

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

Arb.A.No. 11 of 2014 ()

**AGAINST THE ORDER/JUDGMENT IN OPARB 564/2012 of I ADDL.DISTRICT COURT,
ERNAKULAM DATED 19-10-2013**

APPELLANTS/PETITIONERS/RESPONDENT:

- 1. SAJU P.P,
S/O PAILY,POLAYIL HOUSE, PERINGOLKARA,
KOLENCHERY P.O., KOLENCHERY P.O.,
ERNAKULAM DISTRICT-682 311.**
- 2. ALLEY SAJU,
W/O SAJU, POLAYIL HOUSE, PERINGOLKARA,
KOLENCHERY P.O., ERNAKULAM DISTRICT-682 311.**

BY ADV. SRI.K.G.CLEETUS

RESPONDENT/RESPONDENT/CLAIMANT:

**MUTHOOT VEHICLE AND ASSETS FINANCE LTD
(FORMERLY MUTHOOT LEARNING AND FINANCE
LTD.) MUTHOOT CHAMBERS
KURIAN TOWERS, BANERJEE ROAD, ERNAKULAM-682 018.**

BY ADV. SRI.C.S.MANILAL

**THIS ARBITRATION APPEALS HAVING COME UP FOR ADMISSION ON
31-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

vpv

"C.R."

P.N.RAVINDRAN & ANU SIVARAMAN, JJ.
=====

Arbitration Appeal No.11 of 2014
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Dated this the 31st day of July, 2015

JUDGMENT

P.N.Ravindran, J.

The appellants herein availed a loan from the sole respondent on 12.5.2009 for the purpose of purchasing a tractor bearing registration No.KL-40/B-9525. They defaulted repayment of the loan installments. The respondent financier thereupon invoked clause 17A of the loan agreement and after giving notice to the appellants, nominated Sri.Thomas T. Varghese, Advocate of this court as the Arbitrator. The respondent also referred the dispute arising out of the agreement between the parties to the said Arbitrator. The Arbitrator entered on the reference and issued notice to the appellants herein by registered post acknowledgement due requiring them to be present in his chambers at 4.30 p.m. on 2.6.2010. It was stated in the said notice that if they fail to appear in person or through their authorised representatives, he will proceed ex-parte.

2. The appellants herein entered appearance before the Arbitrator through counsel and filed vakalath on 2.6.2010. The proceedings before the Arbitrator was thereupon adjourned to

16.6.2010. On that day, the appellants filed their written statements and the consideration of the claim was adjourned to 7.7.2010. On that day, the appellants did not appear before the Arbitrator. The case was thereupon adjourned to 18.8.2010, later to 22.9.2010, 22.10.2010 and still later to 24.11.2010. On that day also the appellants did not appear. There was also no representation on their behalf. The Arbitrator did not however set the appellants exparte. Instead, the Arbitrator directed the claimant to file his affidavit in lieu of chief examination and adjourned the case to 22.12.2010. The respondent/claimant did not however file a proof affidavit on that day. The case was thereupon adjourned to 20.1.2011, later to 17.3.2011 and still later to 21.3.2011. On that day, the claimant filed its proof affidavit. The appellants herein and their counsel were not present on the aforesaid dates also. However the appellants were not set exparte. After the respondent/claimant filed its proof affidavit on 21.3.2011 the case was adjourned to 21.7.2011. On that day also, the appellants and their counsel were not present. The Arbitrator heard the learned counsel for the respondent/claimant on that day and passed an award on 11.8.2011, whereby he directed the appellants to jointly and severally pay to the respondent/claimant the sum of Rs.8,27,607/- together with interest at 18% per annum from 28.12.2009 till realisation as also the sum of Rs.6,070/- as costs.

