

(2011) 04 AP CK 0097

In the Andhra Pradesh High Court

Case No : C.M.A. No. 3514 of 2003 and CRP. No. 4880 of 2003

The Superintending Engineer, N.S.R.C. O and M Circle,
Lingamguntla Via-Narasaraopet, Guntur District. and The
Executive Engineer N.S.R.C. O and M Division Macherla
Guntur District

APPELLANT

Vs

D. Ranganayakulu, rep. by Power of Attorney holder, K. Sree
Rama Murthy (died) and Others Vs D. Ranganayakulu, Rep.
by Power of Attorney holder, K. Sree Rama Murthy (died),
Makineni Peda Rattaiah

RESPONDENT

Date of Decision : 21-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34, 34(1)
Contract Act, 1872 — Section 73

Citation : (2011) 6 ALT 138

Hon'ble Judges : K.G. Shankar, J;G. Bhavani Prasad, J

Bench : Division Bench

Advocate : Sri. Y. Chandra Sekhar, Spl. GP for the A.G. of A.P, for the Appellant;
Sri S. Ravi for G. Rama Sarma, for the Respondent

Judgement

Sri Justice K.G. Shankar

1. This common order disposes of the appeal as well as the revision. The Superintending Engineer and Executive Engineer of the Nagarjuna Sagar Right Canal are Appellants 1 and 2. In the revision, the State is the first Petitioner represented by the Superintending Engineer of the Nagarjuna Sagar Right Canal. The second Petitioner in the revision is the second Appellant in the appeal. The two Respondents in the appeal and the revision are identical. The second Respondent is the Hon'ble Arbitrator who is merely a proforma party. The parties shall be referred to as the SE, the EE (Superintending Engineer, Executive Engineer), the Contractor and the Hon'ble Arbitrator for convenience.

2. The SE and the EE challenge the common judgment and decrees in O.S. No. 108 of 1996 and O.S. No. 110 of 1996 on the file of the Additional Senior Civil

Judge, Narsaraopet. Through this judgment, the learned Additional Senior Civil Judge, Narsaraopet made the award passed by the Hon"ble Arbitrator on 02.03.1995 under the Arbitration Act, 1940, the Rule of the Court. Aggrieved by the judgment in O.S. No. 110 of 1996, the SE and the EE laid the appeal. Aggrieved by the judgment in O.S. No. 108 of 1996, they laid the revision. However, it is a common judgment with common reasoning by the trial Court.

3. This appeal and revision were earlier disposed of by a Division Bench through a common order dated 01.11.2004. The claim of the first Respondent before the Hon"ble Arbitrator was Rs. 35,29,535/- Relying upon State of A.P. v. Obulureddy 2001 (10) SCC 30, the Division Bench of this Court held that the dispute was not arbitrable, as the dispute was for over Rs. 50,000/- and accordingly set aside the judgments in O.S. Nos. 108 of 1996 and 110 of 1996 on the file of the Additional Senior Civil Judge, Narsaraopet.

4. The first Respondent herein preferred SLP Nos. 5721 of 2005 and 5722 of 2005 from the judgments in the appeal and the revision herein. The Supreme Court granted leave and ultimately allowed the two cases as Civil Appeal Nos. 1087 of 2008 and 1088 of 2008 through a common judgment dated 07.02.2008 holding that the Appellants herein waived their rights to file objection to the award. A clarification thereafter was sought by the first Respondent through I.A. Nos. 1 and 2 of 2009 in the two appeals. The Supreme Court clarified through orders dated 10.08.2009 that the common judgment of the High Court in the appeal and the revision stood set aside through the common judgment of the Supreme Court dated 07.02.2008 and that the appeal and the revision shall be disposed of afresh by

the High Court expeditiously. Thus, the appeal and the revision came up before us for our consideration.

5. The facts leading to the filing of the appeal and the revision may briefly be stated at this stage.

The facts are:

a) The first Respondent is a contractor. He laid a tender for "lining the bed and sides of Nagarjuna Sagar Right Main Canal from Kilometer 23.13 to Kilometer 23.41". The estimated value of the work was Rs. 12.41 lakhs. The bid of the contractor was accepted. The agreement between the SE and the SE and the contractor concluded on 18.04.1986 for a sum of Rs. 11.22 lakhs. The contract is required to be completed during the periods of the closure of the canal in 1986 and 1987. The contractor, claiming that he executed the works entrusted to him, requested for the settlement of the claims. He also issued a notice on 02.04.1991 to the SE to settle his claim.

b) Disputes arose between the SE and the EE on the one side and the contractor on the other side regarding the work conducted by the Contractor. The work indeed could not be completed in 1987 as contemplated by the agreement as the

canal could be closed by 31.03.1988 only. The contractor claimed that he suffered losses in the execution of the works.

c) The contractor consequently invoked the arbitration clause and filed O.P. No. 167 of 1991 on the file of the Principal Senior Civil Judge, Narsaraopet. The Court appointed the Hon''ble Arbitrator as the sole arbitrator.

d) The Hon''ble Arbitrator awarded Rs. 15,21,600/- in favour of the Contractor together with interest at 24% per annum from 05.01.1994 on which date the reference was entered into by the Hon''ble Arbitrator till 02.03.1995 on which date the award was passed. The interest awarded by the Hon''ble Arbitrator worked out to Rs. 4,23,000/-. The Contractor consequently was declared to be entitled to Rs. 19,54,600/- from the SE and the EE.

e) The Hon''ble Arbitrator also awarded compensation to the first Respondent under items 1 to 13 of the claim of the Contractor at Rs. 16,12,400/- together with simple interest at 24% per annum. The total value of the amount for which the award was passed by the Hon''ble Arbitrator was Rs. 35,72,000/-.

f) The EE contended that the award was vitiated by misconduct of the Hon''ble Arbitrator and that the Hon''ble Arbitrator ignored Clause (10) of the Schedule-C of the Special Conditions of Agreement. The claim of the Contractor was thus resisted by the Appellants completely.

g) In their turn, the SE and the EE filed O.S. No. 110 of 1996 to set aside the award of the Hon''ble Arbitrator. The learned trial Judge did not record any evidence. After hearing both sides, the learned trial Judge considered that the award was just and proper. He consequently allowed O.S. No. 108 of 1996 and dismissed O.S. No. 110 of 1996. He made the award the Rule of Court. As already pointed out, impugning the judgment, the Appellants laid the appeal against the judgment in O.S. No. 110 of 1996 and laid the revision against the judgment in O.S. No. 108 of 1996.

