

(2009) 10 AP CK 0048

In the Andhra Pradesh High Court

Case No : C.R.P. No. 4136 of 2000 and C.M.A. No. 429 of 2008

State of Andhra Pradesh and Others

APPELLANT

Vs

Lakshmi Constructions, Engineers and Contractors and
Another

RESPONDENT

Date of Decision : 26-10-2009

Acts Referred:

Arbitration Act, 1940 — Section 17, 20, 30, 8

Citation : (2010) 1 ALD 704 : (2010) 1 ALT 657 : (2011) 3 ARBLR 533

Hon'ble Judges : V.V.S. Rao, J;B.N. Rao Nalla, J

Bench : Division Bench

Advocate : Government Pleader for Arbitration, for the Appellant; C.V. Nagarjuna Reddy and Manmadha Rao, for the Respondent

Final Decision : Allowed

Judgement

V.V.S. Rao, J.—As both the matters arise out of a common judgment dated 05.07.1999 passed by the Court of the Senior Civil Judge, Ongole, in O.S. No. 101 of 1995 and O.P. No. 8 of 1996, it is appropriate to deal the matters together. The State of Andhra Pradesh and its Engineers (hereafter called, the Department) are aggrieved by the impugned common judgment. In both the matters, the contractor and the arbitrator are arrayed as respondents.

2. M/s. Lakshmi Constructions, Engineers & Contractors (hereafter called, the contractor) was awarded the contract for the construction of 200 Bedded District Headquarters Hospital at Ongole vide agreement No. 179/1985, dated 29.11.1985, " at an estimated value of Rs. 71,99,856/-. The contract period is two years and the work is to be completed within the stipulated period from the date of handing over of the site. The site was handed over on 27.12.1985. Contractor did not complete the work. At his request, extension was granted on condition that contractor would not seek any escalation charges. The contract was completed in March 1991 and the final bill was paid. The contractor allegedly after receiving the payment, issued a discharge certificate to the effect that no

claims are pending against the Government for the work in question.

3. The contractor then filed O.P. No. 10 of 1993 on the file of the Court of the Additional Sub Judge, Ongole, u/s 20 of the Arbitration Act, 1940 (the Act, for brevity), for appointment of arbitrator to resolve as many as thirteen claims for a total sum of Rs. 7,67,613/-. The same was opposed by the Department. The learned Subordinate Judge by an order dated 30.06.1994 appointed arbitrator, who passed award on 11.10.1995. The contractor then filed O.S. No. 101 of 1995 u/s 17 of the Act. The Department then filed O.P. No. 8 of 1996 u/s 30 of the Act to set aside the arbitrator's award.

4. The parties did not lead any oral evidence. The contractor marked Exs.C1 to C23 and the Department marked Exs.R1 to R44. Considering these, the learned Principal Senior Civil Judge, Ongole, dismissed O.P. No. 8 of 1996 filed by the Department and decreed O.S. No. 101 of 1995 making the award Rule of the Court. Feeling aggrieved, the Department filed C.M.A. No. 429 of 2008 against O.P. No. 8 of 1996 and C.R.P. No. 4136 of 2000 against the suit.

5. The learned Government Pleader for Arbitration raised the following grounds. In view of the agreement and Preliminary Specification (PS) No. 73 of Andhra Pradesh Detailed Standard Specifications (APDSS), the order appointing arbitrator as well as the award passed by the arbitrator are null and void. The contractor issued discharge certificate undertaking that he had no claims against the Department, and therefore, the award is unsustainable. Lastly, it is urged that no evidence was placed before the arbitrator, and therefore, the claims made by the contractor are unjustified. Per contra, learned Counsel for the contractor submits that when there was no allegation of misconduct on the part of the arbitrator and the arbitrator decides the issues arising in the case basing on the material available, the Court cannot interfere with the award, and the order passed by the arbitrator based on the material cannot be interfered with.

6. The resolution of the dispute between the parties to the contract by arbitration is not provided for by any statute. Such resolution by the arbitral tribunal is facilitated only by an agreement between the parties to go for arbitration to resolve the disputes in relation to and arising out of the contract. Therefore, if any party is able to show that the dispute raised by the other party is not amenable for arbitration, but has to be necessarily resolved by the civil Court, and even if an arbitrator is appointed by the Court u/s 20 of the Act, the award would be void notwithstanding the fact that the order of the Court appointing arbitrator was not challenged by the party.

