Prajakta Vartak

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

COMMERCIAL ARBITRATION PETITION NO. 478 OF 2021

IndiaNivesh Securities Ltd. & Anr. ...Petitioners
Vs.
Central Depository Services India Ltd. ...Respondent

Mr. Prateek Sakseria with Mr. Abhishek Salian i/b. Vidhii Partners for Petitioners.
Mr. Zal Andhyarujina, Senior Advocate with Mr. Nausher Kohli, Mr. Yogesh Chawak, Mr. Chirag Dave and Mr. Anuj Athalye i/b. Legasis Partners for Respondent.

CORAM : G. S. KULKARNI, J.
DATE : JULY 27, 2022.

P.C.:

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the petitioners are before the Court praying for interim measures pending the arbitral proceedings. This petition was filed on 09 July, 2021. It appears from the record that from 13 July, 2021 to 06 July, 2022, which is almost for a period of one year, the petition was never moved.

2. Be that as it may, after the petition was heard for some time on 06 July, 2022 and on 13 July, 2022, the petition was adjourned to 20 July, 2022. On 20 July, 2022, the following order was passed as the petitioner No.2 intended to complete the procedure:-

> " Stand over to **26 July, 2022 (F.O.B.)** to enable petitioner

> no.2 to complete the procedure in view of the changed circumstances."

3. On the above backdrop, on 26 July, 2022, as a settlement was contemplated the following order came to be passed:-

> " Stand over to **27 July, 2022**. To be listed under the caption "for Settlement/Withdrawal".

4. Today it is informed that it is not possible to arrive at any settlement. Accordingly, the learned Counsel for the petitioners has made submissions on the petition.

5. Mr. Andhyarujina, learned senior counsel for the respondent has raised a preliminary objection to the maintainability of this petition on the ground that there is no arbitration agreement between the parties, hence, the present petition under Section 9 would not be maintainable.

6. I have heard learned counsel for the parties on the preliminary objection as raised by Mr. Andhyarujina which needs to be decided so as to determine whether the petitioners can prosecute this petition any further.

7. The agreement in question is a Bi-Partite Agreement dated 15 March, 2007 (for short, "the said agreement") between the respondent-Central Depository Services India Ltd. (depository) and petitioner no.1-IndiaNivesh Securities Ltd. (depository participant). Petitioner No.2 is

not a party to the said agreement. The arbitration agreement between petitioner no.1 and the respondent is contained in clause 38 of the said agreement which reads thus:-

> "38. **Arbitration and Conciliation**
> 38.1. The parties hereto shall, in respect of all disputes and differences that may arise between them, abide by the provisions relating to arbitration and conciliation specified under the Bye Laws. The place of arbitration shall be Mumbai."
>
> (emphasis supplied)

8. It appears to be not in dispute that petitioner no.1 being the Depository Participant had filed a Scheme of Arrangement (Demerger) before the National Company Law Tribunal, Mumbai Bench (for short, "NCLT") being Company Scheme Petition No.260 of 2017, along with connected matters for demerger of its regulated business undertaking into India Nivesh Wealth Management Pvt. Ltd. (petitioner No.2). Such scheme was allowed by an order dated 07 June, 2017 passed by the NCLT which permitted petitioner no.1 to transfer its regulatory businesses to petitioner no.2. It is the case of the petitioners that there was a compliance of clause 16.1.4 of the agreement namely that the respondent was intimated about such change and the consequence as brought about by the demerger. For the respondent, petitioner no.2 is a new entity, which has taken over the business of petitioner no.1. It would be petitioner no.2 who is carrying forward the business of petitioner no.1. If this be so then the provisions of the Depositories Act, 1996, SEBI (Depositories & Participants) Regulations, 1996, Bye Laws and Operating Instructions issued by CDSL, as also the SEBI norms

would stand attracted by which not only the respondent but also the new entity petitioner No.2 would be bound, if petitioner no.2 would now be applying for new approvals/permissions to takeover petitioner no.1's business.

9. Be that as it may, in so far as the objection on the maintainability of the petition as raised by Mr. Andhyarujina is concerned on the ground that the dispute is not arbitrable, it can be seen that the agreement between the parties is specific namely that the parties have agreed that in relation to the disputes and differences which may arise between them, the party shall abide by the provisions relating to arbitration and conciliation as specified under the bye-laws. Mr. Andhyarujina's submission is that the parties having agreed to arbitration under the bye-laws, the arbitration categorically needs to be in terms of what has been provided by the bye-laws and not otherwise. Such objection specifically pleaded in paragraph 6 of the reply affidavit. Mr.Andhyarujina's submission is that the bye laws do not compass arbitration for the dispute as raised by the petitioners.

