

(1958) 03 BOM CK 0016
In the Bombay High Court
Case No : Appeal No. 164 of 1954

Vinayak Vishnu Sahasrabudhe

APPELLANT

Vs

B.G. Gadre and Others

RESPONDENT

Date of Decision : 11-03-1958

Acts Referred:

Arbitration Act, 1940 — Section 16, 20, 30

Citation : AIR 1959 Bom 39 : (1959) ILR (Bom) 87

Hon'ble Judges : Mudholkar, J

Bench : Single Bench

Advocate : B.A. Udhoji, for the Appellant; C.P. kalele, for the Respondent

Judgement

1. This is a plaintiff's appeal from the judgment made in pursuance of an award given by the arbitrators who had been appointed by the parties to arbitrate into their dispute.
2. It is common ground that the plaintiff Sahastrabudhe agreed to construct a building for the respondent No. 1 according to an agreed plan at a cost of Rs. 60,000/-. Subsequent to this agreement, certain variations were effected in the original plan by reason of which the appellant was required to deviate from his original work.
3. The appellant carried out a considerable part of the work which he had undertaken and had received from time to time a total amount of had received from time to time a total amount of Rs. 66,550/- from the respondent No. 1 he got that work finished at a cost of Rs. 21,000/- and odd. He therefore claimed from the appellant the difference between the amount which was agreed to be paid by him to the appellant and the amount actually spent by him. This amount according to him was Rs. 7100/- or so. The appellant, on the other hand, contended that in respect of the work which was actually done by him for the respondent No. 1, he had spent a sum of Rs. 16,726 and odd over and above what he was entitled to receive from the respondent No. 1.

4. In pursuance of a clause in the agreement between the parties, the dispute was referred for arbitration to the respondents 2 and 3. One of the clauses in the arbitration agreement was as follows:

"You arbitrators are authorised to nominate a third person to act as a final arbitrator or umpire in case there is difference of opinion between you and such nomination of an umpire should be made by you both before you proceed to start inquiry."

The Court below has held that no such umpire was appointed by the arbitrators though there were proposals before them for appointing Mr. D.S. Gadre or Mr. B.P. Choudhari as an umpire. The arbitrators then gave notices to the parties that they will take up the matter on 13-7-1951. On that date, both the parties appeared before the arbitrators. A meeting was held in the house of the respondent No. 1. On that date, remuneration of the arbitrator was fixed. The arbitrators then examined the building, made preliminary enquiries from the parties regarding the outstanding issues, and perused the original agreement between the parties along with the estimates and plans for the construction of the building which were in the possession of the respondent No. 1. The arbitrators directed the parties to file detailed statements of their claims along with necessary documents and account-books within 15 days from this date. They also directed the respective parties to submit their replies within ten days from the date of receipt of the statements of claims made by the opposite party. They then fixed sittings for the 11th and the 12th of August, 1951. The arbitrators accordingly sat on those days. Both the parties were present on each of those days. On the first of those days certain measurements were taken. On the next day, the arbitrators made certain calculations on the basis of these measurements and explained those calculations to the parties. After discussion between the parties, they agreed upon a certain method of calculating the costs of the work which had been done up to that date. The arbitrators then fixed sittings for 1st and 2nd of September, 1951. In point of fact, however, they did not sit on either of these dates. They sat instead on the 6th and the 7th of October, 1951. According to the appellant, he had no notice of these sittings. It may be mentioned that the sittings on the 6th and the 7th were admittedly attended by the respondent No. 1, but according to the appellant they were not so attended by him. After these sittings were over no further date was fixed by the arbitrators. It is said that the arbitrators met on the 22nd of October, 1951 and drafted a tentative award which was signed by one of the arbitrators, the respondent No. 2, on that very day but it was not signed by the other arbitrator, the respondent No. 3 on that day. It is further said that he signed it on 1-11-1951.

5. The appellant's complaint is that the proceedings subsequent to the 12th of August, were conducted by the arbitrators behind his back and that he was not bound by that award. He further said that he was never informed of the award though he made several enquiries from the arbitrators as to whether an award

had at all been made. He therefore filed an application u/s 20 of the Arbitration Act before the Court below on 2-4-1952. After the application was filed, notices thereof were given to the respondents and eventually the arbitrators filed the award in the Court on 8-9-1952. After the award was filed the appellant objected to the filing of the award and contended that the arbitrators had mis-conducted themselves inasmuch as they had made the award without hearing him and that therefore the award should be set aside, fresh arbitrators be appointed by the Court and the matter should be referred to them for making an award after following the proper procedure. He also contended that the arbitrators omitted to decide some of the matters in controversy which were referred to them and that on this ground also the award was invalid. He however did not make a separate application u/s 16 of the Arbitration Act for remitting the award to the arbitrators.

