
(1998) 07 AP CK 0006
In the Andhra Pradesh High Court
Case No : AA No. 45 of 1997

M.V.V. Satyanarayana

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 13-07-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8

Citation : (1998) 5 ALD 131 : (1998) 5 ALT 132

Hon'ble Judges : Krishna Saran Shrivastav, J

Bench : Single Bench

Advocate : Mr. Prasada Rao, Vemulapala, for the Appellant; Mr. R.S. Murthy, SC for Railways, for the Respondent

Judgement

1. This is an application for appointment of a sole arbitrator for adjudicating the disputes that have arisen between the applicant and the respondents.
2. It is an admitted fact that, for the construction of Type V Quarters for 7 units and Type IV Quarters for 6 units for Gazetted and Non-Gazetted Officers in IRISSET-SC area, the applicant had submitted his tender and it was accepted by the respondents and in pursuance thereof, they entered into an agreement 31-5-1989. The work was to be completed within 12 months from the date of acceptance letter dated 18-5-1989. The value of the work was Rs.21,94,885/-. The work could not be completed within the stipulated time, that is, 18-5-1990, and at the request of the applicant, time was extended and the contract was completed on 30-10-1991. Possession of the constructed Quarters was delivered by the applicant to the Railways through the respondents.
3. The case of the applicant is that the site was not handed over to the applicant within time, electricity was supplied only after 18-5-1990, drawings were not handed over to the applicant by the respondents within a reasonable time, and the drawings were changed frequently. Due to the aforementioned acts of the respondents, re-construction work had to be done and the workmen had to sit idle. The respondents did not return the security deposit of Rs.1,50,000/- within

time, but returned it only on 18-12-1997 and made illegal deductions and paid only an amount of Rs.68,240/- on 15-5-1997 out of the final bill. Therefore, the applicant is entitled to claim Rs.1,80,000/- against the final bill and various amounts shown at S!.Nos.2 to 11 under different heads making a total claim of approximately Rs.55,00,000/-. The applicant demanded the amount vide letter dated 30-10-1996 and requested for appointment of an arbitrator, but no arbitrator has been appointed and, therefore, an independent arbitrator should be appointed.

4. The application is resisted by the respondents denying the claim of the applicant that the applicant sought extension initially upto 30-11-1990 for carrying out the remaining 20 per cent work which related to outside water supply, drainage arrangements and additions and alterations. Then, he sought further extension upto 30-5-1991 without levy of penalty. Further extension was sought and granted upto 31-8-1991 and then upto 31-10-1991 without levy of penalty. Subsidiary agreement for additional and new schedule items was finalised and at the request of the applicant, the security deposit of Rs.1,51,1137- was converted into F.D.R. On enquiry, it was found that there was less consumption of 1078.37 bags of cement against the supply made to the applicant on 15-7-1992. After negotiations with the applicant, an excess of 34.40 per cent over the agreement value of additional SSR items and additional NS items was agreed to by the applicant. The applicant was paid final bill on 15-5-1997 on the basis of no claim certificate dated 6-12-1991 and there remains no dispute to be resolved. It is also alleged that the applicant is not entitled to recover any loss or damage under Clause 17(3) GCC for failure or delay. Similarly, in view of Clauses 17 (3), 19 and 37 of GCC and Clause 42(1) of GCC, the applicant is not entitled for compensation for any increase or decrease in the quantities of work or alterations in design, character etc., as also for nonavailability of site, water and electricity. The claim for loss due to idling of labour before the commencement of work and during the progress of the work, reimbursement of amounts paid to Bankers and Financiers and continuation of overheads and establishment charges, loss due to less business turnover and incidental and contingent expenses in chasing the final bill are outside the scope of arbitration by virtue of 62(2) (a) of GCC. The claim of Rs.7,00,000/- by way of increase at 35 per cent cannot be granted in view of the negotiations and agreement reached for increase by 34.40 per cent and it is excluded under Clauses 37, 42(1) and 62(2)(a) of GCC. Similarly, no interest is payable on security deposit in terms of Clause 16(2) of GCC and it is outside arbitration. Under Clause 64 GCC, appointment of arbitrator can be made by the General Manager, South Central Railway, alone and, therefore, the High Court cannot appoint an arbitrator. Under these circumstances, the application for appointment of arbitrator is liable to be dismissed.

