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[Case Brief] Mrs. Prajakta Mahesh Joshi & Another v. Mrs. Rekha Uday Prabhu & Others

Case name: Mrs. Prajakta Mahesh Joshi & Another v. Mrs. Rekha Uday Prabhu & Others

Case number/Citation: Arbitration Petition No. 121 Of 2012

Court: High Court of Bombay

Decided on: December 06, 2012

Relevant Act/Sections: Section 34 of Arb and Conciliation Act, 1996

➤ **BRIEF FACTS AND PROCEDURAL HISTORY:**

1. On 28 February, 2007, a MOU (Memorandum of Understanding) for a sale of a 2 BHK flat was signed between the Petitioners and the Respondents. The Respondents made initial payment of Rs. 50,000/- and handed over the documents. On 23 June, 2007, as the Respondents delayed balance payment, the Petitioner on request refunded the advance of Rs.50,000/- to the Respondents by a Bank transfer.
2. On 19 August, 2007, the Respondents filed a Consumer Complaint No. 149 of 2007 before State Consumer Disputes Redressal Commission, Maharashtra against the Petitioners. On 10 January, 2008, the complaint was dismissed by the State Commission. On 17 February, 2008,

the Respondents file First Appeal No. 100 of 2008 before the National Consumer Commission, New Delhi, challenging the State Commission Order. The same is pending.

3. On 10 May, 2010, the Petitioners received a Notice of Arbitration. The Petitioners sent a reply through its Advocate-cum-Arbitrator. On 18 June, 2010, the Petitioners received a reply notice from the learned Arbitrator posing as an Advocate for the Respondents. On 26 August, 2010 a copy of the Arbitral award received by the Petitioners. As dispute arose, Respondents 1 and 2 invoked arbitration clause and thereby unilaterally appointed Advocate Shri Shailendra S. Gandhi as the Arbitrator.
4. The Petitioners immediately by letter dated 24 May 2010 replied to the notice issued by the Arbitrator dated 10 May 2010 by which he fixed the first hearing/meeting at his office and also directed the parties to deposit Rs.50,000/- towards the initial payment. The Petitioners resisted every aspects of the invocation and the appointment of the Arbitrator and specifically mentioned that they would not be participating in the arbitration proceedings.
5. It was specifically pointed out about the dismissal of the Respondents' consumer complaint. It was also mentioned about the refund of Rs.50,000/- to the Respondents. Therefore, there existed no dispute. The Petitioners thereby also contended that having once invoked the judicial proceedings, there was no question of invoking of arbitration clause apart from unilateral appointment of the Arbitrator.

➤ **RATIO OF THE COURT:**

1. The court noted that the Arbitrator who was an Advocate of the Respondents by its reply dated 18.6.2010 referring to the above communication/reply of Petitioners, insisted the Petitioners to participate in the arbitration proceedings on 28 June, 2010 by stating it to be the last and final call. Surprisingly, the learned Arbitrator, who appears to be the Advocate of the Respondents, even replied in detail to the contentious issues specifically raised by the Petitioners in communication dated 24 May 2010.
2. The tenure of the reply/communication of Arbitrator dated 18.06.2010 in this court's opinion was like an Advocate replying on behalf of the client. Even after overlooking the last paragraph of the communication of the Arbitrator, the denial and the assertion were found to be as that of contesting Respondents.
3. This court noted that the arbitration clause referring to the Arbitration Act permitted the parties to resolve their dispute through a sole Arbitrator. Considering the scheme and object

of Arbitration Act, first requirement is that the Arbitrator must be appointed by the consent of the parties. The consent of Petitioner in the present case was never obtained.

4. Therefore, the unilateral appointment of Arbitrator, in such fashion itself was held to be impermissible mode to resolve the disputes by this alternative dispute resolution mode through the Arbitration. The requirement of consent so provided and/or clause so mentioned above, in no way, permits any one party to appoint Arbitrator unilaterally.
5. It is contrary to the terms and the law. Apart from this clause, it is necessary for both the parties to appoint and/or nominate and/or select sole Arbitrator by consent. The appointment of the Arbitral Tribunal without consent itself was contrary to the agreed terms of the contract.
6. In the court's view, an Arbitrator's role is quite limited though appointed by the parties, basically at the stage of fixing the meeting of arbitration proceedings. He is not empowered and/or even permitted to deal with the merit of the matter in such fashion on behalf of other party while calling or fixing the meetings. At this stage, the requirement is simply to give intimation and/or call upon the parties to attend in arbitration proceedings. Such notice/intimation in no way can be denial and/or assertion of other side's case.
7. From the contents of the communication dated 18.06.2010, it was clear that the Arbitrator who was Advocate of the Respondents, acted also as the Advocate and also as the Arbitrator. It is impermissible. Such dual capacity of Advocate and/or even of the Arbitrator is against the basic provisions of the Arbitration Act and/or the arbitration scheme itself. The Advocate by consent can act as Arbitrator, but cannot act in such dual capacity for only one party.
8. It was also noted that the Petitioners never attended the arbitration proceedings. The learned Arbitrator noting this absentee, passed the *ex parte* award by holding that the Respondent/disputant proved "beyond reasonable doubt" that the Petitioners breached and failed to perform the terms and conditions of MOU. This itself meant the learned Arbitrator had passed the award based upon the documents provided by the Respondents and the averments so made in the statement of claim.
9. The court held that the award must be based on the materials available on the record and the law. There is reason to only follow the concept of "beyond reasonable doubt" in such circumstances. The unilateral acceptance of the case of the Respondents, in such fashion, resulted into the Award whereby direction is to provide one flat and/or in the alternatively, to pay Rs.77,50,000/- with interest towards compensation and liquidated damages though there was no such specific agreement between the parties.

10. The aspect of compensation and/or liquidated damages means supporting evidence and material. It is necessary for the party one who claims such compensation and liquidated damages to show how they suffer loss and the basis for claiming such damages, apart from proving the proved default by the other side.
11. The court further held that the remedy under consumer Act as chosen already and as the complaint of the Respondents was dismissed for same contract and the cause and the Appeal was pending, the award so passed therefore also bad in law. The competent consumer court has already rejected the complaint of the Respondents. The Arbitrator, ought not to have decided the arbitration petition in such fashion. The Award was held to be perverse.
12. The Supreme Court has clarified that such proceeding is permissible though there exists arbitration clause. Therefore, even at this stage of passing of Award, the dispute/conflict so raised was pending before the judicial authority between the parties arising out of the same contract towards the same, still proceeded with the matter and passed the award without giving basic opportunity of any kind to the other parties.
13. The award was against the principles of natural justice. It was noted that the Petitioners, as recorded above, deliberately not attended the arbitration proceedings basically for the reason that the proceedings so initiated and the way in which the Arbitrator was appointed and proceeded further itself was contrary to the settled principles of arbitration law.
14. In a given case, the Petitioner would have participated in the arbitration proceedings and resisted the claim in all respects. The Arbitrator would have passed the appropriate order. But in this case the Petitioners having made their position clear in writing and had resisted every steps taken by the Respondents including the steps taken by the Arbitrator, who was no one else, but the Advocate of the Respondents and, therefore, the non-participation, in no way, can be treated as deliberate action to avoid the settlement of disputes through the arbitration proceedings.
15. This court concluded that both the proceedings so initiated and concluded were illegal, contrary and perverse. The Award so passed is unsustainable and liable to be quashed and set aside on all counts.

➤ **DECISION HELD BY COURT:**

1. Award dated 14.08.2010 was quashed and set aside and also the execution proceedings and actions arising out of it;
2. The Petition was allowed accordingly. .