

(2008) 05 DEL CK 0173
In the Delhi High Court
Case No : OMP No. 70 of 2008

S.K. Mahajan and Others

APPELLANT

Vs

B. Subhashchandra Shetty and Others

RESPONDENT

Date of Decision : 20-05-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Citation : (2009) 1 ILR Delhi 131

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : H.S. Phoolka, with Mr. Sharat Kapoor, for the Appellant; Ravi Sikri, for the Respondent

Final Decision : Dismissed

Judgement

Hima Kohli, J.—The petitioners have filed the present petition u/s 34 of the Arbitration and Conciliation Act, 1996 (for short "the Act") assailing therein an Award dated 11.12.2007 passed by the learned Arbitrator. Though no caveat was filed by the respondents, however they were present on the first date of hearing. Counsel for the respondents sought leave to rely on the written submissions filed by them, without filing a detailed reply to the petition, which was granted. The core issue revolves around the Extraordinary General Meeting (EOGM) of the Indian Dental Association, respondent No. 3, held on 5.9.2004. It is the case of the respondents that in the aforesaid meeting held on 5.9.2004, the constitution of the Indian Dental Association (hereinafter referred to as the Association") was approved and the minutes of the meeting and the resolutions passed were subsequently confirmed in the meeting of the Central Council of the Association held on 30/31.10.2004. One of the fallouts of the amendments to the constitution was that the subscription of members of the Association was increased. Aggrieved by the aforesaid Resolution passed in the EOGM held on 5.9.2004 and confirmed in the meeting of the Central Council on 30.10.2004, the petitioners filed a suit in this Court, being CS(OS) No. 1406/2004, praying inter

alia for amongst others, a decree of declaration against the defendants therein that the minutes and the proceedings of the EOGM and the meeting of the Central Council were illegal and unconstitutional. On 10.12.2005, while issuing summons in the suit to the defendants, an *ex parte* interim order was passed on the interim application filed, by the petitioners to the effect that the defendants were restrained from giving effect to the meeting dated 5.9.2004, and the Registrar of Firms and Societies, defendant No. 1 therein, was directed not to act on a letter issued by the defendant No. 3, respondent No. 2 herein, till further orders.

2. In the aforesaid proceedings, the defendants No. 2, 3 & 4 therein (respondents No. 1, 2 & 3 herein) filed an application under Order VII Rule 11 of the CPC (CPC) praying *inter alia* for rejection of the suit on the ground that the same did not disclose any cause of action. Vide order dated 21.11.2005, the said application was dismissed. Aggrieved by the said dismissal, two appeals were preferred by the defendants No. 2, 3 & 4 before the Division Bench, being FAO(OS) Nos. 411 & 412/2005. The Division Bench disposed of the appeals on 19.12.2006 while referring the disputes *inter se* the parties to arbitration, which arbitration proceedings have culminated in passing of the impugned Award dated 11.12.2007. After hearing the parties, the learned Arbitrator arrived at the conclusion that the petitioners were not entitled to any relief and accordingly, a no relief Award was passed. Aggrieved by the said award, the petitioners have filed the present petition.

3. The case set up by the petitioners before the learned Arbitrator was that the Association which is registered with the Registrar of Societies, Delhi has about 15000 members from 26 State branches and 167 local branches. The NCT of Delhi has one State branch and 3 local branches. The main grievance of the petitioners before the learned Arbitrator was that the 92nd World Dental Congress was scheduled to be held in Delhi from 10-13.9.2004 and pre-congress meeting started from 6.9.2004 itself. While more than 4000 members from all over the country were congregating in Delhi to attend the World Congress, an EOGM was called on 5.9.2004 at Mumbai to consider an amendment in the constitution. It was alleged that the said date and venue was fixed by the respondents with the *malafide* intention of rushing through the proposed amendments in the constitution in respect of which a large number of members had raised objections and two meetings held by the Central Council to discuss the draft constitution did not result in any decision. It was alleged by the petitioners before the learned Arbitrator that only 54 members out of the total strength of 15000 members attended the EOGM at Mumbai on 5.9.2004 wherein there was total chaos and the meeting was adjourned by the President midway without transaction of any business. However, despite the same, it was claimed that the respondents sent the minutes of the meeting to the Registrar of Societies alleging that the EOGM had permitted the amendments to the constitution of the Association, which action was stated to be illegal, unconstitutional and *malafide*.

