
(2003) 11 BOM CK 0047
In the Bombay High Court
Case No : Arbitration Petition No. 130 of 2002

Haresh Chinnubhai Shah

APPELLANT

Vs

Rajesh Prabhakar Jhaveri and Another

RESPONDENT

Date of Decision : 04-11-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 34(2)

Citation : (2004) 1 ALLMR 654 : (2004) 1 ARBLR 536 : (2004) 2 BomCR 527 :
(2004) 1 MhLj 1109 : (2004) RLR 179

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

Bench : Single Bench

Advocate : Arif Bookwala and Mugdha Shringarpure, instructed by Hariani and Co, for the Appellant; Shashipal Shankar, for the Respondent

Final Decision : Allowed

Judgement

D.G. Karnik, J.—Heard Mr. Bookwalla, learned counsel for the petitioner. Respondents and their Advocate are absent when called.

2. In this petition u/s 34 of the Arbitration and Conciliation Act, 1996 (for short "the Act") the petitioner takes exception to the award dated 1st February 2002 made by Shri Bhavin Dave and Mr. Niren Mehta, two joint arbitrators. Briefly states, the facts are as under:

3. The petitioner and respondent No. 1 are cousins. The respondent No. 2 is the mother of respondent No. 1. The respondent No. 1 herein had filed a suit bearing suit No. 3659/90 against Sadguna Chimanbhai Shah (mother of the petitioner) and Others on the Original Side of this Court. Consent terms were filed by the parties in the said suit which inter alia provide that the nominee directors of Shirom Limited will arbitrate any future disputes if they arise between the parties. By an order dated 23rd September 1999, the Court decreed the suit in terms of the consent terms. It appears that subsequently disputes arose between the petitioner and the respondent Nos. 1 and 2. The respondent No. 1 thereupon

filed an application bearing Arbitration Application No. 60 of 2001 u/s 11 of the Arbitration Act for appointment of the Arbitrators. By an order dated 10th August 2001, Shri Justice Patankar, the designate of the Hon''ble Chief Justice, passed the following order :--

"There is no dispute that Mr. Shailesh Kothari as nominee director of respondents and Mr. Niren A. Mehta, nominee director of petitioner. I direct them to arbitrate disputes and differences between the parties early. They shall be free to appoint the preceding arbitrator."

4. Mr. Shailesh Kothari who was the nominee of the petitioner did not come forward for arbitration. The respondent No. 1 therefore, filed arbitration application No. 221 of 2001 for replacing Mr. Shailesh Kothari by another arbitrator. By an order dated 21st December 2001. Shri Justice Patankar the designate of the Hon''ble Chief Justice, allowed the application and passed the following order:

"Mr. Bhavin Dave, Chartered Accountant, Room No. 29, 3rd floor, New Amrut Wadi, V. P. Road, Bombay 400004 is appointed as an arbitrator in place of Mr. Shailesh Kothari. He shall be one of the members of the Tribunal and Mr. Mehta and Mr. Dave shall choose the preceding arbitrator and proceed with arbitration. Disposed of accordingly."

It appears that sometime thereafter but before 18th January 2002, a joint meeting was held by the said two arbitrators. It also appears from the letter dated 18th January 2002 written by the said joint arbitrators that the respondent placed before them his statement of claims, in a joint meeting of the two arbitrators. It is however, not clear as to when and what place the said meeting was held by the arbitrators. There is no record that the notice of the meeting of the two arbitrators to the petitioner. The learned counsel for the petitioner states that no notice of such meeting held by the two arbitrators was ever given to the petitioner. In the affidavit in reply filed by the respondent No. 1 he has not specified the date and place of the alleged joint meeting of the two arbitrators. Though in ground No. (L) of the petition. The petitioner has specifically averred that no intimation of any meeting of arbitration prior to 29th January 2002 was ever given to him, the respondent No. 1, in his affidavit in reply has not denied the said averment, clearly indicating that the joint meeting of the two arbitrators in which the claim statement was presented by the respondent was held without notice to the petitioner.

