

**(2008) 07 KL CK 0039**

**In the High Court Of Kerala**

**Case No : Writ Petition (C) No. 9831 of 2008**

Prakash K. Raghavendra Rao

APPELLANT

Vs

Sriram Transport Finance Co. Ltd. and Another

RESPONDENT

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**Date of Decision : 16-07-2008**

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11, 11(2), 11(3), 16, 2(1)(b)  
Constitution of India, 1950 — Article 227

**Citation : AIR 2008 Ker 234 : (2008) 4 ARBLR 553 : (2008) 3 ILR (Ker) 506**

**Hon'ble Judges : M. Sasidharan Nambiar, J**

**Bench : Single Bench**

**Advocate : Kodoth Sreedharan, for the Appellant; Rajesh Nambiar, for the Respondent**

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## **Judgement**

M. Sasidharan Nambiar, J.—What is the procedure to be adopted by a Court when a petition is filed by one of the parties to the suit u/s 8 of Arbitration & Conciliation Act, 1996. Is the Court to refer the parties to arbitration mechanically by looking into the agreement produced or is it for the court to consider and decide whether the agreement produced was executed by the parties. If it is found that the agreement was executed, is it for the Court to decide whether the agreement is vitiated by fraud or misrepresentation.

2. Section 8 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), deals with the power to refer parties to arbitration when there is an arbitration agreement. Under Sub-section (1), a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement and if a party applies not later than before submitting his first statement on the substance of the dispute, Judicial authority shall refer the parties to arbitration. Sub-section (2) provides that the application so filed shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Section 16 of the Act deals with the competence of arbitral tribunal to rule on its own jurisdiction. Under Sub-section (1), the arbitral tribunal is

competent to rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause, which forms part of a contract shall be treated as an agreement independent of the terms of the contract and a decision by the tribunal that the contract is null and void shall not entail ipso jure invalidity of the arbitration clause.

3. Section 8 of the Act reads:

8. Power to refer parties to arbitration where there is an arbitration agreement:

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

It cannot be said that as and when an application is filed by a party as provided under Sub-section (1) of Section 8 producing along with the application the original or the duly certified copy of an agreement which contains an arbitration clause, court shall refer the parties to arbitration. Court cannot act mechanically. Instead it has a duty to decide whether there is a valid agreement executed by the parties which contains an arbitration clause. Only if it is found that there is a valid agreement between the parties and that agreement contains an arbitration clause and along with the application the original of the agreement or its duly certified copy was filed and application is filed before submitting his first statement on the substance of the disputes, parties can be referred to arbitration as provided u/s 8 of the Act.

4. Section 2(1)(b) defines an arbitration agreement as means an agreement referred to in Section 7. u/s 7(3) an arbitration agreement shall be in writing. Under Sub-section (4) of Section 7, an arbitration agreement is in writing if it is contained in a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

5. It is well settled that Scheme of Arbitration and Conciliation Act, 1996 is absolutely distinct and different from the 1940 Act. As held by the Apex Court in Pandey and Co. Builders Pvt. Ltd. Vs. State of Bihar and Another, and Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, the 1996 Act is required to be read keeping in view the UNCITRAL Model Rules.

6. Article 8 of the Model Rules reads:

(1) A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where, in such case, arbitral proceedings have already commenced, the Arbitral Tribunal may continue the proceedings while the issue of its jurisdiction is pending with the Court.

Section 8 of 1996 Act does not contain the expressions found in the second part of the Model Rules. Section 8 of 1996 Act confers power on the judicial authority before whom an action is brought in a matter which is the subject matter of an arbitration agreement, to refer the dispute to arbitration, if a party applies for the same. If the conditions are fulfilled and the agreement is valid and it contains an arbitration clause, Court shall refer the parties to arbitration as laid down by the Apex Court in *P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others*, and *Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums*, .

7. Under Sub-section (2) of Section 11 parties are free to agree on a procedure for appointing the arbitrator or arbitrators. It is subject to Sub-section (6). Under Sub-section (3) of Section 11, failing any agreement in terms of Sub-section (2), in an arbitration with three arbitrators, each party could appoint one arbitrator and the two arbitrators so appointed could appoint the third arbitrator. Under Sub-section (4), the Chief Justice or any person or institution designated by him could make the appointment, in a case where Sub-section (3) has application and where either the party or parties had failed to nominate their arbitrator or arbitrators or the two nominated failed to agree on the third presiding arbitrator. Sub-section (6) provides that where under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure or the parties or the two appointed arbitrators fail to reach an agreement expected of them or a person including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provide other means of securing the appointment.

