

(2003) 11 BOM CK 0048
In the Bombay High Court
Case No : Arbitration Petition No. 279 of 2003

Faze Three Exports Ltd.

APPELLANT

Vs

Pankaj Trading Co. and Others

RESPONDENT

Date of Decision : 11-11-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 24, 31(8), 34

Citation : (2004) 1 ALLMR 685 : (2004) 2 ARBLR 163 : (2004) 2 BomCR 522 : (2004) 2 MhLj 196

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : D.H. Mehta, instructed by Mahimkar and Mahimkar and Co, for the Appellant; S.P. Kanuga, for the Respondent

Judgement

D.G. Karnik, J.

P.C.

1. Admit. Mr. S. P. Kanuga appears for respondent No. 1 and waives service. Respondent Nos. 2, 3 and 4 are arbitrators and are formal parties. Notice to them is dispensed with. By consent, taken up for final hearing.

2. In this petition u/s 34 of the Arbitration Act, the petitioner takes exception to the award dated 14th August, 2002 passed against the petitioners.

3. Disputes having arisen between the parties. They were referred to arbitration by an arbitral tribunal of three arbitrators appointed by Hindusthan Chamber of Commerce. The first award passed on 24th January, 2002 was challenged before this Court by the petitioner by filing Arbitration Petition No. 236 of 2002 on several grounds, including that there was no arbitration agreement between the parties. By an order dated 1st August 2002, this Court allowed the petitioner's application and set aside the award and remitted the proceedings back to the arbitral tribunal for passing fresh orders after hearing the parties. All rights and contentions of the parties save and except for finding that there existed an

arbitration agreement between the parties were kept open. The Court further directed the parties to appear before the arbitrators on 12th August, 2002 at 3 p.m.

4. In accordance with the directions passed by the Court allowing the arbitration petition and remitting the matter back to the arbitral tribunal, both the parties appeared before the arbitral tribunal on 12th August, 2002 at 3 p.m. and the matter was adjourned to 14th August, 2002. The petitioner again appeared before the arbitral tribunal on 14th August, 2002 and inter alia filed three applications namely:

- (i) for permission to be represented by an Advocate;
- (ii) an application requiring the arbitrators to disclose their interest, if any, u/s 12(iii) of the Arbitration and Conciliation Act, 1996 (for short the Act); and
- (iv) that the proceedings be conducted in English.

5. It appears that the arbitrators did not pass any order on any application immediately but, proceeded with the hearing and dealt with all the applications in the award itself. The arbitral tribunal rejected the request to conduct the proceedings in English. They also rejected the petitioners request to be represented by an Advocate and passed an award on the same day i.e. 14th August, 2002.

6. Learned Advocate for the petitioner, apart from challenging the award on merits, canvassed two other grounds before me, namely :

(i) It was an error on the part of the arbitrators not to allow the petitioners to be represented by an advocate. In the absence of proper legal representative, there was no proper hearing. The principles of natural justice were not followed and therefore the award is bad in law.

(ii) In the arbitration meeting on 14th August, 2002, all the three arbitrators were not present. One of the arbitrators Mr. Sunderlal Bagdi was not present at all. Thus, the so called hearing given by the arbitrators was not given by the whole body of arbitrators. There were no deliberations between all the arbitrators as can be seen from the fact that the award has been published on the same day. Though apparently it bears the signature of all the three arbitrators, it is in fact not an award by all the arbitrators and the third arbitrator has merely put his signature without having the benefit of hearing the parties or even without being a party to any deliberations.

7. In paragraph 3 of the award, the learned arbitrators have dealt with the application of the petitioner for permission to engage an advocate in the following words :--

"The third application of the respondents for permission to engage the services of an advocate to conduct the matter. The present case is entrusted to a forum of Chamber so that disputes between the businessmen could be finished without

any delay. If we allow Advocates in the proceedings in that event case will be delayed and protracted. The commercial dispute between the businessmen are decided on the basis of evidence and documents and in the present case also we are following the same. Of course, we the arbitral bench are also businessmen and not legal experts. The claimants have objected to the respondents application to conduct the matter through an Advocate. On the aforesaid basis, we reject the respondents application."

