IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 9TH DAY OF APRIL 2025 / 19TH CHAITHRA, 1947

OP(C) NO. 430 OF 2021

(AGAINST THE COMMON ORDER DATED 03.02.2021 IN I.A.NOS.06 TO 08 OF 2020 IN CS NO.10 OF 2020 OF PRINCIPAL SUB COURT, THIRUVANANTHAPURAM)

PETITIONERS/COUNTER PETITIONERS/PLAINTIFFS:

1. **MINEETHA C.,AGED 52 YEARS, D/O.CHANDRALEKHA, RESIDING AT TC 15/501, UDARASIROMANI ROAD, USRA 46, VELLAYAMBALAM, THIRUVANANTHAPURAM 695 010.**

2. **MANJUSHA C, AGED 49 YEARS, D/O.CHANDRALEKHA, RESIDING AT TC 15/501, UDARASIROMANI ROAD,USRA 46, VELLAYAMBALAM, THIRUVANANTHAPURAM 695 010.**

BY ADV R.S.KALKURA

RESPONDENTS/PETITIONERS/DEFENDANTS:

1. **M/S.SUN PROJECTS INDIA PVT. LTD., REGD OFFICE K.P.17/47 "GURUDAKSHINA", ANCHUMUKKU TEMPLE ROAD, MUTTADA P.O, THIRUVANANTHAPURAM 695 025 REPRESENTED BY ITS MANAGING DIRECTOR.**

2. **SAJEEV.V, K.P 17/47, "GURUDAKSHINA", ANCHUMUKKU TEMPLE ROAD, MUTTADA P.O, THIRUVANANTHAPURAM 695 025.**

BY ADVS.SRI.NAIR AJAY KRISHNAN
SRI.R.T.PRADEEP
SRI.K.C.HARISH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 09.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

JUDGMENT

An order referring the parties in a litigation before the Commercial Court to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act") is under challenge in this proceedings under Article 227 of the Constitution of India, at the instance of the plaintiffs. The subject matter of the suit is based on a joint development agreement entered between the parties on 15.7.2013, wherein there is an arbitration clause. As per the arbitration clause (clause 41 of the agreement), the parties agreed that if any dispute or differences arise between the builder and the owners, they shall be amicably resolved, and if they failed to resolve the issue mutually, the same shall be referred to an Arbitrator mutually agreed upon between the parties and his decision shall be final and binding on them.

2. On 15.10.2019, the plaintiffs issued a notice alleging a breach of the contract by the defendants. The defendants denied

the allegation of breach in the reply dated 13.11.2019 and raised a counterclaim. On 6.12.2019, the plaintiffs issued notice to the defendants under Section 21 of the Arbitration Act informing the unilateral appointment of an Arbitrator to resolve the dispute by initiating arbitration proceedings. On 27.12.2019, the defendants responded to the notice, resisting the unilateral appointment of the Arbitrator and suggesting a panel of Arbitrators. The plaintiffs did not agree to select one of the Arbitrators from the panel. The defendants further informed that if the panel of Arbitrators is not acceptable, the only remedy is to approach the High Court under Section 11 of the Act.

3. The plaintiffs instituted C.S.No10/2020 before the Principal Subordinate Judge's Court, Thiruvananthapuram, the designated Commercial Court, for mandatory injunction, recovery of money and other consequential reliefs. On getting summons in the suit, the defendants filed I.A.No.6 of 2020 under Section 8 of the Arbitration Act, seeking to refer the parties to arbitration. The plaintiffs resisted the application, contending that the attempt of the defendants was to delay and obstruct the proceedings in the Commercial Court. They contended

that the provisions of the Arbitration Act are no longer applicable to disputes that fall under the Commercial Courts Act, 2015. The plaintiffs submitted that in view of the enactment of the Commercial Courts Act, the Commercial Court alone is empowered to adjudicate commercial disputes. They pleaded that the dispute between the parties from a joint venture agreement is a commercial dispute. The Commercial Courts Act is a complete code enacted to provide for speedy disposal of commercial disputes. The plaintiffs pleaded that as per Section 21 of the Commercial Courts Act, it has an overriding effect on any other law inconsistent with it. The plaintiffs specifically contended that the dispute is not liable for being referred to arbitration. The court below, adverting to the rival contentions, held that prima facie, there exists an arbitration agreement, and therefore, in view of the provisions under Section 8 of the Arbitration Act, the parties are to be referred to arbitration.

