IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPEAL No. 679 OF2014
IN
ARBITRATION PETITION NO. 1220 OF 2012
WITH
NOTICE OF MOTION NO. 73 OF 2015
IN
ARBITRATION APPEAL NO. 679 OF 2014.

Way2Wealth Brokers Pvt Ltd.,
3rd Floor, Hincon House,
Tower-B, 247 Park, LBS Marg,
Vikhroli (W), Mumbai 400 083 .... Appellants
(Original Respondents)

vs

Mr. C. B. Sharma,
(s/o Late Smt. Parvatidevi Sharma)
Motibaug Bungalow No.2
Rani Sati Marg, Malad,
Mumbai 400 097 .... Respondent
(original Petitioner)

Mr. Shyam Kapadia with Ms. Smriti Kanade i/by M/s. Negandhi Shah and Himayatullah for the Appellants
Ms. Kashmira Bharucha with Mr. Parag Sharma with Mr. Kinshuk Kislay i/by Udwadia and Co. for Respondent.

**CORAM : ANOOP V. MOHTA AND G. S. KULKARNI, JJ.**
**RESERVED FOR JUDGMENT ON : February 09, 2016**
**PRONOUNCED ON : March 14, 2016**

**JUDGMENT (Per Anoop V. Mohta, J.):**

The Appellants (original Respondents) have filed the present Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Act of 1996) against judgment dated 12 September 2014 passed by the learned Single Judge as the Arbitration Petition, under Section 34 of the Act of 1996, has been allowed and thereby directed the Appellate Arbitral Tribunal under the Bye-laws, Rules and Regulations of the National Stock Exchange of India (NSE Regulations) to decide the delay condonation Application and as the Respondent/original Petitioner also expressed willingness to approach to Appellate Court/Forum as his Appeal was dismissed/rejected solely on the ground of limitation without deciding the merits of the matter.

2 The Appellants' case is as under :

On 20 September 2011, an Award was passed by the panel of Arbitrators (Arbitral Tribunal) rejecting the claim of the Respondent. On 29 September 2011, the Respondent received Award dated 20 September 2011. On 14 October 2011, the Respondent filed an application under Section 33 of the Act of 1996 before the Arbitral Tribunal seeking review of Award dated 20 September 2011. On 10 November 2011 Order was passed by the Arbitral Tribunal rejecting the Respondent's Application under Section 33 of the Act of 1996, holding that the Arbitral Tribunal had no powers to review the matter on merits. On 8 December 2011, the Respondent received order dated

10 November 2011. On 20 December 2011, the Respondent filed another Application under Section 33 (4) of the Act of 1996 before the Arbitral Tribunal seeking additional award.

3 On 9 January 2012 an Email addressed by the National Stock Exchange (NSE) to the Respondent stating that the Arbitrators were "functus officio" in the matter and that the Respondent's remedy was to file an Appeal. On 19 January 2012 the Respondent filed an Appeal against Award dated 20 September 2011 before the Appellate Authority of NSE without praying for condonation for delay. On 24 February 2012 the Appellants filed a reply opposing the Appeal and raised a preliminary objection that the Appeal was barred by law of limitation. On 28 February 2012 the Respondent received the said reply of the Petitioner opposing the Appeal. On 19 March 2012 the Respondent filed an Application for condonation of delay in filing of this Appeal. On 2 April 2012 hearing was fixed before the Appellate Authority. On 10 April 2012 the Respondent filed further submissions as during the hearing on 2 April 2012, the Appellate Authority wanted further details on the Application preferred by the Respondent under Section 33 of the Act of 1996. On 19 April 2012, reply of the

Appellant was filed to the Application for Condonation of delay filed by the Respondent. On 20 April 2012 again hearing was fixed before the Appellate Authority. On 20 April 2012 vide a hand written Application, the Respondent sets out reasons for delay and requested for an opportunity to be heard by the Appellate Authority. On 21 April 2012 the Respondent made further Application to the Tribunal to consider the matter for condoning delay and on merits. On 4 June 2012, impugned order was passed without condoning the delay and on 12 September 2014 impugned order and judgment was passed by the learned Single Judge and set aside the said order. The issue of condonation of delay itself delayed the arbitration proceeding in question.

