

**SUPREME COURT OF INDIA**

Visakhapatnam Port Trust

Vs.

Continental Construction Company

C.A.No.5849-5850 of 2002

(Markandey Katju and R.M. Lodha JJ.)

20.02.2009

**JUDGEMENT**

**R.M. Lodha, J.**

1. Both these appeals by special leave, arise out of one and the same judgment dated 26th April, 2002 rendered by the High Court of Judicature Andhra Pradesh whereby it allowed the two appeals being CMA No. 1559/1994 and CMA No. 77/1995

2. For the sake of convenience, we shall refer the appellant - Visakhapatnam Port Trust, "VPT" and the respondent - M/s Continental Construction Company, "the Contractor".

3. In CMA No. 1559/1994 before the High Court, the dispute between the parties was in respect of refund of an amount of Rs. 2 74,810.38 which was recovered by VPT from the contractor's running bill no. 21. VPT entered into an agreement with the contractor on 7th January, 1973 whereunder the contractor was to construct the ore berth 263 meters long 29.73 meters wide comprising of eight numbers of 18 meters x 27.73 meters long concrete cribs spaced at 35M centres on prepared foundations and connected by pre-cast pre-stressed deck and R.C.C. slab and construction of two Mooring Dolphins comprising concrete deck supported on 900mm internal diameter Racker bored piles. For the execution of the said contract, VPT was to supply various equipments comprising of hydraulic jacks, hydraulic pumps, steel yoke assembly, jack rods etc. and it appears to be fairly admitted position that 950 nos. of jack rods were supplied by VPT to the contractor. Towards cost of 500 jack rods, on 8th August, 1974, from the contractor's running bill no. 21, an amount of Rs.74,810.38 was recovered by VPT.

4. As there was a dispute between VPT and the contractor with regard to return of 950 jack rods valuing Rs. 9,65,155/-, VPT referred to the dispute to arbitration in the year 1975. The statement of claim was filed by VPT before the arbitrators on 4th June, 1976. On 23rd March, 1980, the arbitrators rejected the claim of VPT. The award dated 23rd March, 1980 was challenged by VPT before the Civil Judge, Visakhapatnam by filing a petition under

Sections 30 & 33 of the *Arbitration Act, 1940* (for short, 'Act, 1940'). The Civil Judge, Visakhapatnam dismissed the said petition on 10th September, 1984.

5. It is pertinent to notice here that until the rejection of claim made by VPT for Rs. 9,65,155/- towards the cost of 950 jack rods vide award dated 23rd March, 1980, the contractor did not raise any dispute with regard to recovery of Rs. 74,810.38 made by VPT on 8th August, 1974 from the contractor's running bill no. 21. It was only thereafter, to be specific on 27th March, 1980 that the contractor called upon VPT to release the sum of Rs. 74,810.38. Then on 22nd of September, 1984, the contractor initiated proceedings under the Act, 1940 in respect of claim of Rs.74,810.38 by appointing its arbitrator and also called upon VPT to appoint its arbitrator. The arbitrators entered upon the reference on 1st February, 1985 and they also appointed an Umpire. The contractor filed its statement of claim before the arbitrators on 16th March, 1985. The arbitrators by their award dated 27th October, 1985 accepted the claim of the contractor and passed an award for Rs.74,810.38 in favour of the contractor.

6. VPT challenged the award by filing petition (O.P.No. 10/1986) under Sections 30 and 33 of the Act, 1940, inter alia raising the objection that the claim of the contractor was time barred. The Court of the Principal Subordinate Judge, Visakhapatnam vide his judgment dated 16th February, 1994 allowed OP No. 10/1986; set aside the award of the arbitrators and held that the claim of the contractor was barred by limitation.

7. The contractor challenged the judgment of the Principal Subordinate Judge, Visakhapatnam dated 16th February, 1994 by filing an appeal before the High Court which was registered as CMA No. 1559/1994. The High Court upheld the judgment of the Principal Subordinate Judge, Visakhapatnam and held that the claim of the contractor for Rs. 74,810.38 was within limitation.

