

# **SUPREME COURT OF INDIA**

Kaikara Construction Company

Vs.

State of Kerala

(Sudhansu Jyoti Mukhopadhaya and Dipak Misra JJ.)

01.07.2014

## **JUDGMENT**

### **SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. Leave granted.
2. These appeals are directed against order dated 19.07.2010 passed by the High Court of Kerala at Ernakulam in Arbitration Request No.39 of 2009. By the impugned order, the appellants prayer under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator has been rejected by the High Court.
3. The factual matrix of the case is as follows: On 27.1.2005, the appellant submitted tender, which was accepted by the respondents on 21.7.2005. The possession of the work site was handed over to the appellant on 2.9.2005. The period for completion of the contract expired on 1.9.2007. The case of the appellant is that the Company had completed a major part of the work. This was disputed by the respondents. According to them, only 41% of the work was completed as on 22.12.2007, based on the original contract price. Based on the revised contract price, the progress achieved was only 30% as on 22.12.2007; the work carried out from 22.12.2007 to 1.3.2009 was only 12% as against 70% target.

According to the appellant, a sum of Rs.1,18,87,265/- was payable to it but the said amount was withheld by the respondents. As a condition for releasing the amount, the appellant was compelled to execute a supplemental agreement. The

appellant sought extension of the period for completion of the work which was granted up to 1.3.2009. On 7.3.2009, the appellant requested for appointment of a ~Dispute Review Expert as stipulated in the General Conditions of Contract. On 9.5.2009, the appellant again made a request for appointment of ~Dispute Review Expert and also for extension of the "intended completion period". Another letter dated 10.6.2009 was written by the appellant to the Chairman of the Council of Indian Roads Congress with similar prayer to appoint a ~Dispute Review Expert as stipulated in Clause 36.1 of ITB forming part of the agreement without any delay, with due intimation to the appellant in writing. On 7.08.2009, the Indian Roads Congress addressed a letter to the Chief Engineer, PWD National Highways, Thiruvananthapuram to inform about the appointment of Dispute Review Expert. On 6.10.2009, the Indian Roads Congress wrote another letter to the Chief Engineer, Ministry of Road Transport & Highways, New Delhi requesting him to inform about the appointment of Dispute Review Expert. However, no reply was given to the appellant.

4. In this background, the appellant moved before the High Court under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. The learned Single Judge of the High Court by impugned order dated 19.07.2010 dismissed the request holding that no arbitration agreement exists.

5. Review Petition filed by the appellant was also rejected by order dated 2.02.2011.

6. The appellant relied upon Clauses 24 and 25 of the Standard Bidding Document which forms part of the contract and read as follows:

"24. Disputes

24.1 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 Dispute Review Expert within 14 days of the notification of the Engineer's decision.

25. Procedure for Disputes.

25.1. The Dispute Review Expert (Board) shall give a decision in writing within

28 days of receipt of notification of a dispute.

25.2 The Dispute Review Expert (Board) 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 Dispute Review Expert. Either party may give notice to the other to refer a decision of the Dispute Review Expert to an Arbitrator within 28 days of the Dispute Review Expert's written decision. If neither party refers the dispute to arbitration within the next 28 days, the Dispute Review Expert's decision will be final and binding.

25.3 The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract."

7. Detailed procedure has been stipulated in Sub clause (a) to (f) of Clause 25.3 of the Standard Bidding document.

8. It appears that appellant by letter dated 11.8.2009 requested the Superintending Engineer, National Highway, Central Circle, Kochi, to agree to the appointment of a sole arbitrator mentioned in the letter. But no reply was given.

9. The respondents in their counter affidavit opposed the prayer and contended that if arbitration is the mode of settlement of disputes, the names of Dispute Review Experts are to be specifically mentioned in the contract data, which was not done in the present case. In the contract entered into between the parties on 25.08.2005, there was a specific clause which reads as follows:

"The parties to this contract agree and undertake the condition that arbitration shall not be a means of settlement of dispute or claims or anything on account of this contract."

10. It was contended on behalf of the respondents that in absence of nomination of Dispute Review Expert, there is no valid arbitration agreement.

