

## **POWERS AND DUTIES OF ARBITRATOR**

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### **Duty to act fairly**

Duty to act fairly is the first and foremost function of an arbitrator. He must act in a fair and reasonable manner to both the parties and in the arbitration hearings he must not show or exhibit favour towards one party more than towards the other and must refrain from doing for one party which he cannot do for the other. Showing undue favours to one party at the cost of the other in matters handled by him would be looked upon with suspicion by the Courts. It was in this context that Donaldson J. in the Myron, (1969)1 Lloyd's Rep. 411 (at page 415) observed that "Mr. \_\_\_\_\_ had, indeed, been the arbitrator appointed by them on several occasions and was described before me as their first choice arbitrator, language more usually heard in the context of Smithfield or Covent Garden market produce than of a well known arbitrator, but the meaning is clear enough."

The position of the arbitration is like that of Ceaser's wife who should be above all suspicion. The Courts have continually held that rules of natural justice must be followed by the arbitrators including the principles incorporated in the maxim *audi alterem partem*. Ignorance of the rules of natural justice cannot be defended on the plea that the evidence was inconsequential or had not affected the mind of the arbitrator or was of a trifling nature.

### **Adherence to the principles of natural justice**

Section 1 of the Evidence Act excludes its application in any arbitration matter which should not at all be taken to mean that he can act in the manner he likes or can act arbitrarily. He must act in accordance with the principles of natural justice. It is now well settled that an arbitrator is not bound by the technical and strict rules of evidence which are founded on

fundamental principles of justice and public policy. In proceedings of arbitration, there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with practice and procedure which will lead to proper resolution of dispute.

The rule of natural justice requires that parties should be given an opportunity to be heard by the arbitrators, which means whatever material they want to place before the arbitrators should be allowed to be placed. *Oil & Natural Gas Commission Ltd.v. New India Civil Erectors Pvt. Ltd.*, 1996 (Suppl) Arb LR 426 (DB—Bom).

Where the arbitrator refuses to consider the contentions of the contractor and refuses permission to produce evidence, inasmuch as directions were not given to the government to produce the record which had been withheld on the ground of privilege, without even indirectly or incidentally mentioning the nature and volume of the record held privileged, it was held that these lacunas are the violations of the principle of natural justice and denial of opportunity to the contractor to press and prove his case. *President of India v. Kesar Singh*, AIR 1966 J&K 113 : 1966 Kash LJ 287.

In Mustill and Boyd's Law and Practice of Commercial Arbitration in England, 1982 Ed., p. 261, the following cardinal rules have been suggested for being followed by the arbitral tribunal in order to ensure fairness in conducting arbitration between the litigant parties:

1. Each party must have a full opportunity to present his own case to the tribunal.
2. Each party must be aware of his opponent's case, and must be given a full opportunity to test and rebut it.
3. The parties must be treated alike. Each must have the same opportunity to put forward his own case, and to test that of the opponent.

The above principles (Sr. Nos. 1 and 3) are in consonance with Section 18 of the Act and the principle stated at Sr. No. 2 conforms to Section 23(1) of the Act. 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 ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced, *S.L. Kapur v. Jagmohan*, AIR 1981 SC 136: (1980)4 SCC 379.

### **Hearing in absence of one party**

An arbitrator would be guilty of misconduct if he is charged with any information having been obtained from one side which was not disclosed to the other. Such an information may be oral or in writing. It is with this aspect in mind that the Legislature provided in Section 24(3) of the Act that “All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties”.

An arbitrator must not be guilty of hearing one party in the absence of the other. The principles of natural justice mandate that the person who is to be prejudiced by the evidence must be given an opportunity to suggest cross-examination and to enable him to produce evidence to counter. However, an exception to the rule is that where an arbitrator took evidence at the back of one party, but decided the matter in favour of the absent party [*Black vs John Williams & Co.*, 1924 S.C. (H.L.) 22].

When the arbitrator accepts documents from one party in the absence of the other party, the arbitrator would be guilty of misconducting the proceedings because no arbitrator can accept document from one party at the back of the other. *Padam Chand Jain v. Hukam Chand Jain*, AIR 1999 Del 61.

