
(2002) 01 AP CK 0092

In the Andhra Pradesh High Court

Case No : CMA No's. 3 of 1990 and 882 of 1992

State of A.P. and Another

APPELLANT

Vs

K. Sambasiva Raju

RESPONDENT

Date of Decision : 04-01-2002

Acts Referred:

Arbitration Act, 1940 — Section 8, 8(2)

Citation : (2002) 2 ALD 563 : (2002) 2 ALT 221

Hon'ble Judges : Ramesh Madhav Bapat, J;C.Y. Somayajulu, J

Bench : Division Bench

Advocate : Govt. Pleader for Civil Supplies in CMA No. 3 of 1990 and K Prabhakar, in CMA No. 882 of 1992, for the Appellant; Govt. Pleader for Civil Supplies in CMA No. 882 of 1992 and K. Prabhakar in CMA No. 3 of 1990, for the Respondent

Final Decision : Allowed

Judgement

C.Y. Somayajulu, J.—Though the appeals arise out of orders in two different suits, since they arise out of the same agreement they are being disposed of by a common judgment.

2. Since appellant and respondents in both the appeals are the same, for the sake of convenience, they would hereinafter be referred to as they are arrayed in the trial Court.

3. CM A No. 3 of 1990 arises out of the order dated 24-10-1989 in OS No. 1108 of 1988 on the file of the Court of the V Additional Judge, City Civil Court, Hyderabad filed u/s 20 of Arbitration Act referring the dispute to a single arbitrator and CMA No. 882 of 1992 arises out of the order dated 15-4-1992 in OS No. 837 of 1990 on the file of the same Court dismissing the suit filed u/s 20 of the Arbitration Act to make a reference of the further claims made by the plaintiff to the arbitrator appointed in OS No. 1180 of 1988.

4. For undertaking construction of a Closed Masonary Channel to carry raw water

from Krishna River to the work site, there was an agreement between the plaintiff and defendants, in which there is an arbitration clause for resolving the disputes that may arise in connection with the execution of the said work, which provides that in case of difference between the parties to the contract, either during the progress or after completion of the work or breach of the contract, difference or dispute as to the interpretation of the contract, such differences should be referred to arbitration as per G.O. Ms. No. 876-T, R&B Department dated 31-7-1975/16010/ 1975, as per which in respect of claims up to Rs. 20,000/- in value, the Superintending Engineer of another Circle, and in respected claims above Rs. 20,000/- and up to Rs. One lakh, a panel of arbitrators consisting of (i) a Chief Engineer and (ii) Director of Accounts or Deputy Chief Accounts Officer and (iii) Superintending Engineer of another Circle, and in respect of claims for Rs. One Lakh and above, a panel of three arbitrators consisting of (i) a Chief Engineer, (ii) a representative of the Finance and Planning Department to be nominated and (iii) Director of Accounts or Deputy Chief Accounts Officer, have to arbitrate the dispute and where a panel of arbitrators is appointed, majority opinion is to prevail.

5. Contending that in spite of his raising a dispute, defendants have not chosen to appoint a panel of arbitrators, plaintiff filed OS No. 1108 of 1988 aforesaid seeking appointment of a sole arbitrator. Defendants contested the suit on various grounds, including limitation and jurisdiction of the Court. No oral evidence was adduced by the parties. Exs.A1 to A9 were marked on behalf of the plaintiff. Defendants did not adduce any documentary evidence. By its order under appeal is CMA No. 3 of 1990, the trial Court while directing the defendants to file the original suit agreement dated 9-6-1983 into Court, appointed a retired High Court Judge as the sole arbitrator to adjudicate the disputes raised by the plaintiff. Questioning the appointment of a sole arbitrator, when the agreement provided appointment of a panel of arbitrators, defendants preferred CMA No. 3 of 1990.

6. During the pendency of OS No. 1108 of 1988 plaintiff issued a notice to the defendants making some additional claims and thereafter he filed OS No. 837 of 1990 u/s 20 of the arbitration Act to refer those claims also to the arbitrator. Defendants contested the suit alleging that the suit is barred under Rule 2 of the Order II CPC and that in any event there cannot be a second reference when the final bill was settled. No oral evidence was adduced by parties, but Exs. A1 to A6 were marked on behalf of the plaintiff and Exs. B1 to B20 were marked on behalf of the defendants. Holding that further claim is barred by Rule 2 of Order II CPC the trial Court dismissed the suit. Hence this appeal by the plaintiff.

7. The two points that arise for consideration are:

1. Whether a sole arbitrator can be appointed by Court u/s 20 of Arbitration Act, 1940, when the agreement contemplates appointment of a panel of arbitrators?
2. Whether plaintiff, after filing a suit u/s 20 of Arbitration Act to refer the claim

to arbitrator can, after the appointment of an arbitrator make a fresh claim for further amounts?

8. Learned Government Pleader on behalf of the defendants, relying on Government of A.P. and Others Vs. N.V. Choudary and Another, Government of Andhra Pradesh v. Masthan Rao, 1994 (1) APLJ 43 (SC), and Santokh Singh Arora Vs. Union of India and others, , contended that the order appointing a sole arbitrator when the agreement contemplates appointment of a panel of arbitrators is not sustainable and since the plaintiff, after making a claim and filing a suit u/s 20 of the Act to refer the dispute to arbitrator cannot make further claim the order of refusing to refer further claim to the arbitrator cannot be found fault with.