4. I have heard the learned counsel for the petitioners and the learned counsel for the respondents.

5. The learned counsel for the petitioners/plaintiffs made the following submissions:-

(i) In view of the enactment of the Commercial Courts Act, 2015 a commercial dispute cannot be referred to arbitration.

(ii) Section 21 of the Commercial Courts Act provides that the provisions of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than the Act.

(iii) Sub-section (3) of Section 10 of the Commercial Courts Act says that where the subject matter of an arbitration is a commercial dispute, all applications under the provisions of the Arbitration Act shall be heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration.

(iv) The order of the trial Court rejecting the suit and relegating the parties for arbitration is against statutory provisions.

6. The learned counsel for the petitioners/plaintiffs relied on **Emaar MGF Land Ltd.** v. **Aftab Singh** [(2019) 12 SCC 751], **Dinesh Jaya Poojary** v. **M/s.Malavika Chits India Pvt. Ltd.** [AIR OnLine 2019 (Bom) 497], **Shreedatt Dash** v. **M/s.Z.Estate Private Ltd.**

(ZEPL)[2023 KHC 4480], **Hemalatha Devi** v. **Udayasri** [2023 (5) KLT 1149 (SC)], **Alexander Luke** v. **M/s.Aditya Birla Money Ltd.** (2024 KHC 107), **Joshy Francis** v. **James George** (2024 KHC 536). I have not adverted to those decisions as they have no application to the question in dispute.

7. The learned counsel for the respondents/defendants contended as follows:-

(1) The Commercial Courts Act is a general statute, whereas the Arbitration Act is a special statute, and therefore, there cannot be a position where the former overrides the latter.

(2) The applications referred to in sub-section (3) of Section 10 of the Commercial Courts Act are applications under Sections 9, 17 & 34 and appeals under Section 37 of the Arbitration Act which would normally lie before the Principal Civil Court but for the establishment of the commercial courts in respect of commercial disputes.

(3) As per the impugned order, the trial Court only intended to close the proceedings by referring the parties to arbitration.

8. The dispute in the matter essentially centres around the question of whether arbitral proceedings can be initiated in respect of an agreement wherein there is an arbitration clause regarding a commercial dispute with the constitution of the Commercial Courts. The crux of the arguments raised by the learned counsel for the plaintiffs is that in a commercial dispute there is no question of referring the matter to arbitral proceedings. The Arbitration and Conciliation Act, 1996, which contains the law of arbitration, was enacted in tune with the model law and rules adopted by UNCITRAL. Various provisions were enacted as an instrument for settling disputes through arbitration, conciliation, etc. The main objective of the statute includes provisions to minimise the supervisory role of courts in the arbitral process with the intent to provide for the speedy disposal of cases relating to arbitration with the least court intervention. Various amendments were incorporated in the Act with the passage of time, including the promotion of institutional arbitration in India by strengthening Arbitral Institutions.

9. The Commercial Courts Act, 2015 was enacted to provide

a mechanism for the speedy disposal of high-value commercial disputes. Section 6 of the Commercial Courts Act deals with the original jurisdiction of Commercial Courts to try suits and applications relating to a commercial dispute of a Specified Value. Section 7 deals with the jurisdiction of Commercial Divisions of High Courts to try suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction. Section 3-A deals with Commercial Appellate Courts. Section 5 deals with the Commercial Appellate Division in High Courts.

10. Going by the objects of both the statutes, it is clear that the Arbitration Act is meant for a speedy resolution of disputes between the parties and enforcement of the arbitral awards without delay. Equally, enforcing foreign awards is also one of the principal objects of the Arbitration Act. The Commercial Courts Act has been enacted with the intent to see that commercial disputes involving high amounts of money should be speedily decided.

11. The substantive law as to appeals and applications arising from arbitral proceedings is contained in the Arbitration Act. The

procedure governing the same is laid down in the Commercial Courts Act. The Supreme Court in **BGS SGS SOMA JV** v. **NHPC LIMITED [(2020) 4 SCC 234]** held that the Arbitration Act is a special Act vis-a-vis the Commercial Courts Act is general which applies to the procedure governing appeals and applications in cases other than arbitration as well.

