

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

+ **FAO No. 438/2013**

% **21th September, 2017**

M/S SMART COMMODITY BROKER PVT. LTD. Appellant

Through: Mr. Umesh Mishra, Advocate.

versus

BEANT SINGH Respondent

Through: Mr. Kamaljeet Singh, son of
respondent in person (he is not
the power of attorney holder).

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 34782/2017 (for stay)

1. Instead of hearing the interim application for stay filed by the appellant, I have heard counsel for the appellant on merits for disposal of the appeal.

2. This application is disposed of.

FAO No. 438/2013

3. This first appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the

Act') impugning the judgment of the court below dated 17.9.2013 by which objections filed by the appellant/petitioner under Section 34 of the Act were dismissed. By the impugned Award dated 24.8.2012 the Arbitrator has awarded Rs. 3,70,493/- along with interest at 9% per annum in favor of the respondent and against the appellant/petitioner.

4. The facts of the case are that the respondent/customer opened the trading account with the appellant/petitioner/broker with respect to MCX Exchange. The account number was MTC-22 and the respondent is said to have deposited a sum of Rs.3,10,000/- between 7.6.2007 to 5.7.2007. The case of the respondent was that appellant/petitioner did unauthorized trading in his account and it was informed to the respondent by the appellant/petitioner in April, 2008 that the respondent's investment stood decreased to Rs.49,000/- and subsequently to a nil balance. The appellant/petitioner has also alleged to have closed the respondent's account without any authority thereafter. Respondent asked for the alleged recorded instructions or trading slips or contract note, etc. showing that respondent had authorized the transactions but the appellant/petitioner was not able to provide the same. Respondent, hence, invoked the arbitration proceedings in terms of para 15.10 of the Rules of the Multi

Commodity Exchange of India Limited and which was referred for arbitration on 19.3.2012.

5. Appellant/petitioner contested the arbitration proceedings and pleaded that the trades were carried out in the account of the respondent as per the instructions of the respondent and all the contract notes and the details of the transactions were sent at the e-mail ID address of the respondent. It was also pleaded by the appellant/petitioner that the arbitration proceedings were barred by limitation because as per para 15.11 provisionally the period of limitation for reference to arbitration was six months from the date of the last transactions and which had become one year by amendment of Bye-Law 15.11 with effect from 2.4.2011, but the present arbitration was invoked by the respondent only on 19.3.2012 i.e more than one year after the last transaction on 31.3.2010. The arbitration proceedings and the claim petition were therefore prayed to be dismissed as barred by time.

6. The court below has dismissed the objections filed by the appellant/petitioner under Section 34 of the Act by making the following observations:-

“4. The petitioner could not produce any record of telephonic instructions. The contract notes were sent electronically at an e-mail ID address i.e mtc22@yahoo.com or beant mtc22@yahoo.co. in as mentioned in the registration form. The respondent denied having created this e-mail ID. It was observed that the said e-mail ID contained the client code of the applicant and therefore it would not stand to reason as to how the client would know his ID allocation at the time of filling up of the form or create an e-mail ID at that time of time. This therefore pointed to the fact that the said email ID was created subsequently and filled up by the petitioner’s agents. The log in respect of the email was also appraised by the Ld. Arbitrator who observed that the same could not be relied upon as it did not record essential features such as the time or the ID address of the system. It was also observed that the said log was manually created and was not automated generation. Even the column terminology was observed to have been created manually. It was therefore opined that the log of contract notes was nothing short of fabrication. Further, though the respondent had been asking the petitioner to pay Rs.30,000/- and Rs.40,000/- , the same were not spent. He received Rs.42,000/- only in the year 2010 after a gap of 15 months. The reason given was that fresh cheques were issued on the respondent’s representation that the cheques given to him in 2008 were lost. The entire story of the respondent was disbelieved by the Ld. Arbitrator.

