

Bharat M. N(Sic) Vs. Mr. Satish Ashok Sabni(Sic) and National Stock Exchange of India Ltd., Recognised Stock Exchange, WithIn the Meaning of the Companies Act, 1956 and Securities and Exchange Board, 1992

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Court : Mumbai

Decided On : Mar-28-2003

Reported in : 2003(3)ALLMR936; 2003(3)ARBLR427(Bom); 2003(6)BomCR257; 2003(4)MhLj259

Judge : F.I. Rebello, J.

Acts : Securities and Exchange Board of India Regulation - Regulation 3.2.1, 3.2.2, 3.5.1 and 3.5.2; [Limitation Act, 1963](#) - Sections 3

Appeal No. : Arbitration Petition No. 43 of 2002

Appellant : Bharat M. N(Sic)

Respondent : Mr. Satish Ashok Sabni(Sic) and National Stock Exchange of India Ltd., Recognised Stock Exchange, Wi

Advocate for Def. : D.H. Mehta, ;R.D. Dhanuka, ;G.R. Khinkhabwala, Advs., i./b., ;Kavita A. Shah, Adv. for Respondent No. 1

Advocate for Pet/Ap. : S.U. Kamdar, ;Sonali Gunekar and ;Swati Chaurasia, Advs. i./b., ;Haresh Mehta & Co.

Disposition : Petition allowed

Judgement :
ORDER

F.I. Rebello, J.

1. By the present petition the petitioner impugns the award dated October 10, 2001 whereby the claim of the petitioner has been rejected. The learned Arbitral Tribunal found that there are no written directions issued by the petitioner, but went on to observe as under:-

'But my experience is that not bothering to obtain written instructions is a common feature amongst the stock broking community, I shall, therefore, not go into the question of breach of regulations.'

2. The learned Arbitral Tribunal thereafter on the oral evidence of one Mr. Agarwal rejected the case of the petitioner. The case examined by the learned Arbitrator was of friendship between one Jagmohansingh Gujral and the petitioner herein. It was the case of the respondent that the petitioner had done transaction on behalf of Gujral. Gujral became liable for the amounts and the petitioner instructed the respondent to adjust the amount payable to him towards the due of Mr. Gujral. The learned Tribunal found that the case of the respondent was acceptable and consequently rejected the claim of the petitioner. It is in that context that the challenges as made by the petitioner will have to be examined. The petitioner in the statement of claim filed on 28th March, 2001 pleaded that in respect of his account maintained by the petitioner with the respondent there was a balance amount of Rs. 3,47,272.15 paise with further interest computed thereon as per trade practice. Thus upto 5th March, 2001 the total amount which was due and payable was Rs. 4,62,585.53. In spite of the grievance raised by him before the grievance cell the amount was not paid he sought reference.

3. In reply the respondent on 27th April, 2001 did not deny that the respondent owed moneys to the petitioner, but the defence as raised may be adverted to from paragraphs 4 and 5, which read as follows:-

'4. In these circumstances the applicant and Mr. Jagmohansingh Gujral were/are jointly and severally liable to the opponent for an amount of Rs. 21,26,171.30 along with interest at the rate of 24% p.a. from 01-11-1999.'

5. The opponent submits that the opponent has/had right to recover the said amount from the applicant either directly or adjustments. Thus within the four corners of the rights vested in this opponent, and upon instruction given by the applicant and Mr. Gujral the opponent has adjusted 3,45,838.97 amount by transferring the balance from the a/c. of the applicant to the a/c. of the Mr. Jagmohansingh Gujral. The applicant and Mr. Jagmohansingh Gujral are still jointly and severally indebted to the opponent for the reminding among of Rs. 21,26,171.30 along with interest at the rate of 24% p.a. thereon.

Ledger printout for account year 1999-2000 and 2000-2001 of Mr. Nagori and Mr. Gujral is enclosed.'