4. Counsel for the petitioners contended that the learned Arbitrator had misdirected and misconducted himself in not appreciating the fact that the alleged minutes of the EOGM dated 5.9.2004, initially sent to the Registrar of Firms & Societies and those in the audio disk filed by the respondents No. 2 and 3 on 11.9.2007 are in conflict with each other. Much emphasis was laid on the fact that by way of repeated orders, the respondents were directed by the learned Arbitrator to file the minutes of the EOGM held on 5.9.2004 at Mumbai, but the said order was not complied with till as late as at the stage of arguments before the learned Arbitrator and finally, the respondents filed copies of the minutes which were on a rough notebook and recorded in an audio CD. The aforesaid position was recorded by the learned Arbitrator in the proceedings held on 25.8.2007 and while taking on record the notes of the EOGM and the audio CD containing the minutes of the meeting, the statement of respondent No. 2, Secretary General of the Association was also recorded.

5. Counsel for the petitioners contended that the learned Arbitrator did not appreciate the fact that the alleged minutes of the EOGM dated 5.9.2004 could not have been confirmed in view of an injunction order operating in the suit proceedings and in these circumstances, the minutes, if any, could have only been confirmed in the next AGM which was held at Mangalore on 27.1.2008 wherein also the said minutes were not confirmed. It was stated on behalf of the petitioners that the conclusions arrived at by the learned Arbitrator to the effect that the minutes of the EOGM dated 5.9.2004 filed by respondent No. 2 in the suit proceedings were the extracts of the EOGM, were based on surmises and conjectures and that the same is not borne out from the pleadings or the record. It was further stated that the learned Arbitrator erred in holding that the minutes of the meeting dated 5.9.2004 were confirmed in the Central Council meeting held on 30.10.2004. It was urged that since the learned Arbitrator failed to decide as to which were the minutes of the EOGM, the confirmation of the same in the Central Council meeting was inconsequential and immaterial, more so when as per the constitution of the Association, General Body Meetings cannot be confirmed in the Central Council Meeting, but only by the General Body.

6. It was argued on behalf of the petitioners that the learned Arbitrator overlooked the mandatory requirement of the constitution of the Association that the minutes were required to be written in the minute book. It was vehemently argued on behalf of the petitioners that the learned Arbitrator failed to notice that there were interruptions in the audio CD at a material point and particular portions of the audio CD were doctored, as a result of which, the assertion of the petitioners that the President had adjourned the meeting, did not find place in the audio CD. It was thus contended that the audio CD could not be treated as authentic minutes of the EOGM dated 5.9.2004. Reference was made to the transcription of the audio CD and particular portions thereof to contend that in the meeting, the President had said something which was deleted from the audio CD and any finding returned on the basis of a doctored audio CD was stated to be perverse and contradictory.

7. Per contra, the counsel for the respondents supported the impugned award and stated that the entire objections raised on behalf of the petitioners, whether in respect of the continuation of the EOGM or its having been adjourned on 5.9.2004, the authenticity of the minutes recorded in the said EOGM, the effect of not recording the minutes in the minute book and the alleged manipulations in the records, are all questions of facts. It was submitted that the scope of Section 34 of the Act is very limited in nature and the petitioners cannot be permitted to challenge the findings of fact arrived at by the learned Arbitrator as reappreciation of facts by the Court in the present proceedings, is not permissible. In support of his contention that only when the Court is satisfied that the Arbitrator has misconducted himself or that the award has been improperly procured or is otherwise invalid, can the Court set aside such an award, reference was made to the judgment of the Supreme Court in the case of Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.,

