

(2011) 10 MAD CK 0095

Madras High Court

Case No: O.S.A. No. 61 of 2011

M/s. IVRCL
Infrastructures and
Projects Limited

APPELLANT

Vs

M/s. Alandur Municipal
Corporation and. N.D.
Patel

RESPONDENT

Date of Decision: Oct. 20, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 18, 24, 24(1), 24(2), 24(3)

Hon'ble Judges: R. Mala, J; R. Banumathi, J

Bench: Division Bench

Advocate: R. Murari, for the Appellant; K. Ramasamy, Sr.Counsel for M.P. Srinivas for R.1 and
No Appearance for RR2 to 4, for the Respondent

Final Decision: Dismissed

Judgement

R. Banumathi, J

1. Challenge in this appeal is the order dated 7.12.2010 made in O.P. No. 461 of 2009 allowing the Petition filed u/s 34 of the Arbitration and Conciliation Act, 1996, whereby the learned Judge set aside the award dated 30.4.2007 and remitting the matter back to Arbitral Tribunal for consideration of the matter afresh on merits.

2. The brief facts are as follows:-

For construction of underground sewerage system in the 1st respondent Municipality area, the 1st respondent - Alandur Municipal Corporation invited tenders from various bidders. The appellant was the highest bidder and their bid was accepted. The 1st respondent Municipality and appellant entered into an agreement on 2.3.2000. As per the agreement, the total value of the contract is Rs. 2700 lakhs. The start date of the Contract

was 1.3.2000, to be completed in two phases and spread over 60 months. During the performance of the Contract, the appellant/Contractor raised certain disputes under the Contract. Since the named Adjudicator had refused to act on the ground of personal inconvenience, the appellant/Contractor got the Adjudicator appointed from Institution of Engineers and the appellant/Contractor referred the dispute to Adjudicator appointed through the Institution of Engineers. The Adjudicator decided the issue exparte and by the proceedings dated 24.11.2004, Adjudicator passed the order admitting the claim of Rs. 4,13,01,550/-. The appellant referred the matter to arbitration to pass an award in terms of the decision of the Adjudicator. The appellant filed a Claim Petition before the Arbitral Tribunal. The 1st respondent Municipality has not nominated its arbitrator. As per clause 8.6 of the Contract, the Arbitral Tribunal shall consist of three arbitrators, one each to be appointed by the Owner and Contractor, the third arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. Since the 1st respondent/Municipality has not nominated its Arbitrator, the appellant had approached the Institution of Engineers, Calcutta, which named 4th respondent Mr. N.D. Patel, consulting Engineer of Mumbai as Municipality's nominee. The nominees selected the 2nd respondent as the Presiding Officer.

3. The 1st respondent Municipality filed its reply to the Claim Statement. The 1st respondent Municipality contended that the appellant/contractor had bypassed the terms of the agreement and that the appellant would have to go before the Engineer and then Adjudicator for arrival of payments that are due to him. When that being so, the appellant had straight away referred the dispute to Adjudicator. The subsequent items of works that were not involved before the Adjudicator were raised for the first time in the claim before the Arbitrators.

4. There was some stalemate in the arbitral proceedings and the 1st respondent Municipality did not actively participate. To end the stalemate, the Arbitral Tribunal suggested to the parties on 17.8.2006 allowing six weeks time to meet and sort out the issues and differences partly/fully outside the Tribunal through mediation. Since the parties have not arrived at an amicable settlement, by a very brief order, the Arbitral Tribunal found that it is not necessary to hold oral hearings. The Tribunal proceeded to observe that the Adjudicator's decision is generally in tune with prevailing technical know-how and procedures and also in consonance with the terms of the contract. The Tribunal passed an award of Rs. 3,56,04,759/-as under:-

Claims :	Rs. 1,95,01,881.00
Interest upto 30.04.2007 :	Rs. 1,61,02,878.00
Total	Rs. 3,56,01,759.00

The Tribunal directed that the above amount has to be paid within three months and thereafter with penal interest at 15 percent per annum and additionally directing the 1st

respondent Municipality to reimburse an amount of Rs. 1,28,186/-towards arbitrators' fees and expenses.

