
(2001) 10 BOM CK 0078
In the Bombay High Court
Case No : Arbitration Petition No. 251 of 1999

G.R. Didwania

APPELLANT

Vs

A.C. Choksey

RESPONDENT

Date of Decision : 30-10-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 28, 34

Citation : (2002) 4 ALLMR 187 : (2002) 2 ARBLR 401 : (2002) 4 BomCR 793 : (2002) 2 BOMLR 716 : (2004) 120 CompCas 744 : (2002) 2 MhLj 604

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : S.U. Kamdar and A.A. Mukvi, instructed by Purohit and Co, for the Appellant; P.K. Vora, instructed by Pramodkumar and Co., for the Respondent

Final Decision : Allowed

Judgement

F. I. Rebello J.

1. The petitioner by the present petition, impugns the award dated December 23, 1998, in Arbitral Reference No. 156 of 1997. There were transactions between the petitioner and the respondent. The respondent is a member of the Stock Exchange, Mumbai. The petitioner was his constituent. It was the case of the respondent that on January 15, 1997, the petitioner had placed an order with the respondent for purchase of 7,000 SIV shares. The respondent purchased the shares on the said date at the rate of Rs. 59.75 being the market rate on the relevant date. It was the case of the respondent that on January 15, 1997, while he was talking on the phone in his office with his O.C.B. client regarding GDR transactions on SIV shares, the petitioner who had been afforded BOLT facilities by another member-broker Sri Brij Mohan Sagarmal having his office just adjoining to that of the applicant, overheard the talk and showed interest in the transaction. The petitioner asked him to buy 7,000 SIV shares at Rs. 59.75 knowing fully well that it was a GDR transaction and delivery will be according to GDR standards and will be completed between 30 and 60 days. It is in these

circumstances, that those shares were purchased. The delivery note clearly mentioned "delivery after thirty days" on it. The petitioner received the contract note. However, that delivery was offered on February 26, 1997, he refused to accept the shares on that day and several times thereafter. Subsequent to exchange of correspondence with both the petitioner and the Stock Exchange, Bombay, the respondent invoked the arbitral clause and filed his claim in respect of the said transaction as also in respect of other disputes. The documents filed before the arbitrators included newspaper clippings, in support of the contention that it was normal practice, custom or usage that the delivery period in respect of shares underlying GDR standards is 30 to 60 days. Reference is made to the reply filed by the petitioner on June 4, 1997, in reply to the respondent's letter dated May 10, 1997, wherein it was contended according to the respondents that he had agreed to purchase 7,000 shares on spot basis and delivery thereof was agreed to be made within four weeks as the said contract of purchase of shares was a special contract for delivery within four weeks. In the said letter it was also denied that the petitioner agreed to purchase shares as per the GDR standards. The case of the petitioner in the letter was that he refused to accept the delivery of the shares on the ground of non-delivery within four weeks. Apart from the said shares, disputes were also raised in respect of some other transactions. In respect of those transactions, the matter was settled as recorded in the minutes of proceedings before the arbitrator. The only dispute that survived was in respect of suit shares. Reference was earlier made to the Bench of which one of the arbitrators resigned. The said vacancy was filled in and time for passing the award was enlarged.

2. In reply to the respondent's claim, the petitioner filed his reply dated November 29, 1997. It was contended that the transactions was spot delivery transaction and was to be given within four weeks, time being essence of the contract. The petitioner denied that the respondents had issued contract for the sale of 7,000 SIV Industries Ltd. shares mentioning therein delivery after 30 days. The respondent was called upon to produce contract note for the purpose of verification as to whether the period of delivery of 30 days was accepted by the petitioner. The claim of the petitioner was that he wanted the delivery of the shares within four weeks but shares were not delivered within the said period. On January 20, 1998, the petitioner filed a second reply. The grievance made therein was that the respondent had failed to produce on record copy of the contract note for showing that the contract note undertaking delivery of 30 days was personally accepted. In these circumstances, they only awarded damages at the rate of Rs. 22.50 per share along with interest as set out in the award. It may be pointed out that the case of the petitioner in the correspondence and in the stand before the Arbitral Tribunal was that these were spot transactions. It was further contended that the petitioners had not agreed to the delivery period after 30 days but were agreeable to accept them if it was within 30 days. Refusal was on account of the fact that the shares were delivered after 30 days. It was also a stand taken by the petitioners that GDR transactions in SIV shares was not

permitted.

