
(1994) 02 AP CK 0029

In the Andhra Pradesh High Court

Case No : CRP No"s. 2010 of 1993 and 9 of 1994

S. Krishna Reddy

APPELLANT

Vs

Government of Andhra Pradesh

RESPONDENT

Date of Decision : 16-02-1994

Acts Referred:

Arbitration Act, 1940 — Section 10, 11, 12, 33, 8

Citation : (1994) 2 ARBLR 154

Hon'ble Judges : Motilal B. Naik, J

Bench : Single Bench

Advocate : T. Bheemsen, for the Appellant; Government Pleader, for the Respondent

Judgement

Motilal B. Naik, J.—These two revision petitions can be disposed of by a common order, as the questions raised therein are one and the same.

2. C.R.P. No. 2010 of 1993 arises out of the judgment dated 31.3.1993 passed in O.P. No. 27 of 1992 on the file of the Subordinate Judge, Karimnagar and C.R.P. No. 9 of 1994 arises out of the judgment dated 18.11.1993 passed in O.P. No. 69 of 1993 on the file of the same court.

3. Petitioner is a contractor. He was entrusted with the work relating to "Earth work excavation and forming embankment of DBM-31 from K.M. 5.00 to K.M. 7.00 of Kakatiya Canal of Sri Ramsagar Project" vide agreement No. 1/1982-83, dated 24.4.1982 by the Government. According to one of the clauses in the agreement, the petitioner has to complete the work within twelve months from the date of handing over the site, which was handed over on 5.3.1982. It is also one of the clauses that if any dispute arises between the parties in respect of execution of work, the same may be referred to arbitrators named in the said agreement. According to clause (3) of the agreement, a panel of arbitrator is named as per the value of the dispute between the parties. If the claim is upto Rs. 20,000/-, the Superintending Engineer, I & P.D., Godavari Valley Circle, Jagtial; the claim is of Rs. 20,000/- and above upto Rs. 1 lakh the Chief

Engineer, Investigation, Irrigation and Power (Convenor); Superintending Engineer, Irrigation Circle, Hyderabad and Director of Accounts, Srisailem Project and the claim is of Rs. 1 lakh and above, the Chief Engineer, Investigation, Irrigation and Power (Convenor); Sri P. M. Mohan Rao, Deputy Secretary to Government, Finance and Planning Department and Director of Accounts, Srisailem Project, are named as arbitrators to settle the dispute, if any arises.

4. While so, certain disputes arose between the Government and the contractor in respect of execution of work and the contractor preferred to go for arbitration as per the arbitration clauses in the agreement. A controversy arose between the parties with regard to interpretation of Clause (3) of the agreement and as per that clause, the dispute has to be referred to a panel of arbitrators consisting of Chief Engineer, Investigation, Irrigation, and Power (Convenor); Sri P. M. Mohan Rao, Deputy Secretary to Government. Finance and Planning Department and the Director of Accounts, Srisailem Project on account of the fact that the value of claim is more than Rs. 1 lakh. Since one of the arbitrators viz., Sri P. M. Mohan Rao, Deputy Secretary to Government, Finance and Planning Department had retired from service, the Chief Engineer, Investigation, Irrigation and Power (Convenor), who is named as one of the arbitrators, requested the Government to fill up the vacancy caused due to retirement of Sri P. M. Mohan Rao, to conduct the arbitration proceedings. The government preferred a petition under Sections 8 - 12 of the Indian Arbitration Act O.P. No. 27 of 1992 before the Sub-Court, Karimnagar seeking filling up of the vacancy caused due to retirement of the said Mohan Rao. While so, the contractor, realising that the arbitrators are not entering into reference and settle the dispute, issued a notice to the department as contemplated, to agree with the names suggested for appointing sole arbitrator. The department chose to reply negating the request while intimating that the department has already moved the civil court for filling up the vacancy caused due to retirement of Mohan Rao. In the absence of the department not co-operating, the contractor filed O.P. No. 69/93) on the file of the Sub-Judge, Karimnagar for appointment of sole arbitrator.

