IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.243 OF 2012

Narottamdas Goel ... Petitioner.
V/s.
M/s. Bonanza Portfolio Ltd. ... Respondent.

Mr. M.S. Bhandari a/w Ms. Pranjali Bhandari for the Petitioner.
Mr. Ravikumar Varanasi a/w Mr. Deepak Rane i/b M/s. Ravikumar Varanasi & Co. for Respondent.

CORAM: A.A. SAYED, J.
DATED : 12 MARCH 2015.

P.C. :

1 By this Arbitration Petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 1996 Act), under the Bye-laws, Rules and Regulations of the National Stock Exchange of India Ltd (NSE), the Petitioner seeks to set aside the Award dated 24 September 2011 of the Appellate Arbitral Tribunal comprising of three former learned judges of this Court dismissing the Appeal filed by the Petitioner thereby confirming the Award dated 29 March 2011 passed by the sole Arbitrator (hereinafter referred to as the Arbitral Tribunal) allowing the claim of the Respondent for recovery of Rs.18,14,391.99 along with interest at the rate of 12% from 2 July 2010.

2 The Petitioner/original Respondent was a Constituent of the Respondent/original Applicant, a trading member at BSE and NSE. The Petitioner had executed Member-Client Agreement, Combined Risk Disclosure Document and other documents with the Respondent in the year 2004.

3 It was the case of the Respondent before the Arbitral Tribunal that the Petitioner used to deal in equities and F&O segments of NSE regularly and there was never any complaint or objection from him with respect to the trades executed by the Respondent and the Petitioner was provided with the contract notes which were received by him on his personal e-mail id schokhi@vsnl.com. Confirmation of the accounts for the year 2009-2010 was also sent to the Petitioner and copy of the same was annexed to the Statement of Claim. The Respondent had produced the e-log of sending electronic/digital contract notes with their Rejoinder. POD for sending the Accounts Statement was also annexed with the Additional Rejoinder. The Ledger Statement of the Petitioner for the year 2007-08 for NSE (Cash), NSE (F&O) and BSE (Cash) segments were also annexed to the Rejoinder.

4 The further case of the Respondent before the Arbitral Tribunal was that the Petitioner had open position on 21 January 2008. There

was a heavy down fall in the prices at the Exchanges on 21 and 22 January 2008 due to which the Petitioner had suffered losses. The mark to market loss was debited to the account of the Petitioner for Rs.13,66,148.68 on 21 January 2008. Inasmuch as the Appellant had margin requirement at the end of the day on 21 January 2008 and the market witnessed further fall on 22 January 2008, the open position of the Petitioner was squared off on 22 January 2008. The Ledger balance as on 31 March 2008 of NSE (Cash), NSE (F&O) and BSE (Cash) segments of the Petitioner were as under:

> *"1) NSE (F&O) – (Rs.58,68,958.57) Dr*
>
> *2) NSE (Cash) – (Rs.2,35,414.48) Dr*
>
> *3) Balance in NSE (Cash & F&O) – (Rs.61,02,373.05) Dr*
>
> *4) Less BSE Cash (Cr) (Rs.42,87,442.06) Cr.*
>
> *5) Net Balance – Rs.18,14,930.99 Dr."*

Thus, against the NSE – Cash & F&O segment of Rs.61,02,373.05 Dr, the Respondent was allowing BSE Cash Credit balance of Rs.42,87,442.06 Cr. and arriving at a Net balance of Rs.18,14,930.99 Dr. This type of adjustment was permissible and agreed upon by both the parties while executing the Member – Client Agreement and other relevant documents.

5 The Respondent thus claimed a sum of Rs.18,14,391.99 from the Petitioner and on failure to pay the same, the Respondent had approached NSE and filed the Arbitration Application. The Petitioner did not appear before the Arbitral Tribunal despite several opportunities being granted to him. The Petitioner only sent letters raising some procedural objections as also objections pertaining to limitation, jurisdiction of the Arbitrator etc. The Arbitral Tribunal by the impugned Award held that the Application was within limitation. The Arbitral Tribunal did not accept the plea of the Petitioner that the Arbitral Tribunal had no jurisdiction as the contract notes related to transactions on NSE. The Arbitral Tribunal allowed the claim of the Respondent and directed the Petitioner to pay the Respondent the sum of Rs.18,14,399.99 along with interest at the rate of 12% p.a. from 2 July 2010 till the date of payment. The Arbitral Tribunal also directed the Respondent to return the scrips of four Companies to the Petitioner. The relevant portion of the impugned Award dated 29 March 2011 of the Arbitral Tribunal reads as under:

"5. <u>RESPONDENT'S STATEMENT OF REPLY:</u>

The respondent chose to avoid all the hearings and dealt through written submissions dated February 5, March 9 and 16, 2011 which were taken on record by the sole arbitrator and *given full consideration. The issues which are mostly of a repetitive nature are summarized below:*

(i) The proceedings are time barred as the limitation period is six month. Date of dispute not declared.

ii) Payment of fees to NSEIL.

iii) Mode of appointment of arbitrator.

iv) NSEIL has no jurisdiction as the alleged dispute pertains to BSE and the applicant has filed the member client agreement pertaining to BSE.

v) All documents not received.

vi) Merits of the case are not justified.

At the time of initial hearing the sole arbitrator directed NSEIL to reply to the respondent, if required, in regard to the manner of appointment of arbitrator and fees payable by the parties as these do not fall within his domain.

Turning to the preliminary issues of limitation and jurisdiction, the applicant should have appeared before the sole arbitrator and made his detailed oral submissions instead of adopting delaying tactics by resorting to repetitive communications.

The applicants have submitted the Member client agreement covering trades on NSE along with their rejoinder dated February 25, 2011 and letter dated 21 March 2011.

Moreover the contract notes relate to transactions on NSEIL and any disputes arising there from are subject to *arbitration on NSEIL. Therefore the present application clearly falls under the jurisdiction of NSEIL.*

At the time of the initial hearing the sole arbitrator examined the preliminary issue of limitation. The dispute arose on January 23, 2008 when the last transaction was carried out by the respondent. NSEIL has issued circular on August 31, 2010 that the limitation act would apply instead of the earlier period of six months. Under the law of limitation three years is available from the cause of action. In the instant case the dispute relates to January 23, 2008 when the last trade was conducted by the respondent. Therefore the matter would be time barred only on January 22, 2011, while the applicant filed the claim on December 28, 2010 which is well within the period of limitation.

6. PROCEEDINGS

At the initial hearing held on February 8, 2011 the respondent failed to appear. His statement of reply was tendered by NSEIL at the time of hearing. The sole arbitrator directed the respondent to submit one more copy of the statement of reply to NSEIL and to submit all documents in triplicate in future.

The sole arbitrator examined the preliminary issue of limitation raised by the respondent. The applicant pleaded that they have filed their claim within the stipulated period of three years. The sole arbitrator for reasons detailed in para 5 above ordered that the case is within the period of limitation which has been revised to three years.

The sole arbitrator directed the applicant to submit the following documents by February 25, 2011:

(i) Rejoinder if any to the respondent's statement of reply.

(ii) Ledger statement exchange wise, segment wise

(iii) Any authorization for transfer between group accounts.

(iv) Contract notes.

(v) Margin statement MG-13 submitted to exchange

(vi) KYC, MCA and Mandates for NSE.

The respondent again failed to appear at the second hearing held on March 8, 2011. The applicant made oral submissions which were heard by the sole arbitrator. The final hearing was fixed on March 16, 2011 to afford one more opportunity to the respondent. The sole arbitrator directed that in case the respondent again fails to appear in person or sole arbitration through an authorized person under notarized power of attorney. He will decide the case ex-parte. The applicant submitted their rejoinder dated February 25, 2011 which was taken on record by the sole arbitrator.

At the final hearing on March 16, 2011 the applicant made further pleadings and submitted an additional rejoinder which was taken on record. The sole arbitrator directed the applicant to submit the member client agreement in respect of F&O segment of NSEIL in addition to that for the cash segment which had already been furnished. The applicant confirmed that there was no authorization for transfer between group accounts and no such transfers were effected.

7) <u>REASONS AND CONCLUSION</u>

After going through the relevant papers and proceedings I have concluded that it has now become necessary to pass an ex-parte award in the matter after giving careful consideration to the written submissions of the respondent. In spite of giving sufficient opportunities to the respondent to represent his case he has abstained from the proceedings. The issues raised by him from time to time are purely procedural and of a peripheral nature with an intent to delay the proceedings.

