
(1997) 04 AP CK 0011

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 1385 of 1996

Super Thermal Power Project, National Thermal Power Corporation Ltd.

APPELLANT

Vs

Gouriseti Satyavathi and Others

RESPONDENT

Date of Decision : 01-04-1997

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1997) 2 ALT 728 : (1998) 1 CivCC 168

Hon'ble Judges : Ramesh Madhav Bapat, J

Bench : Single Bench

Advocate : K.V. Subrahmanya Narsu, for the Appellant; R. Subhash Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Madhav Bapat, J.—The appellant herein was the first defendant in O.S.No. 85 of 1987 which is pending on the file of the Subordinate Judge, Peddapalli. The plaintiff-1st respondent herein had instituted the aforesaid suit for declaration that the proceedings dated 4-6-1984 issued by the third defendant appointing the second defendant as sole arbitrator is illegal, arbitrary and without jurisdiction and also for refund of earnest money deposit and security deposit.

2. The averments made in the suit can briefly be narrated as follows: It was averred by the first respondent herein that the first defendant-Corporation issued a notice dated 1-6-1982 inviting the tenders for the work of transportation of cement from M/s. Kesoram Cement Factory, Basanthnagar to the stores of the first defendant-Corporation at Ramagundam by road and for unloading and stocking the cement gunny bags in the store of first defendant-Corporation.

3. It is further stated by the plaintiff-first respondent herein that in response to the aforesaid tender notice, the plaintiff-1st respondent herein submitted

tenders. The first defendant-Corporation i.e., the appellant herein, addressed a letter dated 1-10-1982 to the plaintiff-1st respondent herein accepting her offer accompanied by another letter dated 1-10-1982 stating that she will adhere to all the conditions and regulations prescribed in the tender. The first defendant-corporation accepted the tender submitted by the plaintiff and issued a letter of award dated 8-11-1982 to the plaintiff informing her that the corporation had decided to accept her tender and awarded the work to her on the terms and conditions contained therein. The plaintiff accepted the said letter of award issued by the first defendant-corporation and thus the contract was concluded and execution of the formal agreement was not done. Thereafter some disputes arose and therefore the plaintiff filed the suit for recovery of earnest money and security deposit. Meanwhile the third respondent herein appointed second respondent herein as sole Arbitrator by the impugned order and therefore the suit in question came to be filed.

4. It appears from the record that the appellant herein filed I.A.No. 43 of 1987 u/s 34 of the Indian Arbitration Act to stay all further proceedings in O.S.No. 85 of 1987 pending on the file of the Subordinate Judge, Peddapalli. The learned Judge dismissed the said application with costs for the reasons mentioned by him in the order dated 30-9-1996. Aggrieved by the aforesaid order, the first defendant-appellant herein has approached this Court in appeal on various grounds as stated in the appeal memo.

5. The learned Counsel Mr. K.V. Subrahmanya Narsu appearing on behalf of the first defendant-appellant herein submitted at the Bar that the learned Judge erred in not staying the suit. The learned Counsel further submitted that when the contract took place, it was reduced to writing and there was a covenant in the contract that any dispute arises out of the contract will be settled by an Arbitrator and thus it was contended by the learned Counsel that when there was a specific term to appoint an Arbitrator to resolve the dispute between the parties, the learned Judge ought to have stayed the suit till the work of Arbitrator is completed.

6. The learned Counsel Mr. Subrahmanya Narsu appearing on behalf of the appellant invited my attention to Ex.A-1, which is dated 1-6-1982. It is a notice inviting the tenders. The learned Counsel further submitted that the tender form was issued to the plaintiff-1st respondent herein which contained all the terms in the contract and it was signed by both the parties. The learned Counsel further submitted at the Bar that along with the tender notice, conditions of contract were included. Clause 21 of the said contract makes a provision of appointing the Arbitrator in case of dispute between the parties. Clause 21 of the said terms and conditions of the contract reads as follows:

"In the event of any question, dispute or difference whatsoever arising under this contract or in, connection therewith including any question relating to existence, meaning and interpretation of this contract or any alleged breach thereof, the same shall be referred to the sole arbitration of the Chairman and Managing

Director of the National Thermal Power Corporation Limited, New Delhi or to a person appointed by him for that purpose. The arbitration shall be conducted in accordance with provisions of the Indian Arbitration Act, 1940."

