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

\+ **O.M.P. 12/2009**

VIRENDAR SAIGAL & CO. ..... Petitioner

Through: Mr. Ashok Mathur, Advocate (M-9810018800).

versus

M/S RAM NANDA & CO. & ORS ..... Respondents

Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>O R D E R</u>

% 14.11.2018

1. The Respondents in this matter had been served way back on 27th March, 2009. However, none has put in appearance for the Respondents. Accordingly, they are proceeded *ex-parte*.

2. The dispute goes back to the year 1995 when disputes arose between the Petitioner and the Respondents who are both members of the Delhi Stock Exchange Association Limited. Both parties are stock brokers. Petitioner had monetary claims against the Respondents which were raised through a civil suit for recovery being suit no.1628/1995. In the said suit for recovery, the Respondents took an objection that the parties are governed by the arbitration clause which is contained in the Bye-laws of the Delhi Stock Exchange Association Limited. In view of this application, the Learned Single Judge of this Court passed the following order dated 19th November, 2001:

S.No.1628/95.

The suit is filed by the plaintiff for recovery of Rs.1,10,73,468.00 against the defendants. It is stated in the plaint that the plaintiff is a Member of Delhi Stock Exchange Association Ltd. Defendant No.1 is a partnership firm and the defendants 2 and 3 are the partners of the defendant No.1 firm. Defendant No.1 is also a member of Delhi Stock Exchange Association Ltd. The transaction, in respect of which the present suit is filed relates to sale and purchase of shares and stocks of different companies.

In case of disputes of members of the Delhi Stock Exchange Association Ltd., Bye-laws of the aforesaid Association contains Chapter-XVII relating to arbitration between the members for adjudication and settlement of such disputes. <u>In view of this position, both the parties agree that the matter be referred to the arbitration by Delhi Stock Exchange Association Ltd in accordance with aforesaid Bye-laws.</u>

In view of the Agreement arrived at between the parties, the disputes as contained in the suit are hereby referred to the arbitration of Delhi Stock Exchange Association Ltd. to be decided as per the aforesaid Bye-laws. The plaintiff shall be entitled to submit his statement of claim with the Delhi Stock Exchange Association Limited. The Stock Exchange is directed to appoint the Arbitrator within four weeks from the date of receipt of a copy of this order who shall enter upon reference and initiate the arbitration proceedings after sending notice to the parties. It is agreed that the defendant shall not raise the plea of limitation. It is also agreed between the parties that the arbitration shall be governed by the provisions of Arbitration and Conciliation Act, 1996.

3. It is clear from a reading of the above order that the issue of arbitrability was considered by the Learned Single Judge and after parties

consented for reference to arbitration, and after being satisfied that the same would be arbitrable, the reference was made. It was also made clear in the said order that the Respondents would not raise the plea of limitation.

4. Subsequent to the order dated 19th November, 2001, the Delhi Stock Exchange appointed a Ld. Sole Arbitrator to adjudicate the disputes.

5. In the arbitral proceedings, after the pleadings were completed, the Ld. Sole Arbitrator rejected the claims of the Petitioner by combining the issues of arbitrability, limitation and latches and by conflating the same. The stand taken by the Petitioner strangely in the arbitral proceedings was that the bye laws of the Delhi Stock Exchange would not apply since the transaction did not take place on the floor of the Exchange. The relevant portion of the award is set out herein below:

> *"...Mr. Maheshwari on behalf of the claimant submits that the claimant has already pleaded in its replication that the present dispute is outside the scope of Chapter XVII for the Bye laws of the Exchange but he can still seek directions from the court for a reference in terms of 1996 Act. He conceded that the case is not covered by the bye laws of the Exchange as the transaction in question had not taken place on the floor of the Exchange. He further states that the said fact was also pleaded before the Hon'ble High Court in the replication but was not referred to by the High Court in its order of reference.*
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> *In view of concessions by Mr. Maheshwari, the case of claimant is not covered under the Bye Laws yet the case is not barred by Limitation. I need not go into the argument of Mr. Kalra that assuming the case is covered by bye laws, Bye law 292 gives discretion as this bye law has not application in the present case as contended by Mr. Maheshwari.*
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> ...

Mr. Kalra states that the present reference is barred by limitation for the following among other reasons:

1. The byelaws have no application to the present case as is also admitted by the claimant.

2. The order of court was passed in the year 2001 and claimant served a copy thereof on the Exchange only in the year 2007 and the claim was filed in March 2008. Therefore even on this score the present reference is both not maintainable and also barred by limitation and principle of Latches.

3. Assuming without admitting that the order of the Court was meant to be followed and a reference was to be made under rule 283 still the reference must fail as it was hopelessly time barred because the claimant approached the DSE under the rules more than six years after the court passed the order and then also there was delay in depositing of fees etc.., mandatory condition precedent under the bye law of the DSE.

4. Mr. Kalra says that u/s 43 of Arbitration and Conciliation Act 1996 the provisions of Limitation Act are attracted to arbitration proceedings and hence under the Act the original proceedings (before Arbitrator) would be governed by section 3 of Limitation Act which does not allow the court/arbitrator any discretion to condone the delay. He further states that provisions of section 5 of Limitation Act are meant to apply to applications and appeals. The court of first instance has not power to apply the principles of section 5 to original proceeding, even if it is taken that cause of action for reference arose on the date in which order of High court was passed and not from the date the alleged cause of action arose, the maximum time could be at the most 3 years from the date of the order. Mr. Kalra has relied upon a judgment of Apex Court in the case of Kamlesh Babu & Ors. Vs. Lajpat Rai Sharma & Ors. {IV (2008) SLT) which lays down that section 3(1) of Limitation Act casts duty upon court to dismiss suit *or appeal or application, if made after prescribed period, although Limitation is not set up as defence."*

6. A perusal of the above award shows that the issue of arbitrability, has been gone into and both parties argued that the disputes are not arbitrable. The Arbitrator holds that the matter is barred by limitation as it is not arbitrable. There is a clear confusion in the award as to all the three issues i.e. arbitrability, limitation and latches. The award thus suffers from perversity and illegality.

7. The impugned award is not sustainable inasmuch as the order referring the matter to arbitration had clearly directed reference after parties gave consent and after arriving at a satisfaction that the disputes were arbitrable. The objection of Limitation was also not to be raised by the Respondents or considered by the Arbitrator. The order of reference was passed in 2001, the claims were filed in 2007 and the impugned award was passed in 2009. The award is clearly unsustainable.

8. Under these circumstances, the matter is remanded to the Delhi Stock Exchange for appointment of an Arbitrator to decide the dispute on merits, within a period of six months. The present order shall be communicated by the Registry of the Court to Delhi Stock Exchange as also by the Petitioner who will make a request for appointment of an Arbitrator.

9. The Arbitrator shall issue fresh notice to the Respondents and then adjudicate the disputes as per the time limits prescribed under the Arbitration & Conciliation Act, 1996. The pleadings have already been completed by the parties. The issue of arbitrability and limitation shall however not be raised, since both parties had conceded for the reference made in 2001. The dispute shall be adjudicated on merits.

10. The OMP is allowed in the above terms. The impugned award is set aside. The original record of the Arbitrator be transmitted back to the Delhi Stock Exchange for being handed over to the new Arbitrator to be appointed within a period of two weeks from today.

11. A copy of this order be given *dasti* under signature of the Court Master.

PRATHIBA M. SINGH, J

NOVEMBER 14, 2018
Rahul