3. A signed copy of the award was however not delivered to the appellants. The records disclose that though the Arbitrator had sent two registered postal articles to the appellants on 20.8.2011, they were returned with the endorsement "addressee left". After the award was passed, the respondent/claimant filed E.P.No.75 of 2012 in the Court of the District Judge of Ernakulam to enforce the award. Notice was thereupon issued to the appellants. They received the notice on 30.5.2012 and thereafter applied for a copy of the award passed by the Arbitrator and it was received by them on 21.6.2012. Thereafter, on 9.7.2012 they filed O.P.(Arb.)No.564 of 2012 under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for short) in the Court of the District Judge of Ernakulam praying that the award may be set aside. They contended that the Arbitrator has not complied with the principles of natural justice and had not given them full opportunity to present their case. Upon receipt of notice in O.P.(Arb.)No.564 of 2012, the respondent/claimant entered appearance and filed a written objection contending inter alia that the application to set aside the award is barred by limitation. They also contended that though the appellants had entered appearance before the Arbitrator through counsel and filed a written statement, they did not appear thereafter and therefore, there is no merit in the contention that the Arbitrator did not comply with the principles of

natural justice or afford them full opportunity to present their case.

4. The court below considered the rival contentions and held that O.P.(Arb.)No.564 of 2012 is barred by limitation. The court below held that the signed copy of the award should be deemed to have been served on the appellants when the registered postal articles which were sent to them by the Arbitrator on 20.8.2011 to their addresses as given in the petition to set aside the award, were returned with the endorsement "addressee left". The court below held that such being the situation, the application to set aside the award which was filed on 9.7.2012 is beyond the time limit stipulated in sub-section (3) of section 34 of the Act. The court below also considered the question whether valid grounds exist to set aside the award passed by the Arbitrator and answered the question against the appellants. The court below held that as the respondents had received notice from the Arbitrator and had entered appearance through counsel and also filed their written statement, the Arbitrator cannot be blamed for not putting them on notice about the events that transpired after the written statement was filed. The court below held that as the appellants were not vigilant in defending the claim made by the financier, it cannot be said that the Arbitrator has acted in violation of the principles of natural justice or that full opportunity was not afforded to them. The application to set aside the award was

accordingly dismissed. Hence this appeal.

5. We heard Sri.K.G.Cleetus, learned counsel appearing for the appellants and Sri.C.S.Manilal, learned counsel appearing for the respondent. Inviting our attention to sub-section (5) of section 31 and sub-section (3) of section 34 of the Act as also the decisions of the Apex Court in **Union of India v. Tecco Trichy Engineers & Contractors** [(2005) 4 SCC 239] and **State of Maharashtra and Others v. M/s. Ark Builders Pvt. Ltd.** [AIR 2011 SC 1374], learned counsel for the appellants contended that the period of limitation prescribed under sub-section (3) of section 34 of the Act would commence to run only from the date on which a signed copy of the award is delivered to/received by the party making the application for setting aside the award, that in the instant case, a signed copy of the award was admittedly served on the appellants only on 21.6.2012 after they made a request in that regard and therefore, the finding entered by the court below that the application to set aside the award which was filed on 9.7.2012 is barred by limitation, is unsustainable in law and is liable to be set aside. The learned counsel contended that the court below erred in holding that the despatch of a copy of the award amounts to delivery of a copy of the award or its receipt by the appellants and in non-suiting the appellants on that ground. The learned counsel also contended that copies of the proof affidavit filed

by the claimant and the documents relied on by the claimant were not furnished to the appellants and that the Arbitrator thereby violated the principles of natural justice and denied the appellants a full opportunity to present their case. The learned counsel also invited our attention to the provisions contained in sections 18 and 24 of the Act as also the decision of a Division Bench of this court in **Impex Corporation v. Elenjikal Aquamarine Exports Ltd.** [2008 (2) KLT 822] in support of the said contention. The learned counsel contended that as the Arbitrator has not afforded the appellants a full opportunity to present their case and has not complied with the principles of natural justice and as the application to set aside the award is one filed within time, the instant application may be allowed, the award passed by the Arbitrator may be set aside and the dispute remitted to the Arbitrator for fresh disposal.

