

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

+ CM(M) No. 1480/2011

% 7th August , 2014

ANURADHA SHASTRI Petitioner
Through: Mr. L.K.Bhushan and Mr. Anirudh
Arunkumar, Advocates.

VERSUS

RELIGARE SECURITIES LTD. Respondent
Through: Mr. Gulshan Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this petition under Article 227 of the Constitution of India is to the impugned order of the court below dated 13.10.2011 by which the trial court reviewed its earlier judgment dated 20.4.2011, by which the application under Section 8 of the Arbitration and Conciliation Act, 1996 of the petitioner/defendant was allowed. Therefore, the effect of the impugned order is that the Section 8 application stands dismissed.

2. The judgment dated 20.4.2011 shows that the Member-Client-Agreement which was entered into between the parties is admitted and

Clauses 14 and 18 of that agreement provides for resolution of disputes through arbitration. This aspect is stated in para 4 of the judgment dated 20.4.2011 and the same reads as under:-

“4.(**Findings**)- The record is assessed. The Member-Client Agreement-NSE AND Member-Client Agreement-BSE are on record. The applicant/defendnat’s plea is based on clause 14 and plaintiff’s plea is based on clause 18; both the reproduced hereunder:-

Clause 14- The stock broker hereby agrees that he shall ensure faster settlement of any arbitration proceedings arising out of the transaction entered into between him and the client and that he shall be liable to implement the arbitration awards made in such proceedings.

Clause 18- The stock broker and the client declare and agree that the transaction executed on the exchange are subject to rules, byelaws and regulations and circulars issued there under of the exchange and all parties to such trade shall have submitted to the jurisdiction of such court as may be specified by the byelaws and regulations of the exchange for the purpose of giving effect to the provisions of the rules, byelaws and regulations of the exchange and the circulars issued there under.

It is apparent from the plain reading of clause 14 that the plaintiff has ensured for faster settlement of arbitration proceedings, arising out of transaction entered between the parties and clause 18 of the agreement does not nullify the operation of clause 14. To say, parties are governed by Arbitration and Conciliation Act, 1996 because of arbitration clause in Member-Client Agreements. The defendant has rightly filed the application prior to putting her defence, in terms of Section 8 read with Section 5 of the Act, 1996. Accordingly, it is held that dispute is arbitrable and in the agreement like Member-Client Agreement-NSE and Member-Client Agreement-BSE, the arbitration proceedings is carried by National Stock Exchange of India Ltd.

With these observations, the application stands disposed off and file is consigned to record room.

The parties may approach Ld. Arbitrator in terms of their agreements and as per Arbitration and Conciliation Act, 1996.

(INDER JEET SINGH)
Addl. District Judge-03, South
District,
Saket/24.04.2011”

3. This judgment directing the parties to resolve their disputes through arbitration was reviewed and the application under Section 8 of the Act was dismissed in terms of the following observations in the order dated 13.10.2011:-

“3.3 With this background of case of the parties and their stand, the plaintiff’s application for review of order dated 20.04.2011 is allowed, for the following reasons-

- (a) the scope of review is very limited, when there is apparent error on the face of record or illegality, whereas there is no apparent error or illegality on the face of record because all material produced inclusive of member-client agreement-NSE and member-client agreement BSE, was considered;
- (b) the jurisdiction of revision can be invoked if there exists other sufficient reasons, reliance can be placed on S.P.Gupta vs. Union of India 1993 RLR 606 (SC). Neither the plaintiff/applicant nor the defendant/non-applicant has brought and produced NSE Bye-laws, whereas they are governed by them, pursuant to their contractual legal relations;
- (c) the clauses 14 and 18 of the agreement, cannot be read in isolation but are to be read in the light of bye-laws of NSE and they are to be construed harmoniously. By reading them harmoniously, the purpose of arbitration proceedings is to do

it expeditiously to ensure faster settlement and bye-laws prescribed period of six months, which has been brought to the knowledge of Court at this stage of the case, which was cursory referred in the reply to application earlier;

(d) it does not provide rule, in case parties failed to refer the matter to arbitration within stipulated period of six months prescribed in bye-laws. It means remedy is open to Civil Court. The bye-laws does not waste words by prescribing such period; and

(e) general civil remedy is not barred, in the eventuality like the bye-laws prescribes period of six months and that time lapses.

Accordingly, the application stands disposed off. The suit stands restored to its earlier position.

4. Ahlmad is directed to register the case accordingly and case is adjourned for filing written statement by the defendant.

List on 08.12.2011.

(INDER JEET SINGH)
Addl. District Judge-03, South
District,
Saket/13.10.2011”

4. A reading of the aforesaid para 3.3 of the order dated 13.10.2011 shows that some important contents thereof are clearly unacceptable, and the reasoning is illegal. Firstly, it is mentioned in sub-para (a) of para 3.3 that there is no error or illegality on the face of the record, and once if that was so, there was no question of allowing of the review petition. Secondly, if there is no scope for review, it cannot be understood as to how a revision can be filed of an earlier order which is actually a review because in

the guise of a 'revision', the petition cannot be disposed of as a review petition. Surely, even assuming that the review was maintainable and had to be allowed because certain new material has come to light, however, that new material is only with respect to disputes being required to be referred within six months of the same arising, however which is not a valid legal ground because of Section 28 of the Indian Contract, 1872 Act as amended w.e.f 8.1.1997 by Act 1 of 1997. As per the amendment made to Section 28 by Act 1 of 1997, any contract which extinguishes the rights prior to the extinguishing of the limitation period, then such an agreement is void. In fact, the issue in the present case of six months period of reference is squarely covered by a judgment of a learned Single Judge in the case of ***Smt. Biba Sethi & Mr. Nitin Sethi Vs Dyna Securities Ltd. 2009 (3) Arb. L.R 494 (Delhi)*** wherein the identical issue with respect to the Member-Client Stock Exchange Agreement of the National Stock Exchange was decided. It has been held by a learned Single Judge in the case of ***Smt. Biba Sethi (supra)*** that the period of six months is not a valid limitation period in view of Section 28 of the Contract Act, 1872 and such a clause limiting reference in six months of arising of the disputes is void because of Section 28 of the Contract Act. The relevant paras of the judgment in case of ***Smt. Biba Sethi (supra)*** are paras 15,18,20,22 and 34 and which read as under:-