4 The parties have read and referred the following judgments :

(1) Geojit Financial Services Limited v. Kritika Nagpal in Appeal No. 35 of 2013 dated 25 June 2013 (Dr. D. Y. Chandrachud and S.C. Gupte, JJ.)

(2) Indian Oil Corporation Limited v. M/s. Saibaba Automobiles - MANU/MH/1681/2013

(3) M.M.T.C., through its General Manager v. Vicnivass Agency – (2009) 1 Mh. L.J. 199

(4) Raviuday Construction Co v. Bhaktiyog Co-

operative Housing Society Ltd – MANU/MH/0272/2015 (Anoop V. Mohta J.)

(5) Shipping Corporation of India Ltd v. Mare Shipping INC – AIR 2011 SC 2608

(6) Himachal Pradesh Housing and Urban Development Authority v. Ranjit Singh Rana – (2012) 4 SCC 505

(7) State of Uttar Pradesh v. Combined Chemicals Company Private Limited – (2011) 2 SCC 151

(8) Anand Brothers Private Limited v. Union of India and ors. - (2014) 9 SCC 212

(9) M/s. Angel Capital & Debt Market Ltd v. M/s. Dianum – judgment dated 10 June, 2013 (Anoop V. Mohta, J.) in Arbitration Petition No. 530 of 2010.

(10) Telepathy Inc v. Directi Interest Solutions Pvt Ltd and ors. In Arbitration Petition No.704 of 2012 dated 5 December 2014 (Anoop V. Mohta, J.)

(11) Oil and Natural Gas Corporation Limited v. Western Geco International Limited -n (2014) 9 SCC 263

(12) R. C. Goenka v. Chase Trading Co and anr – 2002 (3) Bom. C.R. 201.
1716
(13) Central Warehousing Corporation v. A.S.A. Transport – (2008) 3 Mh. L. J. 382

5 The Arbitration Mechanism in Stock Exchanges for Settlement of disputes between a client and a member is through

arbitration proceedings in accordance with the provisions of the Circulars issued under Section 2(4) of the Act of 1996. There are separate arbitration mechanism available at Stock Exchanges for Arbitration of Disputes (Claims, Complaints, differences etc.) arising between a client and a member (Stock Broker, Trading Member and Clearing Member) across various market segments. The arbitration mechanism and the Regulations issued by Circular No. CIR/MRD/DSA/24/2010 dated 11.08.2010 by Securities and Exchange Board of India are as under :

> "**5 Arbitration**
>
> 5.1 The limitation period for filing an arbitration reference shall be governed by the law of limitation, i.e. The Limitation Act, 1963.
>
> 5.2 An arbitration reference for a claim/counter claim upto Rs.25 lakh shall be dealt with by a sole arbitrator while that above Rs.25 lakh shall be dealt with by a panel of three arbitrators.
>
> 5.3 The stock exchange shall ensure that the process of appointment of arbitrator (s) is completed within 30 days

from the date of receipt of application from the applicant.

5.4 The arbitration reference shall be concluded by way of issue of an arbitral award within four months from the date of appointment of arbitrator (s).

5.5 The Managing Director/Executive Director of the Stock Exchange may for sufficient cause extend the time for issue of arbitral award by not more than two months on a case to case basis after recording the reasons for the same.

**6 Appellate Arbitration**

6.1 A party aggrieved by an arbitral award may appeal to the appellate panel of arbitrators of the stock exchange against such award.

6.2 An appeal before the appellate panel of arbitrators may be filed within one month from the date of receipt of arbitral award.

6.3 The appellate panel shall consist of three arbitrators who shall be different from the ones who passed the arbitral award appealed against.

6.4 The stock exchange shall ensure that the process of appointment of appellate panel of arbitrators is completed within 30 days from the date of receipt of application for appellate arbitration.

6.5 The appeal shall be disposed of within three months from the date of appointment of appellate panel of such appeal by way of issue of an appellate arbitral award.

**6.6** The Managing Director/Executive Director of the stock exchange may for sufficient cause extend the time for issue of appellate arbitral award by not more than two months on a case to case basis after recording the reasons for the same.

6.7 A party aggrieved by the appellate arbitral award may file an application to the Court of competent jurisdiction in accordance with Section 34 of the Arbitration and Conciliation Act, 1996.