6. The learned Government Pleader for Arbitration advanced his submissions on behalf of the SE and the EE. Sri S. Ravi, learned senior counsel countered the claim of the Appellants while arguing on behalf of the Contractor.

7. The learned Government Pleader contended that the Supreme Court has already resolved the question relating to interest holding that the contractor would not be entitled to interest on the delayed payments if there was an agreement to that effect. He drew our attention to the award of interest at 24% per annum by the Hon''ble Arbitrator and by referring to Clause 59 of the Preliminary Specifications of the Andhra Pradesh Detailed Standing Specifications ("PS to APDSS" for short), he submitted that the contractor is not entitled to compensation on account of delays or hindrances to the work. He placed reliance upon Clause 69 of PS to APDSS prohibiting payment of interest on money due to the contractor. He further contended that the claim under Clause 12 (A) by the contract towards damages for delay in payment of bills to a tune of Rs. 74,880/-

cannot be claimed by the contractor, in view of Clause 59 of PS to APDSS.

8. The learned Government Pleader pointed out that the contract awarded in favour of the contractor was a lump sum contract as opposed to piecemeal or item wise contract and that notwithstanding various defaults urged by the contractor, the contractor would not be entitled to interest, vide prohibition through Clause 69 of the PS to APDSS. He further urged that as Clause 59 of the APDSS was found to be intra vires, the contractor is not entitled to compensation over by the delayed execution of the works.

9. On the other hand, Sri S. Ravi, learned senior counsel contended that in respect of the claims under items 1A, 2A, 3A and 11A, Clause 59 of the PS to APDSS would not operate as a defence. He claimed that the contractor would be entitled to interest at least at 15% per annum keeping the interest rates of Reserve Bank of India in view. Award of interest at 9% per annum uniformly by Courts without reference to the rates of interest was considered by the learned Senior Counsel to be unjust and that the rate of interest, therefore, was prayed to be granted at 15% per annum at least.

10. In the light of the rival contentions, the point for consideration is whether the award passed by the Hon"ble Arbitrator deserves to be confirmed and if so, to what extent.

11. The exact value of the work entrusted to the first Respondent was Rs. 11,21,682/-. The time stipulated for the completion of the work was three months in 1986 and three months in 1987 during the period of the closure of the canal. When the Contractor sought for the extension of the time, the SE extended the time till 16.06.1989 to complete the works by invoking Clause 59 of the Preliminary Specifications to Andhra Pradesh Detailed Standard Specifications ("PS to APDSS" for short).

12. However, the work could not be completed even by 16.06.1989. Curiously, the Contractor did not seek for further extension of time, albeit the EE desired that the Contractor should apply for further extension of time. The Contractor, on the other hand, addressed a letter on 13.12.1990 requesting for the settlement of the claim. The Contractor further intimated the SE and the EE that he would apply for the extension of time if the periods of closing and opening of the canal are adhere to a fixed time schedule.

13. There are as many as 16 claims by the contractor in 29 items. In respect of claims 1 to 13, each of the claims is twofold. The first of these claims is the claim proper. The second of each of these claims is the claim relating to the interest over the main claim. So far as claims 14, 15 and 16 are concerned, there is no added demand for interest over the claim component. The demand for interest component over the main claim is covered by Clause 69 of PS to APDSS. They deserve to be considered while examining the implications of Clause 69 of PS to APDSS. The claims proper, which are the impugned claims, deserve to be examined at the out set.

14. As already pointed out, the main claims are claim Nos. 1 to 13 numbered as claim 1A, claim 2A, claim 3A so on and so forth till claim 13A. The learned senior counsel representing the contractor contended that claim 1A, 2A and 3A as well as 11A are not hit by Clause 59 of PS to APDSS. Clause 59 of PS to APDSS may be recapitulated as a bar of claim for compensation on account of delay or hindrance to the work from any cause whatsoever. The preliminary specification, however, envisaged that such compensation is payable to the extent permitted by preliminary specification No. 59 of APDSS only.

15. There was judicial controversy regarding the constitutional validity of Clause 59 of PS to APDSS. The Division Bench of this Court in the State of A.P. v. Associated Engineering Enterprises, Hyderabad 1989 (2) ALT 372 (D.B.) more or less upheld the vires of Clause 59. In M. Gangareddy, rep. by his G.P.A., A. Srinivas Goud Vs. The State of A.P. and Others, the Division Bench considered that Clause 59 of PS to APDSS does not automatically apply to every case and that the escalation clause beyond the contractual period would indeed operate as an exception to Clause 59. The Division Bench of this Court ignored the prohibition under Clause 59 while considering the case of a contract in the State of A.P. v. S.S. Reddy 1988 (2) APLJ 465. In V. Raghunadha Rao v. State of A.P. 1988 (1) ALT 461, a single judge of this Court held that certain phrases of Clause 59 are arbitrary and unjust. However, the Supreme Court put a quietus to the controversy upholding the vires of Clause 59 of PS to APDSS.

16. In Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, the terms of the contract provided that in case of any delay in the execution of the works either on account of shortfall on the part of the contractor or mistake of the employer or both, the contractor would not be entitled to claim any compensation on the ground of such delay if the contractor sought for and obtained extension of time. This is exactly what Clause 59 envisages. The Supreme Court indeed was dealing with Clause 11 of the General Conditions of Contract ("GCC" for short). The learned Government Pleader contended that Clause 11 (c) of the GCC is para materia of Clause 59 and that where the Supreme Court approved Clause 11 (c) of the GCC, the ratio would equally apply to Clause 59 of PS to APDSS.

