
(1991) 09 MAD CK 0013
In the Madras High Court

Tamil Nadu Cements Corporation Ltd. APPELLANT
Vs
Sathiapal and Company RESPONDENT

Date of Decision : 20-09-1991

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : (1992) 1 LW 136 : (1992) 2 MLJ 303

Hon'ble Judges : Mishra, J

Bench : Division Bench

Judgement

Mishra, J.—This Appeal has arisen out of a proceeding u/s 30 of the Arbitration Act in Application No. 5374 of 1988 and O.P.No.129 of

1981 on the Original Side of this Court. The Tamil Nadu Cements Corporation Limited (appellant and M/s. Sathiapal and Company, a partnership

firm represented by its partner, S. Sathiapal, carrying on business in the city of Madras (first respondent) had fallen in dispute with respect to a

works contract for

(1) Lime stone crusher Building vide agreement No. 36/77-78, dated 10.10.1977.

(2) Sub Station building vide agreement No. 50/77-78 dated 28.12.1977.

(3) Central Control Room Building, vide agreement No. 14/78-79, dated 22.7.1978; and

(4) Lime stock piles construction, vide agreement No. 77/78-79, dated 29.11.1978.

2. The dispute, with the agreement of the parties, was referred to arbitration in terms of the arbitration clause in the agreement between the parties

with the second respondent Mr. S.P. Namasivayam, an Engineer, as the Arbitrator made this award as follows:

S.

No. Particulars Claim Award Claim Award Claim Award

Rs. Rs. Rs. Rs. Rs. Rs.

1. Excavation

in Hard Rock 1,52,541.21 10,967.00 38,483.91 1,341 10,941.64 613

2. Piecemeal

excavations 50,494.98 41,931.00 Nil Nil Nil Nil

3. Shuttering

for PCC 025,489.65 24,414.00 5,001.15 Nil Nil Nil

4. Additional

lead for

AA stones 18,360.00 16,324.00 5,218.70 5,219 Nil Nil

(Steel)

5. Extended 1,10,053.26 23,053.00 66,535.76 Nil 44,000.00 Nil

stay (G.I)

94,917.00

(G.2)

6. Expenses

overload 6,80,000.00 88,918.00 Nil Nil Nil Nil

7. Interest

on undis-

puted

amount 5,310.00 Nil Nil Nil Nil Nil

12,03,486.15 3,15,834 1,69,727.86 6,560.00 82,659.33 1,183

and accordingly the award was sought to be made a rule of the Court. The petitioner/appellant has challenged the award on the grounds inter alia

that the Arbitrator committed error in awarding certain amounts related to matter, either prohibited in the contract, or not contemplated in the

contract, something more than asked for by the contractor) and interest for which he had no authority. On the question that the Arbitrator had

awarded certain amounts with respect to matters either prohibited in the

contract or not contemplated in the contract, the petitioner/appellant relied upon the tender for piece work which stated as follows:

We hereby distinctly and expressly declare and acknowledge that before the submission of our tender we have carefully followed the instructions in the tender notice and have read the Tamil Nadu Detailed Standard Specifications and the relevant clauses of the Preliminary Specification of the Tamil Nadu Detailed Standard Specifications and that we have made such examinations of the contract documents and of the location where the said work is to be done and such investigation of the work required to be done and in regard to the material required to be furnished as to enable us thoroughly to understand the intention of the same and the requirements, covenants, agreements, stipulations and restriction contained in the contract and in the said specifications, and distinctly agree that will not thereafter make any claim or demand upon the Corporation based upon or arising out of any alleged misunderstanding or misconception or mistake on our part of the said requirements, covenants, agreements, stipulations, restrictions and conditions.

3. Shanmukham, J., who heard the matter, however, found that the claim made by the Contractor under this head did not relate to any alleged misunderstanding or misconception or mistake at the part of the requirements, covenants, agreements, stipulations, restrictions, and conditions set out in the contract document and quoted Clause 3(2) of the tender to substantiate his conclusion under which clause it was stated.

Tenderers must satisfy themselves fully before tendering by a personal examination of the site of the proposed work to study about soil conditions, availability of water, power etc. by examination of the plans and specifications attached with tender equity and by other means as they prefer as to the accuracy and sufficiency of the statement of quantities and all terms and conditions attached with tender enquiry and shall not at any time after the submission of their offer dispute or complain of such statement of quantities nor assert that there was any misunderstanding in regard to the nature or amount of the work to be done or facilities mentioned above nor in consequence apply for extension of time for completion beyond the date of completion of job as covered in the agreement.