5. The petitioner has raised objections under Section 34 of the Arbitration & Conciliation Act on the grounds that the respondent’s complaint was time barred and could not have been entertained by the Ld. Arbitrator. These objections have been dealt with by the Ld. Arbitrator vide the impugned award. As per the bye-laws and rules of the MCX, the limitation for raising dispute or claims was one year from the last transaction. The complaint was filed with the MCX on 21.06.2011, beyond a period of one year from the last transaction. Though limitation was enhanced to three years vide notification dated 09.04.2012, the same would not be applicable to a pending claim. Ld. Counsel for the petitioner has argued at length that the amendment extending the limitation was applicable only prospectively not retrospectively.

6. I do not find any merit in the arguments advanced by the Ld. Counsel for the petitioner. The evidence has been well appreciated before conclusions were drawn. With respect to complaint being time barred, the law on the point is well settled that procedural law would have retrospective effect. This has been put into effect wherever limitation has been increased in various statutes.

7. The Ld. Arbitrator has held that the respondent’s claim was within time as the period of limitation had been enhanced to three years and was applicable retrospectively. On the point of unauthorised trades, the petitioner’s defence was not accepted as they could not produce any evidence to corroborate the alleged instructions. The Ld. Arbitrator has also taken note that the act of assuring returns by doing transactions themselves constituted Portfolio Management Services by the petitioner which is specifically banned and amounts to malpractice.

8. Both the objections raised by the petitioner viz. The arbitrator's decision with respect to the limitation as well as on merits cannot be the subject matter of objections under Section 34 of the Arbitration & Conciliation Act. The Ld. Arbitrator has duly applied his mind and given his decision in respect of the evidence on record as well as on the petitioner's objections of the complaint being time barred."

(underlining added)

7. Learned counsel for the appellant/petitioner again argued that the claim petition was barred by limitation, however, I would like to note that Section 28 of the Indian Contract Act, 1872 stood amended by Act 1 of 1997 with effect from 8.1.1997 whereby any contract by which a party reduces the period of limitation as provided under the law, then such contract cannot have the effect of extinguishing the rights of the party to approach proper forum/court within the period being statutory limitation period. In other words, party by contract cannot limit the limitation period which is otherwise provided by law.

8. A Learned Single Judge of this Court in the case of ***Biba Sethi Vs. Dyna Securities Limited 2009 (3) Arb. LR 494*** has examined similar provisions of the National Stock Exchange and on examining the same it has been held that the lesser period of limitation provided would be hit by Section 28 of the Indian Contract Act and other reasons. The relevant paras of the judgment in the case of ***Biba Sethi (supra)*** are paras 24-36 and these paras read as under:-

“24. Here, the law is not providing for arbitration. The law is only prescribing that wherever a person transacts with a stock broker being a member of a Stock Exchange, the terms and conditions of such transaction or contract shall be as prescribed in the byelaws. So, the law here is forcing a contract to be on certain terms i.e. whether the constituent and stock broker have entered into an arbitration agreement or not, under the byelaws they are deemed to have agreed to arbitration in terms of byelaws. Whether such a contract ceases to be a contract and becomes an arbitration under an enactment?

25. A host of judgments of Bombay High Court have held the Arbitration under the Byelaws framed by Stock Exchanges under Section 9 of the Securities Act (supra) to be a statutory arbitration. Reference may be made to **Kishor Jitendra Dalal v. Jaydeep Investments** AIR 1996 Bom. 254, **Himendra V. Shah v. Stock Exchange, Bombay** (1997) 5 Comp LJ 193 and **Stock Exchange, Mumbai v. Vinay Bubna** AIR 1999 Bom 266 (DB). In fact in the last of the aforesaid judgments the Division Bench after noticing the consistent view for long, also felt the need to retain it to prevent chaos.

26. I may notice that the Apex Court in **Harinarayan G. Bajaj v. Rajesh Meghani** (2005) 10 SCC 660 has in relation to the byelaws of NSE held that the arbitration proceedings as provided in the Byelaws and Regulations are subject to the provisions of the Arbitration and Conciliation Act, 1996 to the extent not provided for in the Byelaws and Regulation. Similarly, in **Bombay Stock Exchange v. Jaya I. Shah** AIR 2004 SC 55 the Apex Court in para 38 held that the *Rules, Byelaws and Regulations made by the exchange, having regard to the scheme as also the purport and object thereof, have a statutory flavor; byelaws are required to be made for regulation and control of contracts, whereas rules relate to in general to the constitution and management of stock exchange. Again in para 58 of the said judgment it was held that the arbitration under the byelaws is governed by the provisions of the law of the country namely, the Arbitration Act earlier of 1940 and now of 1996.*