17. In para 12 of this decision, the Supreme Court observed that the contract provided that if there was any delay attributable either to the contractor or to the employer or to both and the contractor sought and obtained extension of time for the execution on that count, the contractor would not be entitled to claim compensation of any nature on the ground of such delay in view of the bar under Clause 11(c) of the GCC. It is the contention of the learned Government Pleader that in view of this decision of the Supreme Court, the Contractor is debarred from questioning the virusness of Clause 59 of PS to APDSS and that in turn, in view of Clause 59, the contractor is not entitled to claim additional amounts on account of delayed execution of the works.

18. He has also placed reliance upon K. Marappan Vs. Superintending Engineer

and Another, where one of us (Sri Justice G. Bhavani Prasad) was a member of the Division Bench. In that case, a contractor failed to complete the works contract: within the stipulated period. The contractor sought for the extension of time. The contractor, however, subsequently made a claim for compensation of delay due to increase in the rates more than the rates fixed at the time of the commission. The Division Bench of this Court observed that such a delay could not constitute a ground to tag the government or the employer without any additional liability. The Division Bench has taken through the march of law in paras 18 and 19 of its erudite judgment. Indeed, the virusness of Clause 59 has not been the direct question in that case. Clause 59, however, was upheld in that case. The learned Government Pleader contended that in view of this decision of this very Court, Clause 59 of PS to APDSS holds sway so much so the contractor would not be entitled to claim any compensation on account of delayed execution of the works.

19. In *Dhirubai D. and Company, Engineers and Contractors v. Nizam Sugar Factory Limited* 2010 (1) ALT 72.1 (D.B.), the arbitral award was passed under the provisions of the Arbitration Act, 1940. The Division Bench of this Court placed reliance upon *Ramnath International Construction (P) Ltd., v. Union of India* (supra) in approving Clause 48 of the GCC. On the strength of these decisions, the learned Government Pleader asserted that Clause 59 of PS to APDSS is intra vires. In all fairness, Sri S. Ravi, senior counsel for the contractor did not urge that Clause 59 of PS to APDSS is

ultra vires and that the claims of the contractor should not be judged on the strength of Clause 59. On the other hand, his contention is that claims under 1A, 2A, 3A and 11A are patently beyond the purview of Clause 59 and that the defence of the prohibition under Clause 59 does not operate so far as these claims are concerned.

20. Claim 1A consists of 13 sub-claims. Claim 1A relates to the execution of the works and the non-payment of amounts for works executed by the contractor. But, the alleged works, in respect of which payments were not made, are 13 in number, which are sub-items 1 to 13 of claim 1A.

21. The total amount covered by claim No. 1A is Rs. 9,88,800/-. The second Respondent-Hon'ble Arbitrator awarded Rs. 6,43,300/- under claim 1A. It is the case of the contractor that he executed as many as 13 items in sub-items 1 to 13 not originally contemplated under the agreement and that the Contractor is entitled to these amounts as value of additional works executed by the Contractor. It may be noticed that the amount covered by claim 1A is not by way of additional amount for the delayed execution of the works. It is a claim towards the value of the additional works executed by the Contractor. We may at once hold that Clause 59 does not operate as a bar for such a claim. The contention of the Learned Counsel for the Contractor that Clause 59 of PS to APDSS has no relevance in this context is justified. Therefore, whether the claim of the Contractor for the additional amounts is justified or not falls for consideration as

question of fact.

22. We are afraid that when the Hon"ble Arbitrator examined the issue and concluded that the Contractor is entitled to additional amounts at Rs. 6,43,300/- as against the claim of Rs. 9,88,800/-, it would be improper in going into the question of fact and examine whether the Hon"ble Arbitrator correctly judged the facts of the case or otherwise.

23. At any rate, we may examine the claim of the Contractor, the resistance from the Government, the evidence and the conclusion of the Hon"ble Arbitrator on each of these sub-items 1 to 13.

24. In respect of claim relating to Mastic Pad (claim under sub-item 1 of the item 1A), the Contractor claimed Rs. 46,000/-. The Hon"ble Arbitrator verified the measurement books and the records in the presence of the EE and Assistant Engineer and worked out the value of the additional works conducted by the Contractor at Rs. 6,812/- as available through memo dated 13.12.1994. Consequently, the Hon"ble Arbitrator considered it appropriate to award the claim in respect of the sub-item No. 1 at Rs. 6,812/- only. As rightly submitted by the learned Government Pleader, the Contractor could not establish through any cogent or fair evidence that the claim at Rs. 46,000/- as made by him was justified. We, therefore, unhesitatingly accept the award of Rs. 6,812/- as reasonable and justified.

25. Sub-item No. 2 relates to additional value of cross section sheets. The Contractor claimed Rs. 34,970/- under sub-item No. 2. Holding that the amount covered by the additional expenditure under this head was already paid by the Department, the Hon"ble Arbitrator disallowed the claim. The learned Senior Counsel failed to explain that the rejection of claim 1A, sub-item 2 by the Hon"ble Arbitrator was not justified. On question of fact, the finding of the Hon"ble Arbitrator is therefore found to be correct and does not call for any interference.

26. Sub-item No. 3 relates to Leads and Lifts. The Contractor asserted that Leads and Lifts were paid for the quantities of soil and rock excavated only and that the quantities lifted by the Contractor were much more than the excavated rocks and soil. Owing to swelling of the soil and rocks, he estimated the difference between the excavated soil and rocks and the actual lifted quantities as 25% of soil and 66 2/3rd% of rocks.

27. Clause 19 of the agreement between the Contractor and the Department contemplated payment on the basis of the quantity and not on the basis of the weight. The difference of amount towards Leads and Lifts claimed by the Contractor is at Rs. 9,757/-. The Hon"ble Arbitrator considered it to reasonable and accepted the same.

