

(1998) 09 BOM CK 0079
In the Bombay High Court
Case No : Arbitration Petition No. 268 of 1988

Atul R. Shah

APPELLANT

Vs

M/s. V. Vrijlal Lalloobhai and Co. and another

RESPONDENT

Date of Decision : 08-09-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 13, 15, 23(1), 25

Citation : AIR 1999 Bom 67 : (1998) 4 ALLMR 464 : (1998) 4 BomCR 867 : (1999) 1 MhLj 629

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Phiroje Andhiyarujina, instructed by G.R. Mehta, for the Appellant;
S.J. Purohit, for the Respondent

Judgement

F.I. Rebello, J.—Admit. Respondents waive service. Heard forthwith.

2. The petitioner by this petition is challenging the impugned Award dated 26-6-1998 u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the Arbitration Act, 1996. Before dealing with the various contentions raised to challenge the Award, a few necessary facts which are essential for disposing of the said contentions are herein set out.

3. The dispute between the respondents and the petitioner was referred to an Arbitral Tribunal in terms of the Bye-laws of the Bombay Stock Exchange. The petitioner is a non member and the respondent No. 1 a member of respondent No. 2 the Bombay Stock Exchange. In the course of the Arbitral proceedings one of the Arbitrators expired. Due notice was given to the parties by the Stock Exchange by their letter dated 15-5-1998. The parties were informed that the matter would be heard again after appointing a new set of Arbitrators. Parties were also informed that the date, time and the name of the Arbitrator would be intimated later on. The record discloses that before the Arbitral Tribunal as originally constituted the matter was heard on different dates between 13-11-1997 to 17-3-1998. Notice after reconstitution of the Arbitral Tribunal was

given to the parties on 15-5-1998 fixing the meeting on 25-5-1998. The Minutes of 25-5-1998 disclose that the Arbitrators have gone through the details of papers filed by both the parties. The draft award which is incomplete was gone through by both the arbitrators and matter was kept on 4-6-1998 at 5.00 p.m. for final award. No notice to the parties.

It may also be pointed that the Minutes of 4-6-1998 also record that the Arbitral Tribunal had also not received any communication in writing from the petitioner herein for non appearance on that date. The award was pronounced in favour of the respondents on that date. The formal award was signed on 26-6-1998.

4. At the hearing of the petition on behalf of the petitioner the award is challenged on the following grounds :

(a) The Arbitral Tribunal it is contended was not constituted in terms of section 10 of the Arbitration & Conciliation Act, 1996 and consequently the award is liable to be set aside by virtue of section 34(2)(a)(v).

(b) No notice of closing of the reference was given to the petitioner and consequently also the award on that count is also liable to be set aside.

(c) The Arbitral Tribunal could not have proceeded ex parte after parties failed to appear, on the contrary the proceedings ought to have been adjourned in order to enable the party absent to participate in the proceedings. This it is contended is denial of a reasonable opportunity to the petitioners to present his case and consequently the award is liable and set aside u/s 34(2)(a)(iii).

(d) It is also contended that the Arbitrator appointed in the place of the deceased Arbitrator has to be empanelled with the B.S.C. The petitioner was not informed whether Arbitrator was empanelled and consequently on that count also the award is liable to be set aside.

On behalf of the respondents in so far as the contentions (a) is concerned it is contended that this objection of constitution of Arbitral Tribunal was not raised before the Arbitral Tribunal and as such this Court is precluded from considering the said contention. It is further contended that there is no merit in the other contentions.

5. Dealing with the first contention, by my judgment dated 7th September, 1998 in Arbitration Petition No. 130 of 1998, Vinay Bubna v. Yogesh Mehta & others, I have held that in respect of proceedings in arbitration pursuant to Bye-laws framed by the Bombay Stock Exchange the procedure u/s 10 of the Arbitration & Conciliation Act, 1996 for constitution of the Tribunal will be applicable, I have further held that if the tribunal is not properly constituted the award would have to be quashed and set aside in terms of section 34(2)(a)(v). The only argument raised on behalf of the respondents is that the objection was not raised before the Arbitral Tribunal. That aspect has also been dealt with in the referred to above judgment. Even otherwise, 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 section 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 to also true of Arbitral Tribunals. The said contention must therefore be rejected and the award has to be set aside on that count alone.

