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(2012) 11 BOM CK 0018

In the Bombay High Court

Case No : Arbitration Petition No. 897 of 2009

Hansraj Sohanlal Gouthi, HUF	APPELLANT
Vs	
Standard Chartered STCI Capital Markets Ltd., (Formerly known as UTI Securities Ltd.) and Ayush Securities	RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34, 34(4)
Securities and Exchange Board of India Act, 1992 — Section 11(1)
Securities Contracts (Regulation) Act, 1956 — Section 10

Citation : (2012) 11 BOM CK 0018

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Mangal Bhandari assisted with Ms. Khushbu Prabhu, for the Appellant; D.D. Madon, along with Mr. Zubin Behram Ramdin, Ms. Isha Kishandas instructed by y M/s. Bharucha and Partners, for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioner, original Respondent, has challenged impugned award dated 13 July 2009 passed by the Arbitral Tribunal, constituted under the Rules, Bye-laws and Regulations of the Bombay Stock Exchange (for short, BSE), basically the rejection of the counter-claim solely on the ground of limitation, u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act). The dates and events are relevant for the purpose of deciding the present Petition.

On 24 November 2007, Hansraj Gouthi suffered a major stroke and was in a critical condition, totally incapacitated till his death on 30 July 2008. On 23 October 2007, Respondent No. 1 filed Arbitration Application before the BSE for claim of Rs. 40,98,609.08 against the Petitioner. On 25 November 2007, the Petitioner denied the claim of Respondent No. 1 stating that the same were fraudulent transfers and an amount of Rs. 33,50,814.02 was due and payable to the Petitioner. On 25 February 2008, the Petitioner filed reply/counter-claim stating that the Respondent''s claim was illegal, malicious and fraudulent and

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prayed for payment of Rs. 33,50,814.02.

2. On 13 July 2009, the Arbitration Award was passed, whereby, claim of Respondent No. 1 was rejected stating that they were unable to substantiate authorization of transactions entered pursuant to 24 November 2006. The Arbitrators also rejected the counter-claim of the Petitioner on the ground of limitation under the BSE Bye-law of 252(2).

3. Being aggrieved by the impugned Award, the Petitioner filed the present Petition on 8 October 2009. The matter was listed for final hearing on 30 October 2012. The Respondent Bank has not challenged the impugned award against the rejection of their main claim. We have to concern only with the rejection of counter-claim of the Petitioner.

4. On 11 August 2010 and 9 February 2011, the circulars of SEBI stating that the Limitation Act, 1963 (for short, the Limitation Act) has been made applicable for filing of the Arbitration References with further clarification that the Arbitration Applications which were rejected solely on the ground of limitation should be reheard on merits, if the limitation period of three years is not yet over.

5. The relevant clauses of circular dated 11 August 2010 are as under:-

5.1 The limitation period for filing an arbitration reference shall be governed by the law of limitation, i.e. The Limitation Act, 1963.

13. This circular is issued in exercise of the powers conferred u/s 11(1) of the Securities and Exchange Board of India Act, 1992, read with Section 10 of the Securities Contracts (Regulation) Act, 1956 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and shall come into effect from September 1, 2010.

This circular supersedes the earlier various circulars of the Securities and Exchange Board of India (for short, SEBI), (from 9 July 1999 to 2 December 2009) and also modifies the provisions relevant to Arbitration contained in various circulars from the year 1997 to 2010.

6. By subsequent circular dated 9 February 2011, the Arbitration mechanism of Stock Exchanges referring to the applicability of the provisions of the Limitation Act has been further elaborated in the following words:-

This is in continuation of circular ref. No. CIR/MRD/DSA/24/2010 dated August 11,2010, which inter alia prescribed that the limitation period for filing an arbitration reference shall be governed by the provisions of the Limitation Act, 1963. In this regard upon consideration of various representations received by SEBI and pursuant to the discussions held with the representatives of stock exchanges, it has been decided that the limitation period, as modified to three years in terms of Limitation Act, 1963, shall be applicable to cover inter alia the following cases:-

i. where three years have not yet elapsed and the parties have not filed for

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arbitration with the stock exchange, or

ii. where the arbitration application was filed but was rejected solely on the ground of delay in filing within the earlier limitation period of six months; and three years have not yet elapsed;

2. The cost for arbitration in such cases would be as under:-

i. Cases which were not filed earlier will be subject to the fee amount in terms of SEBI circulars dated August 11, 2010 and August 31, 2010.

ii. For cases filed earlier and rejected on the ground of bar of limitation as per the earlier limitation period of six months, the amount of fee already paid would be deducted from the amount computed in terms of SEBI circulars dated August 11, 2010 and August 31, 2010. The balance shall be borne by the parties to the arbitration in the manner specified vide SEBI circulars dated August 11, 2010 and August 31, 2010.