28. Sub-item 4 is a claim for Rs. 30,000/- towards the clearing of the forest by the Contractor. Holding that the claim was vague and without subsistence, the

Hon"ble Arbitrator rejected the claim.

29. Sub-item No. 5 is a claim for Rs. 2,82,970/-. The SE and EE assessed the additional costs at Rs. 56,500/- for the season of 1986 and at Rs. 60,500/- for the season of 1987 through their memo dated 22.12.1994. The total value of the claim thus admitted by the SE and EE under sub-item 5 is Rs. 1,17,000/-.

30. While so, the Contractor accepted to the extent of additional expenditure for the season of 1986 at Rs. 56,500/-. He, however, asserted the additional expenditure at Rs. 1,41,490/- for 1987 being half of the original claim Rs. 2,82,980/-. The Hon"ble Arbitrator included the additional claim for 1987 and the claim of 1986 at Rs. 1,41,490/- and Rs. 56,500/- respectively and awarded an amount of Rs. 1,97,990/- as additional expenditure in respect of sub-item No. 5. The learned Government Pleader is not able to show how the additional expenditure for 1987 was only Rs. 60,500/-, whereas the Contractor would appear to have explained the calculation of the additional expenditure for the year 1987 apart from the additional expenditure for the year 1986. The amount payable to the Contractor in sub-item No. 5 at Rs. 1,97,990/- as arrived by the Hon"ble Arbitrator consequently is justified.

31. The Contractor assessed the extra cost of dewatering during the currency of the agreement at Rs. 30,000/-. It is the case of the Contractor that the depth of stagnated water was expected to be at two feet and that the actual depth of the stagnated water during the first season was at a depth of six feet and the depth was 10 feet during the second season. Contending that the dewatering process resulted in extra expenditure as against the projected expenditure, the Contractor claimed additional amount of Rs. 30,000/- towards extra cost of dewatering. The Government authorities contested the claim on the ground that the Contractor was expected to investigate the conditions prevailing at the site before he laid the tender papers. The learned senior counsel for the Contractor pointed out that the Contractor was handicapped in assessing the depth of stagnated water as the canal was flowing when the tender notification was issued and when the tender papers were filed so much so the Contractor had no opportunity of making a study of the depth of the stagnated water. The Hon"ble Arbitrator calculated the overall expenditure towards the dewatering process and awarded Rs. 16,900/- as against the claim of Rs. 30,000/-. The Hon"ble Arbitrator has taken the memo of the department dated 22.12.1994 into consideration in arriving at the additional expenditure.

32. More or less, the entire claim of the Contractor in respect of sub-item No. 7 was accepted through the award by the learned Arbitrator. While the Contractor claimed Rs. 2,88,580/-, the Hon"ble Arbitrator reduced the amount in the award by two rupees and held that the Contractor is entitled to Rs. 2,88,570/- in the sub-item No. 7 of item No. 1A.

33. Sub-item No. 7 is a claim that the Contractor had to spend Rs. 2,88,580/- for the formation of cross-bunds during the two seasons and that it became

necessary for the Contractor to form cross-bunds on account of lapses on the part of the Department. Curiously, the Department claimed details of expenditure at Rs. 1,84,500/- only. It is curious because the Department on the one hand asserted that the claim under sub-item No. 7 of item 1-A is impermissible and at the same time, admitted the expenditure at Rs. 1,84,500/-. The Hon''ble Arbitrator awarded Rs. 2,88,578/- considering that the SE and EE could not satisfactorily explain the exact expenditure and failed to show that: the amount claimed by the Contractor was incorrect. We are afraid that the approach adopted by the Hon''ble Arbitrator in this regard is not correct. It is for the Contractor to first show how the expenditure was at Rs. 2,88,580/- so that the Department could accept or deny the claim. The Department would have had an opportunity to deny item-wise expenditure if the Contractor had submitted a detailed expenditure account regarding the additional expenditure relating to sub-item No. 7. Where the Department admitted the additional expenditure at Rs. 1,84,500/-, it would have been just and proper for the Hon''ble Arbitrator to accept the claim of the Contractor in respect of sub-item No. 7 to the extent of Rs. 1,84,500/- only. We may, however, point out that this calculation is a question of fact. We are neither interested nor permitted to go into the question of fact by sitting in appeal over the findings of the Hon''ble Arbitrator. We, therefore, are constrained to accept the award of the Hon''ble Arbitrator at Rs. 2,88,578/- in respect of sub-item 7 of item 1-A.

34. The Contractor claimed Rs. 50,000/- in respect of sub-item No. 8 towards the cost of dewatering during the prolonged periods of 1988 and 1989 seasons. It is the case of the Contractor that the dewatering claimed under sub-item No. 8 was occasioned on account of the lapses of the Department. It may be recalled that the claim under sub-item No. 8 is for dewatering to a depth up to two feet only as against sub-item No. 6, which is claim relating the dewatering to a depth of six feet and ten feet respectively. The Government estimated the cost of dewatering under sub-item No. 8 at Rs. 20,000/- as against the claim of Rs. 50,000/-. The Hon''ble Arbitrator accepted the claim of the Contractor, placing the burden upon the Department. As in the case of sub-item No. 7, we consider that the initial burden to explain the expenditure would be upon the Contractor. The burden would shift on to the Department only after the Contractor fairly establishes his claim. The Hon''ble Arbitrator, however, viewed the situation in a converse angle and accepted the claim as a whole. While we consider that the Hon''ble Arbitrator would have been justified in awarding the additional expenditure at Rs. 20,000/- under sub-item No. 8 in view of the admission by the Department, we reiterate our stand as in the case of sub-item No. 7 that we cannot interfere with the amount of additional expenditure awarded by the Hon''ble Arbitrator as it is a question of fact. Consequently, we confirm the award in respect of sub-item No. 8.

35. Sub-item No. 9 for Rs. 25,900/- as accepted by the Hon''ble Arbitrator was claimed by the Contractor towards the formation and removal of the ramps twice over and above the requisite number of items during 1988 and 1989 seasons.

