

State of A.P. and Another Vs. Subba Reddy and Another

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Court : Andhra Pradesh

Decided On : Nov-05-1994

Reported in : 1999(1)ALD170; 1999(1)ALT122

Judge : P. Ramakrishnam Raju and ;C.V.N. Sastri, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 14, 17 and 30; Code of Civil Procedure (CPC), 1860 - Sections 34; [Interest Act, 1978](#) - Sections 29; [Indian Contract Act, 1872](#) - Sections 73

Appeal No. : AAO No. 1078 of 1994 and CRP 2727 of 1994

Appellant : State of A.P. and Another

Respondent : Subba Reddy and Another

Advocate for Def. : M/s. A. Gopal Reddy and ;A. Narsimha Reddy, Adv.

Advocate for Pet/Ap. : Government Pleader for Arbitration

Judgement :

ORDER

C.V.N. Sastri, J.

1. This Civil Miscellaneous Appeal and the Civil Revision Petition filed by the State of Andhra Pradesh and its officials of the Irrigation Department arise out of an

arbitration matter. The CMA is against OP 132 of 1992 on the file of the Additional Subordinate Judge, Ongole under Section 30 of the Arbitration Act to set aside the award dated 17-9-1992 passed by the Arbitrator. The CRP is against OS No.4 of 1993 on the file of the same Court filed by the contractor/respondent under Sections 14 and 17 of the Arbitration Act to make the award dated 17-9-1992 rule of the Court. By a common judgment dated 17-1-1994, the lower Court dismissed OP No.132 of 1992 and decreed OS No.4 of 1993 making the award rule of the Court for a sum of Rs.2,73,025/-with subsequent interest at 6% per annum on Rs.1,06,390/- from the date of decree till realisation and for costs of Rs.7,790/-.

2. The State entered into an agreement with the respondent on 1-5-1983 for the construction of a vented cause-way on Inagaleru Drain. The value of the work was estimated at Rs.1,07,057/-. The work site was handed over to the respondent on 8-5-1983. The time stipulated for completion of the work was six months from the date of handing over of the site i.e., 7-11-1983. The respondent executed the work up to the end of May, 1983 by which time only 14% of the work was executed. According to the respondent, the work could not be completed within the stipulated time solely on account of the delays and defaults committed by the Department and he was not at all at fault. On 20-11-1983 the respondent notified the Department that since the agreement period was over and as there is steep increase in the prices, rates quoted in the agreement are not workable and he should be allowed the current Standard Schedule Rates (SSR) for executing the work further. If the Department is not willing to allow the current Standard Schedule Rates, the contract should be closed without penalty. The Department did not agree for the same and instead it invited fresh tenders. After some correspondence, the respondent moved the Court for appointment of a sole Arbitrator invoking the arbitration clause in the agreement. By an order of the Court dated 9-10-1991, a retired Chief Engineer was appointed as the sole Arbitrator to decide the claims and disputes raised by the respondent. The Arbitrator finally passed the award dated 17-9-1992.

3. The respondent made several claims before the Arbitrator. The details of the claims and the award made by the Arbitrator thereon are as follows:

ClaimsAward

I.(a)Claim No.1ARefund of EMD and withheld amountsAllowed EMDRs. 1,950/-
Withheld amountsRs. 1,230/- FDDRs. 1,850/-

Rs. 5,030/-

(b)Claim No.1BCompensation on the above amount from the datewhich it is due to
date of reference @ 30% p.a.

