

(2002) 04 MAD CK 0006

In the Madras High Court

Case No : Application No's. 5156 and 5159 of 2001 in Orllappln. No. 857 of 2001 and Application No's. 5157 and 5158 of 2001 in Ori. Application No. 856 of 2001

Board of Trustees of Chennai Port Trust

APPELLANT

Vs

M/s. Hindustan Construction Co. Ltd.

RESPONDENT

Date of Decision : 29-04-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37(4), 43, 43(3), 5, 9
Limitation Act, 1963 — Section 5

Citation : (2002) 04 MAD CK 0006

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : V.T. Gopalan, Additional Solicitor General for Mr. R.G. Raja, for the Appellant; P. Chidambaram, for the Respondent

Judgement

K. Sampath, J.—All the above applications and the original applications are disposed of by the following common order: Application No.

5156/2001 in O.A. No. 857/2001 is for condoning the delay of one day in giving notice of rejection u/s 5 of the Limitation Act read with Section 9

of the Arbitration and conciliation Act, 1996.

2. Application No. 5159/2001 in O.A, No. 857/2001 is for extension of time for such period as this Court deems fit and thinks proper for

submission to arbitration in the manner provided in sub Clause 67.3 of the agreement between the parties u/s 43(3) of the Arbitration and

Conciliation Act.

3. O.A. 857/2001 is for an interim injunction restraining the respondent from proceeding in the application before the Arbitral Tribunal for

compliance of the recommendation of the Disputes Redressal Board u/s 9 of the

Arbitration and Conciliation Act, 1996.

4. Application No. 5158/2001 is for condoning the delay of one day in giving notice of rejection u/s 5 of the Limitation Act read with Section 9 of

the Arbitration and Conciliation Act, 1996.

5. Application No. 5157/2001 is for extension of time for submission to arbitration as provided under Sub Clause 67(3) of the agreement u/s

43(3) of the Arbitration and Conciliation Act, 1996.

6. O.A. No. 856/2001 is for an interim injunction restraining the respondent from proceeding with the application before the Arbitral Tribunal for

compliance of the recommendation of the Disputes Redressal Board u/s 9 of the Arbitration and Conciliation Act.

7. In the course of the order, the Arbitration and Conciliation Act, 1996 will be referred to as the Act and the Disputes Redressal Board will be

referred to as D.R.B.

8. We will first dispose of O.A.Nos.856 and 857 of 2001. Mr. P. Chidambaram, learned Senior Counsel for the respondent, relied on the

judgment of a three Judges Bench of the Supreme Court in Bhatia International Vs. Bulk Trading S.A. and Another, . The Supreme Court has held

that u/s 9 of the Act, there cannot be stay of arbitral proceedings. The applications now pending before the Arbitral Tribunal have been filed by the

respondent for compliance of the D.R.B.'s recommendation.

9. It was contended by Mr. V.T. Gopalan, learned Additional Solicitor General appearing for Mr. R.G. Rajan, learned Counsel for the applicant,

that if pending decisions in these applications the Arbitral Tribunal is to comply with the recommendations of the D.R.B., then the applications filed

now would become practically infructuous. There is indeed substance in what Mr. Gopalan submitted. But then the Supreme Court having held

that Section 9 of the Act cannot be invoked by the Court to stall the proceedings before the Arbitral Tribunal, as observed by the Supreme Court

in the said decision, the applicant may have to only move the Arbitral Tribunal for suitable relief.

10. A. No. 5156/2001 is for condonation of delay of one day in giving notice of rejection u/s 5 of the Limitation Act.

11. The facts leading to the applications are as under:

For the execution of Ennore Coal Port Project, there was an agreement entered into between the applicant and the respondent. The present original applications relate to ECPP/C4 works contract. M/s Haskoning were appointed as Consulting Engineer. The agreement contains all the terms and conditions relating to the execution of the work covered by the contract. The contract between the parties relates to breakwater construction. The total value is Rs. 2,584,295,000/-. The agreement provides for resolution of the dispute between the parties.