The Department assessed the value at Rs. 12,240/-. Just as in the case of sub-items 7 and 8, the Hon''ble Arbitrator accepted the claim of the Contractor at Rs. 25,400/-.

36. The Contractor claimed Rs. 1,03,800/- under sub-item No. 10 which was rejected by the Hon''ble Arbitrator. The learned senior counsel for the Contractor did not challenge the award of the Hon''ble Arbitrator in respect of claim 1A. Consequently, it is not open for the Contractor now to question the claim under sub-item No. 10 of claim 1A. We, therefore, do not propose to go into the question of the correctness of the award in respect of sub-item 10 of claim No. 1A.

37. Sub-item No. 11 for Rs. 24,400/- was accepted by the Hon''ble Arbitrator. Sub-item No. 11 relates to cost of the sheds constructed by the Contractor. The Department totally denied the construction of the sheds. The Contractor, however, produced photographs before the Hon''ble Arbitrator on the basis of which the Hon''ble Arbitrator determined the value of the sheds at Rs. 24,400/- and awarded the same as additional cost.

38. Sub-item No. 12 is a claim for Rs. 23,300/- towards cost of the curing. The learned senior counsel for the Contractor submitted that curing was not part of the contractual obligation and that unfortunately the total cost of the works did not include the curing cost. It is the case of the Contractor that he did curing work in accordance with the wish and the directions of the SE and EE. The Hon''ble Arbitrator awarded Rs. 6,977/- towards additional cost of curing on the basis of the details furnished by the SE that the cost of the curing was at Rs. 4,813/- and Rs. 2,164/- respectively totaling Rs. 6,977/-. The Contractor did not complain in about the award granting a reduced amount vis-a-vis the claim. The learned Government Pleader did not specifically challenge the award in respect of the sub-item No. 12. Indeed the learned Government Pleader challenged the award in respect of the entire claim 1A, apart from other parts of the award. We shall deal with the same at the appropriate time. Where there is no specific challenge to the award in respect of sub-item No. 12 of claim 1A, the award at Rs. 6,977/- is upheld.

39. The last of the sub-items in respect of claim 1A in sub-item No. 13 is a claim for Rs. 39,600/- towards the cost of the cement convoys. There was no obligation on the part of the contractor to transport cement to the site. It was the obligation of the Department to handover the requisite cement to the Contractor at the site. However, admittedly, it was the Contractor who carried the cement to the site for utilization. While the Contractor claimed Rs. 39,600/- towards the cost of conveyance, the Department filed a statement that the cost of the conveyance was at Rs. 16,543/-. In the absence of concrete evidence from either side, the Hon''ble Arbitrator accepted the claim of the Department and answered the claim in favour of the Contractor to the extent of Rs. 16,543/- only.

40. Thus, the total amount claimed under claim 1A by the Contractor was at Rs.

9,88,785/-, whereas the total amount awarded by the Hon''ble Arbitrator was at Rs. 6,43,357/-. It may, however, be noticed that we have already observed that in respect of sub-items 7, 8 and 9, while the Hon''ble Arbitrator awarded a total amount of Rs. 3,63,978/- at Rs. 2,88,578/-, Rs. 50,000/- and Rs. 25,400/- towards sub-items 7 to 9 respectively, the award of a sum of Rs. 2,16,740/- at Rs. 1,84,500/-, Rs. 20,000/- and Rs. 12,240/- towards the three sub-items would have been justified. The margin between the award at Rs. 3,63,978/- and the amount which could have been awarded at Rs. 2,16,740/- is Rs. 1,47,238/-. However, we have already made it clear that the calculation of the exact amount due by the Department to the Contractor is a question of fact. Where we are not sitting in appeal over the award passed by the Hon''ble Arbitrator examining whether the Hon''ble Arbitrator correctly appreciated the facts, we cannot go into the question of the correctness of the calculations in the award. We, therefore, consider it appropriate to accept the calculation of the Hon''ble Arbitrator at Rs. 6,43,357/- as the additional amount spent by the Contractor over and above the amount covered by the agreement. It has already been indicated that claim 1A of the Contractor is not a claim falling within Clause 59 of PS to APDSS. We, therefore, agree with the contention of Sri S. Ravi, learned senior counsel for the Contractor that claim 1A of the Contractor deserves to be accepted wholly and completely.

41. Claim No. 2A relates to an amount of Rs. 1,04,949/- which is the Additional Security Deposit (ASD) and Earnest Money Deposit (EMD) liable to be refunded to the Contractor after the completion of the works. Unfortunately, the Department has forfeited the EMD and has undertaken to refund the ASD after the settlement of the final bill. The Hon''ble Arbitrator had held that there was no fault on the part of the Contractor for the protraction of the works. It is the contention of the learned senior counsel for the Contractor that the forfeiture of the EMD amount and the failure to refund the ASD amount are unjust and that both of them are liable to be refunded to the Contractor. The Hon''ble Arbitrator accepted the claim of the Contractor in this regard.

42. We see no reason to interfere with the view adopted by the Hon''ble Arbitrator. Inasmuch as the claim relates to the ASD, the Department agreed to refund the same albeit after the settlement of the final bill. The Department consequently is liable to refund the same. Insofar as the claim of the Department is that the EMD was forfeited, where the procrastination of the works was not on account of any positive shortfall on the part of the Contractor, the forfeiture of the EMD is unjust. The Contractor is entitled for the refund of the EMD amount. The award of the claim 2A by the Hon''ble Arbitrator in favour of the Contractor, therefore, is justified and deserves to be accepted.

43. Claim No. 3A curiously is a claim for payment of final bill at a meagre amount of Rs. 1,800/-. It would appear that neither side is interested in considering the merits and demerits of the award in this regard. The Hon''ble Arbitrator awarded Rs. 1,800/- in respect of claim 3A. Where there is no reasonable and justifiable

resistance for this claim from the learned Government Pleader, the claim at once deserves to be accepted. Further, the Hon''ble Arbitrator examined the accounts and arrived at the final figure of Rs. 1,883/- as due from the Department to the Contractor and rounded of the same as Rs. 1,800/-. We fully agree with the award of Rs. 1,800/- by the Hon''ble Arbitrator in respect of the claim 1A.

