

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO. 1034 OF 2013

Mr.Kadir Yakoob Patrawala & Ors. ...Petitioners
vs
Mrs.Mehfuza wd/o. Yakoob Patrawala & Ors. ...Respondents

Mr.Sharan Jagtiani I/b. Javed Akhtar Khan for Petitioners.
Mr.Swapnil Bangur with Deepak Shukla and Swapna Samant I/b. Vinod Mistry & Co. for Respondent Nos.1 & 2.
Mrs. Sneha Prabhu with Som Sinha I/b. Som Sinha & Associates for Respondent Nos.3 to 5.

CORAM : S.C.GUPTE, J.

DATE : 11/12 DECEMBER 2018

P.C. :

Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole arbitrator in a reference. The reference was in respect of disputes between the parties under a partnership agreement. The reference was at the instance of the Respondents herein, who had claimed dissolution of the partnership and accounts.

3 The case of the Respondents (original claimants) before the arbitrator was that there was a partnership agreement between the parties executed on 23 May 2005 and that this partnership had to be dissolved and accounts rendered in respect of the same. One of the main disputes raised by the Petitioners (original respondents) concerned the genuineness of this document of partnership. It was the case of the Petitioners that the

partnership deed purportedly claimed to have been executed between the parties on 26 May 2006 was not a genuine document. The Petitioners did not dispute the partnership business as such; their case was that the partnership was under a deed executed on 23 February 2005 and not the deed of 26 May 2006. What the Petitioners claimed was that one Yakoob Patrawala had originally started the subject business as a proprietorship; in course of time, in or about 23 February 2005, Yakoob and his family members, who include Petitioner Nos.1 to 4 and Respondent No.2, and one Yunus Patrawala, whose heirs are Respondent Nos.3 to 5 to the present petition, executed a partnership deed; and this partnership took over the proprietorship business of Yakoob, giving Yakoob a 25% share in the partnership. Yakoob died on 26 April 2006. The relevant clause of the partnership deed at that time provided for distribution of the share of the deceased amongst his legal heirs in accordance with the applicable law of succession. It was the Respondents' case that after the death of Yakoob, a new deed of reconstituted partnership was executed between the parties on 23 May 2006 and the widow of Yakoob, Respondent No.1 herein, was included as a partner with 20% share from out of 25% share of Yakoob. All other parties continued to be partners of the firm as before, save and except that their shares were augmented whilst distributing 5% balance share of Yakoob. The dispute between the parties really centered around the status of Respondent No.1 herein as 20% partner of the partnership firm and in particular, whether or not the deed of partnership of 23 May 2006, which gave her this 20% share, was in fact executed between the parties. The learned arbitrator, in his impugned award, held that the document was duly proved by the claimants through evidence adduced by Claimant No.3, who identified the signatories to the document. The

arbitrator also noted that Respondent Nos.1 to 3 before him (who are the Petitioners before this court) had signed the partnership deed of 26 May 2006; that was their own case in their defence statement. They had claimed in their defence statement that they had in fact signed the deed of 26 May 2006 on an assurance that the claims of legal heirs of deceased Yakoob would be settled by Respondent Nos.1 and 2 herein. The learned arbitrator held that it was crystal clear that the parties had signed the partnership deed of 26 May 2006 with Respondent No.1 herein as a partner in place of her deceased husband, Yakoob Patrawala. The learned arbitrator, in the premises, held that the deed of partnership of 26 May 2006 was a legal and valid document executed by all partners named therein including the legal heirs of deceased claimant no.2 (later transposed as "Respondent No.5" and since deceased and now represented by his legal heirs, who are Respondent Nos.3 to 5 to the present petition). The learned arbitrator, in this connection, also considered the argument of the Petitioners herein that what was produced on record was only a copy and not the original partnership deed of 26 May 2006. The learned arbitrator accepted the Respondents' case that the original deed was with one Naseen Patrawala, solicitor daughter of deceased Yakoob; that there was record to show that correspondence was addressed in this behalf with Ms.Naseen and she had not given any evidence to rebut the case of the Respondents herein regarding her possession and custody of the partnership deed. The learned arbitrator, in the premises, accepted the copy as evidence of the original. These are clearly possible views, which are supported by evidence and do not suggest any perversity.

