

VIOLATION OF PRINCIPLES OF NATURAL JUSTICE – WHEN MAY NOT RESULT IN SETTING ASIDE AWARD

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It is often said that principles of natural justice should be strictly followed by those administering justice. So the question is as to what is “natural justice”? Natural justice is nothing but fair-play in action; it is something which is founded in equity, in honesty, and right; it is the very essence of an enquiry and decision that the person making the enquiry must be one who does not carry any bias and must be one who can give a decision in a judicial spirit.

The Supreme Court has explained the expression “natural justice” as follows (1):

“Well then, what is ‘natural justice’? The phrase is not capable of a static and precise definition. It cannot be imprisoned in a straight-jacket of a cast-iron formula. Historically, ‘natural justice’ has been used in a way “which implies the existence of moral principles of self-evident and unarguable truth”. In course of times, judges nurtured in

the tradition of British jurisdiction often invoked it in conjunction with a reference of “equity and good conscience”. Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules.”

Natural justice is an irreparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience. (2)

To comply with the principles of natural justice, it is mandatory that the Court/ Tribunal must afford full opportunity to the parties to have their say. Section 18 of the Indian Arbitration and Conciliation Act, 1996, provides that: “...each party shall be given a full opportunity”, while section 33 of the English Arbitration Act, 1996 states: “...giving each party a reasonable opportunity of putting his case....”. It would be noticed that while the Indian Legislature has used the words “full opportunity”, the English Legislature has used the word “reasonable opportunity”. The word “full” connotes 100%, whereas the word “reasonable” means “moderate”. Obviously, “moderate” at best, would convey that the person arguing the matter can be cut short.

Simply because a “reasonable opportunity” had been granted to the party to argue the matter, would not lead to the conclusion that he has been denied opportunity to put forth his case. It often happens that lawyers, during the course of arguments, tend to take recourse to repetition or go off-track. If the Court/ Tribunal, in such circumstances, cuts short the arguments, it cannot be said that “full opportunity” has not afforded.

Mustil and Boyd in their treatise, “Law and Practice of Commercial Arbitration” (3) have so succinctly stated:

- “1. Each party must have full opportunity to present his own case to the tribunal.
2. Each party must be aware of the 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.”

In the same treatise (4), the following is the statement made with respect to oral hearing:

- “1. Each party must have notice that the hearing is to take place.

2. Each party must have a reasonable opportunity to be present at the hearing together with his advisers and the witnesses.
3. Each party must have the opportunity to be present throughout the hearing.
4. Each party must have a reasonable opportunity to present evidence and arguments in support of his own case.
5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral arguments.
6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and arguments."

An equal burden is cast on the Tribunal to adhere to the principles of natural justice, when hearing the matter. In the treatise "Handbook of Arbitration Procedure", Ronald Bernstein (5) has stated:

"In arbitrations, in which there is a hearing, the arbitrator should:

- (a) enable himself, by his discretion, to know what the issues are, and to read all the documents relating to them, before the hearing;

- (b) do the maximum possible thinking about them before, rather than at or after, the hearing;
- (c) ensure, at the hearing, both that he understands the case being made on each side on each issue, and that the advocates know of any facts or arguments that he is minded to take into account that have not already been mentioned, and of which they might otherwise be unaware;
- (d) give the parties an opportunity of controverting or challenging any such facts or experience;
- (e) where he thinks it helpful to the parties and to himself, indicate to the parties any significant preliminary issue which he considers to be relevant and invite comment upon it;
- (f) if, after the hearing, any point of importance occurs to him that the parties have not had an opportunity of dealing with, notify them and give them such opportunity;
- (g) remember that at the end of the day, if the parties agree on a procedure he must follow it, even if it means discounting his own experience.”

It would be of interest to mention another matter on the same subject, from the Ontario Superior Court of Justice (6), wherein it was held that:

“The great merit of arbitration is that they should be, compared to courts, comparatively quick, cheap and final. There is a trade-off between perfection on the one hand and speed, economy and finality on the other hand. If you go to arbitration, you can get quick and final justice and you can get on with the rest of your life. If you go to court, you can get exquisitely slow and expensive justice and you can spend the rest of your life enduring it and paying for it.

“For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second-guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.