8. Rebutting the allegations leveled on behalf of the petitioners to the effect that the date and venue of the EOGM called on 5.9.2004 at Mumbai was fixed by the respondents with the malafide intention of rushing through the proposed amendments in the constitution, it was submitted by the counsel for the respondents that as per clause (xi) of Chapter VII of the constitution of the Association, which deals with the holding of an EOGM, the requisite quorum is of 50 members, as against which, the meeting was admittedly attended by 54 members. Thus, the EOGM held on 5.9.2004 at Mumbai had the required quorum. It was further submitted that the date of the EOGM was decided in the previous meeting of the Central Council held at Mumbai on 7.8.2004 and that the said date of the meeting was chosen since, as per clause 16(b) of Chapter III of the constitution, the annual subscription payable by members becomes due on the first day of November of each year. He submitted that as the issue of enhancement of subscription fee by amending the constitution of the Association was pending consideration, it was deemed necessary to hold the meeting well before 31.10.2004 so as to give necessary intimation to all the State and District level offices before the start of the next Association year.

9. In so far as recording of the minutes of the meeting was concerned, it was submitted on behalf of the respondents that as a matter of practice, the minutes of the meeting were recorded on an audio tape along with rough notes and thereafter, the same are placed before the next AGM wherein the requisite signatures are appended and then it is placed in the minutes book. The attention of the Court was drawn to Clause 3 of Chapter I of the constitution which mandates that amendment to the constitution shall come into effect immediately after it is passed, unless otherwise specified. Thus it was submitted that the resolution of the EOGM by which the constitution was proposed to be amended having been passed on 5.9.2004 itself, came into effect on the very same date and was not dependent on being reduced into writing. It was further submitted that not only was the resolution by which the constitution was amended passed, but the petitioners have in furtherance thereto, implemented the said minutes by

collecting enhanced subscription for the next year, on the basis of the amended constitution, thus accepting the resolution passed on 5.9.2004.

10. It was stated on behalf of the respondents that the minutes of the meeting were duly recorded in the CD which was produced before the learned Arbitrator. Counsel for the respondents submitted that it was not even the case of the petitioners that the minutes of the EOGM held on 5.9.2004 were not recorded in any form or that the recording of minutes had not been the past practice of the Association. He contended that the only issue raised by the petitioners before the learned Arbitrator was regarding the veracity of the CD by stating that there were interpolations or tampering which has been adequately dealt with in the impugned award wherein the learned Arbitrator has held that most of the proceedings were clearly audible and there was no assertion on the part of the President that the meeting was adjourned, as claimed by the petitioners. In support of his contention that mere allegations of tampering of tape will not make the same inadmissible in evidence, counsel for the respondents relied upon a judgment of the Supreme Court in the case of S. Pratap Singh Vs. The State of Punjab,

11. As regards the objection raised by the petitioners that the alleged minutes of the EOGM dated 5.9.2004 were never placed in the next AGM and thus could not be confirmed in the meeting of the Council held on 30.10.2004, it was submitted on behalf of the respondents that since there was a stay granted in the suit proceedings, the minutes could not be placed before the AGM held subsequently, for the purposes of confirmation. It was further submitted that the minutes could not be placed for approval before the AGM held on 27.1.2008, which date was subsequent to the passing of the impugned award dated 11.12.2007, for the reason that the agenda of the said meeting was circulated well in advance on 26.11.2007, during which period, the stay was continuing to operate and the arbitral proceedings had not culminated in an award.

12. I have heard the counsels for the parties and also perused the documents on the record, including the relevant orders passed by the learned Arbitrator during the arbitration proceedings.

