Bhanuchandra J. Doshi Vs. M/S. Motilal Oswal Securities Ltd., Member of Nse Futures and Options

Bhanuchandra J. Doshi Vs. M/S. Motilal Oswal Securities Ltd., Member of Nse Futures and Options

SooperKanoon Citation : sooperkanoon.com/1103665

Court : Mumbai

Decided On : Jul-17-2012

Judge : Anoop V. Mohta

Appeal No. : ARBITRATION PETITION NO. 158 OF 2010

Appellant : Bhanuchandra J. Doshi

Respondent : M/S. Motilal Oswal Securities Ltd., Member of Nse Futures and Options

Judgement :

1. The Petitioner, a constituent, has challenged under Section 34 of the Arbitration and Conciliation Act, 1996, (for short, the Arbitration Act), award dated 19 September 2009 passed by a panel of Arbitrators appointed under the Byelaws, Rules and Regulations of National Stock Exchange of India Limited (for short, Byelaws of NSEIL), whereby all his claims have been rejected on merits.

2. The learned counsel appearing for the Petitioner, in view of the specific ground raised, apart from merit, that the award so passed was beyond the mandatory period of six months which is contrary to the Byelaws of NSEIL, and as there is no provision for seeking extension after expiry period; such award is illegal and liable to be quashed and set aside. The learned counsel appearing for the Respondents,

however, resisted this contention.

3. In 2004, the parties entered into the relevant agreement. There is no dispute for the period upto 2007. In January 2008, in second week, the share market was quite volatile. On 16 January 2008, as alleged, the Respondent entered into the transaction. No information was given, but demanded security cheque of Rs.5,00,000/ on 21 January 2008, though they had share of Petitioner over Rs.30,00,000/as security. The market was crashing. The Petitioner came to know about the transactions, as received notice first time on 25 January 2008. The Petitioner stopped the payment of cheques as dispute arose.

4 The Petitioner, therefore, filed complaint on 28 January 2008. It was replied by the Respondents on 31 January 2008. The Petitioner protested the same. On 8 February 2008 some more shares were disposed of. Another complaint was filed. The Respondents sent demand notice in view of dishonour of cheques. The same was also replied by the Petitioner. Some more shares were sold on 31 March 2008 by the Respondents. The dispute so raised from time to time was not considered and ultimately, suggested on 3 June 2008 to refer the same for Arbitration.

5. The complaint/claim Petition was filed by the Petitioner on 28 July 2008 with the National Stock Exchange India Limited (for short, NSEIL). Respondent No.1 only attended and not Respondent No.2. They denied the claims. The Arbitration reference was filed on 10 December 2008. Written submissions filed by the Respondent on 24 December 2008. There is no serious dispute that the Petitioner received notice of appearance dated 16 December 2008, on 20 December 2008, thereby called upon the parties to appear before the Tribunal for hearing on 8 January 2009. The Petitioner has averred accordingly in additional affidavit dated 1314 February 2012, the same replied by the Respondents through their affidavit dated 29 February 2012. It appears that the Petitioner did visit the NSEIL on 8 January 2009 with pass entry No.06777 Card No.M73 at about 11.55 a.m. The notice is part of the affidavit. The relevant extract of notice dated 16 December 2008 issued by the NSEIL is as under:

The Panel Arbitrator has fixed the hearing on January 8, 2009 at 12.30 p.m. at the office of National Stock Exchange of India Ltd., Ex hange Plaza, 5th floor, Plot No.

C/1, 'G' Block, BandraKurla Complex, Bandra (E), Mumbai400 051.

6. There is nothing on record to show, what happened on that day. The Respondent contended that there was no hearing took place. Another similar notice was issued by the NSEIL and date of hearing was fixed on 24 February 2009. There was no reference to the earlier notice dated 16 December 2008. On 19 January 2009, the Petitioner asked for time and requested for rescheduling of the hearing. The NSEIL forwarded letter on 27 January 2009. As alleged, on 24 February 2009, a meeting took place before the Arbitral Tribunal when the Petitioner was absent but the Respondents were present. The matter was adjourned to 6 April 2009. The Respondent was absent on 6 April 2009 at the hearing. The directions were issued to file rejoinder and matter was adjourned to 8 May 2009. By consent, it was adjourned to 1 July 2009 and the parties were directed to complete the discovery and inspection of the documents. Surrejoinder was filed by the Respondents on 17 June 2009. On 18 June 2009, hearing was fixed on 1 July 2009, which was adjourned to 27 July 2009. On 27 July 2009, by consent the matter was adjourned to 20 August 2009. By this time, there was also no consent obtained to extend time, as provided under the Byelaws of NSEIL. The parties never gave any consent before six months. On 20 August 2009, the Tribunal heard the arguments. The matter was closed. The parties were awaiting the award.

7. Admittedly, the consent was not obtained and/or given, prior to expiry of the six months/90 days and/or the period prescribed under the agreed Byelaws of NSEIL. As averred, on 20 August 2009 the Arbitrator sought consent of both the parties and got extension of the period. The consent was obtained of the Petitioner's son and not of the Petitioner. The impugned award was passed on 19 September 2009. The Petitioner has filed the present Petition along with Notice of Motion No. 177 of 2010, for condonation of delay. The delay was condoned.

8. The learned counsel appearing for the Respondent strongly relied upon the clauses to support their submission that it is well within the time limit and the award needs no interference on that ground itself. The relevant Rules, Byelaws of NSEIL, as referred, are as under

7)(b) in the opinion of the Relevant Authority, the arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay including failure to make the arbitral award within the time period prescribed by the Relevant Authority. Such a decision of the Relevant Authority shall be final and binding on the parties; or

13)(a)**Adjournment**

Adjournment, if any, shall be granted by the arbitrator only in exceptional cases, for bonafide reasons to be recorded in writing.

