

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 13.09.2013
Pronounced on: 04.03.2014

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C.M. APPL. 10879/2012 IN RFA 34/2007

M/S. DELHI STOCK EXCHANGE ASSOCIATION LTD. Appellant
Through: Sh. Rajat Bhalla, Advocate with Sh. Arun
Gupta, representative of the appellant in person.

Versus

SHRI HARI OM MAHESHWARI Respondent
Through: Sh. Hari Om Maheshwari, respondent in
person.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT

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1. This judgement disposes of an application preferred by the plaintiff/respondent, Hari Om Maheshwari, in appeal proceedings initiated by the unsuccessful defendant/appellant, Delhi Stock Exchange (hereinafter “DSE”) against an order and judgment of a learned Additional District Judge. The application seeks a direction to modify this Court’s final order in the appeal, to the extent it required the applicant to furnish a bank guarantee for ₹7,00,000/-.

2. The underlying dispute in this case concerns a suit filed by the plaintiff for ₹7,50,000/- on the ground that the DSE had not refunded the margin money of ₹4,40,000/- which was deposited by the plaintiff as its member of the DSE. The facts were that the plaintiff, a member of the DSE from 24.04.1990 (subsequently having resigned, with the approval of the Board of Directors of the DSE on 30.06.1995) had allegedly incurred debts during his membership to two other members of the DSE, M/s B.K. Jalan (“*BKJ*”) and M/s M. Garg and Company (“*MGC*”). On deciding to exit the membership of the DSE, the plaintiff requested a return of the margin money. However, by a letter dated 09.11.1993, the DSE informed the plaintiff that, in view of the claims of *BKJ* and *MGC*, the DSE was exercising lien over the margin money. Subsequently, after the approval of the Board of Directors of the DSE on 26.10.1996, an amount of ₹3,49,530/- was paid by the DSE to *MGC* from the margin money of the plaintiff on account of this alleged debt owed on 18.12.1996. As will be detailed later, it is an accepted fact that no arbitration was conducted at this point in terms of Article 127 of the Articles of Association of the DSE to determine the validity of the claims of *MGC* against the plaintiff, but rather, an order to pay *MGC* was issued on executive direction by the Assistant Manager of the DSE on 24.02.1994.

3. Aggrieved, the plaintiff instituted a suit for return of the margin money, along with interest and cost. This suit was decreed by the learned Additional District Judge for a sum of ₹4,40,000/- alongwith interest at 15% per annum. Subsequently, the DSE filed an appeal against that judgment and order in this Court. During the pendency of

the appeal, however, a compromise was reached by the parties. Accordingly, this Court disposed of the appeal by recording a compromise decree dated 28.05.2007, which recorded the following terms:

“(i) The appellant shall pay a sum of Rs. 18,00,000/- to the respondent.

(ii) The respondent shall furnish Bank guarantee in the sum of Rs. 7,00,000/- which is inclusive of all interest.

(iii) That the proforma of Bank Guarantee shall be given within one week. Bank Guarantee shall be furnished within two weeks thereafter.

(iv) Bank Guarantee shall be valid for a period of one year in the first instance. The encashment of the bank guarantee is subject to the outcome of the two suits which are pending.

(v) Within two weeks of acceptance of this amount, Rs. 18,00,000/- shall be released to the respondent.

(vi) The respondent shall withdraw all the cases filed by him against the appellant. In so far proceedings filed by the appellant against M/s. M. Garg and Company, in terms of the proposed MOU of November, 2006, in this Court shall remain pending.....”

4. The DSE supplied the proforma of the bank guarantee in compliance of the order, by a letter (No. DSE/L&S/LG/373/3589, dated 6th June, 2007). In response, the plaintiff replied with certain variations to the pro-forma. First, that the amount of ₹18,00,000/- will have to be paid alongwith interest at 15% per annum with effect from

28.08.2006, the date of the compromise; secondly, that the bank guarantee will be furnished against receipt of payment of ₹19 lakhs from the DSE, on the express condition that the DSE shall be entitled to encash the bank guarantee only in the event of a decision in writing, given by any Court of competent jurisdiction/arbitration directing the plaintiff to pay any sum not exceeding ₹7 lakhs in his dispute with MGC. Further, and crucially, the counter pro-forma indicating that the DSE would undertake to arbitrate the dispute referred to in Suit No. 2333A/1997 between the plaintiff and MGC in accordance with its bye-laws and further, that the DSE would make a statement to this effect before the Delhi High Court – which was seized of the matter at the time – on the next date of hearing. Thus, the counter proforma states that the bank guarantee will:

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2.(d) cease to have any effect and shall become null and void.....

