Case No. 69

2005 (1) CTC 401

IN THE HIGH COURT OF MADRAS

A. Kulasekaran, J.
O. P. No 935 of 2000 and Application No. 5469 of 2000
07.01.2005

Tamil Nadu State Construction Corporation Limited,
Jawaharlal Nehru Salai, Jai Nagar, Arumbakkam,
Chennai – 600 106 rep. by its Managing Director — Petitioner

Vs

M/s. Gardner Landscape, Pvt. Ltd., Om Complex,
3rd Floor, 27-A Lloyds Road, Chennai – 600 014 and others. — Respondents

Section 34 of the Arbitration and Conciliation Act, 1996 - Scope of Judicial intervention limited - award to be assalied only on grounds set out in Section 34.

CASES REFERRED

Olympus Superstructures Pvt. Ltd v. Meena Vijay Khetan and others, 1999 (5) SCC 651...(Para 8); Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industires Foreign Trade Co., 1977 (4) SCC 367 : AIR 1977 SC 2122... (Para 8); Shapoor Freedom Mazda v. Durga Prasad Chamaria, AIR 1961 SC 236 ... (Para 12); State of Orissa v. B.N. Agarwalla, 1997 (2) SCC 467 ... (Para 14)

M/s Aiyar & Dolia, Advocate for Petitioner.
Mr. Krishna Srinivasan for M/s Ramasubramanian Associates for Respondent No.1.
Mr. D. Krishnakumar, Advocate for Respondent No. 2.
O.P. DISMISSED

ORDER

1. The Tamil Nadu State Construction Corporation Limited, who suffered an award in Arbitration Case No. 1 of 1998 and the interim award in Application No.2 of 1998 in Arbitration Case No.1 of 1998 has preferred this Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The State Government of Tamil Nadu, Department of Information has issued G.O. Ms No. 162 dated 10.6.1992 for construction of film city at Taramani,

Chennai, thereby appointed the petitioner herein as Consultant and Contractor. The petitioner has issued work order on 23.06.1992 to the first respondent, which has commenced the work after furnishing bank guarantee on 15.07.1992. During the course of execution of work, the second respondent/Government included additional works by issuing G.O. Ms. No.16 and 17 dated 27.01.1994. There are 61 agreements entered into between the petitioner and the first respondent in respect of works covered in the above said three Government Orders. It is an admitted fact that the work was completed and the film city was also inaugurated on 31.08.1994. Dispute arose between the petitioner and the first respondent, which was referred to the third respondent/Arbitral Tribunal.

3. The first respondent contended that it executed the works valued at Rs.11,53,02,308.40 between 02.03.1994 and 04.03.1995, but it was paid only a sum of Rs. 797.43 lacs and the balance of Rs. 3,54,80,000 not paid despite repeated notice and requests. Pending arbitral proceedings, the petitioner filed I.A.No. 1 of 1998 to implead the Film City Corporation as second respondent, which was opposed by the first respondent on the ground that there is no privity of contract between the first respondent and the Film City Corporation, Ultimately, the Film City Corporation was impleaded. The first respondent filed application No. 2 of 1998 for interim award of Rs. 41.97 lacs being 5% of the bill amount withheld. The Arbitral Tribunal passed interim order on 16.07.1998 rejecting the petition of the petitioner stating that non-compliance of work in full and failure to complete the work free from defects.

4. Before the Arbitral Tribunal, the first respondent has filed Exs. C 1 to C60 and the petitioner herein has filed Exs. R 1 to R24. After going through the pleadings, the following seven issues were framed by the Arbitral Tribunal with the consent of the counsel for both sides, which are as follows:

"i) Whether the claim has been made in time?

ii) Whether the claimant is entitled to the claim amount of Rs.5,09,13,800 so sought for in the claim statement? If not to what extent?

iii) Whether the claimant is entitled to claim interest at 18% per annum pendente lite and till realization of the claim amount?

iv) Whether the claimant is entitled to the cost of the proceedings?

v) Is the claimant entitled to invoke the arbitration clause in respect of the three alleged supplemental agreements ?

vi) What amount, if any, is the respondent liable to pay to the claimant and if

so whether interest is payable and at what rate?
vii) To what reliefs the claimant is entitled to?

5. In addition to the above said seven issues, other material propositions of law namely(i)whether the 61 agreements entered into between the parties can be decided by the Arbitral Tribunal in a single arbitration (ii) whether the first respondent is entitled to costs of infrastructural facilities (iii) whether the first respondent herein is guilty of non-rectification of defects during the defect liability period and (iv) whether the petitioner can seek to deduct the amount of sales tax payble by the first respondent to the Sales Tax Department.