8. The other appeal being CMA No. 77/1995 before the High Court arose out of C-3 contract for execution of marine works and break waters at the outer harbour at Lova Garden, Visakhapatnam. The dispute seems to have arisen between VPT and the contractor on 3rd February, 1975 in respect of the charges for power driven survey boat used by the contractor. The dispute was referred to the consulting engineers who opined vide their report dated 3rd May, 1975 that it was the responsibility of the contractor to provide the survey vessel and consequently, the contractor's claim in this regard was untenable. The contractor then on 15th May, 1975 appointed Shri G.N. Bajpai as its arbitrator and called upon VPT to appoint its arbitrator. VPT appointed one Mr. T.V. Rajaram as its arbitrator and the arbitrators in turn appointed Mr. A.W. De'Lima as Umpire. The arbitrators, however, could not enter upon the reference. The contractor, accordingly, approached the Principal Subordinate Judge, Visakhapatnam for the appointment of arbitrators by invoking Sections 8, 9 and 20 of the Act, 1940. The Principal Subordinate Judge, Visakhapatnam treated that suit under Section 8 of the Act, 1940 and vide its order dated 10th September 1984 allowed the suit filed by the contractor and directed each party to appoint its arbitrators within 15 days therefrom. Each party, accordingly, appointed its arbitrator and the appointed arbitrators entered upon

reference. On 14th March, 1985, the contractor filed claim in the sum of Rs. 8,49,000/- with interest and cost pertaining to the charges for power driven survey boat.

9. The arbitrators passed the award on 20th November, 1985 allowing the claim of the contractor for Rs. 6,44,500/- but no interest or cost were allowed.

10. VPT challenged the award dated 20th November, 1985 in the Court of Subordinate Judge, Visakhapatnam by filing petition numbered as OP No. 164/1986. The award was mainly opposed by VPT on the ground of limitation and that the award was non- reasoned.

11. The sub-ordinate Judge, Visakhapatnam allowed the petition vide its order dated 16th February, 1994 and set aside the award holding that the claim was barred by limitation.

12. The contractor, then carried the matter to the High Court by filing CMA No. 77/1995. The said appeal has been allowed by the High Court vide its judgment dated 26th April, 2002.

13. As noticed above, it is from the common judgment dated 26th April, 2002 disposing of CMA No. 1559/1994 and CMA No. 77/1995 that these two appeals arise.

14. We shall first deal with the contractor's claim of Rs.74,810.38. The only issue that falls for our consideration with regard to this claim is whether it is barred by limitation.

15. Section 37 of the Arbitration Act, 1940 and Article 137 of the Limitation Act, 1963 are relevant for the purpose. The Arbitration Act, 1940;

"37. Limitations. - (1) All the provisions of the Indian Limitation Act, 1908 (9 of 1908), shall apply to arbitrations as they apply to proceedings in Court. (2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement. (3) For the purposes of this section and of the *Indian Limitation Act, 1908* (9 of 1908), an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated. (4) Where the terms of an agreement to refer further differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if

any, as the justice of the case may require, extend the time for such period as it thinks proper. (5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908 (9 of 1908) for the commencement of the proceedings (including arbitration) with respect to the difference referred." The Limitation Act, 1963 ; " 137. Any other application three years When the for which no period of right to apply limitation is provided accrues." elsewhere in this division.

16. It is apparent from the bare reading of Section 37 that the law of limitation is applicable to the proceedings before the arbitrators as it applies to proceedings before the Courts. Under Sub-section (3), arbitration proceedings are to be deemed to have commenced when notice is served by one party upon the other - (i) requiring him to appoint an arbitrator, or (ii) if the arbitrator was named or designated in the arbitration agreement, requiring him to submit the difference to arbitrator named or designated.