13. After examining the contour of facts as delineated by both the sides, the key issues which emerge for consideration are as to whether the EOGM dated 5.9.2004 held at Mumbai, was properly held, whether in the said meeting, the House had approved the amendments to the constitution as proposed and whether the amendments could be given effect to without the same being approved by the AGM of the Association. A perusal of the impugned award shows that after recording a brief background leading to the institution of the suit by the petitioners and taking note of the submissions of the parties, the learned Arbitrator formulated a question as to whether the EOGM held on 5.9.2004 was adjourned by the President or it came to an end after approving the amendments of the constitution. It is pertinent to note that by way of the proposed amendments, not only was the subscription for local, State and Headquarter

bodies proposed to be enhanced, it was also proposed that all the activities of the Association shall take place at Mumbai and all pending matters at Delhi shall stand transferred to Mumbai jurisdiction with immediate effect.

14. Taking into Consideration the entire evidence on the record and particularly, after hearing the audio CD submitted by the respondents, which recorded the minutes of the meeting held on 5.9.2004, the learned Arbitrator arrived at a conclusion that though there were some interruptions in between, but most of the proceedings were clearly audible. He held that once there was a quorum as per the constitution of the Association, to hold an EOGM, any objection as to the skeletal presence of members who attended the meeting on 5.9.2004 at Mumbai, on account of the fact that the World Dental Congress was due to be held in Delhi starting from 6.9.2004, is of no consequence. The learned Arbitrator concluded that the meeting was properly held on 5.9.2004 and the proposed amendments were not only passed therein, but given effect to by the petitioners. In fact, the learned Arbitrator went a step further and observed that even if the amendments of the General Body Meeting were not recorded in writing in the minutes book, the same would not make any difference as the minutes had been recorded in an audio CD and the petitioners had themselves acted upon the said minutes by collecting subscription on the basis of the amended constitution.

15. Looking at the nature of objections raised by the petitioners in the present petition, it is apparent that the petitioners are seeking to invite the Court to tread into forbidden territory by reappreciating and re-examining the findings of facts in the impugned award and the correctness of the decision arrived at, which is clearly impermissible and beyond the scope of interference under the provisions of Section 34 of the Act.

16. The law is well settled that the scope of the Court's interference in an Arbitral Award is very limited. This Court is not expected to sit in appeal or judgment over the judgment of the Arbitrator. In *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, , it was held that the Court cannot reappreciate the material on the record. In *Hindustan Tea Co. Vs. K. Sashikant Co. and Another*, the Supreme Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. In *Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others*, , it has been opined that it is only an error of law and not a mistake of fact committed by the Arbitrator which can be adjudicated in the application/objection before the Court.

17. The Supreme Court in the case of *Sudarsan Trading Co. Vs. Government of Kerala and Another*, held that once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the Arbitrator to consider and decide, on which the Court cannot substitute its own decision. If on a view taken of a contract, the decision of the arbitrator on certain aspects, is a possible view, though perhaps not the only correct view, the award cannot be examined and set

aside by the Court on the said ground.

18. It is also a settled legal proposition that where two views were possible, it could not be predicated that there was an error apparent on the face of the award. (Refer M/s. Hind Builders Vs. Union of India, In Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, , the view expressed by the Supreme Court was that the reasonableness of reasons given by the Arbitrator were not open to challenge and that the proper approach would be for the Court to support the award.

19. Returning to the case in hand, the issue of inadequate number of members who attended the EOGM on 5.9.2004 has been rightly answered by the learned Arbitrator by referring to the constitution of the Association which mandates a requisite quorum of 50 members. Thus, no malafide intentions can be attributed to the respondents, particularly, when the date and time of the EOGM was fixed in the meeting of the Central Council of the Association held on 7.8.2004.

20. The argument of the counsel for the petitioners that the learned Arbitrator failed to appreciate that there were interruptions in the audio CD at material points or that particular portions of the audio CD were doctored and that the President said something that was deleted, are again purely questions of fact which do not fall within the realm of interference in a petition filed u/s 34 of the Act. Even if it is assumed that two views were possible after hearing the audio CD, holes cannot be punctured in the findings of the learned Arbitrator on the ground that in the opinion of the Court, another view was possible. On the basis of preponderance of probabilities, if the learned Arbitrator took a particular view which was also a possible and reasonable view in the given facts and circumstances, he cannot be faulted. The learned Arbitrator was well justified in returning a finding on the basis of hearing the audio CD in question. The Court cannot be called upon to substitute itself for the Arbitrator and minutely go through the written text of the audio recording to arrive at different conclusions and exercise appellate powers over the decision of the learned Arbitrator.