27. However, the question posed by me in para 23 hereinabove does not appear to have been addressed in any of the said judgments. The Apex Court however in **Jay I Shah** (supra) noticed distinction between two sets of arbitration - one between a member and non member and another between a member and another member of the exchange. It was further held that a claim by non member against a member must be considered from a different angle having regard to the fact that although the same relates to a contract, such arbitration is governed by the law of the country i.e., the Arbitration Act - a contract between a member and non member is otherwise enforceable in a civil court and by reason of existence of arbitration clause only the suit filed by a non member against a member can be stayed and/or referred to arbitration. In **Harinarayan G. Bajaj** (supra) the argument was that arbitration was a right of a member of the NSE against the non member and which came to an end of cessation of membership. The Apex Court however held that right was not part of privileges of membership but arise

out of contract and the parties remained parties to the arbitration agreement despite cessation of membership.

28. It would thus be seen that the Apex Court recognized the arbitration under the byelaws of NSE to be contractual, though having a statutory flavor.

29. At this stage it is apposite to paraphrase Chagla C.J. speaking for Division Bench in the **Textile Labour Association v. The Labour Appellate Tribunal of India** AIR 1956 Bom. 746, in respect of *pari materia* provisions of Section 46 of the Arbitration Act, 1940.

“Section 46 deals with those statutory arbitrations where the statute itself is looked upon as an arbitration agreement and it may be said that as far as the case with which we are concerned it is not a statutory arbitration in the sense in which Section 46 intends it to be. We are dealing with an arbitration under Section 66 (of the Bombay Industrial Relations Act, 1946) where parties by a written submission go to arbitration by a private party. This is not a case where the state refers the dispute to arbitration and the statutory provisions itself constitutes an arbitration agreement.”

30. There is yet another aspect of the matter. Section 9(2) of the Securities Act (supra) does not provide for the byelaw to provide for limitation within which the claims under the contracts are to be preferred; it only provides for the byelaws regulating and controlling the contract, as to the method and procedure for settlement of claims or disputes. It cannot therefore be said that the byelaws, whether statutory or having a statutory flavor prescribe for preferring claims or for referring disputes to arbitration any period of limitation different from the period prescribed by the schedule to the Limitation Act. The Byelaw 3 of Chapter XI of NSE Byelaws providing time of six months for submission of claims, disputes to arbitration is for this reason also contractual and not statutory.

31. The statute of limitation is founded on public policy. It is enshrined in the maxim "*interest reipublicae ut sit finis litium*". Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The legislature has sought to balance public interest in providing limitation on the one hand and at the same time not to unreasonably restrict a right of the party to initiate proceeding on the other (see **V.M. Salgaocar v. Board of Trustees of Port of Marmugao** (2005) 4 SCC 613)

32. Though the law of limitation is in some respects said to be procedural law, but the Division Bench of Bombay in the **Employees' State Insurance Corporation v. Bharat Barrel & Drum Manufacturing Co. Pvt. Ltd.** AIR 1967 Bombay 472 and the Full Bench of Punjab High Court in **United India Timber Works v. Employees State Insurance Corporation** AIR 1967 Punjab 166 held the rule prescribing limitation for preferring an application, ultravires Section 96 of the Employees State Insurance Act 1948 empowering State Government to make rules inter alia in regard to "the procedure to be followed in proceedings" before Employees Insurance Courts. Justice Tarkunde speaking for Division Bench of Bombay High Court held the rule prescribing period within which

application could be preferred operated at a stage prior to the commencement of proceedings and thus was outside the ambit of power to frame rules or procedure. It was further held that the legislative intent was not to empower the State Government to while framing rules prescribe the limitation for preferring claims; if such was the intention, the State Government would have been empowered to frame rules in relation to proceedings before such courts.