(i) [i]f the DSE does not volunteer to arbitrate the dispute in accordance with its Bye-laws or does not make a statement of its willingness to carry arbitration before the Hon’ble Delhi High Court in suit No. 2333-A/1997, on the next date of hearing,

(ii) [i]f the arbitration application bearing No. 2333-A/1997 titled Hari Om Maheshwari Versus Shri Suresh Chand Garg, & Ors. is dismissed by the Hon’ble Delhi High Court for any reason whatsoever at any time during its validity or the said application becomes infructuous for any reason whatsoever

(iii) [i]f a decree/award is made in favour of the Ex-member, instead of against the ex-member, in arbitration of dispute with M/s. M. Garg and Co. and others.

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5. This counter proforma was rejected by the DSE, on the ground that it violated – and stipulated conditions beyond – the order of the Court dated 28.05.2007. Accordingly, no bank guarantee was issued and the stance of the DSE remained that its obligation to pay ₹18,00,000/- is thus not triggered, as it would come alive only two weeks after the bank guarantee is created, in terms of the order of the Court. Subsequent to this, the DSE filed CM No. 9796/2007 for further directions of this Court on ensuring compliance with the order, alleging that the plaintiff was reneging from the compromise by failing to issue a bank guarantee in the terms prescribed by the order of the Court. The plaintiff then filed CM No. 14605/2008, requesting for a modification of the compromise decree, maintaining the stance that the furnishing of a bank guarantee had been rendered infructuous as no arbitration proceedings were initiated by the DSE to adjudicate the claim between the plaintiff and MGC, and that no pending arbitration matter lay before the Delhi High Court. In its reply to this application, the DSE contended that since the arbitration suit before the Delhi High Court (wherein the plaintiff had prayed for the appointment of an arbitrator) was withdrawn by the plaintiff, the proceedings conducted by the DSE became final and binding. Thus, the amount of ₹7 lakhs as the amount due from the plaintiff to the MGC, which was paid by the DSE, must be deduced from the amount

of ₹18 lakhs to be paid to the plaintiff. The DSE accordingly stated that an amount of ₹11 lakhs only was payable to the plaintiff, and thus, the order dated 28.05.2007 be modified to that extent only.

6. Subsequently, the plaintiff moved CM No. 5576/2009 – an application under Section 12 of the Contempt of Courts Act, 1971 – for the DSE’s failure to comply with the compromise decree. This was followed by a letter dated 31.01.2009 requesting payment in terms of the compromise, maintaining that the bank guarantee envisaged in the compromise was rendered infructuous. The letter, which represents the stance of the plaintiff, stated as follows :

“HARI OM MAHESHWARI

5C/50, New Rohtak Road, New Delhi-110 005

*The Executive Director,
The Delhi Stock Exchange Association Ltd.,
DSE House, Asaf Ali Road, Near Turkman Gate,
New Delhi-110002
Sir,*

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2. That encashment of the Bank Guarantee, envisaged in the order dated 28.5.2008, was contingent upon Award, if any, is made against Applicant, after arbitration of dispute with M/s. M. Garg & Co. The arbitration itself was contingent upon the Applicant succeeding in his arbitration application which was pending before this Hon’ble Court in suit no. 2333-A/1997 titled Hari Om Maheshwari Versus Suresh Chand Garg & Ors. wherein Exchange was also a party and was opposing the arbitration application.

3. That the arbitration application filed by the Applicant in suit no. 2333-A/97, as aforesaid, has been dismissed by the Hon'ble Delhi High Court on 3.4.2008. The order was passed in the presence of counsel for the Exchange. Since the arbitration application itself has been dismissed, no arbitration can take place now qua applicant's dispute with M/s. Garg & Co. Consequently, the 'lien' clause and the Bank Guarantee envisaged in the compromise and order dated 26.5.2007 have become infructuous. A copy of the order dated 3.4.2008 is enclosed herewith as Annexure C'.

