

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BASANT BALAJI

WEDNESDAY, THE 26TH DAY OF MARCH 2025 / 5TH CHAITHRA, 1947

OP(C) NO. 316 OF 2024

AOP NO.127 OF 2021 OF ASSISTANT SESSIONS COURT/PRINCIPAL SUB COURT

/ COMMERCIAL COURT, ERNAKULAM

PETITIONER/S:

M. I. MOHAMMED, AGED 66 YEARS
GOVERNMENT CONTRACTOR, MANATH BUILDING, THRIKKAKARA P.O.,
KOCHI, PIN - 682021

BY ADVS. K. BABU THOMAS
MARYKUTTY BABU
DRISYA DILEEP

RESPONDENT/S:

- 1 M/S. HLL LIFE CARE LTD.
A GOVERNMENT OF INDIA ENTERPRISE, B-14A, SECTOR - 62, NOIDA,
UTTAR PRADESH, REPRESENTED BY ITS CHAIRMAN & MANAGING
DIRECTOR, PIN - 201307
- 2 THE DEPUTY VICE PRESIDENT
HLL BHAVAN, HLL LIFE CARE LTD., HLL INFRA TECH SERVICES
LTD., GOLDEN JUBILEE BLOCK, POOJAPPURA P.O.,
THIRUVANNTHAPURAM, PIN - 695012
- 3 THE ENGINEER-IN-CHARGE
HLL BHAVAN, HLL LIFE CARE LTD., HLL INFRA TECH SERVICES
LTD., GOLDEN JUBILEE BLOCK, POOJAPPURA P.O.,
THIRUVANNTHAPURAM., PIN - 695012

BY ADVS. AJU MATHEW
NIKHILESH KRISHNAN(D/1236/2001)
ABU MATHEW(K/742/2000)

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 26.03.2025, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

(Dated this the 26th day of March 2025)

This original petition is filed against Ext P12 order dated 29.11.2023 in A.O.P. No.127/2021, on the files of the Principal Sub Court, Ernakulam. The petitioner herein is the respondent in the Arbitration proceedings.

2. The petitioner and respondents entered into a contract on agreement dated 31/07/2013, for the construction of a Multidisciplinary Research Laboratory and Animal House at Medical College, Thiruvananthapuram, valued at Rs. 23,90,36,760/-. The contract stipulated an 18-month completion period, ending on 02/06/2015. However, the project was not completed until 15/05/2018. The petitioner has initiated arbitration proceedings, claiming that the respondents' delays were the sole cause of the extended project timeline.

3. With the contract's expiry on 02/06/2015, the contractual rates became unenforceable. Subsequently, on 31/12/2015, the petitioner formally notified the respondents, demanding for payment at prevailing market rates for the work extended beyond the contract period, due to the respondents' delays. The respondents, while compelling the petitioner to complete the project, contested the petitioner's entitlement to market rates. The respondents' default on admitted payment obligations necessitated the filing of W.P.(C) No. 36322 of 2018 before this court and by judgment dated 14/12/2018, directed the respondents to settle the admitted sums within three months. Their failure to comply with the order resulted in contempt proceedings, W.P.(C) No. 3199/2024, pending which partial payments were made.

4. Due to the disputes between the parties, the petitioner demanded payment of Rs. 7,11,41,406/- towards unpaid value of works carried out, vide letter dated 12/06/2019. As per clause 25

of the agreement, a Dispute redressal committee of 3 members was constituted by the respondents but, the said demand of the petitioner was denied by decision dated 24/01/2020. Thus, invoking the arbitration clause in the agreement, the petitioner addressed to the first respondent by Ext.P1 letter dated 31/01/2020, demanding a panel of 3 former Judges of this Court enabling the petitioner to nominate any one of them to be appointed as the sole arbitrator for resolution of disputes, to which the first respondent has supplied a panel in reply, comprising 3 former Judges of this Court vide Ext.P2 letter dated 7.3.2020. Thereafter, the petitioner vide Ext.P3 letter dated 10.03.2020, sent a panel of 3 Engineers for his nomination to be appointed as the sole arbitrator to which the first respondent intimated his disagreement to the panel of Engineers, vide Ext.P4 letter dated 11.03.2020 and insisted the selection from one among the proposed retired Judges of this Court.

5. Further, the petitioner, in accordance with the agreed procedure, nominated Hon. Justice Mr. M. Ramachandran, a retired Judge of this Court, as the sole arbitrator. This nomination was communicated by the petitioner's letter dated 13/03/2020 (Ext.P5). As per the pre-existing agreement, the first respondent's role was limited to intimate the petitioner's nomination, as mutually agreed. Consequently, the first respondent issued Ext.P6 letter dated 16/03/2020 to Hon. Justice Mr. M. Ramachandran, confirming his appointment as the sole arbitrator and outlining the petitioner's claim of Rs. 9,20,37,814/.

6. The Sole Arbitral Tribunal concluded the proceedings and issued Ext.P7 award dated 18/08/2021 in favour of the petitioner. The award directed the respondents to pay Rs.7,31,89,098/- within three months and also mandated the release of a retention amount of Rs.1,10,45,050/- upon the petitioner's submission of a representation within one month.