33. I respectfully concur with the law as laid down which squarely applies to this case. I also do not find any legislative intent in the Securities Act (supra) also to enable Stock Exchanges to while framing byelaws regulating and controlling contracts prescribe any period of limitation for preferring claims. Thus, the byelaw to that extent is purely contractual.

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.

35. This Court recently in Pandit Construction Co. v. DDA 143 (2007) DLT 270 held the clause in works contract requiring the demand for arbitration to be made within 90 days, to be violative of Section 28 of the Contract Act and thus void.

36. Section 28 of the Arbitration Act provides for decision by Arbitral Tribunal in accordance with substantive law of India and Section 34 thereof provides for setting aside of an arbitral award, if in conflict with public policy of India, which as held in SBP & Co. v. Patel Engineering Ltd. 2005(6) SCC 288 means the laws of India. The awards in the present case are found to be contrary to Section 28 of the Contract Act and are set aside.”

(underlining added)

9. Reliance placed by learned counsel for the appellant/petitioner on the Division Bench judgments of this Court in the case of *Debjoyti Gupta Vs. Indiabulls Securities Ltd. and Anr.*, 2014 (1) RAJ 445 (Del) and *Sharad P. Jagtiani Vs. M/s Edelweiss*

Securities Ltd. 2015 (2) RAJ 165 (Del) is misplaced. It is seen that in the case of *Debjyoti Gupta (supra)* there is no discussion with respect to the fact that the arbitration reference cannot be made if it is beyond the limitation provided in Bye-Law 3 of Chapter XI of the National Stock Exchange. What is held in para 6 of the judgment, and which para 6 is relied upon by the appellant/petitioner, is that the time barred claims cannot be referred to arbitration. Obviously, a time barred claim cannot be referred to arbitration but that is not the issue in the present case because the issue is whether arbitration could be invoked after the one year period of limitation provided under Bye-Law 15.11 of the MCX. Therefore, on facts the judgment in the case of *Debjyoti Gupta (supra)* is distinguishable because it does not touch the aspect as to how a lesser limitation period than one provided under the Limitation Act would time bar the reference to arbitration and which would otherwise be in violation of Section 28 of the Indian Contract Act and so held by the Learned Single Judge in the case of *Biba Sethi (supra)*.

10. The judgment in the case of *Sharad P. Jagtiani (supra)* does not at all deal with the issue of whether the provisions of the Bye-Laws if provided for a lesser limitation period then provided

under the Limitation Act the same would have the effect of dismissing the reference to arbitration. At the cost of repetition, the issue is that if the Bye-Law's provide a lesser limitation period than as provided under the Arbitration & Conciliation Act, and which is a period of three years under Article 137 of the Limitation Act, it is the larger period of limitation as per Article 137 of the Limitation Act which applies for seeking of reference of disputes to arbitration and not a lesser period as provided under the Bye-Laws, and as held in ***Biba Sethi's*** case (*supra*).

11. I may note that the above discussion is in addition to the adapting and agreeing with the conclusions of the Arbitrator that the period of limitation as per Bye-Law became three years subsequently and which procedural provision will have retrospective application. The view of the Arbitrator is one possible view in law and cannot be interfered with in Section 34 objections.

12. On merits of the matter para 4 of the impugned judgment exhaustively deals with the fact that the respondent/customer was never given the two e-mail IDs referred to in para 4 of the impugned judgment and to which aspect I put a further query to counsel for the appellant/petitioner as to when a password was given to the

respondent for operating of the e-mail accounts and to which no answer could be given. Reliance placed by the appellant/petitioner upon the letter dated 12.6.2007 sent to the respondent does not help the appellant/petitioner because in this letter the DP ID and the client ID of the appellant/petitioner are left blank and the two e-mail IDs stated in para 4 of the impugned judgment are not stated in this letter. In any case, findings of facts by the Arbitrator, unless they are totally illegal or perverse, cannot be interfered under Section 34 of the Act, and therefore the court below was justified in holding that the findings of facts arrived at by the Arbitrator as per record and evidence that the respondent was not informed of the transactions, could not have been challenged under Section 34 of the Act.

13. There is no merit in the appeal and the same is hereby dismissed.

SEPTEMBER 21, 2017

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VALMIKI J. MEHTA, J