6. The petitioner has also raised other contentions which I will now deal with.

7. The second contention is that the petitioner was not given notice of closure of reference. There was no provision in the Arbitration Act, 1940 for the Arbitrator to give notice to the parties. But by judicial pronouncements and as a method of fair play in action parties were to be informed about the closure of the Arbitral proceedings. Courts have held that such a notice should be given so as to enable the party to lead any additional evidence if they so desired. In so far as the new Act is concerned, I need not address myself to the said issue as in the Minutes of 25-5-1998, it was recorded that the matter was adjourned for final award on 4-6-1998 and no fresh notice would be given to the parties. In other words the parties were informed about the closure of the proceedings. Petitioner, therefore, cannot now contend that no notice of closure was given to the petitioner. The said contention must therefore, be rejected.

8. The third contention is that the petitioner was not given a reasonable opportunity of putting his case. It is pointed out that before the Tribunal as originally constituted there were nearly eight hearings. On 25-5-1998 the matter was adjourned at the request of the petitioner to enable the Chartered Accountant to remain present on the next date. On the adjourned date i.e. 4-6-1998 the petitioner was not present nor the Chartered Accountant. It is contended that the Tribunal in such circumstances should not have proceeded ex parte without giving notice to the petitioners to proceed ex parte. Reliance for that purpose has been placed firstly in the case of Juggilal Kamlatpat Vs. General Fibre Dealers Ltd., . The Division Bench of the Calcutta High Court while considering an ex parte award has observed that -

"the procedural rule applicable to arbitration proceedings is more tolerant than the rule followed in courts of law. Broadly stated, the principles governing the arbitrator's right to proceed ex parte."

Thereafter the Judges have stated some instances as to how the Arbitration should proceed with.

Next reliance is placed from the Judgment of this Court in the case of Pratapsingh v. Kishanprasad and Co., reported in AIR 1932 Bom 68. A learned Single Judge of this Court has observed as under :-

"An inquiry before the arbitrator should be assimilated as near as possible to proceedings in a trial in a Court of law, and therefore a party to the arbitration

must not only have notice of the time and place of the meeting, but he should be allowed reasonable opportunity of proving his case either by evidence or by arguments or both, and of being fully heard. The notice must be sufficiently long in order to give the party that reasonable opportunity if he wants to be heard. If there is no sufficient notice, there cannot be a proper hearing nor a valid award, it being a well recognised rule of natural justice that man's legal rights cannot be determined without giving him an opportunity of being heard."

The last judgment cited is of a learned Single Judge of the Delhi High Court in the case of *Lovely Benefit Chit Fund and Finance Pvt. Ltd. Vs. Shri Puran Dutt Sood and Others*, . A learned Single Judge of the Delhi High Court has observed that :

"An arbitrator ought not to proceed *ex parte* against a party if he has failed to appear at one of the sittings. The arbitrator should fix another date for hearing and give notice to the defaulting party, of his intention to proceed *ex parte* on a specified date, time and place."

Under the provisions of the Arbitration and Conciliation Act, 1996 no procedure has been fixed to be followed by Arbitral Tribunal. The Arbitral Tribunal can follow its own rules. The procedure adopted must be fair so as to enable the parties to put their case. This is only requirement to be followed by the Arbitral Tribunal while deciding the claims before them. There can be no dispute with the observations of the learned Single Judge of this Court or for that matter with the observations of the Division Bench of the Calcutta High Court. It must however be noted that the proposition contained therein would depend on the facts of each case. The discretion to be exercised must be based on the record available to the Court. In the instant case parties had appeared before the Arbitral Tribunal at the meeting held on 25-5-1998. It was recorded that the draft award was incomplete. No objections were taken that the proceedings held earlier before the previous Arbitral Tribunal should be rejected and proceedings should start *de novo*. It is no doubt true that it is contended that party was appearing in person and therefore, could not have raised such objection. Section 15(3) gives a discretion to the arbitral tribunal on reconstitution to save the hearings unless otherwise agreed. u/s 15(4) unless otherwise agreed, the rulings given by the arbitral tribunal shall not be invalid. The record show that on 25-5-1998 when the Arbitral tribunal met after its reconstitution the draft award was ready. That the arbitral tribunal relied on the earlier proceedings which was in their discretion to do cannot be faulted. It must be noted that the members of an Arbitral Tribunal who are empanelled by the Bombay Stock Exchange, are normally experts in the particular field and as has been held by the Apex Court when such experts are appointed as Arbitrators and pass an award on merits it is not for this Court to entertain objections on that scope.