Sub Clause 67(1) requires that a dispute of any kind whatsoever between the parties in connection or arising out of contract or the execution of the works, whether during the execution of the works or after their completion and whether before or after the repudiation or termination of the

contract including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate on valuation of the

Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board (D.R.B.) established pursuant to the Disputes

Review Board agreement; either the Employer or the Contractor may refer a dispute to the Board in accordance with Appendix II; upon receipt of

Board's recommendation(s), the parties shall within 14 days or such other time as the Board may specify, give written notice to each other, the

Board and the Engineer of their acceptance or rejection of each recommendation, failing which notice all of the recommendation(s) shall be

deemed accepted; accepted and deemed accepted recommendations shall be final and binding on the parties; any dispute on which the Board has

not issued a recommendation within 42 days of its final hearing on the dispute or regarding which the recommendation(s) are not accepted may be

referred to in writing by either party to arbitration in accordance with this Clause by written notice to the other party with copies to the Engineer

and the Board; such notice shall state that it is being made pursuant to this Clause and shall establish the entitlement of the party giving it to

commence arbitration provided that subject to Sub Clause 67.3 no such arbitration may be commenced until such notice is given; such reference

shall be made within 14 days of receipt of the Board's recommendation(s) or within 14 days of the day on which said period of 42 days expired

as the case may be, failing which reference, any recommendation(s) previously rejected or not accepted shall be deemed accepted despite such

previous rejection or non-acceptance and shall be final and binding upon the parties; all recommendations which have become final and binding

shall be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer.

Sub Clause 67.3 provides that an) dispute in respect of which the recommendation(s), if any, of the Board, has not become final and binding

pursuant to Sub Clause 67.1 shall be finally settled by arbitration as set forth in that Clause.

Sub Clause 67.4 provides that where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute

within the period stated in Sub Clause 67.1 and the related recommendation or decision as the case may be, has become final and binding, either

part) may, if the other party fails to comply with such recommendation or decision as the case may be, and without prejudice to any other right it

may have refer the failure to arbitration in accordance with Sub Clause 67.3; the provisions of Sub Clause 67.1 shall not apply to any such

reference.

One of the disputes the respondent raised for recommendation before the DRB relates to the additional costs alleged to have been incurred by it in

connection with an increase in the specific density (gravity) of the rock in the Employer's stock pile from those foreseeable at the time of tender

and for the extension of time of 90 days to be added to the contract period. The applicant opposed this. The DRB made the following

recommendation dated 23.3.2001:

A-1. Additional cost due to tonnage of rock consequent on the increased specific density of rock

(a) North & South Breakwater Rs. 4,55,57,805.00

(b) Work Harbour Rs. 19,71,686.00

Total : Rs. 4,75,29,491.00

2. Interest @ 18% from July, 2000 till the date of payment on the above amount.

B. Extension of time - 90 days (ninety days)

By letter dated 24-3-2001 the Chairman of DRB sent a copy of the recommendation. The Chief Engineer-in-charge received it on 27-3-2001.

The Project Office was in the process of being shifted from Ennore to Chennai.

This caused administrative delay. Since relative files had to be examined, the Chief Engineer wrote a letter to the Project Manager of the respondent on 7-4-2001 requiring time till 20-4-2001 for communicating the decision on the recommendation of the DRB. A copy of the said letter was sent to the Chairman and Members of the DRB as well as the Engineer. The respondent received the letter on 7-4-2001. Thereafter, by letter dated 11-7-2001 the Chairman informed the respondent that the Trust is rejecting the said recommendation of the DRB. In the meantime, the respondent by letter dated 8-4-2001 received by the applicant on 11-4-2001, accepted the recommendation of DRB as a whole. The respondent by letter dated 11-4-2001 received by the Secretary's Office on 23-4-2001 and by Chief Engineer on 24- 1-2001 stated that the request for enlarging the time up to 20-4-2001 was beyond the scope of the contract and hence could not be accepted and that the rejection was beyond the time specified in the contract. By letter dated 27-4-2001 the applicant pointed out the justification for the extension that neither the DRB nor the respondent responded and that rejection was already informed by letter dated 11.4.2001. II was pointed out that the respondent's alleged letter of acceptance was received only on 11-4-2001 reiterating the earlier reply and requesting implementation of the recommendation.