6. The Arbitral Tribunal has decided the four material propositions of Law before going into the issues involved that there were 61 agreements entered into between the petitioner and the first respondent herein in respect of various items of work in the very same Film City; that each agreement contains arbitration clause; that all the 61 agreements are in common form or more or less identical; that the 61 agreements are integrated items of work for a comprehensive project, which is evident from G.O.Ms. No.162 dated 10.06.1992; that the 61 agreements were prepared for the sake of convenience and easy reference by the petitioner herein. The Arbitral Tribunal relied on the decision reported in 1955 NUC Calcutta 3323 and also Olympus Superstructures Pvt Ltd. v. Meena Vijay Khetan and others, 1999 (5) SCC Page No. 651.

7. The Documents placed before this Court are perused. All the 61 agreements are integrated part of the whole scheme and are not conflicting with each other.

8. In the decision Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and others, 1999 (5) SCC 651, wherein in para-30 it was held thus:-
"30. If there is a situation where there are dispute and difference in connection with the main agreement and also disputes in regard to "other matter" "connected" with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play

only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differencesare solely confined to the interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the interior Design Agreement can be harmonized or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement … (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute)….it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporation clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreement with arbitration clauses arose before this Court in Agarwal Engg. Co. v. Technoimpex Hungarain Machine Industries Foreign Trade Co., 1977 (4) SCC 367 : AIR 1977 SC 2122. There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contact that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for traveling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to as sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the dispute are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.

In this case, the Honourable Supreme Court held that a situation where there are disputes and difference in connection with the main agreement and also disputes in regard to 'other matters' connected. The subject matter of the main agreement

would be governed by the general arbitration clause under which dispute under the main agreement and disputes connected therewith can be referred to the same Arbitral Tribunal.

9. Applying the said judgment in this case, this Court is of the considered view that the findings of the Arbitral Tribunal that though 61 similar agreements between the same parties in respect of several items of work which are integrated items of work a comprehensive project is perfectly valid.

10. The first respondent has claimed a sum of Rs. 6.23 lakhs as infrastructural facilities against the petitioner herein which was refused. The Arbitral Tribunal rightly held that the contactor tenders his quotation only for the actual work to be done not for cost of providing infrastructural facilities. In respect of the defect liability period and repairs, the Arbitral Tribunal relied on Ex. R1 dated 10.11.1994 that the 2nd respondent has complained of certain defects in their later dated 04.11.1994 i.e., Exs R2 to R4 addressed to the petitioner herein. The first respondent by its letter dated 16.12.1994 Ex C55 and C56 replied that the said defects have been rectified. The other defects pointed out in Ex.R16, R18, R20 to R24 have emanated after March 1998 i.e., after notice of arbitration dated 01.12.1997 was given by the first respondent herein, beyond the period of liability. It is also pointed out by the Arbitral Tribunal that Film City was put on use from 01.10.1994, hence the usual wear and tear due to cyclone the said defects pointed out in Exs. R16, R18, R20 to R24 were arisen. Ultimately, the Arbitral Tribunal found that the first respondent is not guilty of non-rectification of the defects during the defect liability period.

11. The Arbitral Tribunal relied on G.O.Ms. No. 169 dated 27.06.1994 and also Section 3-B of TNGST Act, which provides for deferral of sales tax for period of five years, wherever sales tax levy is applicable. The said Government Order came into force from 01.01.1994. The period of five years contemplated in the said Government Order ends only on 31.12.1998 as such the sales tax becomes payable from 01.01.1999, which is individual liability and the first respondent has to discharge it. Pointing out the same, the Arbitral Tribunal found that the petitioner herein cannot seek to deduct the amount of sales tax payable by the first respondent herein.

