
(2009) 05 KL CK 0130
In the High Court Of Kerala
Case No : AR No. 25 of 2007

R. George Pereira

APPELLANT

Vs

St. Joseph's International Academy

RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 11(8), 12, 13, 21

Citation : (2009) 05 KL CK 0130

Hon'ble Judges : Pius C. Kuriakose, J

Bench : Single Bench

Advocate : K.L. Varghese, for the Appellant; Johny Thottam, for the Respondent

Final Decision : Allowed

Judgement

Pius C. Kuriakose, J.—This is an application u/s 11(6) of the Arbitration and Conciliation Act, 1996 and the Scheme for Appointment of an Arbitrator by the Chief Justice of the Kerala High Court. The application seeks appointment of an independent and impartial arbitrator for adjudicating upon the various claims of the applicant against the respondent. The applicant was contractor of the respondent for the construction of a school building at Kumbalam in Kollam under the name and style "St. Joseph International Academy". It is alleged that disputes and differences arose between the parties on account of what is described as the recalcitrant attitude of the respondent to allow the applicant to complete the work which had neared completion. It is claimed that the applicant has carried out works worth Rs. 68,57,616/- in seven part bills whereas the respondent has paid only Rs. 45,68,712/-. The balance amount due under the part bill is Rs. 22,88,904/-. Since the balance amount remained unpaid, the windows which had been supplied by the applicant to the respondent had to be taken back and deducting the value of those windows, the balance amount due to the applicant is Rs. 22,12,087/-. According to the applicant, in order to avoid payment of the above amount the respondent sought to terminate the contract. The disputes and differences which were thus arisen are to be settled by resorting

to arbitration proceedings. Annexure A8 is copy of the agreement between the applicant and the respondent for construction of St. Joseph International Academy and Clause 17 thereof is quoted as follows:

(17) If there is any dispute relating to any matter regarding the construction of the building or any matter related to this contract, the Manager, St. Joseph's International Academy, Kollam will be the sole Arbitrator for this purpose and his decision shall be final, and the second party will have no right to challenge this decision in the court of law.

It is submitted that as per Clause 17, the Manager of the respondent is to be the sole arbitrator. But since disputes have arisen on account of the actions and inactions of the Manager, he is not entitled to function as arbitrator since the same will be against the fundamental principle of natural justice, *nemo debet esse iudex in propria causa* (no one shall be a judge in his own cause). It was under such circumstances that the applicant sent Annexure A4 letter indicating a panel of three names for selection of one among them as arbitrator by the respondent. To Annexure A4, the respondent's Advocate sent Annexure A5 reply without selecting any of the nominee arbitrators but suggesting for appointment of two Civil Engineers, one to be appointed by each party who could jointly verify the records and files and assess the quantity and quality of the work done in order to avoid a litigation and to come to a fair settlement. The applicant obliged and appointed his nominee under Annexure A6. The respondent also appointed its Engineer. By Annexure A7, the applicant requested both the Engineers to take up the assignment and pave way for a settlement. Though the applicant called for nominee Engineer of the respondent and furnished all measurement books and connected records and made necessary follow up, nothing materialized. In the meanwhile, the applicant's nominee Engineer met with an accident and passed away. Hence no useful purpose will be served by waiting further and that is the circumstances under which the applicant has filed this application u/s 11(6) of the Arbitration and Conciliation Act, 1996 invoking the statutory appointment procedure of arbitrators.

2. On the basis that no counter affidavit was filed the A.R. was allowed by order dated 11-10-2007. Later R.P. No. 233 of 2008 was filed and the above order was recalled.