44. It may be recalled that the learned senior counsel for the Contractor contended that there cannot be two views in respect of claims 1A, 2A, 3A and 11A. We have already expressed our opinion in respect of claim 1A to 3A. Claim No. 11A is for a sum of Rs. 28,500/- towards refund of the recoveries made by the Department wrongly. The Contractor contended that the Department imposed fines without any justification upon the Contractor towards seigniorage charges, canal spoil and cost of the tarpaulins. As rightly submitted by the learned senior counsel, the Department has failed to even prima facie establish that the Contractor was liable to the recoveries towards seigniorage charges, canal spoil and cost of the tarpaulins. The Department claimed that the tarpaulins were not purchased and used by the Contractor but were supplied by the Department itself. Where there was no proof regarding the supply of tarpaulins by the Government, the Hon''ble Arbitrator assessed the total amount due to the Contractor under claim No. 11A at Rs. 18,837/- and awarded Rs. 18,800/- rounding of the same to the nearest Rs. 100/-. We once again agree with the contention of the learned senior counsel for the Contractor that the amount granted under the award in respect of claim 11A was completely just and proper.

45. Claim No. 4A is a claim of Rs. 3,66,700/- towards the increased cost of the execution of the work done beyond the agreement period. The Hon''ble Arbitrator awarded Rs. 2,39,500/-. It may be recalled that in view of Clause 59 of PS to APDSS, the contractor is not entitled to seek for increased cost of the execution of the work on account of delayed execution. The first Respondent, therefore, is not entitled to Claim 4A at Rs. 2,39,500/- as awarded by the Hon''ble Arbitrator. Claim No. 5A is for an amount of Rs. 1,12,200/- towards extra overhead charges. The Appellants countered the claim before the Hon''ble Arbitrator on the ground that the claim is untenable in view of claim under item 8. Claim under item 8 relates to idle labour charges. The Hon''ble Arbitrator held that the resistance by the department is not acceptable. However, in view of Clause 59 of PS to APDSS, the claim would not be entitled to extra overhead charges. The Claim No. 5A, therefore, is liable to be rejected.

46. Claim No. 6A is for an amount of Rs. 2,89,400/- towards idle labour machinery and establishment. The first Respondent contended that he had to keep the labour and the machinery idle for several days on account of the default of the Appellants 1 and 2 including their failure to adhere to the dates of closure of the canals and that the first Respondent-contractor would be entitled to compensation towards idle labour, machinery and establishment. The Appellants contended that it was for the contractor to adjust his source in such a way as to

avoid undue expenses towards idle labour and machinery and that if the first Respondent contractor could not so adjust his affairs, he would not be entitled to claim the same from Appellants 1 and 2. The APDSS provides that the contractor would not be entitled to any additional charges if the work is prolonged. In view of the agreement under APDSS, the first Respondent-contractor is not entitled to Claim 6A towards idle labour, machinery and establishment.

47. The claimant made a Claim of Rs. 90,500/- under Claim No. 7A towards loss of advance. Relying upon Section 73 of the Contracts Act, the Hon''ble Arbitrator referred to the contention of the Contractor that the claim is a resultant consequential damage arising on account of the defaults of the SE and EE and that the Contractor consequently is entitled to the compensation for the loss in view of Section 73. However, as the loss of advance was an incidence of the delayed execution of the works, the first Respondent would not be entitled to the claim.

48 The Hon''ble Arbitrator rejected the claim of the first Respondent under claim 8A, 9 and claim 9A. The question of considering these claims, therefore, does not arise.

49. In respect of Claim 10A the Contractor sought for Rs. 26,800/- towards handling charges of the material on the ground that it became necessary for the Contractor to re-handle the material as the canal was not closed in accordance with the time schedule. On the other hand, the learned Government Pleader contends that just like the extra overhead charges, this claim also is liable to be rejected on the ground that it is for the contractor to arrange his material so as to avert additional expenditure. Claim 10A is an expenditure arising on account of the failure of the department to adhere to the schedule of the closure of the schedule. It, thus, is part of the expenditure on account of the extended period. In view of the contract between the Department and the Contractor that the Contractor shall not be entitled to additional amounts on account of the extension of the contract period, the Contractor is not entitled to this amount as compensation towards re-handling charges of the material.

50. Under Claim 13A, the contractor claimed Rs. 31,000/- towards loss of profit in respect of the works that the first Respondent could not execute. The learned Government Pleader submitted that calculating profits would not arise without damages for non-performance as was awarded in favour of the contractor. The Contractor cannot be a party to the delayed execution of the works and later turn round and claim compensation towards loss of profit. The Contractor, consequently, is not entitled to loss of profit in respect of work not executed by him.

51. We may recapitulate that claims 1B, 2B, 3B so on and so forth till claim 13B are the claims of interest in respect of claims 1A, 2A, 3A so on and so forth till 13A. The award of interest in respect of claims from 4A to 10A, 12A and 13A would not arise as the very award in respect of these claims is found to be unjust

and is found liable to be set aside. The question is about the award of interest in respect of claims 1A, 2A, 3A and 11A. Claims 14A and 15A are the interest component itself. Clause 69 of PS to APDSS envisages that interest is not payable by the Department on any arrears or balance due to the Contractor. There is no doubt about the constitutional validity of the Clause 69 of PS to APDSS. The learned senior counsel for the Contractor placed reliance upon State of A.P. and another Vs. Subba Reddy and another, . In the judgment dated 05.11.1998, a Division Bench of this Court held that an Arbitrator would be competent to award interest pendente lite. In the Government of A.P. v. S.V. Engineering Constructions Limited common judgment in CMA No. 2105 and CRP No. 3081 of 2000, dated 12.04.2010 a Division Bench of this Court rejected the claim of the Contractor for interest over the delayed payments. In Dhirubai's case (8 supra), V.V.S. Rao.J., speaking for the Division Bench held that the arbitral Tribunal should not ignore any clause prohibiting grant of interest whether the interest was pre-reference interest, interest pendente lite or post award period interest. In view of the recent observations of this Court in the two Division Bench decisions cited, we accept the contention of the learned Government Pleader that the Contractor shall not be entitled to interest over the delayed payments. Claims 1B, 2B, 3B and 11B as well as claims under 4B to 10B, 12B and 13B consequently are liable to be rejected. The rate of interest by the Hon''ble Arbitrator in respect of these claims is not justified. The award to this extent is liable to be set aside.

