

(1992) 12 AP CK 0001

In the Andhra Pradesh High Court

Case No : Appeal Against Order No's. 5, 386, 1268/90 and 493/91 and Cross-objections and Civil Revision Petition No's. 818, 1134, 1135 and 1136/90

The Superintending Engineer and The State of A.P. and Others	APPELLANT
Vs	
B. Subba Reddy	RESPONDENT

Date of Decision : 23-12-1992

Acts Referred:

Arbitration Act, 1940 — Section 13, 17, 39, 39(1), 41
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 22(1), 115, 34

Citation : (1993) 2 ALT 687

Hon'ble Judges : Syed Shah Mohammed Quadri, J; Ramakrishnam Raju, J

Bench : Division Bench

Advocate : Govt. Pleader for Civil Supplies, for the Appellant; A. Gopal Reddy, A. Narasimha Reddy and Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

1. These eight cases, 4 C.M.As and 4 C.R.Ps. and together with the Cross-Objections arise out of the common Judgment dated 6-9-1989 passed in four Original Suits and four Original Petitions on the file of the Principal Subordinate Judge, Ongole. The parties in these cases are common. They will be referred to as the contractor and the State respectively.

2. The contractor entered into four agreements with the State for "Providing Lining to the bed and side slopes of the Pamidipadu Branch Canal of N.S.Canals from K.M.O/4 to O/6." Disputes arose between the parties with regard to the works which were the subject matter of the said contracts. The disputes were referred to a sole arbitrator who passed four awards on 18-4-1986. In regard to the awards relating to agreement Nos.8 to 11/SE/82-83 the contractor filed Original Suits No. 59/86, 55/86, 53/86, and 57/86 respectively to make the awards rule of the Court, whereas the State filed O.P.Nos. 85/86, 86/86, 87/86 and 88/86 respectively u/s 30 of the Arbitration Act, to set aside the awards. The

learned Principal Subordinate Judge, Ongole, by common judgment dated September 6, 1989 made the awards rule of the Court in all these cases. except for the modification in the provision of interest awarded by the Arbitrator at the rate of 18% p.a. on the amounts awarded from the date of the reference i.e., 21-10-1985 to the date of actual payment or decree whichever is earlier which is reduced to 12% p.a. from the date of the award i.e., 18-4-1986 till the date of realisation and dismissed the O.Ps. filed by the State. Against the said common judgment the State filed by above CM. As. and C.R.Ps. and the contractor filed Cross-objections in the appeals C.M.A.Nos. 5/90, 386/90, 493/91 and 1268/90 were filed against the common judgment in O.P.Nos. 85/86, 87/86, 88/86 and 86/86 respectively and C.R.P.Nos. 1135/90, 1136/90, 1134/90 and 818/90 were filed against the common judgment in O.S.Nos. 59/86, 53/86, 57/86 and 55/86 respectively.

3. Mr. B.V. Ramamohan Rao, the learned Government Pleader, contends that the Cross-objections in these appeals are not maintainable and that in passing the awards the arbitrator misconducted himself inasmuch as there has been no application of mind by the arbitrator. Therefore, the learned Principal Subordinate Judge ought to have set aside the awards. He further contends that the arbitrator has no power to award interest by way of damages and also to award interest pendente lite and future interest. Therefore awarding the interest is without jurisdiction.

4. It would be convenient to dispose of the preliminary objection with regard to maintainability of cross-objections. The contention of the learned Government Pleader is that Section 39 of the Arbitration Act, 1940, provides appeals against six categories of orders and there is no provision in the Act for filing of Cross-objections, therefore the Cross-objections are not maintainable. It is further contended that if the contractor was aggrieved he could have filed an appeal under Clause (iii) of Sub-section (1) of Section 39, but he cannot file cross-objections.

5. Mr. Gopal Reddy, the learned counsel for the Cross-objector, on the other hand, contends that in an appeal the respondent is entitled to file cross-objections as the provisions of the CPC are applicable.

6. It is no doubt true that Section 39 of the Arbitration Act provides appeals only against specified orders which are mentioned in Sub-section (1) and may be enumerated hereunder:

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceeding where there is an arbitration

agreement;

(vi) setting aside or refusing to set aside an award.

7. We may also notice here Section 41 of the Arbitration Act and it would be useful to set out the same here.

"41. Procedure and powers of Court:- Subject to provisions of this Act and of rules made thereunder-

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same powers of making orders in respect of any of the matters set out in the Section Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."

8. From a perusal of Clause (a) of Section 41 it is clear that the provisions of the CPC are made applicable to all proceedings before the Court and to all appeals under this Act. A combined reading of Section 39 and 41 leads to the conclusion that all contentions which can form subject matter of appeal under the Act can be urged by the respondent by way of Cross-objections.

9. Order 41 of the CPC deals with appeals. In view of the specific provisions in Clause (a) of Section 41 of the Arbitration Act the provisions of Order 41 C.P.C. will be applicable to the appeals filed under the Arbitration Act. Rule 22 of Order 41 C.P.C. provides that upon hearing, respondent may object to decree as if he had preferred separate appeal. Sub-rule (1) of Rule 22 of Order 41 which is relevant for our purposes, reads as follows:

" (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."

