
(1999) 12 AP CK 0044
In the Andhra Pradesh High Court
Case No : AA No. 1152 of 1999

Union of India and another

APPELLANT

Vs

J. Bhaskara Rao

RESPONDENT

Date of Decision : 27-12-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 16, 20
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 141, 144, 151, 2(2)
Constitution of India, 1950 — Article 136

Citation : (2000) 2 ALD 328 : (2000) 4 ALT 494 : (2000) 3 CivCC 515

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : Mr. T. Rama Krishna Rao, for the Appellant; Mr. M.R.K. Choudary, for Mr. G. Vasantharayudu, for the Respondent

Judgement

1. This is an application filed by the respondents in AA No.43 of 1997 under Order IX Rule 13 of the CPC and Rule 8 of the High Court notification dated 24-07-1996 issued under the Arbitration and Conciliation Act, 1996, to set aside the ex parte order dated 06-08-1999.

2. One Mr. P.G. Choudhury, Assistant Engineer (construction), South Central Railway sworn to the affidavit stating that ill the arbitration application, the matter was taken up for hearing before the Hon''ble the Chief Justice and later on the matter was made over to another learned Judge, who is dealing with the original side matters. When the matter came up for hearing on 21-1-1999, the learned Judge passed an order directing the applicant for payment of the admitted amount on or before 1-2-1999, and accordingly the said amount was paid by way of cheque to the respondents. Later on, when the matter again came up for hearing the applicant in AA No.43 of 1997 had engaged an advocate from Madras to argue the case and the learned Standing Counsel of the applicant represented in the Court that a similar arbitration applicant No.14 of 1997, raising similar points of law, had been referred to a Division Bench and this case may also be adjourned till the disposal of AA No.14 of 1997 and accordingly the

matter was adjourned directing as and when the AA No.14 of 1997 is disposed of, post this case, inspite of the same, "it is not known how the AA No.43 of 1997 came up for hearing before the learned Judge Sri (Justice) R.M. Bapat." All the proceedings mentioned above had taken place after passing of the unsigned order passed by the High Court dated 17-12-1998. It appears that the learned Judge had not signed the order as the applicant's advocate appeared in Court on 17-12-1998 and informed the Court that the matter is required to be argued on the merits. Subsequently, the matter again came up before the learned Judge on 6-8-1999 under the caption "judgement". The applicant's advocate informed the Chief Engineer to depute their staff with records to the High Court on 6-8-1999. Accordingly Sri Marga Bandu, Assistant Engineer and Sri Ch. S. V. Prasad Rao, Office Superintendent came to the High Court on 6-8-1999 with records to the Court Room No.19. As there were number of Division Benches presided over by the learned Judge, the learned Standing Counsel instructed the officials to watch the situation and inform him as and when the learned Judge sits single and took up the matter. All the Division Bench matters were over by 03-00 p.m. and immediately Prasada Rao, Office Superintendent, informed the learned Standing Counsel that the arbitration application will be reaching in the Court room No.19 and even before the learned Standing Counsel reached the Court the application was called and the learned Judge signed the order, which was already made on 17-12-1998. Then the learned Standing Counsel represented to the learned Judge. Learned Judge informed him that he has already signed the order. Therefore it was advised the applicant to file a proper application. When the said representation was made, Mr. M.R.K. Choudary, learned Counsel for the respondent was also present. In view of the same, it is eminently a fit case to set aside the ex parte order passed by this Court on 6-8-1999, wherein the learned Judge signed the order dated 17-12-1998 on 6-8-1999 appointing an arbitrator. It is further averred that the learned Standing Counsel was ready to argue the case on 6-8-1999, but he could not address the arguments for the reasons mentioned above.

