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**(2013) 01 KL CK 0126**

**In the High Court Of Kerala**

**Case No :** Arb.A. No"s. 54 and 57 of 2011 and Cross Objection No. 44 of 2012

M/s. Poddar Udyog Limited

APPELLANT

Vs

Lifetime Realty Pvt. Ltd. and M/s. Gold View Vyapar (P) Ltd.

RESPONDENT

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**Date of Decision :** 07-01-2013

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11, 36, 9

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 27(1)

**Citation :** (2013) 2 KHC 710

**Hon'ble Judges :** P.S. Gopinathan, J;K. Hema, J

**Bench :** Division Bench

**Advocate :** Bechu Kurian Thomas, Smt. Nisha John and Sri. Enoch David Simon Joel, for the Appellant; P.B. Krishnan Advocate and Sri. M.P. Ramnath Advocate, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Gopinathan, J.—These appeals and cross objection are preferred against the common order in O.P.(Arb.)No. 24/2011 and I.A. No. 778/2011 on the file of the District Judge, Thodupuzha. The 1st respondent in both the appeals and the cross objector is the petitioner before the lower court. The appellant in Arb.A. No. 54/2011 is the 1st respondent. The appellant in the other appeal is the 2nd respondent, who was subsequently impleaded in the original petition before the lower court. Hereinafter the parties are referred to as they are arrayed before the court below. In contemplation of the arbitration proceedings, the petitioner instituted the above original petition before the court below u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking interim relief against the 1st respondent with a contention that the petitioner and the 1st respondent entered into an agreement, a copy of which was marked as Ext.P2 dated 18.5.2008, in respect of Hope Plantations consisting of three tea estates, namely Glenmary, Koduvakaranam and Landrum comprising plantations, buildings, factories, other erections, fixtures, other movable and immovable properties. In pursuance to the agreement entered into, it is reported

that, more than 19 crores of rupees were parted to the 1st respondent by various occasions. At that time, there was a proposal for demerger between the 1st respondent and the 2nd respondent. It is submitted that the agreement was for sale of the estate, factory and other items belonging to the 1st respondent to the petitioner in the event the proposal for demerger had not been materialized. If the process of demerger was materialized as proposed, the agreement would be treated as one for sale of the shares of the 2nd respondent. Though the demerger had taken effect, the respondents had been avoiding the performance of the agreement. The petitioner would contend that it is only because of the laches on the side of the respondents the performance of the agreement could not be effected and following that there arose dispute between the parties. Contending that in the event there arose any dispute, the matter is to be referred to arbitration and that the petitioner had been taking steps for appointment of arbitrator and that in the meanwhile, the 1st respondent had been attempting to commit waste and to alienate the properties and the shares, the petitioner approached the court below as against the 1st respondent alone seeking interim relief to protect the subject matter of the agreement till the dispute is settled in arbitration. Along with the original petition, an interlocutory application was filed seeking an order of ad interim injunction. Having satisfied with a prima facie case, an order of ad interim injunction was ordered against the 1st respondent. Contending that despite the order of ad interim injunction, the respondents had been committing waste and had been attempting to alienate the scheduled properties and the shares, the 2nd respondent was also impleaded. A petition as I.A. No. 778/2011 was filed for prosecuting the respondents for violation of the interim injunction. The petitioner also sought for appointing a receiver for the management of the properties.

2. The respondents contended before the court below that the respondents were ready and willing to perform their part and the agreement could not be performed only because of the laches on the side of the petitioner and that the petitioner was not in a financial position to pay the balance consideration and that alone is the reason for non-performance of the agreement and that, in the event there arose a dispute, the first attempt as agreed upon is to settle the dispute between the parties and only if the attempt to settle the dispute between the parties fails, the reference to the arbitration would arise and that there was no attempt to commit any act of waste and that there is no justification for appointing a receiver and that the petitioner is not entitled to any of the reliefs sought for.

3. On consent, on the side of the petitioner, Exts.P1 to P13 were marked. On the side of the respondents, Exts.R1 to R16 were marked. Two reports of the Commissioner were marked as Exts.C1 and C2.

4. The court below, on appraisal of the evidence, arrived at a finding in favour of the petitioner. Consequently, the original petition was allowed by order dated 10.10.2011 and the order of ad interim injunction was made absolute for a

period of one year or till the dispute between the petitioner and the respondents is finally adjudicated and final award is passed by the arbitral tribunal, which ever event occurs earlier. The prayer for appointment of the receiver was rejected. Assailing the above order, these appeals were preferred.

5. The 1st respondent also moved a petition u/s 11 of the Act as A.R. No. 37/2011 before the designated judge. The respondents, inter alia, took a contention before the designated judge that the original of Ext.P2 agreement was not duly stamped and that the so called agreement was not produced before the court and therefore, the petition u/s 11 of the Act is not maintainable.