Allowed awarded 18% p.a. from 1-12-83II.(a)Claim No.2ATowards idle overhead
charges @ Rs.12,000/-Allowed awarded Rs. 12,000/- (b)Claim
No.2BCompensation the above claim @ 30% p.a.Allowed awarded 18% p.a from
1-12-89 to28-1-92 on Rs.12,000/-

III.(a)Claim No.3ATowards loss of advance Rs. 72,000/-Allowed awarded
Rs.72,000/- (b)Claim No.3BCompensation on Rs.72,000/- @ 30% p.a.Allowed
awarded @ 18% p.a. on Rs.72,000/-from 1-12-83 to28-1-92

IV.(a)Claim No.4ATowards lossof profit on work prevented from execution
estimated at 15% on the value of Rs. 5,32,000/- (Revised estimates) valued at Rs.
80,000/-

Party allowed awarded Rs. 16,360/- (b)Claim No.4BCompensation on the above
amount @ 30% p.aAllowed, Awarded 18% p.a. on Rs. 16,360/-from 1-12-83 to28-
1-92

V.(a)Claim No.5ATowards compensation for amounts covered underClaim 1A to
4A from die dateof reference to date of award @ 30% p.a.

Awarded pendente lite interest on Claim No.2A, 3A and 4A @ 18% p.a. fromthe
date of entering into reference i.e., 28-1-92till the date-of award dt. 17-9-92

VI. Claim No.6AInterest on award Amount from the date of award to the date of
payment or decree @ 24% p.a.

Allowed. Awarded @ 18% p.a. on Claim No.2A,3A and 4A from the date of award to the date of decree.

4. The learned Government Pleader, appearing for the State has contended that the respondent is not entitled to any of the reliefs claimed by him, that the award of the Arbitrator is illegal and without jurisdiction as it is contrary to the specific terms and conditions of the agreement which expressly prohibit the grant of any compensation or interest, that the Arbitrator exceeded his powers, that most of the claims made by the respondent are imaginary and baseless and that the award is vitiated by error apparent on the face of the record.

5. On the other hand, the learned Counsel for the respondent has contended that the Arbitrator, on a careful consideration of all the evidence on record, rightly came to the conclusion that the Contractor was not at all responsible for the delay in execution of the work, that it is the Department which committed breach of the contract and as such the Contractor is entitled to be compensated for all the losses suffered by him and also for interest. He further contended that the Court cannot substitute its opinion for that of the Arbitrator, that the award made by the Arbitrator is perfectly valid and just and there are no grounds for interference.

6. The learned Counsel on both sides have cited several decisions in support of their contentions.

7. The scope and ambit of the power of interference by the Court with an award made by the arbitrator have been explained in numerous decisions of the Supreme Court and the High Courts from time to time. It is the settled position that the Court, while exercising its power under Section 30 of the [Arbitration Act, 1940](#), cannot act like a Court of appeal. It cannot re-appreciate all the materials on record and substitute its opinion for that of the arbitrator for coming to a conclusion whether, in the facts and circumstances of a particular case, the award in question could have been made. The award can be set aside if it is vitiated by error apparent on the face of the award or the arbitrator exceeded his jurisdiction. The error must be one of law and not of fact. The arbitrator derives his authority from the agreement and as such he must act within the four corners of the agreement and he must also act according to law.

8. In the instant case, the Arbitrator, on a consideration of the entire material on record, came to the conclusion that the contractor is not at all responsible for non-completion of the work within the agreed period, that the Department had kept the contract in suspension for years together without taking any decision on the change of design of the cause-way and that due to the glaring breach of the contract on the part of the Department, the contractor is entitled for all consequent damages. The lower Court also has accepted the said findings.

9. It is now to be seen whether the award made by the arbitrator on the several claims made by the contractor is liable to be set aside on any of the grounds mentioned above.

10. The main contention urged by the learned Government Pleader is that in view of Clause 16.1.1 of the agreement the contractor is not entitled for any compensation on the ground of delay in execution of the work and the award of compensation under the various Heads by the arbitrator is illegal and without jurisdiction. He also contended that the award of interest on the various amounts claimed is also illegal in view of Clause 7.5 of the agreement. It is useful to extract the said clauses of the agreement in this context.