3. In opposition of the same, the respondent in the application filed a counter. As the applicant has not disclosed in the affidavit how he came to know about the facts as to what transpired on the relevant dates referred to in affidavit, was admittedly not present on all those dates. Therefore, the affidavit filed in support of the application cannot be taken note of. There is no verification. As such, the facts narrated in the affidavit, whether they are based on personal knowledge or based on records and without disclosing the source of information, applicant cannot attribute motives for passing the impugned order. The docket order does not support the averments made in the affidavit. After the Hon'ble the Chief Justice released the matter from his list, the matter is posted before another learned Judge. Thereafter the matter was listed on 26-10-1998 and thereafter it was adjourned on several times i.e., 4-11-1998: 12-11-1998: 16-11-1998 and also on 24-11-1998. As none appeared on 24-11-1999 the matter was directed to be listed on 1-12-1998, the learned Standing Counsel for the applicant was

absent, when the matter was called on 1-12-1998, the matter was directed to be posted "for orders" on 2-12-1998. Thereafter, the matter was adjourned to 9-12-1998, 14-12-1998, 17-12-1998. As none were present, the learned Judge passed orders on 17-12-1998, without signing the order, the matter was directed to be called on 24-12-1998. Thereafter, the matter was listed on 29-12-1998 and on that day it was directed to be listed as a first case on 18-1-1999. After the orders were passed to pay the admitted amount, the matter was under went several adjournments. When the matter was taken on 6-8-1999, the order, which was dictated on 17-12-1998 was signed after passing an order on 6-8-1999; and a retired learned Judge of this Court was also appointed as an arbitrator to decide the disputes between the parties, that pursuant to the notice of the arbitrator, the parties appeared before the Arbitrary Tribunal on 4-9-1999. At that time, learned Standing Counsel for the railways took time and the matter was adjourned. Meanwhile, the present application is filed on 31-8-1999. It is also denied about the engagement of an advocate from Madras. The deponent has also not stated how a representation was made to adjourn the matter and the pendency of the AA No. 14 of 1997. It is also denied the understanding arrived at between both the parties as alleged in Para 5 of the affidavit filed in support of the petition: and the presence of Mr. Marga Bandhu and Mr. Prasada Rao, who are alleged to have been present in the Court, have not actually filed the affidavit setting out these facts. It is also a fact that after signing the order, learned Standing Counsel appearing for the railways appeared and made a request, but it is denied that the Hon"ble Court advised the applicant to file, an application for setting aside the dismissal order and Mr. M.R.K. Choudary, learned Counsel for the respondent was present when the order was signed. It is further contended that the application filed under Order IX, Rule 13 CPC is not maintainable. The order of appointment of an arbitrator passed in Arbitration Application No.43 of 1997 is not a judicial order and the CPC has no application to the order. Therefore, respondent prays for dismissal of the application.

4. An additional affidavit was filed on behalf of the applicant by Mr. N.V. Margabandhu dated 8-9-1999, in which, he reiterated the very same facts and stated that in view of the conflict of views, the arbitration Application No.14 of 1997 was referred to a Division Bench, whether the excepted matters can be referred to the arbitration or not. In the present case, the claim item Nos.2, 3, 4 and 9. Hence the contention of the railways is that those claim items cannot be referred to arbitrator. In view of the same, learned Standing Counsel represented before the Hon"ble Sri Justice Ramesh Madhav Bapat in the presence of Madras Advocate and also in the presence of Mr. G. Vasantha Rayudu to post the matter after AA No.14 of 1997 is disposed of. Therefore, the matter was adjourned sine die: thereafter, the advocate who is on record to the application in AANo.43 of 1997 is enquiring with their advocate about the result of AA No.14 of 1997. Once again, the case appeared in the list on 3-6-1999 and 26-6-1999 and the matter was subsequently appeared for hearing on 30-7-1999 under the caption of "orders" before the 19th Court and their Counsel informed the Chief Engineer to

direct Assistant Engineer and Office Superintendent to conic along with records to the High Court so as to enable him for arguing the case. On 30-7-1999 the case appeared and they are watching the position of the case both in the forenoon and afternoon. As the learned Judge was sitting in the Division Bench, the case was not taken up for hearing. Again, the matter was appeared under the caption of judgement on 6-8-1999 and the learned Standing Counsel contacted the Chief Engineer to depute the Assistant Engineer and the Office Superintendent to come tuff the Court. Accordingly himself and Sri Prasad Rao came to the 19th Court with records to meet their Standing Counsel and they were instructed to sit in the Court hall No.19 and inform the Standing Counsel when the Bench work will be over and whenever the learned Judge is sitting single to hear the matters. Except that he has not stated anything in the affidavit. He asked the Prasad Rao to inform the advocate and what transpired thereof as stated by Mr. P.G. Choudary through the affidavit dated 30-8-1999.

