



2025:KER:337

Arb. Appeal No.56/2012

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE EASWARAN S.

TUESDAY, THE 7TH DAY OF JANUARY 2025 / 17TH Pousha, 1946

ARB.A NO. 56 OF 2012

AGAINST THE ORDER/JUDGMENT DATED 22.06.2010 IN OP (ARB)
NO.238 OF 2006 OF DISTRICT COURT & SESSIONS COURT,
THIRUVANANTHAPURAM

APPELLANT/RESPONDENT:

M/S.BHAGEERATHA ENGINEERING LTD.,
AGED 1 YEARS
VAZHAKKALA, KAKKANADU P.O., KOCHI - 622 030,
REPRESENTED BY ITS DIRECTOR (PROJECTS).

BY ADV SRI.G.P.SHINOD
SRI.MANU V.
SRI.GEORGE THOMAS

RESPONDENT/PETITIONER:

STATE OF KERALA
REPRESENTED BY CHIEF ENGINEER (PROJECTS), PROJECT
MANAGEMENT SCHEME, KERALA STATE TRANSPORT
PROJECTS (K.S.T.P.), KILLIPPALAM, KARAMANA P.O,
THIRUVANANTHAPURAM-695002.

SRI.K.V.MANOJKUMAR, SR. GOVERNMENT PLEADER

THIS ARBITRATION APPEAL HAVING COME UP FOR ADMISSION
ON 13.12.2024, THE COURT ON 07.01.2025 DELIVERED THE
FOLLOWING:

**J U D G M E N T****C.R.****Easwaran S., J.**

The appeal arises from the order of the District Court, Thiruvananthapuram dated 22.6.2010 in O.P(Arb.) No.238/2006 by which the award of the arbitral tribunal was set aside.

2. Facts of the case

The appellant is a contractor who came out successful in competitive bidding for execution of the works (1) Kerala State Transport Project-RMC-01-periodic renewal of Thaikkad-Kottarakkara Road, (2) KSTP-RMC-03-periodic renewal of Thodupuzha-Kalur-Ounukal Road, (3) KSTP-RMC-08-periodic renewal of Kozhikkode-Mavoor Road and (4) KSTP-RMC-12 periodic renewal of Quilandy-Thamarassery Road.

3. In respect of Road Maintenance Contract-01 (RMC-01), notice of procedure was issued on 28.5.2002 and the original date of completion was on 27.5.2003. An amount of Rs.8,01,89,947/- was fixed and the same was revised to Rs.6,25,66,956.79. The 1st extension period was approved with liquidated damages upto 31.7.2003 and the 2nd extension of time was approved with liquidated damages upto 31.10.2003.

4. In respect of RMC-03, notice issued to proceed was given on 28.5.2002 and it was completed on 27.5.2003. The original



contract amount was Rs.3,93,96,479/- and the revised contract rate was Rs.3,87,90,927.81 and the extension period was approved upto 31.7.2003 with liquidated damages and the 2nd extension period was approved with damages upto 31.10.2003.

5. In respect of RMC-08, the date of issue of notice was on 17.04.2002 and the date of completion was fixed on 16.04.2003. The original contract amount was for Rs.5,12,54,980/-, which was not revised. The first period was extended upto 30.6.2003 with liquidated damages and the 2nd extension was approved with liquidated damages upto 31.10.2003.

6. In respect of RMC-12, the date of issue of notice to proceed was on 17.4.2002 and the original date of completion was 16.4.2002. The contract amount was Rs.8,49,64,622/-. The 1st extension was approved up to 30.6.2003 with liquidated damages. The 2nd extension was approved with liquidated damages upto 31.12.2003.

7. There arose several disputes between the contractor and the State during implementation of the Contracts as referred to above. As per the terms and conditions of the contract, any dispute between the parties regarding the rate at which the contractor was entitled to be paid was required to be referred to the engineer. Once the engineer takes a decision on the matters referred to him, and if the parties are aggrieved with the same, the decision of the engineer has to be



referred to the adjudicator within a period of 14 (fourteen) days of the notification of the engineer's decision. The adjudicator, in turn, is required to give the decision in writing within 28 (twenty-eight) days from the date of receipt of the notification. It is further provided that if the decision of the adjudicator is not acceptable, then the party, who wishes to question the decision of the adjudicator, has to refer the same to the Arbitrator within a period of 28 (twenty-eight) days from the date of the decision, and if not, the decision of the adjudicator shall be final and binding.

