

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**FAO No. 1134 of 2017 (O&M)
Date of Decision: 26.04.2019**

Ashok Kumar

..... Appellant

VERSUS

The Punjab State Civil Supplies Corporation Ltd. and others

..... Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Ishan Gupta, Advocate,
for the appellant.

Mr. T.S. Sidhu, Advocate,
for respondents No. 1 & 2.

JAISHREE THAKUR, J.

1. The instant appeal has been filed seeking to challenge the order of Addl. District Judge, Sangrur dated 20.12.2016 whereby the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the award dated 15.04.2013 have been partly allowed by setting aside the award, however, respondents were directed to pass fresh award regarding the matter in dispute by appointing the previous or new Arbitrator as per provisions of law.

2. In brief a few facts that need to be noticed are, that for the crop year 2009-10 there was a milling agreement between the parties. As per terms & conditions of the agreement, the respondents were required to issue the paddy by issuing the release orders of the paddy which was kept in joint

custody of the parties and only thereafter when the paddy was issued then the appellant was required to mill the paddy and deliver its due rice as per schedule provided under the milling agreement. It was the case of the appellant that as per the agreement the appellant has milled the paddy and delivered rice and the balance paddy was never issued by the respondents to the appellant as a result of which appellant could not mill the balance paddy as per terms & conditions of the milling agreement. A dispute arose between the parties. Thereafter, without any prior notice to the appellant, respondent No.2 Corporation had filed a claim petition before the Arbitrator for ₹ 3,55,32,200/- which was further revised to ₹ 3,02,14,760/- as on 28.02.2013 with further interest @ 12% per annum w.e.f. 01.03.2013 till its realization. The Arbitrator passed the ex-parte award dated 15.04.2013. The appellant filed objections under Section 34 of the Arbitration and Conciliation Act, which came to be dismissed by the Addl. District Judge, Sangrur vide judgment dated 10.09.2015. Aggrieved against the said order, an appeal i.e. FAO No. 8335 of 2015 came to be filed by the appellant herein, which came to be decided by order dated 11.12.2015 vide which the matter was remitted back to the Court to decide objections keeping in view the objections mentioned in the petition filed under Section 34 of the Act. After remand from the High Court, the District Judge, partly allowed the petition vide its order dated 20.12.2016 and set aside the award, however, respondents were directed to pass fresh award pertaining to the matter in dispute within a period of six months from that day by appointing the previous or a new Arbitrator as per provisions of law. Aggrieved against the order dated 20.12.2016, the appellant herein again approached the High Court by filing

the instant appeal.

3. It is argued by learned counsel for the appellant that the finding of the learned Court below regarding sending the case back to the Arbitrator is liable to be modified as the Court below has no power to send the case back to the Arbitrator as the same is in contravention of the provisions of Arbitration and Conciliation Act, 1996 as far as the award is concerned the same has rightly been set aside by the Court below. It is argued that once the Arbitrator has already passed the final award then the said Arbitrator would become functus officio as provided under Section 32(3) of the Act of 1996.

4. Per contra, the learned counsel for the respondent Corporation submits that in terms of the order passed by the Court deciding the objections, a new arbitrator has already been appointed on 03.02.2017 and it is only thereafter that the appellants have challenged the order of the District Judge. In fact the appellant ought to have challenged the competence of the Arbitrator under Section 16 of the Act of 1996.

5. I have heard the learned counsel for the parties and with their assistance have gone through the pleadings of the case.

6. The facts are not in dispute and the only question that is to be answered is whether the district judge was competent to set aside the award and direct that a fresh award be passed by appointing a previous or new arbitrator as per provisions of the law?

