

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 5TH DAY OF JANUARY 2015/15TH POUSHA, 1936

AR.No. 53 of 2012

PETITIONER(S):

**MFAR REALTORS PVT. LTD.,
N.H.47 BYPASS, KUNDANNUR JUNCTION, MARADU P.O.,
COCHIN-682 304, REPRESENTED BY ITS DIRECTOR.
M.M.ABDUL BASHEER.**

**BY SRI.U.K.RAMAKRISHNAN, SENIOR ADVOCATE
ADVS. SRI.E.K.MADHAVAN
SMT.P.VIJAYAMMA
SRI.V.KRISHNA MENON
SRI.P.J.ANILKUMAR**

RESPONDENT(S):

**CPG CONSULTANTS (INDIA) PVT. LTD.,
21/30, PRESIGE CRAIG HOUSE, CRAIG PARK LAYOUT,
BANGLORE - 560 001,
REPRESENTED BY ITS MANAGING DIRECTOR.**

BY ADV. SRI.S.KRISHNAMOORTHY

**THIS ARBITRATION REQUEST HAVING BEEN FINALLY HEARD ON
05-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S)' ANNEXURES:

**ANNEXURE A: TRUE COPY OF THE CONSULTANCY AGREEMENT DATED 20.2.2008
EXECUTED BETWEEN THE PETITIONER AND THE RESPONDENT.**

**ANNEXURE B: TRUE COPY OF THE LETTER DATED 12.9.2011 ISSUED BY THE
PETITIONER TO THE RESPONDENT TERMINATING THE AGREEMENT.**

**ANNEXURE C: TRUE COPY OF THE LETTER DATED 27.9.2011 RECEIVED FROM THE
RESPONDENT.**

**ANNEXURE D: TRUE COPY OF THE LETTER DATED 5.5.2012 SEND BY THE
PETITIONER TO THE RESPONDENT.**

**ANNEXURE E: TRUE COPY FO THE LETTER DATED 17.8.2012 RECEIVED FROM THE
RESPONDENT.**

**ANNEXURE F: TRUE COPY OF THE LETTER DATED 30.8.2012 ISSUED TO THE
RESPONDENT.**

**ANNEXURE G: TRUE COPY OF THE LETTER DATED 14.9.2012 RECEIVED FROM THE
RESPONDENT.**

**ANNEXURE H: TRUE COPY OF THE LETTER DATED 19.9.2012 RECEIVED FROM
MR.AVISHEK KUMAR.**

**ANNEXURE I: TRUE COPY OF THE LAWYER NOTICE DATED 27.9.2012 ISSUED TO
MR.AVISHEK KUMAR.**

**ANNEXURE J: TRUE COPY OF THE LETTER DATED 31.10.2012 SENT BY THE
RESPONDENT TO THE PETITIONER.**

**ANNEXURE K: TRUE COPY OF THE LAWYER NOTICE DATED 20.11.2012 ISSUED TO
THE RESPONDENT.**

RESPONDENT(S)' ANNEXURES:

NIL

//TRUE COPY//

P.S.TO JUDGE

Msv/

P.BHAVADASAN, J.

Arbitration Request No.53 OF 2012

Dated this the 5th day of January, 2015.

O R D E R

This is a petition filed under Section 11(5) of the Arbitration & Conciliation Act, 1996 (Act 26 of 1996) seeking appointment of a Sole Arbitrator by this Court.

2. The facts absolutely necessary for the disposal of the petition are as follows:

The petitioner-Company who is engaged in the development of Villas sought services of the respondent-Company for providing master plan, schematic infrastructure plan, architectural and civil structural engineering, design service etc. and entered into Annexure A agreement. Though plan was submitted by the respondent, it was found not in terms of the agreement entered into between the parties and therefore, two bills submitted by the respondent were not honoured by the petitioner. In a meeting held on 17.06.2011, the respondent-Company agreed to provide a revised plan and design. There was another meeting on