4. That rival objections to the order dated 26.5.2007 have also been dismissed by the Hon'ble Delhi High court vide order dt. 30.1.2009. Accordingly, the Delhi Stock Exchange, has become liable to pay the agreed amount of Rs.18,00,000/- in terms of order dated 28.5.2007 to the Applicant.

5. That the Applicant since the order dated 28.5.2007, has not pursued any of the cases mentioned in his letter dated 21.8.2006. It is stated that FAO No. 362/2002 titled Han Om Maheshwari vs. The Delhi Stock Exchange was dismissed on 26.4.2007 and suit no. 238/2002 titled Hari Om Maheshwari Versus M/s. Jain Associates & Ors. was compromised and dismissed as withdrawn on 15.9.2006. No appeal has been preferred by the Applicant in both the matters. Both the cases were dismissed in the presence of counsel for the Exchange. Only suit no. 69/96 and 1406/98, both titled Hari Om Maheshwari Versus The Delhi Stock Exchange, are pending. However none of these suits are being prosecuted by the Applicant after order dated 28.5.2007. Both these suits shall be withdrawn in terms of undertaking given by the Applicant to the court in RFA No. 34 of 2007, on receipt of payment from the Exchange.

6. *The Applicant, therefore, demands payment of Rs.18,00,000/- along with interest @ 15% p.a., w.e.f. 28.8.2006 till payment thereof. The liability of the Exchange to make payment of interest arises since the Exchange had failed to make payment of the compromise amount immediately after passing of the Board resolution dated 28.8.2006.”*

7. This stand of the plaintiff was also recorded by the Court in hearing C.M.Appl. 21829/2011 in RFA 34/2007, in an order dated 16.12.2011, in the following terms:

“It is contended by the applicant that though the appeal was decided on the basis of agreement between the parties and consent order was passed, the condition of furnishing bank guarantee in the sum of Rs. 7 lacs agreed upon between the parties has become infructuous. It is his submission that this bank guarantee was to be furnished to take care of any possible claims which the Stock Exchange could have against the applicant. The applicant submits that almost five years have passed and no such claim is lodged by the Stock Exchange against the applicant and, therefore, now there is no need to furnish any bank guarantee.

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8. All three applications, 9797/2007, 14605/2008 and 21829/2011 were dismissed on the ground that the correct remedy would be to approach the execution Court, rather than request for modification of the compromise decree itself. Subsequently, the plaintiff's attempt to execute the decree passed by the learned District Judge in the original

suit, was rejected by the execution Court by an order dated 07.10.2011. In the last application, by an order dated 27.04.2012, in CM No. 21829/2011, the Court again noted that:

“C.M. No.21829/2011 in RFA 34/2007

“The appeal was disposed of on consensual terms which are recorded in order dated 28th May, 2007. In fact, this amounts to passing of the consent decree. If the grievance of the applicant is that the amount is not paid in the said terms, the proper remedy is to file execution proceedings. This was so recorded even on earlier occasion in our order dated 30th January, 2009.

This application is accordingly dismissed.”

9. Accordingly, this back and forth forms the context in which CM No. 10879/2012 was filed by the plaintiff, which is the subject matter of this Court's consideration. The plaintiff states that given the direction of this Court to approach an execution Court to effectuate the compromise decree, *“there are patent errors in the order dated 28.5.2007 which renders the consent decree dated 28.5.2007 in-executable.”* Accordingly, the plaintiff requests for the following modifications before the execution proceedings can take place: first, as regards the 4th clause of the compromise recorded (*“Bank Guarantee shall be valid for a period of one year in the first instance. The encashment of bank guarantee is subject to outcome of the two suits which have been pending”*), the plaintiff states that the encashment of the bank guarantee was not subject to the outcome of any two suits, for no suit was pending against the DSE. Rather, it is argued that the bank guarantee was subject to the DSE being held liable to pay the