6. Per contra, Sri.C.S.Manilal, learned counsel appearing for the respondent/claimant contended that the Arbitrator had admittedly sent signed copies of the award to both the appellants by registered post acknowledgment due on 20.8.2011 (the award was passed on 11.8.2011) to their addresses mentioned in the instant appeal/application to set aside the award and as the said postal articles were returned with the endorsement "addressee left", it should be deemed that there was delivery of the postal articles to the addressees/

appellants and therefore, the application to set aside the award which was filed on 9.7.2012 cannot but be said to be barred by limitation. The learned counsel also placed reliance on the decision of the Apex Court in **Binod Bihari Singh v. Union of India** (AIR 1993 SC 1245) in support of the said contention. Inviting our attention to paragraph 10 of the impugned order, the learned counsel appearing for the respondent submitted that after the written statement was filed on 16.6.2010 though the case before the Arbitrator stood posted on 7.7.2010 and the appellants were aware of the posting date, they did not appear before the Arbitrator thereafter, that it was after eight postings thereafter that the Arbitrator proceeded to dispose of the matter on the merits, that the appellants did not at any point of time after 16.6.2010 enquire about the proceedings before the Arbitrator or participate in the proceedings before the Arbitrator and therefore, no exception can be taken to the course adopted by the Arbitrator in proceeding to pass an award based on the uncontested evidence adduced by the claimant. The learned counsel contended that the appellants, who did not participate in the arbitration proceedings and were not vigilant in pursuing the defence raised by them in the written statement, cannot be heard to contend that the Arbitrator has not complied with the principles of natural justice or denied them full opportunity to present their case.

7. We have considered the submissions made at the Bar by the learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. The fact that signed copies of the award were delivered to the appellants only on 21.6.2012 is not in dispute. It is also not in dispute that the Arbitrator had forwarded signed copies of the award to both the appellants by registered post on 20.8.2011. The postal articles were correctly addressed. However they were returned with the endorsement "addressee left". While the contention of the appellants is that there should be actual delivery of the signed copy of the award, the stand of the respondent is that it is enough that the Arbitrator puts it in the course of transit by sending it by registered post acknowledgment due, to the address given by the appellants. The question whether delivery of a copy of an arbitral award under sub-section (5) of section 31 of the Act is a mere formality or a matter of substance, arose for consideration before the Apex Court in **Union of India v. Tecco Trichy Engineers & Contractors** (supra). The dispute in that case arose out of a contract entered into by the Southern Railway for gauge conversion from Madras Beach to Trichchirappalli - Villupuram section. The dispute was referred to an Arbitral Tribunal which gave its award on 10.3.2011/11.3.2011. A signed copy of the said award was delivered in the office of the General Manager, Southern Railway on 12.3.2011.

The Chief Engineer received a copy of the award from the Arbitral Tribunal on 19.3.2011. The Chief Engineer presented an application under section 34 of the Act for setting aside the award on 10.7.2011. An application to condone the delay of 27 days in filing the said application was also filed. The contractor opposed the application to condone the delay on the ground that the delay in filing the application to set aside the award is 34 days and not 27 days. He contended that as the delay exceeds 30 days, in view of the stipulations contained in sub-section (3) of the section 34 of the Act, the court is not empowered to condone the delay. The said contention was accepted by a learned single Judge of the High Court who dismissed the application as barred by limitation. The appeal therefrom was also dismissed by the Division Bench. The Union of India thereupon moved the Apex Court. Interpreting the provisions contained in sub-section (5) of section 31 as also sections 33 and 34 of the Act, the Apex Court held as follows:-

"8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and

interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.”

8. It was held that the delivery of an arbitral award under sub-section (5) of section 31 is a matter of substance, that for the delivery of the arbitral award to the party, to be effective, it has to be received by the party and that it is this delivery by the Arbitral Tribunal and receipt by the party of the signed copy of the award, which sets in motion several periods of limitation for filing applications such as an application for correction and interpretation of an award, an application for making an additional award and an application for setting aside the award and therefore, the delivery of the copy of the award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings. The Apex Court also held that service of notice on the Chief Engineer on 19.3.2001 would be the starting point of limitation for challenging the award, that there was only a delay of 27 days and not 34 days in filing the application under sub-section (3) of section 34 of the Act and that having regard to the

working of the Railways, the delay of 27 days which was within the limit stipulated in section 34(3) of the Act deserves to be condoned. The appeal filed by the Union of India was allowed and the application filed under section 34(1) of the Act was restored to the file of the High Court, to be heard and disposed of in accordance with law.