However, the respondents' counterclaims for liquidated damages were rejected.

7. The respondents challenged Ext P7, by filing O.P. (Arbn.) No. 127 of 2021 on 14/12/2021 under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') before the Commercial Court (Principal Sub Judge), Ernakulam, to which the petitioner filed a counter-affidavit on 16/08/2022 (Ext.P8). The respondents filed an amendment application Ext.P9 as I.A. No. 5 of 2023 dated 23/05/2023 in the said O.P. (Arbn.), which was allowed, and they subsequently filed the amended O.P. (Arbn.) No. 127 of 2021 (Ext. P10) on the same date.

8. According to the petitioner, an express written agreement to waive the bar under Section 12(5) of the Act was formed when, after the dispute arose, the petitioner, by Ext. P1 letter dated 31/01/2020, requested a panel of former Judges for selection of the sole arbitrator. The respondents' acceptance and

provision of the panel via Ext.P2 on 07/03/2020, constituted the requisite agreement under the proviso to Section 12(5). Further, the petitioner's nomination of the sole arbitrator from the provided panel reinforces the existence of this very written waiver agreement.

9. In response to the amended O.P. (Arbn.) No. 127 of 2021, the petitioner filed a counter-affidavit dated 18/10/2023 as Ext.P11 wherein the petitioner emphasized the lawful nomination of the sole arbitrator and contended that the respondent was only discharging a post office function as mutually agreed. The petitioner relied on **Voe Stalpine Scheinen GMB H v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665**, to assert that the bar under Section 12(5) of the Act is not triggered in the present case when a panel is provided by the appointing authority and the contractor nominates the arbitrator, even if the appointing authority who is ineligible to act as an arbitrator and

consequently, ineligible to appoint an arbitrator does so.

10. Subsequently, the Sub Court, Ernakulam, by Ext. P12 order dated 29/11/2023 in A.O.P. No. 127 of 2021, declared Ext. P7 award as null and void and the petitioner contended that the respondents are liable for compensation. Hence, aggrieved by Ext P12 order, the present O.P. (C) is filed invoking Article 227 of the Constitution of India.

11. The counsel for the respondent has raised a preliminary objection that the Original Petition filed under Article 227 of the Constitution of India, is not maintainable against Ext.P12 order whereby the award Ext.P7 is set aside under Section 34 of the Act.

12. Heard both sides.

13. The petitioner was awarded Rs.73,189,099/- by Ext P7 award dated 18.08.2021 in Arbitration Case No.2 of 2020. The award stipulated payment within three months, with a 10% annual interest rate applicable thereafter. The respondents challenged

this award under Section 34 of the Act before the Commercial Court, Ernakulam in A.O.P. No. 127 of 2021. The Commercial Court, vide Ext.P12, declared the arbitration award non-Est and set it aside. The petitioner now challenges the Commercial Court's order through this O.P.(C.), asserting the absence of any other effective legal remedy.

14. Counsel for the petitioner Sri. Babu Thomas K. submitted that the respondent has filed the AOP placing reliance on Section 12(5) of the Act, which reads as follows:

"12. Grounds for challenge:

(1). xxx

(2) xxxx

(3) xxxx

(4) xxxx

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this subsection by an express agreement in writing."

15. Under Section 34(2) of the Act, a court's power to set aside an award is strictly limited to the grounds specified therein. The petitioner argues that the Commercial Court's decision, purportedly based on Section 12(5) of the Act, related to arbitrator impartiality, falls outside the permissible grounds for challenge under Section 34. Consequently, the petitioner contends that the order is not appealable under Section 37, which applies only to orders under Section 34. Therefore, the petitioner asserts that their only recourse is to invoke the supervisory jurisdiction of this court under Article 227 of the Constitution of India.

16. The respondents, conversely, maintain that Section 34 is the sole provision empowering a court to set aside an arbitral award. Among other grounds enumerated under Section 34 of the Act, they specifically rely on Section 34(2)(b)(ii).

“34. Application for setting aside arbitral award. -

(1) Recourse to a Cour against an arbitral award may be made only by an application for setting aside such award

in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1. For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(1) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

xxx xxx xxx”

17. The respondents argued that Section 12(5) of the Act, read with the Seventh Schedule, prohibits individuals specified therein from being appointed as arbitrators. Citing **TRF Limited v. Energo Engineering Projects Limited [(2017) 8 SCC 377]**, they asserted that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator and the arbitrator becomes ineligible as per the prescription contained under Section 12(5) of the Act.

18. Consequently, they contended that any award stemming from such a prohibited nomination, violates the fundamental policy of Indian law, justifying its being set aside under Section 34. The Commercial Court, acting on the petitioner's application under Section 34, upheld this argument and set aside the arbitral award based on Section 12(5) ineligibility.

19. Section 37 of the Act deals with appeal, which reads as follows:

“37. Appealable orders.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16: or

(b) granting or refusing to grant an interim

measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

20. The respondents emphasized that Section 34 of the Act, exclusively governs the setting aside of arbitral awards. They argued that when a court sets aside an award following a Section 34 application, the sole avenue for appeal is under Section 37(1)(c), as further clarified by Section 37(3).