Even assuming for a moment that the petitioner was handicapped on 25-5-1998 in the absence of his Chartered Accountant, he was given notice of the draft award and about passing of the final award on 4-6-1998. The petitioner cannot

complain that sufficient notice was not given. The petitioner was present before the Arbitral Tribunal. If the notice was short, he could have requested the Tribunal for a longer date. If the Tribunal had rejected such request then perhaps the question whether sufficient opportunity had been given could have been looked into. In the present case notice was given to the petitioners that the Arbitral Tribunal would meet on 4-6-1998. The petitioner not only chose not to appear but did not even send a communication to show reasons for his non appearance. Though the procedure under Order XVII of the CPC is not applicable, the Tribunal after giving notice to the parties and after having adjourned the matter on the request of the petitioner was not supposed to further defer the matter in the absence of any request. This is more so in the light of the fact that the draft award was available which fact was known to the petitioner. I am therefore, unable to find any merits in the contentions raised on behalf of the petitioner that sufficient opportunity was not given.

My attention is also invited to section 25 of the Arbitration & Conciliation Act, 1996. Section 25 states that unless, otherwise agreed by the parties, where, without showing sufficient cause, the claimants fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the Arbitral Tribunal shall terminate the proceedings. We are not concerned with this Clause. It is further provided that if the petitioner fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself, as an admission of the allegations by the claimant. We are also not concerned with this aspect. Thereafter it is provided that if a party fails to appear at an oral hearing or to produce documentary evidence, the Arbitral Tribunal may continue the proceedings and make an arbitral award on the evidence before it. In fact the Arbitral Tribunal in this case can be said to have proceeded u/s 25(c). It is however pointed out that between the words "unless otherwise agreed by the parties, where, without showing sufficient cause." In the beginning of the section it is contemplated that parties can agree to a different procedure in which event that will be the procedure and not the procedure set out u/s 25. The expression is without showing sufficient cause meaning thereby if sufficient cause is shown to the tribunal. The Tribunal can set the clock back and give the party an opportunity to meet any of the requirements under (a) (b) and (c). At any rate I need not further elaborate on the issue as the party did not move the Tribunal to show cause for their non appearance on 4-6-1998 before the award was communicated. The only communication is dated 3rd July, 1998 and the said communication does not make out a case or disclose sufficient cause for non appearance on 4-6-1998. That contention, therefore, must also be rejected.

9. The last contention is that the newly appointed Arbitrator was not empanelled. Reference to that is made in paragraph 8 of the petition. There is no challenge in the petition that the arbitrator appointed was not from the panel. The grievance is that the petitioner was not informed whether the arbitrator was empanelled. This to my mind cannot be a ground for challenging the award. Such an objection

was also not raised before the Arbitral Tribunal that the arbitrator appointed was not a empanelled. Such an objection could have been read u/s 13, which itself provides for removal of an Arbitrator. This was not done. This contention therefore must also be rejected.

In view of what has been discussed above the petition must however be allowed on the finding given by me in respect of first contention raised on behalf of the petitioner.

10. In view of that petition allowed in terms of prayer Clause (a).

It is made clear that it is always open to the respondents to move a fresh, in which event the provisions of section 43(5) of the Arbitration and Conciliation Act, 1996 would apply.

In the circumstances of the case, there shall be no order as to costs. Certified copy expedited.

11. Petition allowed.