8. Parties have a right to be heard by the arbitral tribunal. The right of being heard is specifically conferred on the parties u/s 24 of the Act. It is true that the right of hearing per se may not include and does not necessarily include the right of hearing through a legal practitioner. In administrative matters, the right of hearing may be restricted to personal hearing by self or through an authorised representative in case of person with disability, like illiteracy. It is however, settled position that the arbitral proceedings are not administrative in nature. They are judicial at least quasi-judicial. Normally in judicial proceedings, the right of hearing includes the right to be represented by a legal practitioner, though in some case each right is partly restricted. However, the right to be so represented is required to be specifically excluded by the statute. Even where the statute excludes or limits the right of hearing through the legal practitioner, Courts have often permitted representation through a legal practitioner. For example, Section 13 of the Family Courts Act, 1984, which restricts right to be represented by legal practitioner which reads as follows:

"13. Right to legal representation. -- Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right to be represented by a legal practitioner.

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*. Rule 37 of the Family Court (Rules) 1988 empowers the Court to permit the parties to be represented by a lawyer in Court. While interpreting Section 13 of the Family Courts Act, 1984 and Rule 37 of the Family (Court) Rules, 1988, in *Lata Mahadeo Joshi v. Dr. Mahadeo Sitaram Joshi*, a Division Bench of this Court held that Section 13 of the Family Courts Act, 1984 does not prescribe a total bar to represent by a legal practitioner which would itself be unconstitutional. The Court also observed that refusing permission to be represented by a legal practitioner may inevitably result in possible miscarriage of justice. In *Kishorilal Govindram Bihani v. Dwarkabai Kishorilal Bihani* reported in 1992 Mh.L.J. 997, another Division Bench of this Court reiterated that the party may be permitted to be represented by a lawyer before Family Courts considering the complexities of the case. Thus, even where the statute contained provision of an express bar for representation through legal practitioner without permission of the Court, this Court has held that such permission should not be normally be denied. Arbitration and Conciliation Act, 1996 contains no provision which bars the representation of the parties by a, legal practitioner. On the other hand, there is

an indication in the Explanation to Sub-section (8) to Section 31 suggesting that appearance by lawyers is permitted. Explanation to Sub-section 8 of Section 31 reads thus :

Explanation

For the purpose of Clause (a) "costs" means reasonable costs relating to --

(i) fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses

(Hi) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

Item No. (ii) of the Explanation includes "legal fees" indicating thereby that parties can be represented by lawyers and makes a provision for "legal fees and expenses" as part of the costs, to be awarded by the arbitral tribunal.

9. The arbitral tribunal appears to have declined the request of the petitioner to be represented by a legal practitioner on the principal ground that allowing of advocate's presence would result in delay and protraction of the proceedings. The advocates and lawyers delay the proceedings is myth. Sooner the myth is exploded the better it is. May be on stray occasions, a litigant and sometimes even a Judge may feel that a particular proceeding could be disposed of quickly without the assistance of legal practitioners of either side on account of triviality of the dispute or otherwise. But, that is an exception. By and large, advocates and lawyers assist the Courts and Tribunals in limiting the scope of enquiry to the relevant overlooking the irrelevant, separating grain from the chaff and focusing on the real relevant issues. Generalisation that advocates and lawyers delay the proceedings is incorrect. Every Court and Tribunal which is endowed with the duty to act judicially or to determine any issues affecting the rights of the parties in a judicial or quasi judicial enquiry must, in the absence of a statutory provision to the contrary, allow the party before it, if it so wishes to be represented by his authorised representative-including a legal practitioner. Enforcement of Section 30 (which incidentally has not yet been brought into force) of the Advocates Act is not necessary for this purpose. Section 30 of the Advocates Act speaks of the right of Advocates to practise. But, what about the rights of a litigant, who wants to be represented by a person having knowledge of law. Duty to act fairly is inherent in every Court, Tribunal and Authority which has a right and duty to decide upon the rights for the citizens. Giving of a fair opportunity to defend (or to put up his case) to every party is a part of duty to act fairly. Grant of a permission to a party to be represented by a person of his choice, including a legal practitioner, except where statute prohibits it or the

Tribunal feels it to be against the public policy (like in some sensitive matter involving security of the State) is a part of the duty of the Tribunal to act fairly.