5. Being aggrieved by the award, the 1st respondent Municipality filed Petition in O.P. No. 461 of 2009 u/s 34 of the Arbitration and Conciliation Act. Upon consideration of the contentions of the appellant and 1st respondent Municipality, after referring to clause 8 of the agreement, the learned single Judge held that only after a decision is taken by the Engineer and if such decision is taken wrongly, then only the matter could be referred to Adjudicator and only after the decision of the Adjudicator, either party may refer the decision of the Adjudicator to an arbitrator within 28 days of the Adjudicator's decision. The learned single Judge further held that there is nothing to show that the appellant had approached the Engineer and in the absence of decision by the Engineer, there is no right on the part of the appellant to go to the Adjudicator at all. Referring to the award and that the Tribunal had not held any oral hearings, the learned single Judge further held that once the Adjudicator's decision was referred to Arbitral Tribunal, it has to be treated as a reference to the Arbitral Tribunal afresh and the Tribunal ought to have decided the matter on merits. Pointing out that the Arbitral Tribunal has not even referred or gone into the merits of the case, and observing that the Arbitral Tribunal has no jurisdiction to hold that it is not necessary to hold any oral hearing, the learned single Judge set aside the award and remitted the matter back to the Arbitral Tribunal to decide the same afresh after giving opportunity to the parties in accordance with the provisions of Arbitration and Conciliation Act.

6. Challenging the impugned order, the learned counsel for the appellant contended that the learned judge failed to appreciate the letter dated 29.03.2004 addressed by the appellant to the named Adjudicator clearly stating that "certain differences have arisen between the Engineer - CES representing the employer and ourselves (appellant) by which merely Rs. 3.40 Crores of money is locked up with the Municipality and requesting the Adjudicator to redress the issue. It was further submitted that without proper appreciation of the materials produced by the appellant, the learned single Judge erred in concluding that "in the absence of a decision by the Engineer, there was no right on the part of the appellant to go to the adjudication".

7. Drawing our attention to clauses 8.5 and 8.6, the learned counsel would further submit that the 1st respondent Municipality never challenged the decision of the Adjudicator and in fact, the 1st respondent Municipality has conceded the decision of the Adjudicator by effecting part payment to the extent of Rs. 1,30,23,283/-.

8. Mr. Ramasamy, learned Senior Counsel for 1st respondent Municipality has submitted that before the Arbitral Tribunal, the 1st respondent Municipality had filed its reply to the Claim Statement and it was also negotiating with the appellant for settlement of issues and continuously participating in the discussion and while so, the Arbitral Tribunal was not right in commenting upon the 1st respondent that there was no active participation. It was further submitted that the award is a non-speaking award and the Arbitral Tribunal ought

to have decided the matter on merits by holding oral enquiries and affording opportunity to the parties and since the award suffers from serious infirmities the learned single Judge rightly set aside the award and remitted the matter back to the Tribunal for consideration of the matter afresh.

9. Project has to be implemented strictly as per the commercial principles and in accordance with the terms of Contract. Clause 2 of the Contract contains definitions. "Adjudicator" is defined in Clause 2.3 of the contract as under:

"Adjudicator" is the person appointed jointly by the Owner and the Contractor to resolve disputes in the first instance, as provided for in Clause 8 of the Contract Covenants. The name of the Adjudicator is defined in the Contract Data.

"Engineer" is defined in Clause 2.26 as under:

"Engineer" is the Person or Persons appointed by Owner and notified to the Contractor who shall be responsible for supervising the Contractor, administering the Contract, certifying payments due to the Contractor, issuing and valuing Variations to the contract, awarding extensions of time and valuing the Compensation Events. The Owner may also appoint any Person or Persons to assist the Engineer and provide project management services for this Contract.

10. Clause 8 of the agreement deals with "Disputes". Clauses 8.1, 8.2 and 8.5 are relevant to be noted, which reads as under:

8.1 Engineer"s Decision

If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within fourteen (14) days of the notification of the Engineer"s decision.

8.2 Adjudicator to Decide

The Adjudicator shall give a decision in writing within twenty-eight (28) days of receipt of a notification

of a dispute.

8.5 Notice for Arbitration

Either party may refer a decision of the Adjudicator to an Arbitrator within twenty-eight (28) days of the Adjudicator"s written decision. If neither Party refers the dispute to arbitration within the above twenty-eight (28) days, the Adjudicator"s decision will be final and binding.

11. By a combined reading of clauses 8.1, 8.2 and 8.5, if the contractor is aggrieved by the decision of the Engineer, within 14 days of receipt of notification of dispute, the decision shall be referred to the Adjudicator. The Adjudicator has to give a decision in writing within 28 days. As per clause 8.5, either party may refer decision of the Adjudicator to an arbitrator within 28 days of the Adjudicator's written decision.