21. Coming next to the plea raised on behalf of the petitioners that as the minutes of the EOGM filed by respondent No. 2 in the proceedings in CS(OS) No. 1406/2004 do not tally with the minutes filed before the Registrar of Firms & Societies, the findings in the impugned award to the effect that it was a case of the respondent No. 2 that the minutes filed in the suit proceedings are extracts of the EOGM, is not borne out from the pleadings on the record. The petitioners have placed on record some of the pleadings and documents filed in CS(OS) No. 1406/2004. A perusal of the letter dated 9.9.2004 addressed by the Association to the Registrar of Firms and Societies shows that while mentioning the holding of the EOGM on 5.9.2004 at Mumbai, it was simply conveyed that amendments to the constitution were unanimously approved by the House. The only document enclosed with the letter was the copy of the amended constitution. Even in his application filed in the civil suit, seeking vacation of the exparte injunction order, the respondent No. 2 herein (defendant No. 3 therein) did not state that the

Resolution dated 5.9.2004 filed in the suit proceedings was forwarded to the Registrar of Firms & Societies. Hence, even if the minutes filed in the suit proceedings or the extracts thereof filed by respondent no. 2 are not the true and correct reproduction of the actual minutes of the meeting held on 5.9.2004, the position shall not change as the learned Arbitrator has upheld the authenticity of the audio CD which is the ultimate source and observed that most of the proceedings of the EOGM were clearly audible. When the original source has been held in the award to be unsullied by any tampering or interpolation, nothing further need be said on the said issue.

22. The bone of contention before the learned Arbitrator was as to whether the EOGM was properly held on 5.9.2004 and if held, whether the meeting had approved the amendments to the constitution. For the said purpose, the learned Arbitrator has given his detailed findings in the award from page 16 onwards. He has gone into the background of the amendments proposed in the EOGM dated 5th September, 2004. The relevant clauses of the constitution of the Association have been carefully examined by him, particularly, those which provide for amendment to the constitution and calling of the Extraordinary General Body Meeting of the Association. The correspondence exchanged by different branches of the Association in the context of the proposed amendments has been looked into. Particular mention was made to the letters dated 20th March, 2003 and 29th June, 2003 addressed by the petitioner No. 2, who was the Secretary of the South Delhi Branch of the Association in the year 2003 when the petitioner No. 1 was its President, wherein they had informed the respondent No. 2 that all the amendments including the rates of subscription were approved by their branch. The learned Arbitrator also took note of the discussions held in the meeting of the Central Council on 7th. August, 2004. Thereafter, the notice period for calling an EOGM and the quorum of the said EOGM have been discussed by the learned Arbitrator. He ultimately arrived at a conclusion that the EOGM was held on 5.9.2004 as per the constitution, it had requisite quorum and the amendments proposed in the constitution were duly approved by the EOGM. Finally, the learned Arbitrator took note of a very relevant and germane factor, which is the conduct of the petitioners No. 1 & 2 who were the President and the Secretary of the South Delhi Branch of the Association at the relevant time and observed that they had themselves started collecting subscription from their members w.e.f. November, 2004 at the rate as approved in the amended constitution without raising any objection that the amendments were not approved in the EOGM.

23. Taking into consideration all the aforesaid circumstances, the learned Arbitrator came to the conclusion that the stand adopted by the petitioners/claimants was clearly an afterthought more so, when they had themselves not only approved the amendments in the Branch meeting and in the Central Council meeting, but had also collected subscription on the basis of the amendments without making any protest.