12. As far as the issue No.1 whether the claim has been made in time is concerned, the petitioner herein contended that the arbitration is barred by limitation as it has been made three years after completion of various works undertaken under the said 61 agreement. It is not in dispute that the works relating to 61 agreement, check measurements were taken and final bills dated 12.12.1995 certifying for pay-

ments for the 61 items. Ex.C20 dated 25.09.1995 is letter sent by the petitioner to its Regional Manager, mentioning the amount due namely Rs.315.20 lacs to the first repondent herein and request the Managing Director of the second respondent for early settlement. Ex.C20 also contains details relating to name of work, final bill value, previous payments, balance amount to be paid. The working sheet Ex. C21 dated 1.03.1996 shows the details of amount due by the 2nd respondent to the petitioner herein. Taking into consideration of all the above said two exhibits namely Ex.C20 and C21, the Arbitral Tribunal came to a conclusion that the limitation reckons only from the date of final bill namely 12.12.1995. The notice of arbitration was given on 01.12.1997 and the first sitting of the Arbitral Tribunal took place on 23.02.1998 Taking into consideration of the above said dates, the Arbitral Tribunal has rightly come to the conclusion that the claim is not barred by limitation. It is also pointed out by the Arbitral Tribunal that final bill namely Ex. C21 dated 01.03.1996 certifying for payment would amount to an acknowledgment as mentioned in Section 19 of the Honourable Supreme Court ***Shapoor Freedom Mazda v. Durga Prosad Chamaria***, AIR 1961 SC 236, Wherein in Para 6 it was held thus:-

6. It is thus clear that acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not express but must be made in circumstance and in words from which the Court can reasonably infer that the person making the admission intended to refer to a subsisting liability a at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstance can always be considered. Stated generally Courts lean in favour of a liberal construction of such statements thought it does mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the

statement by an involved or farfetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter.

13. It is seen from the above judgment that the acknowledgment as prescribed under Section 19 merely renews debt. It does not create a new right of action and it is a mere acknowledgement of liability in respect of the right in question and it need not be accompanied by promise to pay either expressly or even by implication.

14. The Arbitral Tribunal also answered the issue relating to interest in favour of the first respondent herein stating that they vests with the jurisdiction to award interest for pre-reference period, pendente lite and post award period. In this case, the petitioner herein has not settled the balance amount due and payable out of the final bill. Certainly, the first respondent is entitled to interest for pre-reference, pendente lite and post-award period till the date of realization. ***State of Orissa v. B.N. Agarwalla***, 1997 (2) SCC 467.

15. In respect of additional work, which pertains to issue No.5 of the award namely three items of Moghul garden, Italian garden and Japanese garden, though the first respondent has claimed amount covered by supplement agreement, neither party produces the same. The Arbitral Tribunal after careful consideration found that the additional works were carried out by the first respondent. Though arguments were advanced by the petitioner before the Arbitral Tribunal that claim in respect of additional works can be made only before the ordinary Law Courts not under the arbitration clauses, the Arbitral Tribunal relied on Ex. C59 dated 12.12.1994 and found that additional works also forms part of the said agreement. In order to justify their finding, the Arbitral Tribunal relied Schedule A of each agreement wherein it is stated that each piece of work is probable and tentative and the same would stand added or modified or deducted during the execution of the work and the actual quantity of work done can be determined only on final and detailed measurements. Further it its pointed out that Exs. C38 ot C54 are payment made on the bills passed by the petitioner herein on various dates between 04.02.1994 to 02.01.1995 and no distinction can be made between the agreed work and additional works.

16. In respect of issue Nos. 2, 6 and 7, the claim of interest of Rs. 1,54,33,800 towards interest at the rate of 18% from 01.10.1995, the Arbitral Tribunal after deducting a sum of Rs.44,22,946 which was paid by way of interim award, the

balance of Rs.3,10,00,000 and Rs.57,054 rounded off to Rs.3,10,57,000 and awarded interest for pre-reference period from 01.01.1996 to 01.03.1998, pendente lite and also post-award on the ground that the petitioner is liable to pay interest for the balance amount since all bills were accepted on 12.12.1995 and the transaction being commercial in nature, entitled to interest at the rate of 18%.

17. The Arbitral Tribunal also found in respect of issue No. 4 that the petitioner is liable to pay 50% of Rs. 9,90,000 on the ground that the petitioner, though liable to pay for the works completed, failed to pay on several untenable pleas.

18. Section 34 of the Arbitration and Conciliation Act limits the judicial intervention. The ground on which the award can be assailed is mentioned in sub-section 2 namely a party to the agreement was under some incapacity, or arbitration agreement is not valid under law to which the parties have subjected it or, failing any indication thereon, under the Law for the time being in force; or the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of Part I from which the parties cannot derogate, or, filing such agreement, was not in accordance with Part I; or the Court finds that subject matter of the dispute is not capable of settlement by arbitrator or the arbitral award is in conflict with the public policy of India. I do not find any such reasons to interfere in the said award, which is impugned in this petition.

19. Hence, the Original Petition is dismissed. However, I am not inclined to order costs. Consequently, connected Application is closed.

RSN