7. The learned Counsel Mr. Subrahmanya Narsu further submitted that the plaintiff issued a letter dated 1-10-1982, which is filed on record, in which the plaintiff informed the first defendant-corporation i.e., the appellant herein that "we wish to state that we will adhere to all conditions and regulations prescribed in your tender." The said letter is signed by the plaintiff and thus it was submitted by the learned Counsel for the appellant herein that the contract was concluded and therefore the parties to the litigation have to adhere to the terms and conditions laid down in the tender and therefore the suit filed by the plaintiff itself is not maintainable and at least the said suit ought to have been stayed by the learned Judge. The main emphasis was given to the fact that the contract between the parties is concluded.

8. While rebutting the aforesaid arguments of Mr. Subrahmanya Narsu, the learned Counsel for the appellant herein, the learned counsel Mr. R. Subhash Reddy appearing on behalf of the first respondent herein submitted that as a matter of fact, the contract between the parties is not concluded. The learned Counsel Mr. R. Subhash Reddy invited my attention to the terms and conditions of the contract which are incorporated in the letter dated 8-11-1982. Clause 11.1 of the said terms and conditions specifically lays down "you shall enter into formal agreement with us within 15 days from the date of issue of this letter of award. The agreement will be signed in three copies which you shall provide three non-judicial stamp papers value of Rs. 5/- each, you shall be provided with one signed copy of agreement. Now we request you to commence the work immediately." With these recitals contained in the letter dated 8-11-1982, the learned Counsel Mr. R. Subhash Reddy appearing on behalf of the first respondent herein submitted that there was no concluded contract and therefore though in the tender notice there was a provision of appointing a sole arbitrator cannot be acted upon.

9. The learned Counsel Mr. Subrahmanya Narsu submitted at the Bar that the submissions made by the learned Counsel for the respondent No. 1 herein are not legally correct. It was submitted by the learned Counsel for the appellant herein that the contract was concluded. The entire transaction has to be looked into between the parties which would go to show that the plaintiff had accepted by an agreement to get the dispute resolved by appointing the sole arbitrator. The learned Counsel once again invited my attention to Ex. A-1 especially Clause 21 of the said terms and conditions of the Contract and submitted that there is a provision of appointing a sole arbitrator and the said letter is signed by the tenderer i.e., the plaintiff in the suit and therefore it was contended by Mr. Subrahmanya Narsu that the contract is completed and it is binding on both the parties.

10. The learned Counsel Mr. Subrahmanya Narsu invited my attention to the

rulling reported in Radha Sundar Dutta Vs. Mohd. Jahadur Rahim and Others, . in which their Lordships of the Supreme Court were pleased to hold as follows:

"If, in fact, there is a conflict between the earlier and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa."

This decision of the Apex Court was based on AIR 1918 P.C. 85 (Ranjit Singh v. Bahadur Singh). Their Lordships also relied upon a ruling reported in AIR 1925 P.C. 226 (Bhupendra Narayan Singh v. Narpat Singh).

11. Looking to the ruling, which was cited before this Court, and also looking to the facts, this Court has no hesitation in holding that the contract between the parties was concluded for the reason that the plaintiff had issued . a letter dated 1-10-1982 to first defendant-corporation accepting the terms and conditions contained in the tender notice. They had also accepted the terms 20 in the contract. One of the terms i.e., 3 (b) reads as follows:

"The contract shall mean the notice inviting the tender, the tender and acceptance thereof and the formal agreement, if any, executed between the National Thermal Power Corporation Ltd., and the contractor together with the documents referred to therein including these conditions with appendices and any special conditions, the specifications, designs, drawings, schedule of quantities with rates and amounts and schedule of rates. All these documents taken together shall be deemed to form one contract and shall be complementary to one another."

