

(2012) 07 BOM CK 0220

In the Bombay High Court

Case No : Appeal No. 692 of 2011 In Arbitration Petition No. 1040 of 2009 and Arbitration Reference No.F and O/M-0966 of 2008

Avalon Investment Private Limited

APPELLANT

Vs

Mukesh Brokerage and Financial Limited

RESPONDENT

Date of Decision : 24-07-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 43
Limitation Act, 1963 — Section 9

Citation : (2012) 114 BOMLR 2716

Hon'ble Judges : R.D. Dhanuka, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Sanjay Jain and Mr. Ramesh Jain, for the Appellant; Dilip Rai instructed by y and Ms. Aruna Singh, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—The appellant challenges an order of a learned Single Judge dated 9 June 2011 dismissing a Petition u/s 34 of the Arbitration & Conciliation Act, 1996. The Petition challenged an arbitral award which rejected the counter claim of the appellant. The respondent is a share broker registered with the National Stock Exchange. The appellant was a client of the respondent. On 30 March 2002 the appellant and the respondent executed a Member Client agreement and a client code was allotted to the appellant. The appellant commenced dealings in the NSE/BSE cash segment. The case of the appellant is that since 20 September 2007, it commenced dealings in the Futures and Options segment (F&O) of N.S.E. with the respondent. It is the case of the respondent that till 18 September 2007, settlement of accounts was done by payment of cheques against specific deals or bills. However, since the respondent started transactions in the F&O segment from 20 September 2007, payments were made on a lump sum basis and a ledger was maintained on a running account basis. It is the case of the respondent that since three different ledgers were maintained, it was not possible for the appellant to give cheques and

receive cheques from all three accounts and hence, as per the appellant's instructions, the balance was transferred from one ledger account to another as required.

2. According to the respondent, as on 18 January 2008, the appellant had a debit balance of Rs.26,18,786.50 in the F&O ledger, a debit balance of Rs.59,79,687/- in the margin account against a credit balance of Rs.1,80,581/- in the cash segment. On 21 January 2008 the appellant sold shares worth Rs.15,43,633.71 and gave a cheque of Rs.15,00,000/- dated 23 January 2008 to the respondent. On 21 January 2008 the market further went down and the loss of the appellant in the F&O segment increased. Though on 21 January 2008 the appellant had a debit balance of Rs.73,36,169.09 in the F&O segment and a debit balance of Rs.1,03,75,881.57 in the margin account, the appellant gave a cheque of only Rs.15,00,000/-. It is the case of the respondent that on 22 January 2008, the market went down further as a result of which the loss in the account of the appellant increased. Since the appellant failed to make any further payment, the respondent squared off the outstanding contracts of the appellant as per the rules, byelaws and regulations of the Exchange and informed the appellant. The respondent also delivered a copy of the contracts to the appellant. On 31 January 2008 the respondent addressed a letter to the appellant pointing out the debit balance of Rs.1,12,01,286.74 in the account of the appellant. The respondent called upon the appellant to send a cheque for the said amount by 1 February 2008, making it clear that if the appellant failed to pay the amount demanded, it would be forced to liquidate the shares of the appellant lying with it as collateral.

3. The appellant, by an email dated 1 February 2008 denied that there was any amount payable to the respondent. The appellant alleged that the entire amount in respect of the shares purchased by the appellant from the respondent was already paid and there was no outstanding. It is further alleged that inspite of the request made by the appellant, the respondent had not transferred shares in the demat account of the appellant. The appellant requested the respondent to transfer the shares held by the appellant and its group company in the demat account on the same day and instructed it not to sell any shares without the written consent and authority of the appellant.

4. On 4 February 2008, the appellant sold shares worth Rs.14.67 lacs, and instructed the Respondent to transfer the proceeds to the F&O ledger account. On 24 March 2008, the appellant sold some other shares worth Rs.8.26 Lacs. approximately and instructed the respondent to transfer the proceeds to the F&O Ledger account of the appellant. The appellant also gave cheques of Rs. 10,00,000/- and Rs.7,34,761.32 dated 19 February 2008 and 22 February 2008 respectively to the respondent. It is the case of the respondent that on 1 July 2008 and on 2 July 2008, the appellant instructed the respondent to sell some of the shares. The respondent accordingly sold the said shares as instructed by the appellant and delivered the contract to the appellant.

