(2003) 3 ALD 687

Andhra Pradesh High Court

Case No: AA No. 93 of 2002

R. Venkat Reddy		APPELLANT
	Vs	
Union of India (UOI) and Another		RESPONDENT

Date of Decision: March 10, 2003

Acts Referred:
Arbitration and Conciliation Act, 1996 â€" Section 11(6)

Citation: (2003) 3 ALD 687

Hon'ble Judges: T. Ch. Surya Rao, J

Bench: Single Bench

Advocate: Keerthi Prabhakar, for the Appellant; Gouri Shankar Sanghi, SC for Railways, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

T.Ch. Surya Rao, J.
The applicant filed the present application u/s 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act" for

brevity) seeking appointment of an Arbitrator for resolution of the dispute between him and the first respondent.

2. The applicant who is a railway contractor entered into an Agreement No. SK/ 4 dated 10.4.1989 for the work of supplying, stacking and

loading into track 50 mm guage stone ballast between MLY-CHE Stations. According to the applicant, although he made all necessary

arrangements for completing the work within six months, due to delays and default on the part of the Railways the work was prolonged. After the

necessary correspondence between the parties, the applicant dumped into track the entire quantity of ballast. He informed the second respondent

that about 95% of the agreement quantity of ballast was already supplied and dumped into track but payment for the dumped quantity was yet to

be made and until the said payment was made, the balance quantity could not be collected further as per extent Rules. Therefore, extension was

granted till 31.3.1996 for completing the balance work. The applicant, therefore, by his letter dated 10.3.1997 requested the second respondent

to arrange payment and extend the contract period up to 30.6.1997 if the balance supply is still required. However, there was no reply. After

sending several reminders, the applicant sent final reminder dated 27.8.2001 to the respondents. The second respondent, however, by his letter

dated 11.9.2001 advised the applicant to attend the Assistant Engineer''s Office to sign the measurement books and bill copies duly submitting the

Mineral Revenue Clearance Certificate for submission of final bill and also advised to give no dues no claim certificate to release E.M.D. and S.D.

etc. In reply thereto, the applicant sent a letter dated 27.9.2001 informing the respondent that the amounts due are not paid, Mineral Revenue

Clearance Certificate would not have been warranted, had the Department made the payment for dumping in January, 1993 and further that as per

the agreement Mineral Revenue Clearance Certificate is required for on account bill and the Department could recover the seigniorage charges at

Rs. 2.50 ps. per 1 M3 prevailing at that time. However, there was no further reply. The applicant, therefore, sent a reminder dated 11.12.2001

and when there was no reply, he got a notice dated 8.7.2002 issued to the second respondent marking a copy thereof to the first respondent

requesting early payment or otherwise to refer the matter to arbitration. As usual, there was no response. Hence the present Arbitration

Application.

3. The respondents resisted the application by filing a counter. It is averred inter alia that the petitioner was expected to complete the work by

3.10.1989 but the period of agreement was extended from time to time up to 31.8.1992 at the request of the applicant. Further the applicant

supplied the quantity of 1759.489 M3 against 2000 M3. Thus, the applicant has not supplied the full quantity of ballast. He was silent up to

27.11.1995 and requested for extension of time up to 31.3.1996. Again he was silent up to 14.05.2001 and by his letter dated 14.5.2001

requested for final payment and release of security deposit. As per Clause 15 of the special conditions for supply of materials, the applicant has to

submit the Mineral Revenue Clearance Certificate. As such the final bill could not be processed due to non-submission of MRCC and non-signing

the bill and measurement book. The petitioner thus failed to complete the work fully, failed to sign the measurement book, bills and failed to submit

MRCC, no dues, no claim certificate and, therefore, the appointment of Arbitrator by the respondents is found not necessary.

