

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

THURSDAY, THE 8TH DAY OF JULY 2021 / 17TH ASHADHA, 1943

AR NO. 105 OF 2020

PETITIONER:

TULSI DEVELOPERS INDIA PVT. LTD.,
8/522B, 139, MAVELIPURAM, NEAR SUNRISE HOSPITAL,
SEAPORT-AIRPORT ROAD, KAKKANAD, COCHIN-682 030,
REP BY MANAGING DIRECTOR, THULASIDAS, AGED 40 YEARS,
S/O. LATE GOPINATHAN NAIR, RESIDING AT FLAT NO.2D,
SHARON NEST, KAKKANAD P.O.-682 030.

BY ADV PRAVEEN K. JOY

RESPONDENT:

DR. APPU BENNY THOMAS, AGED 37,
S/O. DR.BENNY THOMAS, VADAKKEDATH HOUSE,
KOCHAPPILLY LANE, PALARIVATTOM, ERNAKULAM-682 025.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

THIS ARBITRATION REQUEST HAVING COME UP FOR ADMISSION ON
08.07.2021, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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C.R.

ORDER

Dated this the 8th day of July, 2021

This Arbitration Request - which has been seriously contested - has thrown up certain novel, but interpretationally germane legal aspects appertaining Sections 11(2), 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter the "Act" for brevity).

2. As is commonly known, the jurisdiction of this Court - for seeking appointment of an Arbitrator or panel of Arbitrators - can be invoked either under Section 11(4) or 11(5) or 11(6) of the Act. Among these, Section 11(4) is called in only when a panel of three Arbitrators are involved; and since, in this case, the parties are *ad idem* that the

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agreement provides for a sole Arbitrator, I am not called upon to examine its ambit.

3. The focus in this case is on the inter-play of Sections 11(5) and 11(6) of the Act, since both of them deal with appointment of a sole Arbitrator, albeit, in two subtly distinct scenarios. It is this distinction which is ingenuously grabbed by the respondent to resist this Arbitration Request.

4. The petitioner - which is stated to be a private limited Company, incorporated under the provisions of the Companies Act, 1956 - has approached this Court under Section 11(6) of the Act, praying that this Court appoint a sole Arbitrator, in terms of Clause 27 of Annexure-1 Agreement - which they assert is a lease agreement entered between them and the

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respondent - to adjudicate and decide certain disputes, which warrants resolution only through the mechanism of arbitration, on account in the aforementioned clause of the said agreement.

5. The petitioner, therefore, prays that this Court allow this request and appoint a suitable Arbitrator to deal with and resolve the disputes, specified by them in Annexure-2 demand made to the respondent.

6. I have heard Sri.Praveen K.Joy - learned counsel appearing for the petitioner and Sri.G.Sreekumar Chelur - learned counsel appearing for the respondent.

7. Sri.G.Sreekumar - learned counsel appearing for the respondent, contested the arguments made on behalf of the petitioner by

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Sri.Praveen K.Joy, arguing that this Arbitration Request is not maintainable for various reasons. He submitted that, for the first, the grounds raised by the petitioner ineluctably disclose that they have, in fact, approached this Court under Section 11(5) of the Act, though styling it as being under Section 11(6) thereof; and therefore, that unless thirty days have expired after they made their demand to his client, through Annexure-2 notice, for appointment of an Arbitrator, this Arbitration Request is rendered premature and hence not maintainable.

8. As the second ground in opposition to this Arbitration Request, Sri.G.Sreekumar contended that Annexure-1 agreement does not provide for arbitration of disputes relating to the lease arrangement, which can only be

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considered by a competent Rent Control Board.

9. Sri.G.Sreekumar, thereafter, expatiated his first of the afore contentions saying that, as is indubitable from the pleadings on record, petitioner had sought for appointment of an Arbitrator through Annexure-2 notice dated 27.11.202; while he approached this Court for appointment of an Arbitrator, under the aegis of the present request, on 12.12.2020. He then took me through the grounds impelled by the petitioner in this case, particularly Ground G, which avers that the "statutory thirty days period has expired" and it is, therefore, that he has filed this Arbitration Request.

10. Sri.G.Sreekumar thus vehemently argued that what is relevant is not the provision of law, which the petitioner says they have invoked, but what this Court discovers from the

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pleadings and materials; which he ingeminately asserts, can only be Section 11(5) of the Act. He added that his client has, therefore, filed I.A.No.1 of 2021 seeking that this Arbitration Request be dismissed for these reasons and prayed that it be allowed.

11. Sri.Praveen K.Joy, on the other hand, defended the maintainability of this Arbitration Request, contending that his client has invoked Section 11(6) of the Act and hence that they were not obligated to wait for thirty days after Annexure-2 demand had been made on the respondent. The learned counsel, thereafter, submitted that Section 11(5) of the Act is called in only when the agreement does not contain a procedure for appointing an Arbitrator, or when the parties have not agreed on such. He then invited my attention to Clause

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27 of Annexure-1 agreement, to submit that the same expressly discloses the procedure agreed upon by the parties to appoint an Arbitrator; and, therefore, that his client could have only invoked Section 11(6) of the Act before this Court, which provision concedes no pre-conditional stipulations as contended by Sri.G.Sreekumar.

