

(1991) 07 BOM CK 0037

In the Bombay High Court

Case No : Appeal No. 380 of 1987 in Arbitration Petition No. 101 of 1985 in
Award No. 28 of 1984

Dr. D.R. Bharadwaj

APPELLANT

Vs

Shreemati Nathibai Damodar Thackersey Women's
University, Bombay

RESPONDENT

Date of Decision : 18-07-1991

Acts Referred:

Arbitration Act, 1940 — Section 10

Shrimati Nathibai Thackersey Womens University Act, 1974 — Section 74

Citation : AIR 1992 Bom 253 : (1992) 1 BomCR 1 : (1991) 1 MhLj 994

Hon'ble Judges : S.P. Bharucha, J;M.F. Saldanha, J

Bench : Division Bench

Advocate : R.S. Dada and S. Radhakrishnan, for the Appellant; Virag V. Tulzapurkar and Y.V. Divekar and U.M. Mahajan, instructed by . Divekar and Co., for the Respondent

Judgement

Bharucha, J.—The appeal raises an interesting question relating to the meaning to be ascribed to the word "umpire" in a provision of the Shrimati Nathibai Damodar Thackersey Women's University Act, 1974. The question : is such "umpire" to function as an "umpire" within the meaning given to the word in the Arbitration Act, 1940, or is he to function as a third arbitrator. The mere use of the word "umpire" is not, in our view, determinative of the role that he must play.

2. The appellant was employed by the said University as a Senior Lecturer in 1972. He addressed, during the period September to November 1978, nine letters to the said University alleging several deficiencies in its functioning. It was the said University's case that he had made wild and groundless charges of corruption, bias, provincialism and nepotism in these letters. Accordingly a notice to show cause was issued to him by the Vice-Chancellor of the said University on 29th March 1979. The first enquiry officer resigned. Therefore, a second charge-sheet in the same terms was issued on 18th April 1980. The second enquiry officer found the appellant guilty of the misconduct alleged against him. The

report of the enquiry officer was accepted and the said University dismissed the appellant from service by an order dated 10th November, 1983.

3. The appellant applied for a reference to arbitration under the provisions of Section 74 of the said Act. A Tribunal of Arbitration was constituted. It consisted of Mr. R. M. KantJugeing the member appointed by the Executive Council of the said University, Mr. N. S. Manudhane, being the member nominated by the appellant and Mr. D. G. Palekar being the "umpire" appointed by the Vice-Chancellor of the said University. The Tribunal of Arbitration entered upon the reference on 24th April 1984 and the first hearing was held on 14th May 1984. On 8th November 1984 the Tribunal gave its award. Shortly stated, Mr. Kantawala and Mr. Palekar concluded that the order of dismissal passed against the appellant could not be set aside or modified. Mr. Manudhane agreed with the view taken by M/s. Kantawala and Palekar that there was no substance in the challenge made by the appellant to the findings and report of the enquiry officer, as accepted by the said University. He was, however, of the view that there were a series of circumstances in respect of which the appellant had entertained a grievance and there were legitimate grounds for at least some of them; hence, the question of punishment deserved reconsideration. He concluded that the punishment of dismissal should be reviewed by the proper authorities. The award "Per majority of arbitrators" was that the order of dismissal passed against the appellant could not be set aside or modified and the appellant's claim was dismissed.

4. The appellant filed the arbitration petition to impugn the said award. The petition was dismissed by the learned single Judge. Hence this appeal.

5. Mr. Dada, learned counsel for the appellant, drew our attention to the said Section 74 which reads thus:

"Any dispute arising out of or relating to the contract between the University and any officer or Teacher of the University shall, on the request of the officer or Teacher concerned, be referred, within thirty days from the receipt of such request, to a Tribunal of Arbitration consisting of one member appointed by the Executive Council, one member nominated by the Officer or Teacher concerned and an umpire appointed by the Chancellor, and no request based on such dispute shall, for any reason whatsoever, be declined or withheld. The decision of the Tribunal shall be final, and no suit or other legal proceeding shall lie in any Civil Court in respect of the matter decided by the Tribunal. Every such request shall be deemed to be a submission to arbitration on the terms of this section within the meaning of the Arbitration Act, 1940, and the provisions of that Act shall apply accordingly."

6. It was Mr. Dada's submission that the umpire appointed by the Vice-Chancellor was to function as an umpire within the meaning of that word in the Arbitration Act and that he could not have participated in the arbitration proceedings and the award. He could function only in the event that the two

arbitrators appointed by the Executive Council of the said University and the appellant differed. Mr Dada drew our attention to Section 3 of the Arbitration Act which states that an arbitration agreement, unless a different intention is expressed therein, should be deemed to include the provisions set out in the First Schedule thereto in so far as they were applicable to the reference. The First Schedule, inter alia, says that if the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators and shall make his award within two months of entering upon the reference or within such extended time as the Court may allow. Our attention was also drawn to Section 10 of the Arbitration Act and it is material to reproduce it in full:

"S. 10(1) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1) the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail".

