IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

FRIDAY, THE 25TH DAY OF MARCH 2022 / 4TH CHAITHRA, 1944

ARB.A NO. 34 OF 2011

AGAINST THE ORDER DATED 13.12.2010 IN ARB. O.P.No.1906 of 2008 OF I ADDITIONAL DISTRICT COURT, ERNAKULAM

APPELLANT/1ST RESPONDENT:

M/S. BATIVALA AND KARANI,
UNION BANK BUILDING, DALAL STREET,FORT,
MUMBAI-400001, REPRESENTED BY ITS MANAGER
V.H.BHAT, SRIHARI, VIII/937, SHANTHINAGAR ROAD,
KOOVAPADAM, KOCHI-682002.

BY ADV SRI.DINESH MATHEW J.MURICKEN

RESPONDENTS/PETITIONER & 2ND RESPONDENT:

1 **K.I. JOHNY, PROPRIETOR, JOHNY & CO.,**
KOLLANNUR HOUSE, M.O.ROAD, KUNNAMKULAM-680503.

2 **M/S.COCHIN STOCK EXCHANGE LTD.38/1431**
VEEKSHANAM ROAD, ERNAKULAM, KOCHI-682035,,
REPRESENTED BY ITS PRESIDENT.

BY ADVS.
SRI.GEORGE ZACHARIAH ERUTHICKEL FOR R2
SRI.SANTHEEP ANKARATH FOR R1

THIS ARBITRATION APPEALS HAVING COME UP FOR ADMISSION ON 25.03.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Arbitration Appeal No.34 of 2011

Dated this the 25th day of March, 2022

JUDGMENT

P.B.Suresh Kumar, J.

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (the Act) is directed against the order dated 13.12.2010 in Arbitration O.P. No.1906 of 2008 on the files of the Court of the District Judge, Ernakulam. The appellant was the first respondent in the said proceedings.

2. The first respondent is a member of the second respondent, M/s.Cochin Stock Exchange Ltd. and was carrying on business as share broker in the name of his proprietory concern. The appellant availed the services of the first respondent for purchase and sale of shares through the second respondent. A dispute arose between the appellant and the first respondent concerning the transactions effected by the first respondent on behalf of the appellant. Disputes of

this nature, in terms of the provisions contained in the Memorandum and Articles of Association of the second respondent, are to be adjudicated by recourse to arbitration by an arbitral tribunal constituted by the second respondent. An arbitral tribunal was therefore constituted by the second respondent on the request of the parties to resolve the dispute and the arbitral tribunal passed an award directing the first respondent to pay to the appellant a sum of Rs.36,72,180.56/- with interest. The award was challenged by the first respondent in court in Arbitration O.P.No.33 of 1999 invoking Section 34 of the Act. The Court set aside the award on grounds that the arbitral tribunal was not one properly constituted and that the first respondent was not given proper notice in the arbitral proceedings. Thereupon, the appellant required the second respondent to constitute an arbitral tribunal again for resolving the dispute afresh and a new arbitral tribunal was accordingly constituted for the said purpose. Even though notice was issued by the newly constituted arbitral tribunal to the first respondent, he has not chosen to contest the claim of the appellant. Having regard to the materials on record, the newly constituted arbitral tribunal

also passed an award permitting the appellant to realise Rs.36,72,580/- with interest from the first respondent. That award was challenged by the first respondent in Arbitration O.P. No.1906 of 2008 on the ground that in the light of the order in Arbitration O.P.No.33 of 1999, the proceedings which culminated in the award impugned is unsustainable in law being one hit by the principles of *res judicata*. The court accepted the said plea of the first respondent and set aside the award on that ground as per the order impugned in the appeal. The appellant is aggrieved by the said decision of the court below.

3. Heard the learned counsel for the appellant as also the learned counsel for the respondents.

4. At the outset, it was pointed out by the learned counsel for the appellant that the limited jurisdiction vested in the court in terms of the provisions of the Act is only to ensure that arbitral awards do not suffer from the errors mentioned in Section 34 of the Act. The court cannot, in terms of the provisions of the Act, correct all the errors in the arbitral awards by modifying the same or by remitting the references to the arbitral tribunal for fresh adjudication, it was pointed

