
(2016) 07 KL CK 0072

In the High Court Of Kerala

Case No : A.R. No. 25 of 2016.

**Indian Institute of Management Kozhikode, Iimk Campus P.O.,
Kozhikode -673 570, Through Its Authorised Officer Lt. Col. Julius
George (Retd), Chief Administrative Officer, Iimk - Petitioner @HASH
Gold Finger Est. Pvt. Ltd., Abba Residency, 2nd Floor, Offi**

Date of Decision : 27-07-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2016) 4 ILRKerala 678 : (2016) 4 KerLJ 324 : (2016) 4 KLT 135

Hon'ble Judges : P.B. Suresh Kumar, J.

Bench : Single Bench

Advocate : Sri. S. Vinod Bhat and Legith T.K. Kottakkal, Advocates, for the Petitioner

Final Decision : Allowed

Judgement

Mr. P.B. Suresh Kumar, J. - The Indian Institute of Management is the applicant in this arbitration request.

2. The petitioner had entered into two separate contracts with the respondent for the interior works of the Management Development Programme Complex in its Kozhikode campus. According to the petitioner, the respondent had not completed the works satisfactorily within the time stipulated in the contracts and consequently the works had to be re-arranged. It is the case of the petitioner that they have sustained loss on account of the breach of the terms of the contracts committed by the respondent and that steps are being taken to determine the said loss. While so, Annexure-A2 notice was caused to be issued by the respondent stating that a sum of Rs. 21,91,62,354.78/- is due to them from the petitioner in respect of the works executed by them; that the petitioner has not paid the said amount despite various demands and that therefore they are left with no remedy but to invoke the arbitration clause contained in the contracts for realisation of the amounts due to them. As per Annexure-A2 notice, the respondent has called upon the petitioner to choose any one of the three Arbitrators named therein within thirty days for resolution of the disputes

between them. It is also stated by the respondent in Annexure-A2 that if the petitioner does not comply with the requirement in the said notice, action will be initiated by them before the High Court of Bombay, under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of Arbitrator. The petitioner sent Annexure-A3 reply to Annexure-A2 notice stating, mainly, that no amounts are due to the respondent from them; that the amounts are due to them from the respondent towards damages and that a claim for the same will be forwarded shortly. It is also stated by the petitioner in Annexure-A3 reply that they do not concur with the names of the persons suggested in Annexure-A2 for appointment as Arbitrator. It is further stated by the petitioner in Annexure-A3 reply that contracts were intended to be performed in the campus of the petitioner at Kozhikode in the State of Kerala and therefore, the disputes relating to the contracts can be resolved only by invoking the jurisdiction of the High Court of Kerala. Annexure-A4 reply was caused to be sent by the respondent to Annexure-A3 reply notice stating that the contracts between the parties were entered into at Mumbai and therefore, the High Court of Bombay has jurisdiction to deal with the matter. According to the petitioner, since the disputes have arisen between the parties, it is necessary to appoint an Arbitrator as provided for in the contracts entered into by them. The petitioner, therefore, prays for appointment of an Arbitrator for resolution of the disputes between the parties.

3. Though notice on this arbitration request was served on the respondent, there is no appearance for them. Instead, it is seen that a letter was caused to be sent by the respondent to the Deputy Registrar of this Court stating that they have already instituted an arbitration request before the High Court of Bombay on 17.03.2016 and the said matter is listed for hearing on 06.06.2016. As per the said letter, the counsel for the respondent requested the Deputy Registrar of this Court to inform this Court about the arbitration request pending before the High Court of Bombay.

4. Heard the learned counsel for the petitioner.

5. It is seen that this arbitration request is also instituted on 17.03.2016. Section 11(11) of the Act provides that where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section alone shall be competent to decide on the request. There is no other provision in the Act dealing with more than one request made to different High Courts for the same purpose by the parties to a contract. When more than one request has been made to different High Courts for the same purpose by the parties to a contract on the same day, in the absence of any endorsement as to the time at which the requests have been made, the issue as to which request has been made first cannot be decided. As far as arbitration requests filed before this Court are concerned, there is no requirement to make an endorsement as to the time at which the

same is instituted. If the issue as to which arbitration request has been instituted first cannot be found out, according to me, the High Court which takes up the matter first will be within its jurisdiction to deal with the arbitration request. On 26.07.2016, when this matter came up for hearing, the learned counsel for the petitioner informed this Court that the arbitration request referred to by the counsel for the respondent in his letter addressed to the Deputy Registrar of this Court, is still pending. In so far as the said arbitration request has so far not been disposed of, I do not think that there is any impediment for this Court in dealing with this arbitration request on merits.

6. In *M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.* [AIR 2006 SC 450], the Apex Court has dealt with the scope of the jurisdiction of this Court under Section 11 of the Act. Paragraph 38 of the said judgment reads thus:

"38. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an Arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."

The fact that the contracts entered into between the parties contain arbitration clauses is not seen disputed by the respondent as otherwise there is no reason for them to cause issuance of Annexure-A2 notice to the petitioner. Further, since it is admitted by the respondent in Annexure-A2 notice that the contracts entered into between the parties were in respect of works to be executed within the territorial jurisdiction of this Court, there cannot be any dispute as to the territorial jurisdiction of this Court to entertain an arbitration request in respect of the same. Further, since the respondent themselves have instituted an action for appointment of an Arbitrator before the High Court of Bombay, it is evident

that there is a live dispute between the parties. Sub-section 5 of Section 11 provides that if the parties failed to agree on the Arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment can be made upon request of a party to the contract. As far as the present case is concerned, as noted above, the parties failed to agree on the Arbitrator within thirty days of Annexure-A2 notice issued on behalf of the respondent. In the circumstances, I am of the view that the petitioner is entitled to succeed.

In the result, this arbitration request is allowed and Justice Sri. K. Padmanabhan Nair (Rtd.) is appointed as the Arbitrator in this matter. The Arbitrator shall commence the proceedings after notice to the parties. The fee of arbitration shall be fixed by the Arbitrator with the concurrence of the parties.