3. The contentions of the respondent as discernible from the RP. 233/08 filed by him and also the reply affidavit filed by him in the said RP are as follows:

The arbitrator who has been appointed by this Court under the order dated 11-10-07 (Sri. E.K. Muraleedharan, Retired District and Sessions Judge) is incapable of acting as arbitrator between the parties in the light of the legal bar under the provisions of the Arbitration and Conciliation Act, 1996. It is submitted that contrary to what has been projected in the A.R. the Manager envisaged under Clause 17 of the arbitration clause who is to act as the sole arbitrator in the event of disputes and the signatory to the agreement are one and the same

person. In order to convince this Court that the Manager of St. Joseph 's International Academy and the executant to the agreement are one and the same, the applicant has produced Annexure A8, but Annexure A8 does not contain the last page of the agreement. The last page of the agreement will disclose that the Manager was not the executant of the agreement. On the contrary the executant of the agreement was the General Manager. Annexure B1 full text of the agreement is produced. It is pointed out that it will be seen from Annexure B1 last page that there was a typing mistake where the 1st party was indicated and instead of General Manager the word Manager was mistakenly used. Since the party noticed the mistake at the time of execution of the agreement, the first party to the agreement, the General Manager, St. Joseph's International Academy did not sign and instead he signed as the General Manager only where the first party was indicated. This was deliberately and intentionally done in order to avoid confusion as the Manager, St. Joseph's International Academy was appointed as the arbitrator under Clause 17 of the agreement. It is submitted that there is absolute consensus with regard to the arbitrator by both parties to the agreement. It is then contended that the General Manager and the Manager of St. Joseph's International Academy are two different persons. Annexure B2 certificate issued by Mr. Joseph J. who was the Manager of St. Joseph Academy during the period from 1st June 2002 to May 31, 2007 is produced. The present Manager of St. Joseph Academy is one S. Sundaresan and Annexure B3 certificate issued by him is produced.

4. Annexure - B4 dated 22-11-2004 was caused to the applicant by the respondent claiming Rs. 39,43,330/- from the applicant on various counts and requested that if the claim was disputed the matter be referred to the Manager, St, Joseph's International Academy who alone is the arbitrator. Again Annexure B5 dated 30-8-2005 was issued on behalf of the respondent by way of reply to a lawyer notice dated 16-10-2005 sent at the instance of the applicant. Once again by Annexure B6 lawyer notice dated 1st December 2005 the respondent's lawyer informed the applicant's lawyer in reply to applicant's notice dated 19-11- 2005 that the Manager of the St. Joseph's International Academy is to be appointed as arbitrator and that it was not the Manager of the St. Joseph's International Academy who had signed the agreement. In the reply affidavit filed by the respondent to the counter filed by the applicant to RP.233/08, it is submitted that the respondent has never acted in a capacity as the Manager of St. Joseph's International Academy at any stage. The respondent has been styled as General Manager or as Managing Director or Director. This is on account of the fact that at the time of construction of the school, the organization was at a very nascent stage and therefore the respondent was styled as General Manager and later as Managing Director/Director. Similarly the then Manager Joseph John was styled as Manager and subsequently he continued as Manager who was also styled as Administrator. He continued to be the Manager as well as Administrator. It is submitted that the respondent in the RP (applicant) is trying to take advantage of a typing mistake made in the agreement wherein the word Manager was used

in the last page instead of General Manager. However, it is submitted that there is no scope for such confusion as in the last page, it is the General Manager who had signed at the portion where the first party is indicated. In the agreement the first party is described as General Manager. Hence there is no scope for confusion. Referring to the correspondence produced by the respondent it is submitted that the Manager Mr. Joseph John had signed on behalf of the General Manager and not in his capacity as the Manager of the school. It is pointed out that Ext.A9 is not addressed to the General Manager or to the institution. A10 is not addressed to the General Manager but to Joseph John, the Manager. It is reported that Joseph John has functioned only as Manager and that the respondent has never styled or functioned as Manager. It is further pointed out that the present Manager is not Joseph John but is Mr. S. Sundareswaran and therefore there is no question of any prejudice being caused to the respondent.