5. On 26 June 2008, the appellant sent an e-mail to the respondent directing it

to transfer the entire holding in the demat account of the appellant in Indusind Bank. On 10 July 2008 and 31 July 2008, the appellant sent reminders to the respondent requesting it to transfer shares to the demat account of the appellant.

6. On 11 August 2008, the respondent issued a letter to the appellant demanding a sum of Rs.35,51,931.42. On 1 October 2008, the respondent filed the Statement of case before the National Stock Exchange seeking an award against the appellant for Rs.35,51,931.42 and further interest thereon.

7. On 10 November 2008, the appellant filed a reply to the Statement of case denying the claim made by the respondent. In the said reply, the appellant raised a preliminary objection based on limitation. Relying upon bye-law 3 of Chapter XI of the National Stock Exchange Byelaws, it was submitted that the last transaction in the F&O segment was on 22 January 2008 and that the arbitration application should have been filed by the respondent on or before 21 July 2008. It was submitted that since the claim was lodged on 1 October 2008, it was barred by limitation.

8. The appellant also made a counter claim against the respondent seeking an amount of Rs.1,60,53,389.40 or Rs.78,47,097.32 with interest thereon from 21 January 2008 till payment and/or realization, and for return of the shares alleged to have been illegally sold by the respondent. On 10 February 2009, the respondent filed a composite affidavit by way of a reply to the counter claim filed by the appellant and a rejoinder to the reply. The respondent opposed the plea of limitation raised by the appellant. Simultaneously, the respondent also raised a plea of limitation against the counter claim made by the appellant.

9. On 27 April 2009, the arbitral tribunal rejected the claim as well as counter claim on the ground of limitation, holding that the claims, differences and disputes between the parties had arisen on 22 January 2008 and since the claim as well as counter claim were filed after the expiry of six months from 22 January 2008, they were barred by limitation. The relevant paragraphs of the award dealing with the issue of limitation read as under :

5. From the averments made by the Applicant in its Paras 8, 9 and 10 it is crystal clear that the "claims, differences and disputes" between them had arisen on 21.1.2008 and 22.1.2008. Since the parties could not resolve or settle their differences on or about 22.1.2008 the disputes continued to subsist thereafter. For the purpose of commencement of limitation, the only relevant date is 22.1.2008 and no subsequent dates can be considered to extend this point of commencement of the period of limitation though the learned Advocate for the Applicant has tried to draw our attention to the subsequent dates of transactions to bring the reference within the period of limitation of 6 months. It is a sheer fallacy to submit that the Applicant had good relations with the Respondent and that it had faith and trust in their relationship that the Respondent would make payment as per Respondent continued to make promised to make payments. The fact remains that the Respondent's liability to pay arose on 22.1.2008 and it did

not make payment till the expiry of 6 months period of limitation. The alleged good relations, faith and trust and the promises do not save the period of limitation and they never stop it from running. From the averments made by the Applicant and from the record produced by it we have no doubt in our mind that the "claims, differences and dispute" between the parties had finally arisen on 22.1.2008 and the period of limitation had commenced therefrom. We are, therefore, of the considered opinion that the Applicant ought to have filed this reference for arbitration under Chapter XI of the Byelaws within the period of 6 months i.e. on or before 21.7.2008. This reference or Application for Arbitration is filed on 1.10.2008. We agree with the submissions of Mr. Varanasi, the learned Advocate for the Respondent that the present reference or arbitration Application filed on 1.10.2008 is beyond the period of limitation of 6 months. We, therefore, reject the reference being barred by limitation. We dismiss the present Arbitration Application as not maintainable on the ground of limitation. There is no provision under the Byelaws, Rules and Regulations to condone the delay.