On that basis, the learned Judge observes,

The claim made by the petitioner is that the quantity of hard rock was not as expected but was something more, but then there is no dispute with regard to the total quantity involved in the work. The dispute only related to the quantity of hard rock, compared to soft soil. So long as there is no dispute regarding the total quantity of work to be done, there is no room for the application of this provision. There is nothing in the contract which has disabled the contractors to make the claim relating to the excavation in hard rock. If there is no such prohibition even impliedly the contractor is entitled to be paid because the petitioner had the benefit of such work. As a matter of fact, there is no dispute about the quantity of work so done. Then the matter is certainly within the competence of the Arbitrator, because under arbitration clause II-I at page 30 Vol. III the arbitrator shall also have power to open up, review and revise any certificate, opinion, decision, requisition or notice, save in regard to the matters expressly exempted and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid. Thus, the arbitrator has wide powers to determine all matters between the two contracting parties, namely the petitioner and the Contractor. Consequently, any decision of the arbitrator turns on a dead question of fact and cannot be impeached u/s 30 of the Arbitration Act, because such a decision will not amount to an error apparent on the face of the record.

4. Coming to the second objection, the learned Judge held that the dispute under this head turned on pure question of fact and to the third objection that it arose from the combined effect of the agreement and the assurance given to the contractor on behalf of the petitioner, to the fourth objection that as material had been placed before him as to how the award suffered and to the fifth objection that a reading of Clause 9(2) of the agreement meant that if there is any cause beyond the control of both the contracting parties, then the Project Manager of the Appellant Corporation will be provided an opportunity to assess the delay and hindrance observed:

In the instant case, it is common ground that there were delays by the petitioner in supplying the drawings with complete and required details piecemeal without clarity, resulting in the contract, applied for clarification, and so it is not necessary to recapitulate several causes for the delay, as

they are attributable to the petitioner. According to the contractor, it is because of this delay for which the petitioner is solely responsible, they were constrained to extend their stay at the project which caused them loss to the extent of Rs. 1,10,056-26 P. Though this contingency was not contemplated under the contracts the petitioner is entitled to be paid damages that he has suffered on account of the delay for which the petitioner alone is responsible. As long as the delay was not due to any of the laches on the part of the contractor, certainly, it is not only just but also legal that the petitioner shall pay for the extended stay. I do not find, therefore, any error to warrant interference with the award u/s 30 of the Arbitration Act.

5. Similarly, the learned Judge examined certain other items, such as overhead charges and the claim of interest to conclude that those were the questions not indicating any error of law committed by the Arbitrator, of misconduct of any kind by him.

6. The ambit under which the court can examine the validity of award of this kind is stated in a judgment of the Constitution Bench of the Supreme

Court in Raipur Development Authority v. Chokramal Contractors (1989)2 S.C.C. 721. The Supreme Court has said:

The scheme of the Arbitration Act is to provide a domestic forum for speedy and substantial justice, untrammelled by legal technicalities, by getting

the dispute resolved by a person in whom the parties have full faith and confidence. The award given by such a person under the scheme of the Act

can be assailed only on very limited ground like those mentioned in Section 30 of the Act. The result is that most of the awards at present are made

rules of the court despite objections to their validity by the party against whom those awards operate. To have a provision making it obligatory for

the arbitrator to give reasons for the award could be asking for the introduction of an infirmity in the award which in most cases is likely to prove

fatal. Many honest awards would thus be set aside.

Once the arbitrators are compelled to give reasons in support of the award, the inevitable effect of that would be that the validity of most of them

would be challenged on the ground that the reasons or at least some-of them are bad and not germane to the controversy; Sometimes, if four

reasons are given in support of the award and one of the reasons is shown to be

not correct or not germane the award would be challenged on the ground that it is difficult to predicate as to how far the bad reason which is not germane has influenced the decision of the arbitrator. Many awards would not survive court scrutiny in such circumstances.

It is also noteworthy that in a large number of cases the arbitrator would be laymen. Although their final award may be an honest and conscientious adjudication of the controversy and dispute, they may not be able to insert reasons in the award as may satisfy the legal requirements and the scrutiny of the court. The arbitrators having been chosen by the parties, it would, in our opinion, be not correct to put extra burden on them of also giving reasons which are strictly rational and germane in the eye of law in support of their award. Once the parties have voluntarily chosen the arbitrators, presumably because they have faith in their impartiality, the law should not insist upon the recording of reasons by them in their award.

The previous experience, in fact, points out that it is awarded incorporating reasons which have generally been quashed in court. The awards not giving reasons have survived the attack on their validity, unless the arbitrator is otherwise shown to have misconducted himself or his award suffers from some other technical defect.

