

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	26.09.2019
Judgment pronounced on	03.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P.No.364 of 2010

R.Vasudevan

... Petitioner

Vs.

1.Way 2 Wealth Brokers Pvt Ltd.,
Raheja Apartments,
No.138, Residency Road,
Bangalore - 560 025.

2.Mr.S.Subramanian,
Sole Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Ishpahani Centre,
Door Nos.123-124, Nungambakkam High Road,
Chennai - 600 034.

... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 15.06.2009 passed by Arbitrator in F and O/C-0016/2009 and allow the claim of this Petitioner to the extent of Rs.5,00,000/- together with interest at 18% p.a. from 31.08.2006 till date of realisation of the amount.

For Petitioner : Mr.Varun Srinivasan
for M/s.N.V.S.R. Associates

For Respondents : M/s.Ajay Kumar Gnanam for R-1

ORDER

The Claimant is the Petitioner before this Court. The Petitioner intended to invest in shares and debt instruments and for this purpose he availed the services of the first Respondent. The first Respondent is a securities broker with a membership in the National Stock Exchange (NSE). For purposes of investment, the Petitioner is stated to have provided a sum of Rs.3 lakhs to the first Respondent with directions to invest Rs.2 lakhs in debt instruments and Rs.1 lakh in shares. According to the Petitioner, in March 2006, he was informed that there was a credit balance of Rs.3,20,000/- in his account. However, contrary to expectations, the first Respondent invested the money in the futures market. Therefore, the Petitioner requested for a refund of the money, which request was refused by the first Respondent. Eventually, a dispute arose between the parties and the Petitioner invoked the arbitration clause in the bye-laws of the NSE and made a claim for a sum of Rs.5 lakhs with interest thereon at 18% per annum from 31.8.2006 till the date of realisation of the claim.

2.The first Respondent filed a statement of defence wherein it was stated that the claims are barred by limitation because the dispute arose on 25.06.2006 and, consequently, the claim should have been made within six months from that date, whereas the claim was made on 29.12.2008. On the merits, the first Respondent stated that the Petitioner had entered into an agreement to trade both in the cash and futures and options(F&O) segment and that pursuant to such authorisation, transactions were entered into and the relevant contract notes and statements of account were sent to and accepted by the Petitioner. Moreover, according to the first Respondent, the Petitioner had given a letter on 28.02.2006 to the effect that the contract notes may be retained in the branch and that he would collect them periodically. In effect, the case of the first Respondent was that the Petitioner made the claim because he sustained losses while trading in the securities market. The Petitioner exhibited seven documents, which were marked as Exhibits A1 to A6. The first Respondent exhibited one document, Exhibit R1. There was no oral evidence. Based on the pleadings, the learned Arbitrator framed four issues. The first two issues were on the merits of the dispute whereas the third issue related to limitation and the last issue was a consequential issue relating to the entitlement of the Petitioner. On the first issue, namely, whether the Petitioner had traded in the F&O segment, the learned Arbitrator concluded that the evidence does not disclose that

the Petitioner either authorised or was aware of the trading in the derivatives segment purportedly on his behalf by the first Respondent. With regard to the second issue, which is whether the claim of the Petitioner is true and acceptable, the learned Arbitrator concluded that the Petitioner would be entitled to a sum of about Rs. 3.05 lakhs but for the decision on the question of limitation. With regard to the third, which relates to limitation, the learned Arbitrator concluded that the bye-laws of the NSE and, in particular, bye-law 3 of Chapter XI, constitute a special law prescribing a period of limitation as per Section 29 (2) of the Limitation Act, 1963 (the Limitation Act) and that, therefore, the said bye-law does not violate Section 28 of the Contract Act, 1872 (the Contract Act). Consequently, the learned Arbitrator held, by Arbitral Award dated 15.06.2009 (the Award), that the claims are barred by limitation because they were made after the six month period specified in the bye-laws. The said Award is under challenge in this Petition.