out. It was argued by the learned counsel that the scheme of the Act is that if the court finds that an award suffers from any of the errors mentioned in Section 34, the award is liable to be set aside, leaving the parties to begin the arbitration afresh, if they choose to do so. It was submitted by the learned counsel that insofar as the award passed by the arbitral tribunal initially constituted was set aside only on grounds that the constitution of the arbitral tribunal was not proper and that there was no proper notice in the said proceedings to the first respondent, there was no impediment in law for the appellant to initiate proceedings afresh for resolving the dispute and the said proceedings cannot be said to be hit by the principles of *res judicata*. It was also submitted by the learned counsel that the impugned order was passed by the court below without taking note of the fact that the earlier award was set aside by the court on the ground that the constitution of the arbitral tribunal was not proper also. Similarly, it was submitted by the learned counsel that it is on an incorrect understanding as to the scope of the provision contained in Section 34(4) of the Act, the court below happened to hold that the proceedings which culminated in the impugned award was hit by the

principles of *res judicata*. According to the learned counsel, Section 34(4) of the Act does not have any application in a case of this nature. Insofar as it was found that the earlier award was passed by an incompetent arbitral tribunal, at any rate, the plea of *res judicata* does not apply to the arbitral proceedings culminated in the latter award.

5. Per contra, the learned counsel for the first respondent submitted that after the first round of arbitration, the second respondent required the first respondent to nominate his arbitrator to resolve the dispute afresh and he has responded to the said requirement pointing out that in the light of the order in Arbitration O.P.No.33 of 1999, the arbitration agreement does not survive. It was also submitted by the learned counsel that even though he was informed later by the second respondent that the appellant has nominated one K.Aravindaksha Menon initially and one K.R.Krishnan later as Arbitrators on his side, the award is seen passed by Justice K.John Mathew. It was argued by the learned counsel that there was no notice to him concerning the appointment of Justice K.John Mathew as the Arbitrator in the matter. According to the learned counsel, the arbitral award, in the circumstances, was

liable to be set aside under Section 34(2)(a)(iii) of the Act as well. It was also argued by the learned counsel that in terms of the bylaws of the second respondent binding on both the appellant and the first respondent, disputes of the instant nature are to be resolved by an Arbitration Committee consisting of two members. It was conceded by the learned counsel that since the number of arbitrators in an arbitral tribunal shall not be an even number in the light of the requirement in Section 10 of the Act, there should have been at least three arbitrators in the arbitral tribunal and the single-member arbitral tribunal which passed the award impugned the proceedings before the court below was not one properly constituted and the award was liable to be set aside on that ground also under Section 34(2)(a)(v) of the Act. The submission of the learned counsel, therefore, was that even if it is found that the plea of *res judicata* raised by the first respondent does not apply to the facts of the case, the impugned order is not liable to be interfered with.

6. We have examined the arguments advanced by the learned counsel for the parties on either side.

7. A close reading of the impugned order would

show that the view taken by the court below is that insofar as the matter was not remitted to the arbitral tribunal in terms of Section 34(4) of the Act in Arbitration O.P.No.33 of 1999, the arbitral agreement and the claim do not survive for another round of arbitration. Section 34 of the Act deals with the application for setting aside arbitral award. Sub-section (4) of Section 34 reads thus:

> "**34.Application for setting aside arbitral award.** —
>
> (1) x x x x
>
> (2) x x x x
>
> (3) x x x x
>
> (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

The extracted provision, as evident from its contents, is one conferring power on the court to adjourn an application for setting aside an arbitral award, if so requested for by a party for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other actions as in the opinion of

the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. It is only a limited power conferred on the court to adjourn the application under Section 34, if requested for by any party, for the purpose mentioned therein. The said provision does not confer jurisdiction on the court to remit a reference for arbitration for fresh adjudication. Needless to say, the reason, on the basis of which the court below held that the arbitral proceedings in which the award impugned before the court was passed was hit by the principles of *res judicata*, the same is unsustainable in law.

8. As rightly pointed out by the learned counsel for the appellant, it is seen that the impugned order is passed by the court below on the incorrect premise that the award earlier passed by the arbitral tribunal was set at naught only on the ground that proper notice in the proceedings was not given to the first respondent. Paragraph 7 of the impugned order in which a finding to that effect has been rendered reads thus:

> "7. Several other contentions were also raised, it will not be necessary to advert to all those contentions. Suffice it to say that the petitioner has a contention that S.24 (3) of the Arbitration and Conciliation Act has been violated inasmuch as copies of the statement of the Chartered

> Accountant has not been served on him. It is further contended that while S.26 contemplates appointment of experts by the Arbitral Tribunal, in the instant case the expert, the Chartered Accountant was not appointed by the Arbitral Tribunal, but by the 2nd respondent, Stock Exchange as can be seen from the award itself. It is finally contended that the award of the Tribunal is illegal inasmuch as reasons are not given in the impugned award. These circumstances render the award liable to be set aside under S.34, it is contended."