6. The Court below after considering the contentions of both the parties upheld the award whereunder the arbitrators have held that the appellant shall pay a sum of Rs. 5268/- and costs to the respondent No. 1.

7. One of the points raised by the appellant before the Court below was that he arbitrators having failed to appoint an umpire before entering on the arbitration, the award ultimately made by them is invalid. This contention of the appellant was negated by the Court below on the authority of the decision in *Tikaram v. Hansraj*, ILR 1954 Nag 589: AIR 1954 Nag 241. In that case the learned Judges were considering Clause 2 of the First Schedule of the Arbitration Act which reads thus:

"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."

It may be mentioned that there was no express term in the agreement for referring the dispute to arbitration to the effect that the arbitrators shall appoint an umpire before entering upon the reference. The matter was therefore governed by Clause 2 of the Schedule I of the Arbitration Act. According to the learned Judges, in spite of the use of the word "shall" the provisions of Clause 2 of the First Schedule must be construed as being merely directory and not mandatory. I may however point out that apparently a different views has been taken by another Division Bench of the Nagpur High Court in *Firm Shriram Haracharandas Khamgaon v. The President, Cotton Seed Forwarded Delivery Managing Association Ltd., Khamgaon*, AIR 1954 Nag 236. In that case the learned Judges held that if a dispute is referred for arbitration by two arbitrators, they have to appoint an umpire in accordance with Clause 2 of the First Schedule of the Arbitration Act, unless the arbitration agreement provides otherwise.

8. The Lucknow Bench of the Allahabad High Court has held in *Jawala Prasad Vs. Amar Nath*, , that unless there is an express provision to the contrary in the agreement, the arbitrators are under a statutory obligation under Schedule I, para 2, to appoint an umpire not later than one month from the latest date of

their respective appointments, that the provisions of para 2 of Schedule I are of a mandatory character, that it is clearly the duty of the arbitrators to appointment of the umpire, the award made will be invalid.

9. In the first mentioned Nagpur case, it was held that if there is no disagreement between the arbitrators the award was not rendered invalid merely by reason of the failure of the arbitrators to appoint an umpire before they proceeded with the reference. With respect to the learned Judge, I think that the view taken in the later Nagpur case and in the Allahabad case appears to be correct.

10. Apart from that, here we have an express term in the agreement which is to the effect that the arbitrators shall appoint an umpire before entering upon the reference. Now, where there is an express term of this kind in the agreement for arbitration then it seems to me that the provisions of Clause 2 of the First Schedule will not be attracted and the matter would be governed only by that term. Plainly, the intention of the parties was that the jurisdiction of the arbitrators to enter on the reference was subject to the appointment by them of an umpire. Apparently, the parties envisaged a possibility of a difference between the arbitrators who were appointed by them and therefore they thought it fit to incorporate an express term of this kind in the agreement. It has to be borne in mind that an arbitrator derives his authority from the reference which furnishes the scope and prescribes the limits of jurisdiction. He has therefore to make an award in conformity with the reference, both in substance and in form. Thus where it is one of the conditions of the reference that before entering upon it the arbitrators shall appoint an umpire then that condition must be satisfied by the arbitrators before they enter upon their duty. In this connection, I may refer to the decision in *Chooni Lal v. Madhoram*, ILR 36 Cal 388 . In that case the High Court had to consider the effect of the failure of the arbitrators acting under the Rules relating to arbitration under the Bengal Chamber of Commerce to appoint an umpire before their entering upon the reference. The High Court held that when a term of the reference provides for the appointment of an umpire before the arbitrators enter upon the reference, until the umpire is appointed the reference could not proceed. In coming to this conclusion, the High Court relied upon two English decisions: *Bright v. Durnell*, (1836) 4 Dowl. 756 , and *Bates v. Townley*, (1847) 1 Ex 572 . The first mentioned of these two decisions is that of the Full Court of Exchequer which held that where a term of this kind is to be found in the agreement for arbitration, the appointment of an umpire is a condition precedent and that until one is appointed, the reference cannot go on. This being the legal position, I must therefore hold, disagreeing with the Court below, that the award is invalid.