3. The learned counsel for the Petitioner contended that the Award is liable to be set aside with regard to the finding that the claim is barred by limitation. In this connection, he submitted that the bye-laws of the NSE are contractual especially as regards investors such as the Petitioner herein. In order to establish that the said bye-laws are contractual, the learned counsel referred to and relied upon the

judgments that are set out below along with context and principle:

(i) **A.Chandrasekaran Vs. Yohan Securities Ltd 2014 (1) CTC 87** (the A. Chandrasekaran case) wherein, at paragraph 23, this Court held that a contract does not qualify as a local law or special law for the purposes of section 29(2) of the Limitation Act. Moreover, in paragraph 27, this Court held that the bye-laws framed by the NSE do not qualify as law in spite of the fact that they are approved by SEBI. On that basis, this Court examined bye-law 3 of the NSE, which is the bye-law in question in this case, and held that the said bye-law violates section 28 of the Contract Act and, is consequently, void.

(ii) **Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd, (1984) 2 SCC 50** wherein, at paragraph 16, the Hon'ble Supreme Court held that the bye-laws of a cooperative society are not statutory.

(iii) **Biba Sethi vs. Dyna Securities MANU/DE/1325/2009** (the Biba Sethi case) wherein the Delhi High Court held, in paragraph 33, that bye-law 3 of the NSE is contractual and that it violated section 28 of the Contract Act.

(iv) **R.S. Jiwani vs. Ircon International Ltd. and others 2010 (112) BOM LR491** (the R.S.Jiwani case), wherein a Full Bench of the Bombay High Court held, in paragraph 38, that the principle of

severability applies to an arbitral award and, therefore, the court could set aside the arbitral award wholly or partly.

(v) **Smart Commodity Broker Pvt. Ltd. Vs. Beant Singh, FAO No.438 of 2013, Order dated 21.09.2017**, wherein, at paragraph 10, the Delhi High Court held that the relevant bye-law of the MCX, which originally prescribed a shorter limitation period than that stipulated in the Limitation Act, violates Section 28 of the Contract Act and is, therefore, void. In the said judgment, it was further held that the law of limitation is procedural and, therefore, retrospective.

4. In response and to the contrary, the learned counsel for the first Respondent submitted that the finding in the Award that the claim is barred by limitation is not liable to be interfered with for several reasons. The first reason cited by the learned counsel was that the Petitioner, in his statement of claim before the Arbitral Tribunal, did not raise the plea that Bye-law 3 of Chapter XI of the NSE violates Section 28 of the Contract Act. In order to substantiate the submission, the learned counsel for the first Respondent referred to the statement of claim. In specific, he pointed out that it was stated therein that no part of the cause of action was barred by limitation and that the dispute arose on or about 31.8.2006 and the arbitration clause was invoked in February 2007.

5.The learned counsel, thereafter, referred to bye-law 3 of chapter XI of the NSE, which reads as under:

"Limitation period for reference of claims, differences or disputes for arbitration (3) All claims, differences or disputes referred to in bylaws (1), (1A), (1B) and (1D) above shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the Relevant Authority to administratively resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months."

6.The learned counsel for the first Respondent contended that the above bye-law is statutory in nature and, therefore, constitutes special law or local law for purposes of Section 29(2) of the Limitation Act. He also pointed out that bye-law 14 specifies that arbitration proceedings shall be subject to the provisions of the Arbitration Act to the extent not provided for in the bye laws or regulations of the NSE. According to him, this underscores the fact that the bye-laws are statutory and would override anything to the contrary in the Arbitration Act or the Limitation Act. In order to substantiate the submissions, the learned counsel for the

first Respondent referred to and relied upon the following judgments, which are set out below along with context and principle:

(i) **HCG Stock and Share Brokers Ltd. vs. Gaggar Suresh, (2007) 2 SCC 279** (the HCG Stock and Share Broker case), wherein the Hon'ble Supreme Court dismissed an appeal against an order of the Division Bench of the High Court whereby the arbitral award rejecting the claim as barred by limitation on account of bye-law 3 of NSE was upheld.