The applicant has submitted the contract notes, ledger statements and margin statement MG-13 to substantiate their claim. The respondent has not raised any dispute earlier in regard to these transactions on receipt of ECN Log report submitted by the applicant which covered sale of shares."

6 Aggrieved by the order of the Arbitral Tribunal, the Petitioner filed an Appeal before the Appellate Arbitral Tribunal. The Petitioner was represented by an Advocate. In the impugned Award dated 24 September 2011, the Appellate Arbitral Tribunal observed that in the grounds of Appeal taken by the Petitioner, surprisingly not even one ground was raised so far as the merits of the matter was concerned and so far as the grounds of jurisdiction, collusion, fraud procedure for appointment of Arbitrator were concerned, they were absolutely frivolous.

7 On the point of limitation, the Appellate Tribunal held as follows:

"As far as the point of Limitation is concerned, the argument of Advocate Mr. Bhandari was that as far as the present Application is concerned, the limitation period has to be counted as six months only because though there is a circular of NSE extending the Limitation period from 6 months to 3 years as per the provisions of Indian Limitation Act, 1963, the relevant Bye-Law is not amended and the website of NSE does not show it and, therefore, simply a circular by NSE is not binding and does not have the effect of extending the Limitation period.

This argument of Advocate Mr. Bhandari has to be rejected. The Advocate Mr. Bhandari's contention that though NSE has issued its Circular dated 31/08/2010 as directed by the SEBI in its Circular dated 11/08/2010, the NSE's Bye-laws were not amended as required by the provisions of Securities Contracts (Regulation) Act, 1956, as there was no publication of such rules. We do not find any merit in this submission. Under Section 11(1) of the Securities & Exchange Board of India Act, 1992 the SEBI has power to issue Circulars, making them applicable to all the recognized Stock Exchanges in India. They have also powers to publish the rules under the provisions of Section 10 of the Securities Contracts (Regulation) Act, 1956. The contention of the Appellant advanced by Advocate Mr. Bhandari was that in paragraph 11 of

SEBI's Circular dated 11/08/2010, the SEBI had advised the recognized Stock Exchanges "to make necessary amendments to the relevant bye-laws, rules and regulation for the implementation of the above decision immediately". It is vehemently submitted by Advocate Mr. Bhandari is that unless and until NSE had made necessary amendments to its relevant bye-laws, rules and regulations, the same could not have been implemented. Consequently, it was submitted that for the formation of the Appellate Arbitral Tribunal there should have necessary amendments made in the bye-laws, rules and regulations of the NSE. Since the NSE had issued the Circular only on 31/08/2010, the same was neither published nor bye-laws, rules and regulations were amended.

This submission of Advocate Mr. Bhandari is, however, merit less because by virtue of provisions of Section 11(1) of the Securities and Exchange Board of India Act the SEBI has powers to issue Circular and make it applicable without its publication. SEBI's Circular dated 11/08/2010, in paragraph 13 clearly mentions as under :-

> *"13. This Circular is issued in exercise of the powers conferred under Section 11(1) of the Securities and Exchange Board of India, 1992, read with Section 10 of the Securities Contracts (Regulation) Act, 1956 to protect the interest of investors in securities and to*

> *promote the development of, and shall come into effect from September 1, 2010."*

By this paragraph, the SEBI has made the Circular applicable with effect from 1st September, 2010. The Securities Contracts (Regulation) Act, 1956 also empowers the SEBI to dispense with the condition of previous publication. The relevant provision is as under :

> *"10(4) The making of the amendment or revision of any bye-laws under this section shall in all cases be subject to the condition of previous publication.*
>
> *PROVIDED that if the Securities and Exchange Board of India is satisfied in any case that in the interest of the trade or in the public interest any bye-laws should be made, amended or revised immediately, it may, by order in writing specifying the reasons therefor dispense with the condition of previous publication."*