12. In **Kandla Export Corporation and Another** v. **OCI Corporation and Another [(2018) 14 SCC 715],** the Supreme Court held that even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonised by giving effect to the special statute that is, the Arbitration Act vis-a-vis the more general statute, namely, the Commercial Courts Act, being left to operate in spheres other than arbitration.

13. The learned counsel for the plaintiffs, relying on Section 10(3) of the Commercial Courts Act, submitted that in the matter of commercial disputes, even when there is an arbitration clause in the contract entered between the parties, all proceedings arising there from shall be initiated and continued before the Commercial Court after the

enactment of the Commercial Courts Act.

14. The submission of the learned counsel for the plaintiffs is that a commercial matter after the enactment of the Commercial Courts Act, 2015 cannot be referred to arbitration. The learned counsel submitted that the Commercial Courts Act is a self-contained code wherein there are provisions of pre-institution mediation and settlement. Therefore, there is no need to refer the matter to an Arbitrator even when there is an arbitration clause. The learned counsel submitted that the contract entered between the parties, being a joint venture agreement, would come under Section 2(1)(c)(ii) of the Commercial Courts Act, which is exclusively triable by a Commercial Court, avoiding all other mechanisms including adjudication by the arbitral Tribunal.

15. In **Kandla Export Corporation** (supra), the Supreme Court held that the provisions of the Arbitration Act would prevail over the Commercial Courts Act when substantive rights are in conflict. When it comes to matters of procedure like choice of forum and adjudicatory procedure, the Commercial Courts Act will have to prevail in view of the non-obstante clause contained in Section 21 of the Commercial Courts

Act.

16. It is advantageous to extract Section 10(3) of the Commercial Courts Act. It reads thus:-

> "**10. Jurisdiction in respect of arbitration matters.-**Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and--
>
> (1) xx xx xx
>
> (2) xx xx xx
>
> (3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted."

17. Section 10 deals with the procedural matters regarding the choice of forum for the adjudication of applications or appeals arising out of "arbitration", which means any arbitration, whether or not administered by a permanent arbitral institution. Sub-section (3) says that if such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration

under the Arbitration Act that would ordinarily lie before any Principal Civil Court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. It is crystal clear that Section 10 deals with applications or appeals arising out of arbitration under the provisions of the Arbitration Act. Those applications arising from an arbitration under the Arbitration Act include applications under Sections 9, 14(2), 17 and 34 and appeals under Section 37 of the Arbitration Act. Therefore, in so far as those applications and appeals are concerned, Section 2(1)(e) of the Arbitration Act has no application where a "Commercial Court" had been established, in which case, the choice of forum would be regulated by Section 10(3) of the Commercial Courts Act, 2015.

18. Section 10 of the Commercial Courts Act is in no way an indication that commercial disputes of Specified Value shall not be referred to arbitration. If such an interpretation is given to Section 10 of the Commercial Courts Act with the aid of the non-obstante clause under

Section 21, it would be taking away the substantive rights acquired by the parties, which is not the intention of the two statutes. If Section 10(3) is interpreted in that way, it would defeat the very intention of the Arbitration Act. The necessary conclusion is that when an action is brought in a matter which is subject of an arbitration agreement before the judicial authority and a party to the arbitration agreement or any person claiming through or under him applies not later than the date of submitting his first statement on the substance of the dispute, the authority shall refer the parties to arbitration unless it is found that prima facie no valid arbitration agreement exists.

19. The learned counsel for the petitioners pointed out an irregularity in the operative portion of the impugned order, highlighting that the trial court ought not to have rejected the suit and relegating the parties for arbitration is not a mandate of the statute. The operative portion of the impugned order reads thus:-

> "In the result, I.A.Nos.6/20, 7/20 and 8/20 are allowed. The plaint is rejected relegating the parties for arbitration as provided u/s.8 of the A&C Act. Consequently, the order of ex parte injunction granted on I.A.No.1/2020 stands vacated and conditional attachment ordered on I.A.No.3/2020 is vacated.

Parties are directed to bear their respective costs."

