

(1997) 11 MAD CK 0013
In the Madras High Court
Case No : O.S.A. No. 63 of 1997

G. Rajendrababu and brothers

APPELLANT

Vs

The Superintending Engineer, Fishing Harbour, Project Circle,
Madras-6

RESPONDENT

Date of Decision : 18-11-1997

Acts Referred:

Arbitration Act, 1940 — Section 2(c), 20, 37(4)

Citation : (1997) 11 MAD CK 0013

Hon'ble Judges : V. Bakthavatsalu, J; A.R. Lakshmanan, J

Bench : Division Bench

Advocate : R. Murari, for the Appellant; Srikanth, Spl. Govt. Pleader (CS), for the Respondent

Judgement

A.R. Lakshmanan, J.—The above appeal is directed against the judgment and decree is C.S. No. 208 of 1996 (A.A.) of Jayasimha Babu,

J. The plaintiff is the appellant. The appellant filed C.S. No. 208 of 1996 u/s 20 of the Arbitration Act to direct the defendant-respondent to file in

this Court the Original Agreement No. CR15/86-87 dated 7-11-1986 and appoint an arbitrator to hear and decide the disputes between the

plaintiff and defendant and make an order of reference to him of the dispute enumerated in para 10 above of the affidavit of the appellant.

2. Pursuant to the tender invited by the respondent for the construction of quay-wall and side walls of ship way with quarried rubble backfill and

reclamation of fishing harbour at Chinnamuttom in Kanyakumari District, the appellant submitted their tender and the above work was awarded to

the plaintiff by the respondent dated 23-7-1986 for a total value of Rs. 2,17,37,265/- Both the parties entered into an agreement dated 7-1-1986

wherein the terms and conditions of the above work have been set out. The appellant could not commence the work immediately due to various factors. This apart, the appellant had quoted their rights for the work in the year 1985 and due to no fault of them, the contract work had been prolonged to 1990 though the original contract was for 18 months. However, the defendant sought to terminate the appellant's contract on 25-9-1990 even though the appellant was in no way responsible for the delay in the work. According to the appellant the termination is illegal and unjustifiable and that the respondent is liable to pay the appellant the damages, losses and expenses caused to them by means of the said breach. So, the appellant filed O.S. No. 175 of 1990 before the Subordinate Judge, Nagercoil for declaration of the cancellation of the contract as illegal and for consequential reliefs.

3. A Commissioner was appointed to assess the quantities of works done by the plaintiff-appellant and the said Commissioner by his report dated 1-3-1995 has assessed the work done by the appellant in respect of the above contract. In the meanwhile, the respondent prepared a final bill in respect of the above work on 15-3-1995 mentioning the figures which according to appellant are totally incorrect. One of the major aspects of the final bill relates to seigniorage charges on materials used in the work and the respondent has sought to recover the same from the appellant in spite of the fact there is no provision in the contract authorising such deductions. The appellant therefore addressed the respondent on 19-3-1995 stating their objections to the final bill prepared by the respondent for which the respondent had sought a reply on 7-4-1995. According to the appellant by virtue of the letters exchanged between the parties, disputes have arisen between the appellant and the respondent and the agreement between the parties provides for arbitration of all disputes as set out in the page 3 of the Articles of Agreement read with clause 4.56 of Special Conditions of Contract. Accordingly, the appellant filed the above suit u/s 20 of the Act seeking the nomination of an Arbitrator to hear and decide the disputes between the appellant and the respondent and as enumerated in paragraph 10 of the affidavit filed in C.S. No. 208 of 1986 (AA).

4. According to the appellant, this Court is the Court within the meaning of Section 2(c) of Arbitration Act which can hear and decide the above

matter since the respondent carries on business within the jurisdiction of this Court.

5. The suit was resisted by the respondent. According to them the agreement containing disputes which had arisen has to be referred to the

Arbitration within three months from the date of dispute. According to the appellant the claim was received on 24-3-1995 and that he has all the

objections and seek to invoke the arbitration proceedings and hence, the suit is not maintainable in view of the fact that the invoking of the

Arbitration Clause ought to have been done within three months from the date of the alleged dispute. On this ground alone it is submitted that the

suit is liable to be dismissed in limine. Other contentions on merits have also been raised with which were are not presently concerned.

