

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

% *Judgment Reserved on: July 28, 2014*
Judgment Delivered on: August 07, 2014

+ **FAO(OS) 188/2014**

SHARAD P.JAGTIANI Appellant
Represented by: Mr.Rakesh Mukhija, Advocate with
Ms.Ira Gupta, Ms.Jasmine Detwani
and Mr.Pulkit Sachdeva, Advocates

versus

M/S. EDELWEISS SECURITIES LTD. Respondent
Represented by: Ms.Indu Malhotra, Sr.Advocate
instructed by Mr.Apporva Bhumesb
and Mr.Varun Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Sharad P.Jagtiani filed a suit on the original side of this Court praying for a decree in sum of ₹46,71,768.29 (Rupees Forty Six Lacs Seventy One Thousand Seven Hundred Sixty Eight and Paise Twenty Nine only) against M/s. Edelweiss Securities Ltd. on plea that representatives of Edelweiss met him with a request to open a brokerage account with the firm and to trade in the financial market through Edelweiss. He was assured 40% profit on trading. He opened a trading account and transferred ₹48,00,000/- (Rupees Forty Eight Lacs only) in the account. He pleaded that he did not invest the money under any portfolio management scheme. Account No.NDS00S078 was opened in his name. He signed certain blank forms on the assurance

that once filled up copies thereof would be sent to him. He pleaded that Edelweiss was bound by the rules of the National Stock Exchange requiring trading members to ensure that confirmed order instructions were obtained from the members. That he placed 121 trading orders with Edelweiss. Suddenly officers of Edelweiss became non-communicative. With much difficulty he obtained a statement of account showing that he had incurred a loss of ₹41,00,000/- (Rupees Forty One Lacs only). He raised a grievance that without his instructions 65 transactions were effected by Edelweiss without any confirmed order or instruction from him. He pleaded that out of 186 transactions shown to his account he did not dispute 121 but disputed 65. He pleaded that he was entitled to the sum claimed if 65 transactions debited to his account were removed.

2. The learned Joint Registrar (Judicial) before whom the suit was listed issued summons to Edelweiss returnable for August 26, 2011 on which date it was found that on account of defective process fee filed the summons could not be issued. On filing of process fee fresh summons returnable for February 24, 2012 were issued. Before the date fixed a written statement was filed which was signed and verified on December 15, 2011.

3. In the written statement filed apart from refuting the pleadings and affirming that all transactions were carried out under the instructions of Sharad P.Jagtiani it was pleaded in the third preliminary objection as under:-

“That this Hon’ble Court lacks the necessary jurisdiction to entertain and decide the present Suit in view of Clause 13 of Part A of the Agreements dated 23.05.2008 entered into between the parties, wherein the parties have agreed to refer any claims/disputes arisen between the parties to be resolved by the mode of Arbitration, as per the Rules, Regulations and bye-laws envisaged by the respective stock exchange. The

contents of Clause 13 are reproduced herein for the ready reference of this Hon'ble Court.

'..... 13 The Client and the Stock Broker agree to refer any claims and/or disputes to arbitration as per the Rules, Bye-laws and Regulations of the Exchange and Circulars issued there under as may be in force from time to time....''

4. In response to the averments made in para 20 of the plaint wherein Sharad P.Jagtiani had pleaded that the Delhi High Court had jurisdiction to entertain the suit, it was pleaded in the written statement as under:-

“20. That the contents of the para No.20 of the Plaint are incorrect and hence denied. It is denied that the Plaintiff has any cause of action to institute the present Suit. It is further denied that Hon'ble Court has the necessary jurisdiction to entertain and decide the present Suit in view of Clause 13 of Part A of the Agreements dated 23.05.2008 which provides for the disputes/claims arisen between the parties to be resolved by the mode of Arbitration as per the Rules, Regulations and bye-laws envisaged by the respective stock exchange. It is specifically denied that the representatives of the Defendant Company ever approached the Plaintiff for opening of trading account. Remaining contents of the para under reply are denied as incorrect. It is submitted that the Plaintiff be put to the strict proof of the averments made in the para under reply.”

5. In the written statement filed no specific prayer was made to refer the parties to arbitration. No application was filed under Section 8 of the Arbitration and Conciliation Act, 1996.

6. Highlighting that the written statement was filed before February 24, 2012, the date fixed for the return of the summons in the suit and obviously without seeking any time from the Court to file a written statement, we note that vide impugned order dated March 03, 2014 the learned Single Judge has

disposed of the suit referring the parties to arbitration because in the replication filed Sharad P.Jagtiani did not dispute the clause 13 of the agreement dated May 23, 2008 between the parties.

7. What was argued before the learned Single Judge was the effect of an application not being filed under Section 8 of the Arbitration and Conciliation Act, 1996 by Edelweiss. Whereas Sharad P.Jagtiani pleaded that filing of an application under Section 8 of the Arbitration and Conciliation Act, 1996 was the condition for the parties to be referred to arbitration, Edelweiss took the stand that the requirement of the law was to bring it to the notice of the judicial authority in the first statement on the substance of the disputes filed by the defendant that there existed an arbitration clause in the contract between the parties and that the subject matter of the suit i.e. the action brought was the subject of the arbitration agreement. To which response of Edelweiss, Sharad P.Jagtiani responded by taking a stand that in the written statement filed, except for drawing the attention of the Court to the existence of an arbitration agreement between the parties no prayer was made that the parties should be referred to arbitration and while so responding Sharad P.Jagtiani made it clear that said plea was in the alternative to his main argument of an application being required to be filed under Section 8 of the Arbitration and Conciliation Act, 1996.