The order in Arbitration O.P.No.33 of 1999 is part of the records in this case as Ext.A1. A perusal of Ext.A1 order would show that the court has set aside the arbitral award not only on the ground that proper notice in the proceedings was not given to the first respondent, but also that the arbitral tribunal was not properly constituted. As a matter of fact, point No.1 formulated for decision in the said case itself was whether the constitution of the arbitral tribunal was proper and if so, whether the said defect warrants setting aside of the arbitral award under Section 34(2)(a)(v) of the Act. The said point has been answered in paragraphs 10 to 13 of Ext.A1 order thus:

> "10. Point No.1: I must first of all consider S.10 of the Arbitration and Conciliation Act, 1996. S.10(1) stipulates that the parties are free to determine the number of arbitrators provided that such number shall not be an even number. The short question is whether the parties can agree that 2 arbitrators shall constitute the Arbitral Tribunal for them and whether such constitution

would offend S.34(a)(2)(v).

11. There can perhaps be no doubt that each party had nominated an arbitrator. It is also evident that the petitioner had not raised any specific objection to the constitution of the Arbitral Tribunal consisting of only 2 arbitrators (3rd and 4th respondents). The learned counsel for the petitioner submits that it was not necessary for him to anticipate that the two specified arbitrators would proceed to hold the arbitration without appointing an umpire in violation of the mandate of the law that an Arbitral Tribunal cannot consist of even number of arbitrators. S.10 makes it very clear that the parties are not free to stipulate that an even number of arbitrators shall arbitrate the dispute between them. I am of the opinion that S.4 cannot cure this vital and fundamental defect in the constitution of the Arbitral Tribunal. The learned counsel were requested to enlighten the court on this aspect with precedents and principles. Only 2 precedents have been cited before me. They are, AIR 1999 Bombay 67 and AIR 1997 SC 608. My search has not been able to take me to any other binding precedent of the Hon'ble High Court of Kerala or the Supreme Court on this aspect. The Hon'ble High Court of Bombay in AIR 1999 Bom. 67 has very clearly held that the award is still liable to be set aside at the instance of a party who had participated in the arbitral proceedings without raising any objection if the Tribunal is constituted in violation of S.10(1). The relevant passage in paragraph 5 of the said decision is extracted below for the sake of clarity.

> "The fact that an Arbitral Tribunal is not properly constituted and objection has not been raised by the petitioner before the Tribunal, cannot result in the Arbitral Tribunal exercising Jurisdiction if its constitution was in contravention of S.10 of the Arbitration & Conciliation Act, 1996. Courts cannot confer jurisdiction

> on themselves, by consent of the parties and clothe themselves with jurisdiction. A court without jurisdiction merely on account of non-objection by the parties cannot assume jurisdiction in Itself. The same is also true of Arbitral Tribunals and the award has to be set aside on that count alone."

12. No contra precedent on this specific aspect has been cited before me at all. The learned counsel for the 1st respondent relies on the decision reported in AIR 1997 SC 605. According to me, the Hon'ble Supreme Court was not dealing with a situation like the one which is available before this court now or the one which was considered by the Hon'ble High Court of Bombay in the decision referred earlier. The Hon'ble Supreme Court was only considering the question whether an arbitral agreement will be void for the reason that it contemplates only 2 arbitrators with provision for appointment of a third arbitrator. The Hon'ble Supreme Court was dealing with the situation prior to the commencement of arbitration and not with a situation where an even number of arbitrators proceeded to arbitrate and pass the award. I am of the opinion that the dictum in AIR 1977 Bom. 67 is not in any way rendered inapplicable because of the decision of the Supreme Court in AIR 1997 SC 605. I am in these circumstances satisfied that the amount awarded cannot be supported. The same does warrant Interference.

13. The fact that no objections were raised by the petitioner at any earlier point of time on the ground that 2 arbitrators are not sufficient and cannot constitute valid Arbitral Tribunal or the fact that the petitioner nominated one of the 2 arbitrators cannot according to me be reckoned as sufficient circumstances to permit an Arbitral Tribunal to be constituted and proceeding to conduct arbitration contrary to the specific stipulation, of S.10(1). I am in these circumstances satisfied that the challenge on this ground deserves to be upheld."