11. Apart from this, I would like to point out that the arbitrators have dealt with the reference in an extremely slovenly manner. In the first place, no proper notices of the sittings for the 6th and 7th of October, were given to the parties. The fact is admitted by the respondent No. 2 who said that though no notices

were given by them the parties were sent for on the 6th. Of course, on the question whether the appellant did appear at this sitting, there is a difference between the versions of the appellant on the one side and the respondents on the other. That however is another matter. But the fact remains that no proper notices were given to the parties. Even according to the arbitrators and the respondent No. 1 the appellant was not present on the 7th on which day the account-books of the respondent No. 1 were examined by the arbitrators. Therefore, if, in point of fact, the appellant was not given notice of the sitting on the 7th and was absent on that day the arbitrators could not without doing violence to the principles of natural justice proceed with the examination of the account-books. It is true that the Arbitration Act does not provide for the procedure to be followed by the arbitrators. Even so it is well settled that the arbitrators are bound to apply the principles of natural justice. One of those principles is that nothing prejudicial to a party shall be done behind its back or without notice to that party.

12. It may be mentioned that the appellant disputed items to the extent of Rs. 8,000 and odd. He has stated that even the account books do not contain a proper account of these items. As to a part of this item, Rs. 6883/-, one of the arbitrators Mr. Khandekar, respondent No. 3, observed that no details were forthcoming in the account-books. He also objected to certain amounts to which reference was made in the account-books and in fact submitted a note on this point to his co-arbitrator, respondent No. 2, of which he sent copies to the parties. No doubt, the respondent No. 3 ultimately signed the award whereunder credit was given to the respondent No. 1 even in respect of the amount to which reference was made in the respondent No. 2's note. But one fact emerges from this and that is that this deficiency in the account-books does exist. In respect of the entries of Rs 12,936/- and odd, the appellant raised no objection and he accepted them because full details were contained in the account-books. He disputed other entries Therefore it was necessary to prove those entries. I do not think that it was open to the arbitrators, after examining the account-books behind the back of the appellant, to accept the entries relating to the items which were disputed by him unless there was proof apart from the entries before them. By accepting these entries the arbitrators have, in my opinion, contravened one of the principles of natural justice and have thus been guilty of legal misconduct.

13. Then there is a dispute between the parties as to the interpretation of Clause 3 of the agreement. Now, instead of giving a finding on this point, the arbitrators have merely said that no finding need be given thereon. This was clearly improper.

14. Then there are several other defects in the procedure. It is said that the draft award was made on 22-10-51 but was signed only by one of the arbitrators. The other arbitrator then put his signature was put not at the space meant for it but somewhere in a corner. This award was then typed on a stamp paper. We find

that neither of the arbitrators' signature appears on the stamp paper but on a slip of paper which is attached to the stamp paper. The respondent No. 3 has stated in his evidence that he did not sign the award on the stamp paper. Apparently, according to him, his signature was taken on a piece of paper which was not the award and that paper was then pasted to the award. Further, he admits that he did not read the award before signing it. Bearing in mind the fact that he was in ill-health (and it may be mentioned that he had since died) there is no reason to disbelieve him on the point. The appellant cannot, therefore, be blamed if he regards the whole thing as suspicious. It may well be that the arbitrators did not act mala fide but they have acted in such a manner as to give an impression to the effect that every thing was not done in proper form. This impression is accentuated by the fact that the proceedings were conducted in the house of the respondent No. 1 and even all the papers relating to the proceedings were kept in his house. A mention may also be made of the fact that the award itself was handed over by the arbitrators to the respondent No. 1 for typing. All these facts are such as could arouse a reasonable suspicion in the mind of the appellant that the arbitrators were siding with the respondent No. 1.

15. One of the complaints made by the appellant was that though the award is said to have been made on 1-11-1951, he was not given any information about that by the arbitrators. Of course, the lower court after considering several circumstances has come to the conclusion that the appellant was informed of the award soon after it was made. The evidence on the point is however conflicting. If the arbitrators were acting in a business-like manner they should and ought to have given a notice in writing to both the parties as required by the Arbitration Act. Instead of that, they waited till the appellant filed an application u/s 20 of the Act before the Court below and were served with a notice thereof. Considering all these circumstances I am of opinion that the award cannot be sustained. I therefore set it aside and direct the Court below to appoint fresh arbitrators with appropriate instructions and direct them to enter upon the reference.

16. I would however like to make one thing clear and it is that the agreement as to the manner in which the accounts have to be made which was entered into between the parties before the respondents 2 and 3 shall be adhered to by them and the arbitrators who will be appointed by the Court will proceed on the basis of that agreement. If there is any question as to the interpretation of any of the terms thereof it will be for the arbitrators to interpret it.

17. Costs incurred so far will abide the event. The parties should appear in the Court below on 1st April, 1958.

18. Award set aside.