52. The Hon''ble Arbitrator also awarded interest at Rs. 4,23,000/- under claim 14A towards interest pendente lite. Under claim 15A dealing with the future interest, the Hon''ble Arbitrator awarded future interest at 24% per annum on the awarded amount. In view of the decisions of the Division Benches of this Court and in the light of the Clause 69 of PS to APDSS, we are afraid that the Contractor is not entitled to interest either for the pre-reference period or pendente lite. At the same time, from the date of award, certainly the Contractor would be entitled to interest since Clause 69 does not prohibit interest for the post award period.

Rate of Interest:

53. Another curious question arises as to the rate of interest over the awarded amounts that the Contractor would be entitled to. Under claim 15A, the Hon''ble Arbitrator awarded simple interest at 24% per annum. In A.P.S.R.T.C. Vs. SEW Constructions Limited Engineers and Constructions and Others, the Division of this Court awarded post-reference interest at 9% per annum. In Chief Engineer, Construction, South Central Railway and Another Vs. M.V.V. Satyanarayana and Another, another Division Bench of this Court also awarded interest at 9% per annum. What is the rate of interest that the Contractor would be entitled to over the amounts due to him, therefore, is the question. The learned senior counsel produced the rates of interest awarded by the Reserve Bank of India and submitted that post award interest should not be less than the interest granted

by the Reserve Bank of India.

54. Section 34 of the CPC deals with interest in general. Section 34(1) CPC envisaged that the decretal Court may award interest on the principal amount at the rate which the court deems reasonable and that this award of interest is applicable from the date of suit till the date of decree. Section 34(1) CPC was amended in 1956 providing that the interest for the post decretal period shall not exceed 6% per annum. Section 34(1) proviso incorporated with effect from 01.07.1977, however, ordains that where the liability in relation to the sum so adjudged by the Court arose out of a commercial transaction, the rate of post decretal period may exceed 6% but should not exceed the contractual rate of interest. The proviso further adumbrates that if the contract did not provide for any rate of interest, the interest for the post decretal period for commercial transactions should not be beyond the rate at which monies are lent by nationalized banks in respect of commercial transactions.

55. In *Pishori Lal Magu v. Delhi Development Authority* 1994 DLT 53 521, while disposing of an interim application, the Delhi High Court referred to the rate of interest awarded pendente lite and post award period at 10% by the learned Arbitrator and held that there was no dispute in view of the (then) recent pronouncement of the Supreme Court that the Arbitrator was competent to award pendente lite and post award period interest at 10% per annum. The Delhi High Court did not consider it appropriate to state why the rate of interest at 10% per annum was justified.

56. In *S.S. Jetley v. Delhi Development Authority* 1994 DLT 53 709, Mohd. Shamim.J., who delivered judgment in *Pishori Lal Magu*'s case (supra) once again held that the Petitioner would be entitled to interest at 12% per annum from the date of decree till realization. He, however, did not choose to give any reasons for his view in that regard.

57. In *G.D. Tiwari and Company, v. Delhi Development Authority* 2006 DLT 130 675, with reference to the Arbitration Act, 1940, the award of interest at 18% per annum for the post award period was modified by the Court to simple interest at 9% per annum from the date of the award till realization. Unfortunately, no reasons were assigned for awarding interest at 9% per annum for the post award period.

58. In *SEW Constructions Limited Engineers and Constructions case*, B. Seshasayana Reddy, J., speaking for the Division Bench awarded post award interest at 9% per annum. The Division Bench went by the view of the Supreme Court in *Krishna Bhagya Jaya Nigam Limited v. G. Harischandra Reddy* 2007 (4) SCJ 948. The decisions consider so far have not assigned any reasons for awarding interest primarily at 9% per annum from the date of decree till realization.

59. A Division Bench of the Calcutta High Court exhaustively considered the operation of Section 34 Code of Civil Procedure, the provisions of the Interest

Act, 1978 and the provisions of the Banking Regulation Act, 1949 in *Vijaya Bank and etc. Vs. Art. Trend Exports and etc.*, The question arose before that Division Bench in the money decrees passed in favour of various banks including nationalized banks in the suits instituted by the banks against defaulting customers. The Division Bench observed that the rate of interest till the date of institution of the suit would be governed by the agreement between the parties and that in the absence of any agreement, interest would be payable in accordance with the relevant statutory provisions. The Division Bench further observed that the Court has no discretion to ignore the claim of the party for grant of interest at the agreed rate. It may, however, be pointed out that the Court did not hold in that case that interest would be payable at the contractual rate till the date of suit. What it held was that the Court dealing with the case could not ignore the claim relating to the rate of interest as agreed between the parties as put forth by the parties before the Court.

60. After laying down the principles relating to the rate of interest from the date of the suit till the date of decree, the Division Bench held that payment of rate of interest from the date of judgment till realization stands on the same footing as interim interest upon the principles already laid down. Regarding the interim interest i.e., the interest from the date of suit till decree, the Court observed that it is the discretion of the Court to grant interim interest and that the discretion operates in respect of rate of interest also. The Division Bench, however, cautioned that discretion needs to be exercised judiciously. The Division Bench, however, made it clear that the interim interest need not be at the rate agreed between the parties and that a creditor, however, should not be deprived of the agreed rate of interest during the period of the pendency of the case unless equities warrants otherwise. In view of 1956 Amendment to Section 34(1) Code of Civil Procedure, the Division Bench held that the interest for the post decretal period should not ordinarily exceed 6% per annum and that in respect of commercial transactions, either the agreed rates or the rate charged by the nationalized banks should be taken into consideration. The Court further held that reasons should be assigned by the Court if interest is awarded at a rate lower than the rate contemplated by Section 34(1) and Section 34(1) Proviso Code of Civil Procedure.