6. Those who live by sword must also be ready to perish by sword. The Respondent has succeeded to get the claim of the Applicant rusted on the ground of limitation. The respondent while resisting the Application inter alia on the ground of limitation, has also pleaded for its Counter Claim against the Applicant. We have to apply the same test of limitation to the claim of the respondent as Claim includes counter claim. The Respondent has put up its Counter claim for the first time in its Reply filed here before us on 10.11.2008. We are inclined to reject this counter claim on two grounds viz., on the ground of limitation and being a vague claim. According to the Respondent, it wants a sum of Rs.1,60,53,389.40 or a sum of Rs.78,47,097.32. There is absolutely no basis of such an uncertainty to such a huge extent. The Respondent has made such a huge claim malafide and not a genuine claim. It is only a counter blast. A claim or a counter claim must be a certain claim and not a vague one as is the case before us. We are, therefore, inclined to dismiss this Counter Claim on the ground of vagueness and without any genuine basis. Further, according to the Respondent itself the whole dispute had arisen on 21.1.2008 or on 22.1.2008 when the Applicant had the opportunity to sell the margin shares to the extent of losses that arose on 21.1.2008. According to the Respondent the Applicant had not sold those shares on 21.1.2008 or 22.1.2008 but from January to July, 2008. It further alleges that the Respondent had not ordered such sale and still the Applicant had sold as stated in its Para 12 of the Statement of Case. The last transaction in the F&O segment was on 22.1.2008. The whole claim, difference and dispute had arisen on 22.1.2008 even to base the Counter Claim. The Respondent has given several events with subsequent dates. But according to us those dates are not relevant for the purpose of limitation which has stopped after expiry of 6 months from 22.01.2008. The Respondent has raised its counter claim only on 10.11.2008., for the first time in its Reply. The Respondent, therefore, also cannot escape from the cut of the sword of limitation. The Respondent also must fail in its counter claim on the ground that it is barred by

limitation.

10. Being aggrieved by the impugned award dated 27 April 2009, the appellant filed a Petition (1040 of 2009) u/s 34 of the Arbitration & Conciliation Act, 1996. The respondent did not file any petition challenging the award rejecting the claim. The learned counsel for the parties state that both the parties have already filed civil suits in this court for recovery of the respective claims that were the subject matter of the arbitration and the suits are pending.

11. By an order dated 9 June, 2011, a learned Single Judge rejected the Arbitration Petition filed by the appellant.

12. Counsel appearing on behalf of the appellant made the following Submissions:

(a) The claim made by the appellant was in respect of the capital market segment (CM), whereas the claim made by the respondent was in respect of the alleged transaction in the F&O segment only. The appellant had by several letters, called upon the respondent to transfer the shares to the demat account of the appellant and had directed the respondent not to deal with the shares without instructions from the appellant. The cause of action for filing the counter claim arose on 11 August 2008, when the respondent, by its letter of even date, informed the appellant about the sale of shares and the appropriation of sale proceeds towards its alleged claim.

(b) The Arbitral Tribunal had given no opportunity to the appellant to lead evidence in support of its contention that the counter claim filed on 10 November 2008 was within time and was not barred by the law of limitation; and

(c) The finding of the arbitral tribunal as well as of the learned Single Judge, that the counter claim filed by the appellant was vague, is totally erroneous.

13. On the other hand, the learned counsel appearing for the respondent has made the following submissions :

(a) Even according to the appellant, the last transaction in the NSE (CM) segment was on 10 January, 2008. The cause of action for filing a counter claim arose on 10 January 2008 when the last transaction took place or in the alternative on 22 January 2008 when the respondent sold some of the shares of the appellant and appropriated the same against the debit balance of the appellant or in the alternative on 1 February 2008 when the appellant made the demand for return of shares and the shares were not returned;

(b) Clause (3) (authorization of group/family dealings) of the agreement dated 12 October 2006 authorized the respondent to set off part or whole of the collateral i.e. by way of appropriation of the relevant amount or by sale or transfer of all or some of the securities placed as margin/collateral, and/or any account of the client or of the members of the family of the client etc. The respondent had accordingly sold various shares held by the appellant and had

appropriated the sale proceeds towards the amount payable by the appellants in the F&O segment. The Respondent had maintained a running account. The cause of action, thus, in case of the claim and counter claim, is not separate or distinct;

(c) The appellant had not sought any opportunity to lead oral evidence before the arbitral tribunal;

(d) The correspondence exchanged does not extend the period of limitation; and

(e) Both the parties have admittedly filed civil suits in this court in respect of their various claims which were the subject matter of the arbitration proceedings and the suits are pending.

14. Section 9 of the Limitation Act, 1963 reads thus :

Continuous running of time : Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it :

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues

15. Section 43 of the Arbitration & Conciliation Act, 1996 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court.

16. In *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*, , the Supreme Court observed thus :

The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.

