

**Dharam Pal Arora Vs. Share Tips**

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**SooperKanoon Citation :** [sooperkanoon.com/705103](http://sooperkanoon.com/705103)

**Court :** Delhi

**Decided On :** Jul-11-2008

**Reported in :** 2008(3)ARBLR411(Delhi)

**Judge :** Hima Kohli, J.

**Acts :** [Arbitration and Conciliation Act, 1996](#) - Sections 4 and 8; Code of Civil Procedure (CPC) - Sections 151 - Order 6, Rule 17

**Appeal No. :** CS(OS) 986/1995

**Appellant :** Dharam Pal Arora

**Respondent :** Share Tips

**Advocate for Def. :** Sangram Patniak and ; B.K. Jha, Advs. for D-1 and 2

**Advocate for Pet/Ap. :** Amarjit Singh, Adv

**Judgement :**

**Hima Kohli, J.**

IA No.2042/2007 (by defendants under Order 6 Rule 17 read with Section 151 CPC)

1. This application is filed by the defendants stating inter alia that in view of an Arbitration Clause governing the parties, the defendants propose to amend their

written statement.

2. A brief reference to the relevant facts of the case is necessary. The plaintiff has instituted the present suit on 21.4.1995, against the defendants for recovery of a sum of Rs. 50 lakhs along with interest on account of balance amount payable by the defendants towards sale and purchase of shares. The defendants No. 2 and 3 are the partners of defendant No. 1 firm, M/s Share Tips, which deals in buying and selling of shares. The plaintiff is the sole proprietor of M/s Dharampal Arora Stock and Share Brokers and is a member of the Delhi Stock Exchange Limited. Vide order dated 24.4.1995, the suit was registered and summons were issued to the defendants. Appearance was entered on behalf of defendants on 20.10.1995, and time sought to file reply and written statement. Pleadings were completed and thereafter issues were framed vide order dated 15.5.2001. The plaintiff filed its affidavit by way of evidence on 4.5.2004. The cross-examination of the plaintiff's witnesses was concluded on 6.9.2006. The defendants filed their affidavits by way of evidence on 8.11.2006, and their cross-examination was concluded on 22.8.2007. In the meantime, the defendants filed the present application on 9.2.2007.

3. Counsel for the defendants submits that considering the fact that the arbitration clause is contained in the Memorandum of Articles of Association of the Delhi Stock Exchange Ltd., this Court does not have the jurisdiction to try and entertain the present suit and that the parties ought to be relegated to the Arbitrator to be appointed under the relevant clauses of the Articles of Association and the Bye-laws of the Exchange. In this regard, counsel for the applicant/ defendants refers to para 3 of his application, wherein the relevant clauses are reproduced. It is further stated that the contract notes and confirmation memos filed by the plaintiff on the record also make it evident that the parties are governed by the arbitration clause. He submits that as the arbitration agreement between the parties is valid and binding, it is necessary for the defendants to seek amendment of their original written statement filed on 23.7.1999.

4. The aforesaid application is vehemently opposed by the counsel for the non-applicant/ plaintiff. He submits that the amendment proposed by the defendants is

not permissible under the provisions of Order 6 Rule 17 CPC, for the reason that the said provision stipulates that no application for amendment shall be allowed after trial has commenced unless the Court comes to the conclusion that in spite of due diligence, the plaintiff could not have raised the matter before the commencement of the trial. It is stated by counsel for the plaintiff that the applicants/ defendants have failed to furnish in their application, any reason to show due diligence by the defendants in raising the issues sought to be raised by way of the present application. In this context, he not only relies on the list of documents filed by the plaintiff on the record being the contract notes which contain the arbitration clause, but also the documents filed by the defendants in April, 2000, which contain a copy of the Bye laws of the Delhi Stock Exchange Ltd., clauses of which are referred to by the defendant in the present application for seeking amendment to the plaint.

5. Counsel for the plaintiff further submits that the present application is an abuse of the process of law inasmuch as the same is barred under the provisions of Section 4 read with Section 8 of the [Arbitration and Conciliation Act, 1996](#). He submits that if the defendants wanted the subject matter of the present suit to be referred to arbitration, then the defendants ought to have filed an appropriate application to the said effect not later than when submitting their written statement, which the defendants failed to do in the present case. He submits that as a consequence thereto, the defendants have deemed to have lost their right to invoke the arbitration clause stated to be governing the parties.

6. In rebuttal, counsel for the defendants while not denying that the application filed by defendants does not explain as to how and in what circumstances, the defendants came to know about the aforesaid arbitration clauses, draws the attention of this Court to the rejoinder to the reply of the plaintiff. It is stated in para 2 of the reply to the preliminary objections that the defendant No. 2 only came to know recently from one of his friends, who is a member of the Delhi Stock Exchange Ltd., that there is a specific bar under the Bye laws of the Exchange for non-maintainability of the present suit. He further relies on a judgment of the Supreme Court in the case of Baldev Singh and Ors. v. Manohar Singh and Anr. reported at : AIR 2006 SC2832 to state that merely because the evidence had

begun, cannot be interpreted to mean that the trial was over as at the time of filing the present application, though the trial had commenced, the same was not over. He further relies on the following judgments to state that even if the defendant is a non-member, he is governed by the clauses printed in the contract notes just as the plaintiff is:

(i) Madan Mohan Rajgarhia v. Mahendra R. Shah and Ors. : 58(1995)DLT121

(ii) Madan Mohan Rajgarhia v. Mahendra R. Shah and Ors. : (2003)7SCC138 .

