

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CIVIL MISCELLANEOUS APPEAL No.1156 of 2004

AND

CIVIL REVISION PETITION No.1883 of 2004

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COMMON JUDGMENT:

CMA No.1156 of 2004 is filed challenging the order dated 28.11.2003 passed in A.O.P. No.6 of 1993 on the file of Principal Senior Civil Judge, Guntur, wherein and whereby the Award dated 06.3.1990 passed by the Sole Arbitrator was set aside by allowing the petition.

2. CRP No.1883 of 2004 is filed against the dismissal of A.O.P. No.57 of 1996 on the file of Principal Senior Civil Judge, Guntur by order dated 28.11.2003, wherein and whereby the appellants herein have sought to make the Award dated 06.3.1990 passed by the Sole Arbitrator as Rule of the Court.

3. To avoid confusion, the parties are hereinafter referred to as they were arrayed in A.O.P. No.57 of 1996.

4. The fact, which are relevant for disposal of these matters, are briefly as under:

Sri Lakshmi Venkateswara Ginning Mill, Palaparru, represented by its Proprietor—Popuri Satyanarayana (first petitioner – died) carried on cotton ginning business at Palaparru Village in Guntur District. The mill was insured with the first respondent covering the risk of different natures under three different policies. Unfortunately, the fire accident took place in the mill on the intervening night of 09/10.10.1986 and the stocks in the premises were burnt. The petitioner incurred loss to a tune of Rs.11,72,000/-. The petitioner submitted the claim form to the first respondent, who in turn accepted the claim to the extent of Rs.8,23,175/-. Feeling aggrieved by the lesser compensation received than claimed, the petitioner addressed letter dated 07.6.1989. to the first respondent appointing the second respondent as Arbitrator, in

pursuance of Clause 18 of the Insurance Policies. In the said letter, the petitioner, while appointing the second respondent as his Arbitrator in pursuance of Clause 18 of the Policies, requested the first respondent to appoint/nominate its Arbitrator, within the stipulated period in view of Section 9(a) of the Arbitration Act, 1940. For one reason or the other, the first respondent did not choose to appoint its Arbitrator. The first respondent filed A.O.P. No.130 of 1989 on the file of Principal Senior Civil Judge, Guntur *inter alia*, contending that the petitioner is not entitled to invoke Clause 18 of the Insurance Policies, as it paid the compensation amount towards full and final settlement. The second respondent, who was appointed as Arbitrator by the petitioner, passed the Award on 06.3.1990.

5. The first respondent filed A.O.P. No.6 of 1993 with a prayer to set aside the Award dated 06.3.1990. The petitioner filed A.O.P. No.62 of 1992 on the file of Subordinate Judge (now, Senior Civil Judge), Bapatla, to make the Award as Rule of the Court and accordingly pass the decree. A.O.P. No.62 of 1992 was transferred to the Court of Principal Senior Civil Judge, Guntur and was re-numbered as A.O.P. No.57 of 1996.

6. The learned Principal Senior Civil Judge, Guntur clubbed all the three A.O.Ps and passed common order on 28.11.2003. A.O.P. No.130 of 1989 was dismissed. While setting aside the Award dated 06.3.1990, learned Senior Civil Judge remanded A.O.P. No.6 of 1993 and A.O.P. No.57 of 1996 filed by the first respondent and the petitioner respectively, and directed the parties to refer the matter to an independent Arbitrator, who shall give opportunity to both the parties and pass the award afresh. Feeling aggrieved by the order dated 28.11.2003 passed in A.O.P. No.6 of 1993 and A.O.P. No.57 of 1996, the petitioners filed the present appeal. During the pendency of A.O.Ps, first petitioner died and petitioner Nos.2 to 4 were brought on record as his legal representatives.

7. The contention of learned counsel for the petitioners-appellants is three fold:

- (1) The findings of the learned Senior Civil Judge that the Arbitrator passed the award after granting of injunction in A.O.P. No.130 of 1989 is factually incorrect;
- (2) The finding of the learned Senior Civil Judge that no opportunity was given to the first respondent is also factually incorrect; and
- (3) the learned Senior Civil Judge has not considered the scope of Rules 23 and 23A of Order XLI of CPC in right perspective.

Per contra, learned counsel for the first respondent-Insurance Company submitted that the learned Senior Civil Judge has rightly considered various aspects and remanded the matter to secure the ends of justice.