amount after arbitration of the pending dispute with MGC. Secondly, the plaintiff argues that the clause stating that “*within two weeks of acceptance of this amount, Rs. 18,00,000 shall be released to the respondent*” is misleading, in that there is – pursuant to the first argument – no other amount payable by either of the parties. Thus, it is urged that the words “*...of acceptance of this amount*” are required to be deleted, being out of context, and permitting the DSE to delay its obligation to pay ₹18 lakhs without justification. Third, the plaintiff argues that the clause mandating withdrawal of all proceedings filed against the DSE, apart from the proceedings filed against MGC in terms of the “*MOA of November, 2006*”, requires reconsideration. Here, it is submitted that the plaintiff was required to withdraw all cases except two, Suit No. 1278/1995 and 2333A/1997 and therefore, this sentence is required to be revised accordingly. Further, it is submitted that there is no MOA of November, 2006 and thus the last sentence of paragraph 6 must be deleted in order to ensure that the obligation can be enforced. The primary contention of the plaintiff is that the provision of the bank guarantee was a *substitute* for the lien exercised by the DSE in respect of the plaintiff’s alleged dues to MGC. It is argued that since such liability was to be determined in accordance with a properly conducted arbitration – as per the bye-laws of the DSE – the bank guarantee itself was contingent upon the arbitration being conducted. In this case, the arbitration suit filed by the plaintiff in the Delhi High Court, it is argued, was dismissed as withdrawn, as the plaintiff withdrew the suit in accordance with his obligation under the order dated 28.05.2007, in anticipation that the

DSE would itself, absent the interference of the Court, conduct an arbitration to adjudicate the claims. This having not been done, the plaintiff today requests the Court to modify the order so as to spell out the obligations of parties clearly, to allow for a clear and enforceable decree to be drawn up.

10. To the contrary, learned counsel for the DSE contests this application for modification of the order dated 28.05.2007. It is submitted that this application is presented five years after the order sought to be modified, and thus principles of limitation bar the application. Further, learned counsel argues that the application merely repeats various earlier applications filed before this Court - CMs 9797/2007, 14605/2008 and 21829/2011 – both by the plaintiff and the DSE. Those applications having been dismissed, it is urged that the application is barred on this ground as well. Further, learned counsel stresses on the fact that the plaintiff has approached this Court without clean hands, and is not entitled to any relief. This, learned counsel argues, is because the order of 28.05.2007 was a consent order, and even as per the terms of that order, the consequences of non-compliance were made clear to the plaintiff. Despite this, it is argued, the plaintiff refused to provide the bank guarantee as per the preforma delivered by the DSE, but rather, countered it with another that violated the terms of the order. Accordingly, learned counsel argues that the performance of obligations of both parties have been enjoined by the plaintiff's actions himself, and thus, it does not lie in his mouth to now require a modification of the compromise recorded earlier. Furthermore, learned counsel stressed that the plaintiff's

argument that the bank guarantee had been rendered infructuous because no arbitration had taken place is factually incorrect. It is argued that the appellant had – as per its bye-laws – conducted arbitration and it was directed that the plaintiff had to pay ₹3,49,530/- plus interest at 15% per annum consequent to that validly conducted arbitration. It is argued that being aggrieved by this arbitration, the plaintiff filed Suit No. 2333A/1997 which was subsequently dismissed, thus leaving no objections to the arbitration, and triggering the obligation to pay under the terms of the compromise order of the Court. Thus, it is argued that the DSE's exercise of lien over the margin money of the plaintiff, and subsequently, the insistence on a bank guarantee, was justified.

11. The question that arises for the consideration of the Court in this case is whether the compromise order recorded by the Court on 28.05.2007 is to be modified. As a background, it is important to note certain facts. The plaintiff had deposited the margin money with the DSE for the purpose, *inter alia*, of settling any outstanding claims between the plaintiff and another member of the DSE. Equally, it is important to note that on 22.07.1995, when the DSE invited claims against the plaintiff at the time of the plaintiff's exit from the DSE, no such claims were filed. It is, however, claimed by the DSE that the dispute raised by the MGC was arbitrated by it, and settled, and thus, the amount due from the plaintiff to the MGC was deducted from the margin money. Crucially, independent of the claims raised and objections preferred earlier, a compromise order was passed by this Court on 28.05.2007, whereby the order of the learned Addl. District

Judge decreeing a limited amount of ₹4.4 lakhs to the plaintiff was substituted on appeal. It is the terms of that order that are of the greatest relevance to the issue before the Court today. Under the terms of that order, the DSE was to pay the plaintiff ₹18,00,000/- after the plaintiff furnished a bank guarantee for the sum of ₹7,00,000. Equally, the plaintiff was obligated to withdraw all the cases filed by him against the DSE, except for the dispute against MGC in terms of the “*proposed MOU of November, 2006*”. Accordingly, the encashment of the bank guarantee was made “*subject to the outcome of the two suits which are pending*”, i.e. the suits which the plaintiff was not mandated to withdraw in terms of that order.