8. While considering the question whether the power exercised by the Chief Justice is the judicial power or administrative power, Constitution Bench of the Apex Court in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, dealt with the function of the judicial authority u/s 8 and held:

Thus, the judicial authority is entitled, has to and is bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11 only covers another situation. Where one of the parties has refused to act in terms of the arbitration agreement, the other party moves the

Chief Justice u/s 11 of the Act to have an arbitrator appointed and the first party objects, it would be incongruous to hold that the Chief Justice cannot decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the Judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question or cannot decide the question, it will lead to an anomalous situation in that a judicial authority u/s 8 can decide, but not a Chief Justice u/s 11, though the nature of the objection is the same and the consequence of accepting the objection in one case and rejecting it in the other, is also the same, namely, sending the parties to arbitration. The interpretation of Section 11 that we, have adopted would not give room for such an anomaly.

Considering the question whether in view of the powers of the Arbitral Tribunal to decide its own jurisdiction including the validity of the arbitration agreement, court has the jurisdiction to decide it, the Constitution Bench held:

19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the Court as defined in Section 2(e) of the Act and would also, in our opinion, include other Courts and may even include a special tribunal like the Consumer Forum (see *M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi*, . When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority in the absence of any restriction in the Act-has necessarily to decide whether, in fact-there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it. is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or

that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction. whether there is an arbitration "agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil Court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication. (See AIR 1948 12 (Privy Council) .

(Under line supplied.)

9. It cannot be disputed that Court has to satisfy itself that there is a valid agreement executed by the parties which contains an arbitration clause in order to invoke the power provided u/s 8 to refer the parties to the arbitration. The existence of a valid agreement containing an arbitration clause is sine qua non for referring the parties to arbitration u/s 8 of the Act. When existence of a valid arbitration agreement is disputed by one of the parties, court is bound to consider whether it was executed by the parties including validity of the agreement. If validity is questioned on the ground of fraud, as fraud vitiates all solemn acts, that aspect must also to be considered.

10. Apex Court in India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., considering this aspect held:

14. Thus, as and when a question in regard to the validity or otherwise of the arbitration agreement arises, a judicial authority would have the jurisdiction under certain circumstances to go into the said question.

15. Fraud, as is well known, vitiates all solemn acts. (See Hamza Haji v. State of Kerala, Prem Singh v. Birbal and Jai Narain Parasrampur v. Pushpa Devi Saraf).

If that be so, before referring the parties to an arbitration as provided u/s 8, Court has to decide whether the agreement was executed, whether it is valid and if disputed on the ground of fraud whether it is vitiated by fraud.

11. then the question is how the enquiry is to be made. Is it for the Court to record evidence on the question whether the agreement produced was executed by the parties, whether it is vitiated by fraud or other vitiating grounds?

12. The Constitution Bench in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, considered this aspect and held:

It is necessary to define what exactly the Chief Justice, approached with an application u/s 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 u/s 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.

(Underline supplied)

Considering the limited scope of Section 8 of the Act, adoption of same procedure would serve the purpose. The question of execution and validity of the agreement can be resolved by documents or affidavit or such other evidence. It cannot be said that in view of Section 16 empowering the Arbitral Tribunal to decide its own jurisdiction including the validity of the arbitration agreement, Court has to mechanically look into the agreement produced and refer the parties to arbitration, if there is an arbitration clause. Before relying on the arbitration clause, it is for the Court to decide whether there is a valid agreement executed by the parties. Hence in all cases, when a petition is filed u/s 8(1) of the Act and an agreement is produced which contains an arbitration clause, if one of the parties dispute the execution, it is for the Court to enter a finding whether the agreement was executed by the parties. What is to be decided by the Court is whether there exists a valid agreement executed by the parties and if executed whether it is vitiated. Court is also to enter a finding whether that agreement contains an arbitration clause or not. Once these findings are answered and it is found that there is an agreement executed by the parties containing an arbitration clause Court shall refer the parties to arbitration as provided u/s 8(1) of the Act. The enquiry contemplated u/s 8(1) of the Act is only to find out whether the agreement produced by one of the parties is an agreement executed by the parties. If it is admitted by the parties that it is an agreement, no other evidence is necessary. Then what is to be looked into is whether the agreement contains an arbitration clause. If one party produces an agreement and the other party disputes the execution of the agreement, Court has to enter a finding whether the agreement so produced was executed by the parties or not. It could be by recording necessary evidence or based on the

affidavits or other sufficient materials. If it is found that the agreement produced is the one executed by the parties, and its execution is not vitiated and that agreement contains an arbitration clause, Court shall refer the parties to arbitration, as provided u/s 8(1).

