

*** HON'BLE SRI JUSTICE R. SUBHASH REDDY
AND
HON'BLE SRI JUSTICE A. SHANKAR NARAYANA**

+ CIVIL REVISION PETITION No.1067 of 2015

% 28.08.2015

M/s. Yashwitha Constructions (P) Limited,
16, Vivekananda Street, Tirumoolar Colony,
Annanagar West, Chennai, rep. by its
Managing Director, M.Pramod Kumar Reddy

.....

Petitioner/Petitioner

AND

\$ M/s. Simplex Infrastructure Limited,
(formerly known as M/s. Simplex Concrete Piles
India Limited 'Simplex House' 27, Shakespeare Sarani,
Kolkata 700 017, rep. by its Managing Director
and others

.....Respondents

! Counsel for the petitioner : Sri S.Srinivas Reddy

^ Counsel for respondent No.1 : Sri C.B.Ram Mohan
Reddy

Counsel for respondent : Sri S.S.Varma
Nos.3 and 4

< Gist:

> Head Note:

? Cases referred:

Nil

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

**FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

CIVIL REVISION PETITION No.1067 of 2015

Between:

M/s. Yashwitha Constructions (P) Limited,
16, Vivekananda Street, Tirumoolar Colony,
Annanagar West, Chennai, rep. by its
Managing Director, M.Pramod Kumar Reddy

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Petitioner/Petitioner and

M/s. Simplex Infrastructure Limited,
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Kolkata 700 017, rep. by its Managing Director
And others
Respondents/Respondents

...

DATE OF JUDGMENT PRONOUNCED: 28-08-2015

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

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| 1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? | Yes/No |
| 2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? | Yes/No |
| 3. Whether Their Lordship wish to see the
fair copy of the Judgments? | Yes/No |

HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No.1067 of 2015

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ORDER: (Per Hon'ble Sri Justice A. Shankar Narayana)

Aggrieved by the dismissal order dated 26.09.2014 in A.O.P.No.4 of 2013 on the file of the Principal District Judge, Prakasam at Ongole, the instant Civil Revision Petition is filed under Article 227 of the Constitution of India.

2. The facts that are relevant for the purpose of disposal of the instant revision petition are, respondent No.1 formed a joint venture with HO-HUP, Malaysia, and was awarded the work of Construction Package AP-12 of National Highway No.5, for rehabilitation and upgrading of the existing two-lane road to four-six lane divided carriage way between Kavali to Ongole, Kms.222 to 291 of NH-5 in the State of Andhra Pradesh. Respondent No.1 in turn engaged the services of the petitioner as sub-contractor for executing about 50% of the said work on its behalf between km 242 to km 263, km 266.500 to 269 and km 284 to 291 and entered into agreement dated 22.05.2002 at Ongole, Prakasam District.

3. Some time thereafter when disputes arose between them with respect to measures, payments, etc., the petitioner filed suit in O.S.No.72 of 2002 against respondent No.1 before the Senior Civil Judge, Kandukur, and sought ad interim injunction in I.A.No.1391 of 2002, which was granted by the said Court. Thereafter, on the application of respondent No.1-defendant in I.A.No.1503 of 2002 under

Section 8 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act'), the same was allowed for resolution of dispute by an Arbitrator as per Arbitration clause existing in the contract between the parties by its order dated 11.10.2002. Since the Arbitration clause provides for appointment of a single Arbitrator for resolution of disputes, it is alleged that the Managing Director of respondent No.1 has appointed Mr. P.R.Dhar as Arbitrator by its letter dated 18.10.2002, one of the Directors of respondent No.1, which fact was learnt subsequently by the petitioner, and therefore, the petitioner challenged his appointment under Sections 12 and 13 of the Act, but the said application was rejected by the Arbitrator. Respondent No.1 filed its claim statement claiming an amount of Rs.1,57,88,926-72 ps, whereas the petitioner filed its counter-claim claiming an amount of Rs.2,87,19,990/-, and in addition thereto, the price variation in accordance with Clause – 4 of the agreement and interest at 18% showing the amounts under various heads as counter claims 1 to 4. Respondent No.1 filed its rejoinder to the counter claim and even the petitioner filed its reply. The petitioner on 11.08.2004, addressed a letter to the Arbitrator to call for the records relating to certificate of measurements, measurement records, bills paid to respondent No.1 by respondent Nos.3 and 4, etc., and, thereafter, the Arbitrator-Mr. P.R.Dhar resigned as Arbitrator due to ill-health. Since no substitute Arbitrator was appointed on the application of the petitioner in A.A.No.50 of 2004, this Court appointed one Mr. S.K.Biswas as Sole-Arbitrator, and consequently, dismissed the