6 The point of limitation with regard to the power of Appellate Arbitral Tribunal and/or Arbitral Tribunal has been elaborated in a Division Bench judgment in ***Munish Madanlal Bumb (HUF) v. M/s. Joindre Capital Services Ltd*** in Appeal No.147 of 2013

in Arbitration Petition No.554 of 2012 dated 24.07.2013 by Dr. D. Y. Chandrachud and S.C. Gupte, JJ. There are other judgments also in this regard.

7 The learned Judge, in the impugned order, has referred Circulars dated 1.8.2010 and 31.08.2010, placed on record by the Appellant/Petitioner in para 6, while recording the other submissions. After considering the rival case and the facts, the learned Judge has given finding in para 10 and allowed the Arbitration Petition by setting aside impugned Award/order dated 4 June 2012. Considering the facts and circumstances, therefore, the learned Judge has referred the judgment in *Geojit Financial Services Ltd v. Kritika Nagpal* (Appeal No.35 of 2013), and observed in para 12 as under :

> "12 Before concluding, it may be stated that the judgment of the Division Bench of this Court in Geojit Financial Services Ltd vs. Kritika Nagpal (Appeal No.35 of 2013) which interalia holds that it is not permissible for the Court exercising jurisdiction under section 34 of the Arbitration & Conciliation Act, 1996 to remand the matter after

> setting aside the Award, would not apply in the facts of the present case inasmuch as the Appeal is dismissed on the ground of limitation and the Petitioner has not been heard and in view of the categorical statement of the learned Counsel for the Petitioner that the Petitioner is wiling to go back to the Appellate Arbitral Tribunal."

8 It is relevant to note that apart from orders passed by the learned Single Judge of this Court with regard to the aspect of limitation and/or power of Arbitral Tribunal and/or Appellate Tribunal to condone the delay in view of the said Circular so referred above, including Circular dated 11.08.2010 and which was subsequently followed in Circular dated 9.02.2011 which stipulates that the provisions of Limitation Act would be applicable for such scheme. A Division Bench (Dr. D. Y. Chandrachud and S.C. Gupte, JJ.) who passed the judgment in *Geojit Financial Services (supra)* observed in para 7 of *Munish Madanlal Bumb (HUF) v. M/s. Joindre Capital Services Ltd (supra)* as under, and thereby maintained the order passed by the learned Judge of condoning the delay by the Arbitral Tribunal

referring to the said issue of power of Tribunal's/Appellate Tribunal of National Stock Exchange in question.

> *"7 The arbitral tribunal which is constituted by the National Stock Exchange was bound to give effect to the terms of the circulars. The claim in the present case was admittedly within a period of three years of the date of the last transaction. When the reference was filed on 20 December 2010, the first circular dated 11 August 2010 had come into force and was applicable. The second circular dated 9 February 2011 stipulates that the limitation of three years would be applicable inter alia to cover cases where, (i) three years had not yet elapsed and parties have not filed for arbitration, (ii) an arbitration application was filed but was rejected solely on the ground that there was a delay in filing within the earlier limitation of six months and three years had not yet elapsed. This circular of 9 February 2011 was in continuation of the earlier circular dated 11 August 2010. The circular came into effect immediately. The use of the expression inter alia would indicate that the two categories of cases listed in clauses I and II are not exhaustive. In the present case, on the date of the reference, the claim was within a period of three years from the date of the last transaction and therefore, was within limitation. The learned Single Judge was justified in coming to the conclusion that the claim was within limitation."*

9 In ***Marwadi Shares & Finance Ltd. Vs. Miral Kanaksinh Thakore***[1] this Court (Coram:- R.D. Dhanuka, J.) after considering the power of Appellate Bench under the Bombay Stock Exchange bye-laws

1 2014 SCC OnLine Bom 22= (2014) 1 Bom CR 481

and regulations and after considering the rival contentions and the bye-laws so prescribed, allowed Section 34 Petition and directed the Appellate Bench to hear the Application for condonation of delay by exercising the powers of condonation of delay on its own merits expeditiously. Present case is covered by the Judgment, as majority of facts are similar.