10. Sub-rule (1) of Rule 22 is in wide terms. It provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour and he may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his

pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow. The explanation to Sub-rule (1) of Rule 22 is not relevant for our purpose. The right to file cross-objections is co-extensive with the right to file appeal. Under the Act appeal can be filed u/s 17 as well as u/s 39. Section 17 of the Arbitration Act provides that where the court sees no cause to remit the award or any of the matters referred to arbitration for consideration or set aside the award, after the time for making application to set aside the award has expired, or if such an application has been filed and is rejected, it has to pronounce judgment and decree and that no appeal shall lie from such a judgment except on the ground that it is in excess of or not otherwise in accordance with the award. It has also been noticed that against six specific orders and original decrees an appeal is provided. Therefore it follows that on any of these grounds an appeal can be filed. So cross-objections can also be maintained in respect of the same matters. The cross-objections relate to reduction of the rate of interest from 18% to 12% p.a. from the date of the awards i.e., 18-4-1986, till the date of realisation. This falls u/s 17 as well as Clause (iii) of Sub-section (1) of Section 39 of the Arbitration Act. Therefore, in our view, the Cross-objections are maintainable.

11. Now we shall advert to the first contention of the learned Government Pleader viz., that the arbitrator has misconducted himself and that the awards were passed without application of mind. "Misconduct" has not been defined in the Arbitration Act, but this term has been borrowed from the English decisions and it will be useful to refer to the definition of "Misconduct" as given in Halsbury's Laws of England, Fourth Edition, Volume 2.

"622. What constitutes misconduct;

It is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire.

The expression is of wide import, for an arbitrator's award, unless set aside, entitles the beneficiary to call on the executive power of the state to enforce it, and it is the court's function to ensure that the executive power of the Court is not abused. It is accordingly misconduct for an arbitrator to fail to comply with the terms, express or implied, of the arbitration agreement. But even if the arbitrator fully complies with those terms, he will be guilty of misconduct if he makes an award which on grounds of public policy ought not to be enforced. Much confusion has been caused by the fact that the expression "misconduct" is used to described both these quite separate grounds for setting aside an award, and it is not wholly clear in some of the decided cases on which of these two grounds the award has been set aside. However, on one or other of these grounds the expression includes on the one hand that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere "technical" misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference."

12. Some of examples of "misconduct" given therein may be quoted here to elucidate the concept of that expression:

(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;

(ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference; for example, where the arbitrator construed the lease (wrongly) instead of determining the rental and the value of buildings to be maintained on the land; or where the arbitrator has power to direct what shall be done but his directions affect the interests of third persons; or where he decided as to the parties rights, not under the contract upon which the arbitration had proceeded, but under another contract;

(iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt;

(iv) if there has been irregularity in the proceedings, as, for example, where the arbitrator failed to give the parties notice of the time and place of meeting, or where the agreement required the evidence to be taken orally and the arbitrator received affidavits, or where the arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the arbitrator failed to have foreign documents translated, or where, the reference being to two or more arbitrators, they did not act together, or where the umpire, after hearing evidence from both arbitrators, received further evidence from one without informing or hearing the other, or where the umpire attended the deliberations of the appeal board reviewing his award.

13. Now we shall consider, on the following facts, whether the arbitrator can be said to have misconducted himself?

14. On 11-4-1986 the arbitrator has addressed a letter to the parties to the arbitration to furnish any information, documents and written arguments so as to reach the arbitrator before 5 p.m. on 18-4-1986. In reply to the said letter the State sent written arguments on 17-4-1986 through a letter which reached the arbitrator on 18-4-1986 at 4 p.m. and the award itself was passed on the same day. It is contended by the learned Government Pleader that there could have been no time for the arbitrator to consider the written arguments and pass the award on that day and thus the arbitrator misconducted himself. Whereas Mr. Gopal Reddy contends that the arbitrator heard the arguments on 7-4-1986 and posted the case for pronouncement of the award on 18-4-1986 and gave opportunity to present written arguments and documents, if any, in support of the arguments already addressed. But as no fresh arguments or fresh material was sent, it could not have been difficult for the arbitrator to pass the awards on the same day.

15. From the contentions of the learned counsel it is evident that both sides have addressed arguments before the arbitrator on 7-4-1986, however the arbitrator has chosen to address a letter to both the parties on 11-4-1986 inviting them to submit their written arguments and to furnish any information and documents before 5 p.m. on that day. It is not the case of the appellants that a particular document sent on 17-4-19 86 in response to the letter was not considered or a particular written argument was ignored. Indeed no such submission could have been made, in view of the fact that the arbitrator has chosen to give non-speaking awards. The awards relate to all the items of the claim. In a case of the nature like the one on hand it could not be difficult muchless impossible for the arbitrator who was a retired Chief Engineer of Andhra Pradesh to pass a non-speaking award. We are, therefore, unable to accept the contention that the arbitrator has misconducted himself.