3. On the reference being made, the Arbitral Tribunal found in favour of the respondents and observed that considering the material placed on record relating to several GDR transactions entered into with other clients, the delivery period was between 30 and 60 days. A finding was given that the transaction was a GDR transaction. Further finding is recorded that as a matter of fact, that appears to be the normal practice in respect of GDR transactions obviously because the formalities involved in such transactions take that much time to complete. After having so recorded a finding the Tribunal found the explanation given by the respondents for holding the shares for quite a long time after the refusal as not satisfactory. The Tribunal found that the respondents ought to have taken steps to sell the shares. In these circumstances, they only awarded damages at the rate of Rs. 22.50 per share along with interest as set out in the award. The contract note which was the subject matter was produced before the Tribunal. The Tribunal found that there is no endorsement on the note whether the transaction in question was a GDR transaction. It also found that the endorsement "delivery after 30 days" is absent. The respondent explained that by pointing out that the contract note was taken on computer, no copy was taken out at the time of the contract and that the endorsement "delivery after 30 days" was written by hand while delivering the original contract note to the respondent. That delivery was sought to be effected could be seen from the record of February 26, 1997. The Arbitral Tribunal also found that that aspect need not be determined as the petitioner in his reply dated June 4, 1997, had specifically admitted that in written endorsement "delivery after 30 days" was on the contract note.

4. At the hearing of the petition, on behalf of the petitioner, it is contended as under :

(a) that the arbitrators themselves had given a finding that the transaction is a GDR transaction. Once that is to be so in terms of bye-law 354(a)(i) the transaction is void.

(b) In the alternative it is contended that if the stand of the respondent is accepted that it is special delivery contract then the procedure in so far as special delivery is concerned and the bye-laws thereto have not been followed and in these circumstances also the contract would be void considering bye-law 354(a) (4).

5. On the other hand on behalf of the respondents, it is contended that the finding recorded by the arbitrators that it is a GDR transaction cannot be read literally, considering what has been set out in the earlier part of the order. It has to be read as a transaction of underlying shares in respect of a GDR transaction which was not prohibited considering notice No. 114 of 1995 dated January 5, 1995, issued by the stock exchange. Therefore, this being a transaction of underlying shares of GDR would not be prohibited by bye-law 354.

6. In so far as the second contention made on behalf of the petitioner is concerned, it is pointed out that considering Section 28 of the Arbitration and Conciliation Act, 1996, as also bye-law 226(2), the contracts made on the exchange in all cases are deemed to be made subject to the rules, bye-laws, regulations and usages of the stock exchange. The Tribunal, it is contended has given a finding that in so far as underlying shares of GDR are concerned, that it is normal usage that the transaction is completed between 30 and 60 days and in these circumstances, considering both bye-law 226(a) and Section 28 of the Arbitration and Conciliation Act, 1996, it cannot be said that the transaction is void considering bye-law 354(a)(4).

7. In view of the above contention the issues that have to be considered and decided are as follows :

(a) Whether the transaction was purely a GDR transaction and hence, transaction in securities which were not tradable on the Bombay Stock Exchange and consequently the transactions were rendered void under bye-law 354.

(b) Whether the transaction being special delivery, usage of the stock exchange became a part of the contract and in these circumstances, would not be rendered void on account of bye-law 354(a)(4).