The 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 and to be able to find evidence, if he can, that shall meet and answer it. *Wazir Chand Karan Chand v. Union of India*, AIR 1989 Del 175.

During the conduct of a reference the arbitrator required the attendance of a witness whom neither side proposed to call. After this witness had given evidence the proceedings terminated, and the arbitrator said that he required nothing further from either of the parties. Subsequently, however, the plaintiff found the arbitrator closeted with the witness and a special pleader who was acting for the defendants, the three persons being engaged in considering the papers and plans connected with the arbitration. The arbitrator explained that the witness was explaining to him information in connection with the case, by which, however, his opinion would not be biased. Held that, as there had been an opportunity for the mind of the arbitrator to have been biased by information given on behalf of one side without the other having had an opportunity of meeting it, the award eventually made by the arbitrator must be set aside [(1844) 14 L.J.Q.B. 17]

### **Failure to consider vital documents**

The well-settled rule of law is that an arbitrator misconducts the proceedings if he ignores very material documents to arrive at a just decision to resolve the controversy. Even if the department did not produce those documents before the arbitrator, it was incumbent upon him to get hold of all the relevant documents for arriving at a just decision. In K.P. Poulse vs State of Kerala, AIR 1975 SC 1259, it had been held by the Hon'ble Supreme Court as under:

"Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

In the instant case, the Arbitrator has misconducted the proceedings by ignoring the two very material documents to arrive at a just decision to resolve the controversy between the Department and the contractor. Even if Department did not produce those documents before the Arbitrator, it was incumbent upon him to get hold of all the relevant documents including the two documents in question for the purpose of a just decision. Further, he arrived at an inconsistent conclusion even on his own finding. The award suffered from a manifest error apparent ex facie."

The making of an award without the basic documents, namely, the arbitration agreement before the arbitrators at the time of application of mind, i.e. at the time of considering the rival contentions of the parties is not permissible. The arbitrator has to insist on the production of the agreement, even if not presented by the parties, as without such agreement being on record, the respective contentions of the parties cannot be adjudicated upon. *Hooghly River Bridge, Commissioner v. Bhagirathi Bridge Construction Co. Ltd.*, AIR 1995 Cal 274.

#### **Arbitrator must act within submission**

The aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Hence, where the contractor claimed amounts for work done after arbitration proceedings had begun and the claim statement filed with the arbitrator also included this claim, the arbitrator had jurisdiction to make an award on the said claim also. *Shyama Charan Agarwala & Sons v. Union of India*, (2002)6 SCC 201.

In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimants could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some

documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made. *Himachal Pradesh State Electricity Board v. R.J. Shah*, (1999)4 SCC 214; *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises*, 1999(3) RAJ 326 (SC); and *Arosan Enterprises Ltd. v. Union of India*, AIR 1999 SC 3804.

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency (Mustill and Boyd's Commercial Arbitration, 2nd Ed., p.641). He commits misconduct if by his award he decides matters excluded by the agreement (HALSBURY'S LAWS OF ENGLAND, Vol. II, 4<sup>th</sup> Ed., para 622). As an arbitrator derives his jurisdiction only from the agreement from his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitation placed on his authority (HALSBURY'S LAWS OF ENGLAND, Vol. II, 4<sup>th</sup> Ed., para 577). A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a *mala fide* action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award, *Associated Engg.Co. v. Government of Andhra Pradesh*, AIR 1999 SC 322; *V.G. George v. Indian Rare Earths Ltd.*, AIR 1999 SC 1409; *Grid Corp. of Orissa Ltd. v. Balasore Technical School*, AIR 1999 SC 2262. *Shyama Charan Agarwala & Sons v. Union of India*, (2002)6 SCC 201.

It has been stated in the HALSBURY'S LAWS OF ENGLAND, 4<sup>th</sup> Ed., Vol.2, paragraph 577 as follows:

“As an arbitrator obtains his jurisdiction solely from the agreement for his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitation placed on his authority .....