5. Subsequently, a reply affidavit was filed on behalf of the applicant to the counter filed by the respondent in the application with an application u/s 151 of the CPC to receive the reply affidavit signed by D. Yerranna. He also narrated denying the fact that the applicant in AA No. 43 of 1997 never engaged a Madras advocate and stated that the Madras advocate along with Mr. G. Vasaniha Rayudu appeared in February, 1999, and in the chambers of Hon"ble Mr. Justice Ramesh Madhav Bapata, the learned Standing Counsel made a representation that similar questions of law in AA No.14 of 1997 was referred to the Division Bench of the Hon"ble the Chief Justice. He also stated that he is incharge of the arbitration matters and when N.V. Margabhandu, Mr. P.S. Chottdhari was looking after his duties and was authorised by the applicant to sign the affidavit on behalf of the applicant. Curiously, he has not stated anything with regard to the facts that have taken place and the source of information and it is not his case that he was present in the Court on the relevant date. He further alleged in Para 7 that pursuant to the directions of the Hon"ble Judge the application was not appeared after 15-2-1999 and there was an omission to not down the proceedings dated 15-2-1999 on the docket sheet, which resulted in wrong posting of the case on 8-6-199, 28-6-1999; 30-7-1999 and 6-8-1999. It was due to omission of the Court Officer in making note of the proceedings on the docket sheet of the Court file on 15-2-1999 resulted in wrong posting and passing of an order on 6-8-1999 resulted in the absence of learned Standing Counsel for Railways at that time, when the said case was reached under the caption of judgement. He further stated that Mr. Margabandhu and Mr. Prasad Rao were present in the Court and the advocate expected that the case will be taken up around 3-00 p.m. and immediately Prasad Rao informed the advocate about reaching of the application, but even before the advocate reached the Court room, it appears the learned single Judge signed the order, which was passed on 17-12-1998. When the advocate represented the learned Judge informed that he has already signed the order and, therefore, the applicant may file proper application. The omission of the Court Officer in not noting down the proceedings

on 15-2-1999 resulted in posting the case for judgement on 6-8-1999 which resulted in ex parte order and the same is liable to be set aside in view of the judgment of the Supreme Court reported in Rais Ahmad v. State of Uttar Pradesh and others 1999 (7) SC 281. As the Court docket sheet itself clearly shows that the matter did not appear after 15-2-1999 till 6-8-1999, which confirm the fact that the matter was adjourned sine die on 15-2-1999 and the statement of the learned Counsel for the railways made on 15-2-1999 shall be taken note of in view of the decision reported in Tallapakam Kuppu Raghavan Vs. State of A.P. and Others, . He also blames the advocate appearing for the applicant in AA No.43 of 1997 that he should have been told the learned senior Counsel about the wrong posting on 6-8-1999 and hence prayed for allowing the application.

6. Mr. Rama Krishna Rao, learned Standing Counsel for applicant strenuously contended that he being a learned senior Counsel, his statement should be given due credit for passing the order and he need not file any affidavit in support of the application. Whatever he states, should be accepted by the Court. In support of his contention, he relies upon the judgements of this Court in K. Narsingh Rao v. Bala Madhava Rao 1971 (2) ALT 17 (DB); V. Ramana Reddy Vs. Union of India (UOI) and Another, ; and also the Supreme Court in Rais Ahmad v. State of Uttar Pradesh and others 1999 (7) SC 279 and Asgher Hussain Vs. Vicarunnisa Begum and Another, (V 48 C 37).

7. Learned senior Counsel for the respondent Mr. M.R.K. Choudary, on the other hand, contended that the persons, who were not present in the Court filed an affidavit originally and without any knowledge what transpired on the various dates in the matter. The person, who was present in the Court subsequently filed an affidavit and reply affidavit was filed by some other person and whose source of information was also not mentioned. Therefore, the first two affidavits filed by Mr. P.G. Choudhary and Mr. D. Yerranna cannot be taken note of for deciding the issue. He further submits that unless it is recorded in the docket sheet what transpired in the Court cannot be decided on the basis of affidavits and the same cannot be permitted to be challenged by a party unless both the parties agreed that the statement is correct or the Court itself admits that is earlier order is erroneous. In the present case the docket sheet does not disclose what transpired in the Court as alleged in the affidavit and hence the same cannot be relied on for deciding the issue. Therefore, he prays for dismissed of the above application. He further contended that the appointment of an arbitrator u/s 11(6) of the act is only an administrative act and it is not a judgement and the Court which appoints the arbitrator is also not a Court and hence the provisions of Order IX, Rule 13 CPC has no application to the facts of this case.