5. I have heard the submissions of Sri. K.L. Varghese, learned Counsel for the applicant and those Sri. Madhu Radhakrishnan, learned Counsel for the respondent. Mr. K.L. Varghese submitted that the non-production of the last page of Annexure A8 is not fatal. The Arbitration Scheme and the Kerala Arbitration Rules require production of the arbitration agreement only along with the arbitration request and not the whole contract agreement. Reference was made to Section 7(2) of the Arbitration and Conciliation Act in this context. According to the counsel, this was why the applicant produced only Clause 17 of Annexure-A, which is the arbitration clause. Counsel submitted that a reading of Annexures A4 and A5 will show that this is not the first time that issue has cropped up. It is submitted that on behalf of the applicant it has been made clear that it was Sri.George Fernandez who signed the agreement in the capacity of the Manager, first party and disputes have arisen on account of actions and inactions on the part of Sri. George Fernandez, the signatory which were denied. Respondent maintained that the agreement was signed by the Managing Director and that the arbitrator was Manager. In Annexure A5 signatory is referred to as Managing Director and not as General Manager which is very significant. According to Mr. Varghese, last page of Annexure A8 would only strengthen the applicant's case. He pointed out that the last page shows that the first party is styled as Manager. The expression first party is repeated twice. It shows that the statement that the respondent deliberately and intentionally did not sign the first line but only the second line is incorrect. If the signatory found that the first party is not Manager he should have definitely scored it off. If the Manager had signed as witness he should have scored off the word Manager as first party when he signed as witness, instead against the expression witness he should have styled himself as Manager. Annexures 1 and 2 produced along with the counter to the RP will show that there was a manager for the school and never a General Manager. A reading of Annexures 2 and 3 together shows that Sri. Joseph Fernandez himself was the Manager though while issuing Annexure 3 he is styled as Director. Mr. Varghese emphasized the words "I am happy to award" in Annexure 3. Mr. Varghese submitted that the witness Joseph. J. Was only the Administrator and his full

name Joseph John is indicated in Annexures A5 and A6. Mr. Varghese highlighted that in the reply affidavit it is admitted that Joseph. J. alias Joseph John turned to be the administrator. The letter pad in Annexures 3 and 5 to 11 shows that he was only "administrator" and not "Manager". If so, his successor, the signatory to Annexure B4 also can be only an administrator and not the Manager. If u/s 21, the commencement of arbitration proceedings is on the date of request to refer the disputes to arbitration then it should be deemed to be commenced after 22-11- 2004, the date of Ext.B4. B2 will show that Joseph J. / Joseph John was working for the petitioner at that time as administrator which means that there was no Manager to function as arbitrator. This according to Mr. Varghese is precisely the reason why in Annexures B4 and B5 though repeatedly the respondent said that the matter / all relevant papers would be placed before the arbitrator and the matter will be decided by him. He did not do so because there was no manager at that time. According to Mr. Varghese it is unbelievable that certificates like B2 and B3 could be issued by men of average intelligence and common sense. He submitted that those documents are fabricated and cooked up. He pointed out that the title "to whom it may concern" (sic) is conspicuous. He submitted that the same mistake is repeated in B2 and B3, though created and signed on different dates. He pointed out that the first para of both these annexures is identical. Para 2 of Annexure B2 and Paras 2 and 3 of B3 are identical. Para 4 of B2 and para 3 of B3 are identical. He asserted that B2 and B3 are dictated by one and the same person. Though B2 is dated 8-2-08 and B3 is 11-2-08 they are apparently made on the same date. The reason why the signatories on B2 and B3 had to issue such certificates is obscure, according to Mr. Varghese . Obviously the reason is only to help the respondent. By issuing such certificates both the signatories to B2 and B3 prove their allegiance to the respondent, making themselves disqualified to be independent and impartial arbitrator which is required u/s 11(8)(b) of the Act even assuming that any one of them can be considered as arbitrator. Mr. Varghese would fortify his submissions on the authority of a catena of judicial precedents. He relied on paragraphs 4.030 and 4.031 of Russel on Arbitration 22nd Edition for the commentaries on apparent bias and real possibility test. He argued that actual bias is not necessary to be proved and that the knowledge at the time of appointment does not debar from applying on the ground that the arbitrator to be appointed in terms of the agreement may not be impartial. For this proposition he relied on page 215 of the Law of Practice of Commercial Arbitration by Mustill and Byod. To expatiate his argument regarding the concept of independence and impartiality of arbitrator he relied on commentaries contained in Comparative International Commercial Arbitration by Julian D M Lew QC and others. He relied on the judgments of the Supreme Court in Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, , Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., and in Tata Cellular v. UOI (1994) 6 SCC 651 in support of various propositions canvassed by him.