In the bid documents, it was clearly stated that the intending tenderers must inspect the site of the work, make necessary investigation for correctly evaluating the work, to satisfy themselves as to the nature and

location of the work, general and local conditions before arriving at his rates. It was also stipulated therein that no extra payment shall be made to the successful tenderer if he makes any misjudgment. Thus the claim of the contractor on the ground of excess flourine in drinking water due to which the contractor suffered could not have been allowed by the arbitrator. *Ramalinga Reddy v. Superintending Engineer*, (1999)9 SCC 610.

It is an integral part of the duties of the arbitrator to adhere to the conditions of the contract agreed to between the parties and must always be within the terms of reference in accordance with which the parties desire him to make and publish the award. Thus, it is mandatory and obligatory on his part to act strictly in accordance with the law laid down by the Courts and not to act whimsically and arbitrarily and in the manner which he thinks is just and reasonable.

Where in a works contract a contractor demands extra costs due to price escalation, which had been barred specifically under the terms of the agreement, the award of such extra costs by the arbitrator was held to be bad in law on the ground that the arbitrator acted in excess of the jurisdiction conferred on him. (Continental Construction Co. Ltd. vs State of Madhya Pradesh, AIR 1988 SC 1166)

An arbitrator derives authority from the reference made to him either by the parties or by a person named in the agreement having the authority to appoint the arbitrator, as authorized by the parties in the agreement itself. The arbitrator is not permitted in law to enlarge the scope of reference. Any decision or award on an item(s) which is beyond the scope of reference shall not have the sanction of law. If the award on an item not referred for adjudication in arbitration had been decided by the arbitrator and is not severable from the rest of the award, then the whole of the award shall be set aside by the Court. In Jivrajbhai Ujamshi Sheth and others vs Chintamanrao Balaji and others, AIR 1965 SC 214, the Hon'ble Supreme Court laid down the law as under:

“If the parties set limits to action by the arbitrator, then the arbitrator has to follow the limits set for him, and the Court

can find that he has exceeded his jurisdiction on proof of such action. The assumption of jurisdiction not possessed by the arbitrator renders the award, to the extent to which it is beyond the arbitrator's jurisdiction, invalid. And if it is not possible to sever such invalid part from the other part of the award, the award must fail in its entirety."

### **Arbitrator to decide on his skill and knowledge**

Lord Goddard, CJ in *Mediterranean & Eastern Export Co. Ltd. vs Fortress Fabrics Ltd.*, [1948]2 All ER 186, held as under:

"A man in the trade who is selected for his experience would be likely to know and indeed be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. .... It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them.....".

### **Arbitrator cannot delegate his functions**

In *Russell on Arbitration*, 20<sup>th</sup> Ed., page 228, it has been stated as under:

"One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this, being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done".

"Arbitrators cannot refer their arbitrements to others, nor to an umpire; if the submission be not so; neither can they make their arbitrement in the names of themselves and of a third person to whom no submission was made; nor alter it after it is once made."

### **Power to proceed ex-parte**

An arbitrator ought not to proceed *ex parte* against a party if he has not appeared at one of the sittings. The arbitrator should give another notice fixing date, time and venue and intimate that he would proceed with the matter *ex parte* if either party fails to attend. Even after notice if the defaulting party does not attend, the arbitrator may proceed in his



absence. *Lovely Benefit Chit Fund & Finance Pvt. Ltd. v. Puran Dutt Sood*, AIR 1983 Del 413 ; *Hemkunt Builders P. Ltd. v. Panjabi University, Patiala*, 1993(1) Arb LR 348.

As per terms of the arbitration agreement, both the parties were required to nominate their respective arbitrators. Delay occurred on the part of one party to nominate its arbitrator. Thereupon, the nominee-arbitrator of the other party started conducting arbitration proceedings *ex parte* in a tearing haste without waiting for other party. He not only proceeded *ex parte* on same date but also recorded statement of witness and heard arguments. It was held that the procedure adopted by the arbitrator was in violation of the principles of natural justice and the award rendered by him was set aside, *Shri Ram Ram Niranjana v. Union of India*, AIR 2001 Del 424; *Juggilal Kamlatpat v. General Fibre Dealers Ltd.*, AIR 1955 Cal 354 (DB); *Dipti Bikash Sen v. India Automobiles (Pvt) Ltd.*, AIR 1978 Cal 454 ; and, *Lovely Benefit Chit Fund & Finance Pvt. Ltd. v. Puran Dutt Sood*, AIR 1983 Del 413.

