

(2006) 02 MAD CK 0126

In the Madras High Court

Case No : O.P. No's. 270, 297, 447, 717 and 738 of 2002, 58 and 426 of 2003, 18, 187, 188 and 189 of 2004 and 4 and 327 of 2005

Rajam Engineering Contractors

APPELLANT

Vs

The State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 03-02-2006

Acts Referred:

Arbitration Act, 1940 — Section 20, 23
Arbitration and Conciliation Act, 1996 — Section 11(4)

Citation : (2006) 2 LW 639 : (2006) 1 MLJ 701

Hon'ble Judges : Ajit Prakash Shah, C.J

Bench : Single Bench

Advocate : S. Udayakumar, in O.P. Nos. 57 and 58 of 2003, S. Amalraj, in O.P. Nos. 118/03 and 327/05, Bijai Sundar, in O.P. No. 270/02, S. Chandramouli, in O.P. Nos. 287, 738/02, P. Bagyalakshmi, in O.P. No. 447/02, V. Raghavachari, in O.P. No. 717/02, M.K. Kabir, in O.P. No. 426/03, S. Thiruvengataswamy, in O.P. No. 18/04, K. Harishankar, in O.P. Nos. 187 to 189/04 and B.T. Seshadri, in O.P. No. 4/05, for the Appellant; N.R. Chandran, General and Dakshayani Reddy, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Ajit Prakash Shah, C.J.—These Original Petitions filed u/s 11(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") raise a common question on the interpretation of a certain Governmental Order issued by the State of Tamil Nadu, the terms of which supposedly constitute an arbitration agreement. There is, however, apparent conflict between the decisions rendered by the single Judges of this Court on the interpretation of the said Government Order.

2. We take the facts in O.P. No. 58 of 2003 to understand the issue involved in these petitions. The petitioner was awarded a contract for the work of formation of Inner Ring Road in Hosur including construction of minor bridges and culverts by the respondents. It is the case of the petitioner that the work could not be

completed due to the indifferent attitude of the respondents, and the petitioner is no way responsible for the delay. Further, the amount due to the petitioner was not paid by the respondents for the reasons best known to them. All these factors compelled the petitioner to abandon the work halfway and request the respondents to refer the matter for arbitration as contemplated under special conditions for arbitration. The request of the petitioner for reference to the arbitration was refused by the 3rd respondent vide his letter dated 03.05.2002 stating that as per G.O.Ms. No. 1545 dated 26.07.1990 the arbitrator is empowered to settle the claims upto Rs. 2 lakhs only, and since, the claim of the petitioner was for Rs. 2,69,13,200/-, it could not be referred to arbitration. The petitioner vide advocate's notice dated 29.11.2002 requested the respondents to appoint an arbitrator within a period of 30 days to resolve the dispute between the parties, but there was no response from the respondents, and therefore, the petitioner has preferred the present petition seeking appointment of an arbitrator u/s 11(4) of the Act.

3. The relevant portion of the G.O.Ms. No. 1545 dated 26.07.1990 is as under:

In the circumstances stated above the Government approved the following procedure to be followed in respect of Highways and Rural Works Department:

(i) The existing system of referring the dispute between the contractor and the Department to the Arbitrator may be continued.

(ii) Claims upto the value of Rs. 2 lakhs be referred to Departmental arbitration,

(iii) Claims above the value of Rs. 2 lakhs be referred to the Court.

(iv) If both the parties agree to the award passed by the Arbitrator there is no need to file it in the Court and obtain a decree on it.

(v) If the parties move the Court, under the Arbitration Act, 1940 (Central Act X of 1948) then the provisions of the said Act have to be followed and the judgment of the Court shall be final.

(vi) In the case of Tamil Nadu State Construction Corporation Limited the Commissioner and Secretary to Government, Public Works Department will be the arbitrator in disputes between the Corporation and the Highways and Rural Works Department. The orders issued in G.O.Ms. No. 1344, Finance (CFC) dated 27.09.1979 in this regard may be followed scrupulously.

4. A copy of the Governmental Order referred to above was communicated to all the Superintending Engineers and Divisional Engineers (H & RW) including special divisions with a direction that in all the tenders a special condition be incorporated as follows:

In case of any dispute or difference between the parties to the contract either during the progress of or after the completion of the works or after the determination abandonment or breach of contract or as to any matter arising thereunder and if the claims exceed monetary value of more than Rs. 2 lakhs the

same shall be filed before a civil Court having jurisdiction for decision.

5. The figure of Rs. 2 lakhs in G.O.Ms. No. 1545 dated 26.07.1990 was later replaced by Rs. 5 lakhs. There is no dispute that almost all the contracts in the present petitions contain the condition referred to above.