Arbitration Application by the orders dated 04.03.2004, which was confirmed by the Hon'ble Supreme Court in S.L.P.(C) No.11279 of 2006.

4. While the things stood thus, the petitioner again filed an application under Sections 12 and 13 of the Act, as the petitioner learnt that Mr. S.K.Biswas, Arbitrator was also the consultant of respondent No.1 since 2004, in several arbitration cases, pursuant to which, the said Mr. S.K.Biswas resigned on 15.10.2007. According to the petitioner, respondent No.1 without considering the list of Arbitrators provided by the petitioner, has appointed Mr. Tathagata Roy as Arbitrator, respondent No.2 herein. The petitioner expressing no confidence on him also, filed A.A.No.79 of 2007 before this Court requesting to appoint a substitute Arbitrator to resolve the disputes and this Court by orders dated 01.05.2008, dismissed the said application. Thereafter, respondent No.1 filed a claim statement, which was inconsistent from its earlier claim statement and certified its claim at Rs.48,20,085-73 ps. Since the First Arbitrator has not called for the records, as requested by the petitioner, petitioner renewed its request by addressing a letter dated 17.03.2011. Respondent No.1 informed respondent No.2 through its letter dated 09.08.2011 that the contract with respondent No.3 was entered into by HO-HUP Simplex JV and not by Simplex Infrastructures Limited or Simplex Concrete Piles India Limited and that the records were not available with it and that HO-HUP Simplex JV was wound up after closure of the contract and, thus, expressed its inability

to produce record. On receipt of copy of the said letter, the petitioner through its letter dated 15.08.2011, requested respondent No.2, to call for the records from respondent Nos.3 and 4. Respondent No.2 noting the fact that the records were not available with respondent No.1, refused to give directions to respondent Nos.3 and 4 to produce the records stating that the petitioner should have to resort to legal means. That constrained the petitioner to address a letter dated 20.09.2011 to respondent No.2 requesting it to apply the Court for assistance in taking evidence or grant approval to the petitioner to make an application under Section 27 of the Act before the Court and in the meeting held on 26.09.2011, respondent No.2 observed that he would neither apply to any Court for assistance nor was there any question of directing the petitioner to approach any Court, but, however, observed that the petitioner if so advised, may apply to the appropriate Court for assistance in taking evidence and such application would have his approval as required under Section 27 of the Act. Thus, these events constrained the petitioner to file A.O.P.No.4 of 2013 on the file of the Principal District Judge, Prakasam District at Ongole, requesting to call for the records described in paragraph No.7 of the petition. In paragraph No.11 also, which relates to the relief prayed, the petitioner has given the description of records sought to be called for from the custody of respondent Nos.3 and 4.

5. The said request was resisted by respondent No.1 by filing counter stating therein that it has entered into an agreement with HO-HUP for execution of the work. The

respondent No.1 has also referred to certain events that transpired before the Arbitrators, which, of course, are unnecessary to refer to herein. Respondent No.1 resisted the request mainly on the ground that the petitioner has filed the said application only for protracting the arbitration proceedings, which were commenced in 2002, and because of the attitude of the petitioner, not much progress was made therein and since the petitioner failed to make out any case, sought to reject the request.

