

**The Chief Engineer, Madras Island Grounds Vs. Bakthi Constructions,
Represented by Its Managing Partner, S. Velayudham**

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Court : Chennai

Decided On : Sep-10-2004

Reported in : 2004(5)CTC93; (2004)4MLJ257

Judge : P. Sathasivam ; and S.K. Krishnan, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 20

Appeal No. : O.S.A. No. 232 of 1999

Appellant : The Chief Engineer, Madras Island Grounds ; and the Garrison Engineer, P. No. 3, Naval Air Station

Respondent : Bakthi Constructions, Represented by Its Managing Partner, S. Velayudham

Advocate for Def. : N. Jothi, Adv.

Advocate for Pet/Ap. : C. Krishnan, Senior Central Government Standing counsel, ; assisted by M.T. Arunan, Additional Central Government Standing counsel

Judgement :

P. Sathasivam, J.

1. This appeal is directed against the judgement and decree dated 30-11-1998 passed in C.S. No. 832 of 1993, wherein Mr. R. Dhananjayan, retired District Judge was appointed as Arbitrator to resolve the dispute between the parties. The plaintiff/respondent herein filed C.S.No.832 of 1993 before the Original Side of this Court under Section 20 of the [Arbitration Act, 1940](#) for direction to the defendants for production of agreement dated 21-10-1988 entered into between the plaintiff and the defendants in respect of the construction of boundary wall at Naval Air Station, Arakonam and refer the dispute between the parties to an independent arbitrator appointed by this Court. It is the claim of the plaintiff that an agreement was entered into between the plaintiff and the defendants for construction of a compound wall measuring 6.5 K.Ms. Though date was fixed for completion of the said work as 20-10-1989, the same was extended to 28-12-1990 and the work was completed on 31-12-1990. The plaintiff has submitted a bill for a total amount of Rs.1,09,67,690-34. It is stated that after submitting the bill, the plaintiff noticed that certain items of work carried out by it were not taken into account and entered in the measurement books included in the final bill. Hence, he submitted a letter dated 19-10-1991 for a sum of Rs.75 lakhs to the second defendant. By letter dated 30-01-1993, the second defendant informed the plaintiff that the Chief Engineer has rejected the claim of the plaintiff on the ground that 'No claim certificate' was appended to the final bill submitted by the plaintiff and after submitting the 'No claim certificate' the plaintiff is not eligible to claim any more amount on the said bill. As the dispute relates to the terms of the contract and as such the dispute has necessarily to be referred to an arbitrator and the defendants cannot reject the request in limine. In such circumstances, the plaintiff has prayed for appointment of an arbitrator to take a decision of their claims.

2. In the written statement filed by the defendants, it is stated that the plaintiff has submitted a final bill on 9-3-1991 for a sum of Rs.1,16,58,763/- which included escalation amount and along with the bill it has furnished a certificate of no further claim under this contract beyond the net amount of the said bill. This certificate was given without any reservation. After furnishing the certificate, it is deemed that all other claims are waived and extinguished in terms of Condition 65 of the General Conditions of the contract forming part of the Contract Agreement. On 19-10-1991 the plaintiff has made a further claim of Rs.75 lakhs, 7 months after the

submission of the final bill. After submitting the no claim certificate, the plaintiff is not entitled for any further claim under the said contract and the suit making further claim is liable to be dismissed.

3. On the above pleadings, the learned Single Judge after considering the rival claim and after holding that the claim of the plaintiff is a matter which is arbitrable by the arbitrator, appointed one Mr. R. Dhananjayan, a retired District Judge as arbitrator to resolve the dispute between the parties. Questioning the same, the defendants have preferred the present appeal.

4. Heard Mr. C. Krishnan, learned senior Central Government Standing counsel for appellants and Mr. N. Jothi, learned counsel for the respondent.

