

B. Subba Reddy Vs. Superintending Engineer and anr.

B. Subba Reddy Vs. Superintending Engineer and anr.

SooperKanoon Citation : sooperkanoon.com/435493

Court : Andhra Pradesh

Decided On : Mar-16-2007

Reported in : 2007(4)ALD678; 2007(5)ALT409; 2007(4)ARBLR209(AP)

Judge : P.S. Narayana, J.

Acts : [Arbitration Act, 1940](#) - Sections 39 and 41; [Land Acquisition Act, 1894](#) - Sections 26, 53 and 54; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(2), 47, 132(2), 135(3), 135A, 144, 144(1), 144(2) and 151 - Order 21 - Order 41, Rules 1 and 22; Code of Civil Procedure (CPC) , 1882 - Sections 583

Appeal No. : CMA Nos. 1112, 1113, 1131 and 1132 of 2005

Appellant : B. Subba Reddy

Respondent : Superintending Engineer and anr.

Advocate for Def. : Rekha Prasad, Adv.

Advocate for Pet/Ap. : P. Veera Reddy, Adv.

Disposition : Appeal dismissed

Judgement :

P.S. Narayana, J.

1. Heard Sri P. Veera Reddy, the learned Counsel representing the appellant in these civil miscellaneous appeals and Ms. Rekha Prasad, the learned Government Pleader for Arbitration representing the respondents in all these civil miscellaneous appeals.

2. Since common questions of fact and common questions of Law are involved in all these matters, these civil miscellaneous appeals are being disposed of by a common judgment.

3. CMA No. 1112/2005 is filed as against an order made in I.A. No. 1339/2001 in O.S. No. 55/86 on the file of Principal Senior Civil Judge, Ongole. Likewise, CMA Nos. 1113, 1131 and 1132 of 2005 are filed as against the orders made respectively in I.A. Nos. 1338/2001 in O.S. No. 53/86, I.A. No. 1340/2001 in O.S. No. 57/86 and I.A. No. 1341/2001 in O.S. No. 59/86 on the file of Senior Civil Judge, Ongole.

4. The respondents in these civil miscellaneous appeals moved the applications referred to above under Section 144 of the Code of Civil Procedure, hereinafter in short referred to as 'Code' for the purpose of convenience, praying for restitution. The learned Judge in the light of the respective contentions advanced by the parties, allowed the applications in part and ordered restitution of the amounts specified in the respective orders. Aggrieved by the said orders, the present civil miscellaneous appeals are preferred.

5. Sri P. Veera Reddy, the learned Counsel representing the appellant in all these appeals had taken this Court through the respective stands taken by the parties and also pointed out that in the facts and circumstances, these applications for restitution under Section 144 of the Code are not maintainable and the remedy if any available to the Government, may be, to file regular suits. The learned Counsel had drawn the attention of this Court to *Superintending Engineer v. B. Subba Reddy* : [1999]2SCR880 , in this regard. The learned Counsel would contend that this is a matter where the parties fought the litigation which had been taken upto the apex Court. The learned Counsel also specifically pointed out to the observations made by the apex Court in the decision referred in *Superintending Engineer v. B. Subba Reddy* (supra) at paras 24, 25 and 26 in particular. While

further elaborating his submissions, the Counsel would maintain that the Government having raised a ground that under Order XLI Rule 22 of the Code, either Cross-objections or Cross Appeal cannot be maintained under the Arbitration Act 1940, hereinafter in short referred to as 'Act' for the purpose of convenience, the Government now cannot be permitted to contend that Section 144 of the Code can be made applicable. The Counsel would maintain that this would amount to the Government taking double stands or two stands suiting their own convenience. While further elaborating his submissions, the Counsel also pointed out that the order of the apex Court alone had been placed before the learned Principal Senior Civil Judge, Ongole and the decree had not been placed. Even otherwise, even as per the order there is no specific direction relating to the recovery of amount or the refund to be made and when that being so what had not been specifically directed by the apex Court cannot be read into and taking advantage of the same, these applications for restitution cannot be filed by the respondents/ Government. The learned Counsel also had further pointed out that even otherwise, if on the ground of equity and also in the interest of justice, such refund by way of restitution to be ordered, then it would be just and proper to adjust all the amounts taking into consideration the amounts which are payable to the appellant/contractor as well and hence such findings recorded by the learned Judge in a way driving the appellant to a separate proceeding by way of suit in relation to such amounts which the appellant is claiming and at the same time ordering restitution in relation to the amounts said to be due by virtue of the order of the apex Court cannot be sustained. The learned Counsel also placed reliance on certain decisions.