5. It would be beneficial to reproduce the following passage from the case of N.G. Gunani Vs. The Union of India (UOI) and Another, :

" A closer analysis of the provision does not show as if the power of the Arbitration has been taken away to grant interest upon the determination of the amounts payable to the contractor. What the provision means, in the context, that where certain amounts are payable to the contractor but are not paid in time by the department and are released after lapse of time, the department would not pay interest for the delayed payment. It is a restriction on the power of the departmental officers to allow interest because of late payment. But such a provision does not restrict the power of the adjudicator to determine and direct payment of interest. A simple example would expose the fallacy of the submission. No doubt the contract provides Clause 64 as the arbitration clause under which the disputes between the parties would be referred to arbitration but in a hypothetical case, say, where Clause 64 is absent, the disputes between the parties are to be determined by the Civil Court only. In such a case where a civil suit is filed by the contractor claiming all the unpaid dues and also claiming interest, it could not be said that the power of the Court to grant interest is denied because of Clause 16(2). Similarly the power of the Arbitrator also cannot be denied to grant interest as the Arbitrator is to go into the entire question of the disputes between the parties, weigh all aspects of it, find out the respective rights and liabilities and determine the amount that was actually payable to the Contractor and hence may find the necessity also of awarding interest as the amount having remained unpaid in spite of the efforts of the contractor. Clause 63 also makes the matter clear. The clause is in the following words:

"63. All disputes and differences of any kind whatsoever arising out of or in connection with the contract whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after receipt of the contractor's presentation make and notify decisions on all matters referred to by the contractor in writing, provided that matters for which provision has been made in Clauses 18, 22(5), 39, 45(1), 55, 55-A(5), 61(2) and 62(1)(xiii)(B)(c)(b) of the General Conditions of the contract shall be deemed as "Excepted matters" and decisions thereon shall be final and binding on the contractor; provided further that excepted matters shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration."

6. In the case of N.G.Gunani (supra), it is held that in the General Conditions of Contract, Clause 16(2) has not been included as an excepted matter. That being so, it is clear that grant of interest is a matter specifically covered u/s 64 which is the clause for arbitration. Arbitration Clause also shows the matters for arbitration saying that except "matters covered under Clause 63, all matters are referable to arbitration. On perusal of Clause 63 it is evident that, excepted matters under Clause 63 of GCC do not include Clauses 16(2), 17, 19, 37, 42 and 62(2)(a). It is noteworthy that Clause 62(2)(a) is applicable only when the contract is rescinded under Clause 61(1) and not otherwise, because sub-clause (2) of Clause 62 says that in the event of any or several of the courses referred

to in sub-clause (1) of this Clause being adopted, right of Railways accrues for taking action owing to the default of the contractor in any of the courses mentioned in sub-clauses (a) to (d). In the case on hand, the contract has not been terminated by the respondents, but extensions were granted and the contract was completed and the quarters were handed over to them. Thus, it is crystal clear that the matters in question are covered under Clause 64 of GCC which is the clause for arbitration.

7. In the case of *Deepa Galvanising Engineering Industries Pvt.Ltd. v. Government of India and Anr.*, 1997 (5) ALD 765, it is held that the only point that will have to be decided in the applications filed for arbitration is whether there are any valid grounds for appointment of an arbitrator and not whether a particular claim made by the petitioner against the respondents is genuine and valid or whether it is baseless or untenable, such considerations regarding the truth and validity of the claim made by the petitioner relating to which the disputes have arisen will have to be decided only by the arbitrator after he is appointed.

8. In the case of *Marshall Corporation Ltd. v. Union of India and another*, 1997 (6) ALD 132, the respondents had not appointed the arbitrator in spite of notices and they had appointed the arbitrator during the pendency of the arbitration proceedings in the High Court. Under these circumstances, it has been held in this case that the respondents had forfeited their right to appoint an arbitrator and as such the alleged appointment of the arbitrator during the pendency of the application could not be said to be valid.

9. I am in complete agreement with the aforesaid views expressed in the case of *Deejai Galvanising Engineering Industries (supra)* and *Marshall Corporation Ltd, (supra)*.

10. For the foregoing reasons, the application for appointment of arbitrator cannot be rejected on the ground that the claims are exaggerated or baseless. The respondents did not appoint any arbitrator in answer to the notice served on them and, therefore, they have forfeited their right to appoint an arbitrator and as such the argument of the learned Counsel of the respondents that only the General Manager of South Central Railway is competent to appoint arbitrator, has no force. I hold that there is an arbitrable dispute between the applicant and the respondents. Therefore, I do, hereby, appoint Shri Justice T.N.C. Rangarajan, a retired Judge of this Court, as the sole arbitrator to adjudicate the disputes between the parties to the contract. The arbitrator is directed to enter upon the reference with expedition and is also directed to make and publish his Award within a period of four months from the date of entering upon the reference. The arbitrator shall be entitled to remuneration of Rs.50,000/- (Rupees Fifty Thousand Only) to be paid initially by the applicant.

11. The application is thus disposed of. There shall be no order as to costs.