5. The learned Subordinate Judge, interpreting Clause (3) of the agreement, came to the conclusion that as Sri Mohan Rao, Deputy Secretary to Government, Finance and Planning Department, has retired from service and his whereabouts were not known, his vacancy shall be filled up by a person who is working as Deputy Secretary to Government, Finance and Planning Department, and allowed O.P. No. 27/92 filed by the Government, but no orders were passed in O.P. No. 69/93.

6. Aggrieved by the order of the learned Subordinate Judge in O.P. Nos. 27/92 and 69/93, the petitioner-contractor filed these two revision petitions.

7. The learned Counsel for the petitioner contends that under Clause (3) of the agreement, P. Mohan Rao. Deputy Secretary to Government, Finance and Planning Department was named as one of the arbitrators; that the retired from service and his whereabouts are not known; that the said Mohan Rao neglected to

act as an arbitrator to enter into reference; that the court below has no power or authority u/s 8 of the Indian Arbitration Act to substitute the vacancy caused by neglect of Mohan Rao and that the court below, without considering the application filed by the contractor O.P. No. 69/93 has erroneously allowed the application filed by the department. It is further contended that the department without recourse to the procedure contemplated u/s 8 of the Act, cannot straight way approach the court for appointment of arbitrator. The department is bound to give a notice to the contractor for filling up the vacancy and it is only after the contractor refused to concur or reply, then proceedings could be initiated before the court. The court gets jurisdiction to appoint an arbitrator only under such circumstances. It is further argued that the contractor in fact gave a notice while suggesting the name of proposed arbitrator. The department did not co-operate, but straightway rejected the request while intimating that the department is moving the court for appointment of an arbitrator in the vacancy caused due to retirement of P. Mohan Rao.

8. The learned Government Pleader contended that the arbitrators under Clause (3) of the agreement were appointed by designation and not by name; that since P. Mohan Rao retired from service, the Government has power to fill up the vacancy in his place.

9. To decide the issue whether the court has power to entertain an application in such circumstances, it is relevant to refer to Section 8; of the Indian Arbitration Act, which reads as follows :

"Power of court to appoint arbitrator or umpire :

(1) In any of the following cases;

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not after difference have arisen, concur in the appointment of appointments; or

(b) If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) Where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

If the appointment is not made within fifteen clear days after service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appointment of an

arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

10. It is clear from the above provision, when the arbitrator fails to or neglects to enter on reference, either of the parties has to give fifteen day's notice and there is no agreement on the proposed name, no arbitrator is appointed, then the aggrieved party is at liberty to move the competent court.

11. In this case, the petitioner completed the work entrusted to him in time though there were some difficulties faced by him and that there were some disputes between the parties and therefore, in terms of the agreement, any dispute arising out of the work executed, the same should be referred to a panel of arbitrators named in the agreement. Therefore, in terms of Clause (3) of the agreement, the petitioner sought the arbitrators to enter the reference and adjudicate upon the matters. The petitioner by his claim statement dated 6.10.1991 requested the named three arbitrators to enter the references and decide the disputes according to law within four months from the date of entering the references.

Consequently, the convener of the panel, by his letter No. C.E./INV/ARB/6820/91, dated 19.10.1991 directed the Superintending Engineer, 1st respondent herein to file his counter along with the agreement, and reiterated the same by letter dated 4.11.1991 and the 1st respondent filed his counter on 23.11.1991. The convener posted the matter for hearing on 18.12.1991 but hearing was postponed by telegram dated 16.12.1991 and subsequently it was posted to 16.1.1992, 5.2.1992 and then 17.2.1992, but due to non-attendance of the other two arbitrators, the arbitration sittings were not held and the dispute sought to be adjudicated could not be resolved.

12. The petitioner then came to know that one of the named arbitrators in the panel-Sri Mohan Rao, who worked as Deputy Secretary to Government, Finance & Planning Department, has retired from service and his whereabouts were not known. Thereafter, the petitioner seems to have issued a notice on 4.3.1992 u/s 8 of the Indian Arbitrator Act to the respondents explaining the need for appointment of a sole arbitrator and called upon them to concur within fifteen days-after service of notice by appointing any one of the three reputed retired Engineer-in-Chief, who also acted as Commissioner and Ex-Officio Secretary to Government of Andhra Pradesh.