9. The learned Counsel for the plaintiff relying on G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, , Union of India and others Vs. Srinivasa Forest Co-operative Stone Coverri Labour Contract Co-operative Society, Vikarabad, ; Delhi Development Authority and Others Vs. Alkarma, , Shah Construction Co. Ltd. Vs. Municipal Corporation of Delhi, , State of West Bengal Vs. M/s. Naional Builders, and Government of Andhra Pradesh v. M. Venkat Reddy 1994 (1) APLJ 143, contended that the order referring the claim to a sole arbitrator cannot be interfered with and that the order refusing to refer the further claim of plaintiff to the arbitrator is unsustainable.

Point No. 1:

10. Since the value of claim of the plaintiff is above Rs. 20,000/-, as per the terms of agreement between the parties, the said dispute has to be settled by a panel of arbitrators. In N.V. Choudary case (supra), a Full Bench of this Court held that when the agreement between the parties, contemplates appointment of a panel of arbitrators comprising of designated officials, and when there are more than one incumbents confirming to the said designation, panel cannot be said to be vague, and can be made certain, and the dispute can be referred to any one of the persons holding the post of the specified designation, and even if panel is vague, Court shall refer the dispute to panel of incumbents specifying the designations mentioned in the agreement but not to a sole arbitrator, that too a non-official and technically unqualified arbitrator, and if it is not feasible to do so, Court may refer dispute to a panel consisting of senior officers having technical and accounts experience. Mastan Rao case (supra) before the Supreme Court is a case where the agreement contemplated arbitration by a panel of arbitrators. In that case the Supreme Court while setting aside the order appointing a sole arbitrator, constituted a panel of arbitrators to adjudicate the dispute. In Ramachandra Reddy case (supra) and Srinivasa Forest Co-operative Stores case (supra) relied on by the learned Counsel for plaintiff, the agreement contemplated appointment of a sole arbitrator. So the said decisions are of no assistance to decide the question whether sole arbitrator can be appointed when the agreement contemplated appointment of a panel of arbitrators.

11. The ratio in National Builders case (supra) is that is a case where the authority named by office refuses to act as the sole arbitrator, Court has jurisdiction to appoint another arbitrator. The said decision is of no assistance to decide these appeals. The ratio in Venkata Reddy case (supra) is that if the arbitrator or umpire refuse or neglect to act, or are removed applying Clause (b) of Sub-section (1) of Section 8 of the Act, it is open to the Court to proceed under Sub-section (2) of Section 8 to appoint an arbitrator or arbitrators. That decision also has no application to this case because this is not a case where the arbitrators appointed earlier were removed by applying Clause (b) of Sub-section (1) of Section 8 of the Act.

12. In view of the N.V. Choudary (supra) and Mastan Rao (supra) cases it is clear that when an agreement contemplates appointment of a panel of arbitrators, and if the party who has to nominate the panel refuses to act as such and when the jurisdiction of the Court is invoked to enforce the arbitration clause in the agreement, the Court has to appoint a panel of arbitrators but not a sole arbitrator. In this case since the agreement contemplates appointment of a panel of arbitrators, appointment of non-technical sole arbitrator is not proper and hence the order under appeal is liable to be set aside. Point No. 1 is answered accordingly.

Point No. 2:

13. After filing OS No. 1108 of 1988 claiming more amounts than that were claimed earlier by him, plaintiff issued notice to defendants raising a dispute and seeking a reference to arbitration, defendants did not respond. After appointment of an arbitrator in OS No. 1108 of 1988 plaintiff filed OS No. 837 of 1990 seeking a direction to the defendants to refer his enhanced claim to the arbitrator appointed in OS No. 1108 of 1988. The contention of the defendants is that since final settlement

of all the claims of the plaintiff, except disputes referred to arbitration, was already made, no further dispute remains for arbitration.

14. By Ex.A2 notice in OS No. 1108 of 1988 dated 14-7-1988, plaintiff, made 10 claims. They are as under:

(a) Bailing out water-payment of extra rate for masonry and concrete. Rs. 2,38,000/-

(b) earth work excavation in wet and slushy condition under water-payment of extra rate. Rs. 2,68,425/-

(c) Payment for extra lifts involved. Rs. 1,13,880/-

(d) Disposal of surplus earth with a lead of 2 KMC payment for initial lead and lift. Rs. 85,340/-

(e) Variation in soils met with-payment as per actuals met with. Rs. 14,000/-

(f) Change of quarry for rough stone for RR Masonary payment therefor. Rs. 56,000/-

(g) Payment for escalation in the rates of labour and materials. Rs. 2,02,957/-
Over heads. Rs. 1,16,000/-

(h) Payment for compensation towards idle labour charges incurred due to delay in the finalisation of design for cover slab. Rs. 50,000/-

(i) Slipping up earth in inner slopes of channel-payment for extra earth work involved. Rs. 25,000/-

(j) Conveyance of excavated earth at the locations of specified bedhies for super passage extra payment regarding. Rs. 10,000/-

Thereafter it is alleged therein--

"Inspite of repeated requests and appraisals there was no reply from the departmental officers to any of the claims preferred so far and they are maintaining silence. Consequently my bona fide dues are blocked up with the department. My financial position became irreparable and my reputation in the profession is likely to be shattered."