8. Let me first address myself to the first aspect, namely, whether in fact arbitrators have recorded a finding that this is purely a GDR transaction. Much would depend on the finding given on the said count. Throughout the pleadings between the petitioner and the respondent as also the exchange of correspondence, it was neither the case of the petitioner nor the respondents that they had agreed to purchase GDR's. The stand throughout of the petitioners was that they had ordered purchase of shares of SIV. The only dispute was the nature of these shares. The case of the respondent was that the petitioner was aware that these were shares covered by GDRs and these were the shares which were agreed to be purchased as their market value was less than the market value prevailing on the exchange on the date when the order was given. In the compilation of documents filed before this court, we have the contract note in respect of the transaction. The date is shown as January 15, 1997, statement No. 9607 and the statement period is January 13, 1997 to January 17, 1997. Below that in handwriting is "delivery after 30 days". This contract note was sought to be delivered by the respondent to the petitioner only on February 26, 1997. Therefore, it is clear that what the parties had agreed to purchase were shares of SIV. These were the shares in respect of which the company had issued GDR's (global depository receipt). By themselves these GDRs would not be tradable or were permitted to be traded on the Stock Exchange, Mumbai. However, these GDRs in the books of the company also bear distinctive numbers. The Bombay Stock Exchange by its notice No. 114 of 1995 dated January 5, 1995, addressed to the members of the stock exchange, were informed that delivery in 70,60,000 equity shares of which shares in question form part, were permitted to be traded on the stock exchange with effect from January 5, 1995.

This court at the stage of admission had sought clarification from the Bombay Stock Exchange. The communication between the Deputy General Manager (District) and the Deputy General Manager, Legal Department, was placed before this court. That sets out as under :

"We wish to clarify that underlying equity shares of GDR are permitted for trading of resident Indians or in other words resident Indians are not permitted to trade in GDR but only in underlying equity shares."

9. On behalf of the petitioners, it is contended by their learned counsel that what that means is that only after the company converts the GDR's into shares are the shares to be traded on the Bombay Stock Exchange and not before that. On the other hand on behalf of the respondents, it is contended that there can be transactions in GDR but only for the underlying equity shares. In the instant case, it is contended that what the respondent did by the transaction was not transaction of GDRs but in the underlying equity shares of GDR's. The entire dispute arose from the following finding rendered by the Tribunal which reads as under :

"This documentary evidence clearly shows that the transaction in question was GDR transaction."

10. To my mind this finding cannot be read in isolation. It has to be read in consonance with the stand of the parties and the other documentary evidence which clearly indicates that the respondents therein had sought to purchase GDRs from the foreign buyer. In so far as the petitioner is concerned what was to be sold were the underlying shares of those GDRs. That being the case, to my mind it will be difficult to hold that this is purely a GDR transaction. It was faintly sought to be contended that this court cannot substitute its findings for the findings of the arbitrator. In my opinion, it is not a finding de hors finding of the arbitrator. It is merely an explanation sought to be given to the finding of the arbitrators in consonance with their earlier finding that these were transactions in respect of shares underlying GDRs. The first contention must be rejected as bye-law 354(a)(i) would not be attracted.

11. We then come to the second contention in so far as special delivery is concerned. For that purpose, we will have to consider the bye-laws of the Bombay Stock Exchange. Bye-law 44 falls under the heading "Bargains, transactions, dealings and contracts". It is set out that for the purpose of these bye-laws and regulations, the term "bargain, transaction, dealings and contracts" shall have one and the same meaning unless context indicates otherwise. Though bye-laws 45 and 46 are really not relevant in so far as the present case is concerned, some reference may be made to them. Bye-law 45 sets out that for the purpose of bargains, the securities in which dealings are permitted on the exchange shall be distinguished as under :

(i) cleared securities, i.e., securities admitted to dealing on the exchange and placed by the governing board on the cleared securities list; and

(ii) non-cleared securities, i.e., securities other than cleared securities.

12. Bye-law 46 sets out conditions of admission to the cleared securities. We are really not concerned as the securities in question fall in other category namely non-cleared securities.

13. We then come to bye-law 48. Bye-law 48(i) refers to spot delivery. Bye-law 48(ii) refers to "hand delivery" and bye-law 48(iii) refers to "clearing" and bye-law 48(iv) which is the subject matter of the present controversy speaks of "special delivery" and which reads as under :

"for "special delivery" i.e., for delivery and payment within any time exceeding fourteen days following the date of the contract as may be stipulated when entering into the bargain and permitted by the governing board or the president as provided in these bye-laws and regulations."