Before we refer to another judgment of the Supreme Court in *M/s. Hind Builders Vs. Union of India*, we may take notice of the fact that the grounds of attack to the award are based solely on the award having been made for specific items of dispute enumerated therein in the manner extracted by us earlier. Otherwise, it is conceded that the award is not a speaking award. In *M/s. Hind Builders* the Supreme Court considered the arguments for the Union of India that award having been granted in respect of each item of claim was really a speaking award so far as it specified the amount granted in respect of each item of claim. The Supreme Court rejected the contention stating:

We have considered the respective contentions of the parties and we are of the opinion that the Division Bench erred in setting aside the award in so far it related to the sum of Rs. 25,96,000. Though the annexure sets out the award of the arbitrators as against various items of claims, the mere enumeration of the heads of claim cannot be equated to an incorporation of the statement of claim by the contractors into the award. At any rate,

the award does not relate the claims to the various clauses of the contract and the mere fact that the statement of claim refers to various items in the schedule to the contract does not result in the contract itself being incorporated as part of the award. No error can be found in the award unless one reads into it first the statement of claim and then the relevant clauses of the contract. But this cannot be done unless these documents are treated as incorporated in the award. This cannot be done.

This judgment of the Supreme Court is authority for proposition that merely because award is made for each item of claim, it cannot be treated as a speaking award or award with reasons stated therefore and further that items of claims enumerated in the award will not be related to the various

clauses of the contract and conditions of contract will not be read in the award or deemed to have been incorporated in the award. In the instant

case, therefore, unless the said declaration of law by the Supreme Court is ignored it will not be permissible to read in the award contents of the

various clauses of the contract and then to find out whether there has been any error of law or calculation done by the arbitrator. Learned Counsel

for the appellant however has placed reliance upon a judgment of the Supreme Court in *Continental Construction Co. Ltd. v. State of U.P.* 1988

S.C. 1166, to contend that in any case the award of interest by the arbitrator and award beyond the claim of the contractor by the arbitrator have

to be set aside as at least in this matter the arbitrator could be said to have misconducted himself. According to the learned Counsel, there would

always be an inherent objection to any award beyond the claim of the party and to the interest which is not stipulated in the contract. The arbitrator

will be deemed to have misconducted himself in not deciding the objections in this behalf. In *Continental Construction Co. Ltd. v. State of U.P.*

1988 S.C. 1166, a specific issue had been referred to the arbitrator. The arbitrator however had answered the issue by a non-speaking award,

after referring to an earlier judgment of the Supreme Court in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, the court observed:

If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction

and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order

to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is

bound to follow and apply the law, and if he does, he can be set right by the Court provided his error appears on the face of the award. In this

case, the contractor having contracted, he cannot go back to the agreement simply because it does not suit him to abide by it.

The Supreme Court also rejected the contention that if specific issues referred to the arbitrator are answered by a non-speaking award, there is no

mistake of law apparent on the face of record. The Supreme Court approved the view of the District Judge saying:

this being a general question, in our opinion, the District Judge rightly examined the question and found that the appellant was not entitled to claim

for extra cost in view of the terms of the contract and the arbitrator misconducted himself by not considering this objection of the State before

giving the award.

This is evidently distinguishable on facts. Since there were specific issues framed and referred by the District Judge to the arbitrator, the terms of

the contract were very much incorporated in the reference and the consequent award. Moreover to answer a general objection, it had become

necessary to refer to the terms of the contract and once the Court referred to the terms of contract and found that any claim for extra cost was not

contemplated and also that such objection has been raised before the arbitrator, there was no other conclusion possible. We are afraid if we permit

any reference to the terms of the contract to find out whether the arbitrator has misconducted himself or not, we shall be committing a serious error

of law. We also think that any examination of the question of interest in the award therefore is not possible in the instant case. The only inhibition

which courts have recognised upon the jurisdiction of the arbitrator to award interest is that interest could not be awarded for the period prior to

the suit in the absence of an agreement for the payment of interest or any usage of trade having the force of law or any provision of the substantive

law entitling the plaintiff to recover interest and that it must be assumed that the arbitrator will have the same power to award interest as the court -

see Ct. A. Ct. Nachiappa Chettiar and Others Vs. Ct. A. Ct. Subramaniam Chettiar, , Satindar Singh v. Umarao Singh AIR 1961 S.C. 909,

Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., and State of Madhya Pradesh Vs. Saith and Skelton (P) Ltd., . In M/s. Hind Builders

Vs. Union of India, , however, Supreme Court has added:

While this is the positison in cases which arose prior to the coming into force of the Interest Act, 1978 in cases arising after the coming into force of

the Acts, the position now is that though the award of pendente lite interest is still governed by the same principles, the award of interest prior to

the suit is now governed by the Interest Act, 1978. Under the Interest Act, 1978, an arbitrator is by definition, a court and may now award interest

in all the cases to which the interest Act applies.

Thus, it is not a case in which without reference to the contents of the contract and various terms and conditions therein, it will be possible to say

that award of interest has been illegal and thus the arbitrator misconducted himself in making such an award. In view of the above, we do not find

any force in the contentions of the learned Counsel for the appellant that there are questions of any legal misconduct of the arbitrator to be

examined with reference to the various terms of the contract. The award for all purposes is final. The learned single Judge has committed no error

of law in rejecting the objections of the appellant. There is no merit in the appeal. The appeal is accordingly dismissed. However, on the facts and

in the circumstances of the case, there will be no order as to costs.