17. The Supreme Court has in *Steel Authority of India Limited Vs. J.C. Budharaja*, Government and Mining Contractor, has observed thus:

27. For deciding this controversy, we would first refer to the decision of this Court in the *State of Orissa and another etc. Vs. Sri Damodar Das*, wherein this Court held that S. 3 of the Limitation Act, 1963, enjoins the court to consider the question of limitation whether it is pleaded or not. The Court in paragraph 5 held as under:

Russell on Arbitration by Anthony Walton (19th Edn.) at P.4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued: Just as in the case of actions the claim is not to be brought after the expiration of a specified number

of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

18. In our opinion, even if the plea of the appellant that the last transaction in the Cash Segment took place on 10 January 2008 is accepted, the counter claim ought to have been filed on or before 9 July 2008. The counter claim filed on 10 November 2008 was barred by the law of limitation. Even if the commencement of the cause of action is considered to be 22 January 2008, when the respondent sold some of the shares of the appellants so as to reduce the debit balance in the account of the appellant, the counter claim filed on 10 November 2008 is time barred. Admittedly, the appellant, by its letter dated 1 February 2008, had demanded transfer of all its share holding which the respondent had failed to transfer. Even if the letter dated 1 February 2008 addressed by the appellant to the respondent demanding transfer of shares in the account of the appellant is considered, the respondent having failed to transfer the shares in the account of the appellant, the cause of action for filing the arbitration claim had arisen on 1 February 2008 itself. The counter claim thus filed on 10 November 2008 was in either view of the matter, barred by the law of limitation.

19. In our opinion, the cause of action for invoking the arbitration agreement arose when the appellant first acquired the right of action or the right to require that an arbitration take place upon the dispute concerned. The cause of action arises when the amount has first become due and payable. Clause 3 of Chapter XI of the Byelaws provides that all claims, differences or disputes shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. From the perusal of the reply cum counter claim filed by the appellant, it is clear that even according to the appellant, the cause of action for filing the arbitration proceedings ought to have arisen from the date of dispute or the last transaction. In our view, the arbitral tribunal had rightly accepted the plea of limitation raised by the appellant in respect of the claims made by the respondent that the cause of action for filing the arbitration claim arose from the date of the last transaction, being 22 January 2008, in so far as the F&O segment is concerned. The Arbitral Tribunal, had also, rightly applied the same principle in respect of the counter claim filed by the appellant. The cause of action for filing of the counter claim also arose on 22 January 2008 when the respondent broker had sold some of the shares of the appellant, so as to appropriate the sale proceeds thereof in view of the debit balance in the account of the appellants. The making of a demand by the letter dated 1 February 2008 did not extend the period of limitation. Similarly, the subsequent reminders sent by the appellant on 26 June

2008, 10 July 2008 and 31 July 2008 also, did not extend the period of limitation. The exchange of correspondence does not extend the period of limitation. The period of limitation can only be extended when a party against whom a cause of action has arisen admits the liability and seeks time to make payment or makes part payment, thereby admitting the liability. It is not the case of the Appellant that the respondent acknowledged any liability or made any part payment to the Appellant after 10 January 2008, 22 January 2008 or 1 February 2008. The learned counsel for the respondent, therefore, is right in his submission that whichever date out of the aforesaid three dates is considered as the date of the commencement of the dispute, the counter claim filed on 10 November 2008 is *ex facie* time barred.

20. Once the cause of action had arisen, it did not stop, subsequently. Once limitation has begun to run upon the accrual of the cause of action, it would run continuously and it ceases to run when the party commences legal proceedings in respect of the cause of action in question. Limitation stopped running in respect of the counter claim only when the appellant lodged the counter claim with the Arbitral tribunal on 10 November 2008. The Appellant did not apply for arbitration and therefore, when the respondent applied for arbitration in respect of its claim, limitation in respect of the counter claim would not stop on the date of receipt of notice invoking the arbitration clause by the appellant.

21. There is no substance in the plea raised by the appellant that the arbitral tribunal did not give an opportunity to lead oral evidence to prove the date of acquiring knowledge for the commencement of the cause of action. From the perusal of the record, we do not find that any such plea or application was made by the appellant before the arbitral tribunal. The initial burden was on the appellant to prove that the counter claim filed by it was within time. The appellant failed to discharge this initial burden. The arbitral tribunal, was therefore, right in rejecting the counter claim on the basis of the record.

22. We also do not find any substance in the submission made by the appellant that the counter claim made by the appellant was not vague and that the finding of the arbitral tribunal as well as of the learned Single Judge is erroneous. In any event, since the counter claim made by the appellant was found to be barred by limitation, any such observation on the counter claim made by the arbitral tribunal is of no consequence.

23. The arbitral tribunal as well as the learned Single Judge were right in rejecting the counter claim made by the appellant as time barred. We do not find any reason to interfere with the impugned decisions. The appeal is dismissed.

There shall be no order as to costs.