5. The only point for consideration is, whether the claim of the plaintiff can be referred to an arbitrator and whether the learned Single Judge is right in appointing an arbitrator?

6. The only objection as seen from the counter affidavit of the defendants filed before the learned Single Judge is that inasmuch as the plaintiff has submitted the final bill on 9-3-1991 along with a certificate of no further claim, their further claim is waived and extinguished in terms of condition 65 of the General Conditions of the contract forming part of the agreement. It is the categorical stand of the plaintiff that after submitting a bill, the plaintiff noticed that certain items of work carried out by it were not taken into account and entered in the measurement books included in the final bill which necessitated them to submit a letter dated 19-10-1991 for a further sum of Rs.75 lakhs to the second defendant. It is true that the plaintiff submitted the said final bill enclosing no claim certificate. Mr. N. Jothi, learned counsel appearing for the respondent, by extensively taking us through the various clauses of the agreement and judgement of the Apex Court in *Union of India v. M/s. L.K. Ahuja and Company*, reported in : [1988]3SCR402 , would contend that the eligibility or entitlement of further claim can also be considered by the arbitrator. According to him, the right to get further payment is a matter which is arbitrable and the learned Single Judge is perfectly right in appointing an arbitrator. In the case before the Supreme Court, an application under Section 20 of the [Arbitration Act, 1940](#) was filed by the contractor, namely, Messrs. L.K. Ahuja

and Company based on the arbitration agreement dated 18-9-1969. The said application was objected, since the applicant had accepted the full and final payment of the agreements and no claim declaration in respect of the same had been given by them and there was no dispute, the application filed under Section 20 of the Act was mis-conceived. The trial Court held that the Court had no jurisdiction under Section 20 of the Act. The matter was taken up by way of an appeal and the question posed therein was whether there was a valid claim under Section 20 of the Act to be referred in accordance with law. After considering similar claim and the jurisdiction under Section 20 of the Act, the Supreme Court has held as follows: (para 8)

'8. In view of the well-settled principles we are of the view that it will be entirely wrong to mix-up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act, and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an Order under Section 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under Sec. 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable....'

In our case also, it is the claim of the plaintiff that he did not notice certain items of work carried out by it were not taken into account and entered in the measurement books for which they are entitled additional amount of Rs.75 lakhs from the defendants. No doubt, as in the case before the Supreme Court, here also the plaintiff-contractor enclosed no claim certificate along with the final bill. In the light of the conclusion of the Supreme Court, namely, that even on completion of work though right to get further payment gets weakened, however, the claim subsists and whether it does subsist, is a matter which is arbitrable. Based on the said principle, the learned Single Judge has rightly accepted the case of the plaintiff and appointed a retired District Judge as an arbitrator. We are in entire agreement

with the said conclusion and the case on hand is directly covered by the decision of the Supreme Court referred to above and we reject the contra argument made by the learned senior Central Government standing counsel for the appellants. Accordingly, the appeal fails and the same is dismissed. No costs.

7. In the light of the fact that the order appointing a retired District Judge as Arbitrator was the subject matter of this appeal, Mr. C. Krishnan, learned senior Central Government standing counsel, suggested that in the event of this Court holding that the claim subsists and the same is arbitrable, Mr. Justice S. Marimuthu, retired Judge of this Court, may be appointed as Arbitrator. As to the above request of the learned senior Central Government standing counsel, Mr. N. Jothi, learned counsel appearing for the respondent, fairly states that he has no objection for appointment of Justice S. Marimuthu as Arbitrator. In the light of our conclusion and in view of the agreement by both parties, Mr. Justice S. Marimuthu, a retired Judge of this Court, is appointed as Arbitrator to resolve the dispute with reference to the terms of the agreement dated 21-10-1988. The Arbitrator shall enter into the reference in two weeks from the date of receipt of a copy of this order and shall submit his Award thereon into this Court within six months after entering into the reference. The Arbitrator is at liberty to fix his remuneration.