

(1988) 11 DEL CK 0013

In the Delhi High Court

Case No : Suit No. 1706A of 1984 and Interim Application Appeal No. 953 of 1986

Wazir Chand Karam Chand

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 04-11-1988

Acts Referred:

Citation : AIR 1989 Delhi 175 : (1989) 1 ARBLR 187 : (1989) 37 DLT 164

Hon'ble Judges : Mahesh Chandra, J

Bench : Single Bench

Advocate : Mukul Rohatagi, A.S. Gambhir and P.S.Mahendra, for the Appellant;

Judgement

Mahesh Chandra, J.

(1) By this judgment I propose to dispose of suit No. 1706A of 1984 filed under sections 14 and 17 of the Arbitration Act, 1940 and objections incorporated in I.A. No. 953 of 1986 filed u/s 30 read with Section 33 of the Arbitration Act, 1940 against the award dated 12th September, 1984 in the said suit. The objections are opposed on behalf of the Union of India.

(2) The facts giving rise to this order are that vide orders dated 2nd August, 1982 in Suit No. 11 A of 1980 the matter in dispute between the plaintiff and defendant No. 1 Union of India was referred to the sole arbitration of Shri O.N. Endley, defendant No. 2 and after said Shri Endley published his award on 12th September, 1984 this suit u/s 14 read with Section 17 of the Arbitration Act was filed with a request that defendant No. 2 should be directed to file the award and the record of the arbitration proceedings in court where after this court may proceed in accordance with law. On the filing of the said suit notice was issued to defendant No. 2 calling upon him to file the award and the award was accordingly filed by the arbitrator along with arbitration proceedings. After the usual notice of filing of the award was served upon the parties, I.A. No. 953 of 1986 was filed by the plaintiff by way of objections u/s 30 read with Section 33

of the Arbitration Act. The said objections are opposed on behalf of the Union of India. Upon the pleadings of the parties the following issues were framed vide my order dated 13th November, 1986: "1. Whether the arbitrator has misconducted himself or the proceedings ? 2. Whether the award is liable to be set aside on the grounds mentioned in the objections ? 3. Relief".

(3) I have gone through the file including arbitration proceedings and have heard parties' respective counsel and after giving my considered thought to the matter before me I have come to the following findings: Issue No. 1:

(4) The first contention of the objector is that the arbitrator has not disclosed in the award his reasoning as to how a sum of Rs. 10,000.00 only has been awarded to the plaintiff while the claims were in excess of Rs. 3 lakhs. Learned counsel for the plaintiff has not been able to draw my attention to any document whereunder the arbitrator was called upon to give reasons in his award and it is not incumbent upon the arbitrator to give any reasons for his award unless specifically agreed to between the parties and so directed to the arbitrator. In fact no arguments have been addressed on this objection and in these circumstances I hold that the arbitrator has not misconducted by not giving any reasons in his award.

(5) From the perusal of ground (A) in para 3 of the objections we find that it has been contended by the plaintiff as under : "A. That the award published by the arbitrator and the proceedings conducted by him are entirely void being in utter violation of the principles of natural justice. On 21.3.1984, the parties extended time for making of the Award up to 5.2.84. The arbitrator asked 167 the plaintiff to supply the stamp paper which was supplied on 25.5.84. The award was not made during that time. The hearing was concluded on 21.3.84 and formal extension was given up to 5.7.84 to make and publish the award. It appears from the record that in June, 1984 the arbitrator asked the opposite side on telephone to deliver some site plan which appears at page 333 of the arbitration record. It is submitted that the arbitrator acts as a quasi judicial authority and is not supposed to ask either party on telephone to deliver some documents behind the back of the other party. From the inspection of the record, it appears that the site plan which has been supplied by the opposite side has a direct nexus to claim No. 1 raised by the plaintiff in his claims before the arbitrator. This must have prejudiced the mind of the arbitrator while making the award. It appears that on 25.8.84 a further extension of time was given. This was also done without any notice to the plaintiff and the representative of the plaintiff who must have gone to the office of the arbitrator for some other work must have been asked to extend the time. The record shows that after this extension of time, there is no hearing, yet at page 335 of the record, there appears a document dated 1-8/9-1984 which gives some calculations relating to service areas of doggies at Bhiwani Junction. This is also without any notice and at the back of the plaintiff/objector. A perusal of the said document at page 335 clearly shows that it relates to claim No. 6 of the plaintiff raised before the arbitrator as

claimant. This action of the arbitrator is clearly prejudicial to the interest of the plaintiff and is in utter violation of the principles of natural justice which renders the proceedings void and the award deserve to be set aside on this ground alone".