In the light of Section 19 of the Act, arbitral tribunals are not bound by the provisions contained in the Code of Civil Procedure. Even if it is held that the principles of *res judicata* would apply to arbitral proceedings under the Act, insofar as the earlier award was not one passed by a competent tribunal as found by the court in Arbitration O.P. No.33 of 1999, the award passed by that tribunal is non-est in law and the principles of *res judicata* would not apply to such cases. [See **Chief Justice of A.P. v. L.V.A. Dixitulu,** (1979) 2 SCC 34, **Union of India v. Pramod Gupta,** (2005) 12 SCC 1 and **National Institute of Technology v. Niraj Kumar Singh,** (2007) 2 SCC 481].

9. Even if the earlier award was one set aside not on any ground affecting the competency of the Tribunal, we are of the view that the subsequent arbitral proceedings are not hit by the principles of *res judicata*. The reason being that, as rightly contended by the learned counsel for the appellant, the limited jurisdiction vested in the court in terms of the provisions of the Act is only to ensure that arbitral awards do not suffer from the errors mentioned in Section 34 of the Act.

The court cannot, in terms of the provisions in Section 34, correct the errors in arbitral awards by modifying the same or by remitting the same to the arbitral tribunal for fresh adjudication. The scheme of the Act is that if the court finds that an arbitral award suffers from any of the errors mentioned in Section 34, the award is to be set aside, leaving the parties to begin the arbitration afresh, if they choose to do so. In other words, in terms of the provisions of the Act, the court reserves with it only a supervisory role for the review of the arbitral awards to ensure fairness. The aforesaid principle has been explained by the Apex Court in **McDermott International Inc. v. Burn Standard Co. Ltd.**, (2006) 11 SCC 181. Paragraph 52 of the judgment in the said case reads thus:

> "52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration

> as they prefer the expediency and finality offered by it."

The proposition aforesaid was reiterated by the Apex Court later in **NHAI v. M. Hakeem**, (2021) 9 SCC 1 also.

10. In this regard, it is worth referring to a passage from a bench decision of the High Court of Delhi in **State Trading Corporation of India Ltd. v. Toepfer International Asia PTE Ltd.** 2014 (3) ARBLR 105 (Delhi), wherein the scope and effect of the proceedings under Section 34 of the Act has been explained. The relevant passage reads thus:

> "7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of

> the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process."

It could be thus seen that when the court set aside an arbitral award, it only negates a decision, in whole or in part, depriving the portion negated of any legal force and returning the parties to their original litigating position, to start the proceedings afresh, if they choose to do so, in relation to issues which are not concluded. In other words, there will be no impediment in law for the parties to an arbitration agreement in initiating fresh proceedings in the event of the court setting aside an arbitral award on any issue which has not been concluded between them in terms of the earlier award and in that sense, the principles of *res judicata* will have only a limited application in the context of the proceedings under the Act. In that view of the matter, there was no impediment at all for the first respondent in initiating arbitral proceedings afresh for resolution of the dispute.

11. The arbitral award shows that the second respondent has appointed Justice K.John Mathew as the sole Arbitrator to decide the dispute between the appellant and the first respondent. The award also shows that registered notices were sent by the Arbitrator to the first respondent directing him to appear in the proceedings and the first respondent who has accepted the said notice chose not to appear before the Arbitrator. The aforesaid facts have not been disputed by the first respondent in the proceedings under Section 34 of the Act. The argument now advanced by the first respondent is that he was not given notice of the appointment of Justice K.John Mathew as Arbitrator in the matter. First of all, the first respondent has not assailed the arbitral award on that ground in the proceedings under Section 34 of the Act. That apart, the said ground being one falls under Section 34(2)(a)(iii), it was incumbent upon the first respondent to establish the said fact in the proceedings under section 34 of the Act. The materials on record in the proceedings under section 34 do not show that the first respondent has demonstrated in the proceedings that he was not given notice of the appointment of Justice K.John Mathew as Arbitrator. In the circumstances, the contention

aforesaid is only to be rejected as it is devoid of merits. Similarly, there is also no merit in the contention raised by the learned counsel for the first respondent that disputes of the instant nature, in terms of the bylaws of the second respondent, are to be resolved by an Arbitration Committee consisting of two arbitrators. The clause in the bylaws of the second respondent, according to us, is unenforceable in the light of the provision contained in Section 10 of the Act and it is taking the said stand that the award passed by the Tribunal earlier constituted was set aside by the Court. If the clause aforesaid is unenforceable, unless the clause is amended in tune with Section 10 of the Act, there is nothing illegal in appointing a single member arbitral tribunal to resolve the dispute.

In the result, the appeal is allowed, the impugned order is set aside and the arbitral award is restored.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Sd/-
C.S.SUDHA, JUDGE.

ds 22.03.2022