

CASE NO.:
Appeal (civil) 9136-9137 of 2003
Special Leave Petition (civil) 2096-2097 of 2002

PETITIONER:
M/s.Sathyanarayana Brothers (P) Ltd.

RESPONDENT:
Tamil Nadu Water Supply & Drainage Board

DATE OF JUDGMENT: 18/11/2003

BENCH:
Brijesh Kumar & (Arun Kumar.

JUDGMENT:
JUDGMENT

BRIJESH KUMAR, J

Leave granted.

These appeals are the outcome of an arbitration proceedings initiated at the instance of the appellant M/s.Sathyanarayana Brothers (P) Ltd. raising certain claims against the respondent Tamil Nadu Water Supply & Drainage Board (for short 'the Board'). The claim was ultimately partly allowed by the Umpire. The objections against the Award preferred by the appellant were allowed by the learned single Judge but the Division Bench set aside the order of the learned single Judge. Hence, this appeal by M/s.Sathyanarayana Brothers (P) Ltd.

In view of the acute scarcity of water in the State of Tamil Nadu a project known as Veeranam project was undertaken by the State Government after its clearance by the Planning Commission for bringing the water from the left bank of the Coleroon at Lower Anicut to the city of Madras covering a distance of 155 miles through the pipelines to be laid for the purpose. The work required to be done was for manufacturing, supplying, delivering 1676 mm. (66") Diameter Prestressed Concrete Pipes and fittings including transporting to site, laying, jointing and testing for raw water and clear water conveying mains from Veeranam Tank to Madras city.

The tenders submitted by the appellant M/s.Sathyanarayana Brothers (P) Ltd. for carrying on the job detailed above was accepted for a lump sum amount of Rs.16,55,87,300/- subject to clearance of the foreign collaboration arrangement and release of necessary foreign exchange and also subject to other conditions and issued G.O.Ms.No.1607 Public (TWAD) Department dated 13.7.1970. While submitting the tender the petitioner had also written a letter dated 22.1.1970 to the Chief Engineer (Buildings) and City Water Supply, Veeranam Project, Public Works Department, Chepauk, Madras with a request for foreign exchange requirement for import of equipments from foreign manufacturers. The contractor had requested the government to give all assistance in procurement of foreign exchange and other necessary central government clearances. Articles of agreement was executed between the State of Tamil Nadu and M/s.Sathyanarayana Brothers specifying the terms and conditions of the contract. The work was required to be completed within 36 months from the date of the

entrustment of the site which was to be done within 30 days after the date of acceptance of the tender. It also provided that if there was any delay in handing over the site there should be extension of time for completion of the contract. The time for completion was liable to be extended on the request of the contractor for justifiable reasons. The contractor required Rs.1.2 crores of foreign exchange for importing necessary equipments for manufacture of Prestressed Concrete Pipes from Switzerland since the exporters insisted on payment in Deutsche Marks. The contractor was advised to approach the Integral Credit and Investment Corporation of India (ICICI) who insisted that the contractor should be in the form of an incorporated company so as to be able to avail facilities of foreign exchange instead of a partnership firm. The contractor, therefore, converted into a private limited company as per the advice on 24.2.1971. The imported equipment landed in Madras in February 1972 whereafter a factory at Thirukalikundram and another factory at Panruti were commissioned by June 1972 and January 1973 respectively. There was thus already a delay of one year four months in commencing production of prestressed concrete pipes. The contractor therefore, requested for extension of time up to 31.12.1975. It was, however, extended up to 30.06.1975 by the Chief Engineer. The contractor wrote a letter dated 11.11.1974 refusing to accept the offer and further indicated that he would be prepared to work on the condition that contractor would be paid at the rate to be worked out taking into account the increase in the cost and which may further increase during the course of the work. It was also indicated that necessary time may be given for completion of the work keeping in mind the capacity of equipment and the rate of production. He also wanted to be compensated for the losses resulting from the delay and default on the part of the government. The contractor stopped the work with effect from June 30, 1975. The Chief Engineer extended time for completion of the work by 31.12.1975 and again upto 31.3.1976 but did not agree to the other conditions as indicated in the letter of the contractor dated 11.11.1974. The dispute thus arose and the work stood stopped with effect from 30.06.1975. The contractor invoked the arbitration clause and appointed one Mr.P.S.Subramaniam, a Chartered Engineer as its Arbitrator. After some litigation at the instance of the Board it also nominated its arbitrator. The arbitrators entered upon the reference on 18.3.1978. The arbitrators disagreed. Mr.P.S.Subramaniam, the arbitrator appointed by the appellant partially awarded the claim to the extent of about Rs.7.00 crores whereas the arbitrator appointed by the Board only said that he did not agree with the award. Since there was no agreement between the two arbitrators hence the matter was referred to the Umpire - Justice Palaniswamy, a retired Judge of the High Court who started the proceedings on 2.4.1979. The Umpire gave its award on 10.9.1979 and filed it in the court on 26.11.1979. The appellant contractor filed objections for setting aside of the Award given by the Umpire and challenged the conclusions and findings arrived at by him to the effect that it was not obligatory upon the State Government to get foreign exchange cleared from Government of India for the contractor and that the contractor had abandoned the work on June 30, 1975 despite the extension of time up to March, 1976 as well as the finding that non-production of inter-departmental correspondence and documents as requested by the contractor would not vitiate the award. The Board, on the