7. The question whether the Court is competent to remand the matter back to the Arbitrator for afresh decision while deciding objections under Section 34 of the Arbitration and Conciliation Act 1996 has already been answered by the Supreme Court in a judgment rendered in *Kinnari*

Mullick and Another vs. Ghanshyam Das Damani, (2018) 11 SCC 328. It has been held that the Court while deciding a Section 34 petition has no jurisdiction to remand the matter to the Arbitrator for a fresh decision. This view has been *reaffirmed the view in* a recent judgment of *Radha Chemicals v Union of India, 2018(4) Law Herald 2913.*

8. In the case in hand, the Court while deciding the objections held that there was no proper service of the appellants by the Arbitrator and thus the ex-parte award was not sustainable. While setting aside the ex-parte award the Court directed the respondents to pass fresh award regarding the matter in dispute by appointing previous or new Arbitrator as per provisions of law. The argument as raised by the counsel for the appellant that the arbitrator had become *functus officio* would be sustainable in view of Section 32 (3) of the Act of 1996 which reads as “*Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.*” As the award had come into existence and there were no proceedings pending before the Arbitrator on an application filed under Section 34(4) of the Act of 1996, the role of the Arbitrator had ceased and therefore he had become *functus officio*. The dispute could not be referred back to him nor was he competent to pass a fresh award.

9. However, the claims/dispute still remains to be adjudicated between the parties, since the award has been set aside by the Court on the ground that there was no effective service. Admittedly, as per clause 25 of the milling agreement dated 30.10.2009 which had been duly executed between the parties, all disputes are to be settled through the process of

arbitration and therefore the appellant cannot wriggle out settling the dispute through such a mechanism. In the classic case of ***Mc Dermott International Inc vs Burn Standard Co. Ltd., (2006) 11 SCC 181*** the Supreme Court in para 55 has held: *"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, 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."*

10. A reading of the said para in the aforesaid judgment reflects that after the award is set aside, the next logical step would be to start arbitration proceedings afresh to settle the dispute, if the parties so desire. The Court deciding objections can at best allow the objections, if the parameters as specified within Section 34(2) of the Act of 1996 are satisfied and can set aside the award, or the Court can dismiss the objections, but it would not be competent to either remand the case back to the Arbitrator or give a direction for the appointment of an Arbitrator. A similar issue came up before the Division Bench of the Delhi High Court in ***Steel Authority of India Limited vs. Indian Council of Arbitration 2016 SCC Online DI 1291*** and it was held as under :

*“48. Notwithstanding the issue whether a Court has the power to remit the award under [Section 34](#) of the Act, the fact is that this Court had by a judgment dated 9th May, 2012 set aside the award rejecting GE Shipping's claim but had not remitted the matter. Thus the claims of GE Shipping remained to be finally adjudicated. Admittedly, the parties had agreed to resolve the disputes arising out of the Charter Party by arbitration. Thus, it would not be open for SAIL to avoid resolution of such disputes through arbitration. At this stage, it is necessary to refer to the following observations of the Supreme Court in *Mcdermott International Inc. (supra)* whereby the Supreme Court had held as under:-*

"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, 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."

*49. A plain reading of the aforesaid passage also clearly indicates that once an award has been set aside, the parties would be free to begin the arbitration once again. Thus, in my view, the contention that GE Shipping could not initiate the arbitration after the decision of this Court under [Section 34](#) of the Act, cannot be accepted. Mr Ganguli sought to suggest that the observation made by Supreme Court in *Mcdermott International Inc. (supra)* was a "stray observation" and was*

not determinative of the issue at hand. This contention is also unacceptable. First and foremost, the observations of the Supreme Court are relevant to the decision rendered by it; secondly, in Puri Construction Pvt. Ltd. (supra) a division bench of this Court followed the principles laid down by the Supreme Court in Mcdermott International Inc. (supra) while interpreting the provisions of [section 34](#) of the Act.”

11. Therefore, this Court is of the opinion that while setting aside the award, the District Judge erred in directing a fresh award to be passed. It was not within his jurisdiction to do so and should have left it open to the parties to seek arbitration afresh should the parties choose to do so. Therefore, this appeal is allowed to the extent that the District Judge erred in giving a direction to the respondent to pass afresh award or to appoint a new Arbitrator.

12. Therefore, as the dispute which has arisen out of the milling agreement entered into between the parties is yet to be adjudicated, this appeal is being disposed of leaving it open to the parties to invoke arbitration again should they so desire, and in case a new Arbitrator has already been appointed, he may proceed in accordance with law.

26.04.2019

Satyawan

**(JAISHREE THAKUR)
JUDGE**

Whether speaking/reasoned

Yes

Whether reportable

No