

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

TUESDAY, THE 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

OP(C).No. 821 of 2015 (O)

O.P(ARB)NO.87/2012 OF III ADDITIONAL DISTRICT COURT, KOLLAM

PETITIONER(S) :

**M/S.CHI COMMODITIES HANDLERS INC.,
3950 14TH AVENUE, SUITE 504, MARKHAM,
ONTARIO L 3R 0A9, CANADA,
REP. BY ITS AUTHORISED SIGNATORY, ANILKUMAR S.,
S/O.DR.SREEDHARAN, 237, 13TH STREET,
GIRINAGAR, KADAVANTHRA PO, COCHIN-682 020.**

BY ADV. SRI.T.R.ASWAS

RESPONDENT(S):

**RANJITH LAL,
PROPRIETOR, M/S.MAHAVISHNU CASHEW FACTORY,
EDAVATTOM, KOLLAM-691 505.**

**BY SRI.E.K.NANDAKUMAR (SENIOR ADVOCATE)
ADVS. SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURYAN THOMAS**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 03-09-2015,
ALONG WITH OP(C).No.903 OF 2015 AND CONNECTED CASES,
THE COURT ON 06-10-2015 DELIVERED THE FOLLOWING:**

Msd.

OP(C).No. 821 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS :

- EXT P1 : TRUE COPY OF FIVE INTERNATIONAL COMMERCIAL CONTRACTS
EXECUTED BETWEEN PARTIES.**
- EXT P2 : TRUE COPY OF FOREIGN ARBITRATION AWARD PASSED BY
AFI, USA.**
- EXT P3 : CERTIFICATE ISSUED BY AFI DATED 16.01.2013.**
- EXT P4 : TRUE COPY OF PRELIMINARY OBJECTION FILED QUESTIONING
MAINTAINABILITY OF O.P(ARB)NO.87/12.**
- EXT P5 : TRUE COPY OF JUDGMENT DATED 09.03.2003 IN OP(C).No.1390/13.**
- EXT P6 : IMPUGNED ORDER DATED 12.03.2015 IN O.P(ARB) NO.87/12 OF
IIIRD ADDL. DISTRICT COURT, KOLLAM.**

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

“C.R.”

A.MUHAMED MUSTAQUE, J.

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**O.P.(C).Nos.821/2015, 903/2015, 904/2015 &  
905/2015**  
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Dated this the 6th Day of October, 2015

J U D G M E N T

These original petitions are arising from the orders passed by the District Court, Kollam rejecting preliminary objection raised by the petitioners on the maintainability of Original Petitions (Arbitration) filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the “Arbitration Act, 1996”). Since common questions of law are involved in all these original petitions, the same are being disposed of by this common judgment.

2. The petitioners in all these original petitions are one and the same, namely, a Canadian entity, which has raised a claim against the respondents invoking Arbitration clause in accordance with the Arbitration procedure of the Association of Food Industries (Inc.) (for short, “AFI”). The relevant clause of Arbitration is as follows:

“Any controversy or claim arising out of or relating to this contract or breach thereof shall be settled by Arbitration in New

York, NY, by the Association of food industries in Inc in accordance with its rules and judgment.”

Accordingly, an Award has been passed in the matter by the Arbitrators of AFI.

3. The respondents, who are based at Kollam, filed the original petitions under Section 34 of the Arbitration Act, 1996 to set aside the Award before the District Court, Kollam. The petitioner raised preliminary objection against maintainability of the original petitions. According to the petitioner, the Award in question is a Foreign Award and Part-I of the Arbitration Act, 1996 would not apply.

4. The learned Additional District Judge, following the judgment of this Court in **International Nut Alliance LLC v. Binu John [2014 (3) KLT 355]** took the view that maintainability cannot be decided by piece meal adjudication without affording parties an opportunity to adduce evidence. Therefore, the issue regarding maintainability has been relegated for a decision along with final determination of the original petitions.

5. Heard Shri T.R.Aswas for the original petitioner and Shri Gopikrishnan Nambiar for the respondents.

6. Part-I of Arbitration Act, 1996 would apply only in respect of Domestic Award. Part-II of the Act provides enforcement of certain Foreign Awards. In the light of the order passed by the Additional District Judge, the first question that arises is whether the issue relating to maintainability can be decided at the threshold without recourse to the evidence. Second question that arises for consideration is whether the Award in question is a Foreign Award or not.

7. In regard to the first question, this Court is of the view that the matter does not require a probe by evidence. It is a purely construction of the Arbitration clause in relation to the contract. The court below cannot enlarge the scope of the Arbitration agreement by allowing parties to adduce evidence. When an Award is called in question, it has to be decided with reference to the law that would apply to the Arbitration agreement. The Arbitration agreement may consist of, law in relation to Arbitration (governing law), law in relation to procedure of Arbitration (curial law) and the law in relation to the contract (substantial law).