12. These obligations must be understood in terms of the context in which the compromise order was made. There were a spate of claims pending against DSE (including as a direct party, and as an indirect, *proforma* party) filed by the plaintiff. The compromise reached between the parties concerned not only the suit decreed by the learned Addl. District Judge in this case, but various other cases as well as detailed above, involving a monetary value much greater than that involved in the suit before the learned Addl. District Judge. The request for a compromise came originally from the plaintiff by a letter dated 18.08.2006, by which the plaintiff requested the settlement of all cases pending, including the present suit. This included Suit No. 2625/1996 (Delhi High Court) for an amount of ₹160 lakhs against the DSE, Suit No. 50/2004 (Karkardoma Court) for an amount of ₹11 lakhs against the DSE, Suit No. 69/1996 (Tis Hazari Court) against the DSE for an amount of ₹22,000/-, and three others suits where the DSE

was an indirect party, i.e. Suit No. 238/2002 (Tis Hazari Court) for an amount of ₹1.8. lakhs against M/s Jain Associates, Suit No. 1278/1995 (Delhi High Court) for an amount of ₹38.41 lakhs against BKJ and Suit No. 2333-A/1997 (Delhi High Court) for an amount of ₹26 lakhs against MGC. The DSE was only a *proforma* party in the last two suits. In the letter, the plaintiff stated that he was willing for an out-of-Court settlement of all the above cases, except the last two. He also stated that the DSE shall have lien to the extent of ₹3,49,350/- as regards the “*dispute with M/s. M. Garg & Co. to be arbitrated by the Exchange ...*” This proposal was discussed by the Board of Directors of the DSE on 28.08.2006, and the minutes of the meeting indicate as follows:

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The Board took note of the legal cases pending in various courts filed by Shri Hari Om Maheshwari. The Board further noted the minutes of the meeting of the group for Legal & Staff matters dated 21.08.2006 wherein the said matter was discussed and a composite amount of Rs. 18 lacs was agreed to be paid to Shri Hari Om Maheshwari subject to the approval of the Board. Some of the Directors felt that since the full facts of the matter were apparently not brought to the notice of the Group for Legal and Staff matters, the matter should be referred back to the Group for reconsideration. The Chairman of the Group, for legal and staff matters, however assured the Board that all matters concerning the issue had been duly considered and that there was no need to refer the matter to the Group again.

*The Board after considering all the facts decided that the matters filed by Shri Hari Om Maheshwari as detailed in the minutes of the meeting of the group for Legal & Staff matters held on 21.08.2006 (which forms part of this minutes as **Annexure A**) which are presently being handled by UKCA Law Chambers on behalf of the Exchange, be compromised for a composite sum of Rs. 18 Lacs being paid to Shri Hari Om Maheshwari.*

The Board took note that Shri Hari Om Maheshwari vide his letter dated 21.8.2006 has stated that:

“... The Exchange shall have the lien to the extent of Rs. 349530 - with interest on the dispute with M/s M. Garg & Co. to be arbitrated by the Exchange from the date of payment including interest allowed, if any on the above amount.”

The Board also decided that copy of the letter dated 21.08.2006 of Shri Hari Om Maheshwari, be placed in the concerned arbitration file.”