10. In the present case, the petitioner had specifically made a request to be represented by a legal practitioner. A partner of M/s Mahimkar and Mahimkar, Solicitors was present at the venue of arbitration but, was not allowed to appear for the petitioner. This is recorded in the letter of the petitioner's Solicitors dated 16th August, 2002. It is thus, clear that fair opportunity of hearing was not given to the petitioner and to present his case which he wanted to do through his legal practitioner. This was done without any authority of law or without any authority in the arbitrators to prevent the representation of the petitioners through a legal practitioner. I am of the considered opinion that even in arbitration proceedings, parties are entitled to be represented by a legal practitioner if they so desire unless they have agreed in writing that none of the parties shall be represented by a lawyer.

11. It is not disputed that Mr. Sunderlal Bagadi was not present in the arbitral meeting on 14th August, 2002. Solicitors of the petitioner by their letter dated 16th August, 2002 have also recorded in writing that Mr. Sunderlal Bagadi was not present but, the remaining two arbitrators stated that his presence was not necessary and they would inform him as to what transpired at the hearing. In para 33 of the petition, the petitioners have stated on oath that only two arbitrators were present at the arbitral meeting on 14th August, 2002 and they told the petitioner that they would convey him what transpired at the hearing. No affidavit in reply has been filed by the respondents denying this. Even before me, the learned counsel for the respondent did not dispute that the third arbitrator was not present at the arbitral meeting held on 14th August, 2002.

12. Learned counsel for the respondent submitted that it is not necessary that all the arbitrators should remain present at every stage of hearing and it is enough if the award is signed by all of them or by a majority of them. He invited my attention to Sub-section (2) of Section 31 of the Act. Sub-section (2) of Section 31 reads as under :

"For the purposes of Sub-section (12) in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated."

13. Learned counsel submitted that under Sub-section (2) of Section 31 of the Act the arbitral award need not even be signed by all the arbitrators as long as majority of the member sign it. According to the learned counsel, this shows that all arbitrators need not be present at every meeting in which effective hearing takes place and even at the time of making of the award, I am unable to agree. Sub-section (2) of Section 31 contemplates a situation when an award is not unanimous. A dissenting arbitrator may decline to sign the award and write a separate award. Under Sub-section (2) even where an award is not signed by all the arbitrators, the award remains valid. Sub-section (2) nowhere dispenses with the presence of all the arbitrators in the decision making process.

14. It is argued that the presence of Mr. Bagadi, the arbitrator who did not attend, could not have made any difference because, two out of the three arbitrators in any way constituted a majority under Sub-section (2) of Section 31 of the Act. Centuries ago, similar argument was rejected in *Dalling v. Matchett* reported in (1740) 125 ER 1138 in the following words:

"It has often been said that if that one had been present, that is, the arbitrator who did not attend, he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always been received this answer that every one has, a right to argue and debate as well as to give his vote and it is possible at least that the person absent may, if he had been present at the meeting have made use of such arguments as may have brought over the majority of the rest to be of his opinion."

This decision was quoted and followed by a Division Bench of Madhya Pradesh High Court in *Maganlal Gangaram Rathor and Another Vs. Ramaji Bondarji and Others*, .

15. As arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witness and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceeding brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving at a just decision. In the present case, it is not disputed that there were only two arbitral meetings after the remand i.e. on 12th August, 2002 and 14th August, 2002. The first meeting was merely adjourned and no procedure took place thereunder. Therefore the only effective meeting was held on 14th August, 2002 and for the entire period of that meeting, one arbitrator was absent. In such circumstances, the award made by the arbitral tribunal cannot be sustained and has to be set aside.

16. On account of the view taken by me on the aforesaid two points, it is not necessary to consider any of the arguments made by learned counsel for the petitioner on the merits of the award. Both the learned counsel also submitted that since the matter is to be remanded back to the arbitral tribunal, no opinion may be expressed on the merits of the award. All disputes and contentions of the parties except the one which was closed by this Court in judgment dated 1st August, 2002 are expressly kept open.

17. Accordingly, the impugned award is set aside and the matter is remanded back to the arbitral tribunal for deciding it afresh in accordance with law. Needless to say that the arbitrators would permit the parties to be represented by legal practitioners. Both the parties state that they shall appear before the learned arbitrators on 5th January, 2004. The Arbitrators shall then decide further dates of hearing.

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