6. Ms. Rekha Prasad, the learned Government Pleader for Arbitration while taking this Court through the findings which had been recorded by the learned Judge would contend that the facts are not in controversy and the fact that these applications for restitution had been filed in the light of the order made by the apex Court also is not in serious controversy. When that being so, the contention of the other side that Section 144 of the Code is not applicable cannot be sustained. The learned Counsel pointed out to Section 41 of the Act and would maintain that in the light of the language employed in Section 41 of the Act, it is too much on the part of the other side to contend that Section 144 of the Code is not applicable at

all to a case of this nature. While further elaborating her submissions, the learned Counsel also had drawn the attention of this Court to Sections 41 and 39 of the Act and would maintain that in the light of the language employed, the apex Court while overruling the decision of Patna High Court in *Bihar State Electricity Board v. Khalsa Bros.* : AIR1988 Pat304 , observed in the decision referred in *Superintending Engineer v. B. Subba Reddy (supra)*, that Cross Objections in relation to an Appeal under Section 39 of the Act is not maintainable. The Counsel would maintain that this cannot be read into as though all the other provisions of the Code also are not applicable especially in the light of the express language employed in the provision specified above. The Counsel also would contend that the power to order restitution always to be taken as inherent as held by different Courts repeatedly and even if Section 144 of the Code as such cannot be made applicable, definitely Section 151 of the Code is applicable and in the light of the specific bar imposed by Section 144(2) of the Code, inasmuch as a separate suit is barred, the only remedy available to the respondents/Government is by way of restitution and restitution alone. The Counsel also would maintain that no doubt some defence was taken by the Contractor to the effect that some more amounts are payable in relation to the transaction in question, but that is not the subject-matter of the litigation which had been fought upto the apex Court and hence the remedy if any available to the party would be by way of a separate proceeding and in this restitution the Government is interested in seeing that the order of the Apex Court is implemented in its true letter and spirit and hence the submissions made by the Counsel for the appellant in all these civil miscellaneous appeals are unsustainable and the impugned orders do not suffer from any illegality whatsoever. The Counsel also placed strong reliance on certain decisions to substantiate her contentions.

7. The appellant herein is a Contractor who entered into an agreement with the Government/Department and earlier when disputes arose the matter was referred to the Arbitrator on the direction of the Court and the Arbitrator allowed the claim made by the appellant herein and while passing the award the Arbitrator granted interest at the rate of 15% per annum prior to entering into the reference. The Contractor i.e., the appellant herein, approached the Court for making the award the rule of the Court in the respective suits referred to and the Court was pleased

to allow the claim and pass decree confirming the interest aspect on the damages and the respective O.Ps. were filed to set aside the award and those were dismissed and as against such decrees the Department/ Government preferred appeals to the High Court which resulted in dismissal while allowing the Cross Objections filed by the Contractor/present appellant in these appeals with regard to interest pendente lite. Aggrieved by the dismissal made by the High Court, the Government/Department preferred C.A. Nos. 451 to 458/94 before the apex Court and the apex Court was pleased to allow the appeals in part on 26-4-1999 while setting aside the award granting damages by way of interest at the rate of 15% per annum for the period prior to the date of reference. It is also stated that the Government/Department paid the respective amounts towards interest in the respective E.Ps., the details of which had been furnished in the orders which are being impugned in these civil miscellaneous appeals.