10. To appreciate Mr. Andhyarujina's objection, the relevant bye-laws being the bye-law no.22.2 needs to be noted which reads thus:-

> "22.2 CLAIMS, DIFFERENCES AND DISPUTES
>
> 22.2.1 All claims, differences and disputes between CDSL, Users and Beneficial Owners or any of them (including those inter se between Users or Beneficial Owners) arising out of or in relation to any dealings or transactions in CDSL in respect of any provisions of the Act, Regulations, Bye Laws or Operating Instructions shall be referred

> in accordance with the provisions of [*Limitation Act 1963 and*] Arbitration and Conciliation Act, 1996.
>
> *Provided however that limitation period shall also be applicable in following cases.*
> *Where the limitation period (in terms of Limitation Act 1963) have not yet elapsed and the parties have not filed for arbitration with the depository, or,*
> *where the arbitration application*
> *was filed but was rejected solely on the ground of delay in filing within the earlier limitation period; and the limitation period (in terms of Limitation Act 1963) have not yet elapsed.*
>
> ***Provided that nothing contained in this chapter shall apply to any action/decision taken by CDSL pursuant to the provisions of Depositories Act, 1996, SEBI (Depositories & Participants) Regulations, 1996, Bye Laws and Operating Instructions issued by CDSL from time to time. Reference to arbitration shall be made as follows: … … … ….***
>
> (emphasis supplied)

11. Thus, Bye-law 22.2.1 postulates that all claims, disputes and differences between the respondent, its users and beneficial owners or any of them (*the term users is defined in clause 22.1.10 includes participants and the petitioner No.1 which today does not exist, was a participant*), arising out of or in relation to any dealings or transactions in respondent (CDSL) in respect of any provisions of the Act, Regulations, Bye Laws or Operating Instructions shall be referred in accordance with the provisions of Limitation Act and Arbitration and Conciliation Act, 1996. By an amendment incorporated with effect from 16 June, 2011, the terms of Limitation Act, 1963 have been inserted, as seen from the clause which is extracted above. The second proviso to the said bye-law stipulates that nothing contained in "this chapter" (*the index of the bye-laws would show that it is the chapter on arbitration*

containing bye-laws 22.1 to 22.27) shall apply to any action/decision taken by the respondent pursuant to the provisions of Depositories Act, 1996, SEBI (Depositories & Participants) Regulations, 1996, Bye Laws and Operating Instructions issued by the respondent from time to time. In the context of the clear terms of the proviso, which speaks of non-arbitrability, what is of relevance, is to refer to the termination notice dated 02 June, 2021 issued by the respondent to petitioner no.1. It is clearly seen from the termination notice that the termination is for breach of the bye-laws. A clear reference has been made by the respondent to bye-laws 5.5.1.1, 5.5.1.1.1, 16.1.12, 16.1.13, 27.1, 27.1.1, as also 5.5.4.7, 5.5.4.8. This apart there are certain clauses of the agreement which are also referred along with the said bye-laws as the application of such clauses having some incidental to the bye-laws as noted above.

12. It is significant to note that in the very first part of the termination, it has been recorded that the participant (petitioner No.1) had entered into an agreement with the respondent as a "depository participant" on 15 March, 2007 pursuant to the grant of certificate of registration in that regard by the "Securities and Exchange Board of India (SEBI)", as per the eligibility criteria laid down in SEBI (Depositories & Participants) Regulations, 1996 read with Bye-Laws 5.2 on the respondent being a condition of basic eligibility,. The said

paragraphs need to be noted which read thus:-

"**5.2 ADMISSION CRITERIA**

5.2.1. No applicant shall be eligible to be admitted as a participant to CDSL unless and until the applicant shall have met all the following conditions:

5.2.1.1. The applicant has furnished such information and details pertaining to its business and equity holding relating to a minimum period of three years immediately preceding the date of the application or from the date of its inception, if less than three years.