'16.1.1

If, however, the failure of the contractor to complete the work as per the stipulated schedule referred to above arises from delays on the part of the Government of Andhra Pradesh in supplying the materials or sites which it has undertaken under the contract to supply, an extension of time to enable him to complete the work shall be given by Government of Andhra Pradesh. No claim for compensation shall lie against the Government for such delays.

7.5

The contractor shall not be entitled to interest upon any guarantees fund, or payment in arrears nor upon any balance on final settlement of the contract be found due to him.'

11. We shall now consider the claims one by one.

Claim No.I related to the refund of EMD, withheld amounts and FSD totalling Rs.5,030/- in all. In view of the categorical findings recorded by the Arbitrator that the contractor was not responsible for the delay and he was not at fault, the respondent is clearly entitled for the refund of the said amounts and there cannot be any serious dispute about the same and the Arbitrator was fully justified in allowing the said claim. However, under Claim No.I B, the Arbitrator awarded interest on the said amount of Rs.5,030/- at the rate of 18% per annum from 1-12-1983 to the date of payment. It has to be seen whether the award of interest can be justified in the face of Clause 7.5 of the agreement.

12. In Secretary, Irrigation Deptt. v. G.C. Roy, : [1991]3SCR417 , a Constitution Bench of the Supreme Court observed that, 'A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.' The said observations were, however, made while dealing with a case where the agreement was silent as to the award of interest. In Durgaram Prasad v. Govt. of A.P., : (1995)1SCC418 , the Supreme Court, while dealing with a case in which the agreement contained a clause similar to Clause 7.5 in our case, held that the contractor was not entitled to interest from the date of withholding of the amounts till the date of award nor has the arbitrator jurisdiction to award interest for that period. It is also held therein that the ratio of the decision in G.C. Roy's case (supra) cannot be applied to such a case, hi Board of Trustees, Port of Calcutta v. Engineers-De-Space Age, : AIR 1996 SC2853 , the Supreme Court was concerned with a clause in the contract which prohibited the commissioner from paying interest on the amounts due to the contractor. The Supreme Court held that the said clause must be construed strictly, that the prohibition applied to the commissioners only and the clause did not fetter the power of the arbitrator to award interest pendente lite. The Supreme Court further held that if there is a dispute with regard to the effect of this clause, that is a matter falling within the jurisdiction of the arbitrator to decide. In M. Ganga Reddy v. State of AP., 1996 (3)

ALD 434 = 1996 (3) ALT 434, a Division Bench of this Court, after considering all the above decisions of the Supreme Court held that Clause 69 of the MODS (which is similar to Clause 7.5 in our case) is not in the nature of a blanket ban or an absolute ban on the entitlement of interest for the amounts due to be paid to the contractor and it depends on the nature and character of the amount claimed. The Division Bench also noted in the said case that by the time the award was passed, the pronouncement of the Supreme Court in Durgaram Prasad's case (supra) was not there and in such a situation if the arbitrator had interpreted Clause 69 and took the view that Clause 69 cannot be construed as a total prohibition but it operates for a limited period of six months from the date of completion of the work, the award would not be open to question either on the ground of error of law apparent on the face of it or on the ground of want of jurisdiction. The Division Bench ultimately upheld the award of interest on the earnest money and security deposit with the observation that even if we go by the dicta laid down in Durgaram Prasad's case (supra), if there is no dispute with regard to the liability of the Government to pay the amounts of the nature specified in second part of Clause 69, the bar against payment of interest will not apply. In Orissa v. B.N. Agarwalla, 1997 (1) Scale 599, a Division Bench consisting of three Judges of the Supreme Court, while holding that the arbitrator has the jurisdiction to award pre-reference interest in cases which arose after the [Interest Act, 1978](#) has become applicable and that the arbitrator has also the power to award interest pendente lite, however, observed that there can be no doubt that if the terms of the contract expressly stipulate that no interest would be payable, then, notwithstanding the provisions of the Interest Act, 1978, an arbitrator would not get the jurisdiction of right to award interest. In Ramnath International Construction (P) Ltd. v. State of UP., 1997 (9) Supreme 233, it is held that the arbitrator is competent to award interest pendente lite where the terms of the agreement did not exclude that jurisdiction of the arbitrator.

