

(2005) 01 BOM CK 0088
Bombay High Court (Nagpur Bench)
Case No: Writ Petition No. 5681 of 2004

Vilas Kaware

APPELLANT

Vs

Ganesh Builders and Others

RESPONDENT

Date of Decision: Jan. 13, 2005

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 12, 13, 13(3), 13(5), 14
- Constitution of India, 1950 - Article 226, 227
- Transfer of Property Act, 1882 - Section 52

Citation: (2005) 2 ALLMR 634 : (2005) 4 BomCR 788 : (2005) 2 MhLj 912 : (2006) 1 MPLJ 100

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: A.S. Jaiswal, for the Appellant; H.D. Dangre and S.P. Dharmadhikari for respondent No. 1 and A.G. Gharote, for the Respondent

Final Decision: Dismissed

Judgement

B.P. Dharmadhikari, J.

In this writ petition filed under Articles 226 and 227 of Constitution of India, the petitioner challenges order passed by District Judge Nagpur in Misc. Civil Application No. 593 of 2004 on 30 November, 2004 which is an application moved by him u/s 14 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act). I have heard Advocate Shri Jaiswal for the petitioner, Advocate Shri Gharote for respondents 2 and 7 (colluding with petitioner) and Advocate S. P. Dharmadhikari for caveat or/contesting respondent.

2. The petitioner filed application u/s 14(2) of the Act contending that on account of "Bias" and also on account of the fact that there is no dispute between parties now for adjudication, Arbitrator has become de jure and de facto unable to perform his functions and hence the arbitration proceedings pending before respondent number 17 Shri C. V. Kale, Advocate, should be closed. The present respondent

number one, a builder has initiated arbitration proceedings before respondent number 17 for specific performance of a agreement dated 16th February, 1998 against present petitioner and respondents 2 to 16. The "Bias" as pointed out in his application dated 4 October, 2004 by petitioner before the Arbitrator is that Advocate Madnani who appears for claimant builder is also the counsel for arbitrator in Arbitrator's personal case Special Civil Suit No. 844/2003, C. V. Kale v. R. C. Sawarkar before the Jt. Civil Judge, Sr. Division Nagpur and the son of Arbitrator is co-counsel with Advocate Madnani. Insofar as the other challenge is concerned, it is pleaded that the claimant builder has assigned his interest in suit property in favour of one Linkhouse Industries Ltd and it is contrary to the alleged agreement between parties. It is further contended that in view of such assignment, the claimant builder has lost his right in the agreement of sale dated 16-2-1998. It is further mentioned that the petitioner also has on 7th August, 2004 sold suit property in favour of Soham Co-operative Society of Nagpur and has placed that society in possession. These landowners also do not have any title left in the suit property and therefore arbitration proceedings cannot proceed further. The applicant/petitioner contends that in view of this position the Arbitrator has become de jure and de facto unable to perform his function and mandate to Arbitrator has come to an end as contemplated by Section 14(1)(a) of the Act. It is the contention of petitioner that Arbitrator functioned as director for three years of Mr. N. Kumar group of companies and he was also Advocate for Mr. Jagdish Harchandani - one of the directors of Kumar group of companies and that in January, 2004 Arbitrator drafted one agreement for Mr. Jagdish Harchandani appointing himself as Arbitrator in it. The Arbitrator has rejected all these challenges by his order dated 24-10-2004 and has directed arbitration to proceed further. The learned District Judge has negatived challenge to this order and rejected the application u/s 14 of the Act filed before him by petitioner by passing an exhaustive order running into 44 pages considering the entire law on the point of "Bias" and also the scheme of the Act by ultimately holding that the jurisdiction invoked by petitioner is not proper and remedy lies u/s 34 of the Act.

3. Advocate for petitioner as also Advocate for respondents number 2 to 7 have assailed the order of District Judge on the ground that the learned District Judge has not considered the "Bias" by applying tests settled by law on the point and further that the facts warranting action u/s 14 are entirely different and cannot form subject matter of Section 12 or Section 16 of the Act. Both of them have placed on record Xerox copies of relevant cases to show how "Bias" is required to be considered by the Courts. Counsel for petitioner has relied upon the judgment of Apex Court in the case of [Ranjit Thakur Vs. Union of India \(UOI\) and Others](#), to point out test to determine "Bias", and also judgment in the case of [Koshy Vs. K.S.E. Board](#), to argue that actual "Bias" of Arbitrator is not required to be proved but existence of circumstances which are likely to lead to "Bias" are enough. He has also relied upon ruling of Full Bench of Allahabad High Court in the case of Hindu National School

Management Trust Society v. Deputy Director of Education, reported at AIR 1981 NOC 1 to point out meaning of "assign". The case of [The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar](#), and [Anant Trimbak Sabnis Vs. Vasant Pratap Pandit](#), are also cited to show the meaning of word assign. The judgment reported at [Mr. Hasmukhlal H. Doshi and another Vs. Mr. Justice M.L. Pendse and others](#), has been cited in support of contention that "Bias" is the ground to hold that de jure the Arbitrator cannot perform his functions. In the case of [Sri Nasiruddin Vs. State Transport Appellate Tribunal](#), and in [Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf](#), are pressed into service to urge to give the full and natural meaning to the word assign used in document executed by respondent number one in favour of Messers Linkhouse. Counsel for respondents number 2 to 7 has placed in a brief chart explaining the factual position as regards "Bias" and assignment and has also relied upon case law in support of his contention. It is his contention that Section 52 of Transfer of Property Act has no application to the transfers made by landowners in favour of Soham Cooperative Society as arbitration proceedings are not suit and are not pending before in the Court. He draws support from judgment of this Court reported in the case of [Saurabh Kalani Vs. Tata Finance Ltd.,](#).