12. By considering the terms of contract, two kinds of disputes are likely to arise:-firstly, between "Contractor" and "Engineer" and secondly between "Contractor" and "Owner". As per Clause 1.26, the "Engineer" is to certify payments due to the Contractor, issuing and valuing Variations to the contract, awarding extensions of time and valuing the Compensation Events, etc., In the dispute raised before the adjudicator, Claim No. 1 relates to Non-release of payment in STP for the actual sewer flow for the period from 19.9.2002 to 31.8.2004. On Claim No. I, main issues taken up for consideration by the adjudicator are:-(a) the date from which the Contractor is eligible for payment whether 01.03.2003 or 19.09.2002? and (b) Whether to be paid for actual flow treated or for the forecast M.L.D. Likewise, Claim No. II relates to Non-release of Price Adjustment Payment since 1.4.2002 in U.G.S.S and interest payable.

13. Considering Claim No. 1 and the issues taken up for consideration, it falls within the purview of the matters to be resolved by the "Engineer". The terms of the contract provides for mechanism for settling the disputes, which fall within the purview of Engineer's power. Engineer appointed by the Owner and notified to the Contractor certifies payments due to the Contractor awarding extension of time and valuing the compensation events, etc. By a combined reading of clauses 8.1 and 8.2, the matter could be referred to the Adjudicator only after the decision is taken by the Engineer. As per Clause 8.5, only if either of the parties are not satisfied by the decision of Adjudicator, the parties can go for arbitration.

14. As pointed out earlier, yet another dispute that would arise is, the dispute between the "Contractor" and the "Owner" (Municipality). Any issue arising between "Owner" and the "Contractor" is to be resolved as per the Arbitration and Conciliation Act, 1996. Clause 8.6 deals with "Arbitration", the relevant portion of which reads as under:

8.6 Arbitration

(a) In case of dispute or difference arising between the Owner and a domestic Contractor relating to any matter arising out of or connecting with this Contract, such dispute or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The Arbitral Tribunal shall consist of three arbitrators, one each to be appointed by the Owner and Contractor. The third arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two arbitrators appointed to reach upon a consensus within a period of thirty days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of the Institution of Engineers (India).

By a combined reading of Clauses 8.5 and 8.6, it is clear that the reference to arbitral Tribunal are likely to arise atleast in two ways -(i) reference to an arbitrator against the decision of the adjudicator and (ii) any dispute or difference arising between the "Owner" and a "Domestic Contractor". As rightly pointed out by the learned single Judge, any decision by the Arbitral Tribunal has to be decided on the merits of his own.

15. The learned counsel for the appellant has drawn our attention to the letter dated 29.3.2004 addressed to K. Govindan Menon, the named adjudicator, pointing out that certain disputes have arisen between the Engineer - CES representing the Employer and the Contractor by which nearly Rs. 3.40 crores of money was locked up with the Municipality. Since the named adjudicator - Govindan Menon expressed his inconvenience, the appellant got the adjudicator appointed from Institution of Engineers in Calcutta. The learned counsel for the appellant Mr.R.Murari has further submitted that the appellant/contractor had sent the letter dated 10.4.2004 requesting the 1st respondent Municipality to name any acceptable person as Adjudicator since the named Adjudicator had refused to act on the grounds of personal inconvenience and that even after two months, no positive reply was forthcoming from the 1st respondent Municipality in relation to nomination of an Adjudicator. It was further submitted that only because of inconvenience expressed by the named Adjudicator, and failure of the Municipality to nominate any Adjudicator, it was necessitated to address the Institution of Engineers seeking appointment of Adjudicator as per the terms of the contract. The learned counsel would further submit that inspite of repeated notices given by the Adjudicator on several occasions, the 1st respondent Municipality has not participated in the adjudication process and since there was no objection either to the merits of the claim or the jurisdiction of the Adjudicator, the Adjudicator passed the decision on 24.11.2004.

16. Contention of Appellant is that 1st respondent Municipality had participated in the arbitration proceedings and also made part payment pursuant to the Adjudicator's decision, the Municipality must be deemed to have waived its right of raising objection as to the non-compliance of any requirements for proceeding with the arbitration. Placing reliance upon Section 4 of Arbitration and Conciliation Act, the learned counsel for Appellant contended that when the parties subjected to the jurisdiction of the Arbitral Tribunal by filing claim and the counter-claim without raising question of jurisdiction of the adjudicator, the award cannot be challenged on the ground of want of jurisdiction.

