

(2024) 11 KL CK 0027

High Court Of Kerala

Case No: Arbitration Request No.114 Of 2024

P & C Projects Pvt Ltd

APPELLANT

Vs

M/s Inkel Limited

RESPONDENT

Date of Decision: Nov. 12, 2024

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11(6), 11(8), 12(1)

Hon'ble Judges: G.Girish, J

Bench: Single Bench

Advocate: Nisha George, George Poonthottam, P.U.Shailajan

Final Decision: Allowed

Judgement

G.Girish, J

1. The applicant, a company registered under the Companies Act, 1956, has filed this application under Section 11(6) of the Arbitration and

Conciliation Act, 1996 (for short "the Act"™) for the appointment of a sole Arbitrator to adjudicate the disputes between the applicant and the

respondent in terms of Clause 25 of Annexure-A3 agreement executed in between them on 06.08.2018.

2. As per Annexure-A3 agreement, the applicant undertook the work for developing and constructing the flagship project of Cochin Cancer Research

Centre, Ernakulam funded by the Kerala State Infrastructural Investment Fund Board (KIIFB). The period initially fixed for the completion of the

project was 730 days from the date of handing over of the project site. However, the applicant was not able to complete the project within the above

stipulated time due to the reasons which, according to the applicant, amounted to force majeure. At the request of the applicant, the period for completion of the project was said to have been extended to 949 days. Even after the expiry of the extended period, the applicant was not able to complete the project as undertaken in the agreement executed between the parties. Thereafter, the respondent, pursuant to show cause notices issued to the applicant, terminated the contract stating the reason that the explanations offered by the applicant were unsatisfactory. The applicant challenged the aforesaid termination unsuccessfully by filing W.P.(C) No.2200/2021 and W.A.No.905/2021 before this Court. Pursuant to the dismissal of S.L.P (C) No.5672/2022 which the applicant filed before the Supreme Court against the judgment in W.A.No.905/2021, Arbitration Request No.115/2022 was filed before this Court under Section 11(6) of the Act. This Court, as per Annexure-A28 order dated 10.08.2022 observed that the final bill submitted by the applicant has to be considered by the Dispute Redressal Committee as provided under Clause 25 of Annexure-A3 agreement, and accordingly disposed of the Arbitration Request without prejudice to the rights of the applicant to seek the appointment of an Arbitrator at a later stage, if so warranted. It is the grievance of the applicant that even the Dispute Redressal Committee constituted by the respondent, after much persuasion, did not take any effective steps to redress his grievance. Accordingly, the applicant issued Annexure-A49 letter to the respondent invoking the Arbitration Clause contained in Annexure-A3 agreement suggesting the respondent to choose one among the three Arbitrators mentioned in that letter for the resolution of the disputes which arose in connection with the agreement between the parties. Alleging non co-operation on the part of the respondent to have the dispute resolved through the mode of arbitration provided under Annexure-A3 agreement, the applicant has filed the present Arbitration Request.

3. The respondent appeared through their counsel and filed a counter affidavit strongly disputing the entitlement of the applicant to seek the appointment of an Arbitrator. According to the respondent, the applicant was delaying the work from the very beginning itself, and it could not be

completed even after the respondent granted extension of period to 949 days from the initial period of 730 days originally fixed. It is also alleged that the work carried out by the applicant was of poor quality. According to the respondent, the contract was terminated due to the failure of the respondent to complete even a substantial portion of the work within the extended period. The respondent also stated in the counter affidavit that all the issues raised by the applicant in connection with the claim for arbitration had already been considered and rejected by this Court in the writ petition and the writ appeal filed by the applicant. It is further contended that the petitions filed by the applicant before the Commercial Court, Ernakulam in C.M.A (Arb) No.546/2021 were dismissed by the said court accepting the contentions of the respondent in the counter affidavit filed by them. As regards the proceedings of the Dispute Redressal Committee, the respondent stated that the said Committee had conducted five meetings with a view to redress the grievance of the applicant. It is thus stated that in the last sitting of the DRC held on 02.12.2023, it was resolved that all the claims placed by the applicant in the final bill, as well as the statutory deductions and compensation payable to the respondent for the delay in the completion of the project etc., are to be determined at the time of final settlement, and that there shall be no further claims from the applicant in connection with the materials/plant/equipments lying in the project site since the applicant has been allowed to take such materials/plant/equipments etc. at its own risk and cost. By adverting to Clause 25 of Annexure-A3, the respondent would contend that there is no scope for appointment of Arbitrator since the Dispute Redressal Committee had already dealt with the issue and resolved that the claims of the applicant are to be considered at the time of final settlement. Thus, it is stated that the Arbitration Request is premature since it could be resorted to only after the DRC takes a final decision.