(6) In reply thereto it is contended by the Union of India as under : "The allegations made in this ground are not admitted as stated. It is denied that the arbitrator conducted the proceedings in violation of the principles of natural justice. The plaintiffs were given full hearing and they participated in the proceedings of the arbitration without any objection at any stage. The time for making and publishing the award was extended with the natural consent of the parties to which the plaintiffs also agreed. It is however, agreed that the site plan was made available to the arbitrator on his demand. The site plan was a document, which was in the possession of the plaintiffs, who executed this work. It was the document which was common between the parties. Therefore, there was no question of the site plan prejudicing the mind of the arbitrator while making the award. It was not a private communication but only an admitted common document. Therefore, the ground taken by the plaintiff is without any substance. The allegations made in this ground are denied. The extension of time for making and publishing the award from 25.8.84 to 4.11.84 is duly signed by the parties i.e. by the plaintiffs, through Shri V.S. Gupta, Authorised representative of the plaintiffs and Shri Krishna Lal, Sen (C)/SSB on behalf of the Union of India. A copy of the enclosures filed before the Arbitrator was delivered to the plaintiffs at the same time".

(7) It has not been in fact disputed during the course of arguments that certainly site plan which is at page 332 of the arbitrator's file was obtained by the arbitrator after the arguments in the matter had been heard and the matter had been reserved by the arbitrator for giving his award. Reference in this behalf may be made to page 333 of the arbitrator's file which is the copy of the letter sent by the department of defendant No. 1 to the arbitrator. This letter shows that defendant No. 2 had asked defendant No. 1 to furnish copy of the site plan of the work in dispute showing the length, breadth and height of the ground reservoir and thus it can safely be concluded that certainly the arbitrator had accepted the site plan of the works on the back of the plaintiff from the defendant No. 1. Learned counsel for the plaintiff has then drawn my attention to page 335 of the arbitrator's file. This is the letter received by the arbitrator from the office of defendant No. 1 whereby certain calculations regarding the surface area of doggies at Bhiwani Jn. had been submitted on 1.9.1984 after the arguments in the matter had concluded before the arbitrator. There is nothing in the arbitrator's file which suggests that after receipt of these calculations any notice was issued by the arbitrator to the plaintiff calling upon the plaintiff to submit its objections regarding the said calculations and it can safely be presumed that in arriving at his conclusion the arbitrator had taken into account these calculations. This also shows that these calculations have been received by way of additional documents or additional evidence from the defendant No. 1 by the arbitrator

behind the back of the plaintiff. In this context it would be appropriate to make a reference to the affidavit of Shri S.N. Sharma, Deputy Chief Engineer of the Northern Railway, Shakurbasti, Delhi filed by way of evidence on behalf of defendant No. 1, when this affidavit is read in the light of the reply to the objections it cannot be said that any notice of filing of these documents, the site plan and the calculations, was given by the arbitrator to the plaintiff. This affidavit is conspicuously silent on the question that the site plan was demanded in the presence of the parties or was given in the presence of the parties to the arbitrator as suggested in the reply. Likewise the affidavit is silent on the allegations that the calculations were given by the representative of defendant No. 1 to the arbitrator in the presence of authorised representative of the plaintiff. In view of these facts, I hold that the site plan and the calculations were received by the arbitrator on the back of the plaintiff and without affording any opportunity to the plaintiff to rebut these documents.