5. On 18th January 2002, the learned arbitrators wrote a letter to the petitioner and his mother intimating them that respondent has filed a claim statement before them and that the petitioner should file a reply and remain present on 29th January 2002 at 5.00 p.m. in the staff room of H. R. College of Commerce and Economics. A copy of the claim statement filed by the respondent was forwarded along with the said letter dated 18th January 2002.

6. It is the case of the petitioner that the petitioner''s representative attended

the meeting and asked for time to file the reply but he was asked to file a written application which he did on 1st February 2002. The respondent however, has denied this and has contended that neither the petitioner nor his representative attended the arbitration meeting fixed on 29th January 2002 nor made any request for adjournment and the letter dated 1st February 2002 is an afterthought. Within two days of the petitioners alleged absence on 29th January 2002, the two arbitrators however, pronounced an ex-parte award.

7. The grievance of the petitioner that principles of natural justice were not followed appears to be justified. There is no evidence on record to show that the two arbitrators ever gave a notice of their joint meeting which is allegedly held prior to 10th January 2002 in which the claim statement was presented by the respondent No. 1. It appears that the said claim statement was presented by the respondent No. 1 behind the back of the petitioner and that is clear from the letter of the arbitrators letter dated 18th January 2002 itself, for the said letter itself forwards the copy of the claim statement filed by respondent No. 1.

8. Procedures for arbitrators was not agreed between the parties and the arbitrators do not appear to have held any meeting for fixing the procedure for arbitration. The statement of claims made by the respondents was forwarded to the petitioner by a letter dated 18th January 2002 and the written statement was called on 19th January 2002 i.e. within 10 days of the purported despatch of the letter. Even ignoring the controversy as to whether the petitioner attended the meeting on 29th January 2002 and made a request for adjournment and assuming that he did not attend, it is clear that the two arbitrators pronounced the award ex parte, within three days thereafter. The arbitrators failed to follow principles of natural justice of even not giving notice of their joint meeting to the petitioner, though such notice was obviously given to the respondents as they submitted their statement of claim at that meeting.

9. There is however a greater lapse on the part of the arbitrators. Section 10 of the Act lays down that the parties are free to determine the number of arbitrators provided that such number shall not be an even number. Thus, Arbitral Tribunal cannot consists of an even number of arbitrators. The first order dated 10th August 2001 passed by designate of the Chief Justice u/s 11 of the Arbitration Act appointed two arbitrators with a direction that they shall be free to appoint a presiding arbitrator. Implicit in the order was that the two arbitrators would appoint the third presiding arbitrator and would not act unless they appointed the presiding arbitrator. The second order dated 21st December 2001 by the designate of Chief Justice is more explicit and says that Mr. Mehta and Mr. Dave shall choose the presiding arbitrator and proceed with the arbitration. It is clearly mandates that the two arbitrators had to choose the presiding arbitrator before they chose to proceed further. This direction was in consonance with Section 10 of the Act. It is nobodys case that the two arbitrators appointed a presiding arbitrator. Presiding arbitrator was never appointed and the Arbitral Tribunal consisted of only even number of members contrary to the provision of

Section 10 of the Act and contrary to the orders passed by the designate of the "Hon"ble Chief Justice u/s 11 of the Act. Two arbitrators, therefore, could not have proceeded with the arbitration, much less could have proceeded ex-parte.

10. Sub-section (2) of Section 34 of the Act prescribes grounds on which Arbitral award may be set aside. Clause (v) of sub Section (2) of Section 34 reads as under:--

(v) the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreements, was not in accordance with this Part; or

Wrong composition of the arbitral Tribunal is a ground for setting aside of an award. In the present case, it is shown that the composition of the arbitral Tribunal was not in accordance with law; not in accordance with Section 10 of the Act not in accordance within the directions and order u/s 11 of the Act passed by the designate of Hon"ble the Chief Justice. The award is therefore, liable to be set aside and is accordingly, set aside.

Petition is accordingly allowed and the award is set aside.