8. The applications filed under Section 144 of the Code were resisted by filing counters in detail taking a specific stand that the apex Court had not passed any order for refund of the amount and hence the remedy available to the Government/Department would be to file a separate suit and even otherwise the claim made by the Government/Department under Section 144 of the Code is barred by limitation. Even as per the provisions of the Act, the Arbitrator has got power to award interest and the civil Court cannot assume jurisdiction to interfere with the said award. Hence the Government/Department would not be entitled to the refund of the amount. Further specific stand is taken that if the account is taken the Government/Department is liable to pay the amount and hence restitution cannot be ordered. The learned Judge recorded reasons in detail at paras 6, 7 and 8 and ultimately ordered restitution relating to the respective amounts specified in these orders in accordance with the provisions which had been expressed by the Apex Court referred in *Superintending Engineer v. B. Subba Reddy (supra)*.

9. It may be appropriate to have a look at the decisions which had been strongly relied upon by the Counsel on record. Both the Counsel are placing reliance on the decision referred in *Superintending Engineer v. B. Subba Reddy (supra)*, wherein the apex Court at paras 24, 25 and 26 observed as hereunder:

From the examination of these judgments and the provisions of Section 41 of the Act and Order 41 Rule 22 of the Code, in our view, following principles emerge:

(1) Appeal is a substantive right. It is creation of the statute. Right to appeal does not exist unless it is specifically conferred.

(2) Cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.

(3) Court-fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeals by indigent person also apply to cross-objection.

(4) Even where the appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.

(5) Respondent even though he has not appealed may support the decree on any other ground but if wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the Court like in appeal.

(6) Cross-objections is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give quietus to whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order.

In the present case, as noted above, the respondent did not file any appeal under Section 39 of the Act in the High Court which right he admittedly had when the award of interest @ 18% per annum was reduced to 12% per annum by the this Court Section 41 of the Act is merely procedural in nature. If there is no right of

cross-objection given under Section 39 of the Act, it cannot be read into Section 41 of the Act. Filing of cross-objection is not procedural in nature. Section 41 of the Act merely prescribes that procedure of the Code would be applicable to the appeal under Section 39 of the Act. We are, therefore, of the opinion that cross-objection by the respondent was not maintainable and the High Court was not correct in holding otherwise and restoring the award of interest to 18% per annum and, thus, interfering in the decree of the this Court.

We would, therefore, set aside the award so far it grants damages by way of interest at the rate of 15% per annum on the amount found due to the respondent for the period prior to the date of reference. We would further restore the award of interest at the rate of 12% per annum as decreed by this Court.

It is no doubt true that in the said decision, the apex Court came to the conclusion that the cross objections by the respondent cannot be maintained in view of Sections 41 and 39 of the Act. Section 41 of the Act deals with Procedure and Powers of Court and the said provision reads as hereunder:

Subject to the provisions of this Act and of rules made thereunder-

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

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

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

Section 39 of the Act deals with Appealable orders. Reliance was placed on *Bhaurao v. Smt. Savitribai and Ors.* : AIR1991 Bom55 , wherein it was observed by the learned Judge of Bombay High Court at Para 5 as hereunder:

One of the main contentions of Mr. Mohta appearing on behalf of the applicant/tenant is that the non-applicants/landlords had initiated the proceedings for ejectment and possession in Special Civil Suit No. 346 of 1983 without obtaining permission from the Rent Controller to determine the tenancy of the applicant/tenant. Therefore, he contended that the decree in that suit was a nullity. In my view, it is not possible to entertain this argument in the present proceedings which have their origin to Regular Civil Suit No. 1134 of 1984 which was withdrawn. I have already pointed out that the decree in Special Civil Suit No. 346 of 1983 was challenged by the applicant/tenant by way of first appeal before this Court which was dismissed on 14-2-1985. Thereafter, the matter was agitated before the Supreme Court by way of special leave petition which was also dismissed. In view of this background, it is not possible to entertain the argument that the decree in Special Civil Suit No. 346 of 1983 is a nullity, apart from the fact that the present proceedings have not arisen out of that suit. The suit out of which the present proceedings have arisen was withdrawn by the applicant/tenant and, therefore, he cannot retain the benefit which he got on account of the order of temporary injunction passed in the present proceedings in pursuance of which he dispossessed the non-applicants/landlords of the first floor. This Court had already observed that in view of the withdrawal of Civil Suit No. 1134 of 1984, the order of injunction also stands vacated. The non-applicants/landlords were already in possession of the first floor before filing of Civil Suit No. 1134 of 1984 in their capacity as owners thereof. Because of the order passed by the this Court on an application for an injunction filed by the applicant/tenant that the non-applicants/landlords lost possession of the first floor. That injunction order having been vacated as a consequence of the withdrawal of the Civil Suit No. 1134 of 1984, the benefit which the appellant/tenant had obtained cannot be retained by him. That would be contrary to the very object of Section 144 of the Civil Procedure Code. The portion of Section 144 of the Code of Civil Procedure, which is material for our purpose, is reproduced below:

144.(1) Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise,

cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order....

(2) No such suit shall be instituted for the purpose of obtaining any restitution of other relief which could be obtained by application under Sub-section (1).

From the close scrutiny of the above section, it is clear that it is an obligation on the Court that it shall on the application of any party entitled to any benefit by way of restitution, cause such restitution to be made insofar as it may place the party in the position which it could have occupied, but for such order as has been varied. In the facts and circumstances of the present case, application for restitution is the only remedy available to the non-applicants since a fresh suit is barred in view of Sub-section (2) of Section 144 of the Code of Civil Procedure. The Courts below were, therefore, perfectly justified in directing the applicant/tenant to restore possession of the first floor to the non-applicants/landlords.

10. Further strong reliance was placed on *Mahijibhai v. Manibhai* : [1965]2SCR436 , whereunder at paras 23, 26 and 28 the apex Court observed:

With this background the Legislature in passing the Code of Civil Procedure, 1908, introduced Section 144 therein. The said section is more comprehensive than Section 583 of the Code of 1882. Section 144 of the present Code does not create any right of restitution. As stated by the Judicial Committee in *Jai Berham v. Kedar Nath Marwari* 49 Ind. App. 351 at p. 355 : AIR 1922 PC 269 at p. 271,

It is the duty of the Court under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances

towards all parties involved.

The section, to avoid the earlier conflict, prescribes the procedure, defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief objectionable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of the restitution clear and unambiguous. It does not say that an application for restitution, which till the new Procedure Code was enacted, was an application for execution, should be treated as one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie, therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree...

The next criticism is that while execution proceedings are confined to Part II and Order XXI of the Code of Civil Procedure, the Legislature, presumably to make it clear that an application for restitution is not an execution application, placed it in Part XI thereof under the heading 'Miscellaneous'. The placing of a particular section in a Part of the Code dealing with a specific subject-matter may support the contention that that section deals with a part of the subject dealt with by that Part, but that cannot be said when a particular section appears under a Part dealing with miscellaneous matters. The Part under the heading 'Miscellaneous' indicates that the sections in that Part cannot be allocated wholly to a Part dealing with a specific subject, for the reason that the sections entirely fall outside the other Parts or for the reason that they cannot entirely fall within a particular Part. They may have a wide scope cutting across different parts dealing with specific subjects. Section 144 may have been placed in Part XI, as relief of restitution may

cover cases other than those arising in execution of a decree of an appellate Court setting aside the decree of a Court under appeal. Indeed there is a conflict on the question whether Section 144 applies to an order setting aside an ex parte decree, to a decree setting aside another decree in a collateral proceeding and to dependent decrees etc. That apart, even under earlier Code, Section 583 was not placed in the chapter dealing with 'Execution', but only in the chapter dealing with appeals. Indeed, some of the sections in Part XI partly deal with execution matters : See Sections 132(2), 135(3), 135A etc. The fact that a section has been placed in a particular Part for convenience of arrangement cannot affect the question if in reality the application is one for execution : at the most it is only one of the circumstances relevant to the present enquiry; it is not decisive of the question one way or other..