6. Sri. MadhuRadhakrishnan, learned Counsel for the respondent also did not lag behind in citing authorities. The learned Counsel relied on the judgment of the Calcutta High Court in Pragati Engineering (P) Ltd. and others Vs. Tamil Nadu Water Supply and Drainage Board, to argue that where the parties entered into a contract with their eyes open and knew that the nominated arbitrator is an employee of one of the parties, none of the parties to the agreement should be allowed to allege that such nominated arbitrator being an officer of one of the parties to the contract, would be biased or is likely to be biased. Mr. Madhu Radhakrishnan relied on the judgment of the Supreme Court in International Airport Authority of India v . K.D. Bali AIR 1988 SC 1099 to argue that the apprehension of bias must be judged from a healthy, reasonable and average point of view and the request for removal of the appointed arbitrator is not to be granted lightly. Mr. Madhu Radhakrishnan placed reliance on the judgment of the Supreme Court in Jain Studios Limited through its President Vs. Shin Satellite Public Co. Ltd., also.

7. The provisions contained in Sections 12 and 13 of the Arbitration and Conciliation Act incorporate grounds for challenge and the challenge procedure against and in respect of arbitrators will reveal that partiality and bias or circumstances giving rise to justifiable doubts regarding the impartiality and independence can be valid grounds for challenging the appointment given to a certain persons as arbitrator. At the same time, a party should not be allowed to wriggle easily out of agreements entered into by them with open eyes. In the instant case it is seen that the applicant had agreed to the appointment of a person in the service of the opposite party as an arbitrator in the event of disputes. That being the position I would have been ordinarily reluctant to accept the opposition of the applicant to the appointment of the nominated arbitrator on ground of bias and partiality. After all, it is a quasi judicial function which is being discharged by the arbitrator whose proceedings will be regulated by the provisions of the Arbitration and Conciliation Act. His award will be subjected to judicial scrutiny though on limited grounds and to a limited extent. But in the instant case I am not inclined to dismiss the arbitration request and to appoint the nominated arbitrator as the arbitrator for resolving the disputes which have admittedly arisen between the parties because it is seen from Annexures A4 and A5 that the respondent also became agreeable to the idea of the disputes between the parties being resolved by persons other than the arbitrator nominated under the agreement. Annexures A6 and A7 will show that the parties had nominated an Engineer each and were willing to have the disputes between them resolved by a joint perusal of the relevant records by these two Engineers. To this extent, in my opinion the respondent has waived his right to insist that the arbitrator to be appointed has to be the arbitrator nominated under the agreement. Moreover, in my opinion no prejudice whatsoever will be occasioned to the respondent by appointing a Retired Judicial Officer known for his learning and integrity as the arbitrator for resolving the disputes which admittedly subsist. Therefore without deciding the issue whether appointment of the

nominated arbitrator will be vitiated due to reasons of bias and partiality I allow the arbitration request and appoint Sri. E.K. Muraleedharan, Retired District and Sessions Judge, presently at Ernakulam as arbitrator for settling all the claims and counter claims raised by the applicant and the respondent respondent as detailed in Annexures A1 to A4 as well as in the arbitration request. The arbitrator will enter on arbitration and make and publish his award without undue delay.