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Court : Delhi

Decided On : Aug-01-1995

Reported in : 1995IIIAD(Delhi)773; 1995(2)ARBLR397(Delhi); 59(1995)DLT720; 1995(34)DRJ531

Judge : N.G. Nandi, J.

Acts : [Arbitration Act, 1940](#) - Sections 33

Appeal No. : Interim Application No. 8586 of 1993 and Suit No. 1962 of 1993

Appellant : Ashok Kumar

Respondent : Sanjeev Gupta and ors.

Advocate for Def. : Ms. Bhalla

Advocate for Pet/Ap. : Sunil Malhotra,; Sudhir Sharma,; R.K. Agarwal,;

Judgement :

N.G. Nandi, J.

(1) In the suit requiring defendants 1 & 2 to render true and correct accounts of the dealings on behalf of the plaintiff and upon such true and correct rendition of accounts, a decree for recovery of the amounts, so determined and found due and payable to the plaintiff and requiring defendant No.3 to take effective action

against defendants 1 & 2, defendants 1 & 2, by this LA., under Section 34 of the Arbitration Act, pray for the stay of the proceedings in this suit requiring the plaintiff to be directed to approach defendant No.3, Delhi Stock Exchange, for appointment of the arbitrator in accordance with the law.

(2) It is the say of the plaintiff that the plaintiff is a member of Kanpur Stock Exchange and the plaintiff started having dealings with defendants 1 & 2, who are the members of Delhi Stock Exchange (Defendant No.3), from September 1990, that dealings of purchase and sale of shares continued till February 1992 and during this period, large transaction has taken place with defendant No.2, for which, the plaintiff has not been paid his dues nor defendants delivered the shares for the last more than an year.

(3) As far as this I.A. is concerned, it has been the say of defendants 1 & 2 that all the transactions of shares between the plaintiff and defendants concerning defendant No.3 exchange are subject to the rules and bye-laws of defendant No.3, (Delhi Stock Exchange Association Limited); that under bye-law 247(b) the dealings with regard to the shares with the plaintiff constitute agreements between defendant No. 1 and the non-member and all dealings and transactions between the parties shall have to be submitted to an arbitrator, to be decided by arbitration as provided under Rules, bye- laws and regulations of the exchange; that all or any question related to such transaction, has also to be submitted to and decided by arbitration, as provided by bye-law 247(a) and (b) of bye-laws of defendant No.3; that the subject-matter in the suit can only be resolved by arbitration, the plaintiff is not entitled to maintain the present suit and the suit is liable to be stayed under Section 34 of the Arbitration Act

(4) The plaintiff is admittedly not the member of Defendant No.3 but a member of Kanpur Stock Exchange, as averred in the plaint. It is suggested from the plaint and the documents on record that there have been dealings concerning defendant No.3 stock exchange between the plaintiff and defendants 1 & 2. The allegation in the plaint is that there have been dealings of purchase and sale of shares between the plaintiff and defendants 1 & 2 from September, 1990 to February, 1992 and that the defendants did not pay the money due to the plaintiff and also did not

deliver the shares for the last more than five years.

(5) Ms. Bhalla, counsel for defendant No.3 has referred to clause (a) of Bye-law No.247 of Bye-laws and Regulations of defendant No.3 and contended that sharing of brokerage is no criterion between the member and any other person and that the plaintiff, who has the dealing concerning stock exchange, would fall within the ambit of word 'any other person', occurring in clause (a) and that word 'non-member' does not mean remiser, authorised clerk or employee or any other person only, but amongst other persons, non-member includes these persons also and that under clause (a), the dispute between the plaintiff and defendants 1 & 2 would be liable to be referred to the arbitrator and the suit stayed under Section 34 of the Arbitration Act. It is further contended that the contract note, which is in form 'A' in the bye-laws and also produced with the la, will also bring the plaintiff within the scope of clause (a) of bye-law 247.

(6) As against this, it is submitted by Mr. Malhotra, on behalf of the plaintiff that bye-laws are for administration and governance of defendant No.3; that the plaintiff being a non-member is not covered by clause (a) of bye-law 247; that the plaintiff does not share brokerage with the defendants; that the plaintiff served a notice dated 5.5.1992 and in reply thereto, defendants did not show their ready and willingness to go to the arbitration.'