The learned counsel submitted that the court should not have rejected the plaint. In the present case, the trial Court admitted the suit and issued notice to the parties. By allowing the application under Section 8 of the Arbitration Act, the court below only intended that the proceedings be terminated. The learned counsel further submitted that relegating the parties is not a mandate of Section 8 of the Arbitration Act. The word "relegate" as per Webster's II New Riverside University Dictionary means 'to refer or assign for performance or decision'. Therefore, I find no impropriety in the terminology used by the trial Court as it was acting as per the mandate of Section 8 of the Arbitration Act.

The original petition is dismissed.

Sd/-
K.BABU
Judge

TKS

APPENDIX OF OP(C) 430/2021

PETITIONER EXHIBITS

EXHIBIT P1 **TRUE COPY OF THE JOINT VENTURE AGREEMENT DATED 15-07-2013 ENTERED INTO THE PETITIONERS AND THE RESPONDENTS.**

EXHIBIT P2 **TRUE COPY OF THE ORDER DATED 25-06-2020 IN COMPLAINT NO. 92 OF 2020 ON THE FILE OF THE KERALA REAL ESTATE REGULATORY AUTHORITY.**

EXHIBIT P3 **TRUE COPY OF THE PLAINT IN COMMERCIAL SUIT NO. 10/2020 DATED 23-09-2020 BEFORE THE COMMERCIAL COURT AT THIRUVANANTHAPURAM (PRINCIPAL SUBORDINATES JUDGES COURT, THIRUVANANTHAPURAM).**

EXHIBIT P4 **TRUE COPY OF THE IA NO. 1/2020 DATED 23-09-2020 IN C.S 10/2020 FILE OF THE PRINCIPAL SUBORDINATES JUDGES COURT, THIRUVANANTHAPURAM.**

EXHIBIT P5 **TRUE COPY OF THE IA NO. 3/2020 DATED 23-09-2020 IN C.S 10/2020 FILE OF THE PRINCIPAL SUBORDINATES JUDGES COURT, THIRUVANANTHAPURAM.**

EXHIBIT P6 **TRUE COPY OF THE APPLICATION FILED BY THE RESPONDENTS AS IA NO. 6/2020 DATED 10-10-2020 IN C.S 10/2020 ON THE FILE OF THE PRINCIPAL SUBORDINATES JUDGES COURT, THIRUVANANTHAPURAM.**

EXHIBIT P7 **TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE PETITIONERS TO IA NO. 6/2020 DATED 19-10-2020 IN CS NO. 10/2020 ON THE FILE OF THE PRINCIPAL SUBORDINATES JUDGES COURT, THIRUVANANTHAPURAM.**

EXHIBIT P8 **TRUE COPY OF THE APPLICATION FILED BY THE RESPONDENTS AS IA NO.7/2020 DATED IN C.S NO. 10/2020 ON THE FILE OF THE PRINCIPAL SUBORDINATES JUDGES COURT, THIRUVANANTHAPURAM DATED 10-10-2020.**

EXHIBIT P9 **TRUE COPY OF COUNTER AFFIDAVIT IN IA NO. 7/2020 IN C.S NO 10/2020 ON THE FILE OF THE PRINCIPAL SUBORDINATES JUDGES COURT, THIRUVANANTHAPURAM DATED 10-10-2020.**

EXHIBIT P10 **TRUE COPY OF THE I.A 8 OF 2020 DATED 10-10-2020 IN C.S NO. 10 OF 2020 ON THE FILE OF THE PRINCIPAL SUBORDINATE JUDGES COURT, THIRUVANANTHAPURAM.**

EXHIBIT P11 **TRUE COPY OF THE COUNTER AFFIDAVIT DATED 19-10-2020 TO I.A 8 OF 2020 DATED 10-10-2020 IN C.S NO. 10 OF 2020 ON THE FILE OF THE PRINCIPAL SUBORDINATE JUDGES COURT, THIRUVANANTHAPURAM.**

EXHIBIT P12 **TRUE COPY OF THE COMMON ORDER DATED 03-02-2021 IN NO. 06/2020 IA NO. 07/2020, IA NO. 8/2020 IN C.S NO. 10/2020 ON THE FILE OF THE PRINCIPAL SUBORDINATE JUDGES COURT, THIRUVANANTHAPURAM.**

TKS