“It is, therefore, important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the arbitration. If an arbitration is basically fair, courts should resist the temptation to plunge into detailed complaints about flaws in the arbitration process”. (6)

The Court/Tribunal must not show tearing haste in disposing of the matter and must give full opportunity to the parties for presenting their case. Where the arbitrator held hearing on just one day without having on record claim statement or counter claims, in such a case it can safely be said that the arbitrator has violated the principles of natural justice and the award rendered was patently illegal (7). If irregularities in procedure can be proved, which would amount to no proper hearing of the matter in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. (8)

It would not be incorrect to say that any irregularity of action, which is not in tune with general principles of equity or good conscience, which ordinarily should govern the conduct of the arbitrator, would amount to misconduct. For example, if a piece of evidence which is material for deciding the matter in controversy is produced but is rejected by the arbitrator, then the award would be bad in law. Section 19(1) of the Arbitration and Conciliation Act, 1996, states that: "The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (V of 1908) or the Indian Evidence Act, 1872 (1 of 1872)". True that the arbitrator shall not be bound by these statutes, but it by no means would show that his proceeding should be opposed to the principles of natural justice. If there be non-observance of the rules of

natural justice, then the award would be liable to be set aside. For example, if an opportunity is afforded to one party to get an advantage with the arbitrator over the other, and that too at the back of the other party, the proceedings can be said to be in violation of the principles of natural justice.

LORD LANGDALE M.R. in *Harvey v. Shelton* (9) has held as under:

“It is so ordinary a principle in the administration of justice, that no party to a case can be allowed to use any means whatsoever to influence the mind of the Judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not to see, that this was an extremely indiscreet mode of proceeding, to say the very least of it. It is contrary to every principle to allow of such a thing, and I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations. The first principle of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both sides must be heard, and each in the presence of the other. In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly

constituted courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side.”

A tribunal does not act fairly and impartially if it does not give a party an opportunity of dealing with arguments which have been advanced by the other party. Where it had not been suggested by the claimant contractor that either of the two points mentioned in the arbitrator’s letter, was raised by it in the arbitration, as being influential, on the overall burden and determination of costs then unless such an opportunity is given, there is a danger that the final result will not be determined fairly, against the party, who would be ordered to pay the costs. (10)

The duty to act fairly is quite distinct from the autonomous power of the arbitrator to make finding of fact. Thus, whereas it may normally be contrary to the arbitrator’s duty to fail to give the parties an opportunity to address them on proposed findings on major areas of material, primary facts which had not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submissions, every single inference of fact from the primary facts which arbitrators intend to draw, even if such inferences may not have been

previously anticipated in the course of the arbitration. Particularly where there are complex factual issues, it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact which have been in issue. In such a case, the Tribunal does not have to refer back its evidential analysis for further submissions. (11)

Principles applicable to rules of natural justice

The principles which govern the applicability of rules of natural justice are:

- (a) Parties to arbitration have, in general, a right of being heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. An arbitrator should not base his decision(s) on matters not submitted or argued before him. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.
- (b) Fairness, however, is a multi-dimensional concept and it would also be unfair to the successful party if it were deprived of the fruits

of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. The courts are not a stage where a dissatisfied party can have a second bite of the cherry.

- (c) Indeed, the latter conception of fairness justifies a policy of minimum curial intervention, which has become common as a matter of international practice. To elaborate, minimum curial intervention is underpinned by two principal considerations. First, there is a need to recognize the autonomy of the arbitral process by encouraging finality, so that its advantage as an alternate dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risk of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for the dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play, differently.

- (d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act. Insofar as right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submission is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. To echo the language employed in *Rotoaira*, the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.

- (e) It is almost invariably the case that the parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither he is expected to consult the parties on his thinking process before finalizing his award, unless it involves a dramatic departure from what has been presented before him.
- (f) Each case should be decided on its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied. (12)

Trivial matters may not amount to violation of principles of natural justice

Mere meeting of one party in the absence of the other may not be good enough to establish that some prejudice has been caused to the other party. In this connection, reference may be made to Russell on Arbitration (13), which states:

“Not every meeting between an arbitrator and one party alone will amount to misconduct or invalidate the award; there must be a substantive suggestion of injustice.”