13. On the basis of these discussions, a proposed Memorandum of Agreement (“MOA”) was allegedly signed by the parties on 28.08.2006 to settle pending and decreed suits against each other. Further discussions took place between the Board of Directors of the DSE and the plaintiff on the MOA concerning the lien exercised by the DSE over the margin money of the plaintiff. In a letter on 16.11.2006, the plaintiff replied to the DSE as regards the MOA signed by the parties, stating that “*there is a bona fide mistake in para 3 of the MOA executed by me.*” This paragraph relates to the clause

permitting the DSE to exercise a lien. The plaintiff stated that he had a pending claim against MGC for ₹9,44,530/-, and that this claim had nothing to do with the amount of ₹3,49,530/- paid by the DSE to MGC. Stating further that he had initiated an arbitration within the DSE against MGC for the former amount, and had pursued the matter in the Delhi High Court as well, the plaintiff stated that the amount of ₹3,49,530/- ought to be recovered by the DSE from MGC itself, as the payment was – in the first place – unjustified. Accordingly, the plaintiff requested that paragraph 3 be deleted from the MOA. Subsequently, in a letter dated 20.11.2006, the plaintiff reiterated this position, but proposed that paragraph 3 be modified as follows:

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The Exchange shall have lien to the extent of Rs. 3,49,530/- with interest on the amount, if any, that Shri Hari Om Maheshwari is held liable to pay in his dispute with M/s Garg & Co. to be arbitrated by the exchange.”

15. The primary issue before the Court thus is to construe the obligations recorded in the compromise order. Though the consent order does not spell this aspect out expressly, the *purpose* of furnishing the bank guarantee by the plaintiff in this case was as a security to the DSE in case the arbitration award in the dispute between the plaintiff and MGC was rendered against the plaintiff. Since the amount claimed by the MGC, along with interest, amounted to ₹7 lakhs, the bank guarantee corresponded to that amount. If the plaintiff were to prove – before the competent authority – that the

MGC did not have a valid claim against it, then the bank guarantee would expire, but if on the other hand, the plaintiff was held to be liable to the MGC, then the bank guarantee could be encashed. The plaintiff's stance – through the entire dispute, as also before the learned Addl. District Judge – has been that the DSE has not conducted an arbitration under Article 127 of its bye-laws, but rather, directed payment on the basis of an executive action within its ranks. Indeed, that is precisely the reason why the plaintiff filed Suit No. 2337A/1997 in order to *appoint* an arbitrator, being aggrieved by the fact that *the DSE has not conducted a valid arbitration*. The DSE's argument that, in fact, the suit was filed because the plaintiff was aggrieved by the arbitration conducted by it is not supported by the record. Not only no any material been placed before the Court as to this alleged arbitration in terms of the arbitral award, or submissions of parties, or the place/seat of the arbitration, but moreover, this argument was also rejected by the learned Addl. District Judge in this case. The issue before the learned Addl. District Judge was whether any arbitration had indeed been conducted by the DSE. In deciding in the negative, the learned Addl. District Judge made the following observations:

“23. So as per the aforesaid provision, the disputes between the plaintiff on the one hand and M/s. BKJ and MGC on the other should been referred to Arbitration Committee for arbitration as provided by the Bye laws and Regulations and it had no business to arbitrarily exercise lien over the margin money of the plaintiff and resort to the alleged adjustment in question. Admittedly the disputes of the said M/s BKJ

and MCC with the plaintiff were not referred to the arbitration. Therefore, this action of the defendant is illegal and cannot be countenanced.

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24. At this stage a reference may be made to a judgment of Hon'ble High Court in the case of Ram Nanda and Company Vs. Delhi Stock Exchange Association Ltd. and Others, (1995) 5 Company Law Journal 361. This judgment was passed while dealing with the interim injunction application. However, in the said judgment Hon'ble Delhi High Court considered the course of action which Delhi Stock Exchange Association Ltd. who is also the defendant in the present suit should have adopted while dealing with the disputes arising between its various members. In this context Hon'ble Delhi High Court held that a finding in this regard (sic) could only after resort is had as per Article 127. It was further held that since the claim had not been adjudicated upon, the exchange would not be justified in taking recourse to Article 99E on the basis of a non-admitted claim.

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25. Now in the present case what do we find. The so called claims of M/s. BKJ and MGC against the present plaintiff have not been placed on record. Also admittedly the said claims if any had not been referred to the Arbitration Committee for the purposes of Arbitration as contemplated by Article 127, Bye Laws and the Regulations.

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27 This is in the nature of an executive direction and merely by virtue of this,

defendant could not direct the plaintiff to make payment of disputed amounts unless and until it was settled by way of the arbitration as contemplated by Article 127.”