8. In view of the rival contentions the point for consideration is (1) Whether the petitioner has made out any case for setting aside the order passed in AA No.43 of 1997;

(2) Whether Order IX, Rule 13 CPC applies to the facts of the case; and

(3) If the order is not set aside any prejudice will cause to the applicant.

9. Admittedly, as seen from the three affidavits filed by the department for setting aside the ex parte order neither P.G. Chowdary nor Mr. D. Yerranna were present in the Court at any time to speak what transpired in the Court on various dates when the case was taken up for hearing and it is also not stated by them and verified by them the basis of information and knowledge about the facts which took place on the relevant dates. Therefore, their affidavits cannot be given any credence in preference to the proceedings recorded by the Court. Then the person who actually present in the Court is only Mr. N.V. Margabandhu, who filed an additional affidavit dated 8-9-1999. But he has not stated anything about the facts except stating that himself and Mr. Prasad Rao were sitting in the Court hall No. 19 to inform their learned Standing Counsel when the Bench will be over and the learned Judge sits single to hear the matter and it is nowhere stated that after the Bench work is over, he was sitting in the Court hall and Mr. Prasad Rao, Office Superintendent, went and informed the advocate about the application likely to be taken up for hearing by the Court passing the order by the Court and signing the order dated 17-12-1998. He has also not stated anything about the mention made by the learned Standing Counsel before the Court and the Court informing to file an application. Particularly, in the counter affidavit, it is denied about the granting of time to file the application: it is categorically stated in the counter that after signing the order when the learned Counsel Mr. Ramakrishna Rao made a request, he was informed that the order was already signed and nothing could be done. As seen from the docket order also, it is not mentioned anything about the representation made on 6-8-1999 nor about signing the order. But curiously Mr. P.G. Choudary, who filed an affidavit stated that it is not known how the AA No.43 of 1997 came up for hearing before the learned Judge which is in my view is a reckless, irresponsible statement made by the petitioner, who has no knowledge about the proceedings in the case. In fact in the additional affidavit filed by Mr. Margabandhu, it is admitted that their case appeared in the list on 8-6-1999 and 26-6-1999 and subsequently appeared for hearing on 30-7-1999 under the caption for "for order" before 19th Court. Nor it is his case that he has verified the docket order and made such statements. When the application was filed for setting aside the order and taken up for hearing the matter undergone four adjournments from 6-9-1999 to 14-10-1999 and on the said date the learned single Judge declined to hear the matter and directed the Registry to post the matter before some other learned Judge after obtaining the orders from the Hon"ble the Chief Justice. This itself shows the recklessness and unsavoury remarks, which were made in the affidavit by Mr. P.G. Choudary and are deplorable. I feel that the deponent in the application has also not taken proper care in using the above words in the affidavit filed by Mr. P.G. Chowdary and the same has to be condemned and cannot be encouraged.

10. In the affidavit filed in support of the application no verification is made stating about the source of information by Mr. P.G. Chowdary. The provisions of the CPC are made applicable to the procedure relating to the interlocutory

applications as per the scheme for appointment of arbitrators issued in exercise of powers under sub-section (10) of Section 11 of the Arbitration and Conciliation Act, 1996 by the Chief Justice of Andhra Pradesh High Court. The explanation to Section 141 CPC provides the procedure provided in the Court in regard to the suits shall be followed for proceedings under Order IX of the CPC also. In view of the same I have no hesitation to hold that in the absence of any verification in the affidavit filed by the petitioner in support of the application the averments made in the affidavit cannot be given credence over the proceedings recorded by the Court.

11. With regard to the proposition laid down by a Division Bench of this Court in *K. Narasingh Rao v. V. Bala Madhava Rao* (supra), it is the privilege, resulting from the credit due to the honour and prestige of the profession of advocates to make on occasions, statements from their place at the bar without being sworn as in the case of witness. There is no quarrel with regard to the law laid down in regard to the above proposition. The Supreme Court in *Rais Ahmad v. State of Uttar Pradesh and others* (supra), held that there was a procedure established in Allahabad High Court where the advocates can move the Chief Justice not to list their cases because of illness and in the above case inspite of an order passed by the Chief Justice not to post his matters, a case was listed and when the illness slip was produced, the same was rejected. In view of the same the ex parte order passed was set aside by the Supreme Court, The said case is not applicable in the case on hand.