7. He also relies on the judgment of the Supreme Court in the case of Bombay Stock Exchange v. Jaya I. Shah and Ors. reported at : (2003)185CTR(SC)36 to state that the rules and regulations and Bye laws of the exchange have a statutory flavor and the said fact ought to weigh with the Court while deciding the present application.

8. Counsel for the plaintiff has relied on the following two judgments to submit that the provisions of Order 6 Rule 17 CPC are mandatory in nature and must be construed very strictly -

(i) Salem Adv. Bar Asso. v. UOI 2005 (RLR) 450 SC

(ii) Ajendraprasadji N Pande v. Swami Keshavprakeshdasji N. 2007 (RLR) 6 SC

9. I have heard the counsels for the parties and perused the averments on the record relied upon by the respective parties. The law with regard to the amendment of pleadings is well settled. Undoubtedly, the courts should be liberal in allowing amendment to the pleadings and in the case of amendment to the written statement as against amendment to the plaint, the Courts are normally more generous as the yardsticks applicable are different. However, the facts and circumstances of every case ought to be examined in the light of the relevant background.

10. In the present case, the suit is of the year 1995, the written statement was filed by the defendants about a decade ago in the year 1999. The evidence was also at the final stage when the defendants preferred the present application. All these

factors when taken together show that the amendments proposed to be incorporated in the written statement by the applicants ought not to be allowed at such a belated stage. The contention of counsel for the defendants that though the trial has commenced, it has not concluded as final arguments are yet to be addressed, can be taken note of only to be rejected. The proviso to Order 6 Rule 17 CPC imposes a restriction on the courts from allowing an amendment, if at the time of filing of the application, the trial has already commenced. The aforesaid provision does not refer to the 'conclusion of the trial' as sought to be distinguished by the counsel for the defendant. It also does not indicate that merely because the evidence of the defendants had not concluded, it ought to be assumed that the trial has not concluded and that the present application filed by the defendants could be entertained at such a belated stage. Reference made by the counsel for the plaintiff to the recent judgment of the Supreme Court in Ajendraprasadji's case (supra) is well taken. It was observed by the Supreme Court in the aforementioned case as below:

Para 56 - It is submitted that the date of settlement of issues is the date of commencement of trial. *Kailash v. Nankhu and Ors.* (supra) Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination in chief as date of commencement of trial, the matter will fall under proviso to order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter affidavit which proves lack of due diligence on the part of the defendant Nos. 1 and 2 (appellants).

Para 59 - The above averment, in our opinion, does not satisfy the requirement of Order VI Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier inspite of due diligence. As held by this Court in *Kailash v. Nankhu and Ors.* (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

11. In the aforesaid judgments, reference has also been made to the judgment relied upon by counsel for the defendant in the case of Baldev Singh. Once the case was set down for recording of evidence, the defendants cannot seek amendment of their written statement. For the said reason alone, the present application is liable to be rejected.

12. However, taking the matter further, considering that the amendment proposed by the defendants is for invoking the arbitration clause stated to be governing the parties, this Court is constrained to refer to the provisions of Sections 4 and 8 of the [Arbitration and Conciliation Act, 1996](#), which prohibit entertaining of any application after a party who proposed to invoke the arbitration clause, files its defence in a civil litigation. In the present case, the defendants filed the written statement almost a decade ago and for the said reason also the present application is not maintainable. Furthermore, the moment the defendants filed their written statement, they have deemed to have waived their right to invoke the arbitration clause governing the parties.

13. The plea of the defendants that the defendant No. 2 came to know very recently about the Bye laws, rules and regulations of the Delhi Stock Exchange through a friend and hence filed the present application for referring to the arbitration clause, governing the parties and for invoking the same, is belied by the fact that the defendants themselves chose to file certified copies of the Bye laws of the Delhi Stock Exchange which contained the arbitration clause along with the list of documents filed in the year 2000. Furthermore, the defendants have sought to rely on the contract notes issued by the plaintiff in the present case. A perusal of the record shows that in the year 1995 itself, the plaintiff had filed the said contract notes on the record along with his documents. Hence, it cannot be pleaded that it was not to the knowledge of the defendants that the parties were governed by the arbitration clause and had they known so, they would have invoked it.

14. In the above circumstances, it is held that the defendants have failed to show any diligence on their part, much less 'due diligence' for this Court to conclude that they could not have raised the matter sought to be raised by way of present application for amendment, earlier thereto. In fact, the gross delay on the part of

the defendants in filing the application is in itself sufficient to oust them. That apart, the application is also liable to be rejected as any such permission granted to the defendants shall amount to causing grave injustice and prejudice to the plaintiff, whose case has now ripened for final arguments after a period of thirteen long years. For all the aforesaid reasons, it is held that the present application is not maintainable and is liable to be rejected. Considering the fact that the pendency of the present application has delayed the suit proceedings for about one year, the same is rejected with costs of Rs. 5,000/- payable to the plaintiff through counsel within two weeks.

CS (OS) No.986/1995

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