11. Learned counsel for the appellant relied upon decision of this Court in M.K. Abraham and Company v. State of Kerala and another, (2009) 7 SCC 636. In the said

case, the Court noticed that a letter dated 28.9.1994 was issued by the Ministry of Surface Transport, Government of India informing all the State Public Works Departments and all Chief Engineers in all the States dealing with National Highways, that a standard contract clause prescribing the procedure to be followed for appointment of arbitrators was to be incorporated in the bidding conditions for the National Highway works and that the arbitration clause should be compulsorily made part of the bidding conditions in the respective states. In said case, this Court noticed the aforesaid letter dated 28.08.1994 and Clauses 24 and 24(a) of the notice inviting tenders for works as printed in the standard form of agreement executed between the parties and observed as follows:

24. In the present case, as noticed above, the contract consists of a typewritten contract agreement between the appellant and the second respondent [which does not contain any terms and conditions, but which merely states that the contract is for execution of the described work as per the accompanying articles of agreement, plan, specification and conditions of contract approved by the Project Director (SE), National Highway (ADB), Circle Adappally, Cochin] with several printed forms with cyclostyled additions as annexures and handwritten corrections. The printed form of articles of agreement has an attachment slip.

25. The contract in the present case does not contain any handwritten terms in regard to arbitration. The contract has printed clauses barring arbitration [Clauses 24 and 24(a) of the notice inviting tenders for works and a preamble clause and Clause 3 in the articles of agreement]. A cyclostyled slip signed by both parties containing the words arbitration clause as per the Ministry of Surface Transports Letter No. RW/NH- 34041/3/94-DO-III dated 28-9-1994 will be applicable is attached to the printed articles of agreement.

26. By applying the well-settled principles relating to construction of contract the following position will emerge:

(i) the terms of the articles of agreement will prevail over the terms of notice inviting tenders for works, and

(ii) the term contained in the cyclostyled attachment to the printed form of

articles of agreement will prevail over the terms of the printed articles of agreement.

Consequently, the contents of the attachment slip to the printed form of articles of agreement providing for arbitration will prevail over the bar on arbitration contained in the notice inviting tenders for works and the articles of agreement. As a result, it has to be held that there is a provision for arbitration in regard to the disputes between the respective appellant and the respondents.

However, the High Court distinguished the case relied upon by the appellant.

12. In the letter of acceptance dated 21.07.2005, the Superintendent Engineer intimated the appellant the acceptance of the offer given by the appellant at paragraph 9 therein, it was specifically mentioned that all terms and conditions of notice inviting tenders and tender documents shall be binding on the said contract and the contractor. In the bidding document supplied to the appellant by respondent no.3 arbitration clauses were incorporated at clause 25 and 25.3 as noticed above. At Clause 36 the provisions of Dispute Review Expert was mentioned as follows: 36. Dispute Review Expert

36.1 The Employer proposes that [name of proposed Dispute Review Expert as indicated in Appendix] be appointed as Dispute Review Expert under the Contract, at a daily fee as indicated in Appendix plus reimbursable expenses. If the Bidder disagrees with this proposal, the Bidder should so state in the Bid. If in the Letter of Acceptance, the Employer has not agreed on the appointment of the Dispute Review Expert, the Dispute Review Expert shall be appointed by the Council of Indian Roads Congress at the request of either party.

13. In the agreement clause (3) it was mentioned that the parties to the contract agreed and undertake the conditions that arbitration shall not be means of settlement of disputes or claims or anything on account of the said contract.

14. The case was heard and judgment was reserved. Subsequently, parties have filed joint application showing the name of the arbitrator mutually agreed to by the parties as under:

Hon. Justice Mr. K. John Mathew

Former Judge of the Hon. High Court of Kerala,

Veekshanam Road, Kochi, 682018

Kerala State

Sd/-

Advocate for the Petitioner

Babu Thomas K

For Rabin Maujumdar

Sd/-

Adv. M T George

Advocate for the respondents

15. In view of stand taken by the parties and as they mutually agreed for arbitration by retired Honble Judge of the Kerala High Court, without going into the question of merit, we set aside the impugned order dated 19th July, 2010 and refer the matter to Honble Mr. Justice K. John Mathew (retired). The parties will negotiate and settle the terms and conditions of arbitration. It is expected that the arbitration proceeding will be concluded at an early date.

16. The appeals stand disposed of with aforesaid observations. No costs.