9. The issue again arose before the Apex Court in **State of Maharashtra and Others v. M/s. Ark Builders Pvt. Ltd.** (supra). The award in that case was passed on 30.3.2003. A copy of the award was given to the claimant in whose favour the award was passed. A copy was not given to the party against whom the award was passed for the reason that they failed to pay the costs of the arbitration. The party against whom the award was passed sent a letter to the Arbitrator asking for a copy of the award. The Arbitrator thereupon furnished a xerox copy of the award certified as a true copy. The said copy of the award was received by the party against whom the award was passed on 19.1.2004. The party thereupon filed an application under section 34(1) of the Act on 28.1.2004. An objection was raised regarding the maintainability of the petition on the ground that it is barred by limitation. The learned Principal District Judge, Lathur dismissed the application on the ground that it is barred by limitation. On appeal, the High Court of Bombay held that sub-section (3) of section 31 of the Act does not require the copy of the arbitration award

to be sent to the concerned party, that this stipulation is only to the effect that signed copy shall be delivered to each party, that a copy of the award was received by the Executive Engineer in April 2003, but the appellant did not act till January 2004 and therefore, as the appellants themselves are to be blamed for their inaction even after receipt of a copy of the award in April 2003, it cannot be said that there was non-compliance with sub-section (5) of section 31 of the Act. Allowing the appeal filed by the respondents before the Arbitrator, the Apex Court held that the period of limitation prescribed under section 34(3) of the Act would start running only from the date a signed copy of the award is delivered to/received by the party making the application for setting it aside under section 34 (1) of the Act. It was held that if the law prescribes that a copy of the award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also prescribes a period of limitation for challenging the order/award in question, the period of limitation can only commence from the date on which a copy of the award is received by the party concerned in the manner prescribed by the law.

10. In the instant case, it is not in dispute that a signed copy of the award was communicated and served on the respondent for the first time only on 21.6.2012. The cover containing the signed copy of

the award sent by the Arbitrator to the appellants on 20.8.2011 by registered post was not delivered to them. The appellants did not refuse to take delivery of the postal articles when they were tendered to them. The postal articles were returned with the endorsement "addressee left". The respondents do not have a case that at some point of time thereafter, a signed copy of the award was served on the appellants by the Arbitrator. In such circumstances, in the light of the binding decisions of the Apex Court referred to above, we are persuaded to take the view that the period of limitation prescribed for filing the instant application under section 34(1) of the Act commenced to run only from 21.6.2012, the date on which a signed copy of the award passed by the Arbitrator was delivered to/received by the appellants. The finding entered by the court below on point No.1 that the application to set aside the award is barred by limitation cannot therefore be sustained. We accordingly set aside the said finding.

11. That takes us to the question whether the the application filed by the appellants under section 34(1) of the Act is liable to be allowed on the merits. The impugned order discloses that the court below dismissed the application on the ground that the appellants themselves are to be blamed for not participating in the proceedings. The court below has held that the appellants who had entered appearance through counsel and filed a written statement should have

made enquiries about the arbitration proceedings and their failure to do so disentitles them from contending that the Arbitrator did not afford them a full opportunity to put forward their case or that the Arbitrator has acted in violation of the principles of natural justice. It is evident from the materials before us that the Arbitrator had not, after the appellants filed their written statement issued notice to them informing them of the dates on which the case stood posted or cautioned them that if they do not appear on the next posting date, they will be set ex-parte and the case disposed of without further notice to them and in their absence. The date fixed by the Arbitrator in the notice issued to the appellants to appear before him was 2.6.2010. The appellants appeared on that date through the counsel and sought time to file their written statement. The case was accordingly adjourned to 16.6.2010. On that date, the appellants filed their written statement. The case was thereupon adjourned to 7.7.2010. The appellants did not appear on that day. But they were not set ex-parte. Instead, the case was adjourned to 18.8.2010, thereafter to 22.9.2010, later to 22.10.2010 and still later to 24.11.2010. Though, the appellants did not appear on any of the aforesaid dates, the Arbitrator did not set them exparte or issue notice to them informing that if they fail to appear on the next posting date, they will be set ex-parte and the case decided in their absence. On 24.11.2010, the