17. Per contra, learned Senior counsel for 1st respondent Municipality has submitted that certain amounts were payable to the contractor and that amount was paid and the payment cannot be said to be in pursuance to the Adjudicator's decision and therefore, payment made cannot amount to waiver.

18. Of course, 1st respondent Municipality had made part payment and also participated in the arbitration proceedings. But the payment was not in pursuance to the Adjudicator's decision and therefore it cannot amount to waiver. A waiver arises out of consent or acquiescence, which "must be an intentional act with knowledge". In its counter-claim

before the Arbitral Tribunal, 1st respondent Municipality has also raised objection that without Engineer's decision, the matter ought not to have been referred to the Adjudicator. Making part payment would not lead to inference of waiver or relinquishment of raising the objection as to the arbitrability of the matter.

19. As pointed out earlier, for resolving the dispute, the appellant would have to go to the Engineer and only after the notification of the Engineer's decision, the appellant can go before the adjudicator. Since the appellant has not adopted the stipulated procedure, the 1st respondent Municipality did not choose to participate in the proceedings before the Adjudicator. The learned Senior Counsel Mr. Ramasamy would submit that the part payments made by the 1st respondent would not amount to waiver of the 1st respondent's defences.

20. As pointed out earlier, in case of dispute or differences arising between the Owner and Contractor relating to any matter arising out of or connecting with the contract, such dispute could be settled by the Arbitral Tribunal. Once the appellant had filed the decision of the Adjudicator before the Arbitral Tribunal, as held by the learned single Judge, the Arbitral Tribunal should have treated the same as a Reference to the Arbitral Tribunal afresh and the Tribunal cannot proceed to decide merely the correctness of such adjudication. By a reading of the award, it is clear that in its brief award, the Arbitral Tribunal observed as under:

The tribunal carefully went into the substance of the decision of the Adjudicator not as an appellate authority but to arrive at a general evaluation on the resolution of the disputes. The Tribunal found that his decision is generally in tune with the prevailing technical know-how and procedures and also in consonance with the terms of the contract and his decision is found to be fair and reasonable....

21. When the Adjudicator's Order has been referred, the Tribunal ought to have taken up the matter as a fresh reference and the Tribunal was expected to give reasonings for agreeing with the Adjudicator. The Arbitral Tribunal has not gone into the merits of the matter and chosen to consider the justification of the adjudicator. The Arbitral Tribunal has not given any reasonings. When the scope of reference was to examine the order of the Adjudicator, the cryptic order cannot be sustained.

22. By perusal of the award, it is seen that the Arbitral Tribunal suggested to the parties to meet and sort out the issues and differences partly/fully outside the Tribunal through mediation. On behalf of 1st respondent Municipality, it was submitted that in pursuance of the direction of the Arbitral Tribunal the parties were also negotiating and certain payments were also made. The 1st respondent Municipality had also filed its reply to the Claim Statement. When the parties could not amicably settle the issues the Tribunal ought to have held oral hearings. Even when the 1st respondent Municipality was pursuing the matter the Arbitral Tribunal was not justified in observing as under:

..... there was no active participation nor was there any symptom of involvement in the proceedings. There was every attempt to purchase time rather than aiming at a solution....

23. In our considered view, when the 1st respondent Municipality was pursuing the matter before the Arbitral Tribunal, the Tribunal was not right in making the above observation. When the parties could not amicably settle the matter through mediation, the Tribunal ought to have held oral hearings.

24. Section 24(1) grants the first option to the parties to decide the questions -whether to have oral hearings for presentation of their evidence or whether proceedings should be conducted on the basis of documents and other materials. In the absence of agreement between the parties, the Tribunal is authorised to conduct the proceedings in the manner it considers appropriate. But the essence of Section 24(2) and (3) is covered by the general principles set forth in Section 18 i.e., a fair trial by an impartial Tribunal. By not holding oral hearings and affording opportunity to 1st respondent, the award cannot be sustained.

25. Since the award suffers from legal infirmities, the learned single Judge rightly set aside the award and remitted the matter back to the Arbitral Tribunal for consideration of the matter afresh after affording opportunity to both parties in accordance with the provisions of Arbitration and Conciliation Act. We do not find any reason warranting interference with the order of the learned single Judge and this appeal is bound to fail.

26. In the result, the Appeal is dismissed. However, there is no order as to costs.

27. After we have pronounced the judgment, learned counsel for the appellant requested that time frame may be fixed for conclusion of the proceedings before the Arbitral Tribunal.

28. In view of the submission made, the Arbitral Tribunal is required to take up the matter at an early date and dispose of the same as expeditiously as possible.