“15. That brings me to the core question for adjudication in the present case, i.e. whether the Byelaw 3 of Chapter XI providing for claims, disputes and differences to be submitted for arbitration within six months from the date on which the claim, difference or dispute arose is a local/special law within the meaning of Section 29(2) of the Limitation Act or is a contract to be governed by Section 28 of the Contract Act. The plea of the byelaws being a law is raised for the reason of the byelaws having been framed under Section 9 of the Securities Contracts (Regulation) Act, 1956 (Securities Act). The said Act was enacted to prevent undesirable transactions in securities, by regulating the business of dealing therein and for providing certain other matters connected therewith. The recognition to the stock exchange is given under the said law. Section 9 thereof, inter alia, provides:

9. Power of recognized stock exchange to make byelaws—

(1) Any recognised stock exchange may, subject to the previous approval of the Securities and Exchange Board of India, make bye-laws for the regulation and control of contracts.

(2) In particular and without prejudice to the generality of the foregoing power such byelaws may provide for—

Xxx	xxx	xxx—
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(n) the method and procedure for the settlement of claims or disputes, including settlement by arbitration;

Xxx	xxx	xxx
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(3) The bye-laws made under this section may-

(a) specify the bye-laws the contravention of which shall make a contract entered into otherwise than in accordance with the bye-laws void under Sub-section (1) of Section 14;

Xxx	xxx	xxx
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(4) Any bye-laws made under this section shall be subject to such conditions in regard to previous publication, as may be prescribed, and, when approved by the Securities and Exchange Board of India, shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised stock exchange is

situate, and shall have effect as from the date of its publication in the Gazette of India.

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18. Section [43\(1\)](#) of the Arbitration Act makes the Limitation Act applicable to the arbitrations, as it applies to the proceedings in court. At the time of coming into force of Arbitration Act, 1996 w.e.f. 22nd August, 1996, Section [28](#) of the Contract Act as interpreted by the Apex Court, though prohibited the parties to a contract from substituting their own periods of limitation in place of the period laid in general law of limitation, permitted the parties to substitute their own periods of prescription i.e., to say the parties were free to provide that if a party does not sue within specified period, then the rights accruing under the contract shall be forfeited or extinguished or that a party shall be discharged from all liability under the contract. Most of the arbitration agreements also contained such clauses of forfeiture/extinguishment of rights unless arbitration was commenced within a period shorter than that under the Limitation Act. Since arbitration was/is a specie of contract, on the interpretation of then Section [28](#) Contract Act such clauses were valid. The legislature, while enacting the 1996 Arbitration Act, while providing for applicability of Limitation Act, also empowered the court under Section [43\(3\)](#), to relieve against such forfeiture in cases of undue hardship.

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20. However, soon after the coming into force of Arbitration Act, 1996 w.e.f. 22nd August, 1996, Section [28](#) of the Contract Act was amended w.e.f. 8th January, 1997. The purport and effect of the amendment was to make contracts providing for such forfeiture/extinguishment of rights or permitting the parties to prescribe their own periods of prescription, void to that extent. After the said amendment, the arbitrators are to themselves apply the amended Section [28](#) of the Contract Act and Section [43\(3\)](#) of the Arbitration Act, 1996 cannot be understood as vesting such power in court only, notwithstanding amendment to Section [28](#). I have recently in Punj Lioryd Ltd. v. National Highways authority of India OMP 340/2008 and Arbitration Application 14/2008 decided on 17th February, 2009 dealt with this aspect.

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22. The question thus is, is the arbitration under the Byelaws of NSE, an arbitration under any other enactment, within the meaning of

Section 2(4) of the Arbitration Act, so as to make Section 43 thereof and consequently the Limitation Act inapplicable to such arbitration.

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34. If the Byelaw 3 of Chapter XI to the extent prescribing limitation period for reference of claims/disputes for arbitration is contractual, then, Section 2(4) of Arbitration Act prescribes that Part-I thereof will apply including Section 43 making the Indian Limitation Act applicable to arbitration. Consequently, Section 28 of the Contract Act, declaring agreements by which a party is restricted absolutely absolutely from enforcing rights under a contract by usual legal proceedings in ordinary tribunal or which limits the time within which he may thus enforce his rights, as void to that extent comes into play. Thus, the part of Byelaw 3 of Chapter XI of NSE Byelaws, to the extent prescribing limitation of six months for reference of disputes/claims to arbitration is void. The time therefore will be governed by the Limitation Act.” (underlining added)

5. It is not disputed before me that the reference to arbitration was not within six months but was within the three years period which is prescribed as per Article 137 of the Limitation Act, 1963 and therefore, the rationale of refusing to refer the matters to arbitration because of bye-laws of MCA (Member-Client-Agreement) providing six months was not a legal sound basis for the trial court to review its judgment dated 24.2.2011 by the impugned order dated 13.10.2011.

6. In view of the above, petition is allowed. The impugned order dated 13.10.2011 is set aside and consequently the original judgment dated 24.2.2011 passed by the trial court will stand restored. Parties are left to bear their own costs.

AUGUST 07, 2014
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VALMIKI J. MEHTA, J.