12. Similarly, this Court in *Asgher Hussain Vs. Vicarunnisa Begum and Another*, , held that the absence of the Counsel due to his engagement in other Court is sufficient ground for setting aside the ex parte order has no application in view of the amendment brought to Order XVII of the CPC by Amending Act, 1976.

13. The next question that arises for consideration is whether the order appointing an arbitrator in Arbitration Application No.43 of 1997 is a decree within the meaning of Section 2(2) of the CPC to attract the provisions of Order IX, Rule 13 CPC. Decree as per Section 2(2) CPC means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 but shall not include (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.

14. Order accepting application u/s 20 of the Arbitration Act is not a decree as held by the Delhi High Court in *Maltextmalsters Private Ltd. Vs. Allied Engineers*, . Similarly, the Apex Court in *Diwan Bros. Vs. Central Bank of India, Bombay and Others*, , held that an adjudication under the displaced persons under Debts Adjustment Act is not a decree. Recently, the Supreme Court in *Ador Samia Private Limited v. Peekay Holdings Limited* 1999 (7) SC 309, considered the order passed u/s 11(6) of the Arbitration and Conciliation Act, 1996 is a

judgement, decree, determination or order in any case or matter passed or made by any Court or Tribunal within the meaning of Article 136. After referring to the decision in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., , the Apex Court held that Section 11 does not contemplate passing of a judicial order and also observed that the learned Chief Justice or his designate u/s 11(6) acts in administrative capacity, hence the appeal under Article 136 was held to be not maintainable. In view of the same, I am of the view that the present application filed under Order IX, Rule 13 CPC to set aside the ex parte decree is not applicable to the proceedings u/s 11(6) of the Act, which is applicable only to setting aside a decree which is passed ex parte as none of the requirements of a decree are found in the decision given in appointing an arbitrator. This Court has not adjudicated anything between the parties finally and left all the issues to the arbitral Tribunal appointed under the Act.

15. Even assuming that Order IX, Rule 13 applies it has to be seen whether by appointment of arbitrator any prejudice will be caused to the applicant. The applicant can raise all defence, including the jurisdiction of the Arbitral Tribunal u/s 16 of the Act and the grounds mentioned in the present application with regard to the maintainability of claims, which comes under excepted matters. The Arbitral Tribunal can rule its own jurisdiction including the rule of any objection with respect to the existence and validity of the arbitration agreement whether the claims are subsisting or not or the same were falling under excepted matters etc. The contention of the learned senior Counsel Mr. Ramakrishna Rao that he has got arguable case that many of the claims which are now claimed are outside the purview of the arbitration agreement can also be adjudicated by the Arbitral Tribunal, if an objection is raised whether particular claims are excepted matters or not is again a dispute which can be arbitrable by the arbitrator.

16. In view of the same, if the appointment of arbitrator is allowed to continue and the arbitrator is proceeded with the adjudication of claims no prejudice will be caused to the applicant. Therefore, the application filed by the petitioner is devoid of consideration and the same is liable to be dismissed with costs.

17. Accordingly the application is dismissed with costs quantified at Rs.2,500-00 (Rupees two thousand five hundred only). The costs shall be paid by Sri P.G. Choudhary personally and not by the Railways to the credit of Secretary A.P. State Legal Services Authority, Hyderabad within four (4) weeks from today.

18. This application is set down for being mentioned by Sri T. Ramakrishna Rao, Standing Counsel for Railways on behalf of applicant and upon perusing the order dated 29-12-1999 of this Court and upon hearing the arguments of Mr. T. Ramakrishna Rao, SC for Railways for the applicant and of Mr. Vasantharayadu, advocate for the respondent the Court made the following order:

ORDER:

19. The matter is posted for being mentioned at the instance of the learned Standing Counsel for Railway applicant Sri T. Ramakrishna Rao by in advertance

it is mentioned in the affidavit filed by Mr. P.G. Choudary that certain facts which are not neither deliberate nor wanton. In view of the request to forgive Mr. Choudary and from payment of costs, the officer should be hereafter very careful in filing affidavits of such nature and the costs i.e., Rs.2,500/- imposed by this Court is set aside.