5.2.1.2. The applicant (including any partner, where the applicant is a partnership firm, and any director or any person holding any substantial interest in or being otherwise in a position to control the affairs of the applicant, where the applicant is a company or other body corporate) should not have been convicted in any of the five years immediately preceding the filing of the application in any matter involving misappropriation of funds and securities, theft, embezzlement of funds, fraudulent conversion, forgery or any other offence involving moral turpitude;

5.2.3.1 The applicant (including any partner, where the applicant is a partnership firm, and any director or any person holding any substantial interest in or being otherwise in a position to control the affairs of the applicant, where the applicant is a company or other body corporate) should not have been expelled, barred or suspended by SEBI or by any recognized stock exchange. Provided however that, if a period of three years or more has elapsed from the expiry of the period of expulsion, debarment or suspension, as the case may be, CDSL may, in its discretion, consider such application.

5.2.1.4. *Net worth requirement:*

5.2.1.4.1. Where the applicant is a Non-Banking Finance Company [*or a RTA]* the applicant has and undertakes to maintain the net worth specified in Regulation 19(a)(ix) [*and 19(a)(x) of the Regulations]* respectively.

5.2.1.4.2. *Where the applicant is a Stock Broker, the applicant has and undertakes to maintain a net worth of rupees 2(two) crores.*

[Provided however that a limited Depository Participant may

have a Net worth of not less than 1(one) crore]

Explanation : For the purpose of determining whether the applicant *[mentioned under 5.2.1.4.1 and 5.2.1.4.2]* has adequate net worth, the applicant shall submit to CDSL, a Net worth Certificate (including the computation thereof) based on the audited books of accounts, and calculated and itemized in the manner specified in [*the Operating Instructions issued by CDSL from time to time*] and duly certified by a *[Statutory auditors] [or Practicing Chartered Accountant]*.

5.2.1.5. The applicant shall have furnished the details of its Board of Directors/Partners / Authorized Officials as the cae may be, who shall be responsible for the conduct of the business of the applicant as a participant.

5.2.1.6 The applicant shall have on its staff such number of persons as CDSL may specify who are adequately trained or who, in the opinion of CDSL, are otherwise sufficiently qualified or have adequate skill and knowledge relating to the operational, functional and technical aspects of the working of CDSL system.

5.2.1.7 The applicant shall have appointed a Compliance Officer to interact with CDSL on its behalf for compliance with these Bye Laws and for resolution and redressal of Beneficial Owners' grievances:

5.2.1.8. The applicant has adequate office space exclusively for CDSL operations.

5.2.1.9 The applicant has made adequate arrangements for conducting effective and safe depository operations including security measures, software and hardware requirements, risk containment and insurance requirements, as specified by CDSL.

5.2.1.10 Where the applicant is a stock broker or a RTA, the applicant is a company [*Limited Liability Partnership (LLP)],* whether existing or incorporated under the Companies Act, [*2013*] or [*Limited Liability Partnership Act, 2008 or]* any reenactment thereof.

5.2.1.11.1 [*A participant who has been granted a certificate of initial registration may, three months before the expiry of the period of certificate of initial registration, make an application through [any of the depositories in which it is acting as] a participant for grant of a certificate of permanent* *registration in such form together with fees specified by SEBI.*]

[*5.2.1.11.2 The participant who has already been granted a certificate of registration or has obtained renewal of certificate of registration, prior to the commencement of SEBI (D&P) (Amendment) Regulations, 2011, may three months before the expiry of validity of certificate of registration or before, make an application through [any of the depositories in which it is acting as] a participant for grant of a certificate of permanent registration in such form together with fees specified by SEBI.*]

[*Provided however that the applicant, its directors, proprietor, partners and associates satisfy the Fit and Proper Criteria as defined in the SEBI (intermediaries) Regulations, 2008;*

Provided however that the applicant has taken satisfactory corrective steps to rectify the deficiencies or irregularities observed in the past inspections or in case of actions initiated / taken by SEBI / depository(s) or other regulators.

Provided however that, the applicant has paid all pending fees / dues payable to SEBI and depository and no amount is overdue.]