Pursuant to the said notice, the 2nd respondent through his letter dated 11.3.1992 seems to have intimated the petitioner that the department has already filed a petition before the Sub-Court, Karimnagar in this aspect, Consequently, the request of the petitioner for appointment of sole arbitrator was rejected. Therefore, the petitioner was compelled to file an application under Sections 8 and 33 of the Arbitration Act-O.P. No. 69 of 1993 before the Sub-Court, Karimnagar seeking to supply the vacancy caused by appointing an

independent person as a sole arbitrator to settle the dispute. It is stated that along with the notice, a panel of persons was suggested by the petitioner to the department to refer the dispute, so that the difficulties faced pursuant to non-availability of Mohan Rao, could be mitigated by filling up the vacancy. It was also suggested that even otherwise, one person could be appointed as a sole arbitrator, so that the matter could be decided as expeditiously as possible.

Instead of giving concurrence or indicating the arbitrator, the respondents stated to have rejected the plea put forth by the petitioner on the ground that they have already moved the appropriate court. In those circumstances, the petitioner was forced to file an application under Sections 8 and 33 of the Act seeking indulgence of the court below.

13. Notwithstanding the fact that a notice has been received by the respondents, the respondents took upon the responsibility of moving the court by way of filing O.P. No. 27/92 before the Sub-Court to fill up the vacancy caused due to retirement of Mohan Rao, one of the named arbitrators. The petitioner contends that the petition filed by the respondents - O.P. No. 27/92 is not maintainable u/s 8 of the Arbitration Act; though he filed an application O.P. No. 69/92 seeking appointment of an arbitrator and requested the court to hear the two matters together, unfortunately those two applications were not heard together, and O.P. No. 27/92 filed by the respondent-Government was decided. Consequently, O.P. No. 69/92 filed by the petitioner was closed.

14. The lower court, accepting the contentions raised on behalf of the department that the vacancy caused pursuant to retirement of Mohan Rao could be filled up without considering the objections raised by the contractor, allowed O.P. No. 27/92 filed by the department by appointing person, who is working in the place of Mohan Rao, as one of the arbitrators and directed the arbitrators to proceed with the proceedings according to law

15. Sri T. Bhimsen, learned Counsel for the petitioner, primarily contended that the procedure contemplated u/s 8 has not been complied with by the respondents; that the court below had lacked jurisdiction to entertain the application filed by the department that the court below has failed to appreciate the objections filed by the petitioner and that, therefore, the order made by the court below is without jurisdiction, he further contended that in terms of Clause (3) of the agreement, when the arbitrators are requested to enter the reference within a particular period, they have to discharge their obligation and failure to discharge their obligation as contemplated u/s 8 would amount to negligence or refusal. In the instant case, though the petitioner had given a notice for filling up the vacancy caused due to retirement of Mohan Rao, by suggesting somebody's name, no proper response was given. On the contrary, the respondents-Govt. approached the court below by way of filing an application seeking to fill up the vacancy. Therefore, the court below has erred in appointing an incumbent officer who is working in the place of Mohan Rao, without examining whether the respondent had adhered to the provisions of Section 8 of the Act before

approaching the court. It is not the case of the Government that a notice was given to the contractor for filling up the vacancy before approaching the court below.

On the contrary, the learned Government Pleader vehemently contended that the order made by the court below is sustainable, for the petitioner himself affirmed in the petition filed that the whereabouts of Mohan Rao were not known and that, therefore, there were sufficient reasons for the Government to approach the court below for filling up the vacancy. It is further contended that the petitioner has failed to co-operate with the department to proceed with the matter. Therefore, in the absence of co-operation by the petitioner, the only alternative remedy available for the department was to approach the competent court for filling up the vacancy in the place of Mohan Rao, who retired from service.

In the wake of these submissions, the short question that arises for consideration is whether the lower court has properly exercised its jurisdiction in entertaining O.P. No. 27/92 filed by the department for filling up the vacancy caused pursuant to the retirement of Mohon Rao ?