8. The appellant sought reference to the adjudicator on four disputes, namely, (1) value of the work to be considered for calculating the adjustment of prices for bitumen and POL, (2) decisions for releasing the escalation during the extended periods, (3) price of bitumen to be considered for calculation of price adjustment of bitumen; and (4) release of interest payable at 12% per annum for the delay in releasing the eligible payments beyond 42 days from the date of submission of the monthly statement of the value of the work done. The adjudicator after hearing the parties, answered point Nos. (1) and (3) in favour of the appellant and (2) and (4) against him. None of the parties sought reference of the disputes to the arbitrator by invoking the arbitration clause under the agreement within the stipulated 28 days as provided under the contract. However, the State, after a



period of 28 days, sought reference of dispute No. (1) to the arbitrator, which was objected to by the appellant on the ground that beyond the period of 28 days the dispute cannot be referred to the arbitrator. However, the State decided to condone the period and persuaded the appellant to go for arbitration in respect of dispute No.(1). Both parties selected their choice of arbitrators. Before the arbitrator, the appellant sought reference of all the disputes and also certain disputes beyond the disputes which were referred to the adjudicator. The State, on the other hand, raised objection to the above course suggested by the appellant. The arbitral tribunal went into the core of the disputes between the parties and answered all the four disputes in favour of the contractor-appellant and overturned the decision of the adjudicator. Aggrieved by the award, the State invoked the jurisdiction of the District Court under Section 34 of Arbitration and Reconciliation Act, 1996 and the District Judge by the order impugned set aside the award passed by the Arbitral Tribunal and restored the award of the adjudicator and thus the appellant-contractor is before us in appeal.

9. Heard Sri.George Thomas, the learned counsel appearing for the appellant and Sri.K.V.Manojkumar, learned Senior Government Pleader appearing for the State.



10. **Submissions on behalf of the appellant**

- (i) The learned counsel for the appellant pointed out that by letter dated 1.10.2004, the State wanted to refer dispute No.(1) to the Arbitrator as the decision of the adjudicator was not acceptable. The appellant, in turn, by letter dated 28/29.11.2004 stated that the dispute cannot be adjudicated as the option was not exercised by the respondent within 28 days. However, notwithstanding this, the appellant wanted to raise all three disputes, since the State wanted to declare the decision of the adjudicator as null and void and thus entitling the appellant to raise all disputes arising out of the contract and therefore, the arbitral tribunal was constituted. Before the arbitral tribunal, the appellant filed an application under Section 16 of the Arbitration and Reconciliation Act, 1996 contending that dispute No.(1) was belated and in the event the respondent wanted to refer dispute No.(1) for arbitration, the entire disputes ought to be considered. The State did not oppose the said application and both parties requested the arbitral tribunal to decide on its jurisdiction and thus the said application was not pressed.
- (ii) The arbitral tribunal passed an award on 29.6.2006 deciding the disputes referred to it from the recommendations of the



adjudicator and the learned District Judge could not have set aside the award passed by the arbitral tribunal since the parties went with open eyes before the arbitral tribunal for adjudication of disputes.

(iii)The clause under the contract which restricts the claim of the appellant to be referred to the arbitrator or the tribunal if the same is not referred to within a period of 28 days, is hit by Explanation-2 to Section 28(b) of the Indian Contract Act, 1872. Any contract, which stipulates a lesser period of limitation other than what is provided under the provisions of the Limitation Act, 1963 must be construed as restraint imposed on initiation of legal proceedings and, therefore, will be hit by Section 28(b).

(iv)In terms of clause 25.2 of the contract, any dispute or reference arising between the employer and the domestic contractor relating to any matter arising or connected with the agreement can be referred to the arbitrator. Therefore, once the State has chosen to go before the arbitrator, any dispute arising between the parties can be subjected to arbitration.



