 61(1) of the General Conditions of the Contract, the Department is entitled to determine and terminate the contract at any time. The Department terminated the contract because of the gauge conversion and intimated the same to the Contractor and directed him to submit the final bill. When once the Department terminated the contract by invoking clause 61(1) of the General Conditions of the Contract, it becomes an excepted matter to determine as to the validity of the termination. Therefore, the findings recorded by the learned arbitrator is in accordance with the terms of the contract and it does not warrant interference.

18. With regard to refund of penalty amount, the Department imposed the penalty since there is delay on the part of the contractor in completing the work entrusted to him. The Department is entitled to levy penalty under the terms of the contract. A similar question came up for consideration before a Division Bench of this Court in Satyanarayana Construction's case (4th cited) wherein it has been held that when the contractor failed to complete the work within the stipulated time or extended time inspite of cautioning him, penalty imposed in those circumstances is justified. Therefore, the findings recorded by the learned Arbitrator that the Department imposed penalty in accordance with the terms of the contract is not required to be interfered.

19. The contractor claimed an amount of Rs. 1,92,000/- under the head of loss due to the expenditure incurred by way of salaries to employees. The learned arbitrator rejected the claim under the ground that the contractor failed to place

any evidence to substantiate the claim. We do not see any illegality in the finding recorded by the learned arbitrator on this aspect.

20. The contractor claimed certain amount as compensation for not releasing the security deposit within reasonable time after submitting his qualified No Claim Certificate. In a way it is the plea of the contractor that had the amount been released, he would have invested the same and thereby earned some profits. This is a too remote claim. This aspect fell for consideration before the Division Bench of this Court in Kehar Singh's case (6th cited) wherein it has been held that awarding damages by arbitrator on the claim made by the contractor that he would have earned more profit if money due to him is paid in time is unsustainable as it is too remote a claim to be allowed. When the arbitrator granted interest on the withheld amount, the contractor is not entitled to any further amount on that score.

21. The Civil Court considered the findings recorded by the learned arbitrator and did not find any valid ground to interfere with the same. We do not see any legal flaw in the order impugned in this Civil Miscellaneous Appeal.

Accordingly, this Civil Miscellaneous Appeal is dismissed. No order as to costs.