6. The question is whether in terms of the above Governmental Order a claim of above Rs. 2 lakhs is to be referred to the arbitrator or is to be adjudicated upon by a Court having competent jurisdiction by filing a regular suit.

7. Learned counsel appearing for the petitioners strenuously submitted that the Governmental Order clearly suggests that in cases where the claim is above the value of Rs. 2 lakhs it has to be necessarily referred to the Court u/s 20 of the Arbitration Act, 1940 in order to enable the Court to nominate an arbitrator to enter into the reference in respect of the dispute between the parties and the same does not contemplate that civil suit alone has to be filed in cases where the claim is above Rs. 2 lakhs. It is submitted that Clause (v) read with Clauses (ii) and (iii) of the said Governmental Order should be interpreted to mean that the claims upto the value of Rs. 2 lakhs can only be referred to departmental arbitration and claims above the value of Rs. 2 lakhs have to be referred to the arbitrators nominated by the Court. It is also submitted that since the issue has already been determined against the respondents by two learned single judges of this Court namely, C.V. Govardhan, J. and A. Ramamurthi, J. an issue estoppel would apply in subsequent proceedings, and respondents are estopped from denying the existence of an arbitration agreement. It is also urged that pursuant to the orders passed by this Court, several matters involving the value of more than Rs. 2 lakhs were referred to arbitration and if at this juncture a contrary opinion is expressed, it will open up a series of conflicts and consequent litigation, thereby disturbing the settled position of law in the State. On this score a heavy reliance was placed on the doctrine of stare decisis.

8. In reply, Mr. N.R. Chandran, learned Advocate General contended that the words "be referred to Court" should be understood in the proper perspective and the interpretation suggested by the petitioners is incorrect. u/s 20 of the old Act, an application is filed in a Court to file an arbitration agreement and then reference is made by the Court to an Arbitrator u/s 23 of the old Act. Therefore, the term "be referred to Court" can only mean that party is referred i.e., directed to move the Civil Court for adjudication. He submitted that the arbitration clause between the parties is clear that the claim shall be filed before the Court having jurisdiction for decision and with regard to claims of below Rs. 2 lakhs the matter shall be referred to departmental arbitrator, who shall be the Superintending Engineer. He further submitted that the State never took a stand conceding the position pleaded by the petitioners, but on the other hand disputed the interpretation suggested by the petitioners, which was not accepted by the Court. Therefore, the doctrine of issue estoppel can never be applied, especially when the litigation is not between the same parties. Learned Advocate General also brought to our notice that two former Chief Justices of this Court namely,

Hon"ble Shri Justice B. Subhashan Reddy and Hon"ble Shri Justice Markandey Katju categorically held that the said Governmental Order does not contemplate an arbitration agreement where the value is more than Rs. 2 lakhs. According to the learned Advocate General the matter is no more res Integra and while considering a similar Governmental Order of the Andhra Pradesh Government the Supreme Court in State of A.P v. Obulu Reddy 2001 10 SCC 30 held that the question of reference to arbitration would not arise if the claim was above the amount of Rs. 50,000/-. The learned Advocate General submitted that the interpretation suggested by the petitioners is contrary to the law laid down by the Supreme Court.

9. Having given anxious thought to the rival arguments made at the Bar, I am of the view that the interpretation suggested by the petitioners cannot be accepted and the petitions are liable to be dismissed. What is contemplated by the Governmental Order is that the existing system of referring the disputes between the contractors and the department to the arbitrator may be continued. The claims upto the value of Rs. 2 lakhs may be referred to the departmental arbitration and claims above the value of Rs. 2 lakhs will be referred to Court. The contention of the petitioners is that the words "be referred to Court" means referred to the Court for appointment of the arbitrator where the value of contract is more than Rs. 2 lakhs. In other words even claims of more than Rs. 2 lakhs should be referred to arbitration through Court. In my opinion, the interpretation suggested by the petitioner's counsel is wholly impermissible. The term "be referred" to Court could only mean that the party may be referred/directed to Court for adjudication. Learned Advocate General is right in contending that Section 20 of the old Act contemplates an application to be filed in a Court to file an arbitration agreement and then reference would be made by the Court to an arbitrator u/s 23 of the said Act. Therefore, the words reference to the Court cannot mean reference to the Court u/s 20 of the old Act. In any event, the existence of arbitration agreement must be decided on the basis of the terms of the arbitration agreement and on a plain reading of arbitration clause it is clear that the claim should be filed before the Court having jurisdiction for decision and only with regard to claims less than Rs. 2 lakhs the matter should be referred to departmental arbitrator, who shall be the Superintending Engineer.