(b) **Time for completion of Arbitration**

The arbitrator shall make the arbitral award normally within 3 months from the date of entering upon the reference.

(c) Request for extension

The time taken to make the award may not be extended beyond 3 times, by the Managing Director or Relevant Authority on an application by either of the parties or the arbitrator, as the case may be.

Notwithstanding the extensions granted in the above manner, the arbitrator shall make the arbitral award within a period of six months from the date of entering into reference i.e. extension of time of award can be for a maximum period of three months.

(d) **Date of entering reference**

For the purposes of these byelaws, the arbitrator shall be deemed to have entered upon a reference on the date on which the arbitrator has held the first hearing. However, if no hearing is required or the parties waive their right of hearing and the arbitrator proceeds to decide the matter without a hearing, then the arbitrator shall be deemed to have entered upon a reference on the date of acceptance of arbitration by the arbitrator.

9. The scheme and purpose of fixing the time bound program in such Arbitration proceedings just cannot be overlooked by the parties, as well as, the Arbitral Tribunal and even the Court. The basic requirement is that the Arbitral award should be made within three months from the date entered into the reference. The Arbitral award should be made within a period of six months from entering into the reference covering the extension of time of award, for maximum period of three months. The Arbitrator shall be deemed to have entered upon the reference on the date on which the Arbitrator has held the first hearing. Therefore, the concepts of entered upon a reference and the first hearing, go to the root of the matter. It is relevant to note that if no hearing is required or the parties waive their right of hearing and the Arbitrator proceeds to decide the matter without a hearing, then the Arbitrator shall be deemed to have entered upon a reference on the date of acceptance of Arbitration by the Arbitrator. In the present case, as noted, the first date of hearing by notice dated 16 December 2008 was fixed on 8 January 2009, there is no material and reasons revolving around in this aspect, which goes to the root of the matter.

10. During the course of the arguments, issue was raised with regard to the mandate of the expiry of the agreed period and also of the date of first hearing. The time was granted to the parties to produce on record any material to justify what happened on 8 January 2009, when admittedly, by notice dated 16 December 2008, the first hearing was fixed on 8 January 2009. The Petitioner did visit the venue. There is nothing responded by the Respondents. There is no material to support and/or to deny what happened on 8 January 2009. This date is relevant for various purposes, basically to consider the case of expiry of six months and/or extension of period, by consent within and/or thereafter. It is not essential that all parties' presence are required on first date of hearing, one party, even if absent, the Tribunal may proceed with the hearing of the matter. It appears from the events, so recorded, that on some dates one party was present and/or other party was absent on other dates. There is nothing pointed out, to provide and to decide the meaning of first hearing under the Byelaws of NSEIL. The concept of first hearing is relevant for deciding the period of limitation and/or the mandate of Arbitrator to dispose of the Arbitration proceedings within the agreed and specified period. There is no finding whatsoever given/provided by the

Arbitrator in this regard.

11. Normally, there is no question to go into this fact but when the contentions are raised revolving around the power of Arbitrator to pass the award beyond the statutory period of six months and by getting the period extended after expiry of six months, though alleged consent of both the parties have been obtained later on as cited, still this issue, if goes to the root of the matter, just cannot be overlooked by the Court under Section 34 of the Arbitration Act.

12 Both the parties have filed respective affidavits and also contended that while at the time of hearing of the matter to direct the NSEIL to produce the record so that appropriate order can be passed with regard to the first date of hearing, as contended by the learned counsel appearing for the Petitioner, as admittedly by notice, 8 January 2009 was first date of hearing fixed by the Tribunal. However, considering the facts and the contract between the parties including the Byelaws of NSEIL in question, there is no provision to call for such record for these purposes and deal with the issue for the first time, basically when all these facts were never considered and/or decided by the Arbitral Tribunal including the issue with regard to the First hearing of the matter. The contention with regard to the passing of award beyond the period of six months, in view of the Byelaws of NSEIL, goes to the root of the matter. If the case is accepted, then the award in a given case needs to be set aside on the ground 'for want of jurisdiction'. The issue with regard to the extension of time beyond six months, as done in the present case, is also relevant.

13. The learned counsel appearing for the Petitioner pointed out and also as averred in the affidavit that even if the meeting was held on 24 February 2009, the award ought to have been passed before 23 August 2009. The award was, admittedly, singed and passed on 19 September 2009 though it was closed on 20 August 2009. Therefore, even on this ground, it is beyond the period of six months from the date of alleged appearances/entered into the reference by the learned Arbitrator. Therefore, the date of reference, as well as, the date of first hearing, consequent notices and the hearing so fixed from time to time within six months period and the consequences of passing award after expiry of six months, in the

present facts and circumstances, need to be adjudicated by the Arbitral Tribunal again.

14. In my view, the Arbitral Tribunal needs to consider all these points and pass order after giving opportunity of hearing to the parties. Therefore, without expressing anything on merits of the matter, I am inclined to interfere with the award so passed on these grounds itself. The issue cannot be referred or remit in part, in the present case. It is not severable.

15 Resultantly, the following order.

ORDER

a) The impugned award dated 19 September 2009 is quashed and set aside. The matter is remanded. The Arbitral Tribunal to reconsider all aspects afresh. All contentions are kept open.

b) The Petition is allowed.

c) There shall be no order as to costs.