14. In other words, delivery after 14 days following the date of the contract is also permitted if a special delivery and complies with other requirements as set out therein. Under bye-law 49, it is set out that the bargains in spot delivery, hand delivery and special delivery may be made in any security in which dealings are permitted on the exchange. In other words, in so far as shares underlying GDR transactions are concerned, being securities tradable on the exchange can be the subject matter of special delivery. The next relevant bye-law is bye-law 56. Bye-law 56 sets out that the bargains for special delivery may be entered into with the permission of the governing board or the president in the case of new issues or when securities are sent for renewal, sub-division, consolidation, conversion, exchange or registration or when securities have to be received from abroad or when securities cannot be delivered for any other reason within fourteen days following the date of the contract. The governing board or the president may give such permission generally or members may make application for such permission in the form prescribed in the relative regulation or in such other form as the governing board may from time to time prescribe in modification or substitution thereof.

15. The next relevant bye-law referred to and relied upon by the parties is bye-law 226 (a) which sets out as under :

"All contracts made by a member or with a non-member for the purchase or sale of securities in which dealings are permitted on the exchange shall in all cases be deemed made subject to the rules, bye-laws, regulations and usage of the exchange which shall be a part of the terms and conditions of all such contracts and they shall be subject to the exercise by the governing board and the president of the powers with respect thereto vested in it or him by the rules, bye-laws and regulations of the exchange."

16. A conjoint reading of bye-law 56 and bye-law 226(a) would lead to the following conclusion :

In the first instance usage of the stock exchange is deemed to be part of the

contract in respect of dealings on the stock exchange. In other words apart from rules, bye-laws and regulations, if there be usage that also forms part for the contract. This has a bearing as it is contended that in so far as shares underlying GDRs are concerned, it is usage that they are normally delivered between 30 and 60 days.

17. Bye-law 56 provides that in so far as bargain for special delivery is concerned, the governing board or the president may give such permission generally or members may make application for such permission in the form prescribed in the relative regulation or in such other form as the governing board may from time to time prescribe in modification or substitution thereof.

18. Again in so far as special delivery is concerned, there are two aspects firstly there can be general permission given by the governing board. If such permission is given then in that event no individual permission is required. However, where general permission is not given individual permission is required. This will have a bearing considering bye-law 48(4) which provides for delivery period and payment within a period not exceeding fourteen days which can be done by entering into bargain on being permitted by the governing board or the president as provided in the bye-laws and regulations.

19. Therefore, what follows is that any transaction where the delivery period is by special delivery and which is more than fourteen days such transaction if there is permission generally would not require the permission of the governing board or the president. If general permission has not been given then permission as contemplated by regulation 3.3 has to be given after applying in the form as set out in terms of regulation 3.3. Can the permission referred to in the award of the arbitrators by the stock exchange by their notice 114 of 1995 dated January 5, 1995, be considered to be general permission as contemplated by bye-law 56 for the special delivery as contemplated by bye-law 48(4). To my mind clearly this notification cannot be said to be enlarging time for delivery. This notification only emphasizes that the bar banning trading in GDRs has been removed and that shares underlying GDRs can be transacted. This contention has also not been raised on behalf of the respondent. By the said notice the stock exchange has permitted underlying shares of the GDR to be transacted on the Bombay Stock Exchange which they otherwise would not be. Therefore, it cannot be said after considering bye-law 56, that the governing board has issued general notification. In the instant case, admittedly no special permission has been taken.

20. Therefore, the only limited issue which still requires consideration is whether "usage" as sought to be contended by the respondents can be read into the expression "give such permission generally" or on reading of bye-law 226 it can be said that the contract is subject to usage.

21. The expression usage will have to be read in the context of the bye-laws and unless it is capable of standing by itself. Is it so capable of so standing when bye-law 226(a) uses the expression that all contracts are subject to the rules, bye-