other hand supported the findings of the Umpire and prayed for making the award a rule of the court. The matter was considered by the learned single Judge of the High Court. According to the decision of the learned single Judge the State Government was obliged to get foreign exchange clearance for the contractor for import of equipment from Switzerland for the purposes of manufacturing prestressed concrete pipes. Due to delay in clearance for foreign exchange the time should have been extended by the Board as requested by the contractor. The learned single Judge also found that extension of time after stoppage of the work was of no avail, thus there was no breach on the part of the contractor. Non-production of the documents by the Board as requested by the appellant had the effect of vitiating the award given by the Umpire. The award was thus set aside by the learned single Judge. In the appeal preferred by the Board, the Division Bench, found that the following points fell for its consideration:

"(1) Whether there is any obligation on the part of the Government of Tamilnadu to get foreign exchange clearance from Government of India as per the terms of contract entered into between the Contractor and the State Government?

(2) Whether the contractor has not committed breach of contract by abandoning the work with effect from 30.06.1975?

(3) Whether the non-production of inter departmental correspondence of confidential nature as required by the contractor will vitiate the Award passed by the Umpire?

(4) To what relief?"

The Division Bench held that no such clause in the agreement has been disclosed to indicate that it was the obligation on the part of the State Government to get clearance of Government of India for foreign exchange for the purpose of import of equipment by the contractor from Switzerland. The acceptance of the tender was subject to Government of India clearance of foreign collaboration arrangement and release of necessary foreign exchange. While arriving at this finding the Division Bench quoted an extract from one of the letter of the contractor dated 22.1.1970 Exh.D-557 to the following effect : "We understand that the Government should give us all assistance in the procurement of foreign exchange and necessary Central Government clearance".

The Division Bench further observed that the Umpire was right in coming to a conclusion that Government of Tamilnadu had rendered all possible assistance to the contractor for getting the foreign exchange clearance as the Government of Tamilnadu had approached the I.C.I.C.I. for that purpose, whom the contractor had approached on the advise of Government of India. Thus the state shall not be responsible for the delay in getting the foreign exchange. On the other two points the Division Bench held that time cannot be said to be the essence of the contract since the agreement contained a clause for extension of time for justifiable reasons. It has also been found that the contractor

could not carry on the work in accordance with its commitment of manufacturing 28 prestressed concrete pipes per day and laying of 72 pipes per day. Whereas according to the contractor the target could not be achieved due to frequent failures of electricity and dropping of voltage. The Division Bench ultimately came to the conclusion that the contractor alone had committed the breach of contract in executing the work of Veeranam project. In so far it related to non-production of the file containing inter-departmental correspondence including the handing over note by former Chief Engineer, Veeranam project Exh.D-660, it was observed by the learned single Judge that it was a secret document which was not available on the record of the Board. The case of the Board was that the note of the former Chief Engineer while handing over the charge to his successor would not bind the Board in any respect and other inter-departmental correspondence may not be admissible in evidence and it would also not advance the case of the contractor. The Division Bench seems to have agreed with the submissions made on behalf of the Board. The Division Bench, after discussing the case law, came to the conclusion that the Award given by the Umpire cannot be set aside except on the ground that the arbitrator or the umpire had mis-conducted himself or the arbitration proceedings having become invalid or the Award was procured improperly. The Court would not re-appraise the evidence. The Award of the Umpire awarding only a sum of RS.2,67,41,079 has been upheld by the Division Bench. Thus it set aside the order passed by the learned single Judge.