13. In the instant case, the date of reference to the Arbitrator is 28-1-1992 and the award was passed on 17-9-1992. The Arbitrator, placing reliance on the judgment of the Supreme Court in Hyderabad Municipal Corporation v. V.M. Krishnaswamy, : AIR 1985 SC607 , held that Clause 7.5 of the Agreement is not a bar to grant interest to the contractor on the amounts due to him. Accordingly he awarded

interest on the HMD and other withheld amounts at the rate of 18% per annum from 1-12-1983 till date of payment. The lower Court, while passing the decree in terms of the award, however, granted subsequent interest at 6% per annum only from the date of decree till realisation. This is perfectly in order in view of Section 29 of the Act which confers a discretion on the Court in the matter of award of interest from the date of decree to the date of payment. On a conspectus of all the decisions referred to above, we are satisfied that the award in this behalf is not open to challenge. Accordingly we uphold the award and the decree of the lower Court in respect of Claim Nos.IA and IB.

14. Claim Nos.2, 3 and 4 can be dealt with together as they all relate to the compensation for the loss allegedly suffered by the contractor on account of the breach of the contract by the State. Under Claim No.2A, the contractor claimed a sum of Rs. 12,000/- towards idle overhead charges on the pica that no work could be carried out after May, 1983 for no fault of him resulting in loss of wages etc., to the tune of Rs.12,000/-. Similarly under Claim No.3A, he claimed a sum of Rs.72,000/- towards loss of advance paid for supply of metal, stone, labour, machinery etc., which had become irrecoverable. Under Claim No.4A he claimed a sum of Rs.80,000/- towards loss of profit on the balance work which he was prevented from executing. He estimated the value of the said work at Rs.5,32,000/- on the basis of revised estimates as against the original value of the total work which was estimated at Rs. 1,07,057/- only. The Arbitrator allowed Claim Nos.2A and 3A in toto but allowed Claim No.4A partly only to the extent of Rs. 16,360/-. The Arbitrator accepted the case of the contractor that he was virtually prevented from execution of the balance work due to the default of the Department which kept silent despite persistent correspondence from the contractor obviously because they had intended to revise the design of the causeway. The Arbitrator held that there was a breach of the contract on the part of the Department for which it was liable to pay damages to the contractor. The Arbitrator, however, held that the claim has been boosted up by the contractor by calculating the value of the work as per his own revised estimates which cannot be accepted and that the value of the work as per the contract agreement could only form the basis for estimating the damages. Accordingly the Arbitrator held that the contractor was entitled to claim loss of profit at 15% on the amount of work

actually prevented as per the contract amount. On that basis, the Arbitrator awarded a sum of Rs. 16,3607- only towards loss of profit under Claim No.4A. The learned Government Pleader, on the strength of the judgment of the Supreme Court in Ch. Ramalingareddy v. Supdt.Engineer, 1994 (5) Scale 12, has contended that the award of compensation under the above heads is illegal and without jurisdiction as it is expressly prohibited by Clause 16.1.1 of the agreement. The said Clause, no doubt, provides that no claim for compensation shall lie against the Government for delays on the part of the Government in supplying materials or sites which it has undertaken under the contract to supply and that in the event of such delay's, an extension of time to enable the contractor to complete the work shall be given by the Government of Andhra Pradesh. But here the claim is not for compensation by way of payment of extra rates or escalation charges on account of the delays in execution of the work. The claim is for damages for breach of contract and preventing the contractor from executing the balance work. The said clause is, therefore, strictly speaking, not applicable. The judgment of the Supreme Court in Ramalingareddy's case (supra) does not, therefore, render any assistance to the State. In A.T. Brij Paul Singh and Ors. v. State of Gujarat, : AIR 1984 SC1703 , it is held that where in a works contract, the party entrusting the work commits breach of contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. It was also held that the loss of profit calculated at 15% of the value of the balance work was a reasonable measure of damages. In Supdt Engineer v. P. Radhakrishna Murthy, 1996 (3) ALD 1085 = 1996 (3) ALT 1137, a Division Bench of this Court, following the said judgment of the Supreme Court, held that compensation in the form of loss of profit could be legitimately awarded if, as a result of breach of contractual obligation, the other party is disabled from carrying out the work fully and the damages on account of loss of profit cannot be considered to be too remote. We do not, therefore, find any illegality in the award of the sum of Rs. 16,360/- towards loss of profit under Claim No.4A. We are, however, satisfied that the contractor is not legally entitled for the amounts claimed under Claim Nos.2A and 3A which are practically based on the same cause of action as Claim No.4A. This, in our view, amounts to granting damages thrice over against the same claim though shown as three different claims.