(8) Factual position being what has been decided above, a question arises whether the arbitrator was justified in accepting the site plan and calculations on the back of the plaintiff-objector. The answer clearly would be in the negative. No doubt arbitrator is not bound by technical rules of procedure but he cannot ignore rules of natural justice. Thread of natural justice should run through the entire arbitration proceedings and the principles of natural justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken to suggest cross-examination or himself to cross examine and to be able to find evidence, if he can, that shall meet and answer it, in short to deal with in an ordinary course of legal proceedings. Except in a few cases where exceptions are unavoidable, both sides must be heard each in the presence of the other. If the arbitrator departs from this rule and hears one party in the absence of the other he is guilty of misconduct. Position of arbitrator is like Caesar's wife who should be above suspicion.

(9) In order to exclude the application of the rules of natural justice two things must co-exist : one is an express exclusion of the principle by a specific rule or term of the contract and the other is that dispute referred to arbitration is of a kind as is capable of being decided by the arbitrator fairly and honestly without the due observance of rule of natural justice.

(10) In *Cursetji Jehangir Khamba Tta and another v. W. Crowder and another*, 1894(19) Bom 299 it was held that "an arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without (if he does) giving the other side affected by such evidence the opportunity of meeting and answering it. This proposition is, however, subject to the qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration, and they may also expressly or by their conduct waive their objection to an irregular course of conduct on the part of the arbitrator.

(11) Where an arbitrator received certain papers and documents from the

defendants in a suit referred to his arbitration together with a letter from the defendants containing certain comments on the documents sent to him and made his award without giving the plaintiffs an opportunity of seeing the said papers and documents, and of meeting the inferences deducible from them, it was held that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside".

(12) Lahore High Court, following *Cursetji Jehangir Khamba Tta and another (supra)*, held in *Delhi Cloth and General Mills Co. Ltd. v. Firm Kidari Pershad Chhedi Lal of Ferozepur Cantonment* Air 1921 Lah 396 that "where an arbitrator received certain documents from the defendants in a suit referred to his arbitration and made extracts there from and placed them on file and made his award without giving the parties opportunity of seeing the said documents and of meeting the inference deducible from them and there was such a breach of duty on the part of the arbitrator as entitled the party to have the award set aside". This ruling was in turn followed in *Savarala Venkatasubbiah Vs. Kumara Ramiah*, .

(13) A division Bench of Calcutta High Court of the view in *Hari Singh Nehal Chand v. Kankinarah Co. Ltd.* Air 1921 Cal 657 that "although the court must not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, cannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to disregard. Whether the arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice must be equally applied in every case. One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether information is given orally or in the shape of the documents".

(14) In *Union of India (UOI) Vs. Ghaziabad Railway Station*, , a Division Bench of that court had also set aside the award where the arbitrator had accepted the claim made by one of the parties before him but without affording notice of that claim and opportunity of a hearing to the other party and it was held that the arbitrator was guilty of committing judicial misconduct.

(15) Thus the consistent view of various courts in India has from the very beginning been that arbitrator is bound by rules of natural justice including the principle incorporated in the maxim *Audi Alteram Partem*. It may be mentioned here that action of arbitrator cannot be defended on the plea that the evidence was inconsequential or did not affect his mind or was of trifling nature. The arbitrator cannot take it upon himself that this evidence improperly admitted had no effect on his mind. The arbitrator must observe principles of natural justice under which both parties are entitled to make representations on their own case and the case of his opponent. The courts will not permit slightest deviation from principles of natural justice even if such deviation relates to a trifling matter. In fact is impossible to gauge the influence which ex parte statement/document had upon the mind of arbitrator. The case is brought within the general principle that he might have been influenced. This court will not inquire whether or not the

mind of the arbitrator has been affected. It was in fact held by the Supreme Court in S.L. Kapoor Vs. Jagmohan and Others, that "the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It all comes from a person who has denied justice that the person who has been denied justice is not prejudiced".

(16) In view of my discussion above, I have come to the finding that the arbitrator has been guilty of legal misconduct in the instant case and decide this issue accordingly. Issue No. 2:

(17) For my findings upon Issue No. 1, I hold that the award is liable to be set aside on the grounds mentioned in the objections.

(18) For my discussion and findings upon issues above, objections (I.A. No. 953 of 1986) are accepted and the award is set aside. This disposes of the suit as well.