Shri Deepankar Gupta, learned senior counsel appearing for the appellant has first tried to submit that the Arbitration Tribunal has not been constituted in accordance with the arbitration clause. In that connection he has drawn our attention to Clause 70 of the agreement which provides that the dispute shall be referred to the arbitration of three persons, one of whom shall be nominated by the contractor, the second by the Governor and the third shall be an independent person selected by other two persons so nominated and this provision shall be deemed to be a submission to the arbitration within the meaning of Indian Arbitration Act 1940. It is therefore submitted that there should have been three arbitrators instead of two arbitrators and an umpire chosen by the arbitrators, in the present case. It appears that this point was never raised by the appellant before any forum earlier as pointed out by Shri Nageshwar Rao, learned senior counsel appearing for the respondent. It is submitted that such a question cannot be allowed to be raised in this Court for the first time after the appellant had himself submitted to the jurisdiction of the arbitrators and the umpire. There is no dispute about the appointment of two arbitrators and the umpire having been appointed by the arbitrators. The arbitration proceedings concluded before the two arbitrators in which both parties participated without any objection. Thereafter all matters having been referred to the umpire, there too parties submitted to the proceedings before the umpire. No such objection was raised in the objections filed against the award nor before the High Court. That being the position, it is submitted that it is too late in the day to say that the dispute should have been decided by three arbitrators and not by two and then by umpire in the event of difference between the two arbitrators. No good reason could be indicated on behalf of the appellant for having kept silent on this point all throughout the proceedings. They still rely upon the award given by the arbitrator Shri Subramaniam in their favour. It is still their

stand that the order passed by the learned Single Judge of the High Court records the correct finding. We find that the stage to have raised such an objection as to whether the dispute was liable to be decided by two arbitrators or a Board of three arbitrators had passed long before. The two arbitrators were appointed in accordance with the provisions of arbitration clause as well as the third arbitrator called umpire. The mode of hearing was adopted in the manner that the dispute was heard by two arbitrators appointed by the respective parties. The matter was referred to umpire since there was no agreement between the two arbitrators. There is no justification now at this stage to raise such an objection that Board of three arbitrators should have decided the matter. Such a plea contradicts their own action, and it seems to be taken now to wriggle out of the award ultimately given by the umpire, but it would not be permissible at this stage. Shri Nageshwar Rao, learned senior counsel, has placed reliance upon Russel on Arbitration "Loss of right to object". It states as under: "A party who objects to the award on the ground that the tribunal lacks substantive jurisdiction, should not only act promptly, but should also take care not to lose his right to object. A party who takes part or continues to take part in the proceedings is in a different position from someone who takes no part in the proceedings. The latter cannot lose his right to object as long as he acts promptly to challenge the award once it is published. The former must, however, state his objection to the tribunal's jurisdiction "either forthwith or within such time as is allowed by the arbitration agreement or the tribunal". That statement, which should be recorded in writing and sent to the tribunal and the other parties, should not only mention the jurisdiction objection but also make clear that any further participation in the arbitration will be without prejudice to the objection. If that is not done, the party concerned may not be able to raise that objection before the court "unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know or could not with reasonable diligence have discovered the grounds for the objection". A person alleged to be a party to arbitral proceedings but who takes no part in those proceedings may at any time apply to the court for a declaration, an injunction or other relief concerning the validity of the arbitration agreement, the proper constitution of the arbitral tribunal and any matter submitted to arbitration in accordance with the arbitration agreement."

In view of the above position, we repel the contention raised on behalf of the appellant pertaining to the jurisdiction of the arbitrators and the umpire to decide the matter.