The abstract of the claims made in Ex.A2 in OS No. 837 of 1990 is at page 11. They are as under:--

1. Bailing out water-payment of extra rate for mansory and concrete bodies earth work excavation. Rs. 6,13,648/-

2. Earth work excavation in west and slushy condition under water payment of extra rate. Rs. 2,94,462/-

3. Payment for extra lifts involved.

Rs. 1,67,534/-

4. Payment for initial lead and lift involved in the disposal of surplus earth with a lead of 2 KMs. Rs. 1,50,000/-

5. Payment for variation in soils Actually met with. Rs. 14,000/-

6. Change of quarry for rough stone for R.R. Masonry - claim for payment therefor. Rs. 1,15,680/-

7. Payment for escalation in the rates of labour and materials and over-head charges: 2,24,428+1,89,000. Rs. 4,12,428/-

8. Payment for compensation towards idle labour charges incurred due to delay in the finalisation of design for cover slab. Rs. 50,000/-

9. Slipping of earth in the inner slopes of channel-payment for extra earth work involved. Rs. 25,000/-

10. Conveyance of excavated earth at the locations of specified godhies for super passage-claim for extra payment. Rs. 10,000/-

11. Conveyance of materials by Head loads claim for extra lead and lifts. Rs. 75,555/-

12. (a) Payment for earth work excavation actually done which was not considered in the final bill. Rs. 35,000/-

(b) Payment for conveyance of surplus earth which was considered in the final payment. Rs. 1,40,000/-

Total: Rs. 21,03,307/-

Thereafter it is alleged therein--

"In this connection it is submitted that inspite of repeated requests and appraisals none of the claims settled. I have received final payment only, with protest pending settlement of above claims. I request your goodself kindly to consider my above claims in the light of natural justice and irreparable loss sustained by me under various accounts."

In Ex.A2 in OS No. 1108 of 1988 dated 14-7-1988 plaintiff claimed Rs. 2,38,000/- as charges for bailing out water. In Ex.A2 dated 29-11-1988 in OS No. 837 of 1990 he claimed Rs. 6,13,648/- for the same items. Similarly, the claims made under several heads are also quite different from the amounts originally claimed. It is therefore clear that the plaintiff tried to create a dispute by making higher claims than originally made by him in the earlier notice in respect of which he already filed OS No. 1108 of 1988 on 11-7-1988. It is thus clear that plaintiff, about four months after filing a suit to refer the dispute to arbitration, thought it fit to make enhanced claims for the same items and wants that to be treated as a dispute after receiving final payment, no doubt, under protest.

15. In Santokh Singh Arora case (supra), the Supreme Court held that it is not permissible for a party to raise new disputes in relation to damages claimed to have been sustained by him after the disputes have been referred to arbitration. That ratio applies on all fours to the facts of this case, because the plaintiff after having, made claims in Ex.A2 in OS No. 1108 of 1988 and requesting the Court to refer that dispute to arbitration, cannot by making a higher claim for the same items seek reference of that enhanced claim also to arbitration.

16. In M/s. Alkarma case (supra) the contractor, due to over sight, did not seek reference of certain items of disputes to arbitration, while seeking a reference to arbitration some other items of dispute. After the order of reference was made he filed petition to refer those items also to arbitration. That claim was opposed on the ground that it is barred by Rule 2 of Order II CPC. Repelling the said contention it was held that the provisions of Rule 2 of Order II CPC would apply only if fresh reference is sought after making of the award holding that the Court

can refer other items also to the arbitrator before the passes the award. The facts of this case are different from the facts of that case. After filing of OS No. 1108 of 1988 plaintiff gave a fresh notice claiming higher amounts than claimed earlier and seeks reference of enhanced claims for the same items to arbitration. The question for decision in this case is not whether the fresh claim is barred by Rule 2 of Order II CPC, but is whether the plaintiff, having made a claim for a certain amount as damages suffered by him, can subsequently be permitted to say that he suffered higher amount of damage or loss, and seek to refer that dispute to arbitration. In our considered opinion, a party cannot be permitted to do so, because the claim for damages would have been made only after the individual suffered the damage. The plaintiff did not make the claim for damages on guess work. Therefore we hold that the plaintiff cannot, after appointment of an arbitrator, enhance the claims made earlier by him. Point in answered accordingly.

17. In the result, CMA No. 3 of 1990 is allowed and the order dated 24-10-1989 in OS No. 1108 of 1998 on the file of the Court of the V Additional Judge, City Civil Court, Hyderabad, is set aside. The trial Court is directed to appoint a panel of arbitrators as per the agreement CMA No. 882 of 1992 is dismissed. In the circumstances of the case, both parties are directed to bear their costs in both the appeals.