

CASE NO.:
Appeal (civil) 1087-1088 of 2008

PETITIONER:
D. RANGANAYAKULU

RESPONDENT:
SUPERINTENDENT ENGINEER NSRC O&M & ANR

DATE OF JUDGMENT: 07/02/2008

BENCH:
H.K. SEMA & MARKANDEY KATJU

JUDGMENT:
JUDGMENT

O R D E R

CIVIL APPEAL NOS. 1087-1088 OF 2008
[Arising out of SLP(C) Nos.5721-5722/2005]

Leave granted.

These appeals are directed against the judgment and order dated 1/11/2004 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in CRP No.4880/2003 and AAO No.3514/2003.

Briefly stated, the facts are as follows.

On 18/04/1996, a contract was awarded to the appellant by the respondents for work of lining the bed and sides of M.S. Right Main Canal. The work was to be completed within a period of six months divided into two slabs of three months each, i.e. three months in the year 1986 and three months in 1987. The work could not be completed within stipulated time for the reasons which we are not concerned here. Ultimately, the work was finally completed in 1989. A dispute arose. The appellant, by its letter dated 20/10/1990, addressed to the respondent to settle the dues. On 13/12/1990, the appellant
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approached the Civil Court and filed an application praying to take up arbitration and act as arbitrator. On 13/02/1991, the Court refused to act as arbitrator and dismissed the application. On 06/06/1991, the appellant filed O.P. No. 167/1990 before the Principal Subordinate Judge, Nasaraopet under Section 8(1)(b) of Arbitration Act, 1940 for appointing arbitrator from list of names supplied by the appellant. In that application, counter was filed by the respondent herein objecting to jurisdiction of arbitrator. However, it appears from the counter that the respondent had submitted the names of Chief Engineer, Minor Irrigation, Chief Engineer, Medium Irrigation and Commissioner, CADA. The learned Judge, by its order dated 30/04/1993, rejected the names supplied by the parties and appointed Mr. Justice Punniiah, retired Judge of the High Court as sole arbitrator.

Undisputedly, the order dated 30/04/1993 passed by the learned Judge rejecting the names of arbitrator supplied by the parties and appointing Mr. Justice Punniiah, retired Judge of the High Court as sole arbitrator has not been assailed by the respondents herein. The said order has attained finality.

Thereafter, the respondents participated in the proceedings before the sole arbitrator or throughout without any demur and the award was passed by the sole arbitrator on
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02/03/1995. Against the award, two suits were filed. O.S. No.108/1996 was filed by the appellant herein for making award the Rule of Court. O.S. No.110/1996 was filed by the respondents herein to set aside the award dated 02/03/1995. In the O.S. filed by the respondents herein, they raised an objection that the arbitrator has passed the award without any jurisdiction. The learned Judge allowed O.S. No.108/1996 filed by the appellant herein and O.S. 110/1996 filed by the respondents herein was dismissed with costs. The learned Judge also allowed the decree and made the award dated 02/03/1995 Rule of the Court. Hence, present appeals by special leave.

On 01/04/2005, this Court issued limited notice on SLP as under:-

"Issue notice to ascertain if the respondents had submitted to the jurisdiction of the Arbitrator and participated in the proceedings without any demur which will have the effect of waiver."

Mr. L. Nageswara Rao, learned senior counsel appearing for the appellant contended that once the party has participated in the proceedings before the arbitrator without any demur and without challenging the order appointing the arbitrator, they have waived their rights and are not entitled
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to raise any objection with regard to the jurisdiction of the arbitrator at the time of award being made Rule of the Court.

In view of the notice issued by this Court limited to the question as to whether the parties participated before the arbitrator without any demur would have effect of waiver of the parties to raise an objection about the jurisdiction of the arbitrator is the sole question to be determined in these appeals. In this connection, Mr. L. Nageswara Rao has referred to a decision of this Court rendered in Sathyanarayana Brothers (P) Ltd. Vs. T.N. Water Supply & Drainage Board, (2004) 5 SCC 314. This Court in the said decision considered a similar question and pointed out in paragraph 9 as under:-

"We find that the stage to have raised such an objection as to whether the dispute was liable to be decided by two arbitrators or a Board of three arbitrators had passed long before. The two arbitrators were appointed in accordance with the provisions of the arbitration clause as well as the third arbitrator called umpire. The mode of hearing was adopted in the manner that the dispute was heard by two arbitrators appointed by the respective parties. The matter was
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referred to the umpire since there was no agreement between the two arbitrators. There is no justification now at this stage to raise such an objection that the Board of three arbitrators should have decided the matter. Such a plea contradicts its own action, and it seems to be taken now to wriggle out of the award ultimately given by the umpire, but it would not be permissible at this stage. Shri Nageswara Rao, learned senior counsel, has placed reliance upon Russell on Arbitration -- "Loss of right to object". It states as under:
"A party who objects to the award on the ground that the Tribunal lacks substantive jurisdiction, should not only act promptly, but should also take care not to lose his right to

object. A party who takes part or continues to take part in the proceedings is in a different position from someone who takes no part in the proceedings. The latter cannot
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lose his right to object as long as he acts promptly to challenge the award once it is published. The former must, however, state his objection to the Tribunal's jurisdiction 'either forthwith or within such time as is allowed by the arbitration agreement or the Tribunal'. That statement, which should be recorded in writing and sent to the Tribunal and the other parties, should not only mention the jurisdiction objection but also make clear that any further participation in the arbitration will be without prejudice to the objection. If that is not done, the party concerned may not be able to raise that objection before the court 'unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know or could not with reasonable
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diligence have discovered the grounds for the objection'. A person alleged to be a party to arbitral proceedings but who takes no part in those proceedings may at any time apply to the court for a declaration, an injunction or other relief concerning the validity of the arbitration agreement, the proper constitution of the Arbitral Tribunal and any matter submitted to arbitration in accordance with the arbitration agreement".

The same view was taken by this Court in the case of State Bank of India Vs. Ram Das & Anr., (2003) 12 SCC 474. There it was pointed out in paragraph 27 as under:-

"It was only after the High Court adversely commented upon the conduct of the arbitrator in the manner as noticed hereinbefore, that the appellant became wiser and for the first time this objection has been taken before us. It is an established view of law that where a party despite knowledge of the defect in the jurisdiction or bias or malice of an arbitrator participated in the proceedings
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without any kind of objection, by his conduct it disentitles itself from raising such a question in the subsequent proceedings. What we find is that the appellant despite numerous opportunities made available to it, although it was aware of the defect in the award of the umpire, at no stage made out any case of bias against the umpire. We, therefore, find that the appellant cannot be permitted to raise the question of bias for the first time before this Court."

Mr. Anoop Choudhary, learned senior counsel appearing for the respondents, however, referred to a decision of three-Judge Bench of this Court rendered in State of A.P. & Anr. Vs. Obulu Reddy, (2001) 10 SCC 30. We are of the view that the facts of that case is not applicable in the present case. In the case referred to by Mr. Anoop Choudhary, learned senior counsel, it clearly appears that the appointment of arbitrator was challenged in the High Court contending, inter alia, the jurisdiction of the arbitrator. As already pointed out, in the present case, the respondent did not challenge the order of the Court dated 30/04/1993 appointing Mr. Justice Punniyah, retired Judge of the High Court as sole arbitrator. They participated in the entire proceedings before the arbitrator without any demur till the award was passed on 02/03/1995.

In the facts and circumstances as recited above, the
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respondents waived their rights to file an objection at the time when the award was made Rule of the Court. For the reasons afore-stated, these appeals are allowed and the order of the High Court is set aside. No order as to costs.