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

ARBITRATION PETITION NO.721 OF 2016

Nitin S.Joshi	...Petitioner
V/s.	
M/s.Kotak Mahindra Bank	...Respondent

Mr.Kishor V. Tembe for the Petitioner.

None for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 26TH JUNE, 2019.

P.C. :-

1. None appeared for the respondent, though served. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996, the petitioner has impugned the award dated 20th July, 2017 passed by the learned arbitrator directing the petitioner to pay a sum of Rs.89,919/- inclusive of interest and further interest at the rate of 18% p.a. on Rs.89,919/- from 24th January, 2015 till the date of payment and further payment of Rs.2,000/- towards the arbitration costs.

2. Mr.Tembe, learned counsel appearing for the petitioner invited my attention to the averments made in the arbitration petition and the annexures to the arbitration petition.

3. It is submitted by the learned counsel that the earlier arbitral award rendered by the learned arbitrator Ms.Jyoti Mestry dated 30th March, 2012 was an *ex-parte* award. He invited my attention to an order dated 27th August, 2014 passed by this Court in Arbitration Petition No.927 of 2012 filed by his client impugning the said *ex-parte* award dated 30th March, 2012. He submits that the said *ex-parte* award dated 30th March, 2012 was set aside by consent of the parties by this Court on 27th August, 2014.

4. Learned counsel invited my attention to the averments made in paragraph 23 of the arbitration petition to the effect that the father of the petitioner was over 85 years old and was almost bed ridden, required constant attention and except the petitioner, there was no other male member in the family to attend his father. The petitioner accordingly could not attend before the learned arbitrator on the agreed date mentioned in the order dated 27th August, 2014 i.e. on 22nd September, 2014. On 2nd September, 2014, the petitioner sent a letter to the learned arbitrator Ms.Jyoti Mestry recording these facts and requested for hearing the matter at the convenient place in South Mumbai to enable the petitioner to return to Pune back by evening train. There was no response from the learned arbitrator Ms.Jyoti Mestry.

5. Learned counsel for the petitioner submits that instead of

proceeding with the arbitral proceedings before the same learned arbitrator Ms.Jyoti Mestry as agreed by the parties before this Court on 27th August, 2014, the respondent appears to have filed a fresh statement of claim on 30th April, 2015 *inter-alia* praying for an amount of Rs.89,919/- with interest. He submits that the petitioner could not remain present before the new arbitrator Mr.Prakash Kashinath Hushing for the same reasons. He submits that even otherwise, the respondent could not have appointed another arbitrator in view of the order dated 22nd August, 2014 passed by this Court referring the matter back to the learned arbitrator Ms.Jyoti Mestry.

6. A perusal of the order dated 27th August, 2014 passed by this Court clearly indicates that the *ex-parte* award dated 30th March, 2012 passed by the learned arbitrator Ms.Jyoti Mestry was set aside by consent of parties. This Court recorded the statement made by learned counsel for both the parties that they would appear before the learned arbitrator Ms.Jyoti Mestry on 22nd September, 2014. Learned arbitrator was directed to pass a fresh award in accordance with law after hearing the parties. The father of the petitioner was unwell and thus he could not remain present before the learned arbitrator and sought an adjournment in advance by addressing a letter on 2nd September, 2014. There was no response from the learned arbitrator. The petitioner thereafter did not get any notice

from the learned arbitrator Ms.Jyoti Mestry.

7. In my view, since by consent of parties the matter was remanded back to the same arbitrator, who had passed *ex-parte* award dated 30th March,2012,the respondent could not have filed fresh statement of claim and could not have appointed Mr.Prakash Kashinath Hushing, another arbitrator for adjudication of the claim filed afresh.

8. Insofar as the submission made by the learned counsel for the petitioner that the petitioner could not remain present because of ill-health of the father of the petitioner, he was about 85 years and was bed ridden is concerned, the respondent has not chosen to remain present before this Court and to controvert these averments made in paragraph 23 of the arbitration petition. I am thus inclined to accept these averments made in the arbitration petition about the ill-health of the father of the petitioner and the reasons as to why the petitioner could not present before the same learned arbitrator and even thereafter before the new arbitrator. The statement of claim filed afresh thus could not have been filed by the respondent. No new arbitrator could be appointed by the respondent when the matter was already pending before the erstwhile arbitrator. Learned erstwhile learned arbitrator had not recused from the matter.

9. I therefore, pass the following order :-

a). The impugned award dated 28th July, 2015 passed by the learned Arbitrator Mr.Prakash Kashinath Hushing is set aside.

b). Both the parties are directed to remain present before the learned arbitrator Ms.Jyoti Mestry on 15th July, 2019 at 11.00 a.m.

c). The petitioner is directed to convey this order to the respondent as well as to the learned arbitrator Ms.Jyoti Mestry. In the event of the learned arbitrator Ms.Jyoti Mestry if unable to proceed with the matter and recuses herself, the respondent would be at liberty to appoint another arbitrator in accordance with the arbitration agreement. If the petitioner has any objection about the appointment of the arbitrator by the respondent, the petitioner would be at liberty to raise such issue before the new arbitrator if appointed by the respondent.

10. The arbitration petition is allowed on the aforesaid terms. There shall be no order as to costs. Parties as well as the learned arbitrator to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)