4 Learned Counsel for the Petitioners, however, submits that in

this case, as facts stand, there is gross failure of observance of principles of natural justice. Learned Counsel submits that the document of 26 May 2006 was not initially marked in evidence by the learned arbitrator. All other documents produced by the claimants before the arbitrator had been duly marked. Since the document was not marked and yet considered by the learned arbitrator at the hearing of the arbitration reference and was held to be proved, the Petitioners were effectively denied opportunity to tender evidence to disprove the document. Learned Counsel submits that since the document was not marked, the Petitioners were within their right, as duly advised, not to ask any question on the document in cross-examination. Learned Counsel submits that this cannot be termed as a mere procedural impropriety; it has resulted into a serious denial of natural justice to his clients. Learned Counsel submits that had the document been marked, even accepting that such marking does not imply acceptance of its genuineness by the court or the arbitrator, as the case may be, the Petitioners would have had an opportunity to extensively cross-examine the Respondents' witness or tender any other substantive evidence to disprove the document. Learned Counsel, in this behalf, relies on a judgment of a learned Single Judge of our court in the case of **Rashmi Housing Pvt.Ltd. vs. Pan India Infraprojects Pvt.Ltd.**¹ Relying on this judgment, learned Counsel submits that improper receipt of a document in evidence, though a procedural error, can also be appropriately termed as breach of principles of natural justice in a given case.

5 There is no quarrel with the proposition canvassed by learned Counsel. Indeed, in a given case, improper admission of a document in

1 2014(2) Bom.C.R. 697

evidence, in the face of objections by the opponent to receive the document, may amount to breach of principles of natural justice and not just a procedural error. The question is whether it is so in the present case. In the present case, the initial order of the arbitrator refraining from marking the document clearly suggests that the other documents were marked as they were admitted, whilst the deed of partnership of 26 May 2006 was not marked because it was not an admitted document. The arbitrator, however, noted that it would be continued to be referred as Exhibit-C as a disputed document and it was for the claimant to prove it at the trial. Effectively, what this means is that the document was kept on record, but was said to be subject to proof; the arbitrator would have considered admitting the document in evidence after its proof was tendered by the parties in the trial.

6 No doubt, ordinarily, in a witness action in a court of law, documents are simply marked in evidence upon their formal proof being tendered in court or as admitted documents without such formal proof. Such marking does not signify acceptance by the court of their genuineness. Execution of a document and its identity are matters which have to be proved in the course of the trial, but the documents are nevertheless marked. The parties are, then, given an opportunity to prove or disprove the documents at the trial, whereupon the court decides whether or not to accept their genuineness, such acceptance coming only in the final order. I do not see how what has happened in the present case, though not exactly on the lines as would in all probability happen in a court of law, is in any way different from any substantial standpoint. Without saying exactly that the document is marked, the learned arbitrator