4. It is further averred in the counter that the application filed by the applicant is not in conformity with the Clause 63 of the General Conditions of

Contract OGCC" for brevity). As per Clause 63 of the GCC after expiry of 120 days and within 180 days if the applicant does not receive any

claim from the Railways, he must make an application as per Clause 64 of the GCC, which was not followed by the applicant. The applicant has

put forth his claim as per Clause 64 of the GCC on 8.7.2002 and did not wait for 120 days to expire on 7.11.2002 in this case and 180 days to

expire on 7.1.2003 and as such the present application is premature and, therefore, the present application is liable to be dismissed.

5. In his reply affidavit filed in answer to the averments made in the counter, it is the case of the applicant that Clauses 63 and 64 of the GCC of

1998 are not applicable to the contract agreement which was entered into on 10.4.1989 and the relevant GCC-63 and 64(1)(i) of the then

prevailing GCC are only applicable. As per Clause 63 of the GCC on the date of contract, the contractor can after 90 days but within 180 days of

his presenting his claim on disputed matters demand in writing that the disputes or differences be referred to arbitration and, therefore, the present

application of the applicant is not premature.

6. It is discernible from the factual matrix that the applicant is a contractor and he entered into an agreement dated 10.4.1989 for the works of

supplying, stacking and loading into track 50 mm guage stone ballast between MLY-CHE Stations. He completed 95% of the work, of course,

during the extended period but not within the original stipulated period. There has been a lot of correspondence between the parties in connection

with this work and settlement of the final bill. While the respondents insisted that the applicant should submit MRCC, no dues, no claim certificates

to process the final bill and arrange payment; it is the case of the applicant that at this length of 10 years period there has been no need to submit

MRCC and furthermore, since the ballast supplied was obtained from the local waddar labourers who were the licensees to quarry, there is no

need for obtaining such clearance certificate. While it is the further case of the respondent that the claim of the applicant is premature as he should

make claim after the initial demand of payment of the final bill after the expiry of 120 days and within 180 days and inasmuch as the petitioner gave

legal notice on 8.7.2002, the presentation of the present application on 24.10.2002 is premature; it is the case of the applicant that Clauses 63 and

64 of the GCC of 1998 have no application and Clauses 63 and 64 of the GCC as on the date of contract, namely, 1989 would apply as per

which the period was after 90 days and within 180 days and, therefore, the present application is not premature.

7. Having regard to the respective stands taken by the applicant as well as the respondents, it is obvious that there appears to be a serious dispute

for the settlement of the claim of the applicant. Obviously, the applicant by his letter dated 8.7.2002 demanded for settlement of dues or for

referring the matter to an Arbitrator for resolution of the dispute as per the procedure envisaged under Clauses 63 and 64 of the GCC as on the

date of the contract. Admittedly, Clauses 63 and 64 envisage resolution of the disputes by means of arbitration.

8. It is the contention of the learned Standing Counsel appearing for the respondents-Railways that the present application being premature, it is

liable to be dismissed. In support of his contention, he seeks to place reliance upon a judgment of this Court in P. Siva Prasad Vs. South Central

Railways, . A learned Single Judge of this Court has taken the view that the Railways shall be allowed 120 days time from the date of presentation

of reference to take a decision and any application filed before that prescribed period of 120 days is premature and is liable to be dismissed.

9. There is a Division Bench judgment of this Court on the point rendered earlier to the judgment of a learned Single Judge of this Court referred to

supra in Union of India Vs. Vengamamba Engineering Co., Juputi, Krishna Dist. and another, While referring the case law on the point,

particularly, Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., , (first case), in para 17 of its judgment, the Division

Bench held thus:

17. .....when the legislative intent is clear, it would be proper for the Chief Justice or his nominee just to appoint an Arbitrator without

wasting any time or without entertaining any contentious issues raised at that stage, by party objecting to the appointment of an Arbitrator inasmuch

as all issues can be raised in the arbitral proceedings.

Perhaps, the Division Bench judgment has not been placed before the learned Single Judge of this Court.