21. They rejected the petitioner's assertion that the Commercial Court's decision was based on Section 12(5). While acknowledging that Section 12(5) was the ground for setting aside the award, they maintained that the act of setting aside was unequivocally under Section 34. Therefore, it is concluded that the petitioner's recourse to an Original Petition under Article 227 of the Constitution of India is improper, and that the sole remedy

lies in an appeal under Section 37 of the Act.

22. Reference is invited to **SBP & Co. vs. Patel Engineering (2005 (8) SCC 618)**, wherein it is held that when the remedy to challenge the order of arbitrator is available under the Act, then filing of writ is disapproved. Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 or Section 34 of the Act.

23. Moreover, the object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated, if the High Court could be approached under Article 227 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral

Tribunal, parties have to wait until the award is pronounced unless, a right of appeal is available to them under Section 37 of the Act even at an earlier stage. Thus, it can safely be concluded that the remedy available to the party aggrieved, is to challenge the award in accordance with Sections 34 or 37 of the Act and intervention by the High Courts under Article 227 of the Constitution of India, is not permissible.

24. In **Hameed Kunju vs. Nizam [(2017) 8 SCC 611]**, the Hon'ble Supreme Court held that any petition under Article 227 of Constitution of India should be dismissed in *limine* where there is statutory provision of appeal. In other words, the High Court should decline to entertain the petition under Article 227 on the ground of availability of an alternative remedy of appeal. Reliance for the same has also been placed in **Hindustan Coca Cola Beverage Private Ltd vs. Union of India and others, [(2014) 15 SCC 44]** and in another case titled **Ansal Housing**

and Construction Limited vs. State of Uttar Pradesh and others [(2016) 13 SCC 305], wherein the apex court goes along the very same footing that when the statute provides for statutory appeal, the said remedy is to be availed by the litigating parties and it shall not be bypassed by availing the remedy under Article 227 of the Constitution.

25. This court in **Alexander Luke Vs. M/s Aditya Birla Money Ltd., (2024 KHC 107)**, has held that a plain reading of the provisions of the statute, especially Sections 6 and 10(3) of the Commercial Courts Act, would lead us to the inescapable conclusion that the court for the purpose of consideration of a commercial dispute even if it arises under the Act, would be the commercial court and the appeal would, therefore, lie only to the Commercial Appellate Court, that is, the District Court. If that be so, the remedy available to an aggrieved person is to approach the appellate forum under Section 37 of the Act and not under

Article 227 of the Constitution of India.

In the result, this O.P.(C) stands dismissed as not maintainable.

dl/



Sd/-
BASANT BALAJI
JUDGE

HIGH COURT OF KERALA
CERTIFIED COPY

APPENDIX OF OP(C) 316/2024

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF LETTER OF THE PETITIONER TO THE FIRST RESPONDENT DATED 31-1-2020
- Exhibit P2 TRUE COPY OF LETTER OF THE 1ST RESPONDENT SUPPLYING PANEL OF 3 FORMER JUDGES DATED 7-3-2020
- Exhibit P3 TRUE COPY OF LETTER OF THE PETITIONER CONTAINING NAMES OF 3 ENGINEERS DATED 10-3-2020
- Exhibit P4 TRUE COPY OF LETTER OF THE 1ST RESPONDENT DATED 11-3-2020
- Exhibit P5 TRUE COPY OF LETTER OF THE PETITIONER NOMINATING HON. JUSTICE MR. M. RAMACHANDRAN AS THE SOLE ARBITRAL TRIBUNAL DATED 13-3-2020
- Exhibit P6 TRUE COPY OF LETTER OF THE FIRST RESPONDENT TO HON. JUSTICE MR. M. RAMACHANDRAN DATED 16-3-2020
- Exhibit P7 TRUE COPY OF AWARD PASSED BY THE SOLE ARBITRAL TRIBUNAL DATED 18-8-2021
- Exhibit P8 TRUE COPY OF COUNTER AFFIDAVIT IN O.P. (ARBN) NO.127 OF 2022 DATED 16-8-2022
- Exhibit P9 TRUE COPY OF I.A. NO. 5 OF 2023 IN O.P. (ARBN) NO.127 OF 2021 DATED 23-5-2023
- Exhibit P10 TRUE COPY OF AMENDED O.P. (ARBN) NO.127 OF 2021 DATED 23-5-2023
- Exhibit P11 TRUE COPY OF COUNTER AFFIDAVIT IN THE AMENDED O.P. (ARBN) NO.127 OF 2021 DATED 18-10-2023
- Exhibit P12 TRUE COPY OF ORDER PASSED IN O.P. (ARBN) NO.127 OF 2021 BY THE COMMERCIAL COURT, ERNAKULAM DATED 29-11-2023

RESPONDENT EXHIBITS

- Exhibit R3(a) True copy of the rejoinder affidavit of the respondent to counter affidavit of the petitioner to the amended OP (Arbn) No. 127 of 2021 on the

file of the Commercial Court, Ernakulam



HIGH COURT OF KERALA
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