10. In State of A.P. v. Obulu Reday (supra) a similar Governmental Order of the Andhra Pradesh High Court came up for consideration before the Supreme Court. The relevant portion of the said Governmental Order runs as follows:-

Value	of	Amount	Panel	of	Arbitration
Claims upto Rs. 10,000/-	in	the	same	department	"
1. Superintending Engineer and above of another circle					
2.					

Claims above Rs. 10,000/- 1. Another CE of the same upto Rs. 50,000/- department 2. where there is only one CE in the department, CE will submit proposals to Government in the Administrative Department for nomination of another CE as arbitrator by Government. 3. Claims above Rs. 50,000/- Court of competent jurisdiction.

To avoid ambiguity ,a clarification was issued subsequent, which is as follows:

All claims above Rs. 50,000/- shall be. decided by a Civil Court of competent jurisdiction of regular suit.

11. When the matter was referred to three Judge Bench of the Supreme Court, the Bench took the view that the question of resort to arbitration would not arise if the claim was above Rs. 50,000/-. The earlier decision of the Supreme Court in State of A.P. and Another Vs. Obulu Reddy, was approved and the relevant portion in paragraph-5 of the said decision runs as follows:

Having perused G.O.Ms. No. 430 dated 24.10.1983 we have no doubt that it clearly provides for arbitration in respect of claims only up to Rs. 50,000/- and not above that amount, making it clear in para 2 that the claims above Rs. 50,000 are to be adjudicated by the Court of competent jurisdiction. No doubt the expression "Court of competent "jurisdiction" is mentioned under the head "panel of arbitrators" since the same para deals with "claims up to Rs. 10,000/- and up to Rs. 50,000/-. That is, however, an inartistic drafting of the GOMs but it cannot be construed to mean that claims above Rs. 50,000 are to be adjudicated by arbitration in which the Judge presiding over the Court of competent jurisdiction is to act as the arbitrator. It would be absurd to make such a construction of that part of the GOMs which would oblige the Judge to act as an arbitrator. The subsequent G.O. Ms. No. 160 dated 01.06.1987 merely clarifies this fact on account of an attempt by some contractors to misconstrue the earlier GOMs as clearly stated in the subsequent GOMs. The contention of the respondent is wholly untenable.

12. In the present case, the petitioners seek to rely upon Clauses (i) to (iii) of the Governmental Order wherein it is stated that the existing system of referring the dispute between the contractor and the Department to the Arbitrator would continue and if the value is less than Rs. 2 lakhs it would be referred to the departmental arbitration and if the value is more than Rs. 2 lakhs the matter should be referred to Court, which according to the petitioners mean reference to Court for arbitration. If this interpretation is accepted it will mean that the Court should also function as an arbitrator. This interpretation is clearly impermissible and disapproved by the Supreme Court. The only interpretation which can be applied to this clause is that the parties are free to approach Court having competent jurisdiction for adjudicating all their claims of above Rs. 2 lakhs.

13. The reliance by the petitioners on the doctrine of issue estoppel is totally

misconceived. This doctrine is explained in *Thoday v. Thoday* 1964 1 All ER 341 in the following words:

Estoppel per rem judicatam is a generic term which in modern law includes two species. The first species, "cause of action estoppel", is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment, or for those who prefer Latin, *transit in rem judicatam*. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule, of public policy expressed in the Latin maxim, "*nemo debet bis vexari pro una at eadem causa*". In this application of the maxim, *causa* bears its literal Latin meaning.

The second species, "issue estoppel", is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a Court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfillment of the identical condition, assert that the condition was fulfilled if the Court has in the first litigation determined that it was not, or deny that it was fulfilled if the Court in the first litigation determined that it was.

14. Estoppel would arise, where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same party shall be dealt with similarly as that was done in the previous proceedings. Admittedly, the petitioners were not parties to the previous proceedings, and therefore, the doctrine of issue estoppel has no application.

15. As regards the principle of *stare decisis* the Supreme Court in *Molar Mal (Dead) Through L.Rs. Vs. M/s. Kay Iron Works(P) Ltd.*, observed that the Court will be failing in its duty, if the Court does not declare an erroneous interpretation solely on the ground that it had stood the test of time. Moreover, this is not a case where a decision has been followed for a long time and in fact, there are conflicting views expressed by the learned single Judges of this Court. When the law is clearly laid down by the Supreme Court, it will be improper to follow the earlier decision merely because it had remained for a considerable length of time, and the same cannot be permitted to continue so, when it is erroneous and brought to the notice of the Court.

16. In view of what is discussed above, all the original petitions are dismissed.