7. In the State of Andhra Pradesh APDSS forms part of the contract. There is no dispute on this. PS No. 73 was amended by adding a note 3 vide G.O.Ms. No. 430, dated 24.10.1983. While enumerating the panel of arbitrators for resolution of disputes, paragraph 3 of the Government Order excluded all the agreements above Rs. 50,000/- from the purview of arbitration and such disputes/claims exceeding Rs. 50,000/- shall have to be decided by the civil Court alone.

Subsequent to the said Government Order there were amendments issued by the Government vide G.O.Ms. No. 158, dated 13.07.1992, and G.O.Ms. No. 160, dated 01.06.1987. The subsequent Government Orders created confusion. In *State of Andhra Pradesh v. I. Devender Reddy* (1) (1999) 9 SCC 571 : (1993) 2 SCALE 732 the apex Court took the view that G.O.Ms. No. 160 is only prospective, and therefore, the disputes which arose prior thereto are arbitrable. In *Vishakapatnam Urban Development Authority v. V. Narayana Raju* (2) (1999) 9 SCC 572 : (1995) 2 SCALE 234 two learned Judges of the Supreme Court took a different view and laid down as under.

Having perused GOMs No. 430 dated 24.10.1983 we have no doubt that it clearly provides for arbitration in respect of claims only up to Rs. 50,000/- and not above that amount, making it clear in para 2 that the claims above Rs. 50,000 are to be adjudicated by the court of competent jurisdiction. No doubt the expression "court of competent jurisdiction" is mentioned under the head "panel of arbitrators" since the same para deals with "claims up to Rs. 10,000" as well as "claims above Rs. 10,000 and up to Rs. 50,000". That is, however, an inartistic drafting of the GOMs but it cannot be construed to mean that claims above Rs. 50,000 are to be adjudicated by arbitration in which the Judge presiding over the court of competent jurisdiction is to act as the arbitrator. It would be absurd to make such a construction of that part of the GOMs No. 160 dated 1.6.1987 merely clarifies this fact on account of an attempt by some contractors to misconstrue the earlier GOMs as clearly stated in the subsequent GOMs....

8. In view of the inconsistency between the two decisions as above, the matter was referred to a Division Bench in *State of A.P. and Another Vs. Obulu Reddy*, . The matter then went to three Judge Bench in *State of Andhra Pradesh v. Obulu Reddy* (4) (2001) 10 SCC 30. After considering the relevant Government Orders, the Supreme Court Bench laid down as below.

...But having examined GOMs No. 430 we have no hesitation to agree with the conclusions arrived at in *Vishakapatnam* case and hold that under the said GOMs question of deciding claims above Rs. 50,000 by way of arbitration does not arise. It merely provided that disposal of claims up to Rs. 50,000 by way of arbitration indicating as to who would be the arbitrator depending upon the claims and all claims above Rs. 50,000 are to be filed before the civil court of competent jurisdiction. This being the position, the second GOMs No. 160 is nothing but a clarificatory one and was required to be issued because of the confusion arising in the minds of some of the claimants as well as the civil court, inasmuch as the civil court did entertain application u/s 8 and appoint arbitrator in respect of claims above Rs. 50,000. The earlier judgment of this Court in *D. Reddy* case has interpreted GOMs No. 430 in a manner which is not the correct interpretation according to us...

(emphasis supplied)

9. The position that emerges from the precedents is as follows. In all the Government contracts PS No. 73 of APDSS as amended from time to time shall form part of the contract. If any claim is raised by way of a dispute by the contractor and such claim is above Rs. 50,000/-, such dispute is not arbitrable. Aggrieved contractor has to necessarily invoke the common law jurisdiction of the civil Court. We are also convinced that when the dispute itself is not arbitrable from the beginning, any subsequent appointment of arbitrator either by the Department or by the Court and the award passed by the arbitral tribunal shall have no consequence. They have to be treated as null and void. It is no doubt true that though the Department has not specifically taken such plea as seen in paragraph 17 of the order in O.P. No. 10 of 1993, dated 30.06.1994, but the learned Judge indeed considered this aspect, but misdirected in coming to the conclusion that lie claim is Rs. 50,000/- and above and arbitrator has to be appointed by the civil Court. Per dicta in Obulu Reddy (supra), we are convinced that appointment of arbitrator - though collaterally challenged ... this proceedings - is itself void and consequential award is also null and void.

10. Accordingly for the above reasons, we allow the Civil Miscellaneous Appeal as well as the Civil Revision Petition without any order as to costs declaring the award null and void. Needless to mention that it shall be open to the contractor to avail the other remedies in law.