12. The respondent filed an application before the Arbitral Tribunal purporting to be-under Sub Clause 67.4 praying for compliance of the recommendation of the DRB According to the respondent, the recommendation of the DRB had become final and it was entitled to relief under Sub Clause 67.4. The applicant has filed the necessary counter opposing the said application

13. The applicant was under bonafides belief that the time for extension as requested in the letter dated 7.4.2001 would be allowed: again, since the applicant had rejected the recommendation, it was only the aggrieved party, i.e. the respondent that should seek arbitration and not the party rejecting the recommendation; it was not free from doubt whether rejection should also be subject matter for arbitration and notice under Sub clause 67.3 should be given seeking arbitration for rejection; the Chief Engineer of the Chennai Port Trust is the Project Director of the Ennore

Project under construction; the permanent incumbent retired on 31st January 2001 and in his place new Chief Engineer/Project Director was

appointed only on 10-9-2001 and as he was new to the subject and time was needed to study the entire matter relating to the Project and in the

interregnum, only the Subordinate Engineers were in charge and most of them were involved in the Voluntary Retirement Scheme; the project

work itself was to be completed by 26- 4-2001; the Project Office was shifted from Ennore to Chennai and the process of shifting took substantial

time; under the above circumstances, the decision regarding the rejection and submission of request for arbitration could not be taken; the delay of

one day in intimating rejection or not issuing notice under Sub Clause 67.3 is neither wanton nor willful, but due to the bona fide reasons stated

supra; the delay should be condoned and time for submission of the recommendation for arbitration has to be extended u/s 43(3) of the Act.

14. So far as the other Original Application is concerned, the rejection was intimated in time, but notice of submission to arbitration in the manner

provided under Sub Clause 67.3 had not been given and the prayer is for grant of extension of time for submission to arbitration.

15. Very detailed counters have been filed in these matters. The material portion relevant for the purpose on hand may be set out as under:

So far as O.A. No. 857/2001 is concerned, by letter dated 7-4-2001 seeking time until 20-4-2001 the applicant had merely stated that due to

administrative reasons, the Employer required time up to 20-4-2001 for communicating its decision on the recommendation of the DRB. The said

letter dated 7-4-2001 had been addressed by the Chief Engineer/Project Director of the applicant to the respondent and it bore no endorsement

and acknowledgement of it having been addressed to or served upon the DRB. The respondent had by its letter dated 11-4-2001 informed the

applicant that the contract did not envisage or provide for extension of time to be granted by the respondent and turned down the request of the

applicant and called upon the applicant to strictly comply with the provisions of the said contract, more particularly Sub Clause 67.1 and to

thereunder accept or reject the recommendations passed/issued by the DRB within 14 days of the date of receipt of recommendations of the

DRB. Under the provisions of the contract, the party accepting or rejecting the recommendations of the DRB is required to give written notice to

each other. Board and the Engineer of its acceptance or rejection of the said recommendations, failing which notice of the recommendations shall

be deemed accepted. Accepted and deemed accepted recommendations under the provisions of the contract are mandatory, final and binding on

the parties to the said contract. The applicant was further required under Sub-Clause 67.1 to issue a written notice of its intention to refer the

matter to arbitration. The applicant has not done and never bothered to do so till the filing of the petition. The applicant had not given any written

notice of its intention to commence arbitration within the period prescribed under Sub Clause 67.1 and thereafter in the manner provided under

Sub Clause 67.3.

So far as dispute No. 2 is concerned, the recommendations of DRB has become final and binding. So far as dispute No. 4 is concerned, though

rejection had been intimated in time, the further obligation to seek reference to arbitration has not been complied with by the applicant. The

applicant by its conduct must be deemed to have accepted the recommendation of DRB in accordance with the provisions of Clause 67.1.

The applications of the applicant are misconceived in view of the fact that there is no claim which is a prerequisite to the invocation of Section

43(3), and in any event, there is no case made out by the applicant on the ground of undue hardship.