6. The Court below heard the petitioner and respondent No.1. Respondent Nos.2 to 4 remained *ex parte* before it. Referring to the decisions relied on by the learned counsel for the petitioner and respondent No.1 therein, more particularly, the timeframe fixed by this Court while dismissing the Arbitration Application in A.A.No.79 of 2007 on 01.05.2008 to dispose of the Arbitration proceedings within six weeks and considering the averments in paragraph No.7 of the petition, observing that the petitioner admitted about availability of the records with the Arbitrator and also taking into consideration the representation of the learned counsel for respondent No.1 that he would not raise any objection for marking the said documents, but however, the said documents have to be proved as per evidential rule, and holding that the documents since are already available with the Arbitrator dismissed the petition.

7. It is the said order which is under challenge in the instant revision petition raising various grounds. Specific ground contained in paragraph No.8 shows that in the

minutes of the meeting held on 26.09.2011, respondent No.2 observed that respondent No.1 denied the contents of all the documents placed by it in support of its counter claim and thus, it became imperative to prove the contents of the disputed documents in order to substantiate its counter claim by placing the documents/records submitted by respondent No.1 to the respondent Nos.3 and 4 in relation to the works executed, which were not available with respondent No.1, and since the Court below, somehow, did not appreciate the same, it sought to set aside the order challenged herein and to allow the A.O.P.No.4 of 2013.

8. Heard Sri C.V.Mohan Reddy, learned Senior Counsel, assisted by learned counsel, Sri S.Srinivas Reddy, for the revision petitioner, and Sri C.B.Ram Mohan Reddy, learned counsel for respondent No.1, and Sri S.S.Varma, learned counsel for respondent Nos.3 and 4.

9. Learned counsel for the revision petitioner would submit that the Court below went wrong in observing that since the records sought to be produced from the custody of respondent Nos.3 and 4 were already available with respondent No.2-Arbitrator, there was no purpose in directing respondent Nos.3 and 4 to produce the same. It is according to him that, though, the records were available with respondent No.2, since they are not certified copies and do not bear the original signatures of respondent No.1, they are inadmissible, though, relevant and the contents of the said documents are required to be proved in accordance with

evidentiary rule, and, therefore, requested to set aside the order under challenge and direct respondent Nos.3 and 4 to submit the records for resolution of dispute between the revision petitioner and respondent No.1. He would further submit that the said request was made way back during the tenure of the First Arbitrator, which request was renewed even before the respondent No.2 herein, and, therefore, the observation of the Court below that the revision petitioner was disinterested in participating in Arbitration proceedings is improper.

10. On the other hand, the learned counsel for respondent No.1 would submit that the application to summon the documents from the custody of respondent Nos.3 and 4 was made by the petitioner only to protract and delay the proceedings before the Arbitrator on one pretext or the other, and, thus, the arbitral proceedings have been pending since 2002. He would also submit that the earlier Arbitrators were made to resign only at the instance of the petitioner and that itself is sufficient enough to show that the petitioner was not interested in conclusion of proceedings before the Arbitrator. It is his further submission that, though, the description of the documents sought to be produced from the custody of respondent Nos.3 and 4 is mentioned, but the relevant records would be of half a truck load to be placed before the Arbitrator, which would reflect that it would be difficult to sort out the documents and mark them in the Arbitration proceedings. He has also brought to our notice the earlier orders passed by this Court fixing timeframe for conclusion of

proceedings by the Arbitrator.

11. Perused the order under challenge and the material placed on record. During the course of arguments, learned counsel for respondent No.3 expressed readiness of respondent Nos.3 and 4 to produce the records before respondent No.2.