laws, regulations and usage what it really means is when that usage forms part of the contract. On the other hand, the bye-laws also specify as to what can be bargains in securities. They are listed in bye-law 48. In so far as special delivery is concerned, it specifically sets out that the time must be stipulated in the contract when entering into and permitted by the governing board or president as provided in the bye-laws and regulations. In other C-120-48 words, even though under bye-law 226 contracts are subject among others to usage, when it comes to special delivery it must satisfy two things ; that the date was entered into the contract and it has been permitted by the governing board or the president. If the contention of the respondent was to be accepted/ that such transaction beyond the period of fourteen days are permissible by usage, then the latter part of the bye-laws which requires permission of the governing board would be rendered otiose. It is never the rule of interpretation that legislation primary or subordinate should be rendered otiose. It has to be given its due meaning. Article 56. indicates that there can be transactions where delivery may not be possible within 14 days, as for example where securities have to be received from abroad or securities cannot be delivered for any other reasons within 14 days. Shares underlying GDRs would be a typical illustration. It can only be delivered on the company issuing shares in so far as those GDRs are concerned. Therefore, while reading bye-law 48(a), clearly usage will have to be excluded. The natural meaning of the language will have to be given. If the natural meaning has to be given, requirement of permission of the governing board or the president as provided in the bye-law and regulation is mandatory unless as pointed out earlier, there has been general permission given. It cannot be said that the usage would amount to general permission. If it was so, it could have been provided by the bye-laws itself. Usage cannot be added to bye-law 48(4) and thereby read into the bye-law something not provided for by the bye-law. In my opinion, therefore, a reading of bye-laws 48, 56 and 226 in so far as special delivery is concerned, in the absence of general permission by the governing board, special permission contemplated by the regulation will have to be taken. In the instant case, such permission is not taken. If such permission is not taken, such transaction would clearly be hit by the provisions of bye-law 354(4). In other words, a contract for special delivery without permission of the governing board or president as provided by the same bye-laws and regulations is null and void. The finding of the Tribunal that usage will save such transaction is clearly contrary to bye-law 354(a)(4) and other bye-laws which have been discussed.

22. Once I have come to the conclusion that the transaction which was the subject matter of the arbitral proceedings is void, considering bye-law 354(a)(4), then the next question is under which part of Section 34 of the Act of 1996, the award can be set aside. Bye-law 354 starts with the words "member shall not enter into following contracts and any such contracts if entered into in contravention of the provisions in that behalf contained in these bye-laws and regulations shall be void".

23. The contract therefore for special delivery without permission of the governing board or president would thus be void. In other words, though contract in respect of shares underlying GDR could have been entered into if it was to be special delivery then the permission of the governing board was required. Therefore, because of the failure to take permission the contract itself becomes void. The effect of bye-law 354 was considered by a learned single judge of this court in reference under the Arbitration and Conciliation Act 1996, in the case of *Syndicate Bank v. Kishore Narotamdas Amerchand* in Arbitration Petition No. 273 of 1999 CLC 2000. The learned single judge of this court by his order dated October 6, 2000, held that in the event the contract itself is void, recourse cannot be had to the arbitration clause. For that purpose, the learned judge relied upon the judgments of the apex court under the Forward Contracts Act. That judgment was decided under the Arbitration Act of 1940. u/s 16 of the Arbitration and Conciliation Act, 1996, unlike the Act of 1940, even though the contract may be void, the arbitral clause has to be considered as an independent agreement and will not suffer the consequences of being void. It will be open to the Arbitral Tribunal to decide the issue of voidness of the contract while considering the dispute under the arbitral clause. The judgment in *Syndicate Bank* will not apply.

24. The question therefore is whether the challenge to the award in these circumstances would fall under any of the grounds as contained u/s 34 of the Arbitration and Conciliation Act, 1996. The law is clear that the arbitrator under the Act of 1996 has to proceed by following the substantive law of India as in force as set out u/s 28 of the Act of 1996. The foundation of exercising jurisdiction for grant of relief is therefore, based on the facts that the award passed has taken into consideration the substantive law of India which will include the bye-laws of the stock exchange. Bye-laws framed by the Bombay Stock Exchange have been held to be an exercise in subordinate legislation. It would therefore, be law. If the award is passed without considering the substantive law, then it would be arbitrary. The jurisdiction of the Arbitral Tribunal to pass an award would only be in the event the contract entered into was a valid contract. Considering bye-law 354 of the bye-laws, the contract entered into in contravention of the said bye-laws is void. The arbitrator therefore, had no jurisdiction to pass the award based on the void contract or in passing the award has acted arbitrarily. See *Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor*, . Though that judgment was decided under the Act of 1940, the same principles would apply. An award based on a contract which is void would be arbitrary. An award without jurisdiction or an award which is arbitrary, would be contrary to the public policy of India and consequently be covered by Section 34(b)(ii).

25. In the light of the above, the petition is allowed in terms of prayer clause (a). There shall be no order as to costs.