61. In *Union of India Vs. Prince Muffakam Jah and others*, the Supreme Court granted interest at 6% per annum only. In *M/s. Shree Bharat Laxmi Wool Store, Panipat and others Vs. Punjab National Bank and another*, the Supreme Court awarded interest at 6% per annum only u/s 34 CPC from the date of decree. Earlier, in *Srinivasavardachariar and Others Vs. Gopala Menon and Others*, in a suit on the foot of a mortgage, taking Usurious Loans Act, 1918 into consideration, the Supreme Court reduced interest to 6% per annum. In *Central Bank of India Vs. Ravindra and Others*, the Court observed that the rate of interest for the post decretal period is primarily governed by Section 34 CPC de hors the contract between the parties and that indeed the discretion vested u/s 34 CPC should be exercised by the court fairly, judiciously, and for reasons. In

fact, when the High Court of Rajasthan enhanced the rate of interest to 6% per annum pendente lite from 4 1/2 % as granted by the trial Court, the view of the High Court was upheld by the Supreme Court in *The State of Rajasthan Vs. Raghubir Singh and Others*, Thus, series of decisions referred to point out that the Courts consider that the rate of interest is a matter of discretion for the Court and that by and large, it would not be appropriate for an appellate court to interfere with the same. The Supreme Court aptly put it in *Ravindra*" case (supra) that Section 34 CPC is a grant and that whether it would apply or not and if it would apply, to what extent would it apply, would obviously depend upon the fact situation of each case. Therefore, it needs to be examined as to what would be the appropriate rate of interest for the post award period in the present case.

62. Sri S. Ravi, learned senior counsel representing the Contractor submitted that it would be reasonable to award interest at the rates determined by the Reserve Bank of India (RBI). It may be recalled that Section 34 CPC contemplates that payment of interest for the post decretal period shall not be over and above the contractual rate in respect of commercial transactions and that where there is no contractual rate, interest for the post award period should not be exceed the interest at the rate at which nationalized banks advance monies in commercial transactions. It may also be noticed that the rates of interest have drastically reduced in the first decade of 21st century compare to the rates of interest admitted by various banks in view of the economic slump that the world has suffered if not has been suffering from. Keeping these factors into consideration, we would deem it appropriate to go by the rates of interest permitted by the RBI, which is the supreme Lord so far as the monetary matters are concerned in India in the banking field. It may be noticed that the RBI permitted rate of interest in 1970-71 between 7% to 8.5%. The rate went on increasing from year to year reaching the peak in 1995-96 to 16.5. The odd year was 1993-94 when RBI admitted interest on commercial transaction at 19% per annum. The rate of interest after 1995-96 started to decline. It started going down and went down to 10.25% in 2005-06.

63. The question is whether the Contractor would be entitled to interest for the post award period at 10.25% as it stood in 2005-06 or at 9% as granted in money cases by various Courts or of the year 1993 when the Hon"ble Arbitrator was appointed. The rate of interest in 1993-94 and admitted by the RBI was at the highest at 19% per annum. The lowest rates were in the year 1970-71 at 7%. The rate of interest as on today is at 10.25%.

64. The rate of interest admitted by the RBI shows that the rates of interest more or less have been fluctuating from year-to-year but remained constant from 2003-04 at 10.25%. We, therefore, deem it appropriate that the Contractor should be entitled to interest at 10.25% per annum and not at 24% per annum as awarded by the Hon"ble Arbitrator.

Conclusion:

65. The Contractor claimed Rs. 22,75,939/- together with interest thereof at 24% per annum. The Hon"ble Arbitrator awarded most of the claims of the Contractor and also awarded interest and granted a total of Rs. 35,72,000/- in all. It may be noticed that the claim of the Contractor referred to is the claim, which did not include interest. The claim awarded includes the claims made by the Contractor together with interest thereof.

66. The Hon"ble Arbitrator rejected claims 8A, 9A and 12A together with the claim for interest on these main claims. The learned Arbitrator accepted the rest of the claims of the Contractor. However, for the reasons already pointed out, we accept claim 1A, claim 2A, claim 3A and claim 11A. So far as claim 1A is concerned, we consider it appropriate to accept the claim at Rs. 6,43,300/- as awarded by the Hon"ble Arbitrator, albeit there is a difference of Rs. 1,47,238/- with reference to sub-items 7, 8 and 9 of claim 1A between the amounts awarded by the Hon"ble Arbitrator and the amount which the Hon"ble Arbitrator ought to have awarded. We have already given the reasons for accepting the claim at Rs. 6,43,300/- as awarded by the Hon"ble Arbitrator. We also accept the claim of the Hon"ble Arbitrator in respect of claim 2A at Rs. 1,04,900/-, claim 3A at Rs. 1,800/- and claim 11A at Rs. 18,900/-. The total of claims 1A, 2A, 3A and 11A is Rs. 7,68,900/-. We agree with the contention of the learned senior counsel for the Contractor that these claims deserve to be upheld. For the reasons already narrated, we respectfully disagree with the view of the Hon"ble Arbitrator in respect of the remaining claims. Consequently, the award is liable to be set aside in respect of various claims accepted by the Hon"ble Arbitrator including the interest portion thereof barring for claims covered by claim 1A, claim 2A, claim 3A and claim 11A at a total of Rs. 7,68,900/-. The Contractor is entitled to interest over this amount at 10.25% per annum, again for the reasons already recorded, from the date of the common judgment in O.S. Nos. 108 of 1996 and 110 of 1996 on the file of the Additional Senior Civil Judge, Narsaraopet, Guntur District, till realization.

67. The Revision and the Appeal are disposed of accordingly, however, without costs.