8. Now the point that arises for consideration in these matters is:

Whether the learned Senior Civil Judge is justified in remanding the matter to an independent Arbitrator for fresh disposal or not?

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Point:

9. It is an admitted fact that the Arbitrator passed the award on 06.3.1990. The learned counsel for both the parties, in one voice, submitted that the interim injunction was granted in A.O.P. No.130 1989 directing the Arbitrator not to pass the Award on 22.3.1990. In para-15 of the order, the learned Senior Civil Judge made an observation that the Arbitrator passed the award after granting of interim injunction. It is an admitted fact that the award was passed on 06.3.1990 whereas the injunction was granted 22.3.1990; therefore, the finding of the learned Senior Civil Judge is factually incorrect. Therefore, the said finding is not sustainable either on facts or on law.

10. As per the findings of the learned Senior Civil Judge, no opportunity was given to the first respondent by the Arbitrator. The fact

remains that the petitioner got issued notice to the first respondent on 07.6.1989 asking the first respondent to appoint Arbitrator of his own choice. The learned Arbitrator issued notices to the first respondent on 26.3.1989 and 13.9.1989 directing it to appear before him. On 07.11.1989, the Arbitrator issued another notice directing the first respondent to participate in the arbitration proceedings. The material available on record clinchingly establishes that the Arbitrator as well as the petitioner issued notices to the first respondent directing it to participate in the arbitration proceedings. For the reasons best known, the first respondent did not choose to participate in the arbitration proceedings. At every stage of the proceedings, the first respondent was issued notices by the petitioner as well as the Arbitrator. All these facts clinchingly establish that the first respondent was very much aware of the proceedings of the Arbitrator. The observation of the learned Senior Civil Judge that the first respondent might not have attended the arbitration proceedings in view of pendency of A.O.P. No.130 of 1989 is not sustainable. The material available on record clinchingly establishes that the Arbitrator has not violated the principles of natural justice. The findings of the learned Senior Civil Judge that no opportunity was given to the first respondent is not factually correct.

11. Another interesting aspect is that A.O.P. No.130 of 1989 filed by the first respondent contending that the petitioner is not entitled to invoke Clause 18 of the Insurance Policies and for appointment of Arbitrator is dismissed. Admittedly, the order passed dismissing A.O.P. No.130 of 1989 has become final, in view of non-filing of appeal. In view of the same, the first respondent is not entitled to agitate that there is no arbitration clause in the insurance policies.

12. Coming to the remanding of A.O.P. No.6 of 1993 and A.O.P. No.57 of 1996 by the learned Senior Civil Judge, it is apposite to extract the following portion in **Lisamma Antony v Karthiyayani**^[1].

14. Rule 23 of Order XLI of Code of Civil Procedure, 1908, (for short "the Code") provides that where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

15. Rule 23A of Order XLI of the Code provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has Under Rule 23.

16. Rule 24 of Order XLI of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

The learned Senior Civil Judge has not considered the scope of Order XLI Rules 23 and 23A of CPC and remanded the matters on assumptions and presumptions. The learned Senior Civil Judge remanded the matter on the ground that the first respondent had not participated in the arbitration proceedings. As observed earlier, the first respondent was issued notices at every stage of the proceedings by the first petitioner as well as the Arbitrator. The claim of the petitioner is of the year 1989. No purpose will be served by remanding the matter to an independent Arbitrator. The material available on record is sufficient to dispose of the matter on merits. If this court disposes of the matter on merits, one of the parties to the proceedings may lose right of appeal or revision as the case may be. Keeping in mind the interest of both the parties, I am of the considered view that it is appropriate to direct the learned Senior Civil Judge to dispose of A.O.P. No.6 of 1993 and A.O.P. No.57 of 1996 on merits.

13. In the result, the CMA and the CRP are allowed setting aside the

common order dated 18.11.2003 passed in A.O.P. Nos.6 of 1993 and 57 of 1996 on the file of Principal Senior Civil Judge, Guntur. The learned Senior Civil Judge is directed to dispose of the A.O.Ps on merits as expeditiously as possible preferably within a period of six months from the date of receipt of a copy of this order, without being influenced by any of the observations made hereinabove. There shall be no order as to costs. Miscellaneous petitions, if any, pending in these matters, shall stand closed.

T.SUNIL CHOWDARY, J

Date: 15.7.2015
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[\[1\]](#) 2015 (3) SCALE 836