6. Learned Judge, Jayasimha Babu, J., by his order impugned in this appeal rejected the claim of the appellant on the ground that the contract does

not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the Engineer that the bill is

ready for payment. Therefore, the claim of the appellant is deemed to have been waived. The above finding was challenged by the appellant on

various grounds.

7. We have gone through the Arbitration Clause and also other relevant documents and pleadings. Admittedly, the respondent did not make

payment within 90 days after the date of receipt of the letter dated 15-3-1994. The appellant also wrote a letter only an year later. There was a

long interval between the respondent's letter and that of the appellant. In this case the final bill, which records all the transactions and determines

the amount payable to one of the other party and that the same has been done under the letter dated 15-3-1994.

8. Mr. R.Murari, learned counsel for the appellant contended that the period of limitation would commence from the date of the report of the

Advocate-Commissioner appointed by the Subordinate Judge, Nagercoil and as the report was filed only on 1-3-1995, the appellant's claim is

within time. In this case an Advocate-Commissioner was appointed at the instance of the appellant. He also has filed his report. In our view the

report of the Commissioner cannot be taken as the date from which the period of limitation should commence. What would be the material is that

the date of the order in L.P.A. No. 155 of 1991 and the date of the letter sent by the respondent. While disposing of the appeal (L.F.A. No. 155

of 1991) this Court on 3.11.1993 had observed that the order of the trial Court rejecting the application I.A. No. 621 of 1990 is restored with a

direction to the defendants 1 and 2 therein that before proceeding with the entrustment or execution of the balance of work in question, the work

done by the appellant-contractor till the date of cancellation of the contract, namely, 25-9-1990, be valued with notice to the plaintiff by the

Assistant Engineer in charge of the project in question and to be check measured and valued by the Executive Engineer and a copy of the same

shall be furnished to the plaintiff. It is further observed that it is open to the plaintiff/ contractor or its agent to be present during the course of

measurement by the Assistant Engineer and the check measurement by the Executive Engineer.

9. Learned counsel for the appellant further submitted that this Court should exercise its power u/s 37 (4) of the Arbitration Act and extend the

time. We are unable to countenance the said contention. In this case, the contract was admittedly signed in the year 1986 and the work was to be

completed within 18 months. It had not been completed, for four years and hence, the contract was terminated. The contractor had also instituted

a litigation and filed a suit before the Subordinate Judge, Nagercoil. He had also brought the matter upto this Court in L.P.A. No. 155 of 1991.

The plea of the learned counsel for the appellant that the appellant is a semi-literate and did not have legal advise, cannot be accepted and such

plea, in our opinion, do not constitute sufficient ground for extending the time u/s 37 (4) of the Arbitration Act.

10. Mr. Murari, learned counsel for the appellant in support of his contention has drew our attention to the judgment reported in Union of India v.

Messrs L.K.Ahuja and Company (AIR 1988 S.C.1172) wherein the Supreme Court has held as follows:

that it is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right

to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrate.

But as rightly pointed out by learned counsel for the respondent that in order to be entitled to ask for a reference u/s 20 there must be an entitlement

to money and a difference or dispute in respect of the same. It will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference under S.20 and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an order u/s 20 to be barred by limitation. In matters of this nature, the main question is whether the application u/s 20 was within time. Admittedly, in this case, the claim u/s 20 of the Act was beyond 90 days from the date of final bill dated 15-3-1994. Therefore, a barred claim cannot be adjudicated by the arbitrator. The learned Judge also has clearly found that the claim u/s 20 of the Act by the appellant was out of their turn. But however, the right of the appellant before the Courts can always be pursued provided if the said claim is also within the period of limitation. The appellant has admittedly filed suit on the file of Subordinate Judge, Nagercoil in O.S. No. 175 of 1990 for declaration of the cancellation of the contract as illegal and for consequential relief. Learned counsel for the appellant further represents that the appellant has already filed another application for amendment of the plaint and that the said Interlocutory Application is pending for final adjudication. Though the claim u/s 20 of the Act to invoke the arbitration is barred, the appellant is always at liberty to also file a suit to pursue his remedy before the Civil Court in O.S. No. 175 of 1990. Therefore, the Subordinate Judge, Nagercoil is directed to dispose of the said claim of the appellant on merits and in accordance with law after affording opportunities to both the parties. The O.S. Appeal is ordered accordingly. No costs.