24. The aforesaid findings of the learned Arbitrator are not only well-reasoned

but are based on the conclusions arrived at as per the records. There is no justification for this Court to sit in appeal on the findings of facts and the conclusions arrived at by the learned Arbitrator. The challenge laid to the award by the petitioners does not come within the scope of the provisions of Section 34 of the Act as there is no jurisdictional error, illegality, arbitrariness, irrationality or perversity in the impugned award which deserves to be interfered with.

25. The contention of the counsel for the petitioners that the learned Arbitrator did not give a finding with respect to difference in the minutes of the meeting as recorded in the audio CD, as against the minutes of the meeting sent by the respondents to the Registrar of Firms & Societies, loses its significance when, at the end of the day, the learned Arbitrator arrived at the conclusion that the audio CD containing the recording of the meeting held on 5.9.2004, produced by the respondents, was reliable and held in accordance with the Rules. The respondents are justified in stating that the petitioners neither challenged the source of the CD, nor did they challenge the custody thereof. The veracity of the CD having been established by the learned Arbitrator upon hearing the same, this Court cannot sit in appeal over the findings of the learned Arbitrator by examining the admissibility of the evidence afresh, as sought to be done by the petitioners. Even if the other view projected by the petitioners was a possible or a plausible view, the same cannot be foisted on the learned Arbitrator and nor can the same be a ground for displacing the view taken by the Arbitrator, for the reason that there appears no error apparent on the record. Once it is held that the conclusions of the Arbitrator are based on facts, this Court ought not to tamper with the award lightly.

26. Even if it is assumed that the Central Council meeting could not have confirmed the minutes of the EOGM dated 5.9.2004, till the said minutes were placed before the AGM for confirmation, as contended on behalf of the petitioners, there is no running away from the fact that Clause 3 of Chapter I of the constitution of the Association stipulates that the amendment to the constitution shall come into effect immediately after the same is passed. In the meeting held on 5.9.2004, the proposal to amend the constitution was duly passed by the EOGM. Hence, irrespective of the Central Council confirming the minutes of the meeting of the EOGM, prior to the minutes being placed before the AGM, the amendments made to the constitution were to be given effect to, immediately. Furthermore, the petitioners also do not controvert the fact that pursuant to the carrying out of the amendments to the constitution, the petitioners have not only been party to approving the same in their branch meetings, but have also collected the enhanced subscription from the members of the basis of the said amendments, without raising any protest. In fact, the aforesaid findings given by the learned Arbitrator have not been questioned by the petitioners before this Court in the course of arguments.

27. Lastly, the contention of the counsel for the petitioners that the learned Arbitrator overlooked the mandatory requirement of the constitution of the

Association to the effect that the minutes were required to be written down in the minutes book, is answered by a perusal of Clause 3 in Chapter-I of the constitution which mandates that an amendment to the constitution shall come into effect immediately after it is passed, unless otherwise specified. The explanation offered by the counsel for the respondents that the minutes of the EOGM held on 5th September, 2004 could not be placed in the next AGM for confirmation and thus, could not have been confirmed in the meeting of the Central Council held on 30th October, 2004 for the reason that on 26.11.2007, when the AGM was notified for being held on 27th January, 2008, the stay was continuing to operate and the arbitral proceedings had not culminated in an award, is tenable and reasonable. Much emphasis was laid on behalf of the petitioners on the question as to "which are the minutes of the EOGM dated 5th September, 2004". The said query has been answered in clear, unequivocal and unambiguous terms by the learned Arbitrator who has arrived at a conclusion that the minutes contained in the audio CD were the correct reproduction of the minutes of the meeting held on 5th September, 2004. Thus, even if it is assumed that the minutes filed in the civil suit and before the Registrar of Firms & Societies were not the correct minutes and that the confirmation of the said minutes in the Central Council meeting was of no consequence, fact remains that the minutes contained in the audio CD were the original minutes of the meeting and as the same related to amendments in the constitution of the Association, they could have been given effect to immediately after the same were passed without taking any further steps in that regard.

28. In the aforesaid facts and circumstances, the petition filed by the petitioners assailing the impugned award is held to be devoid of merits and is accordingly rejected. The parties are left to bear their own costs.