10 In "*Geojit*" *(Supra)* award on merit was set aside and matter was remanded for re-consideration on all issues. The counter-claim was not decided by giving reasons. Therefore, both the claim and the counter claim as interlinked were directed to be decided. The Division Bench, however, did not accept the remand order. The Appeal was allowed against the Section 34 Judgment and remand order. In the present case, the Appellate Bench did not decide the merit of the matter – Rejected the Appeal on ground of delay. The facts are different so also the reason for sending back the matter for reconsideration. We are therefore, in agreement with the learned Single Judge that the decision of the Division Bench in "Geojit" is not applicable in the facts of the present case.

11 In the present case, therefore we are maintaining the impugned Judgment as the Appellate Authority and NSE Rules, are bound by Arbitration and Conciliation Act, 1996 specially Section 43 and the Limitation Act, including it's principles to consider the case of condonation of delay, if sufficient case is shown. The order of Appellate Authority did not deal with specific provision of about Acts and it's principles. The direction to reconsider the issue of limitation and to take decision, therefore, distinguishes this case from *“Geojit”(Supra)*.

12 Normally the Appellate Court, unless specific case is made out do not accept documents for the first time. In the present case, in reply to the Appeal filed by the Respondent, two correspondences of original Petitioner with National Stock Exchange, Arbitration Department, WRO, Mumbai are placed on record. The inquiry was about the power of Appellate Court to condone the delay. The said communication is not specifically denied, but address only to the Petitioner/Respondent and, therefore, as objected by the Appellant, still the contents and reply of Department supports the case of Respondent that the provisions of Arbitration Act shall prevail and the

Appellate Tribunal may at his own discretion allow the condonation of delay or may reject the same. This is precisely the reason where we are also inclined to maintain the order independently for the reason so recorded by the learned Judge as well as for above reasons. This communication definitely was after the impugned judgment passed by the learned Judge.

13 The aspect of remand, therefore, in the present facts and circumstances, as facts and circumstances of *Geojit Financial Services (supra)* are different. The same Division Bench has concluded the issue about applicability of Limitation Act, to such claim. This, therefore, is also required to be noted by the Appellate Tribunal, including the basic principle of condonation of delay in facts and circumstances of the case. As the learned Judge directed the Appellate Authority to decide the case on delay application in filing Appeal, and as no merit is decided, therefore, no case is made out to interfere with the impugned Judgment. The judgments so cited are of no assistance in view of distinguished and distinct facts of present case. There is no perversity and no illegality. The judgment is well within the frame of law by keeping interest of justice and fair and

equal opportunity to both the parties. It is unacceptable to say that in these circumstances,provisions of Limitation Act shall not be applicable to Appellate forum.

14 As a sequel to the above discussion, we may observe that it is indisputed that the original claim as filed by the Respondent was not barred by limitation. A two-tier arbitration mechanism has been created for resolving the disputes between the constituents and the trading members of the NSE. It is a settled principle of law that the right of appeal is not a mere matter of procedure but, is a substantive right and such right was vested/accrued in the Respondents as also the Appellants on the day the lis commenced albeit it would be actually exercised when such occasion would arise namely an adverse order of the Arbitral Tribunal so as to invoke the appellate remedy. We cannot overlook the position that the provisions of the Limitation Act 1963 were admittedly applicable to the original proceedings which was clear from the circular dated 11 August 2010 issued by SEBI in exercise of the powers under the Security and Exchange Board of India Act, 1992 read with section 10 of the Securities Contracts (Regulation) Act 1956. If this be the case an appeal which is a step in

in the series of proceedings connected by an intrinsic unity cannot be regarded as a different proceedings outside the purview of the Limitation Act. We are therefore, of the clear opinion that the Appellate Authority in these circumstances, would have power to condone delay of ten days as arising in the present case. Any other conclusion wold render the right of appeal otiose defeating substantive rights occurred to an aggrieved party.

We are therefore, in complete agreement with the impugned orders passed by the learned Single Judge.

15 Therefore, considering the submission so raised by the learned counsel appearing for the Appellant/original Respondent, in view of the above settled position of law, we see that no case is made out to interfere with the Judgment.

16 The Appeal is dismissed. There shall be no order as to costs.

17 In view of dismissal of the Appeal itself, nothing survives in the Notice of Motion and the same is also disposed of.

**(G. S. KULKARNI, J.)** **(ANOOP V. MOHTA, J.)**