17. In the backdrop of aforesaid legal position, let us now turn to the facts. On 8th August, 1974, VPT recovered an amount of Rs.74,810.38 being the cost of 500 jack rods from running bill no. 21 tendered by the contractor. The dispute with regard to claim of Rs. 74,810.38, thus, arose on that date. The contractor ought to have given notice calling upon VPT to appoint arbitrator within three years therefrom or apply to the Court within this time. However, it was after ten years on 22nd September, 1984 that the contractor appointed its arbitrator and called upon VPT to appoint its arbitrator. Significantly, VPT had already made a claim of Rs. 9,65,155/- against the contractor for withdrawal and return of jack rods and the dispute was referred to arbitration at the instance of VPT in the year 1976. Although the contractor contested the said claim of VPT before the arbitrators but curiously no counter claim for Rs. 74,810.38 was made in those proceedings. It is true that arbitrators rejected the claim of VPT on 23rd March, 1980 and the petition before the Civil Judge, Visakhapatnam also came to be dismissed on 10th September, 1984 but that does not improve the case of the contractor in so far as limitation is concerned as the limitation began to run from 8th August, 1974. It was too late on 22nd September, 1984 for the contractor to agitate the claim of Rs.74,810.38 for which the cause of action accrued on 8th August, 1974. The contractor ought to have made counter claim before the arbitrators in the year 1976 itself when VPT made a claim of 9,65,155/- for withdrawal of jack rods. In any view of the matter, the claim of Rs. 74,810.38 raised for the first time after 10 years of accrual of cause of action is apparently barred by time and rightly rejected by Principal Subordinate Judge, Visakhapatnam vide judgment dated 16th February, 1994.

18. As a matter of fact, Mr. S.B. Upadhyay, Senior Counsel for the respondent could not show that claim for Rs. 74,810.38 was within time.

19. As noticed above, CMA No. 77/1995 before the High Court related to non-payment of the charges of the power driven survey boat used by the contractor. Admittedly, the dispute

in this regard arose between the parties on 3rd February, 1975 and the matter was referred to the consulting engineers. The consulting engineers rejected the claim of the contractor on 3rd May, 1975 holding that it was the responsibility of the contractor to provide survey vessel. The contractor on 15th May, 1975 appointed its arbitrator and gave notice to VPT requiring them to appoint their arbitrator. VPT also appointed its arbitrator but the arbitrators could not enter upon the reference. It was in the year 1979, then that the contractor approached the Principal Subordinate Judge, Visakhapatnam by filing suit under the Arbitration Act, 1940 which was allowed vide order dated 10th September, 1984 directing each party to appoint its arbitrator within 15 days. In compliance thereof, the parties appointed their arbitrators and on 16th March, 1985 the contractor filed its statement of claim for payment of hire charges for power driven survey boat.

20. Sub-Section (3) of Section 37 of the Act, 1940, inter alia, provides that an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other party thereto a notice requiring the appointment of an arbitrator. The core controversy is: in the facts and circumstances of the case, when the arbitration can be said to have commenced.

21. In what we have already noticed above, the dispute with regard to charges for the power driven survey boat arose on 3rd February, 1975 and after the claim was rejected by the consulting engineers on 3rd May, 1975, the contractor appointed the arbitrator on 15th May, 1975 and asked VPT to appoint its arbitrator. In other words on 15th May, 1975, the contractor served on VPT a notice requiring them to appoint their arbitrator under the agreement. Thus under Section 37(3), the arbitration shall be deemed to have commenced on 15th May, 1975 i.e. well within time and the High Court rightly rejected the objection of VPT that the claim with regard to charges for the survey vessel was time barred. Merely because, the arbitrators could not enter upon reference and the contractor had to approach the Court in the year, 1979 by filing suit which was allowed on 10th September, 1984 and new arbitrators were appointed by the parties and statement of claim was filed by the contractor on 14th March, 1985, that would not render the contractor's claim time barred.