4. After the award was passed and in opposition to the affidavit an affidavit was filed on 21st February, 2002. Paragraph 10 of the said affidavit reads as follows:-

'10. I say that at the instance of the petitioner, the amount was transferred to Mr. Gujral's account. The petitioner had never complained about the same before filing of the claim before the learned Arbitrator. It is hereby deny that the amount of Rs. 2 lacs given by Gujral to the petitioner and credited to his account was without the knowledge and authority of the petitioners. I say that the petitioner can not claim ignorance of the same. It is hereby deny that petitioner become aware of the said entry only during the pendency of Arbitration proceedings and put the petitioner to the strict proof thereof. It is hereby deny that I have violated the laws and regulations as laid down by the Respondent No. (2). It is hereby deny that it is oppose to public policy as it seeks to give credence and justification to fraud and put the petitioner to the strict proof thereof.'

5. It may be mentioned at this stage that the Award of the Arbitral Tribunal would show in para 3 where it is clearly set out that in so far as the claim of Rs. 2.00 lacs is concerned the statement of account of Mr. Sabnis as received shows that he had already reversed the entry in respect of Rs. 2.00 lakhs which he had earlier

made.

Considering the need to bring order in the stock market and to remove dubious transaction SEBI had issued instructions in the form of Regulations. Regulation No. 3.2.1 requires that Trading Members shall ensure that appropriate confirmed order instructions are obtained from the constituents before placement of an order on the system and shall keep relevant records or documents of the same and of the completion or otherwise of these orders thereof. Regulation 3.2.2 sets out that the Trading Member shall make available to his constituent the NEAT order number and copies of the order confirmation slip/modification slip be dispatched to the constituent. Regulation 3.5.1 then provides that every Trading Member shall issue a contract note to his constituents for trades executed in such format as specified in ANNEXURE-2 with all relevant details as required therein to be filed in, and issued in such manner and within such time as prescribed by the Exchange. Under Regulation 3.5.2 a contract note shall be signed by a Trading Member or his Authorised signatory or constituted Attorney. There are other regulations. I need not for the moment revert to them as they may not be relevant for disposing of the controversy.

6. On behalf of the petitioner the learned Counsel challenges the award on the ground that the arbitral Tribunal was bound to follow the law in force which would include SEBI regulations and guidelines. Failure to follow the substantive law including subordinate law would affect the public policy of India and therefore, the award is liable to be set aside under Section 34(2)(ii). The Tribunal has given a clear finding that there were no contract notes between the parties, but has proceeded to pass an award by observing that not bothering to obtain written instructions is a common feature amongst the stock broking community and, therefore, would not go into the question of breach of regulations.

It is then contended that the award against Mr. Jagmohansingh Gujral having been set aside by this Court on 24th/25th March, 2003 the question of adjustment has to be set aside and consequently the claim of the petitioner had to be allowed and the award as such is liable to be set aside.

On behalf of the respondent their learned Counsel has contended as follows:-

(i) That the claim of the petitioner is barred by limitation. Even though the Arbitral Tribunal has not taken that into consideration it is open to the respondent hereto to raise this plea considering Section 3 of the [Limitation Act, 1963](#). Considering the date of the transaction and the cause of action clearly the claim is barred by limitation and for that reason the award is liable to be confirmed.

(ii) It is then contended that this was purely a case of adjustment as can be seen from para. 10 of the affidavit in reply. There is a finding of fact recorded by the Arbitral Tribunal. This Court hearing the challenge under Section 34 will not reappreciate the evidence and consequently the petition must be rejected.

7. With the above we may now consider the challenge and the contentions on behalf of the respondent. The first issue, therefore, would be whether it is open to the respondent in a case where a plea was not raised that the claim was barred by limitation to raise the said plea for the first time before this Court. In the earlier part of this order we have referred to the claim of the petitioner herein. The claim is of 5th March, 2001. The respondent in his affidavit did not raise the plea that this claim is barred by limitation. Consequently the said contention had to be rejected. This issue, therefore, not an issue for consideration before the Arbitral Tribunal. The issue of limitation on the facts pleaded would be a mixed question of fact and law. Under these circumstances considering the pleadings it is not possible to hold that the claim filed is barred by limitation. The Apex Court in *Oil & Natural Gas Commission v. M.C. Clelland Engineers S.A.* : [1999]2SCR830 dealing with the contention of limitation raised before it observed that when a no foundation has been laid in the course of the proceedings before the Arbitrator either in the pleadings or in the evidence it would be difficult to examine the plea as raised. Even otherwise in so far as the Limitation Act is concerned, the issue is whether in matters pertaining to the transaction under the Bye-laws of the N.S.E. where Section 3 of the Limitation Act would be attracted under which the Court would suo moto take notice of a plea of limitation. Under Section 2(4) of the Act of 1996 it is set out that this part except Sub-section (1) of Section 40. Section 41 and 43 shall apply to every arbitration under any other enactment for the time being in force. Arbitrations under NSE are under other enactments. Section 43(1) provides that limitation shall apply to the arbitration as it applies to proceedings in a Court.