What was mentioned in paragraph 11 of the said Circular dated 11/08/2010 was only an advice to the recognized stock exchanges to make necessary amendments in their relevant bye-laws, rules and regulations for the implementation of the above decision immediately. What is mentioned in paragraph 11 of the Circular does not make the necessity of amending the bye-laws, rules and *regulations by the recognized Stock Exchanges, the qualifying requirement for the purpose of implementation. It is clear that paragraph 13 of the SEBI's Circular had clearly given the reason for urgency, namely, to protect the interest of the investor in securities and to promote the development of, and to regulate the securities market. In the same paragraph it was specifically made clear that the Circular was to come into effect from 1st September, 2010. The advice given by the SEBI in paragraph 11 of the Circular was only to make the amendments in their respective bye-laws, rules and regulations and complete the formality without making it qualifying requirement for the purpose of implementation. A conjoint reading of paragraphs 11 and 13 makes it clear that amendments shall be made in the NSE Bye-Laws but in the meantime the Circular has to be given effect to from 1st September, 2010 till the Bye-Laws of the NSE are amended without waiting for amendments. Under these circumstances, we find no substance and merits in the submissions made by Advocate Mr. Bhandari.*

It is also to be noted that the above mentioned change with respect to change in Limitation period so also procedure for appointing Arbitrator and other changes with respect to procedure to be followed for Arbitration Applications is all appearing in the Gazette of India No.47 dated 20th November - 26th November, 2010 and also in the Gazette of Maharashtra Government Serial No. 990 dated November 11 – 17, 2010."

8 I have heard learned Counsel for the parties.

9 At the outset it needs to be stated that between 17 and 22 January 2008 there was a melt down and the stock market had plummetted. The Petitioner was holding outstanding position in the F&O segment of NSE and had suffered heavy losses due to the fall in the stock market. This factual aspect of having suffered losses has not been disputed by the Petitioner. Not only the Petitioner, but there were hundreds of Constituents (as also Trading members) who suffered heavy losses due to the huge fall in the prices of shares and the margin requirements including the mark to market losses could not be met by the Constituents resulting in squaring off of the positions of the Constituents by the Brokers. The present case is required to be seen in this light.

11 Despite opportunities being granted, the Petitioner chose to abstain from the hearing and canvassing any submissions before the Arbitral Tribunal either by himself or through an agent. Even the Appellate Arbitral Tribunal has clearly recorded that the Petitioner did not raise any contentions before it on the merits of the case. Pertinently, though the squaring off took place on 22 January 2008, the Petitioner had not raised any objections and/or questioned the

squaring off at the relevant time. The Respondent had produced the e-logs, contract notes, ledger accounts before the Arbitral Tribunal in respect of which no objection was raised by the Petitioner.

12 The facts and circumstances of the case prima facie suggest that the Petitioner had accepted the losses suffered by him and it is only when the Arbitration Application was filed by the Respondent after more than 2½ years that the Petitioner raised objection which were concurrently held by the Arbitral Tribunal as well as the Appellate Arbitral Tribunal to be without merit. Significantly, there was no Application made by the Petitioner before the Arbitral Tribunal under section 16 of the 1996 Act questioning the jurisdiction of the Arbitral Tribunal. So far as the issue of limitation is concerned, the Appellate Arbitral Tribunal has elaborately dealt with the same and rightly rejected the said plea of limitation and it is not necessary for me to add anything more. Even otherwise, the Circular dated 11 August 2010 of SEBI and Circular dated 31 August 2010 of NSE whereby the limitation period was extended for filing an arbitration reference from 6 months to 3 years so as to be governed by the law of limitation i.e. the Limitation Act, 1963, was not challenged by the Petitioner at any point of time by initiating any proceedings or otherwise.

13 The Petitioner was dealing with the Respondent right from the year 2004 and there was never any issue, and the objection/s have been raised only after the filing of the Arbitration reference. The Trading member is only a conduit in the transactions between the Constituent and the Exchanges. The submission before this Court that there was no notice before the squaring off is an afterthought and without merit as the Petitioner had not raised any such objection at the relevant time despite having received the bills, contract notes and ledger statement. The two judgments cited on behalf of the Petitioner are of no assistance and do not take the case of the Petitioner any further.

14 For the reasons stated above, no interference is warranted by this Court with the concurrent findings in impugned Award of the Arbitral Tribunal as well as the Appellate Arbitral Tribunal in the exercise of its limited jurisdiction under section 34 of the 1996 Act. The Petition shall accordingly stand dismissed with no order as to costs.

(A.A. SAYED, J.)

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