11. **Submissions of the State**

The learned Senior Government Pleader, Sri.K.V.Manojkumar, on the other hand, pointed out that even going by the statement of defence filed before the arbitral tribunal, the State had specifically opposed the attempt of the contractor to raise all disputes for reference, including dispute nos.(2) to (4), which were not subject matter of reference. Even though, the request for arbitration was beyond 28 days, the parties decided to condone the period subjected themselves to the jurisdiction of the arbitral tribunal. If that be so, the arbitral tribunal could have entered into a finding in respect of dispute no.(1) alone and not otherwise.

12. We have considered the rival submissions raised across the bar.

13. **Evaluation of the arguments and findings thereon**

The essential dispute which falls for our consideration is two-fold; (a) whether the restraint on the legal proceedings as stipulated by clause 25.2 of the contract is void in the light of Explanation-2 to Section 28(b) of the Contract Act, 1872,

(b) Once the parties decided to go for arbitration, whether it is possible for the arbitral tribunal to pronounce upon its decision on a point which has not been referred for adjudication before it.



14. We will first examine the intricacies of law involved in the matter of interpretation of the clause in the contract which puts a restraint for initiation of legal proceedings. Clause 25.2 of the contract is extracted for reference.

“25.2 The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator’s written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator’s decision will be final and binding.”

A plain reading of the aforementioned clause in the contract shows that if either party does not refer the dispute to the arbitrator within a period of 28 days from the date of receipt of the award of the adjudicator, then, it becomes final. Certainly, it appears that the aforesaid clause putting restraint on initiation of legal proceedings within the period of 28 days, offends the general law of limitation under Article 137 of the Limitation Act, 1963.

15. The law governing the restraint on initiation of legal proceedings is embodied under Section 28 of the Indian Contract Act, 1872, which reads as under :



“28. Agreements in restraint of legal proceedings, void.—Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.

Exception 1.—Saving of contract to refer to arbitration dispute that may arise.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.—Saving of contract to refer questions that have already arisen.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Exception 3.—Saving of a guarantee agreement of a bank or a financial institution.—This section shall



not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.”

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16. Plain reading of clause (b) of Section 28, reveals that any agreement which extinguishes a right of a party in respect of a contract on expiry of a specified period so as to restrict the other party from enforcing the right, is void to that extent. Therefore ex facie Clause 25.2 of the Contract offends the provisions of Section 28(b) of the Contract Act, 1872.

17. In **Grasim Industries Ltd. v. State of Kerala** [(2018) 14 SCC 265], the Hon'ble Supreme Court was called upon to consider a clause in the agreement between Grasim Industries v. State of Keala, which provided a period of 30 days for raising the dispute before the arbitral tribunal. The Apex Court held that a clause in an agreement, which offends Article 137 of the Limitation Act, 1963 by curtailing the period of limitation to institute legal proceedings, offends Section 28(b) of the



Contract Act. Therefore, we have no hesitation in our mind to hold that clause 25.2 provided in the agreement is void and cannot operate as a restraint for initiation of the dispute between the parties.

18. However, the issue does not end here. Even if we are to hold that clause 25.2 creates a restraint on initiation of judicial proceedings, that by itself will not enable the appellant to succeed in the present appeal. Going by the provisions of Arbitration and Reconciliation Act, 1996 before initiation of proceedings of Arbitration, it is mandatory to issue notice under Section 21. Section 21 reads as under:

“21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

From the facts as disclosed above, it is clear that the appellant never sought for reference of the disputes under the provisions of the Arbitration and Reconciliation Act, 1996 by issuing any notice as provided under Section 21 of the Act. On the contrary, it was the State which sought reference before the Arbitrator for adjudication of dispute no (1).

19. To tide over the embargo under Section 21 of the Arbitration and Reconciliation Act, 1996, the learned counsel for the



appellant submitted that the respondent-State had agreed to arbitrate the entire disputes before the arbitral tribunal. We are afraid that the said argument is not borne out by any documents on record. Though the tribunal in its award specifically stated that the respondent-State agreed to arbitrate the entire disputes, in the light of the specific objections raised by the State, we are not persuaded to hold that there was a meeting of minds by both parties before the arbitral tribunal to open the entire disputes for arbitration.

