

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN**

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

Arb.A.No. 32 of 2009 ()

**AGAINST THE ORDER/JUDGMENT IN OPARB 261/2004 of I ADDL.DISTRICT COURT,
ERNAKULAM DATED 16-02-2009**

APPELLANTS/PETITIONERS/OPPOSITE PARTIES

- 1. A.J.BENNY , AGED 60 YEARS,
S/O.A.A.JOSEPH, ANJIPARAMBIL HOUSE, CHELLATH
MANAGING PARTNER OF M/S.INDUSTRIAL
MARKETING AGENCIES, RAVIPURAM, ERNAKULAM.**
- 2. A.J.LOY, AGED 56 YEARS,
S/O.A.A.JOSEPH, ANJIPARAMBIL HOUSE, CHELLATH
PARTNER OF M/S.INDUSTRIAL MARKETING AGENCIES, RAVIPURAM
ERNAKULAM.**
- 3. A.J.MATHEW @ MATHAPPAN, AGED 52 YEARS
S/O.A.M.JOSEPH, ANJIPARAMBIL HOUSE, CHELLATH,
PARTNER OF M/S.INDUSTRIAL MARKETING AGENCIES, RAVIPURAM
ERNAKULAM.**

**BY ADVS.SRI.P.SHRIHARI
SMT.P.VANI
SRI.SHIJU VARGHESE**

RESPONDENTS/RESPONDENTS/CLAIMANT AND ARBITRATOR:

- 1. HAYIS MATHEW, AGED 43 YEARS,
S/O.A.M.ABRAHAM, (A.M.KUNJUVARIA), ANJIPARAMBIL HOUSE
PALARIVATTOM, KALOOR, KOCHI-17.**
- 2. K.RAMACHANDRAN, RETIRED DISTRICT &
SESSIONS JUDGE , HONB'LE ARBITRATOR IN
A.R.NO.2/2002 RESIDING AT NEDUVELIL LANE,
VALANJAMBALAM, ERNAKULAM SOUTH, KOCHI-16.**

**R1 BY ADV. SRI.V.V.SIDHARTHAN SR. (CAVEATOR)
R-1 BY ADV. SRI.D.G.VIPIN
R2 BY ADV. SRI.S.SREEDEV**

**THIS ARBITRATION APPEAL HAVING BEEN FINALLY HEARD ON 22-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

P.N.RAVINDRAN & ANU SIVARAMAN, JJ.
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Arbitration Appeal No.32 of 2009
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Dated this the 22nd day of July, 2015

JUDGMENT

P.N.Ravindran, J.

The appellants and the first respondent are partners of a firm, namely M/s. Industrial Marketing Agencies. Disputes and differences arose among the partners. The first respondent herein thereupon filed Arbitration Reference No.2 of 2002 in this court under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for short) praying for the appointment of an Arbitrator to settle the disputes and differences among the parties. Reliance was placed on clause 22 of the partnership deed. By order passed on 5.2.2002, this court appointed Sri.K.Ramachandran, former District and Sessions Judge as Arbitrator. The said order was not challenged. The Arbitrator thereupon entered upon the reference and passed an award on 31.8.2004. The appellants herein thereupon filed Arbitration O.P.No. 261 of 2004 in the Court of the District Judge of Ernakulam under section 34(2) of the Act praying that the said award may be set aside. The main ground raised in the said application was that the Arbitrator had no jurisdiction to enter upon the reference for the reason that there is no arbitration clause in the partnership deed. Relying on clause 22 of Ext.A1 partnership deed, which stipulates that any dispute or

difference between the parties shall be settled by mutual discussion or by arbitration as also the fact that the Arbitrator was appointed by this court by order passed on 5.2.2002, after hearing both sides, having regard to the aforesaid stipulation in the partnership deed, the learned District Judge held that the appellants cannot challenge the appointment of the Arbitrator in the petition filed by them under section 34(2) of the Act. Arbitration O.P.No.261 of 2004 was accordingly dismissed. Hence this appeal.

2. The issue raised by the appellants namely the challenge to the competence of the Arbitral Tribunal is covered against them by the decision of a seven judge Bench of the Apex Court in **SBP & Co. v. Patel Engineering Ltd. & Another** [(2005) 8 SCC 618]. It was held that the basic requirement for exercising the power under section 11 (6) of the Act is the existence of an arbitration agreement in terms of section 7 of the Act and the applicant before the Chief Justice being a party to such an agreement. The Apex Court held that a decision on competence and locus standi of the party seeking the appointment of an Arbitrator would attain finality unless it is successfully challenged in appeal before the Apex Court. The relevant observations contained in paragraph 47 of the aforesaid judgment are extracted below for easy reference:-

"47. We, therefore, sum up our conclusions as follows:

- (i) the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11 (6) of the Act is not an administrative power. It is a judicial power.*
- (ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.*
- (iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.*
- (iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.*
- (v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.*
- (vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.*
- (vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.*
- (viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an*

- application under Section 11(6) of the Act.*
- (ix) *In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.*
- (x) *Since all were guided by the decision of this Court in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.*
- (xi) *Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.*
- (xii) *The decision in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. is overruled."*

In the light of the binding decision of the Apex Court, we are of the opinion that there is no merit in the challenge to the impugned order or the award. The appeal fails and it is accordingly dismissed.

Sd/-
P.N.RAVINDRAN
JUDGE

Sd/-
ANU SIVARAMAN
JUDGE

/TRUE COPY/

P.A. TO JUDGE