22. Mr. Kailash Vasudev, Senior Counsel contended that the non-reasoned award is bad in law. In this connection, learned Senior Counsel referred to Section 17 of the Act, 1940 which came to be amended by insertion of proviso vide Andhra Pradesh Act (1 of 1990).

23. Section 17 of the Act, 1940 reads thus ; "17. Judgment in terms of award. - Where the Court sees -- no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

24. Vide Andhra Pradesh Act ( 1 of 1990), the following proviso have been inserted to Section 17; "Provided that where as award pending in the Court at the commencement of the

Arbitration (Andhra Pradesh Amendment) Act, 1990 or an award filed in the Court, thereafter does not contain reasons therefore as required by the proviso to sub-section (1) of Section 14 the Court shall not proceed to pronounce the judgment according to the award, but shall remit the award to the arbitrators or the umpire for giving reasons therefore as required by the said proviso and thereupon the arbitrators or umpire shall, within thirty days from the date of remittance of the award to them by the Court give reasons for the award and file the same in the Court: Provided Further that on the application of the arbitrators or the umpire and for reasons to be recorded in writing, it shall be competent for the Court, to extend the period of thirty days aforesaid for a further period not exceeding fifteen days: Provided also that where an award pending in the court as aforesaid does not contain any reasons and there is no possibility to remit the award to the arbitrator or panel of arbitrators or umpire due to their incapacity, negligence, refusal to act or death, the Court shall set aside the award and direct the parties to initiate fresh arbitration in accordance with the terms of the agreement."

25. Firstly, amendment in Section 17 vide Andhra Pradesh Act (1 of 1990) is not attracted in the present fact situation as the award was passed by the arbitrators on 20th November, 1985 i.e. much before the amendment. As per Section 17 then obtaining, it was not imperative for the arbitrators to give reasons in support of the award. Secondly, upon the award dated 20th November, 1985 being challenged by VPT before Principal Sub-ordinate Judge, Visakhapatnam, the Principal Sub-ordinate Judge, Visakhapatnam, directed the arbitrators to give reasons for the award in the light of the amendment aforesaid.

26. Consequently, the arbitrators gave the following reasons: "Having gone through the various provisions in the contract documents which have a bearing on the dispute between the parties and after applying correct and proper interpretation for adjudication of the said dispute, we find that the Visakhapatnam Port trust, the Respondents in this case, were under a Contractual obligation to make available a Survey Boat for use on these works and that, although the survey boat was available with them, they failed totally to fulfil that contractual obligation necessitating the claimants to obtain a boat from their own resources and deploy the same on the works throughout the construction period. We find that after allowing some adjustments found necessary on perusal of the contract and after having considered the written as also the oral submissions made to us by the parties, the claimants are entitled to be paid by the Respondent the sum as determined by us in our award."

27. Although this exercise was unnecessary but the fact of the matter is, that subsequently the arbitrators did give their reasons. Reasonableness of the reasons given by arbitrators cannot be gone into by the Court. This objection of the Senior Counsel is, accordingly, overruled.

28. For the foregoing reasons, we dispose of these appeals as follows:- (1) The judgment of the High Court of Judicature of Andhra Pradesh in CMA No. 1559/1994 is set aside. The claim of M/s Continental Construction Company for Rs. 74,810.38 stands dismissed. The amount of Rs. 74,810.38 deposited with the executing Court by Visakhapatnam Port Trust pursuant to the order dated 27th September, 2004 of this Court shall be refunded to them alongwith interest accrued thereon. (2) The judgment of the High Court in CMA No. 77/1995

is affirmed. The amount of Rs. 6,44,500/- deposited by Visakhapatnam Port Trust with the executing Court pursuant to the order of this Court dated 27th September, 2004 shall be paid to M/s Continental Construction Company alongwith interest accrued thereon. (3) The parties shall bear their own costs.