The Tamil Nadu Handloom Weavers Co-operative Society Limited Vs Vijayaraghavan and Company Engineering Contractors and Hon'ble Mr. Justice M.A. Sathar Sayeed Sole Arbitrator

Court: Madras High Court

Date of Decision: Sept. 12, 2011

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 34, 34(2)
Partnership Act, 1932 â€" Section 47

Hon'ble Judges: R. Banumathi, J; B. Rajendran, J

Bench: Division Bench

Advocate: T.S. Rajmohan, for the Appellant; M.K. Kabir for A. Dhiravianathan, for R1, for the Respondent

Final Decision: Allowed

Judgement

B. Rajendran, J.
The present appeal has been filed by the Appellant aggrieved by the order dated 24.08.2007 passed by the learned

single Judge, dismissing the O.P. No. 660 of 2003 filed by the Appellant u/s 34 of the Arbitration and Conciliation Act, 1996.

2. The brief facts of the case is that the first Respondent herein was awarded the contract for execution of certain works on the basis of the tender

called for by the Appellant on 15.03.1989. The first Respondent became the highest bidder and his tender was accepted by the Appellant on

05.07.1989. An agreement dated 23.10.1989 was entered into between the parties. As per the agreement, the contract work has to be completed

within 9 months from the date of handing over the site. According to the Appellant, the site was handed over to the first Respondent as early as on

24.12.1989 and the work should have been completed on or before 23.09.1990. Since the work was not completed by the first Respondent, the

period of contract was extended upto 04.04.1993. Even on 04.04.1993, the first Respondent did not complete the work and therefore, the

contract was terminated on that date. According to the Appellant, originally the contract awarded in favour of the first Respondent was to

construct a building consisting of basement and ground floor, however, that was abandoned and a fresh plan was drawn for constructing ground

floor, first and second floor. The first Respondent also agreed to construct the building as per the revised plan, in terms of the original agreement

dated 23.10.1989. As per the agreement between the parties, steel, cement and other building materials were supplied by the Appellant to the first

Respondent, which were also acknowledged by the first respondent. However, the first Respondent, right from the inception, did not adhere to the

time schedule and failed to complete the work in time. On account of the lethargic progress of the work in the site, the Appellant had to suffer

administrative problem, apart from objections raised by the audit. No doubt, there was a delay on the part of the Appellant due to the change in

the plan. However, the first Respondent insisted for payment of enhanced rate for completing the work. In order to avoid any contraversy in future,

complications or unavoidable delay in completing the work, the Appellant agreed for such enhanced rate insisted by the first Respondent on

01.08.1991, which represents 5% increase than the originally agreed rate. Even for putting up construction of second floor, the contract was given

to the first Respondent to avoid civil dispute raised by the first Respondent in C.S. No. 224 of 1992 on the file of this Court. It was further

contended by the Appellant that an excess amount of Rs. 1,38,420.70 was paid to the first Respondent. On the contrary, the first Respondent filed

the claim petition before the learned Arbitrator claiming huge sum of money due and payable by the Appellant. In fact, after terminating the

contract on 04.04.1993, the Appellant called upon the first Respondent for taking inventory of the materials on 16.04.1993, but the first

Respondent did not come forward to take stock of the inventory. Therefore, the Appellant had taken the inventory and found that there was a

shortage of materials to the tune of Rs. 4,47,924/-. Therefore, the appellant would contend that in view of the fact that there was excess payment

made by the Appellant to the first Respondent, besides there was shortage of materials, the first Respondent is estopped from making any claim

before the arbitrator and the claim petition filed by the first Respondent before the learned Arbitrator ought not to have been entertained.

Furthermore, the Appellant would contend that only 60% of the work was completed by the first Respondent, but the first Respondent alleged that

they have completed 90% of the contract work.

3. Mr. Rajmohan, Learned Counsel for the Appellant would contend that pending arbitration proceedings, the partnership firm of the first

Respondent itself was dissolved and therefore, the first Respondent has no locus standi to prosecute the arbitration proceedings. Unfortunately, this

was not taken up for consideration by the learned arbitrator. The learned Arbitrator has erroneously interpreted Section 47 of the Indian

Partnership Act, failed to take note of the delay in handing over the site by the first Respondent, escalation of cost, idling of men and machinery

and directed the Appellant to pay compensation to the first respondent. Aggrieved by the same, the Appellant filed O.P. No. 660 of 2003 before

the learned single Judge. The learned single Judge also failed to take into consideration that the learned arbitrator, in the absence of any material to

substantiate the claim of the first Respondent and the fact that the Appellant had sustained loss due to slow progress in the completion of the work

attributable to the first Respondent, passed the award. The learned single Judge also failed to take note that the learned arbitrator, without taking

into consideration of Ex. R63 wherein the first Respondent had categorically admitted that there was excess supply of steel and cement passed the

award in favour of the first Respondent. Lastly, the Appellant would contend that the application of Hudson"s formula was totally misinterpreted by

the learned Arbitrator, which is not mentioned in the agreement between the parties that in the event of dispute between the parties, the hudson

formula would be adopted. Therefore, the Appellant prays for allowing this appeal.