Upholding that contention, the learned designated judge by order dated 2.3.2012, reported in Lifetime Realty (P) Ltd. Vs. Poddar Udyog Ltd. and Another, , rejected the arbitration request. Having the request u/s 11 rejected, the petitioner preferred cross appeal with a delay of 142 days, assailing the time limit fixed by the impugned order. The order declining to appoint the receiver and to prosecute the respondents for the alleged violation of the impugned order was also assailed in the cross appeal.

6. On the other hand, the respondents would seek for allowing the appeal and vacating the interim order without going into the merits with a plea that since the application u/s 11 was rejected by the designated court, the impugned order u/s 9 of the Act is not sustainable any more.

7. The petitioner, on the other hand, would contend that the order rejecting the petition u/s 11 is a technical one and that, had the petitioner got an opportunity to produce the original of Ext.P2, the original would have been produced before the designated court and would have paid the deficit stamp duty, if any, and the penalty and that assailing the order rejecting the petition u/s 11, the petitioner had preferred a SLP before the Apex Court as SLP No. 10649/2011 and that the same was admitted on 23.4.2012 and that the parties were sent for mediation before the Apex Court and that though the mediation failed, there is every chance for the petitioner succeeding in the SLP and therefore, the petitioner sought for extending the interim order till the disposal of the SLP before the Apex Court or till the dispute is settled by the arbitrator.

8. The petitioner had also filed a petition as I.A. No. 2193/2012 seeking permission of this Court to produce the original of Ext.P2. Simultaneously, a petition as I.A. No. 2216/2012 was filed under Order 41 Rule 27 of the CPC (CPC) along with the original of Ext.P2 seeking an order to receive the original. The reason stated in the affidavit accompanying I.A. No. 2216/2012 is that Ext.P2 was marked on consent and no objection regarding the stamp duty was raised before the court below and that the petitioner had no reason or opportunity to produce the original agreement before that court and that there was no willful delay or laches on the part of the petitioner in not producing the document earlier and that the original of the document is highly necessary for enabling this Court to pronounce the judgment in this case. The learned counsel

for the petitioner also submitted that since the document was produced before this Court, stamp duty and penalty may be imposed and that the petitioner is prepared to pay the stamp duty and the penalty.

9. Both the above petitions were stoutly opposed by the respondents by contending that the respondents are not raising any objection before this Court as they are estopped from raising objection at this stage and that the petitioner was at liberty to produce the original of Ext.P2 before the court below or before the designated court and that the reasons stated in the affidavit accompanying the petition I.A. No. 2216/2012 are not sufficient under the above provision of CPC to receive the document. Having heard either side, we find that there was no impediment for the petitioner to produce the original of Ext.P2 before the lower court or before the designated court as the original was well in the custody of the petitioner. Probably, the petitioner was well aware that the document was deficitely stamped and to avoid the payment of stamp duty and penalty, the petitioner initiated proceedings with copy on experimental basis and having now known that there is no other way, the original is produced. There is total lack of bonafide. Whatever it be, in these appeals and cross objection, no objection was raised by the respondents regarding stamp duty. In the above circumstance, we find that the reasons stated in I.A. No. 2216/2012 would not come under either Clause (a) or (aa) or (b) under Order 41 Rule 27(1) of CPC which reads as follows:

27. Production of additional evidence in Appellate Court:-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined.

10. Therefore, we dismiss the above petitions. In the above circumstance we are not considering the request of the learned counsel for the petitioner to impound stamp duty and penalty on the original of Ext.P2 especially since the question whether the original of Ext.P2 is liable to be impounded stamp duty and penalty is seized off by the Supreme Court in the Special Leave Petition.

11. Regarding the order impugned, we find that a reading of Section 9 of the Act, would be relevant for a better appreciation of the argument of the respondents.

Section 9 reads as follows:

9. Interim measures etc. by court.-A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

The above provision would show that an order u/s 9 would be maintainable only before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced. Since the request u/s 11 to appoint an arbitrator was turned down by the designated court, we find that no interim order u/s 9 is any more sustainable. The learned counsel for the petitioner would submit that his application u/s 11 was rejected on technical ground and that a SLP is pending before the Apex Court. We are not sitting in appeal over the decision of the designated Court. Irrespective of the reason for rejecting the petition u/s 11, now there is no arbitral proceedings since the request u/s 11 was rejected. Though it is seen that the SLP was preferred as early as on 2.3.2012, so far no interim order is issued by the Apex Court.

The petitioner has also not taken any steps for review of the order in A.R. No. 37/2011. In the above circumstance, we find no merit in the arguments advanced by the learned counsel for the petitioner. The order impugned is a commercial suppression which in our opinion cannot indefinitely be allowed to continue.

We are not inclined to assess the merit of SLP or to sustain the impugned order

anticipating that the SLP may be allowed at any point of time or an arbitrator would otherwise be appointed. Therefore, the order impugned, which already expired, requires no extension. The cross objection is devoid of merit and liable to be dismissed.

In the result, both the appeals are disposed of as infructuous since the order impugned already expired. The cross objection and the other interlocutory applications would stand dismissed. No costs.