16. Thus, no arbitration – as envisaged under Article 127 – had been conducted by the DSE at the time of the order of the learned Addl. District Judge, and nothing since has been brought on record. Rather, the plaintiff had filed a Suit (2337A/1997) to compel – through this Court – the DSE to conduct an arbitration and decide the claim of MGC as against the plaintiff. However, the DSE *opposed* this suit, and subsequently, in terms of the compromise order, in the anticipation that the DSE would arbitrate the dispute itself, the plaintiff withdrew Suit No. 2337A/1997, and other suits pending against the DSE. Thus, the purpose of the bank guarantee was to secure the possible amount awarded by an arbitral tribunal in the dispute between MGC and the plaintiff; but owing to the DSE’s failure to initiate arbitration under its own bye-laws, and its opposition of the plaintiff’s arbitration, this purpose was vitiated. Moreover, the plaintiff’s counter-proforma for the bank guarantee spelt out only these terms, which far from going beyond the terms of the consent order, are squarely situated within in. Without arbitration, the bank guarantee itself is of no value. In fact, if the DSE’s argument is to be accepted, that an arbitration had already been conducted, and the amount was due at the time of compromise order, then the reason as to why a bank guarantee was chosen as the method of security, rather than a direct obligation to pay, is beyond the pale of logic. While it is

true that the payment of ₹18 lakhs in terms of the compromise order had to be made after two weeks of the furnishing of the bank guarantee, the fact that the purpose of furnishing the bank guarantee itself was lost due to the action of the DSE cannot imply that its obligation to pay is vitiated. Neither is the plea that a total amount of only ₹11 lakhs is payable, i.e. ₹18 lakhs minus ₹7 lakhs, supported in fact or law, given that the validity of the ₹7 lakh claim against the plaintiff is *still* unsettled due to the lack of a properly conducted arbitration under the bye-laws of the DSE. The use of the phrase “[t]he encashment of bank guarantee is subject to outcome of the two suits”, used in the compromise order, provides some scope to be misleading, in that the encashment of the bank guarantee was subject to the arbitration conducted by the DSE, and thus, any connected arbitration suits pending before the Courts, as for example, Suit No. 2337A/1997. Indeed, the communications between the parties indicate that the two suits the plaintiff was not willing to withdraw were the two suits where the DSE was only a proforma party (Suit No. 1278/1995 and 2333A/1997). It also becomes apparent that the bank guarantee was subject to the outcome of the arbitration of the claim between MGC and the plaintiff. In his letter dated 18.08.2006 proposing a compromise, the plaintiff stated the term of the compromise (replacing a lien over the margin money with a bank guarantee serving as security for the amount): “*The Exchange shall have the lien to the extent of Rs. 349530 - with interest on the dispute with M/s M. Garg & Co. to be arbitrated by the Exchange.*” (emphasis supplied) This was specifically recorded by the DSE in its Board

Meeting dated 02.08.2006. Subsequently, on 20.11.2006, this was reiterated by the plaintiff, by stating that the correct clause should be that the DSE “*shall have lien to the extent of Rs. 3,49,530/- with interest on the amount, if any, that Shri Hari Om Maheshwari is held liable to pay in his dispute with M/s Garg & Co. to be arbitrated by the exchange.*” (emphasis supplied).

17. Furthermore, the compromise order also states that “[w]ithin two weeks of acceptance of this amount, Rs. 18,00,000/- shall be released to the respondent.” This amount clearly refers to the furnishing of the bank guarantee. However, since the bank guarantee has become infructuous at this stage due to the DSE’s actions, the payment of ₹18 lakhs cannot be held hostage by the DSE on the basis of its own conduct.