(7) It would be of advantage to reproduce clause (a) of bye-law 247, which reads as follows :-

247.(A) All claims (whether admitted or not); differences and disputes between a member and a non-member or non-members (the terms 'non-member' and 'non-members' shall include a remiser, authorised clerk or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to Rules, By laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or relating to the rights, obligations and liabilities or remiser, authorised clerks, employees or any other persons with whom the member shares brokerage in relating to such dealings, transactions and contracts shall be referred to and decided by arbitration

as provided in the Rules, Bye-laws and Regulations of the Exchange.'

(8) In Articles & Association of defendant No.3, at page 24, vide Article No. 67, remiser has been defined to mean a person, who is engaged by a member primarily to solicit commission business in securities. In the instant case, it is not the say of the plaintiff that the dealings with defendants 1 & 2 were in his private capacity and not in the capacity of the broker. In the plaint, the relief claimed is that of accounts on the allegation that defendants did not pay amount due to the plaintiff and did not return the shares/securities for the last four years. The plaintiff has not in so many words said in the plaint that he was entitled to commission from defendants 1 & 2 for the transaction of shares/securities. In this regard, reference may be made to notice dated 5.5.1992, served by the plaintiff to defendants 1 & 2, in para 2 whereof, it has been stated that accordingly, the plaintiff agreed to take one percent commission on cash script and half per cent on specified shares; that the defendant accordingly stunted work on the instructions as well as within the four corners of rules of the stock exchange; that as a matter of fact, defendants are aware that it is the duty of the broker to maintain the account and to furnish the same to the principle from time to time. It may be seen from the contents of the notice that the plaintiff claimed to be entitled to 1% commission on cash script and half percent of specified shares and that defendant is alleged to have agreed to these terms.

(9) Plaintiff, as per the contents of the notice dated 5.5.1992, claimed commission as aforestated. According to clause (a), reproduced above, a non- member shall includeany other person with whom the member shares brokerage. In the present case, defendant No.1 is the member of defendant No.3 exchange. Notice dated 5.5.1992 speaks of the relation between the plaintiff and the defendant, namely, the plaintiff claiming to be entitled to the commission, as aforestated from the defendants 1 & 2 with regard to the transactions concerning defendant No.3 stock exchange. In the instant case, the plaintiff can be certainly said to be sharing the brokrage with defendant No.1, as suggested from the notice dated 5.5.92 and, thereforee, the plaintiff would be included within clause (a) as 'any other person with whom the member (defendant No.1) shares brokerage'.

(10) On behalf of defendants 1 & 2, reliance has been placed on the decision in the case of *Mis. Prasad & Company versus Shri Satish Gupta & Another* reported in : 56(1994)DLT267 . In the case before the learned Single Judge of this court, plaintiff as well as the defendant were the members of Delhi Stock Exchange Association Ltd. and the suit was for the recovery of the money on the strength of dishonoured cheque, issued by the defendant in favor of the plaintiff concerning the Stock Exchange transactions and in the light of these facts it has been held that 'the arbitration clause would apply and the suit liable to be stayed under section 34 of the Arbitration Act'. It can not be disputed even for a moment that clause (a) of bye- law 247 would apply to the members of defendant No.3 and all claims, differences and disputes also with any other person, with whom the member shares brokerage shall be referred to and decided by the arbitration, as provided in the Rules, Bye-laws and Regulations of the exchange.