16. Mr. V.T. Gopalan, learned Additional Solicitor General, took me through the provisions of Section 43(3) and submitted that an element of

public good was involved and if the recommendations of the DRB were to become final, there would be undue hardship caused to the applicant.

The stakes involved were very heavy and the respondent should not be allowed to defeat arbitration on technical grounds. The Court had ample

jurisdiction u/s 43. The respondent was already before the Arbitrator and interests of justice required that there should be condonation of delay of

one day so far as dispute No. 2 was concerned and the applicant should be allowed to have reference to arbitration. So far as dispute No. 4 was

concerned, Mr. Gopalan submitted that there was no delay and that only the formality of reference remained.

17. The learned Additional Solicitor General relied on the judgment of the Supreme Court in *Sterling General Insurance Co. Ltd. Vs. Planters*

Airways Pvt. Ltd., The learned Additional Solicitor General also referred to two other decisions:

Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, for the proposition that one must look at the whole instrument and not at

only parts and the decision in Bihar State Electricity Board, Patna and Others Vs. Green Rubber Industries and Others,

18. Per contra, Mr. P. Chidambaram, learned Senior Counsel, submitted that the subject cases were not identical cases, but entirely different. The

learned Senior Counsel referred to the various paragraphs in the counter and submitted that there should be rejection in time and reference in time.

So far as dispute No. 2 was concerned, there was no rejection in time and no reference at all. So far as the other case was concerned, though

there was rejection in time, till date there had been no reference. The learned Senior Counsel took me through the contract document as it

originally stood and the subsequent amendments made. Though originally only rejection and not reference was contemplated, the amendments had

made the position clear. There must be a rejection and reference within the stipulated periods. The learned Senior Counsel also took me through

Sections 5 and 43 of the Act. He also sought to distinguish the decisions of the Supreme Court relied on by the learned Additional Solicitor

General for the applicant. The learned Senior Counsel also brought to my notice the various instances where the very applicant had complied with

the requirements regarding rejection and reference within the stipulated periods and it would not be open to the applicant to plead ignorance of the

same. Tabular statements were furnished. Those tabular statements indeed bear out that the contention of the learned Senior Counsel for the

respondent in this regard is correct.

19. So far as dispute No. 2 is concerned. it is to be noted that the applicant had not rejected the recommendations of the DRB within the time. The

applicant had also not taken steps for reference to arbitration within the time stipulated in the agreement between the parties. This is so with regard

to both the disputes. The learned Senior Counsel is well-founded in his submissions.

20. But then, we have to examine the consequences if the applicant is to be denied the opportunity to have the matter decided by arbitration. In

both the disputes, the stakes involved run to crores. The Supreme Court in several cases has held that rules of procedure are intended to be

handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even

infraction of the rules of procedure. (See *Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon*,

21. In *Sterling General Insurance Co. Ltd. v. Planters Airways Pvt. Ltd.* (1975 I SCC 603) the question arose this way:

The appellant company insured the carriage of goods by the respondent carrier. One consignment of general merchandise valued at Rs. 1,10,000/-

was loaded in a truck on June 29, 1971 but neither the merchandise nor the truck reached its destination. Whereupon, claims were filed by the

respondent on July 1, 1971 and September 21, 1971. The police reported that the episode of robbery put forward to explain the missing truck,

was false. The appellant by his letter on February 16, 1973, disclaimed liability, against which the respondent by his letter of March 30, 1973

asked for the grounds. The appellant replied on May 30, 1973 that he had nothing more to add. The respondent took the advice of solicitors and

to invoke the arbitration clause of the agreement on August 17, 1973 filed application before the High Court u/s 37(4) for extension of time which

was granted. The appellant, aggrieved by the decision, has challenged the propriety of the High Court's decision. The Supreme Court held as

follows:

The corresponding provision of English law was originally interpreted in a narrow and strict sense. But lately the prevalent view is liberal in this

respect. It has been stated that the word "undue" in the context simply means excessive hardship greater than the circumstances warrant and that

even if a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault. Even if a claimant

makes a mistake which is excusable, and is in consequence a few days out of time, then if there is no prejudice to the other side, it would be

altogether too harsh to deprive him of all chance forever of coming and making his claim and that is all the more so, if the mistake is contributed or

shared by the other side.