Duplication of the claim for compensation under Section 73 of the Contract Act was disapproved by the Supreme Court in *Union of India v. Jain Associates*, (1994) 2 Scale 604. We accordingly set aside the award in respect of Claim Nos.2A and 3A.

15. Under Claim Nos.2B, 3B and 4B, the Arbitrator has allowed further compensation by way of interest at 18% per annum on the amounts awarded under Claim Nos.2A, 3A and 4A respectively from 1-12-1983 to 28-1-1992. As we have set aside the award in respect of Claim Nos.2A and 3A, the question of granting any further interest on the said claims does not arise. So the award made under Claim Nos.2B and 3B automatically goes. As regards the grant of further interest on the amount awarded under Claim No.4-A is concerned, we see much force in the submission of the learned Government Pleader that award of damages on damages or award of interest by way of damages is not permissible. In *Supdt. Engineer v. P. Radhahishna Murthy* (supra), the Division Bench held that the award of interest by way of damages is not recognised in law is a proposition well established by series of judgments which are referred to therein. Following the said judgment, we set aside the award in respect of Claim No.4B as well. It follows from the above reasoning that the contractor will be entitled for interest on the sum of Rs. 16,360/-awarded under Claim No.4A only from the date of the award but not earlier.

16. Claim No.5 relates to the grant of pendente lite interest on Claim Nos.2A, 3A and 4A at 18% per annum from the date of entering into reference i.e., 28-1-1992 till the date of award i.e., 17-9-1992. In view of our findings on Claim Nos.2A, 3A and 4A, the contractor is not entitled to any pendente lite interest on the said claims. The award under Claim No.5A is accordingly set aside.

17. Claim No.6A relates to the award of interest at 18% per annum on Claim Nos.2A, 3A and 4A from the date of the award to the date of decree. In view of our findings on the said Claims, it follows that the contractor will be entitled for interest at 18% per annum only on the sum of Rs. 16,360/- awarded under Claim No.4A from the date of the award to the date of decree.

18. In the result, the CMA and the CRP are partly allowed and the award and decree shall stand modified directing the appellants/petitioners to pay to the respondent (a) the sum of Rs.5030/- with interest thereon at 18% per annum from 1-12-1983 till the date of decree i.e., 17-1-1994 and thereafter at 6% per annum till the date of payment and (b) the sum of Rs. 16,360/-with interest thereon at 18% per annum from the date of the award i.e., 17-9-1992 till the date of decree i.e., 17-1-1994 and thereafter at the rate of 6% per annum till the date of payment. There will be no order as to costs.

19. Before parting with this matter, we would like to observe that if only the departmental authorities had acceded to the reasonable request of the contractor to close the contract without penalty and refunded the EMD and other withheld amounts which amounted to no more than Rs.5,0307-, all this litigation could have been avoided. Their penny-wise and pound-foolish attitude has only resulted in considerable loss to the public exchequer and waste of valuable public time and energy.

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