The terms are signed by the tenderer-plaintiff and this Court has no hesitation in holding that it was a concluded contract.

12. One more fact is important in this aspect to ascertain as to whether the contract was concluded or otherwise. The plaintiff had already started transporting the cement from the factory to the godown, but they did not adhere to the time schedule and therefore there was a dispute between the parties. If the tenderer i.e., the plaintiff would not have accepted the contract and the terms and conditions contained therein, they would not have transported the cement bags. This fact alone is sufficient to hold that there was a concluded contract. Once it is held that it was a concluded contract, the next question emerges from the aforesaid fact as to whether the application i.e., I.A.No. 43/87 filed by the first defendant is tenable or not and this Court had also to ascertain whether the first defendant had submitted to the jurisdiction of the Civil Court or not?

13. The learned Counsel Mr. Subrahmanya Narsu appearing on behalf of the appellant submitted at the Bar that the plaintiff filed the suit but the first defendant had not submitted to the jurisdiction of the Civil Court and once it is held that there is a covenant of referring the dispute to the arbitrator, the

learned Judge ought to have stayed the suit. The learned Counsel Mr. Subrahmanya Narsu relied upon a ruling reported in M/s. Sadhu Singh Ghuman Vs. Food Corporation of India and others, . Their Lordships were pleased to observe as follows:

"Section 34 of the Arbitration Act:- The expression a step in the proceeding" which would disentitle the defendant from invoking Section 34 of the Arbitration Act is not every step taken by him in the suit. It should be a step to abandon the right to have the suit stayed. It should be a step in aid of the progress of the suit. The step must have been consciously taken with a view to submit to the jurisdiction of the Court for the purpose of adjudicating the controversy on the merits."

14. The learned Counsel Mr. Subrahmanya Narsu further submitted at the Bar that the first defendant had not taken any steps which would go to show that they had taken any positive steps to submit to the jurisdiction of the Civil Court. The first defendant had not filed any written statement and therefore it was contended by the learned Counsel for the appellant that the learned Judge ought to have stayed the suit. The learned Counsel further invited my attention to the ruling reported in General Electric Co. Vs. Renusagar Power Co., . in which their Lordships of the Supreme Court held as follows:

"Section 34 of the Arbitration Act - filing written statement or taking any other steps in the proceedings - What constitutes - Preliminary objections raised in the applications by the defendant designed to prevent the Court from going into merits of the controversy, held, do not constitute written statement or other steps - Facts to be judged taking a broad view and considering substance of the matter."

15. With this ruling on record, it was contended by the learned Counsel for the appellant that whatever steps were taken which do_ not show that the appellant-first defendant had a positive intention to submit themselves to the jurisdiction of Civil Court and therefore submitted that the decision of the learned Subordinate Judge in not staying the suit is bad in law.

16. Reliance was also placed by the learned Counsel for the appellant to the ruling reported in Food Corporation of India and Anr. v. Yadav Engineer and Contractor, AIR 1982 SC 1302. in which their Lordships of the Supreme Court held as follows:

"Arbitration Act - Section 34 - Taking any other steps in the proceedings - Does not include each and every step - Intention to waive benefit of arbitration agreement and to proceed with suit must be displayed - Defendant contesting interlocutory orders or filing application for setting aside ex parte interim injunction - Does not disentitle party from claiming stay."

17. While rebutting the aforesaid arguments of Mr. Subrahmanya Narsu, the learned Counsel for the appellant, the learned Counsel for the first respondent

herein Mr. R. Subhash Reddy relied upon a ruling reported in Banala Yasoda Devi and Anr. v. Bilakanti Venkateswarlu., 1991 (2) Arbitration Law Reporter 48 = 1990 (3) ALT 343. The learned Single Judge of this Court was pleased to hold as under:

"Arbitration Act - Section 34 - Partnership deed contained arbitration clause - Disputes between partners - One of the disputes fell within the arbitration clause - Suit in respect of one dispute can be stayed - Court can decide remaining disputes mentioned in the suit."