RUSSELL ON ARBITRATION, 20<sup>th</sup> Ed., p. 263 states:

“In general, an arbitrator is not justified in proceeding *ex parte* without giving the party absents himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator’s intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word ‘peremptory’ marked on it is, however, sufficient”.

If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorised to proceed *ex parte* at the second meeting, unless the appointment for it was also marked ‘peremptory’ or contained a similar intimation of his intention. On this aspect of the matter, RUSSELL ON ARBITRATION, 20<sup>th</sup> Ed., p. 264 states:

“If a party says: ‘I will not attend, because you (the arbitrator) are receiving illegal evidence, and no award which you can make will be good, ’ the arbitrator may go on with the reference in his absence; and it seems that it is not necessary in such a case to give the recusant any notice of the subsequent meetings. But, though it may not always be necessary, it is certainly advisable that notice of every

meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he pleases.”

If the arbitrator did not allow adjournment of just one day, as the counsel of the party was busy in another arbitration proceedings and proceeded to pass an *ex parte* award, without giving notice of his intention to do so, the award would be invalid. *Executive Engineer, Prachi Division v. Gangaram Chhapolia*, AIR 1983 NOC 205 (Ori).

### **Failure to act without unreasonable delay**

Section 14(1)(a) of the Act provides that the mandate of an arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons *fails to act without undue delay*. Thus, where the named arbitrator does not act for three months despite repeated reminders, it can be clearly said that the mandate of the named arbitrator shall be deemed to have been terminated as he failed to act without undue delay as contemplated under section 14(1)(a) and the court gets the power to appoint a new arbitrator under section 11(5). *Deepa Galvanising Engg. Industries Pvt. Ltd. v. Govt. of India*, 1998(1) ICC 410 (AP).

Where the parties stipulated by consent that if the arbitrator does not complete the arbitral proceedings on or before a particular date his mandate shall stand terminated, then the mandate automatically terminates on the expiry of that date. Consent order is nothing but an agreement between the parties with super imposed seal of the court. *Kifayatullah Haji Gulam Rasool v. Bilkish Ismail Mehsania*, AIR 2000 Bom 424.

What is reasonable dispatch depends upon the type of arbitration and the size and complexity of the dispute. The question of reasonableness should be determined by reference to the nature of arbitration and the interests of the parties and not individual circumstances of the arbitrator. Thus, if the arbitrators were delayed in proceeding by illness or unexpected absence abroad, they would be open to removal, even though they had not personally flawed. Conversely, fault is not sufficient

to amount to a failure to use all reasonable dispatch: an arbitrator may be incompetent or guilty of misconduct and yet not be guilty of such delay. MUSTIL AND BOYD'S Commercial Arbitration, p. 474.

A Division Bench of the Karnataka High Court in a very recent judgment reported as Rudramani Devaru vs Shrimad Maharaj Niranjan Jagadguru, AIR 2005 Kant 313 summarized the principles to be followed by an arbitral tribunal as under:

“The minimum requirements of a proper hearing should include: (i) each party must have notice that the hearing is to take place and of the date, time and place of holding such hearing; (ii) each party must have a reasonable opportunity to be present at the hearing along with his witnesses and legal advisers, if any, if allowed; (iii) each party must have an opportunity to be present throughout the hearing; (iv) each party must have a reasonable opportunity to present statements, documents, evidence and arguments in support of his own case; (v) each party must be supplied with the statements, documents and evidence adduced by the other side; (vi) each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case. It is expected of an arbitral tribunal that it should ensure that the date of the hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagements of himself elsewhere etc. Each party is also entitled to know any statements, documents, evidence or information collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of one party in the absence of the other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal as provided under S.24 of the Act”.