4. Heard the learned Senior Counsel Adv.Mr.George Poonthottam appearing for the applicant under instructions from Adv.Mrs.Nisha George, and Adv.Mr.P.U.Shailajan, the learned counsel for the respondent.

5. The fact that the applicant and the respondents had entered into Annexure-A3 agreement which provides for the resolution of the disputes arising

between the parties in connection with the said agreement by resorting to arbitration as provided under Clause 25 of the said agreement, is not in dispute. The contention of the respondent is that the provisions contained in Clause 25 regarding the appointment of Arbitrator could be resorted to only when the DRC fails to give its decision within the period prescribed thereunder or when any of the parties are dissatisfied with the decision of the DRC. Thus, it is stated that the DRC constituted in this case had rendered Annexure-R1(ad) decision to have the claims raised by the applicant determined at the time of final settlement after the completion of the project. Accordingly, it is contended that the applicant is entitled to seek the appointment of an Arbitrator only after the completion of the project by the new company entrusted with the task by the respondent. It is the further contention of the respondent that Annexure-A49 letter cannot be considered as a valid notice since even after the said letter of the applicant, two sittings were conducted by the DRC, which the applicant had suppressed in this proceedings.

6. The first contention of the respondent that the applicant has to wait till the completion of the project by the new entity entrusted by the respondent, to have its claim resolved at the instance of the DRC, prima facie defeats the purpose of the Arbitration and Conciliation Act, 1996 enacted for speedy and efficacious remedy to be rendered to the parties to commercial disputes. It is to be noted that the DRC is only an in-house mechanism provided by the respondent itself, with its members chosen at the discretion of the respondent. There is no point in arguing that the applicant has to wait till the Project Work of the respondent is completed by the present company entrusted with the task, and the DRC again convened to delve upon the final settlement of the bills, for getting the payment of amounts lawfully entitled to them. Therefore the objection raised by the respondent in the above regard is bereft of merit. The contention of the respondent about the suppression of facts by the applicant on the decisions taken by the DRC in the two sittings conducted after Annexure-A49 notice, is also totally untenable since it could be seen from Paragraph 31 of the Arbitration Request that the applicant has disclosed the details pertaining to the efforts made by them to remove their materials lying at the site, and Annexures-A50 and

A52 letters issued by the respondent consequent to the decision of DRC to permit the applicant to remove the materials, plant, equipments etc., from the Project site. The mere fact that the applicant co-operated with the respondent in the two DRC meetings held after Annexure-A49 notice, cannot be termed as a circumstance which would vitiate or nullify the sanctity of Annexure-A49 notice. A reading of the said letter issued by the applicant would reveal that it contains the essential requirements envisaged under law as prerequisites for invoking the Arbitration Clause in an agreement between the parties.

7. Another argument advanced by the respondent is that the present application filed, without KIFB in the party array, is prima facie not maintainable due to non joinder of necessary parties. I find no merit in the above argument since there is absolutely no requirement to arraign persons outside Annexure A3 agreement as parties to this Arbitration Request, which is to be decided on the basis of the contract inter-se between the parties to that agreement.

8. As a conclusion to the aforesaid discussion, I find that the applicant is entitled to invoke Section 11(6) of the Act, and seek the appointment of an Arbitrator at the instance of this Court.

In the result, the application stands allowed, and an order is passed as follows:

- i) Mr. Justice M. Sasidharan Nambiar, 'Swapnam', Amritha Lane, Near Puthenkulangara Temple, Eroor North P.O., Kochi- 682 306 is nominated as the sole Arbitrator to arbitrate upon the disputes that have arisen between the petitioner and the respondent within the purview of Annexure-A3 agreement.
- ii) The learned Arbitrator is at liberty to rule on all issues between the parties in connection with the said agreement, including his own jurisdiction if the parties raise such a dispute.
- iii) The Registry is directed to communicate a copy of this order to the learned Arbitrator within a period of ten days from today and to obtain a Statement of Disclosure from the learned Arbitrator as provided under Section 11(8) read with Section 12(1) of the Act.

iv) Once the Disclosure Statement is obtained from the learned Arbitrator, the Registry shall issue the certified copy of this order to the learned

Arbitrator, with a copy of the said statement appended to it, retaining the original of the same by this Court.

v) The fees of the learned Arbitrator shall be governed by the Fourth Schedule of the Act.

vi) The learned Arbitrator shall decide the manner in which the fees and expenses of the arbitration proceeding has to be paid by the parties.

vii) The parties will appear before the learned Arbitrator on such date and place as decided by the learned Arbitrator.