(ii) **Himachal Pradesh State Forest Company Limited vs. United India Insurance Company Limited, (2009) 2 SCC 252** (the HP State Forest Company case) wherein, on facts, the Hon'ble Supreme Court held that the claim was barred even upon application of the relevant provision of the Limitation Act. However, by examining the relevant contractual provision, the Supreme Court held that the unamended section 28 of the Contract Act does not prohibit a stipulation that rights would be extinguished if not exercised in time and only prohibited curtailment of the period of limitation.

(iii) **HDFC Securities Ltd. vs. S. Vivekanandan 2010 (5) MLJ 686** (the HDFC Securities case) wherein, in paragraph 20, this Court held that the claim was barred as per bye-law 3 of the NSE and also held, at paragraph 23, that the plea challenging the validity of the bye-law had not been raised before the Arbitral Tribunal and, therefore, could not be raised before the Court.

(iv) **Debjoyti Gupta vs. Indiabulls Securities Ltd. FAO(OS) 203 of 2013, order dated 08.07.2013**, wherein a Division Bench of the Delhi High Court held, in paragraph 6, that bye-law 3 of Chapter XI of the NSE constitutes a special law for the purposes of section 29 (2) of the Limitation Act.

7.By relying upon the said judgments, the learned counsel for the first Respondent concluded his submissions by stating that the Award is not liable to be set aside because it is in conformity with principles laid down in the above judgments of the Supreme Court, other high courts and this Court. In specific, he pointed out that the Award is not liable to be interfered with merely because one judgment of this court, namely, that in the A.Chandrasekaran case, is in favour of the Petitioner especially when the said judgment is contrary to the judgments of the Supreme Court, the judgments of other high courts and that of this Court in the judgment in the HDFC Securities case (all cited supra).

8.By way of rejoinder, the learned counsel for the Petitioner referred to paragraphs 28 and 29 of the judgment of this Court in the A.Chandrasekaran case, wherein this Court distinguished the Supreme Court judgment in the HP State Forest Company case and that of this Court in the HDFC Securities case on the basis that the Supreme Court

judgment was in the context of a contractual provision that had the effect of extinguishing rights that are not canvassed within the stipulated period and, on facts, the pre-amended Section 28 of the Contract Act applied to that case. He further noted that this Court did not notice this aspect while deciding the HDFC Securities case and that the said decision of this Court was in the factual context of there being no challenge to the bye-law before the Arbitral Tribunal.

9. The records were examined and the oral submissions of both sides were considered carefully. The main issue that arises for consideration in this case is whether the claim made by the Petitioner herein before the Arbitral Tribunal is barred by limitation. The case of the Petitioner is that Arbitration proceedings were invoked in February 2007 and that the dispute arose on 31.08.2006. On the other hand, the finding of the Arbitral Tribunal is that the dispute arose on 25.06.2006 and that the Arbitration proceedings were invoked in August 2007. On this purely factual aspect of limitation, there is no scope to interfere with the finding of the Arbitral Tribunal when such finding is based on appraisal of evidence and it cannot be said that the Arbitral Tribunal disregarded vital evidence or relied upon irrelevant evidence in arriving at such finding. Thus, the legal aspect should be considered by accepting the factual findings, in this regard, by the Arbitral Tribunal. Both the learned counsel