13. Coming to the facts of the case petitioner instituted O.S. 342/2007 before Munsiff Court, Kasaragod. Suit is for a permanent prohibitory injunction restraining defendants, respondents herein, from seizing the stage carriage vehicle KL. 14 C/7430 plying in Kasaragod-Cherkala-Badladka-Vidyagiri route. Case of the petitioner in the plaint was that he availed of a hire purchase loan from UTI Bank and purchased the bus and he had no transaction with the respondents and they have no right to seize the vehicle. Respondents filed Ext.P3 application producing the original hypothecation agreement allegedly executed by petitioner in their favour which contains an arbitration clause and sought a reference to arbitration. Ext.P5 objection was filed to that application by petitioner. Petitioner contended that he did not execute the alleged loan-cum-hypothecation agreement and the one produced by respondents along with the petition is a forged document and he never agreed to resolve the dispute to arbitration and therefore the petition is to be dismissed.

14. Learned Munsiff under Ext.P6 order allowed the application and referred the parties to arbitration as provided under the agreement. It is challenged in this petition filed under Article 227 of the Constitution of India.

15. Ext.P4 is the copy of the agreement produced by respondents along with Ext.P3 petition filed u/s 8(1) of the Act. Clause No. 10.14 of that agreement provides for arbitration. As per the clause, any and all disputes, differences and/or claims arising out of or in connection with the agreement or its performance shall be settled by arbitration to be held in Mangalore and the named arbitrator should be the sole arbitrator and in case of his inability the other person named therein should be the arbitrator. Learned Munsiff relying on the said clause found that petitioner has been paying the amount under the agreement and therefore the dispute is to be referred to arbitration. The argument of the learned Counsel appearing for petitioner is that when petitioner specifically contended that he did not execute the agreement and the agreement produced is a forged one, without entering a finding that the agreement so produced is an agreement executed by the petitioner, learned Munsiff was not justified in referring the parties to arbitration. Learned Counsel appearing for respondents argued that though in the plaint it was contended that there was a hire purchase agreement between petitioner and UTI Bank, no such agreement was produced and the only agreement produced before the Court is Ext.P4 and in Ext.P5 objection filed to Ext.P3 application, petitioner admitted the agreement and also pleaded that he had discharged the liability and therefore trial Court was justified in acting upon Ext.P4 agreement as an agreement executed by the petitioner. Learned Counsel also argued that pursuant to Ext.P6 order, the arbitrator named in Ext.P4 agreement had commenced the arbitration and passed an interim order and it is

only thereafter the petition is filed before this Court and as provided u/s 16 of the Act the arbitral tribunal is competent to decide the existence of a valid agreement and in such circumstances this Court may not interfere with Ext.P6 order even if the order is not satisfactory.

16. As stated earlier, when the existence of an agreement containing an arbitration clause itself is disputed and petitioner specifically pleaded that he did not execute any agreement with the respondents and the agreement produced is a forged one, learned Munsiff was not expected to act upon the arbitration clause in the agreement without first entering a finding that the agreement produced was executed by the petitioner. Unfortunately learned Munsiff did not enter a finding on this crucial aspect in Ext.P6 order. The relevant portion of the orders reads:

The respondent argued that when a fraud is alleged in case the same has to be considered differently. But no fraud regarding the agreement is alleged in the suit. The agreement between the parties in the suit is not alleged as null and void. The plaintiff was making the payment as per agreement. The dispute in this suit is with regard to the amount due to the parties. Even though the respondent herein denied the execution of agreement, it is admitted by the plaintiff in the suit that there was an agreement executed between the parties. Hence, contention of the respondent cannot be accepted. The agreement dated 1.4.2007 clearly shows that there is an arbitration clause in the agreement.

12. What was found by the learned Munsiff was that petitioner in the suit admitted that agreement was executed between the parties and the agreement dated 1.4.2007 clearly shows that there is an arbitration clause in the agreement. Ext.P2 plaint does not contain any such admission that petitioner executed an agreement with the defendants. On the other hand, the specific pleading was that there is no agreement executed by him in favour of the respondents and an agreement was executed in favour of UT1 Bank. So also there is no admission in the plaint that petitioner has been paying any amount under the disputed agreement to the defendants. Though reliance was placed on paragraph 3 of Ext.P5 counter affidavit filed by petitioner to Ext.P3 application, I cannot agree with the submission that there is an admission either with regard to the existence of an agreement in favour of respondents or any admission about any payment to respondents pursuant to the agreement. In such circumstance, learned Munsiff is not justified in referring the parties to an arbitration. Ext.P6 order is quashed. As execution of the agreement produced by petitioner was not decided on the materials, learned Munsiff is directed to reconsider I.A. 270/2008 in the light of the observations made earlier and pass appropriate orders in accordance with law. Writ petition is disposed of as above.