8. The view taken by the learned Single Judge is that the requirement of law i.e. Section 8 of the Arbitration and Conciliation Act, 1996 is for a party relying upon an arbitration agreement to apply to the Court praying that parties be referred to arbitration not later than when submitting the first statement on the substance of the dispute. The learned Single Judge has

held that the first statement on the substance of the dispute by the defendant could be the written statement.

9. Section 9 of the Securities Contracts (Regulation) Act, 1956 provides that any recognized stock exchange may, subject to the previous approval of Securities and Exchange Board of India (SEBI) make bye-laws for the regulation and control of contracts. Section 9(2)(n) of the Act provides the method and procedure for settlement of claims or disputes including settlement by arbitration. Under S.9(2)(n) the National Stock Exchange has framed Bye-Laws which have been approved by SEBI. Section 9(4) provides that the Bye-Laws made under Section 9 shall be subject to conditions with regard to previous publication, and the same shall be published in the Gazette of India, and also in the Official Gazette of the State in which the principal office of the recognized Stock Exchange is situated, and shall have effect as from the date of publication in the Gazette of India.

10. Chapter XI of the Bye-Laws of the National Stock Exchange of India Limited specifically provides for reference to Arbitration. Sub-Section 4 of Section 2 of the Arbitration and Conciliation Act, 1996 reads as under:-

“This Part except sub-Section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactments were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with other enactments or with any rules made thereunder.”

11. Thus, the arbitration under the National Stock Exchange Bye-Laws are Statutory Arbitrations would be covered under Section 2(4) of the

Arbitration and Conciliation Act, 1996.

12. The arbitration between Stock Broker and the Client is conducted under the Bye-Laws of the National Stock Exchange. In the decisions reported as 1996 (2) Arb LR 430 (Bom.) Kishore Jitendra Dalal Vs. Jaideep Investments, Bombay (1997) 5 Comp LJ 193 Himendra V. Shah Vs. Stock Exchange and (1999) Supp. Arb LR 32 (Bom) (DB) Stock Exchange, Mumbai Vs. Vinay Bubna it has been held that arbitration under the bye-laws framed by the stock exchanges under Section 9 of the Securities Act are statutory arbitration. In the decision reported as (2005) 10 SCC 660 Harinarayan G.Bajaj Vs. Rajesh Meghnani it has been held that the arbitration proceedings as provided in the Bye-Laws and Regulations of a body are subject to the provisions of the Arbitration and Conciliation Act, 1996 to the extent not provided for in the Bye-Laws and Regulations.

13. Section 8 of the Arbitration and Conciliation Act, 1996 reads as under:-

“8. Power to refer parties to arbitration where there is an arbitration agreement –

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the

judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

14. We simply need to highlight the phrase ‘*not later than when submitting his first statement on the substance of the dispute*’ in sub-Section (1) of Section 8. The requirement is to bring to the notice of the Court at a point not later than when submitting the first statement on the substance of the dispute that there exists an arbitration clause between the parties and that the subject matter of the action brought before the Court by way of the suit falls within the ambit of the arbitration clause.

15. Section 8 does not specify the manner in which the party has to submit its first statement on the substance of the dispute, and normally with respect to a suit, the first statement on the substance of the dispute by the defendant would be the written statement. Thus, if in the written statement filed it is brought to the notice of the Court that there exists an arbitration agreement between the parties which embraces the subject matter of the suit there would complete compliance with the mandate of the law and the Court would be obliged to refer the parties to arbitration if the plea in the written statement is made good.

16. On the facts of the instant case, it may be true that in the written statement filed a specific prayer has not been made to refer the parties to arbitration, but we have highlighted hereinabove that in the written statement filed a preliminary objection has been taken that the suit is barred in view of the arbitration agreement. The written statement filed is with strings attached by challenging the maintainability of the suit in view of the arbitration clause and therefore in such circumstance the said objection taken by Edelweiss contained in the written statement could be treated as an

application under Section 8 of the Arbitration and Conciliation Act, 1996.

17. It is trite that it is the substance of a matter contained in a document which matters and not the form thereof.

18. For three reasons, the appeal has to be dismissed. Firstly the arbitration agreement in the instant case being the result of a statute, there being no estoppel against the statute, required by law to be held; secondly the view taken by us hereinabove relating to the interpretation of Section 8 of the Arbitration and Conciliation Act, 1996; and thirdly Section 89 of the Code of Civil Procedure, 1908 which empowers a Court to refer the parties to arbitration if in the opinion of the Court it appears that there exists element of a settlement which may be acceptable to the parties. There cannot be a better case where such element exists than a case where the parties themselves have agreed for referring the matter to arbitration at the time of entering into the contract itself.

19. Before dismissing the appeal we would be failing not to note a preliminary objection filed by the respondent to the very maintainability of the appeal. With reference to Section 37 of the Arbitration and Conciliation Act, 1996 wherein such orders as are appealable are listed, it was urged that an order under Section 8 of the Arbitration and Conciliation Act, 1996 was not made appealable. We have chosen to decide on merits to interpret the law correctly for the reason we find that a few learned Single Judges of this Court have taken a view that unless an application is filed under Section 8 of the Arbitration and Conciliation Act, 1996, mere raising a plea in the written statement that there exists an arbitration agreement between the parties which embraces the subject matter of the dispute raised in the suit, would be useless. One objection raised by Sharad P.Jagtiani is that judicial discipline

demanding the learned Single Judge to follow the view taken by learned Single Judges and if he did not agree the matter ought to have been referred to a larger Bench. We thought it advisable to settle a point of law on which there exists conflicting decisions of learned Single Judges of this Court. We formally declare that the view taken by the learned Single Judges contrary to the view taken by us in the present decision is overruled. The view taken by the learned Single Judge in the instant case is affirmed.

20. The appeal is dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

AUGUST 07, 2014
mamta