7. Both the learned Counsel appearing for the respective parties restricted their arguments revolving around the point of limitation, by referring to the circulars and BSE Bye-laws 252 (2). Bye-law 252 (2) of BSE reads as under:-

252(2) Time period for filing of Arbitration Reference:-

(2) The Arbitrators shall not take cognizance of any claim, complaint, difference or dispute unless the same has been received by the Exchange within six months from the date of the transaction or from the date on which the client claims to have given the instruction/order to buy or sell a security or from the date on which the client claims to have paid money or given a security, whichever is earlier.

Any dispute as to whether a claim, complaint, difference or dispute falls within the ambit of this clause shall be decided by the Arbitrators.

Provided that the Governing Board or the Executive Director may, from time to time, appoint a committee to amicably settle all claims, complaints, difference and disputes that are referred to it.

Provided further that when such claims, complaints differences and disputes are referred to the aforesaid Committee, the time taken in amicable settlement of such claims, complaints, differences and disputes shall be excluded while computing the period of limitation.

Provided further that this Bye-law shall be applicable in respect of all Arbitration Cases filed on or after the date when this Bye-Law comes into effect. Provided further that in respect of Arbitration Cases arising out of the transactions having been done prior to the date on which this Bye-law comes into effect, the limitation period of six months shall be computed from the date on which this Bye-law comes into effect.

8. As per the Bye-Laws, as prescribed referring to the Arbitration, a period of six

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months from the date on which the claim, difference or dispute arises and/or deemed to have been arisen, was in the field at the relevant time in the year 2006-2007 and even prior to that. Those being agreed rules, have binding force between the parties. All the parties acted accordingly at the relevant time.

9. There is no serious dispute with this regard. Such Bye-laws of BSE has been declared void by the Delhi High Court in Smt. Biba Sethi and Mr. Nitin Sethi Vs. Dyna Securities Limited, by judgment dated 17 March 2009. The relevant paragraph of the judgment is reproduced in Mukesh Garg Vs. O.J. Financial Services Ltd. & Ors. FAO No. 285/2005 by the Delhi High Court, decided on 15 February 2010, which is as under:-

37. Consequently, both these petitions are allowed and the arbitral awards holding that the claims of the petitioners are barred by time, are set aside. The petitioners shall be entitled to approach the NSE and/or the Arbitral Tribunal for adjudication of the claims of the petitioners. In the facts of the case, the parties are left to bear their own costs.

10. The Delhi High Court, further set aside such similar places awards in Mukesh Garg (Supra) in the following words:-

9 The appeal is allowed and the impugned order is set aside. Consequently, the Arbitral Award holding the claim of the appellant as time barred is also set aside and the matter is remanded back to the Arbitral Tribunal for passing fresh award on merits. The copy of this order along with the original arbitration record be sent back to National Stock Exchange, 4th Floor, Jeevan Vihar Building, Parliament Street, New Delhi-110001 through a special messenger.

10. In the facts of the case, the parties are left to bear their own costs.

11. In the present case, Respondent No. 1 filed Arbitration Petition on 23 October 2007. The Petitioner filed rejoinder on 25 February 2008, which was stated to be beyond period of limitation of six months. The Arbitration Award was passed on 13 July 2009. The Delhi High Court declared the restricted period of six months referring to the similarly situated Bye-laws of National Stock Exchange of India Limited (for short, NSEIL) to be void and the same was further reiterated in Mukesh Garg (Supra) on 15 February 2010. Therefore, on the date of passing of the award, in the present matter, the Delhi High Court has already declared such restricted period of six months, by such exchanges, null and void.

12. The SEBI, by 11 August 2010 circular, referring to the earlier circulars by superseding and by modifying the same, specifically announced and extended the provisions of the Limitation Act and the period for filing the Arbitration reference. Therefore, in all respect, everybody need to confer and read the provisions of the Limitation Act while dealing with any disputes, differences arising out of the monetary claim or counter-claim and similarly situated circumstances.

13. The period of six months has been substituted and the period of 3 years has

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been made applicable accordingly. The SEBI, thereafter, by circular dated 9 February 2011 clarified the position as recorded and reproduced above.

14. The learned senior counsel appearing for the Respondent submitted that the circulars in question cannot be extended to the facts and circumstances of the present case. By circular dated 9 February 2011, the SEBI has clarified that the provisions of Limitation Act should be applicable only to the cases, where three years have not yet elapsed and the parties have not filed for Arbitration with the stock exchange, or where the Arbitration Application was filed but was rejected solely on the ground of delay in filing within the earlier limitation period of six months and three years have not yet elapsed. I am not inclined to accept the same as the counter-claim was filed on 25 February 2008, though there was no such issue of close of transactions, even on that day. From the date of circular i.e. 9 February 2011, even if we go back to the previous three years period, it would be 9 February 2008. The counter-claim was filed on 25 February 2008. It is difficult to overlook even the same circular whereby, it is specifically mentioned that "this is in continuation of circular dated 11 August 2010, which inter alia prescribed that the limitation period for filing an arbitration reference shall be governed by the provisions of the Limitation Act". It means the intention was to provide and prescribe three years period instead of six months. By circular dated 9 February 2011, it was further clarified by referring to three years period, retrospectively, not yet elapsed. I am inclined to observe therefore, that the intention from plain reading of this circular and in the background of the decisions given by the Delhi High Court, is to give benefits of limitation to the maximum claimants/litigants, to settle their disputes through the existing Arbitration proceedings/Bye-laws, but subject to the existing provisions of the Limitation Act.