21.07.2011 wherein same assurance was given but no compliance was done by the respondent-Company. In the meanwhile, in the second meeting held on 21.07.2011, the petitioner-Company, requested the respondent to do certain additional structures which was also acceded to by the respondent-Company. For the purpose of doing such additional works, a modified agreement was required to be entered into between the parties and it is claimed by the petitioner-Company that they had sent a draft to the respondent-Company for approval on 28.07.2011. It was also averred that they had paid Rs.43,68,000/- as good will on 02.08.2011. However, contrary to the expectation of the petitioner-Company, there was no approval of the draft by the respondent-Company and that caused issuance of Annexure B notice by the petitioner-Company. A reply was received from the respondent-Company which is produced as Annexure C. In Annexure C reply, the respondent-Company claimed to have adjusted the amounts paid by the petitioner-Company towards two bills which they had submitted on earlier occasions.

3. While things stood so, attempts were made to reconcile the dispute between the parties but without success. That necessitated the petitioner-Company to initiate the arbitration clause contained in Annexure A agreement. They informed the respondent-Company about the appointment of Justice K.Narayana Kurup (Retd.) as their Arbitrator and sought concurrence from the respondent. The respondent did not respond for a while. Annexure D notice was sent on 05.05.2012 by the petitioner-Company calling upon the respondent-Company to respond. To Annexure D notice, Annexure E reply was sent. Ultimately, the respondent-Company informed about the appointment of an Advocate from Delhi as their nominee as Arbitrator and therefore it is claimed that they have complied with their part of the agreement.

4. The controversy that arises for consideration is whether more than one Arbitrator can be appointed and if so, what is the procedure to be followed.

5. Fortunately for this Court, there is no dispute regarding the arbitrability of the dispute or regarding the clause for

arbitration that is available for the parties in case there is any dispute. Relevant clauses in Annexure A agreement are clauses 13.2 and 13.4 which read as follows:

“13.2. If representatives of the Parties cannot resolve a Dispute within thirty (30) days, each Party shall have the right to submit the Dispute to be settled by arbitration.

13.4. The arbitration proceedings shall be completed within a period of six months from the date of referring the dispute. It is further agreed that the Arbitral tribunal, if deemed necessary by them, extend the time for making the award and the parties hereto specifically consent and agree and confer on the arbitrators the right and power to extend the period of making the award as aforesaid”.

6. Sri.U.K. Ramakrishnan, learned Senior Counsel appearing for the petitioner, relying on Sections 10 and 11 of Act 26 of 1996 contended that in the absence of any stipulation of number of arbitrators in the arbitration agreement, going by the scheme of the Act, only a sole arbitrator can be appointed. Reliance placed by the respondent on the words 'them' and 'arbitrators' in clause 13.4 of Annexure A already extracted cannot be of any use

to the respondent to contend for the position that more than one arbitrator can be appointed. In support of his contention, learned Senior Counsel relied on the decisions in **M.M.T.C Limited** vs. **Sterlite Industries (India) Ltd.** (AIR 1997 Supreme Court 605) and in **Sime Darby Engineering SDN.BHD** vs. **Engineers India Limited** ((2009) 7 Supreme Court Cases 545). Learned counsel went on to contend that as long as clause 13.2 of Annexure A agreement already referred to makes mention of only the fact that the dispute that may arise between the parties shall be resolved by arbitration, it cannot have the meaning of enabling the parties to appoint more than one arbitrator unless it is specified as stipulated in Section 10 of the Act.

7. Sri.S.Krishnamoorthy, learned counsel appearing for the respondent, on the other hand, contended that even assuming that clause 13.2 of Annexure A does not make mention of appointment by each of the parties of an arbitrator, that infirmity is cured by the words in clause 13.4 of Annexure A which has already been referred to thereby indicating that the arbitration agreement entered into between the parties envisages arbitrators

being appointed by each one of the parties. On the facts of the case, according to the learned counsel, it cannot be said that Section 11(5) of the Arbitration and Conciliation Act, 1996 is applicable. It is Section 11(6) of the Act that is applicable to the facts of the case. It is therefore emphasised that the contention raised by the learned counsel for the petitioner that there can be only sole arbitrator cannot be countenanced.