7. The emphasis of the argument is upon the use of the word "umpire" in the said Section 74 and it is, therefore, contended that the reference contemplated by the said Section 74 is a reference to two arbitrators, the umpire to act only in the event of a difference arising between them.

8. In the first place, the said Section 74 requires the formation of a "Tribunal of Arbitration" which shall consist of one member appointed by the Executive Council of the said University, one member nominated by the delinquent officer or teacher and an umpire appointed by the Chancellor of the said University. It requires the Tribunal to decide the dispute. It says that the "decision of the Tribunal" shall be final and that no suit or other legal proceeding shall lie in any Civil Court in respect of "the matter decided by the tribunal". In our view, therefore, the terms of the said Section 74 contemplate that each one of the three persons who constitute the Tribunal of Arbitration shall participate in the decision making process and the award. This does not accord with the

interpretation that Mr. Dada seeks to place upon the said Section 74 for, in that event, the appointee of the Chancellor of the said University would not participate in the decision making process and award if the appointees of the University and the delinquent did not differ. Secondly, under the terms of the Arbitration Act, the umpire is appointed only by the arbitrators. The Arbitration Act does not empower the parties or any third party to appoint an umpire; that can be done only by the arbitrators. Where an arbitration agreement contemplates the appointment of three "arbitrators", one by each party to the dispute and the third by the two arbitrators so appointed, that third appointee is obliged to function as an umpire. In other words, he who is a party to the dispute appoints an arbitrator. He who the arbitrators appoint is an umpire. In the circumstances. We must hold that the nomenclature "umpire" used for the appointee of the Chancellor of the said University in the said Section 74 does not imply that he has to function as an "umpire" within the meaning of that word in the Arbitration Act. He is one of three arbitrators and is entitled to participate in the decision making process of the Tribunal of Arbitration and its award. The award of the Tribunal of Arbitration in the present case cannot be set aside on the ground that the appointee of the Chancellor of the said University participated in its decision making process and award.

9. The next contention raised by Mr. Dada pertained to alleged breaches of the principles of natural justice. Our attention was drawn to the allegation in the writ petition that the Tribunal of Arbitration committed legal misconduct by not showing to the appellant or his representative, though repeatedly asked for, a confidential report dated 15th February 1973 produced before it. The case of the said University in this behalf is set out in its affidavit in reply. It says that the confidential report dated 15th February 1973 was made in the course of the appellant's service. It was against the appellant and was confidential. With a view not to create any prejudice in the minds of the Tribunal, the Tribunal was shown the report. The Tribunal did not think it fit to disclose it to the appellant. The report was not at all relevant to the enquiry before the arbitrators, for the enquiry was not based on matters referred to in it.

10. It appears that the said report was referred to in the proceedings before the enquiry officer but was not produced, even though asked for by the enquiry officer, on the ground that it was confidential. The enquiry officer expressed unhappiness at the stand taken by the said University and threatened to draw an adverse inference against it. It would appear that this prompted the said University to disclose the said report to the Tribunal. It is inconceivable that this Tribunal would not have directed the said University to show the report to the appellant and/or his representative if it in any way affected the proceedings before it or if it was in any way likely to prejudice the minds of the Tribunal. It is patent from the date of the report that it related to events prior to the matter which the Tribunal was enquiring into.

11. Mr. Dada then drew our attention to the averment in the petition that the

appellant had, after his representative had informed him that the Tribunal was going to pronounce its award, made written submissions on 11th October, 1984 and handed over four copies thereof to the said University. The next meeting of the Tribunal was fixed on 13th October, 1984. The Tribunal, however, passed no orders on the written submissions but only informed the parties that they would intimate the date upon which the award would be pronounced. In answer to this allegation the said University stated in its affidavit in reply that the written submissions of the appellant dated 11th October, 1984 were not taken on file and the appellant's representative withdrew the same. Both the appellant's representatives have, however, filed affidavits in identical terms which say that the written submissions dated 11th October, 1984 made by the appellant to the Tribunal through the University were not withdrawn by them. Mr. Dada submitted that, having regard to the affidavits made by the two representatives of the appellant, the statement that the written submissions were withdrawn could not be accepted. Proceeding upon this basis, we find in the award this recital, that the award was made "after having considered the relevant evidence on record and the papers produced during the course of hearing and the written and oral submissions made on behalf of both the sides". The written submissions, therefore, must be taken to have been considered by the Tribunal and the award passed thereafter. There is no question of passing orders on the written submissions.

12. A third point was raised before the learned single Judge but it has, fairly, not been pressed before us by Mr. Dada in view of the fact that the minutes of the Tribunal record that the appellant's representatives had agreed to extend the time for making the award.

13. The appeal is dismissed. There shall be no order as to costs.

Appeal dismissed.