submitted that bye-law 3, as applicable to this case, specified a limitation period of six months and that this was subsequently modified in line with the Limitation Act. On examining bye-law 3 of Chapter XI of the NSE bye-laws, as applicable to this case, it is evident that the heading is "limitation period for reference of claims, differences or disputes for arbitration". Although a heading is not determinative in interpreting a provision, in the absence of any other indication in bye-law 3 with regard to the consequences of not making a claim within the stipulated period of six months from the date of such claim and bearing in mind that the stand of the first Respondent is that bye-law 3 stipulates the period of limitation, one has to conclude that it is intended to be a limitation period as described in the heading. This leads to the next question as to whether such a stipulation violates Section 28 of the Contract Act. With regard to this question, it is also necessary to consider whether the contention of the learned counsel for the first Respondent that the validity of bye-law 3 was not questioned before the Arbitral Tribunal is correct. From the statement of claim before the Arbitral Tribunal, it is clear that the Petitioner stated that the claim petition is within the period of limitation as per the provisions of the Limitation Act (P.34 of the Petitioner's typed set). Moreover, the Award discloses, in no uncertain terms, that it was contended by the learned counsel for the Petitioner that the curtailment of the period of limitation by bye-law 3 violates section 28 of the Contract

Act. Further, this question was considered and decided by the Arbitral Tribunal by holding that bye-law 3 constitutes a special law as per section 29(2) of the Limitation Act and that, consequently, it does not violate Section 28 of the Contract Act. Therefore, I conclude that this question was expressly canvassed before and decided by the Arbitral Tribunal.

10.This leads to the next question, namely, as to whether bye-law 3 is statutory or contractual. Before examining the case law on the subject, it is pertinent to closely examine the bye-laws, in this regard, so as to ascertain whether the said bye-laws provide an indication as to whether they are contractual or statutory. In this connection, bye-law 2 is relevant and reads as under:

"Provisions of these bye laws and regulations deemed to form part of all dealings, contracts and transactions. In all dealings, contracts and transactions, which are made or deemed to be made subject to the Bye-laws, Rules and Regulations of the Exchange, the provisions relating to arbitration as provided in these Bye-laws and Regulations shall form and shall be deemed to form part of the dealings, contracts and transactions and the parties shall be deemed to have entered into an arbitration agreement in writing by which all claims, differences or disputes of the nature referred to in Bye-laws (1), (1A), (1B) and (1D) above shall be submitted to arbitration as per the provisions of these Bye-laws and Regulations."

11.The above bye-law clearly and expressly states that the

parties shall be deemed to have entered into an arbitration agreement. By stating that it is a deemed arbitration agreement, there is a clear and unambiguous indication of the intention to treat the bye-laws as contractual and not statutory as regards dispute resolution by arbitration. In this connection, if the above bye-law is compared and contrasted with the relevant provision pertaining to arbitration in statutes such as the National Highways Act, 1956, the Micro, Small and Medium Enterprises Development Act, 2006, the Indian Telegraph Act, 1885, etc., it becomes evident that those statutes provide for statutory arbitrations that are not dependent on the actual or deemed execution of an arbitration agreement, whereas the bye-laws of the NSE provide for a deemed arbitration agreement. Nevertheless, it is necessary to examine the relevant case law before drawing any definitive conclusions that bye-law 3 of Chapter XI is contractual and not statutory.

12.The question as to whether the bye-laws of the NSE are contractual or statutory was considered and answered in three judgments, namely, those of the Delhi High Court in the **Debjyoti Gupta case** and the **Biba Sethi case** and that of this Court in the **A.Chandrasekaran case**. In the **Biba Sethi case**, the Delhi High Court adverted to the fact that statutory arbitrations are provided for in several statutes in India but the Securities(Contract) Regulation Act,1956 (the Securities Act) does not