Therefore, by a specific statutory provision under Section 2(4), provisions of the Indian Limitation Act are excluded in arbitral proceedings. Even if it is contended that the plea being a plea of public policy considering stale claims it will be difficult to examine the matter bearing in mind that in the absence of a plea being raised before the Arbitral Tribunal as to the arbitrability of the claim itself it would not be possible to examine the matter. The issue pertaining to arbitrability of the claim on the ground that it is barred by limitation would have fallen under Section 16 of the Act of 1996. In that light of the matter in my opinion I do not find any merit in the plea raised on the ground of limitation and consequently the same must be rejected.

8. We then come to the issue as to whether the award can be set aside on the ground of public policy. The case of the respondent in his pleading of 27th April, 2001 in answer to the claim of the petitioner was that he adjusted the amounts because the petitioner along with Jagmohansingh Gujral were jointly and severally liable to the respondent. The record shows that both the petitioner and Jagmohansingh Gujral had different accounts with the petitioner. That is reflected in the Ledger print produced by the respondent himself and as reflected in para. 5 of the judgment. The Arbitral Tribunal has proceeded on the footing that there were no contract notes, but could proceed on the oral evidence of one Mr. Agarwal. The plea which found favour with the Arbitral Tribunal was Jagmohansingh Gujral was indebted to the respondent for the sum of Rs. 21,26,171.30 and that the petitioner gave instructions to respondent to adjust the amounts due by petitioner to the respondent against the dues of Jagmohansingh Gujral. This is what was examined by the Arbitral Tribunal. This is clearly contrary to the pleadings of Respondent that the adjustment was made because both the petitioner and Jagmohansingh Gujral were jointly and severally liable. Secondly, the Arbitral Tribunal discarded the SEBI Regulations. SEBI Regulations would be the law in force which will govern the parties. SEBI Regulations require that all transactions between broker and constituents and brokers themselves are to be evidenced by contracts. These regulations are introduced as a matter of public policy to avoid speculations and bogus transactions on the Stock Exchange. SEBI itself was created as market regulator to curb and control fictitious, bogus and speculative transactions. Regulations issued by SEBI, therefore, have to be strictly

complied with so as to avoid speculations and bogus transactions on the stock exchange. The Arbitrator therefore, was bound to consider all those transactions which were supported by contract notes unless there was admission by the parties themselves as to the transactions which is not the case. In my opinion, therefore, the award of the Arbitral Tribunal suffers on two counts (1) considering a case which was not even pleaded by the respondent and (2) failure to take into account SEBI regulations which were binding both on the petitioner and respondent. The purported oral evidence of the respondent considered by the Arbitrator was basically in the nature of hearsay evidence and could not have been relied upon. Apart from that this is inconsistent with the case pleaded by the respondent in reply on 27th April, 2001 that the petitioner and Gujral were jointly responsible. If that be the case there would be no question of transferring the amount to Gujral's account as Noori's account could itself had been adjusted for the dues. The award was clearly contrary to the public policy of India and to that extent is liable to be set aside.

9. In view of the above, it is not necessary to deal with the third contention raised on behalf of the petitioner as the award against Jagmohansingh Gujral being set aside the award against the petitioner has to be ipso facto set aside.

10. For the aforesaid reasons, the petition is allowed and consequently the award is set aside.

Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associate/Personal Secretary of this Court.

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