8. The Arbitration agreement as afore-noted clearly indicates the law relating to Arbitration and the procedure of the Arbitration. It is categorically stated in the agreement that the Arbitration is governed by the law of New York and the procedure in relation to rules and regulations of

the Arbitration are in accordance with the AFI. It does not state anything about the governing law of the contract. The question is, even if its governing law of contract is Indian law, would it be suffice to hold, to treat it as a Domestic Award governed by Part-I of Arbitration Act, 1996.

9. In **Bharat Aluminium Company v. Kaiser Aluminium Technical Service (INC)** [(2012) 9 SCC 552], it was held by the Hon'ble Supreme Court as follows:

“In view of the above discussion, we are of the considered opinion that the [Arbitration Act](#), 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. [Section 2\(2\)](#) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in, [Arbitration Act](#) 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.”

10. In **Videocon Industries Ltd. v. Union of India and another** [(2011) 6 SCC 161], the Hon'ble Supreme Court at para.33 held as follows:

“In the present case also, the parties had agreed that notwithstanding [Article 33.1](#), the Arbitration agreement contained in [Article 34](#) shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act.”

11. In **Sakuma Exporters Limited v. Louis Dreyfus Commodities Suisse SA** [(2015) 5 SCC 656], the Hon'ble Supreme Court held that in view of the specific provision expressly incorporating that governing law of disputes, Arbitration and contract are English law, Part-I of the Arbitration Act, 1996 would not apply.

12. The Hon'ble Supreme Court also considered the issue relating to the law governing Arbitration in relation to International commercial Arbitration in a Foreign Country in **Yograj Infrastructure Limited v. Ssang Yong and Engineering and Construction Company Limited** [(2011) 9 SCC 735]. In the above case, the parties also have, apart from agreeing to be governed by Arbitration and as far as the procedure under Singapore International Arbitration Centre Rules, 2010 (for short, the “SIAC Rules”), it is also agreed that the agreements shall be subject to laws of India. The Hon'ble Supreme Court held that since Arbitration law that would apply is

that of SIAC Rules, the same would shut out applicability of Part-I of Arbitration Act, 1996.

13. In **Reliance Industries Limited and Another v. Union of India [(2014) 7 SCC 603]**, it was held by the Hon'ble Supreme Court that once the parties consciously agree that the juridical seat of Arbitration would be London and that the Arbitration agreement will be governed by laws of England, the provisions of Part-I of the Arbitration Act, 1996 would not apply.

14. An Arbitration Award will be considered as a Domestic Award, if the same is made in accordance with Part-I of the Arbitration Act, 1996 [See Section 2(7)]. Section 34 of Chapter-VII is a part of Part-I of the Arbitration Act, 1996. Thus, any Award of Part-I is referred as a Domestic Award. The Domestic Award necessarily implies that the Arbitration agreement to be governed by the domestic law. Any Arbitration agreement to be governed by a Foreign law has to be treated as a Foreign Award.

15. The Arbitration agreement in this case clearly spells that Arbitration is to be governed by the law of New York and procedure of AFI. When parties consciously agree that Arbitration law is that of a Foreign Country, the Award can only be construed as a Foreign Award. The Arbitration in such circumstances held in Foreign Country cannot be

considered as a mere Award, based on venue of the Arbitration. The substantial law relating to Arbitration would determine whether the Arbitration Award is to be governed by law of the domestic or that of a Foreign Country.

16. Even assuming that the parties have agreed that the contract would be governed by Indian law, it may not have much significance as far as the jurisdiction of Indian Courts are concerned, as it would only operate as a contract as far as the parties are concerned in a Foreign Country. The substantial law of contract cannot determine jurisdiction of the Arbitration agreement. Express or implied choice of Arbitration law governing the Arbitration agreement is decisive in determining the jurisdiction. The parties to an Arbitration agreement is free to have an agreement governed by the law of jurisdiction, different from the law governing the performance of the substantive terms and conditions of the contract. The Arbitration agreement is unique and different from the agreement on law relating to contract. It is separable and distinct from the contract wherein it is found.

17. To sum up above discussions, the Court must inquire into, to determine the proper law of Arbitration as follows:

i) whether the parties have expressly or impliedly agreed to be governed by the law relating to Arbitration;

ii) in the absence of any express or implied choice, the law that has proximate relation to the Arbitration agreement has to be considered; to determine this, the law relating to the contract also can be relied upon or looked into.

18. The proper law of Arbitration is the proper law governing Arbitration. It is only in the absence of any prescription on law relating to Arbitration agreement, any agreement governing the contract would have an impact or influence in determining law of Arbitration.

19. As noted in the aforesaid paragraphs, parties have agreed that the Arbitration law is that of New York. In such circumstances, this Court is of the view that the Arbitration Award is a Foreign Award and the same cannot be challenged invoking Part-I of the Arbitration Act, 1996. This Court is also of the view that the court below failed to exercise jurisdiction vested with it, warranting exercise of power of superintendence under Article 227 of the Constitution by this Court.

20. In the result:

These original petitions are allowed holding that the original petitions filed by the respondents before the Additional District Court, Kollam are not maintainable and the impugned orders are set aside. The original petitions

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filed by the respondents before the Additional District Court, Kollam are dismissed as not maintainable.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

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