The contention that the determination of a question under Section 144 of the Code is included in the definition of a decree under Section 2(2) of the Code has also no relevance to the question before us. The said definition takes in both an order made under Section 47 and that made under Section 144 of the Code. The said two sections are included for the purpose of giving a right of appeal. If an execution application to which Section 47 applies does not cease to be an execution application by reason of the section being included in the definition of 'decree', an execution application under Section 144 cannot likewise cease to be one for the reason that the said section is included in the definition of 'decree'.

11. Reliance also was placed on *Jagan Nath Phool Chand v. Union of India and Ors.* : AIR1982 Delhi93 . A similar question in a slightly different context no doubt while dealing with Land Acquisition Act had fallen for consideration before a Division Bench of this Court in *K. Potharaju v. Government of A.P.* : 1999(3)ALD473 , and the Division Bench while dealing with Section 144 of the Code and also Sections 53, 54 and 26 of the Land Acquisition Act 1894 observed that where the award passed by the Civil Court had been reversed in Appeal made by the State Government and the matter remanded for fresh disposal and a Petition was filed by the State Government under Section 144 of the Code as ordered in appeal for restitution of the compensation amount deposited in civil Court and already withdrawn by the claimants, it was held that the same is

maintainable and the provisions of the Code including Section 144 apply to proceedings under the Land Acquisition in view of Section 53 in the absence of any inconsistent provision in the said Act.

12. In the light of the language employed under Section 41 of the Act referred to supra, this Court is of the considered opinion that the contention advanced by the Counsel for the appellant in all these Appeals that Section 144 of the Code cannot be made applicable to an Arbitration proceeding like this, cannot be accepted. This Court is conscious of the fact that in the context of Cross-Objections no doubt certain observations were made by the Apex Court in the decision referred in *Superintending Engineer v. B. Subba Reddy* (supra). Even otherwise, the Division Bench of this Court in *State Government of Andhra Pradesh v. Manickchand Jeevraj & Co.*, Bombay : AIR 1973 AP27 , while dealing with Sections 144 and 151 of the Code where pending the suit to declare the plaintiffs right to movables attached by the revenue authorities and the Court raised the attachment on plaintiff depositing, pursuant to the Court's order, the amount in favour of the Government for which the movable were attached, observed that the Court on the suit being decreed can order restitution of the amount with interest to the plaintiff under Section 144 and even assuming that Section 144 was not attracted the Court can order restitution and payment of interest under Section 151 of the Code. The Division Bench of this Court in *B. Yamuna Bai v. L. Venkoba Rao* : AIR 1976 AP46 and also in yet another decision in *Ganesh Parshad v. Adi Hindu Social Service League* : AIR 1975 AP310 , expressed similar view.

13. On appreciation of the overall facts and circumstances, this Court is satisfied that the orders impugned in these civil miscellaneous appeals do not suffer from any illegality since only in pursuance of the order of the apex Court these restitution applications had been filed by the Government/Department.

14. A novel contention had been advanced that the decree which had been drafted in accordance with the order made by the apex Court had not been enclosed while moving these applications. This contention on the face of it appears to be attractive, but however, this Court is not inclined to accept the said contention also since it is needless to say that a decree to be drafted only in accordance with the

judgment. Even if there is any ambiguity in the decree, always what had been specified in the judgment alone would be looked into even to rectify such mistakes, if any, in the decree. That being so, this Court is not inclined to accept the alternative contention also.

15. Viewed from any angle, the civil miscellaneous appeals being devoid of merit, the same shall stand dismissed. However, it is made clear that the appellant is at liberty to take appropriate proceedings in relation to the amounts said to be due to him from the Government/Department. No costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com