20. It is pertinent to mention that as per the prescribed procedure for arbitration, once a party to the contract expresses his intention to commence the proceedings by issuing a notice, and an arbitral tribunal is appointed, the procedure under Section 23 of the Arbitration and Reconciliation Act, 1996 comes into operation. Section 23(1) provides that within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent is required to state in defence in respect of these particulars, unless the parties have otherwise agreed as to the required things to be done before the tribunal.

21. On a careful reading of Section 23, we are of the considered view that the tribunal is required to formulate the points of reference and the disputes to be decided. If, as a matter of fact, one of the



parties does not agree for the entire claim to be adjudicated before the tribunal, then the tribunal has to rule on its own jurisdiction as provided under Section 16 of the Arbitration and Reconciliation Act, 1996. It is in this context that the finding of the tribunal assumes significance. The reading of the award passed by the tribunal shows that the only finding rendered by the tribunal on this point is as follows:

“5.(d) : From a perusal of the records including the agreements, it is found that the disputes were first raised by the claimant before the Engineer and thereafter before the Adjudicator. Altogether the following four disputes – para 6 (a,b,c,d) were raised by the claimant before the Adjudicator. This much has been admitted by the Respondent vide para 7.2 of their submission dated 10.3.2005 (marked as R1).”

This finding, in our considered view, cannot be sustained in the teeth of the objection raised by the State in their objection.

22. The learned counsel for the appellant, however, tried to get over the above impediment by raising an innovative argument that once a party to the contract refers a dispute for arbitration, then, it expressly shows the intention of that party to arbitrate on the dispute and, therefore, the other party to the contract can raise all such disputes before the arbitrator. We are afraid, the said argument is misplaced.



23. In **MSK Projects India (JV) Ltd. v. State of Rajasthan & Another [(2011) 10 SCC 573]**, the Hon'ble Apex Court was called upon to decide the question as to whether the arbitral tribunal can enter into findings beyond the scope of reference. While answering the question posed before it, the Apex Court held that when an issue regarding jurisdiction of the arbitral tribunal is raised before it, then the arbitral tribunal must decide the issue and enter a finding in this regard. It was unequivocally held by the Apex Court that the tribunal cannot enlarge materially the scope of reference itself. Paragraph No.15 of the judgment is extracted for reference hereunder:

“15. The issue regarding the jurisdiction of the Arbitral Tribunal to decide an issue not referred to is no more res integra. It is a settled legal proposition that special tribunals like Arbitral Tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference made to them. Thus, it is not permissible for such tribunals/authorities to travel beyond the terms of reference. Powers cannot be exercised by the Tribunal so as to enlarge materially the scope of reference itself. If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award. (Vide Grid Corpn. of Orissa Ltd. v. Balasore



Technical School [(2000) 9 SCC 552] and DDA v. R.S. Sharma and Co.[(2008) 13 SCC 80)]”

24. Equally so, we are not impressed by the argument of the learned counsel for the appellant that when one party to the contract refers a particular dispute to arbitration, the entire disputes between the parties open up for arbitration. We must state that the argument is flawed for more reasons than one. Going by the scheme of the Arbitration Act, the power to refer the parties to the arbitration can be found under Section 8 of the Arbitration and Conciliation Act, 1996. Section 8 provides that when an action is brought before the judicial authority in respect of a subject on which an arbitration agreement is in existence, then, the party or a person claiming through or under him applies by submitting a statement that the substance of a dispute is required to be adjudicated by arbitration, then, the court shall refer the parties to the arbitration. It is now settled law that the reference to the arbitration can be done either by the parties themselves or by the court. The appointment of the arbitrator by a court comes in when the parties fail to concur in the appointment of the arbitrator as required under the arbitration agreement. Reference to the arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specifically enumerated disputes. If, in a given case, the parties choose to refer to a singular