Arbitrator directed the claimant to file its proof affidavit. The claimant did not file its proof affidavit on that date, with the result, the case was adjourned to 22.12.2010 and later to 20.1.2011, 17.3.2011 and 21.3.2011. The claimant filed its proof affidavit only on 21.3.2011 and on that day the claimants also produced the documents marked as Exts.A1 to A10. On that day also, the Arbitrator did not issue notice to the appellants informing them that the claimant has filed its proof affidavit and produced documents. The Arbitrator did not also forward a copy of the proof affidavit or copies of the documents to the appellants. Instead, the Arbitrator adjourned the case for hearing to 21.7.2011, four months after the proof affidavit of the claimant was filed and the documents marked as Exts.A1 to A10 were produced. On that day, the claimants were heard and thereafter, an award was passed on 11.8.2011 allowing the claimants to recover the sum of Rs. 8,27,607/- with interest at the rate of 18% from 28.12.2009 and the sum of Rs.6,070/- by way of costs, from the appellants.

12. Section 18 of the Act stipulates that the parties shall be treated with equality and that each party shall be given full opportunity to present his case. Section 24(3) of the Act stipulates that all statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary

document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. Interpreting the aforesaid provisions, a Division Bench of this court has in **Impex Corporation v. Elenjikal Aquamarine Exports Ltd.** (supra) held that though the Arbitrator has liberty to proceed ex-parte he should give that party notice of his intention to proceed ex-parte, if he is absent at the next hearing and if an ex-parte decision is taken if one party is absent without sufficient reason, the decision will be valid. The Division Bench held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental, that the purpose of following the principles of natural justice is the prevention of miscarriage of justice and this principle is embodied in sections 18 and 24 of the Act. The Division Bench held that if there is violation of the basic principles of natural justice and the statutory provisions contained in sections 18 and 24 of the Act, the award of the arbitrator is liable to be set aside under section 34(2)(iii) of the Act.

13. As stated earlier, in the instant case, the Arbitrator did not set the appellants ex-parte. The Arbitrator had, eventhough the claimants had not filed proof affidavit in time, repeatedly adjourned the case to suit the claimant's convenience. The Arbitrator did not take up the case for hearing immediately after the proof affidavit of the claimant was filed. It was only four months after the proof affidavit of

the claimant was filed that the Arbitrator heard the claimants. He did not in the interregnum issue notice to the appellants cautioning them that if they fail to appear, he will be constrained to set them ex-parte. He did not also forward to the appellants a copy of the proof affidavit filed by the claimants and copies of the documents produced along with it. It is thus evident that before the award which is the subject matter of the instant appeal was passed, the appellants were not given full opportunity to present their case and that the adjudication made by the Arbitrator was without proper notice to them. The award passed by the Arbitrator in the instant case is in our opinion liable to be set aside as one made and passed in gross violation of the principles of natural justice and sections 18 and 24 of the Act.

We accordingly allow the appeal, set aside the order passed by the Court of the Additional District Judge of Ernakulam on 19.10.2013 in O.P.(Arb.)No.564 of 2012, allow the said application, set aside the award passed by the Arbitrator on 11.8.2011 and remand the case to the Arbitrator for fresh disposal. The parties shall appear before the Arbitrator through counsel on 19.10.2015. The Arbitrator shall on that day fix a date for filing of proof affidavit(s) on the side of the appellants and for production of documents if any from their side and thereafter pass a fresh award after affording both parties an opportunity of being heard. We make it clear that we have not

expressed any opinion on the merits of the rival contentions and that the Arbitrator will be free to arrive at his own conclusions and findings having regard to the pleadings and the materials on record. No costs.

Sd/-

**P.N.RAVINDRAN
JUDGE**

Sd/-

**ANU SIVARAMAN
JUDGE**

/true copy/

P.A. to Judge

vpv/al