4. Mr. Kabir, learned Senior counsel appearing for the first Respondent would contend that even though the original contract was for 9 months as

per the agreement dated 23.10.1989 between the parties, the site itself was handed over by the Appellant only on 24.12.1989 and the period of

nine months expired on 23.09.1990. Moreover, the original plan was shelved by the Appellant and a new plan was drawn and prepared for the

purpose of putting up a construction of ground floor, first and second floor. Further, when the second floor itself was sought to be given to a third

party it was protested by the first Respondent and subsequently the Appellant agreed to continue the construction work in second floor in

continuation of the contract. The learned senior counsel would further contend that there was lot of delay in commencing the work and even the

contract was awarded only after filing of the suit by the first Respondent. Undoubtedly, there was a delay only on the part of the Appellant and

therefore the Appellant is bound to pay PWD contract rate, which was prevailing at the relevant point of time and not the originally agreed rate

especially when there is a supplemental agreement entered into for payment of enhanced rate also. The learned senior counsel for the first

Respondent, relying on the cross-examination of the Chief Engineer, CW3 in relation to Ex. R64 had categorically stated that huge quantity of

materials in the site were diverted to stall the work and final measurements were taken when the contract was terminated. Based on such a

evidence, the learned Arbitrator has rightly passed the award directing the appellant to pay the compensation amount to the first Respondent. The

learned Senior counsel further contended that in the absence of any material to point out any arbitrariness or lack of evidence in the award passed

by the learned Arbitrator, the Original Petition filed by the Appellant is not maintainable and this was rightly considered and rejected by the learned

single Judge. As far as locus standi of the first Respondent to file the claim petition before the learned Arbitrator, the learned senior counsel for the

first Respondent, relying upon Section 47 of the Indian Partnership Act, would contend that dissolution of the partnership firm has nothing to do

with the filing of the claim petition and the Original Petition is maintainable under law. Lastly, the learned senior counsel for the first Respondent

would contend that the jurisdiction of the Court u/s 34 of the Arbitration and Conciliation Act, 1996 is very limited unless it is shown that the

award passed by the learned Arbitrator is perverse. In the absence of any material to point out arbitrariness or unreasonableness in the award

passed by the learned arbitrator, the learned single Judge is justified in dismissing the Original Petition filed by Appellant and he prayed for

dismissal of this appeal.

5. We have heard the counsel for both sides and perused the materials on record. The short point for consideration in this appeal is whether the

award passed by the learned Arbitrator is not in accordance with law.

6. Before dealing with the questions of law, the facts involved in this case has to be considered. Originally, an agreement dated 23.10.1989 was

entered into between the Appellant and the first Respondent in which the time for completion of the contract was mentioned as 9 months.

However, after a long delay, the Appellant handed over the site to the first Respondent for commencing the work only on 24.12.1989. Thereafter,

the drawings were supplied by the appellant to the first Respondent on 03.05.1990 and the delay was attributable by the Appellant due to the post

and pre-agreement consultative process entertained by them in completing the contract work. Thereafter, the Appellant supplied steel, cement and

other construction materials only from 01.08.1990.

7. The learned arbitrator, considering the above chronological dates and events, found that there was an inordinate delay on the part of the

Appellant and the Appellant cited the modification in the plan and change of pattern of the work originaly proposed as reasons for the delay. The

learned Arbitrator also taken into consideration Exs. C47 and C48 series to hold that cement and steel originally supplied for the completion of the

work were diverted for other works at the direction of the Appellant and this has resulted in the delay in completing the project work by the first

respondent. The learned Arbitrator also found that the appellant, in order to substantiate their defence, have not produced the log book or beam

card to show the quantity of the material suppplied to the first respondent or available at the site store and the issue thereof to the first respondent

for continuing the work. Therefore, the learned arbitrator concluded that the commencement or completion of the work by the first Respondent

was delayed only due to the act of the Appellant and passed the award granting compensation to the first Respondent under various heads which

are as follows:

S.No. Nature of claim Amount Amount

Claimed Rs. Allowed Rs.

1. Amount due for work 24,71,451 24,71,451

done

2. Refund of deposits 38,000 38,000

3. Idling of men & material8,16,005 1,22,480

4. Material handling 20,180 Nil

charges

5. Expenditure for plan and99,430 Nil

Design

6. Loss of profit 33,12,894 7,59,075

7. Change in lead 1,28,568 Nil

8. Materials detained at 1,67,085 78,500

site

38,53,414

8. It is evident that even though the claimant/first Respondent herein claimed Rs. 2,25,84,657/- as compensation, the arbitrator awarded only Rs.

38,53,414/-.