It is next submitted on behalf of the appellant that it is no doubt that period of contract was specified to be 36 months in the agreement itself but it has been rightly held

by the learned Single Judge that time was not essence of the contract for the reason that as per the terms of the contract time could be extended for justifiable reasons and it is for this reason that the time was extended by the respondent but they initially extended the time in an unreasonable manner. It is submitted that despite the best efforts made, the equipment could not be imported prior to February 1972 at the first instance. The result was that there was a delay of one year and 4 months as found by the courts also, in starting the work itself. It is submitted that there was clear understanding that the State Government would get the clearance from the Central Government for foreign exchange necessary for import of the equipment. The State Government did not provide proper assistance in the matter and the appellant was referred to ICICI by the Central Government for foreign exchange. As per conditions of ICICI, the appellant had to change its constitution converting into a company as desired. After the clearance of the foreign exchange, due to other intervening factors of Pak war etc., the import could not be possible. Therefore, the appellant was not responsible for the delay caused. It is then further submitted that after the factories were installed on receipt of foreign exchange, equipment were installed promptly. There have been problems of availability of electrical energy and low voltage which was so necessary for carrying on the work in the factory. For such difficulties the appellant could not be held responsible. It is also submitted that according to the agreement, trenches etc. were also to be dug out by the Board. It is submitted that the finding as recorded by the umpire and the Division Bench that the Board was not responsible for the delay, it will not necessarily lead to the inference that the appellant was responsible for it. For good reasons time was liable to be extended reasonably. It could not be cut short unreasonably. It is further submitted that the Board itself later on extended the time beyond 31.3.1975 but initially it was refused. It indicates that partial extension given by the Board was insufficient and not justified. Time was even thereafter extended but by that time the appellant was compelled to stop the work. The effort therefore which has been made before us by the appellant is that it was not a case of abandonment of contract on the part of the appellant rather the delay occurred for justifiable reasons on account whereof extension of reasonable time as prayed for by the contractor was not allowed by the respondent.

Shri Nageshwar Rao, learned counsel for the respondent submits that the Board had extended all possible assistance which was needed for the foreign exchange to import the machinery by the appellant but so far electricity is concerned it was to be arranged by the contractor himself. In this connection learned counsel for the appellant has drawn our attention to the observations made by the umpire in his award where it has been observed that no doubt failure of electricity or low voltage would have caused some dislocation but that cannot absolve the contractors from their contractual liability and certainly the failure of electricity cannot be the sole reason for the dismally poor performance of the contractors. It is submitted that the case of the appellant is not that the Board failed to arrange for the electricity but there is no denial of the fact that due to interrupted electric supply and low voltage the progress of the work got slowed down, may be Board is not responsible for it but it also cannot be said to be the responsibility of the contractor. Such a reason would be a justifiable reason to be considered for appropriate

extension of time to complete the job.

Learned counsel for the appellant then submitted that the arbitrator failed to summon the document, namely the inter-departmental correspondence of the Board and the "handing over note" of the Chief Engineer of the Project to his successor. It is submitted that these documents contained relevant and authentic material and facts and provide proper background to correctly appreciate the points regarding obligation of the State Government to get the foreign exchange, late arrival of equipments imported, the interrupted electric supply, digging of trenches etc. by looking into which alone the question could properly be decided as to whether the appellant had abandoned the work or how far the appellant was responsible for the delay and stoppage of the work. It is submitted that there could not be any confidentiality about such documents which related to the work of the project. So far the "handing over note" is concerned, it is a document written by none else but the Chief Engineer of the Project who had first hand knowledge of all that was going on pertaining to the work and he was competent to prepare a record of the same in official discharge of his duties. It is submitted that the arbitrator erred in not allowing the application moved before him for summoning of the "handing over note" and the learned Single Judge, it is submitted, rightly held that it vitiated the award of the arbitrator. It may be mentioned here that the Umpire also refused to get the "handing over note" and place it on record and peruse the same so as to realize the relevance of the note for the purposes of arriving at a just and correct finding on the questions involved. It was necessary to have the proper background as contained in the note prepared by the Chief Engineer of the Project. The learned counsel for the appellant has taken us through some of the parts of the "handover note" just with a view to emphasize the relevance and importance of the said note which is document D-660. A copy of the same has been filed in this Court. In Paragraph 6.1.7 and 6.1.7.1. it is indicated that Department had to carry out the work of trench excavation, the service roads, river, rail and road crossings besides many other things enumerated therein. Para 6.1.10 deals with requirement of foreign exchange and the details thereof. In Paragraph 6.1.10.3 the delay in arrival of the machinery imported due to Indo-Pakistan war is also indicated. Paragraph 6.11 deals with the factors that contributed to delay in execution of the project. Thereunder it is mentioned about the availability of power. Some problem relating to trench excavation by the Board also finds mention in Para 7 onwards. A bare look of some of the parts of the note indicates that it may have some material bearing on the merits relating to the question of delay in execution of the project, and throwing some light on the share of responsibility of the parties to the contract and extent of their responsibility as well.