proceeded to retain the reference to the document as Exhibit-C making it clear that it was a disputed document and expressly leaving it to the parties to prove the same. In pursuance of these observations, the claimants (the Respondents to the present petition) even tendered evidence to prove the signatures of the parties to this document. It cannot be claimed with any seriousness by the opponents (Petitioners to the present petition) that they were not put to notice that the document might be pressed for admission or evidence on its proof would be tendered; they knew that the other side would tender such evidence (which they in fact did) and press for its acceptance as a genuine document at the trial. The arbitrator's decision on such acceptance would have come only in this award. In other words, the trial did envisage leading of evidence by the parties to prove or disprove the document. The Petitioners were perfectly free to cross-examine the claimants' witness or tender their own evidence to disprove the document. Secondly, and in the alternative, even if we were to accept their contention that they in fact refrained from doing so with a view to take advantage of the fact that the document was not formally marked in evidence, it was, or, at any rate, ought to have been, clear to them when arguments were advanced on the document and its genuineness at the hearing of the reference, that they had missed the bus due to their mis-calculation and even at that stage, could very well have applied to the arbitrator for recalling the witness for cross-examining him further or, for that matter, tendering their own evidence to disprove the document. There is nothing on record to suggest that the Petitioners in fact did anything of the kind before the learned arbitrator. There is at least no ground raised in this behalf to suggest that they in fact applied for such course but that it was denied to them. In the premises, this court is of the considered view that

there is no serious defect in the trial before the learned arbitrator insofar as observance of principles of natural justice is concerned. The Petitioners cannot be said to have been denied any opportunity to present their case.

7 Insofar as the proof of the document itself is concerned, learned Counsel for the Petitioners submits that a very important or material fact, namely, existence of another document on record (a copy) which had signatures of all parties save and except Petitioner No.4 herein, which the arbitrator was obliged to consider, was not taken into account by the arbitrator whilst arriving at his finding on genuineness of the document. There is nothing to suggest that this particular argument was advanced before the learned arbitrator. Be that as it may, this is really a matter of assessment of evidence. So far as the proof of the document is concerned, it is for us merely to see whether the arbitrator's finding in respect of the document is supported by some evidence. If it is so supported, and there are quite a few matters which, in fact, support such finding, and if there is no material document or circumstance disregarded, or no irrelevant or non-germane document or circumstance considered by the arbitrator, there is nothing further to inquire into. Sufficiency of evidence is most certainly a matter for the arbitrator to decide. It cannot be said that the document, which did not bear the signature of Petitioner No.4 herein, was such a material document that disregarding the same, assuming that this matter was in fact argued before the learned arbitrator, could be said to have caused failure of justice. In other words, it cannot be said that had the arbitrator considered the document, namely, the unsigned document, the arbitrator would have come to a different conclusion. The Respondent's case before the arbitrator was that initially the agreement

was signed by everyone except Petitioner No.4, who signed the document subsequently. In other words, copies of the document, one signed by Petitioner No.4 and others, and the other signed only by others and not Petitioner No.4, could, on the basis of the Respondents' case, very well co-exist. If it was the Petitioners' case that they could not so co-exist, it was indeed for them to cross-examine the Respondents' witness or to produce their own evidence, which, as I have noted above, they have singularly failed to do. In that case, based on the available material before him, if the arbitrator were to come to the conclusion that the document was indeed signed by all parties including, as we have noted above, admittedly, by Petitioner Nos.1 to 3 herein, and the execution of the document was thus proved, it cannot be termed as a perverse finding, that is to say, an impossible finding or a finding, which no fair or judiciously minded person could have arrived at or as would shock the conscience of the court.

8 There was adequate material before the learned arbitrator to show that not only did the parties act on the partnership deed of 23 May 2006 but that they expressly acknowledged and allowed Respondent No.1 herein to act as a partner during the two years which followed the execution of the document and during which the parties had no *inter se* disputes.

9 In the premises, there is no infirmity in the impugned award within the grounds of challenge available under Section 34 of the Arbitration and Conciliation Act, 1996. There is, thus, no merit in the petition. The petition is, accordingly, dismissed. No order as to costs.

10 Since the arbitration petition challenging the impugned award has been dismissed, the Respondents will have to now take the matter before the executing court. The Court Receiver, High Court, Bombay, who has been appointed as a receiver of the firm's property including the premises admeasuring 7500 sq.ft. in City Central Mall, Mumbai Central, and whose continuation may now have to be considered by the executing court, is continued for a period of four weeks from today, so as to enable the Respondents to apply to the executing court.

(S.C. GUPTE, J.)