12. As regards Ground G in this request, Sri.Praveen K.Joy was quick to accept the averments therein to be in error, submitting that merely because it is asseverated that the statutory thirty days period has expired, the respondent cannot maintain, consequently, that this Arbitration Request has to be construed as having been urged under Section 11(5) of the Act. He argued that what is *acme* for consideration is if there is a procedure agreed

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upon by the parties for appointment of an Arbitrator and that if this Court is to find this to the affirmative, then this Arbitration Request can only be treated as one being under Section 11(6) of the Act - as has been stated by his client - notwithstanding any inadvertent mistakes that may have been committed by them in the pleadings. Sri.Praveen K.Joy concluded on this issue by showing me that, through Annexure-4 reply, the respondent had refused either to appoint an Arbitrator or to submit himself to Arbitration, thus arguing that even if Section 11(5) of the Act applies, its rigour would not be now attracted when the respondent made his refusal so clear.

13. Sri.Praveen K.Joy then proceeded to answer the second objection of Sri.G.Sreekumar - that the disputes in Annexure-2 notice are

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not capable of being resolved through Arbitration, but only by a competent Rent Control Court - asserting that this aspect is one that the Arbitrator alone can answer as per the well accepted doctrine of "Kompetenz - Kompetenz", and under the purlieus of Section 16 of the Act. He thus prayed that this Arbitration Request be allowed and that this Court nominate an Arbitrator as prayed for.

14. I have examined the afore syllogistical contentions of the learned counsel for the parties and have carefully evaluated the materials available on record, particularly Annexure-1 agreement.

15. Even going by the submissions made on behalf of the respondent by Sri.G.Sreekumar, there is no contest that Annexure-1 is a valid agreement and that Clause 27 thereof has been

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entered into by both the parties with full volition.

16. It is also apodictic that Clause 27 of Annexure-1 agreement provides for Arbitration between the parties in case of disputes, since it reads as under:

"27 If any dispute or difference arises between the lessor and lessee during the period of lease or upon the expiry of the said lease both parties shall seek to resolve by mutual discussions. If such discussions are unsuccessful the same shall be referred to arbitration in accordance with the provisions of the Arbitration and conciliation Act, 1996 for the time being in force. Arbitration shall be by a sole arbitrator if parties can agree upon one and failing that the disputes shall be referred to an arbitrator to be selected by the lessor. The arbitration sitting shall be at Kochi."

17. As indited above, the primary submission of Sri.G.Sreekumar is that even if Clause 27 of Annexure-1 agreement is accepted

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to be providing for arbitration of disputes between the parties, the provisions of Section 11(5) of the Act ought to have been first complied with by the respondent, before they could have approached this Court.

18. When Sri.G.Sreekumar vigorously maintains as afore, I became certainly enjoined to examine the forensic perimeter of Section 11(5) of the Act, in the context of unambiguous averment of the petitioner that they had, through Annexure-2 notice, requested the respondent for referring the disputes between them to arbitration, in terms of Annexure-1 agreement; and that the latter had unequivocally refused to it through Annexure-4 reply.

19. Before moving forward, it must be remembered that Section 11 of the Act has been

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proposed to be amended substantially through the Arbitration and Conciliation (Amendment) Act, 2019. However, Section 3 of the said Amendment Act, which proposes amendments to Section 11 of the Act, is yet to be notified and hence, said Section continues as it was prior.

20. The three sub-sections of Section 11, that becomes relevant for the purpose of this Arbitration Request are sub-sections (2), (5), and (6), which, for the aid of immediate reference are reproduced as below:

11(2) Subject to sub-section(6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

11(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other

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party to so agree [the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4)].

11(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

21. A conjoined reading of all the afore

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provisions would limpidly reveal that Section 11(5) of the Act would become attracted only in the cases where an agreement as to the procedure for appointment of an Arbitrator, as referred to in Section 11(2), between the parties has failed. As far as section 11(2) is concerned, the parties are given liberty to enter into an agreement for procedure to appoint an Arbitrator, in which event, Section 11(6) alone would apply and the mandate of the provisions therein will guide the appointment.

22. It must be specifically borne in mind that requirement of waiting thirty days - after the notice seeking appointment of an Arbitrator is made by one party to the other - before approaching this Court, is stipulated only in Section 11(5) of the Act and not in Section 11(6); and that as per the latter, appointment

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is to be accomplished as per the procedure agreed upon by the parties.

23. In the case at hand, when one closely examines clause 27 of Annexure-1 agreement, a clear procedure is stipulated therein as to how the parties must initiate and proceed to arbitration. It is unambiguously mandated therein that, initially, both parties will resolve their disputes by mutual discussions; and that if such discussions are unsuccessful, they will subject themselves to arbitration at the hands of an Arbitrator to be appointed through mutual consent. The said Clause also makes an adscititious provision that if such consent is unable to be arrived at, an Arbitrator shall be appointed by the lessor.