[5.2.1.11.3 *The application for grant of a certificate of permanent registration shall be accompanied by details of the changes that have taken place in the information that was submitted to the Board while seeking initial registration or renewal, as the case may be, and a declaration stating that no changes other than those as mentioned in such details have taken place.*]

[5.2.1.11.4 *The application for permanent registration shall be dealt with in the same manner as if it were a fresh application for grant of a certificate of initial registration. Provided that the Membership Committee may, in its discretion and in the interest of Beneficial Owners, consider an application for permanent registration of an existing Participant in case falling under Bye Law 5.2.1.3., if the period of expulsion, debarment or suspension has expired even though a period of three years has not elapsed from such expiry.*]"

13. The respondent, inter-alia on the ground that petitioner no.1 having failed to inform the respondent about its cessation to be a

trading member with any of the recognized stock exchanges i.e. National Stock Exchange (NSE), Bombay Stock Exchange (BSE) and MCX, pursuant to its demerger, had ceased to meet the statutory conditions, issued a show cause notice dated 19 April, 2021 to petitioner no.1 on which petitioner no.1 was heard and in pursuance of which, the termination order was passed. The relevant extract of the termination is required to be noted which reads thus:-

> "NOW THEREFORE in accordance with Bye Law 5.5.1.1.1 and clause of the aforesaid agreement and for the violations mentioned in this Termination Order, the Member Committee by way of circular resolution dated May 31,, 2021 decided that the aforesaid agreement shall stand terminated with immediate effect from End of Day of June 2, 2021 without any further reference or recourse to the participant and without prejudice to all the other rights available to CDSL to take any further actions in this regard, which the participant may please note. Notwithstanding the aforesaid, in accordance with Bye Laws 5.5.4.7, 5.5.4.8 and Clause 29.5 and 29.6 of the said agreement, even pursuant to termination as a DP, for a period of 15 days from the date of this Termination Order i.e. till June 17, 2021, the participant shall continue to avct as a participant for the limited purpose of facilitating the transfer of securities and demat accounts held with the participant to another participant in the same name and order of holders as per the request received by the participant from the concerned BOs."

14. It is, therefore, clear that the termination has been effected by the respondent not in relation to any operating or trading dispute, however clearly for the reason that petitioner no.1 had ceased to meet the requirement for continuing with the agreement and having failed to comply with the SEBI criteria and as per the eligibility criteria as laid down in SEBI (Depositories & Participants) Regulations, 1996 read with

the Bye-Laws 5.2 of the respondent. It is thus clear that such termination would certainly fall under the second proviso to clause 22.2.1 (supra), which has been carved out to clearly make the dispute non-arbitrable.

15. Mr. Sakseria, learned counsel for the petitioners would submit that Mr. Andhyarujina's objection is misconceived as bye-law 22.2 cannot be interpreted in the manner Mr. Andhyarujina would intend to read/ interpret. It is Mr. Sakseria's submission that clause 22.2.1 is not a clause which would provide for arbitration and it merely provides as to the application of the Limitation Act for any arbitration.

16. Mr. Sakseria's next contention is that a reading of the termination notice itself would show that it is not under the bye-laws as there is also reference to the clauses of the agreement as referred in the termination notice. According to Mr. Sakseria, taking into account the reference as made of such clauses of the agreement in the termination notice, arbitration ought to be accepted to be the only mode of resolution of disputes, as agreed between the parties by agreeing to subscribe the clause 22.2.1 of the Bye-Laws.

17. In my opinion, none of the contentions/submissions of Mr. Sakseria can be accepted for the reason that on a holistic reading of the termination order, it is quite clear that termination is a result of

petitioner no.1 ceasing to comply with the statutory requirements as also ceasing to comply with the bye-laws. If that be so, the second proviso to the bye-law 22.2.1 squarely becomes applicable, in as much as, it categorically provides that nothing contained in the chapter of 'Arbitration' shall apply to any action/decision taken by the respondent not only pursuant to the provisions of Depositories Act, 1996, SEBI (Depositories & Participants) Regulations, 1996, but also the Bye Laws and Operating Instructions issued by CDSL from time to time. Thus, in my opinion, the proviso completely takes within its ambit the termination as issued by the respondent, to make the disputes of such nature and subject matter of the present proceedings as arising from such termination, to be not arbitrable.

18. In view of the above discussion, the objection as raised by Mr. Andhyarujina is required to be accepted. It would be required to be held that there cannot be any arbitration on the issues as raised in the present petition. Consequent thereto the petition for interim measures cannot be entertained. The petition is, therefore, required to be dismissed. It is dismissed. No costs.

19. Needless to observe that it is open for the petitioners to take recourse of appropriate remedies as may be available in law.

[G.S. KULKARNI, J.]