If the sole arbitrator interviews the plaintiff and the defendant separately and records their statements separately ending with a request to the arbitrator to look into the plaint and the written statement and make the award on that basis, neither party desiring to adduce evidence, the arbitrator cannot be said to have violated the rules of natural justice since it cannot be said that the arbitrator recorded evidence of one party behind the back of the other or even received information from one party, which the other party had no opportunity of meeting. (14)

Breach of natural justice must be established

To set aside an arbitral award, the court has to be satisfied, first, that the arbitral tribunal breached a rule of natural justice in making the arbitral award. Second, and more importantly, the court must then be satisfied that the breach of natural justice caused actual or real prejudice to the party challenging the award. In other words, the breach of the rules of natural justice must have actually altered the outcome of the arbitral proceedings in some meaningful way before curial intervention is warranted. Where the same result could or would ultimately have ensued even if the arbitrator had acted properly, there would be no basis for setting aside the arbitral award in question. (15)

A party challenging an arbitration award as having contravened the rules of natural justice has to establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights. The rule of natural justice alleged to have been breached should be one which concerns the alleged right of the respondent to be heard on the issue that it maintains is crucial to the outcome of the arbitrator's decision. (16)

If the parties agree to abide by whatever decision honestly given by the arbitrator, but they do not authorize him to form his own conclusions in any

manner he liked, he has to follow the ordinary rules of natural justice. But the position will be different where the parties had given full powers to the arbitrator to decide the matter in any way they liked, including taking evidence of one party at the back of the other and to make private enquiries, such an agreement is effective and the award cannot be set aside on the ground of violation of the principles of natural justice. (17)

Breach of natural justice must be material

In Singapore, an applicant would have to persuade the court that there had been some actual or real prejudice caused by the alleged breach. While this was a lower hurdle than substantial prejudice, it certainly did not embrace technical or procedural irregularities that had caused no harm in the final analysis. There had to be more than technical unfairness. It was neither desirable nor possible to predict the infinite range of factual permutations or imponderables that may confront the courts in future. What could be said was that to attract curial intervention it has to be established that the breach of rules of natural justice had to, at the very least, actually alter the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, if the same result could or would ultimately have been attained, or if it could be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the

arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award. (18)

It is easy enough to make charge of breach of natural justice against an adjudicator. The purpose of the English Arbitration Act, 1996 is to provide speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decision of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve the purpose would be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicator's decisions. It is only where the defendant has advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground.

The passage in the conversation which led the judge to hold that a fair-minded and informed observer might well have concluded that there was a real possibility of a bias was the statement by AMEC's solicitor that the reason why the dispute was being referred to the adjudicator was that his familiarity with the facts would save time and costs. Such a remark cannot

amount to an invitation to the adjudicator that he would reach the same decision by reason of that remark. Conversation between one party and the tribunal in the absence of the other party should be avoided. Communications should ordinarily be in writing with copy to all parties. There is nothing wrong in the circumstances of this conversation, which arose out of an innocuous telephone call to the adjudicator's office, which will lead the fair-minded and informed observer to conclude that what was said would give rise to a real possibility of bias. (19)

When the officers of the State Government were present at the time of inspection when the additional set of documents was filed, it cannot be said that the rules of natural justice have been violated and it also cannot be said that the documents had been filed at the back of the State Government and it had no opportunity to controvert them. (20)

In case an arbitrator visits the site in the absence of the parties after the parties had requested the arbitrator, during arbitration hearings to visit the site, and the arbitrator declares the result of inspection at the next hearing, to which there is no objection by either party, it cannot be said that the arbitrator has flouted the rules of natural justice. (21)

CITATIONS

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3. 1982 Ed., p. 261
4. Ibid, pp. 263-264
5. 3rd Ed., para 2.296, pp. 88-89
6. Webber v Seltzer 2005 CanLII 3209. [Ontario Superior Court of Justice]
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9. (1844) 7 Beav. 455
10. Gbangbola v Smit & Sherriff Ltd [1998] 3 All ER 730
11. The Pamphilos [2002] 2 Lloyd's Rep 681 at 687
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14. Payyavula Kessana versus Payyavula Venkamma, AIR 1950 Mad 16 (DB)
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