16. A reading of Section 8 of the Arbitration Act indicates that if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy, any party may serve the other party or the arbitrators, as the case may be, written notice to concur in the appointment or appointments or in supplying the vacancy. If any of the arbitrators are not appointed as contemplated under the provisions within fifteen clear days after the service of the notice and after receipt of such notice, the matter has to be moved before the competent Civil Court for adjudicating seeking to fill up the vacancy caused.

17. Nothing has been placed before me by the learned Government Pleader indicating that a notice was given to the petitioner for filling up the vacancy. The only argument advanced by the learned Government Pleader is that the petitioner has filed a petition before the court below stating that the whereabouts of Mohan Rao were not known, which itself is the sufficient reason for the court to entertain the application.

18. It would be difficult to agree with the contention of the learned Government Pleader that in the reply notice, it was categorically stated by the department that they were not agreeable to the suggestions made by the contractor and it amounts to sufficient notice as contemplated under Clause (b) of Section 8 of the Arbitration Act. The department cannot fill up the vacancy on the basis of some statements made by the contractor here and there. As contemplated u/s 8 of the Act, a notice has necessarily to be issued and within fifteen days if the party fails to respond to the said notice, the department may move the civil court for appointment of an arbitrator or for filling up the vacancy caused. As I have said, there is no notice to the petitioner. I am inclined to accept the submissions made

by the learned Counsel for the petitioner that the court below has grossly erred in entertaining the application filed by the respondents, without examining whether the respondents have complied with the requirement of Section 8 of the Act. Consequently, the impugned proceedings, subject-matter of C.R.P. No. 2010/93, are set aside.

19. Having set aside the impugned proceedings, subject-matter of C.R.P. No. 2010/93, what is the remedy available to the petitioner in a situation of this nature ?

20. The intention of the arbitration proceedings is to resolve the controversy soon. No useful purpose would be served if the very same named persons are appointed as arbitrators, when they have failed to discharge their obligation. In the instant case, the record discloses that the petitioner requested the named three arbitrators to enter the references and decide the disputes according to law within four months from the date of entering the references, but the same was not completed and the arbitrators have failed to discharge their obligation. In such circumstances, in order to mitigate the hardship between the parties, the only course open to this court is to see that the matters are resolved expeditiously by appointing an arbitrator who has time and energy to devote whole time for this case and settle the matter soon. In this context, the observation of the Supreme Court in *State of West Bengal Vs. M/s. Naional Builders*, is extracted herein below :

"Where either is absent no party to the arbitration agreement can be forced to undergo same procedure, for the simple reason that the arbitrator having refused to act he cannot be asked to arbitrate again. In law the result of such refusal is that the agreement clause cannot operate."

It, therefore, follows that in a case where the arbitration clause provides for appointment of an arbitrator and he refused to act, then the agreement clause stands exhausted. And it is for the court to intervene and appoint another arbitrator u/s 8(1)(b), if arbitration agreement does not shows that it was intended that the vacancy shall not be supplied.

21. The facts and circumstances do not warrant appointing same persons as arbitrators who have failed to discharge their obligation. Equally so, no useful purpose would be served in filling up the vacancy caused due to retirement of P. M. Mohan Rao and continuing the very same panel of arbitrators minus P. M. Mohan Rao, I am convinced that though the agreement contemplates appointment of three persons as arbitrators, much time has already lapsed due to pendency of litigation in the court below. Therefore, it is not desirable to refer the dispute to the three arbitrators again. In the circumstances, I am of the view, one person could be appointed as sole arbitrator to settle the dispute expeditiously.

22. The learned Government Pleader as well as the learned Counsel for the petitioner have placed before me lists of retired Government officials including

few retired High Court Judges.

Sri Justice K. Pannaiah, a retired Judge of this Court is appointed as the sole arbitrator in this case. The parties are directed to place all the papers before the sole arbitrator to enter the reference. The sole arbitrator will proceed with the adjudication of the matter according to law expeditiously.

23. The revision petitions are allowed accordingly. No order as to costs.

24. Revision petitions allowed accordingly.