8. Before going into the question as to whether more than one arbitrator can be appointed on the facts of the case, it will be useful to refer to the definition of Arbitral Tribunal as contained in Section 2(d) of Arbitration and Conciliation Act, 1996. Section 2(d) defines 'Arbitral Tribunal' as follows:

“2(d): “arbitral tribunal” means a sole arbitrator or a panel of arbitrators”.

9. It is evident from the above definition that the Tribunal constituted under the Act contemplates a sole arbitrator or panel of arbitrators. That there is arbitration agreement in the case as contained in Section 7 of the Act is not in dispute. The next relevant provision is Section 10 of the Act which reads as follows:

“10. Number of arbitrators.-(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator”.

10. Section 10 of the Act provides that the parties are at liberty to determine the number of arbitrators. But the provision says that the number so determined by the parties shall not be an even number. It also stipulates that in case the parties did not specify the number of arbitrators as mentioned in clause (1) of Section 10, arbitration shall be conducted by the sole arbitrator.

11. Section 11 of the Act deals with appointment of arbitrators. One may not be very much concerned with Sections 11(1) and 11(2) of the Act. Section 11(3) of the Act says that if the number of arbitrators chosen by the parties is three, each party shall appoint one arbitrator and those two arbitrators so appointed shall appoint the third arbitrator who in fact shall act as empire. As far as clause 5 of Section 11 of the

Act is concerned, it deals with the case in which arbitration is conducted by sole arbitrator. The provision provides that in case arbitration is to be conducted by 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 party, the former party may approach the High Court for appointment of sole arbitrator. Section 11(6) of the Act deals with the case covered by Section 11(3) of the Act.

12. The question that arises for consideration is as long as the number of arbitrators to constitute arbitration tribunal as in the case on hand is not seen mentioned in the clauses referred to above, can the words which have been extracted earlier lead to the conclusion that the arbitration clause envisages appointment of arbitrator by each one of the parties and two arbitrators so appointed are competent to elect an arbitrator or empire as the case may be.

13. Going by the terms 'them' and 'arbitrators' contained in clause 13.4 of Annexure A already extracted, they may suggest that the parties envisaged more than one arbitrator. But the Apex

Court had occasion to consider a situation almost a similar case where the word 'arbitrators' was used in the latter clause where as in the clause stipulated in the agreement for arbitration, there is no such specification.

14. Before going into that, the decision rendered in **M.M.T.C Limited** vs. **Sterlite Industries (India) Ltd.** (AIR 1997 Supreme Court 605) can be referred to. That was a case where arbitration agreement provided that each one of the parties is competent to nominate an arbitrator. That meant that there were two arbitrators to be nominated by the parties. Contention was raised before the Apex Court that such a clause is invalid in view of Section 10 of the Act which says that the parties are free to determine the number of arbitrators and that number cannot be an even number. Since the clause in the arbitration agreement specifies the number of arbitrators, it cannot be given effect to. The Apex Court repelled the contention and held that merely because the clause provided that each one of the parties could nominate an arbitrator will not make the clause invalid. But it only means that two persons will

have to elect a third party as empire. The Apex Court, in paragraphs 8 and 9 of the above decision, held as follows:

“8. Sub-section (3) of Section 7 requires an arbitration agreement to be in writing and sub-section (4) describes the kind of that writing. There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General.

9. Section 10 deals with the number of arbitrators. Sub-section (1) says that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Sub-section (2) then says that failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator. Section 11 provides for appointment of arbitrators. This is how arbitral tribunal is constituted”.

15. But in a case decided by the Apex Court i.e. in **Sime Darby Engineering SDN.BHD vs. Engineers India Limited** ((2009) 7 Supreme Court Cases 545), relevant clause reads as follows:

“12. Learned counsel for the petitioner submitted that admittedly the arbitration clauses in the contract which govern the rights of the parties in the matter of arbitration are as follows:

“12.1 This sub-contract shall be governed by and construed in accordance with the laws of India. The courts at Delhi shall have sole jurisdiction.