16. It is next contended by the learned Government Pleader that the arbitrator has awarded interest upon interest and interest pendente lite and future interest, as such the arbitrator has acted beyond his jurisdiction and thus misconducted himself. Mr. Gopal Reddy contends that the arbitrator has not awarded interest on interest and that insofar as the interest pendente lite and future interest are concerned, the arbitrator has jurisdiction to award interest both pendente lite and further interest.

17. The contention of the learned Government Pleader is based on the following paragraph in the award.

"I award and direct that the respondents pay the claimant the interest at 18% per annum on the amounts of the award indicated under items 1, 6, 8, 9, 11, and 12 and relevant damages under Items 18 to 58, 98, 7, 8, 11 and 12 from the date of the reference i.e., 21-10-1985 to the date of actual payment or of decree whichever is earlier."

18. From a perusal of the above portion of the award, it is clear that the arbitrator has awarded interest at 18% per annum on the amounts of the award under items 1, 6, 8, 9, 11 and 12 and damages on items 1 (b) to 15 (b), 9 (b), 7, 8, 11 and 12. Thus it is clear to us that no interest is awarded on times 1 (b) to 15 (b), 9 (b), 7, 8, 11 and 12. However, on items 8, 11 and 12 interest at 18% is awarded. Item 8 relates to claim No. 8 Under that claim the arbitrator awarded Rs. 74,547/- towards extra rate for the work done beyond the agreement time and also damages for late payment and he adopted, as a measure of damages, amount at the rate of 15% of the said amount for thirteen months i.e., 1-9-1984 to 21-10-1985. So also item 11 relates to award of amount on pending bills and damages. Item 11 deals with claim No. 11. The arbitrator awarded damages for belated payment of final bill and for withholding amounts from 18-8-1984 till the date of reference i.e., 21-10-1985. Item 12 relates to non-refund of E.M.D. The amount of E.M.D. was awarded together with interest as measure of damages for belated payment from 17-2-1985 till the date of reference on 21-10-1985. It is clear that on the total amount which was

awarded by the arbitrator to the contractor, interest was awarded at 18% p.a. from the date of reference, till the date of actual payment or of decree whichever is earlier.

19. Insofar as the interest pendente lite in concerned in Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, the Constitution Bench of the Supreme Court held as follows:

"Where the agreement between the (parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied terms of the agreement between the parties and therefore when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

20. It is not the case of the parties here that by agreement between the parties grant of interest was prohibited. Therefore awarding of interest pendente lite by the arbitrator cannot be said to be without jurisdiction.

21. In regard to future interest in Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, , the Supreme Court laid down as follows:

"The arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of C.P.C. provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of Section 34 applicable to proceedings before the arbitrator, though the section as such may not apply."

22. From the above discussion it follows that the arbitrator can award interest pendente lite as well as future interest. So it cannot be said that in this case the arbitrator has misconducted himself so as to render the award liable to be set aside.

23. Now we shall deal with the Cross-objections. The contention of the learned counsel for the Cross-objector is that when the arbitrator awarded interest at 18% p.a. from the date of reference till the date of decree or realisation, the learned Subordinate Judge ought not to have reduced the interest from 18% to 12% p.a. The learned Government Pleader contends that u/s 34 C.P.C. the civil court is competent to award interest from the date of the suit to the date of the decree and also future interest from the date of decree till realisation at

reasonable rate not exceeding 6% p.a., therefore, the court was justified in awarding the interest at 12% p.a.

24. In a suit u/s 17 of the Arbitration Act, where the court sees no cause to remit the award or any of the matter referred to arbitration for reconsideration u/s 16 or to set aside the award u/s 30, either because the time for making an application to set aside the award has expired or because such an application having been made was refused, has to pronounce the judgment according to award, which should be followed by a decree. It is necessary to note here that no appeal lies from such a decree which is in terms of the award but if the decree is in excess of or not otherwise in accordance with the award, it is made appealable. It cannot be disputed that the Court has discretion u/s 34 C.P.C. to award interest for the period during the pendency of the suit as well as future interest till realisation of the amount. It has already been held above that the arbitrator has jurisdiction to award interest pendente lite as well as future interest till the date of realisation of the awarded amount. A harmonious construction of Section 34 C.P.C. and Section 17 of the Act in the light of the pronouncements of the Supreme Court upholding the power of the arbitrator to award future interest, in our view, would lead to the conclusion that where no future interest is awarded by the arbitrator in the award, the Court would be competent to grant interest u/s 34 C.P.C. from the date of the suit till the date of the decree and from the date of decree till the date of realisation, but where interest has been awarded at a particular rate in the award by the arbitrator, the court cannot, u/s 34 C.P.C, enhance or reduce rate of interest which results in modifying the award and passing a decree otherwise than in terms of the award. In the instant case that is what the Court has done. So the judgment and decree insofar as they reduce the rate of interest from 18% to 12% cannot be sustained. The contractor is entitled to interest @ Rs. 18% per annum from the date of award till the date of realisation.

25. In the result the appeals and the Civil Revision Petition are dismissed and the Cross-objections are accordingly allowed. In the circumstances of the case we direct the parties to bear their own costs.