

Intention Of Parties As To Seat Of Arbitration Can Be Determined From Their Conduct: Kerala High Court

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

N. NAGARESH, J.

A.R. Nos.69, 70, 71 and 77 of 2022; 7 October, 2022

M.A. HAKKIM versus M/S PATANJALI AGRO INDIA PVT. LTD

Petitioner by Advs. Johnson Gomez, Mohamed Sheharan, Viswanath Jayan, Sanjith Johnson Sreedevi S., Dinoop P.D., Sanjay Johnson, John Gomez, S. Biju (Kizhakkanel)

Respondents: by advs. Raghul Sudheesh, K.J. Glaxon, J. Lakshmi, Bini Das

ORDER

The petitioners in these four Arbitration Requests entered into Ext.P1 Sales Contracts with the 1st respondent for sale of raw cashew nuts. They later entered into a mutually acceptable High Sea Sale Agreements (Ext.P2) whereunder the respondents sold to the petitioners certain quantity of net weight raw cashew nuts in shell at specified rate. The 1st respondent issued invoices to the petitioners for the amount payable. The petitioners took delivery of original shipping documents.

2. The petitioners state that it was agreed that quality inspection was to be done by RBS Maritime Services. The designated agency took samples from Tuticorin and found that the cashew nuts were of low quality and submitted Annexure-A4 inspection reports. The petitioners therefore issued debit notes. The 1st respondent sent e-mail communication stating that the reports of the RBS Maritime Service are null and void as regards quality and admitting liability for short weight.

3. Though the Broker of the 1st respondent initially agreed to resolve the issue, later he repudiated the claim. The 1st respondent then issued a notice alleging contractual violation and making monetary claims with 12% interest. The petitioners issued Annexure-A7 reply denying the allegations made by the 1st respondent. Thereafter, in accordance with the terms contained in Annexure-A2, the petitioners proposed to appoint Sri. E. Francis as the Sole Arbitrator, as per Annexure-A8 notices. The respondents have not responded to Annexure-A8.

4. Hence, the petitioners have invoked Section 11(5) of the Arbitration and Conciliation Act, 1996 to arbitrate the dispute between the petitioners and the respondents.

5. The 1st respondent entered and contested the Arbitration Requests. The 1st respondent submitted that there is no entity named Patanjali Agro Pvt. Ltd. and impleading such an entity as 2nd respondent is unwarranted. The 1st respondent submitted that this Court has no jurisdiction to entertain the Arbitration Requests. The claims of the petitioners are bogus.

6. The 1st respondent contended that in view of Clause 4 of Ext.P1 Sales Contract, it is mandatory that when a third party inspection is made, the same be made in the presence of the 1st respondent. Therefore, the inspection, if any, made at the instance of the petitioners is not binding on the 1st respondent.

7. The 1st respondent further argued that as per Clause 10 of Ext.P1 Sales Contracts, the resolution of any disputes between the parties shall be through arbitration and the seat of arbitration shall be Haridwar. The Sales Contracts are subject to High Sea Sale

Agreements. Only the terms of the Sale Contracts and not the terms of the High Sea Sale Agreements shall be attracted.

8. The 1st respondent relied on the judgment of the Apex Court in ***Mankastu Impex Private Limited v. Airvisual Limited*** [(2020) 5 SCC 399] and contended that the question of seat of arbitration is all about which court would have the supervisory power over the arbitration proceedings. As the seat of arbitration is Haridwar, beyond the territorial limits of Kerala, this Court has no jurisdiction to entertain the Arbitration Requests, contended the 1st respondent.

9. Heard.

10. The prime defence raised by the 1st respondent against the Arbitration Requests made by the petitioners is that as per Ext.P1 Sales Contracts, the seat of arbitration is Haridwar and hence Arbitration Requests are not maintainable before this Court. The petitioners would submit that as per Ext.P2 High Sea Sale Agreements executed by the 1st respondent, the seat of arbitration is Kollam, in Kerala and hence the seat of arbitration proceedings should be Kollam. This Court has hence jurisdictional competence to appoint Arbitrator.

11. Contracts are to be interpreted according to their purpose. The purpose of contract is the interest, objectives and values that the contract is designed to actualise. It comprises joint interest of the parties. The Hon'ble Apex Court has held in ***DLF Universal Ltd. and others v. Director, T and C Planning Haryana and others*** [(2010) 14 SCC 1] that consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of the contract primarily by the joint intent of the parties. It is not the intent of a single party.

12. In these Arbitration Requests, the 1st respondent first issued Ext.P1 Sales Contracts to the petitioners. Clause 10 thereof provided that all disputes arising are to be settled via arbitration under the Indian Arbitration Act and under Haridwar jurisdiction only. But, it was made clear in the Sales Contracts that those contracts are contingent upon signing of mutually acceptable High Sea Sales Agreements.

13. Thereafter, the parties entered into Ext.P2 High Sea Sales Agreements. Clause 10 of the High Sea Sales Agreements provided that Arbitration shall be held at Kollam and the proceedings shall be in English language. As the initial Sales Contracts were specifically made contingent upon signing of "mutually acceptable" High Sea Sales Agreements and the subsequently executed and "mutually acceptable" High Sea Sales Agreements specified that arbitration should be held at Kollam, the joint intent of the parties can only be taken as one deciding that the seat of arbitration should be Kollam.

14. The Hon'ble Apex Court in the judgment in ***Mankastu Impex Private Limited v. Airvisual Limited*** [(2020) 5 SCC 399] has held that the intention of the parties as to the seat of arbitration should be determined from other clauses in the agreement and the conduct of the parties. The fact that the initial Sales Contract was made contingent upon mutually acceptable High Sea Sales Agreement to be entered into and the fact that the subsequent High Sea Sales Agreement signed by the parties stipulated that the arbitration should be held at Kollam, would show that joint intention of the parties was to fix the seat of arbitration as Kollam.

15. Other grounds raised by the 1st respondent in the counter affidavit relate to factual aspects and conduct of parties, which can be looked into by Arbitrator and does not deserve adjudication in these proceedings. In the facts of the case, the petitioners in the Arbitration Requests are entitled to relief.

16. The Arbitration Requests are therefore ordered as follows:

- (i) Mr. Sundaram Govind (Retired District Judge) is appointed as the sole Arbitrator, to arbitrate upon the disputes that have arisen between the applicant and the respondent arising out of Annexure-A1 and Annexure-A2.
- (ii) The learned Arbitrator is at liberty to rule on his own jurisdiction, if the parties raise such a dispute.
- (iii) The Registry is directed to communicate a copy of this order to the learned Arbitrator within a period of ten days from today and to obtain a Statement of Disclosure from the learned Arbitrator as provided under Section 11(8) read with Section 12(1) of the Act.
- (iv) Once the Disclosure Statement is obtained from the learned Arbitrator, the Registry shall issue the certified copy of this order to the learned Arbitrator, with a copy of the said statement appended to it, retaining the original of the same by this Court.
- (v) The fees of the learned Arbitrator shall be governed by the Fourth Schedule of the Act.
- (vi) The learned Arbitrator shall decide the manner in which the fees and expenses of the arbitration proceeding has to be paid by the parties.
- (vii) The parties will appear before the learned Arbitrator on such date and place as decided by the learned Arbitrator.
- (viii) All contentions of the parties are left open to be raised before the learned Arbitrator.

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