18. The order of the learned Addl. District Judge in this case was pronounced on 19.07.2006, and compromise order was made on 28.05.2007. Since then, for a period of more than 6 years, the plaintiff has been unable to either execute the order of the learned Addl. District Judge for a limited sum of ₹4.4 lakhs in respect of the limited dispute with MGC, nor the greater amount of ₹18 lakhs with respect to the various litigation that was pending between the parties. While the order of the learned Single Judge was substituted with the compromise decree, the latter – due to the reasons discussed above – could not be executed till date. Equally, the compromise decree records certain obligations of the parties that have left room for abuse, which has been the case in the present facts, leading to one party delaying payment to another on account of a contorted reading of the reciprocal obligations

provided in the order. Moreover, since the order was made, the back and forth between the parties (including the plaintiff's inability to effectuate his rights) has materially altered the situation. As much water has flown, in order to ensure that parties' rights are effectuated, it is important to modify accordingly the rights and obligations of the parties in accordance with the intent of the original compromise in the background of this case as detailed above. The Supreme Court has recognized, as a matter of general principle, that parties cannot renege from their compromises, transformed through an order of the Court under Order XXIII, Rule 3 of the Civil Procedure Code, 1908. (see, *K. Venkata Seshiah v. Kanduru Ramasubbamma (dead) by LRs*, (1991) 3 SCC 338).

19. The present request for modification is not an example of renegeing from the compromise, but rather, asking for a suitable modification so as to allow enforcement of the compromise, which was otherwise held up by the other party. Indeed, the Supreme Court has, in *Dr.AshishRanjan v. Dr.AnupamaTandon*, (2010) 14 SCC 274, recognized that in

“22.....such a fact-situation, where circumstances have substantially changed subsequent to the order dated 3.5.2008, due to non-compliance of the terms of compromise order, the applicant is fully justified seeking review/modification of the said order.

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20. This Court is alive to the fact that, ordinarily, matters treated as final are not re-opened. The DSE argues— relying on this principle —

that this Court should not now seek to revisit issues which were in effect considered and dealt with while rejecting the applicant/plaintiff's previous miscellaneous applications. However, a close scrutiny of the said previous orders shows that the Court did not indicate any reasons for refusing to go into the contentions that have now been dealt with in this order. In the circumstances of this case, we have no doubt that the principle "*actus curiae neminem gravabit*" which broadly translates in English to "*an act of the court shall prejudice no one*" applies in this case.

21. In this case, as the DSE has – as it clear from its conduct – failed to, and in fact, actively opposed any attempt to arbitrate the dispute between the plaintiff and MGC, it cannot rely on the furnishing of a bank guarantee to secure a possible arbitral award to delay its obligation to pay the plaintiff the sum of ₹18 lakhs. In any case, the Court also notes that the counter-proforma of the bank guarantee relayed to the DSE by the plaintiff was in tune with the parties' obligations under the compromise order, and there was no reason for the DSE to reject that proforma. At the same time, the observations made by the Court do not touch upon the validity of MGC's claim against the plaintiff for the amount of ₹3,49,530/- plus interest, which has not yet been settled by an arbitral tribunal as mandated, and indeed, may be gone into in the future in accordance with law. Importantly, the failure to initiate any steps after the order on the one hand, and insistence by it (DSE) that in fact the arbitration had been initiated and conducted – by relying on the previous award, which was set aside by the Additional District Judge – also betrays an

attempt to block the applicant's legitimate rights. The inaction to commence arbitration proceedings – which should have been immediately after the compromise order of 28.05.2007 also means that the cause of action – if at all – to do so has become time-barred in view of Section 37 of the Arbitration Act, 1940, as well as Section 43 of the Arbitration and Conciliation Act, 1996, read with Section 3 of the Limitation Act, 1963.

22. Accordingly, for the above reasons, the Court modifies the order (recording the compromise between the parties) dated 28.05.2007, as follows:

- i. The Delhi Stock Exchange shall pay a sum of ₹18,00,000/- to Shri Hari Om Maheshwari, who is not obligated to furnish a bank guarantee in return for such payment. Any payments made hitherto in furtherance of the previous order shall be adjusted;
- ii. Shri Hari Om Maheshwari shall withdraw all cases filed by him against the Delhi Stock Exchange as were pending on 28.05.2007, except proceedings in which the Delhi Stock Exchange is only a proforma party, if not already withdrawn.

23. Accordingly, for the reasons indicated, C.M. Appl. 10879/12 is disposed of in the above terms. Decree sheet is directed to be drawn up accordingly.

S. RAVINDRA BHAT
(JUDGE)

SUDERSHAN KUMAR MISRA
(JUDGE)

MARCH 04, 2014