9. The main argument of the counsel for the Appellant was that the learned arbitrator granted Rs. 7,59,075/- towards over head charges (wrongly

mentioned in the award as loss of profit) by applying the formula propounded by Hudson. According to the Learned Counsel for the Appellant, the

hudson formula ought not to have been applied in this case when there is no agreement between the parties in the contract for invoking Hudson

formula

10. From a careful reading of the award passed by the learned Arbitrator, it is seen that the learned arbitrator has not discussed anything and the

learned Arbitrator has only stated this - ""the claim for overhead charges is based on the formula propounded by Hudson and it is calculated for the

period of 133 weeks. I do not think the same cannot be allowed in entirety. Taking into consideration the delay caused by the Respondent

(appellant herein) I hold that the claimant (first Respondent herein) is entitled to Rs. 1,22,480/- for idling of men and material and Rs. 7,59,075/-

towards over head charges (wrongly stated as loss of profit in the award) under the formula propounded by Hudson"". Unfortunately, the learned

Arbitrator has not given any reasoning at all as to how the Hudson formula is made applicable for determining the claim, whether there was any

agreement between the parties for applying the Hudson formula. We do not see any reasoning for the learned arbitrator to apply Hudson formula.

Therefore, excepting the award of overhead charges to the tune of Rs. 7,50,075/- , which has been awarded as ''Loss of profit"" by the learned

arbitrator, we do not see any reason to interfere with the award passed by the learned arbitrator. In fact, the learned single judge also did not give

any reason as to how and why the learned arbitrator had invoked the formula propounded by Hudson and granted amount under the head Over

head charges (loss of profit). Even though lesser amount was awarded by the learned arbitrator than the one claimed by the claimant (first

Respondent herein) we are inclined to set aside the award passed by the learned arbitrator only in so far as grant of over head charges by applying

the formula propounded by Hudson.

11. Though the appellate Court normally would not sit in appeal over the decision of the learned Arbitrator especially in granting or determining

amount, in this particular case, we find that the learned arbitrator is not justified in applying the formula propounded by Hudson and awarded over

head charges when it was not agreed upon between the parties. Therefore, we are constrained to interfere with the award passed by the learned

arbitrator. In all other respects, we hold that the learned arbitrator has passed a reasoned award and the same was also confirmed by the learned

single Judge.

12. A feeble attempt was made by the Learned Counsel for the appellant that in the statement of account given in page No. 128 of the typed set of

papers, regarding the amount due for work done, the learned Arbitrator has only looked into the first page and passed the award, ignoring the next

page namely Page No. 129 of the typed set of papers wherein, amount was arrived at after giving deduction and this vitiates the award.

13. We are not inclined to accept this submission of the Learned Counsel for the Appellant. Taking into consideration the statement as given in

page No. 128, where there is a consolidated amount is mentioned as due and payable by the Appellant to the first Respondent to the tune of Rs.

27,51,678/- and also after taking into consideration the deductions given in the next page i.e., page No. 129 of the typed set of papers which

shows the excess amount paid to the contractor to the tune of Rs. 5,67,773.20, the learned arbitrator has rightly pointed out that in the absence of

any counter-claim by the Appellant, the appellant is not entitled to such a claim. Therefore it is clear that the learned arbitrator has considered the

deductions pointed out by the Appellant, which is available in page No. 129 of the typed set of papers, and it cannot be said that the learned

arbitrator omitted or failed to consider the same. Therefore, this argument of the Learned Counsel for the Appellant is rejected.

14, The learned Senior Counsel appearing for the first Respondent relied on the decisions reported in Oil and Natural Gas Corporation Ltd. Vs.

SAW Pipes Ltd., (ii) McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, (iii) (Leo Oils & Lubricants and Ors. v. Bharat

Petroleum Corporation Limited and another) (2008) (5) RAJ 232 (Mad) (DB) and (iv) Sumitomo Heavy Industries Limited Vs. Oil and Natural

Gas Commission of India, for the proposition that an award can be set aside if it is contrary to the grounds enumerated in Section 34(2)(b) of the

Arbitration and Conciliation Act.

15. The scope and ambit of the Court to interfere with an award passed by the learned Arbitrator is limited except on the grounds which are

enumerated u/s 34 of the Arbitration and Conciliation Act, 1996. Section 34 of the Act clearly stipulates that the Courts cannot sit on appeal over

the decision of the learned Arbitrator or to review the award or re-examine the award passed by the learned arbitrator. In fact, the learned single

Judge also extracted various decisions for the above said proposition and held that the Court would not normally interfere with the award passed

by the arbitrator unless it is shown that such award passed is perverse, irregular or unresonable. Section 34(2)(b) of the Arbitrartion and

Conciliation Act deals with the grounds on which an award passed by the arbitrator can be set aside, if the award is contrary to (i) fundamental

policy of Indian law (ii) interest of India and (iii) justice or morality. Therefore, considering the grounds enumerated in Section 34(2)(b) of the

Arbitration and Conciliation Act, 1996, we are of the view that the Appellant has not made out any case for interference with the award. As

pointed out above, we are only setting aside the sum of Rs. 7,59,075/- awarded by the learned arbitrator towards over head charges (wrongly

stated as loss of profit in the award) inasmuch as the learned arbitrator had adopted the formula propounded by Hudson in the absence of any

agreement between the parties.

16. In the result, the appeal is partly allowed by modifying the award passed by the learned arbitrator only to the extent of disallowing the sum of

Rs. 7,59,075/- awarded by the learned arbitrator towards over head charges (wrongly stated as loss of profit in the award). In all other respects,

the award passed by the learned arbitrator is confirmed. No costs.