provide for a statutory arbitration. Instead, it provides for the framing of bye-laws with regard to the settlement of disputes by arbitration. Thereafter, in the said judgment, the Delhi High Court held, in paragraph 28, that arbitration under the bye-laws of the NSE is contractual notwithstanding the statutory flavour of the bye-laws. In the **Deb jyoti Gupta case**, the Division Bench of the Delhi High Court did not notice the earlier decision in the **Biba Sethi case**. Instead, the Supreme Court decision in the **HCG Stock and Share Broker case** was referred to while concluding that the bye-laws constitute a special law as per Section 29 (2) of the Limitation Act. The last of the three judgments is that of this Court in the **A.Chandrasekaran case** where this court referred to and relied upon the judgment of the Delhi High Court in the **Biba Sethi case** and distinguished that of the Hon'ble Supreme Court in the **HCG Stock and Share Brokers case** and that of this court in the **HDFC Securities case**. In specific, this Court held as follows with regard to the judgments in the **HCG Stock and Share Brokers case and the HDFC Securities case**:

"18. In the decision in HCG Stock and Share Brokers Ltd. vs. Gaggar Suresh (2007) 2 SCC 279, the Supreme Court was concerned with an award that was upheld by a single Judge and a Division Bench of the Bombay High Court on the ground of limitation. In other words, the rejection of the claim by the Arbitral Tribunal on the basis of bye-law 3 of

Chapter XI was upheld right up to the Supreme Court. But a careful perusal of the said decision would show that the validity of bye-law No. 3 was never in question, with reference to Section 28 of the Contract Act 1872 and Section 29 (2) of the Limitation Act, 1963.

19. Even the decision of this court in HDFC Securities cannot be taken to be laying down the law on this point, in view of the fact that the question of validity of bye-law 3 was never raised in that case before the Arbitral Tribunal. Therefore, it was observed by this Court in HDFC Securities (para 25), that the question as to the validity of the bye-law was not raised before the Arbitral Tribunal and that therefore, the question did not arise in the petition under Section 34. Once it is held that that question did not arise before this Court, even the observations made in paragraph 22 of the Report, disagreeing with the views of the Delhi High Court, may at the most tantamount to obiter. Therefore, there is no impediment for me to consider the issue independently."

13. When the above decisions are analyzed with reference to the facts of this case, the following material aspects of this case are evident:

(a) In this case, the Petitioner pleaded in the statement

of claim that the claim is within the period of limitation as per the Limitation Act.

(b)The Arbitral Tribunal considered the submission of the learned counsel for the Petitioner that the curtailment of the period of limitation by bye-law 3 violates section 28 of the Contract Act and, in fact, entered the definitive finding that bye-law 3 constitutes special law, as per section 29 (2) of the Limitation Act and, consequently, does not violate section 28 of the Contract Act. In effect, in this case, the question as to whether the curtailment of the period of limitation violates section 28 of the Contract Act was raised before and decided by the Arbitral Tribunal.

(c) As a corollary, the fact situation in this case is different from that in the HDFC Securities case and is closer to that in the A.Chandrasekaran case.

14.By taking into consideration the fact that bye-law 2 of chapter XI expressly states that a deemed arbitration agreement is created by the bye-law, in contrast to several statutes that provide for statutory arbitration, and by examining the case law cited by both sides, I am of the view that bye-law 3 is contractual and not statutory. Once it is held to be contractual, it would violate Section 28 of the Contract Act if it curtails the time limit prescribed in the Limitation Act. Section 28 of the Contract Act reads, inter alia, as under:

“Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent...."

15.As a corollary, the stipulation of a limitation period of six months in bye-law 3 of Chapter XI, as opposed to the three year limitation period prescribed in the Limitation Act, is in violation of Section 28 of the Contract Act as held by the Hon'ble Supreme Court in several cases, including **National Insurance Co. Ltd. vs. Sujir Ganesh Nayak (1997) 4 SCC 366**. Thus, the stipulation of the limitation period of six months for making a claim before the Arbitral Tribunal is void. The Arbitral Tribunal held that the dispute arose on 25.06.2006 and that it was referred for arbitration in August 2007. Therefore, by applying the period of limitation of three years as prescribed in the Limitation Act, and proceeding on the basis of the factual findings on limitation in the Award, the dispute was raised within a period of three years from the date when the cause of action arose. Hence, I conclude that the finding of the

Arbitral Tribunal that the claim is barred by limitation is illegal and contrary to law. Moreover, this illegality can be discerned from the Award and does not require appraisal of the evidence. In effect, the finding on the third issue pertaining to limitation, in the Award, is patently illegal as per principles laid down, in this regard, in **Associate Builders vs. DDA (2015) 3 SCC 49** and, in particular, paragraphs 40 to 42 thereof and such illegality goes to the root of the matter.