Learned counsel for the appellant has placed reliance upon a decision reported in (1975) 2 S.C.C. 236 \026 K.P. Poulse Vs. State of Kerala and Another to indicate that where it is a speaking award and the arbitrator fails to take note of the relevant documents or ignores the same, it vitiates the award. It was observed such documents which were ignored were material documents to arrive at a just and fair decision to resolve the controversy between the parties. Our attention has particularly been drawn to the observations made in Paragraph 4 which reads as under: "We have been taken through all the relevant documents by the learned counsel

for both sides and we are satisfied that Ex.P-11 and Ex.P-16 are material documents to arrive at a just and fair decision to resolve the controversy between the Department and the contractor. In the background of the controversy in this case even if the Department did not produce these documents before the Arbitrator it was incumbent upon him to get hold of all the relevant documents including Ex.P-11 and P-16 for the purpose of a just decision. Ex.P-11 dated September 8, 1966, is a communication from the Superintending Engineer to the Chief Engineer with regard to the objections raised by audit in connection with the construction of the reservoirs\005\005." (emphasis supplied by us)

Reliance has also been placed upon a decision reported in (2001) 5 S.C.C. 629 \026 Sikkim Subba Associates Vs. State of Sikkim, particularly to the observations made in Paragraph 12 of the decision that an award, ignoring very material and relevant documents throwing light on the controversy to have a just and fair decision would vitiate the award as it amounts to misconduct on the part of the arbitrator. The case of K.P. Poulse (supra) has also been referred to. Yet another decision on the point referred to is reported in 2003 (7) Scale Page 20 \026 Bharat Cocking Coal Ltd. Vs. M/s. Annapurna Construction where also it has been held that passing award ignoring the material document would amount to mis-conduct in law, In such circumstances the matter was remitted to a retired Judge of the Jharkhand High Court instead of to the named arbitrator since only the question of law was involved and the parties had also agreed for the same.

In so far the case in hand is concerned, learned counsel appearing for the respondent first made a submission that no application was moved by the appellant before the arbitrator for summoning the document, namely, the "handing over" note prepared by the Chief Engineer while handing over the charge as Project in-charge to his successor but after verification he conceded that such an application was moved before the Arbitrator but no orders had been passed on it. The learned Single Judge has given it as one of the reasons to hold that it vitiated the award. We again find that before the umpire also effort was made to get the document on record for perusal of the same but the request was not accepted. We find that there is no question of secrecy or confidentiality so far the "handing over note" of the Chief Engineer is concerned. It is a note prepared by the Chief Engineer of the project in official discharge of his duties. It contains relevant facts and information regarding questions involved in the case. The appreciation of the contents of the 'note' and its effect would of course be a matter to be decided by the appropriate authority/arbitrator/umpire but its perusal or consideration could not be shut out on the meek ground that the department was not bound by it or on the ground of confidentiality in the times when more stress is rather on transparency. In our view, the learned Single Judge was right in inferring that such an infirmity would vitiate the award. That being the position, in our view the order of the Division Bench, reversing the decision of the Single Judge is not sustainable and the matter may be required to be

remitted to be considered in the light of the "handing over note" of the Chief Engineer in respect whereof an application was moved by the appellant before the arbitrator as well as before the Umpire which remained unattended to by the forum and later did not accede to the request.

Considering the fact that it is an old matter and it being a speaking award the matter having also been considered by the learned single Judge, it would better serve ends of justice to ensure expeditious disposal of the matter, therefore, the Division Bench of the High Court may consider the matter afresh, taking into account the "handing over note" of the Chief Engineer of the Project and other relevant documents in respect of which request may have been made but refused.

In the result, these appeals are allowed. The order of the Division Bench of the High Court is set aside and the matter is remitted to the High Court for being decided afresh by the Division Bench in the light of the observations made above. Costs easy.