12. At the outset, we would like to observe that we are least concerned as to what were the reasons that accounted for change of Arbitrators from one to another. We are also not inclined to go through and analyse the sequence of events placed on record by the learned counsel for respondent No.1. But, irrespective of the allegations and counter allegations of the petitioner and respondent No.1 touching the appointment of Arbitrators in succession, we would like to observe that there is substance in the submission made by the learned counsel for the revision petitioner that, though, the records were available with the Arbitrator, but unless they are authentic documents and admissible in evidence, which are required to be proved in accordance with evidentiary rule, certainly, those records cannot be substitute for the originals, now sought to be produced from the custody of respondent Nos.3 and 4. We are also conscious of the fact that this Court had occasion to fix the timeframe for conclusion of proceedings, but the reasons are obvious as seen from the allegations and counter allegations made by the petitioner and respondent No.1 against each other. The Court below dismissed the application observing in paragraph No.7(e) thus:

"The petitioner is admitting about the availability of the records with the arbitrator but he is submitting that the documents have to be proved. During the course of arguments, the learned counsel for the first respondent reports that he will not raise any objection for marking but the said documents have to be proved according to law. In view of the recitals in para '7', as the documents are already available with the arbitrator, I am of the opinion that the petition filed by the petitioner directing the respondents 3 and 4 to produce the petition schedule documents does not arise."

13. As can be seen from the above observations, we find, the sole reason that favoured the Court below in rejecting the request has been, as the records were already available with the Arbitrator, it opined that the request made by the petitioner to direct respondent Nos.3 and 4 to produce the petition schedule documents does not arise. The observation of the Court below in the previous sentence would make it abundantly clear that the learned counsel for respondent No.1 has reported only to the extent that he will not raise any objection for marking the documents, but the further objection raised by him that the said documents have to be proved was, somehow, either not noticed or not comprehended by the Court below. This ground alone is sufficient, in our considered view, to accede to the request of the revision petitioner. During the course of hearing, the learned counsel for the revision petitioner has filed affidavit on 13.08.2015, pointing out the records that are required to be produced before respondent No.1, which are described in paragraph No.6 thus:

"i) Measurement Books maintained by consultants of

Respondents 3 and 4 with reference to the work executed in Package AP-12, NH-5, Kavali to Ongole from chainage km 242 to km 243, km 245 to km 263, and km 284 to km 291.

ii) Bills raised and submitted by HO HUP Simplex JV, with reference to the work executed in Package AP-12, NH-5, Kavali to Ongole from chainage km 242 to km 243, km 245 to km 263.18, and km 284 to km 291.

iii) Quantity certified by the Consultants of Respondents 3 and 4 and Certificates of Measurements, with reference to the work executed in Package AP-12, NH-5, Kavali to Ongole from chainage km 242 to km 243, km 245 to km 263.18, and km 284 to km 291.

iv) Payments made to HO HUP Simplex JV by Respondents 3 and 4 and copy of bills paid to HO HUP Simplex JV with reference to the entire work executed in Package AP-12, NH-5, Kavali to Ongole from chainage km 242 to km 243, km 245 to km 263.18, and km 284 to km 291.

v) Price Variation Paid with reference to the entire work executed in Package AP-12, NH-5, Kavali to Ongole from chainage km 242 to km 243, km 245 to km 263.18, and km 284 to km 291.

vi) BOQ Variation (Final) with reference to the entire work executed in Package AP-12, NH-5, Kavali to Ongole from chainage km 242 to km 243, km 245 to km 263.18, and km 284 to km 291.

vii) Final Executed Cross Sections with reference to the entire work executed in Package AP-12, NH5, Kavali to Ongole from chainage km 242 to km 243, km 245 to km 263.18, and km 284 to km 291."

Therefore, we direct respondent Nos.3 and 4 to produce the said records before respondent No.2 holding that the order passed by the court below is unsustainable.

14. Accordingly, the Civil Revision Petition is allowed setting aside the order dated 26.09.2014 passed by the Court below in A.O.P.No.4 of 2013, and consequently, A.O.P.No.4 of 2013 is allowed granting relief sought for by the petitioner, as indicated above. Before parting with, it is desirable to

observe that respondent Nos.3 and 4 would produce the records before respondent No.2 immediately and both parties, i.e., revision petitioner and respondent No.1, would cooperate with respondent No.2 to enable him to dispose of the Arbitration proceedings, as expeditiously as possible. There shall be no order as to costs.

15. As a sequel thereto, miscellaneous petitions, if any pending in the instant revision petition, shall stand closed.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

28th August, 2015.

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