12.2 The parties shall endeavour to resolve any dispute or difference amicably through joint negotiation and when necessary by reference to the Chief Executive of EIL and SSE. If any dispute or difference, which cannot be mutually resolved by the parties, the same shall be referred to arbitration in accordance with the provisions contained in the Indian Arbitration and Conciliation Act, 1996 which is generally in accordance with the UNCITRAL Rules.

12.3 The arbitrator(s) shall give reasoned award in respect of each dispute or difference referred to him. The award as aforesaid shall be final, conclusive and binding on all the parties of this sub-contract in accordance with the law.

12.4 The venue of the arbitration shall be at New Delhi, India”.

By relying on Clause 12.2, learned counsel for the petitioner submitted that the said clause does not indicate about the number of arbitrators to be appointed while reciting that the matter be referred to arbitration in accordance with the provisions contained in the Indian Arbitration and Conciliation Act, 1996, which is generally in accordance with the UNCITRAL Rules”.

16. Like the case on hand, in that case also, as contemplated under Section 10 of the Act, there was no stipulation of the number of arbitrators to constitute arbitral tribunal. But, strength was drawn from the word 'arbitrators' contained in clause 12.3 extracted above to contend for the position that the plural used indicate that each of the parties could nominate an arbitrator of its own and those two parties can chose a third party as empire. The above contention did not find favour with the Apex Court. Even though it was contended that going by the terms of the agreement and also Sections 10(1) and 10(2) of the Act, appointment of panel of three arbitrators cannot be ruled out, observing that the clause relating to arbitration is

silent about the number of arbitrators, the Apex Court went on to hold that the word 'arbitrators' used in the subsequent clause cannot be taken to mean that each of the parties can nominate an arbitrator of its own and two arbitrators so nominated can nominate a third person as umpire. It was held in paragraph 29 as follows:

"29. Insofar as reference to the expression "arbitrator(s)" in Clause 12.3 is concerned, the same does not in any way affect the intention of the parties in Clause 12.2. It is noted in this connection that the parties have freedom to change the number of arbitrators even after the contract has been entered and by mutual consent the parties may amend the contract. If that takes place, in such an eventuality Clause 12.3 provides that the arbitrator or arbitrators have to give reasoned award in respect of each dispute and difference referred. Here also the expression which has been used is "him" which also points to a sole arbitrator".

17. It was very vehemently contended on behalf of the respondent that in the case on hand, going by the facts and situation, it cannot be taken that the parties intended a sole arbitrator to resolve the dispute between them. The case is to be

governed by Sections 11(3) and 11(6) of the Act.

18. It is difficult to accept the above contention in view of the decision in **Sime Darby Engineering SDN.BHD** vs. **Engineers India Limited** ((2009) 7 Supreme Court Cases 545). Section 10 of the Act is very specific and clear and it leaves one in no doubt that though the parties are at liberty to choose the number of arbitrators, the number will have to be specified in the agreement itself. Unless it is so done, the arbitration envisaged by the parties will be done only by sole arbitrator. The contention that there cannot be a sole arbitrator cannot be countenanced for more than one reason. The definition of 'arbitral tribunal' has already been referred to. If any support in this regard is required, that is provided by Section 11(5) of the Act. Therefore, it is not the law that there cannot be a sole number constituting arbitral tribunal. Complying with the principles laid down in the decision in **Sime Darby Engineering SDN.BHD** vs. **Engineers India Limited** ((2009) 7 Supreme Court Cases 545), it is necessarily to be held that arbitral tribunal in this case can consist of only a sole number.

19. The question then arises is the appointment of arbitrator. The parties were in consensus that this Court may appoint an arbitrator and that arbitrator may resolve the dispute.

In the result, this petition is allowed and the request is accepted on record and Justice T.V.Ramakrishnan (Retd) is appointed as Arbitrator and the arbitral tribunal is free to fix the fees and the Award shall be passed as expeditiously as possible, at any rate, within a period of six months from the date of entering into arbitration.

**P.BHAVADASAN
JUDGE**

smp