24. It is thus without need for further elaboration that Clause 27 of Annexure-1

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crystally provides for a specific procedure - which has been agreed between the parties - as regards appointment of an Arbitrator. Axiomatically, therefore, the mandate of Section 11(2) of the Act has been satisfied by the stipulations in this Clause; and resultantly, Section 11(5) cannot come into play because, as is evident from its phraseology, the procedure therein is attracted only "*failing any agreement referred to in subsection (2)*".

25. *Quad hoc* the singular facts presented in this case, since I find from Annexure-1 agreement that the parties had agreed on a procedure for appointing an Arbitrator, I cannot find favour with the submissions of Sri.G.Sreekumar that this Arbitration Request - urged under Section 11(6) of the Act - is

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vitiated for the reason of non-compliance of the rigour of Section 11(5) thereof.

26. On the same parity of reasoning, even if the petitioner has projected grounds in this Arbitration Request, under a mistaken notion that the mandate of Section 11(5) is to followed or has been satisfied, it would be of no real consequence, since it is the duty of this Court to affirmatively and conclusively determine if there is an agreement between the parties regarding the procedure for appointment of an Arbitrator and then to apply the correct and applicable sub-section of Section 11 of the Act.

27. That being so concluded, the other question is whether the respondent/lessor can now be allowed to appoint an Arbitrator, because Clause 27 of Annexure-1 agreement so

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provides. The answer to this is now pretty obvious because, subsequent to the amendments to the Act in the year 2016 - through which sub-section (5) was inserted into Section 12 - notwithstanding any agreement to the contrary, any person whose relationship with the parties falls under any of the categories in the seventh Schedule of the Act, is rendered ineligible to be appointed as an Arbitrator. The Hon'ble Supreme Court considered the effect of Section 12(5) of the Act in **TRF limited v. Engineering projects Ltd.** [(2017) 8 SCC 377] and has unreservedly declared that neither a party to the disputes nor a person nominated by it can be appointed as an Arbitrator.

28. It is, therefore, apodictic that this Court will have to disregard the stipulations of Clause 27 of Annexure-1 agreement, to the

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extent to which it allows the lessor to nominate the Arbitrator when the parties fail to arrive at a consensus nominee.

29. The surviving aspect in this case is whether the disputes now raised by the petitioner are capable of being arbitrated under the provisions of the Act. It is the specific case of Sri.G.Sreekumar that the alleged disputes between the parties are one which falls within the jurisdictional realm of the Rent Control Act and, therefore, can only be decided by the competent Rent Control Court. I do not propose to delve into this argument on its merits, or to answer it either way, because, without need for reinstatement, of the law which is now well established, the Arbitrator himself can - under the sanction of Section 16 of the Act - decide whether he has

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the competence to adjudicate; and to rule appropriately on his jurisdiction as regards all or any of the disputes, under the "*kompetenz-kompetenz*" doctrine, which is expressly incorporated into the Act.

30. In the afore circumstances, I deem it appropriate to allow this Arbitration Request and to appoint a sole Arbitrator to consider and resolve the disputes between the parties.

31. At this time, Sri.G.Sreekumar intervened to say that since this Court has been inclined to refer the parties to a sole Arbitrator, his client does not oppose it; but that he is not willing to bear any part of the arbitration fees or expenses, since he is not in a position to do so on account of various factors. Sri.Praveen K.Joy, in response, submitted that if that be so, his client is

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willing to shoulder the entire such burden; but prayed that the Arbitrator be left liberty to make appropriate provisions in the Award.

In summation:

(a) I nominate Sri.D.Pappachan, H.No.43/1979 (Old No.32/1603), Peringattu Road, Opposite Ernakulam Medical Centre, Palarivattom P.O., Kochi - 682 025 as the sole Arbitrator to adjudicate and resolve the disputes and differences between the parties to this case arising from Annexure-1 agreement. Needless to say, he is also at full liberty to rule on his jurisdiction *qua* the whole or any part of the disputes, if the parties so approach him.

(b) The Registry is directed to communicate a copy of this order to the learned Arbitrator within a period of one week from today and to obtain a Statement of Disclosure

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from him under Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996.

(c) Once the Disclosure Statement is obtained from the learned Arbitrator, the Registry shall release the certified copy of this order, with a copy of the said statement appended to it, retaining the original of the same on the files of this case.

(d) The fees of the Arbitrator shall be governed by the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

(e) The petitioner is directed to bear the entire fees and expenses of the arbitration proceedings and the learned Arbitrator will make appropriate provisions for this in his Award, depending upon the final result.

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(f) In order to enable the Arbitrator to commence the proceedings without delay, I direct the parties to mark appearance before him at 11 A.M. on 25.08.2021.

This Arbitration Request is thus allowed.

Sd/-
DEVAN RAMACHANDRAN
JUDGE

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APPENDIX OF AR 105/2020

PETITIONER'S ANNEXURE:

- | | |
|------------|---|
| ANNEXURE-1 | THE TRUE COPY OF THE REGISTERED
AGREEMENT DATED 01.04.2016 |
| ANNEXURE-2 | THE TRUE COPY OF THE LETTER DATED
21.10.2020 |