15. In the present case, the learned Counsel appearing for the Petitioner submitted that it is only with respect of the alleged claim against them, they filed counter-claim on 25 February 2008. The transactions were never closed. There was no occasion for them to file and/or raise any dispute against the Respondent. However, as the claim was raised, they filed counter-claim based upon the existing provisions of their running account. The submission, therefore, was also made that there is no question of dismissal of their counter-claim on the ground of delay or even on merits.

16. In the present case, on 23 October 2007, Respondent No. 1 invoked Arbitration Clause. The Petitioner on 25 November 2007 denied the claim. On 25 February 2008, filed the counter-claim. By the impugned award, on 13 July 2009, the same was dismissed along with the claim of Respondent. The Respondent did not challenge the award. The challenge is only made by the Petitioner by filing Petition on 8 October 2009. Now, the matter is listed for final hearing and heard accordingly on 30 October 2012.

17. I am, therefore, of the view that this itself means the limitation period so prescribed by the circulars are extendable to such pending cases also. All these

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pendency itself means the claims, so filed by the concern party, have not attained finality and/or not elapsed. The Court, therefore, u/s 34 of the Arbitration Act, needs to consider this substantial change in law, which certainly goes to the root of the claim/counter-claim so raised by the person like the Petitioner. The SEBI has prescribed and announced that the general principle of Limitation Act are applicable to settle the Arbitration disputes between the parties through the same bye-laws, then rejection of such claim on the ground of earlier six months period, would definitely against the principle of law of limitation. There is no dispute with regard to the contents of the Circulars. It also means, the Court needs to consider the period of three years in place of six months, for filing Arbitration references. In this case, as recorded above, in view of the decisions of Delhi High Court as referred above, the restricted period of six months, declared null and void and/or ineffective on 17 March 2009 itself. The Arbitral Tribunal even on the date of passing of award, ought to have taken note of this fact and the provisions of law. I am of the view that both these circulars if read together, it covers all the cases which are not adjudicated finally on the ground of delay of six months. The Award so passed and if challenged u/s 34, unless confirmed, cannot be stated to have attained the finality. The ground of limitation so raised under such Petition, therefore, are entitled the person like the Petitioner to claim the benefits. The Court, u/s 34, would definitely entertain such Application, as the award so passed by overlooking the law and the provisions of the limitation, itself was contrary to the express provisions and the public policy. Therefore, I am inclined to set aside the award and remand the matter for rehearing only with regard to the counter-claim so rejected by the Arbitrator.

18. The learned Counsel appearing for the Petitioner has relied on the Judgment of India Infoline Limited Vs. Shyamlal Daulatram Vachhani, wherein I have observed as under:-

4 In the present case, the Tribunal has considered, as per the BSE Ledger, the basic date 30 January 2008. Considering the scope and purpose and to give an another opportunity to the Petitioner to submit his case, as it falls within the ambit of this circulars/provisions, I am inclined to grant the same. The impugned award is dated 22 September 2009. The Petitioner has filed this Petition on 23 December 2009. The same is pending till this date. Therefore, taking over all view of the matter and if the provisions of Limitation Act are extended, the learned Arbitral Tribunal has to re-consider this facet by giving the opportunity to both the parties.

19. I have already observed in M/s. Gulraj Engineering Construction Co. Vs. Hotel Corporation of India Ltd. (Arbitration Petition No. 341 of 2009, dated 7 September 2012) that the Court u/s 34(4) of the Arbitration Act, is empowered to remand the matter back. In the present case, the only question here is of counter-claim of the Petitioner. There is no challenge raised by the Respondent with regard to the rejection of their claim. Therefore, I am inclined to remand the

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matter with directions to the Tribunal to adjudicate the counter-claim of the Petitioner in accordance with law taking note of both these circulars and existing provisions of law. Therefore, taking over all view of the matter, the following order:-

ORDER

a) The impugned award dated 13 July 2009 is quashed and set aside only to the extent of rejection of counter-claim.

b) The matter is remanded back to the Arbitral Tribunal to re-consider the same.

c) The Arbitral Tribunal to hear and dispose of the matter expeditiously.

d) Rest of the award is maintained.

e) There shall be no order as to costs.

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