It was contended by the Mr. Subhash Reddy, learned Counsel for the first respondent herein that, as a matter of fact, the plaintiff-1st respondent herein had filed the suit for recovery of the earnest money etc., of the previous contract and not in respect of the contract in question alone. But the first defendant-corporation is intending to adjust the earnest money deposits towards their claim in the present contract and therefore the plaintiff was required to file the suit. If at all the suit is to be stayed, then the claim of the plaintiff in respect of the contract in question can be stayed at the most and not the claim in respect of the previous contract. The learned Counsel Mr. Subhash Reddy further submitted at the Bar that according to the plaintiff, the first defendant- corporation had submitted to the jurisdiction of the Civil Court and therefore the learned Judge rightly dismissed the interlocutory application filed by the first defendant-corporation.

18. The learned Counsel Mr. Subhash Reddy relied upon a latest ruling of the Supreme Court reported in Rachappa Gurudappa Bijapur Vs. Gurudiddappa Nurandappa and Others, . in which their Lordships of the Supreme Court were pleased to hold as under:

"Arbitration Act - Section 34 - Stay of legal proceedings - Requirement of filing application for stay before filing "W.S or taking any other step" - Seeking adjournment for filing W.S. amounts to "any other step" - Stay 30 not permissible thereafter.

19. In view of Section 34 of the Arbitration Act, in order to have the proceedings in the suit stayed, there must be an arbitration agreement between the parties covering the disputes in question. The section stipulates that in order that stay may be granted under the section, it is necessary that the following conditions are fulfilled:-

- (i) The proceedings must have commenced by a party to an arbitration agreement against any other party to the agreement;
- (ii) The legal proceedings, in this case, the suit, which is sought to be stayed must be in respect of a matter agreed to be referred;
- (iii) The applicant for stay must be a party to the legal proceeding, the suit in this case;

- (iv) The applicant must have taken no steps in the proceeding after appearance.
- (v) The applicant must satisfy that only the applicant was at the time when the proceedings were commenced, ready and willing to do everything necessary for the proper conduct of the arbitration; and
- (vi) The Court must also be satisfied that there was no sufficient reason why the matter should not be referred to arbitration."

It is a latest ruling on the point.

20. Looking to the rulings given by the Apex Court and also applying the test to the present set of facts, it can be seen that the original suit was filed by the plaintiff with certain reliefs in the year 1987. The defendants must have appeared within three or four months from the date of filing of the suit and since then till to this date, the defendants were seeking adjournments for filing written statements which amounts to any other steps as contemplated u/s 34 of the Arbitration Act and therefore it must be held that the defendants had submitted to the jurisdiction of the Civil Court.

21. One more fact goes against the first defendant-appellant herein that they were aware of the arbitration clause contained in the agreement. They ought to have promptly filed an application for stay of the proceedings but right from 1987 they went on seeking adjournments for filing written statements. The laches committed by the defendants would go against them. When the first defendant was quite sure and firm on the fact that there was an arbitration clause in the agreement, they did not take any immediate steps by filing an application u/s 34 of the Arbitration Act. It means that they intended to submit to the jurisdiction of the Civil Court.

22. Considering the above facts and the manner in which the first defendant participated in the suit towards the progress of the suit, in protracting the proceedings, under these circumstances, this Court had no hesitation in holding that the first defendant did submit to the jurisdiction of the Civil Court and therefore this Court finds no merit in the appeal and it is accordingly dismissed. No costs.

23. The Original Suit is of 1987. It is pending in the Court without much progress for the last Ten years. Therefore, this Court directs the learned Subordinate Judge, Peddapalli to dispose of the suit preferably within a period of one year from the date of receipt of this judgment by his Court.