
(2008) 12 AP CK 0050

In the Andhra Pradesh High Court

Case No : Writ Petition No. 20824 of 2002

The Superintending Engineer and Another

APPELLANT

Vs

P. Lakshmu Reddy and Another

RESPONDENT

Date of Decision : 29-12-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(2), 11(5), 11(6)
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 136, 32

Citation : (2009) 3 ALD 79

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : GP for Arbitration, for the Appellant;

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—The 1st respondent was entrusted with the work of formation of earth dam in one of the units of Telugu Ganga Project, vide agreement dated 03.07.1992. The value of the work was Rs. 8,03,74,840/-. Clause (3) of the agreement provided for adjudication of disputes. According to this, claims up to the value of Rs. 10,000/- are to be decided in arbitration by the Superintending Engineer of another Circle and claims above Rs. 10,000/- up to Rs. 50,000/-, by the Chief Engineer, Central Designs Organization, Hyderabad. Settlement of all claims above Rs. 50,000/- in value are to be decided by the Civil Court of competent jurisdiction by way of regular suit and not by arbitration.

2. The 1st respondent filed application No. 1 of 1997 before the Subordinate Judge, Kadapa, under Sub-section (5) read with Sub-section (2) of Section 11 of the Arbitration and Conciliation Act 1996 (for short "the Act"). An ex parte order was passed on 28.02.2000, appointing the 2nd respondent as arbitrator. The petitioners filed C.R.P. No. 1497 of 2000 against the order in application No. 1 of 1997. The C.R.P. was dismissed by this Court on 11.09.2001 following its order in C.R.P. No. 1601 of 2000 dated 26.06.2001. Thereupon, the petitioners filed I.A.

No. 143 of 2000 under Order IX Rule 13 C.P.C. The application was dismissed through order, dated 19.07.2000, by the trial Court. Reference was made to a judgment of this Court in Union of India and another Vs. J. Bhaskara Rao, . This writ petition is filed against the order dated 28.02.2000 passed in application No. 1 of 1997.

3. Learned Government Pleader for Arbitration submits that there was absolutely no basis for filing the application for arbitration, inasmuch as it was silent as to the extent of claim and there was no agreement between the parties for referring the matters of this nature to arbitration. She contends that the trial Court was under obligation to verify the claim made by the 1st respondent with reference to the terms of agreement and an arbitrator could have been appointed, if only the claim fitted into any Clauses of the agreement, even assuming that the petitioners herein remained ex parte. Learned Counsel submits that the petitioners herein were set ex parte, even while they were taking necessary steps to verify the record and enter appearance.

4. The 1st respondent remained ex parte and the 2nd respondent is only an arbitrator appointed through the impugned order.

5. The earlier challenge made by the petitioners to the order in application No. 1 of 1997 by filing C.R.P. No. 1497 of 2000 was turned down, on the ground that a revision is not maintainable. Obviously the judgment of the Supreme Court in Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., was applied. In that case, the Hon'ble Supreme Court took the view that an order passed u/s 11(6) of the Act by the Chief Justice of a High Court or his nominee is an administrative order and it is not amenable to judicial review under Article 136 of the Constitution of India nor to a writ petition under Article 32 of the Constitution of India. In the instant case, the petitioners approached the trial Court with an application under Order IX Rule 13 C.P.C. The application was rejected in view of the orders of this Court in C.R.P. No. 1497 of 2000 and the judgment of this Court in Union of India's case (1 supra).

6. Section 11 of the Act prescribes the procedure for appointment of arbitrators. Power to appoint arbitrators is conferred upon the Chief Justice or the person or institution designated by him. Sub-sections (2) to (5) thereof deal with the cases, where the parties seek appointment of arbitrators, in the absence of any prior agreement among them. In case, if there exists a procedure for appointment of arbitrators, the recourse is to be had to Sub-section (6), which reads as under:

11(6) Where, under an appointment procedure agreed upon by the parties:

a party fails to act as required under that procedure; or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary

measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

In the instant case, there is an agreement between the parties and the manner, in which the disputes can be settled, has already been indicated in the preceding paragraphs. The 1st respondent did not invoke the procedure u/s 11(6) of the Act. On the other hand, he filed the application under Sub-section (2) read with Sub-section (5) of Section 11 of the Act. Therefore, it becomes highly doubtful as to whether the ratio laid down by the Supreme Court in *Konkan Railway Corpn. Ltd.*'s case (2 supra) applies to the facts of this case. A perusal of Section 11(2) makes it clear that any application made thereunder is subject to the one u/s 11(6). In other words, when the matter is governed by Section 11(6), an application u/s 11(2) becomes untenable.

Even where an application under Sub-section (2) read with Sub-section (5) of Section 11 of the Act is otherwise tenable, the matter can proceed only with the agreement of parties. If the parties fail to agree on a common arbitrator, each of them have to appoint one arbitrator and the arbitrators, so appointed, shall appoint a third one. The net result is that no ex parte order can be passed, if an application is made under Sub-section (2). For the reasons best known to it, the trial Court had proceeded to pass an ex parte order appointing the 2nd respondent as arbitrator. This is totally contrary to the letter and spirit of Sub-sections (2) and (5) of Section 11 of the Act.

An exercise of disposal of application under Sub-sections (2) and (5) of Section 11 of the Act partakes the character of adjudication than of administration. A party feeling aggrieved can certainly complain to a superior Court. Unless a mechanism exists for correction of patent errors, the wronged party would be put to serious hardship and it would be too late, if not impossible, to retrace the steps.

The 1st respondent maintained a tactical silence as to the value of the claim, obviously being aware of the terms of agreement. If his claim were to exceed Rs. 50,000/-, the bar against arbitration operated and he was under the obligation to file a suit. To overcome that, he filled column 8 of the application as under:

8. Valuation of the subject matter: The disputes are in the nature of declaration of rights. Hence, a notional value of Rs. 10,000/- is taken for the purpose of payment of cost for processing the request in terms of paragraph 19 of the scheme.

Another aspect is that the value would have a bearing upon the Forum, before which the application were to have been filed under the scheme framed by the High Court u/s 11(6) of the Act. Jurisdiction is conferred upon different nominees of the Chief Justice to entertain the claims for appointment of arbitrator u/s 11(6). Even from this point of view, the application was untenable.

The judgment of this Court in *Union of India*'s case (1 supra) was in relation to

the cases arising u/s 11(6) of the Act. It has already been pointed out that the application filed by the 1st respondent was under Sub-sections (2) and (5) of Section 11. Though this writ petition is filed against the order in the arbitration application itself, this Court is of the view that the ends of justice would be met, if the ex parte order is set aside, by allowing I.A. No. 143 of 2000 filed under Order IX Rule 13 C.P.C.

Hence, the writ petition is allowed, setting aside the ex parte order, dated 28.02.2000, in application No. 1 of 1997 and directing the trial Court to pass fresh orders, after hearing both the parties. There shall be no order as to costs.