4. Advocate for respondent number one/caveator has supported the impugned order. He has placed reliance upon provision of sections 5, 12 and 13 of the Act to contend that objections raised by petitioner are not maintainable u/s 14 and during pendency of arbitration proceedings, no such application can be entertained. He contends that only remedy is to file application u/s 34 of the Act after the award is declared. He also points out provisions of Section 16 of the Act and the judgment of Hon'ble Apex Court [Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.,](#) to explain the scheme of the Act. He also relies upon Division Bench ruling of this Court reported at [Saurabh Kalani Vs. Tata Finance Ltd.,](#) to point out the tests to be applied to find out to whether an Arbitrator is "Biased" or not. He has also relied upon the judgment of Division Bench of Andhra Pradesh High Court in which it has been held that the fact that the Arbitrator is standing counsel of one of the parties ipso-facto may not mean that he is disqualified himself.

5. Counsel for petitioner has pointed out that his challenge is not u/s 16 of the Act and assignment of interest by parties in suit property is not covered by sections 12, 13 or 16 of the Act. He further states that even if Section 16 is held to be available, petitioner has option of moving either u/s 16 or u/s 14 and in the facts of present case remedy u/s 14 is correctly opted.

6. Perusal of judgment of Hon'ble Apex Court in the case of reported at [Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.,](#) , particularly concluding portion of paragraph 3 at page 394 of the report reveals that Section 12 of the Act imposes obligation upon Arbitrator designate to disclose to the parties any facts which may give rise to doubts about his independence and impartiality.

But challenge to Arbitrator is possible if there are doubts about his independence and impartiality or if he does not possess qualifications agreed to by the parties. Section 13 of the Act prescribes procedure therefor. The Arbitral Tribunal has to decide upon the challenge unless it withdraws or the other party accepts the challenge. If it negates the challenge, it has to continue the arbitration proceedings and make an award and such award can then be challenged u/s 34 of the Act. Same is the position even if challenge to the jurisdiction of Tribunal is rejected. Thus, the Court cannot be approached against interlocutory orders and the Tribunal has to make an award, which can be challenged, u/s 34 of the Act. This Court has in the case of [Mr. Hasmukhlal H. Doshi and another Vs. Mr. Justice M.L. Pendse and others](#), observed that there could be no dispute that "Bias" may constitute the ground to hold that de jure the Arbitrator cannot perform his function. However, what happens once there is a specific provision made by the Act for a challenge to decision u/s 13(3) of the Act and there is also an embargo in the shape of Section 5 ? This Court has considered the situation in which the Arbitrator does not decide objections raised and also if it decides objections. In paragraph 11 at page 699 this Court has found that the object of legislation is to restrict judicial interference and as Section 13(5) provides for a challenge and forum, it would not be open to Court to decide and consider that the mandate of the Arbitrator has been terminated u/s 14.

7. In the facts of present case, the Arbitrator has decided the challenge and in view of the law laid down by Hon'ble Apex Court and this Court, it is clear that remedy u/s 14 of the Act is not available to petitioner. Further, act of transfer of property by any of the parties during pendency of arbitration proceedings cannot render the Arbitrator de jure or de facto unable to perform his functions. Section 14(1)(a) is not applicable in situations where either party to the arbitration takes step in order to defeat the end result of arbitration proceedings. Such an interpretation will defeat the very purpose of the Act. Disqualification envisaged by this provision is personal to the Arbitrator and emerges because of his own voluntary or involuntary participation in the facts constituting it. It contemplates a situation in which Arbitrator enters a state that renders him incapable of adjudicating the dispute within the four corners of the law either generally or qua that particular dispute. His mandate is terminated because the dispute between the parties still survives and requires appointment of another Arbitrator for its resolution. Section 15 of the Act prescribes procedure for his substitution and also for further course of action open to such new Arbitrator. Thus the case of assignment as pleaded by petitioner cannot be a valid ground to invoke Section 14(1)(a) of the Act as indirectly what is being contended is that the dispute is rendered infructuous by act of one of the parties to it. Such an act of any party will not create any disqualification in the Arbitrator and whether dispute survives or not may itself call for a decision. Contesting parties have placed necessary facts on record before the Arbitrator to enable them to raise appropriate challenges about his "Bias" or assignment or its effect in proceedings

u/s 34 after the award is made by Arbitrator. No adjudication about alleged "Bias" of Arbitrator or effect of assignment, if any; on arbitration proceedings is warranted at this state and issue is left open for consideration at Section 34 stage, if required.

8. All the counsels have invited the attention of this Court to the impugned order delivered by learned District Judge. I find that the learned Court below has considered all the arguments advanced before it and has also applied the law to the facts before it. No perversity or manifest error or jurisdictional mistake is pointed out to me in the matter. Conclusion reached by said Court does not call for any interference in writ jurisdiction. The petition accordingly fails and is dismissed with no order as to costs.

At this stage Advocate Jaiswal makes a request for continuation of interim order of status quo, passed by this Court for a period of two weeks more to enable him to take further appropriate steps in the matter. Advocate Dangre, appearing for respondent No. 1, opposes this request. He states that the matter before the Arbitrator is only fixed for filing of Written Statement. However, in the interest of justice, two weeks time is granted to the petitioner to take appropriate steps in the matter, until then the interim order of status granted by this Court shall continue.