point for arbitration, then the arbitral tribunal cannot proceed to decide on all disputes. On the contrary, if the parties agree to arbitrate on the entire disputes, then the arbitral tribunal shall have the jurisdiction to decide the entire disputes and not a specific dispute. Thus, Section 8 of the Act speaks of referring the parties to arbitration, while Section 11 contemplates the appointment of arbitrators or taking necessary measures as per the appointment procedure as per the arbitration agreement. It must be remembered that Section 8 of the Act does not provide for appointment of arbitrator or referring any dispute to the arbitration, but requires the judicial authority before whom an action is brought to refer the parties to arbitration. The entire gamut of the proceedings to be initiated under the provisions of the Arbitration and Conciliation Act differs from case to case. If one of the parties decides to go for arbitration without the intervention of the court, then he is required to issue a notice under Section 21 of the Arbitration and Conciliation Act, expressing his intention to go for arbitration on any of the dispute or the entire disputes. Once the parties concur on the number of arbitrators to arbitrate upon the disputes, then the procedure under Section 23 of the Act triggers. It is true that Section 23 enables one of the parties to the dispute to raise his claim in its entirety. However read as may be, we could not find any enabling provision under the Act which enables the opposite party



to seek arbitration of entire disputes once the other party expresses his intention to arbitrate only on a specific dispute.

25. We must bear in our mind that the arbitral tribunal was appointed at the request of the State to adjudicate on dispute no. (1) alone. The appellant never intended to raise any dispute regarding point Nos. (2) to (4) by issuing a separate notice under Section 21 of the Act. The assumption that where one-party files an application and gets an arbitrator appointed, the other party can raise all such disputes under the contract before the arbitrator is baseless, especially when the law governing the arbitration specifically provides that the arbitrator can decide only such dispute referred before him and not otherwise. To hold otherwise will certainly do violence to the statute. Hence, we find that the arbitral tribunal had clearly exceeded the jurisdiction in deciding the entire disputes. Perhaps the appellant was under a mistaken impression with regard to its right to have the entire disputes opened for arbitration. We must also note that the State was never put on notice regarding the intention of the appellant to go for arbitration. Even assuming that the contention of the appellant that the State had unequivocally agreed to arbitrate on the entire disputes, the tribunal ought to have framed an issue or given its finding on the jurisdiction as envisaged under Section 16. In the absence of any finding in this regard by the tribunal, we are afraid that



the award in question clearly crossed the contours of the law and thus rendering itself to be inexecutable and falling within the mischief of Section 34 of the Arbitration and Reconciliation Act, 1996.

26. We may however state that though the learned District Judge had set aside the award on the ground that the reference of the parties to the arbitration itself was void under clause 25.2 of the contract, we do not agree with the learned District Judge on that finding, especially since we have found that clause 25.2 of the contract offends Section 28(b) of the Indian Contract Act, 1872. However, we are inclined to uphold the findings of the District Judge on the other grounds as stated above.

27. We are persuaded to hold so because, the scope of power of the High Court under Section 37 of the Arbitration and Conciliation Act, 1996 while considering an appeal against an order under Section 34 is limited. In **Punjab State Civil Supplies Corporation Ltd. and Another v. Sanman Rice Mill and Ors.** [2024 SCC OnLine SC 2632], the Apex Court held that the scope of interference in an appeal under Section 37 is restricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act. Paragraph No.16 of the judgment is extracted as under:

“16. It is seen that the scope of interference in an appeal under Section 37 of the Act is restricted and subject to the same grounds on which an award can be



challenged under Section 34 of the Act. In other words, the powers under Section 37 vested in the court of appeal are not beyond the scope of interference provided under Section 34 of the Act.”

Since we have already found that the tribunal exceeded its jurisdiction while rendering the award, the same becomes void and inexecutable. Therefore, the order of the learned District Judge is liable to be sustained on other grounds.

As an upshot of these discussions, we are of the considered view that the appeal lacks merits and accordingly, the same is dismissed. No order as to costs.

Sd/-

**DR.A.K.JAYASANKARAN NAMBIAR,
JUDGE**

Sd/-

**EASWARAN S.,
JUDGE**