10. In Konkan Railway Corporation Limited and Anr. v. Mehul Construction Co, referred to supra a Three Judge Bench of the Apex Court in

para 4 of its judgment considered the objects and reasons for enacting the Act thus:

4. To attract the confidence of the international mercantile community and the growing volume of India''s trade and commercial relationship with

the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and

Conciliation Act of 1996 on the UNCITRAL Model and, therefore, in interpreting any provisions of the 1996 Act, Courts must not ignore the

objects and purpose of its enactment. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the

Arbitration and Conciliation Act, 1996 would unequivocally indicate that the 1996 Act limits intervention of Court with an arbitral process to the

minimum and it is certainly not the legislative intent that each and every order passed by a authority under the Act would be a subject-matter of

judicial scrutiny of a Court of Law.....The provisions of the Act aim at achieving the sole objective of resolving the dispute as expeditiously

as possible so that trade and commerce are not affected on account of litigation. The Statement of Objects and Reasons of the Act clearly

enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process.

Keeping the sole objective of resolving the dispute between the parties inter se as expeditiously as possible, the Apex Court held ultimately thus:

When the matter is placed before the Chief Justice or his nominee u/s 11 of the Act it is imperative for the said Chief Justice or his nominee to

bear in mind the legislative intent. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue

between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the

qualifications, independence and impartiality of the Arbitrator, arid in respect of the jurisdiction of the Arbitrator could be raised before the

Arbitrator who would decide the same. Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the

existence or validity of the arbitration agreement. Therefore it would be proper for the Chief Justice or his nominee just to appoint an Arbitrator

without wasting any time. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be

open to raise any objections, as provided under the Act.

11. In Nimet Resources Inc. and Another Vs. Essar Steels Ltd., , the Apex Court held that even where there has been some transaction, but the

correspondence, documents or exchange between the parties are not clear as to the existence or non-existence of an arbitration agreement, it

would be an appropriate course for the Arbitrator to decide that question u/s 16 of the Act rather than the Chief Justice or his nominee u/s 11 of

the Act.

12. In Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , the Apex Court held thus:

When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of

the doctrine of ""freedom of contract"" has been whittled down by various labour and social legislations, still the Court has to give importance and

effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down

under the said clause.

The said judgment was rendered by a two Judge Bench of the Apex Court.

13. Ultimately, every controversy has been resolved by a Constitution Bench judgment of the Apex Court in Konkan Railway Corporation Ltd.

and Another Vs. Rani Construction Pvt. Ltd., . In para 18 of its judgment, the Apex Court held thus:

18. There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a

response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may

raise, even in regard to its failure to appoint an Arbitrator within the period of thirty days. ..... In its request to the Chief Justice to

make the appointment the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to

bear this out. This is all that the Chief Justice or his designate has to see.

14. Having regard to the authoritative pronouncement of a Constitution Bench of the Apex Court, the contention that the present application is

premature having not been filed after the expiry of 120 days and before expiry of 180 days from the date of notice, merits no consideration. The

judgment of a learned Single Judge of this Court in P. Siva Prasad"s case, referred to supra, is no more a good law in view of a Constitution Bench

judgment of the Apex Court.

15. Here is a case where obviously there has been an agreement between the parties and Clauses 63 and 64 of the GCC envisage the resolution of

the disputes between the parties inter se by arbitration. Admittedly, a notice demanding the resolution of the dispute by arbitration has been issued

in this case. Therefore, the request of the applicant for appointment of an Arbitrator can validly be considered. It may be made clear that every

objection touching the merits of the dispute between the parties can be taken into consideration notwithstanding the observations if any made by

this Court in the order supra and the same can be resolved by the Arbitrator independently.

16. For the foregoing reasons, the Arbitration Application is allowed and Sri D. V. Ramana Murthy, District and Sessions Judge (Retired), is

appointed as Sole Arbitrator for resolution of the dispute between the parties inter se. The Sole Arbitrator is entitled to fix his fee.