In considering this question the Court must take all the relevant circumstances of

the case into account: the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake, the length of delay: whether the claimants have been misled, whether through some circumstance beyond their control it was impossible for them to appoint an arbitrator in time. Another important circumstance is whether there is any possibility of the other side having been prejudiced by the delay.

So a liberal view of the words "undue hardship" is called for. "Undue" must mean something which is not merited by the conduct of the claimant or

is very much disproportionate to it.

Both the amount at stake and the reasons for delay are material in considering the question of undue hardship. No material prejudice would be

caused to the appellant by extending the time. There would be undue hardship if time is not extended, as the consequences of non-extension would

in any event be excessive and out of proportion to the fault of the respondent, if any, in not being prompt. The mere fact that a claim would be

barred would not be undue hardship. But considering the amount involved and the reasons for the delay, it would be undue hardship to the

respondent if time is not extended.

In the same decision the Supreme Court observed as follows:

There are no decisions of this Court or of the High Courts concerning the relevant considerations to be taken into account in exercising the

jurisdiction for extending time u/s 37(4) of the Act. Section 16(6) of the English Arbitration Act, 1934 which is in pari materia with Section 37(4)

of the Act. Therefore, the interpretation placed by English Courts upon Section 16(6) and Section 27 of the respective Acts has great persuasive

value.

22. No doubt, Mr. P. Chidambaram, learned Senior Counsel, sought to distinguish the decision of the Supreme Court by contending that the delay

in the case before the Supreme Court was practically negligible and in the instant case, after rejecting the recommendations, till date, no steps have

been taken for seeking reference to arbitration. Of course, so far as the first matter, viz. dispute No. 2 is concerned, the learned Additional

Solicitor General is right in his submission that only if the delay in rejecting the recommendations is condoned, the further question of seeking

reference would arise. However, so far as the second matter, viz. dispute No. 4 is concerned, the rejection has been made in time, but reference has not been sought.

23. For this the learned Additional Solicitor General, submitted that it is always open to the Court to mould the relief to suit the situations. Indeed, the applicant had not been diligent and as pointed out by the learned Senior Counsel Mr. Chidambaram, at or about the same time rejections in other matters had been made and reference sought by the present applicant and the explanation offered for non-rejection in time and reference thereafter cannot be that easily accepted. In case the applicant fails so far as the first claim is concerned, the loss would be in the region of 47.53 millions and in the other matter, viz. dispute No. 4 it will be in the region of 30 millions.

24. It is really disturbing that the applicant had not been diligent in doing the routine required things as per the contract between the parties and in particular, Clauses 67.1 and 67.3. It is not disputed that Section 37(4) of the Old Act is identical with Section 43(3) of the present Act and the Court has ample powers when in its opinion, 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 deems proper. It cannot be said that no hardship would be caused to the applicant. It cannot also be said that any serious prejudice would be caused to the respondent. It is not as if the claims of the respondents under disputes 2 and 4 of the respondent are straightway rejected. The respondent is only required to have a decision through arbitration and it will have to succeed on the merits of its claim. At the same time it has to be pointed out that the applicant has not done the proper thing in the circumstances of the case. Routine formalities had not been attended to by the applicant's Officers and the consequences in monetary terms are very serious. The Officers responsible for the serious lapses and who are thus guilty of dereliction of duty should be proceeded against and suitably punished. In view of the discussion above Application Nos. 5156 to 5159 of 2001 will stand allowed, subject to payment of Rs. 10,000/- as costs in each application and the costs to be recovered from the Officers responsible for

the infraction. O.A.Nos.856 and 857 of 2001 will stand dismissed. It is made clear that it is open to the Arbitrators to take up the reference by the applicants also along with the applications by the respondent for confirmation. It is further open to the applicants to approach the Arbitrators for suitable interim relief as well.