(11) One of the contentions raised by the plaintiff is that the defendants have submitted to the jurisdiction of the court inasmuch as the defendants had prayed for time to file written statement to the suit and thereby they have taken step in the proceeding. In this regard, reliance has been placed on the decision in the- case of *Rachappa Gurudappa, Bijapur versus Guru Siddappa Nuraniappa and others* reported in : AIR 1989 SC635 , wherein it is observed that Section 34 requires that the application for stay of legal proceedings must be filed before the filing of the written statement or taking any other step in the proceeding. In order to be entitled to the stay under Section 34 of the Act, it is imperative to find out whether 'any other steps in the proceedings' have been taken before making of application for stay apart from written statement. 'Some other step' mentioned in in the section must undisputably by such step, as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. The expression 'taking any other steps in the proceedings' does not mean that every step in the proceedings would come in the way of enforcement of the arbitration agreement. It is further observed that 'where the counsel appearing for the parties to the suit had sought adjournment specifically for filing written statement and obtained time on more than one occasions for such purpose and subsequent application for stay of suit would not be maintainable. It was not only the time taken to consider whether written

statement should be filed as a defense to the plaint to enter into arena of controversy, but it was time taken to have the matter decided by the suit the party evinced an intention to have the matter adjudicated by the Court.'

(12) In the instant case, the plaintiff on 30.8.1993 obtained orders in the suit as well as is No. 7601/93, under order 39 Rule 1 & 2 CPC. Summons and notices were issued, returnable on 30.9.93. On 23.9.93, defendants 1 & 2 filed this is under Section 34 of Arbitration Act. On 30.9.1993, the plaintiffs counsel accepted notice of this is and prayed for time to file reply. Thus, it will be seen that even before the returnable date of 30.9.1993, defendants 1 & 2 came forward with the present application invoking the arbitration. On 30.8.94, defendant No.1 was present in person and the court passed order - 'let the written statement and reply be filed within 4 weeks'. It may be appreciated that before requiring defendant No.1 to file written statement on 30.8.94, on 23.9.93, defendants 1 & 2 submitted this is under Section 34 of the Act, which would mean that defendants did not take any other steps in the proceedings nor did they ask even for adjournment much less for filing written statement for contesting the suit and it can not be said that defendants submitted to the jurisdiction of the court.

(13) One of the contentions raised by the plaintiff is that the defendants did not show ready and willingness to go to arbitration by filing any reply to the plaintiffs notice dated 5.5.1992. It is true that defendants 1 & 2 did not file any reply to the plaintiffs notice. It may be appreciated that letter dated 18.11.93, by respondent No.3 to Shri S.Murthy, General Counsel, Sebi, Bombay, suggesting that the letter dated 8.10.93 was written by defendant No.3 regarding the present suit. It is further suggested that after voluminous correspondence, reply and counter replies, member (defendant) requested defendant No.3 for reference of the case either to arbitration or to court of law. It appears that defendant No.2 requested for the reference of dispute of arbitration. It appears that the plaintiff being a member of Kanpur Stock Exchange, had lodged a complaint dated 26.5.1992 against defendant No.2 for non-rendition of accounts and also for the recovery of unspecified loans to the tune of Rs.5.00 lakhs. Copy of the letter dated 14.5.1992 suggests that copy of the account for the year 1991-92 was submitted to defendant No.3 in evidence to the claim of A.Arora and Company from defendant

No.2, which is pending under the bye-laws of Defendant No.3. May not be in reply to the notice dated 5.5.93, but it is suggested that defendant was ready and willing to go to the arbitration. Under the circumstances, it can not be said that defendants 1 & 2 were not ready and willing to go to the arbitration, as per clause (a) of bye-law 247.

(14) Thus, it will be seen from the above that the plaintiff would be covered under clause (a) of bye-law 247 and defendants 1 & 2 have applied for stay of the suit under Sec-34 of the Arbitration Act, even before the returnable date of summons in the suit and notices in the is and the defendants having not taken any other steps in the proceedings and having not submitted to the jurisdiction of the civil court, would be entitled to the stay of the suit since it does not appear that defendants 1 & 2 were not ready and willing to go to the arbitration. In the above view of the matter, the proceedings in the suit being S.No-1962/93 would be liable to be stayed under Sec. 34 of the Arbitration Act.

(15) In the result, this is succeeds. Further proceedings in Suit No.1962/93 are stayed and the parties are directed to go to the forum of their choice, namely, the arbitration under clause (a) of Bye-law No.247 of defendant No.3. Plaintiff and defendants No. 1 & 2 shall approach defendant No.3 under bye-law 249 for the appointment of an arbitrator by the Board of Directors or the President of Defendant No.3-Exchange.

(16) I.A. stands granted accordingly.

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