16. This leads to the next question as to whether the Award is liable to be set aside in entirety on that account. In this case, the learned Arbitrator first examined the merits of the case in the first and second issues and entered findings in favour of the Petitioner. In specific, as regards the first issue, the learned Arbitrator held that the Petitioner had not authorised the first Respondent to trade in the derivatives or F&O segment by appraising the evidence in that regard. As regards the second issue as to whether the monetary claim of the Petitioner is acceptable and, if so, to what extent, the learned Arbitrator held that the Petitioner would be entitled to a sum of Rs.3,05,883.50 but for the conclusion on the third issue with regard to limitation. In order to reach this conclusion, the learned Arbitrator considered the fact that a sum of Rs.2,83,921.27 was transferred, without authorisation, from the cash segment to the F&O segment and that the amount due to the Petitioner comprises this amount

plus the amount of Rs. 20,559.88 realised as sale proceeds on sale of shares on 14.02.2008 plus the credit balance of Rs.1402.45.

17.As a question of law, it is the settled position that an Arbitral award may be set aside in part or wholly. This principle was laid down in several judgments, including that of the Full Bench of the Bombay High Court in the **R.S. Jiwani case**, which was referred to and relied upon by the learned counsel for the Petitioner. Applying this principle and the patent illegality test to this case, the Award is liable to be set aside in respect of the findings on the third and fourth issues. However, it is relevant to note that the first Respondent did not challenge the findings on the first and second issues by filing a petition under Section 34 of the Arbitration Act and there is no reason to set aside the Award in respect of the findings on the said issues, which are factual findings based on appraisal of evidence. As a consequence, the Petitioner would be entitled to the sum of Rs.3,05,883.50 as per the finding of the learned Arbitrator on the second issue. Notwithstanding the fact that interest was claimed at the rate of 18% per annum, there is no contractual rate of interest. Moreover, the sum of Rs.3,05,883.50 comprises the aggregate amount of Rs.2,83,921.27, which was transferred, without authorisation, to the F&O segment on various dates by the first Respondent and was crystallised for the first time in the Award, the amount of Rs. 20,559.88, which was realised on 14.02.2008

from the sale of shares, and the credit balance of Rs.1402.45 as per the statement of account as on 31.03.2007. Keeping in mind the above facts, the Petitioner is not entitled to interest until the date of Award. As regards the period subsequent to the date of Award, the rate of 18% per annum, which was specified in Section 31(7)(b) of the Arbitration Act prior to the 2015 amendment, would not apply because no amount was directed to be paid under the Award. Accordingly, it is proposed to apply the SBI marginal cost of funds based lending rate(MCLR)/base rate during the relevant period, which was in the region of 9%, as a reasonable benchmark for the grant of interest. Therefore, the sum of Rs.3,05,883.50 shall carry interest at the rate of 9% per annum from the date of Award until the date of realisation.

18.In the result, the Award is partly set aside in respect of the findings on the third and fourth issues whereas it is not liable to be interfered with in respect of the findings on the first and second issues. Hence, the first Respondent is directed to pay the Petitioner a sum of Rs. 3,05,883.50 with interest thereon at 9% per annum from the date of Award until the date of realisation.

03.10.2019

Speaking Order
Index :Yes
Internet :Yes
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SENTHILKUMAR RAMAMOORTHY, J.

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Pre Delivery order
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