
(2014) 01 BOM CK 0110
In the Bombay High Court
Case No : Arbitration Petition No. 443 of 2003

Harinarayan Bajaj

APPELLANT

Vs

M/s. Sheth Securities Pvt. Ltd. and The National Stock
Exchange of India Ltd.

RESPONDENT

Date of Decision : 18-01-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 23(3) 34
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2014) 01 BOM CK 0110

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Zal Andhyarujina instructed by and M/s. Druv and Co, for the Appellant; Sunanda Kumbhat, Ms. Ruchita Salvi and Ms. Krutika Suhadia, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka J.

1. By this petition filed u/s 34 of the Arbitration and Conciliation Act, 1996, petitioner has impugned the award dated 28th May 2003 passed by the learned arbitrators allowing the claims made by the respondents and rejecting the counterclaim filed by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under:

(a) Respondent No. 1 was a trading member of respondent No. 2 NSE of India Ltd. The petitioner was constituent of respondent No. 1 at the relevant time. The petitioner became constituent of respondent No. 1 sometime in August 2000. The petitioner trading in shares and used to receive payments and/or delivery of shares. It is the case of respondent No. 1 that the petitioner had placed orders for purchase of shares of Amaraja Battery Ltd. in settlement number 10 and issued cheques for Rs. 19 lakhs and Rs. 35 lakhs towards margin for purchase of shares on 12th March 2001 on NSE and BSE. On the basis of the orders placed

by the petitioner, respondent No. 1 purchased shares of the said Amaraja Battery Ltd. on behalf of the petitioner on 12th March 2001. It is the case of respondent No. 1 that respondent No. 1 issued contract notes, bill and ledger account to the petitioner. Since the exposure limit of respondent No. 1 had exhausted, their terminal was deactivated by the NSE. According to respondent No. 1, since the price of the shares in the market fell, petitioner stopped the payment of the cheques issued by him towards margin for purchase of shares on 12th March 2001 and consequently the cheques issued by the petitioner were returned unpaid. Respondent No. 1 after issuing notice u/s 138 of the Negotiable Instruments Act, initiated complaint against the petitioner which is still pending.

(a) On 19th March 2001, respondent No. 1 called the petitioner to pay Rs. 12,33,39,189.80 as per the account ledger attached to the said letter. Respondent No. 1 informed the petitioner that non-payment by the petitioner has disabled respondent No. 1 from paying the dues to the NSE arising due to his positions and has caused a loss of prestige, loss of peace of mind and loss of money and that they were squaring position of the petitioner.

(b) By letter dated 24th March 2001, respondent No. 1 issued notice u/s 138 of the Negotiable Instruments Act and called upon the petitioner to pay Rs. 12,33,39,189.80 and also sum of Rs. 19 lacs. By letter dated 2nd April 2001, the petitioner admitted that he had given a cheque for sum of Rs. 19 lacs as and by way of margin money to respondent No. 1 for purchase on behalf of the petitioner in the scrip of Amara Raja Batteries Ltd. On 12th March 2001 another cheque of Rs. 35 lakhs was given in favour of M/s. Madhukar Sheth in order to purchase the shares of Amara Raja Batteries Ltd. It was alleged that the said purchase was conducted by respondent No. 1 on behalf of the petitioner. The petitioner alleged that respondent No. 1 had not provided him with the daily obligation sheet and the delivery details of the transactions conducted by respondent No. 1 on his behalf in settlement No. 10 of NSE on one pretext or the other.

(c) By letter dated 3rd May 2001, respondent No. 1 denied the allegation made by the petitioner in letter dated 2nd April 2001 and once again contended that the petitioner had instructed to purchase shares of Amara Raja Batteries Ltd. and had promised to give more amount to respondent No. 1. The petitioner had issued stop payment notice and as a result thereof, the cheques issued by the petitioner were dishonoured. It was also placed on record that the petitioner had promised to give Pay Order of Rs. 50 lakhs to respondent No. 1. Respondent No. 1 once again called the petitioner to pay Rs. 12,33,39,189.90 on 11th June 2001.

(d) Respondent No. 1 filed statement of case before the arbitral tribunal inter-alia praying for an amount of Rs. 12,33,39,189.80 plus interest @ 18% p.a. and damages against the petitioner. Respondent No. 1 annexed copy of the Party Ledger and various other documents including the contract notes and correspondence exchanged between the parties. It was mentioned in the statement of case that petitioner had to pay sum of Rs. 12,61,53,607.60 towards

his purchases to respondent No. 1 after giving credit of Rs. 31,12,000/- for his margins and a small previous debit of Rs. 2,97,583/- and remained the sum of Rs. 12,33,39,189.80. It is averred in the statement of case that the non payment by the petitioner caused default of respondent No. 1 in pay-in to the NSE and the petitioner should pay the said amount to respondent No. 1 in order to pay to NSE. Respondent No. 1 also prayed for Rs. 100 crores by way of damages from the petitioner for non payment and consequent closing of their business and repercussions thereto. It was stated that the petitioner was trading in the scrip through 15 brokers and had purchased a total quantity of about 15 lakhs shares of Amara Raja Batteries and had picked up more than 10% of the equity without informing any Stock exchange or SEBI thus cheating investors and brokers. The petitioner had filed written statement in the said arbitration proceedings before the arbitral tribunal. Petitioner also filed various applications from time to time before the arbitral tribunal for one or the other order or directions against the respondents.

(e) The petitioner by his letter dated 26th May 2001 to respondent No. 1 admitted that he had given a cheque of Rs. 19 lakhs to respondent No. 1 on 9th March 2001 and a cheque of Rs. 35 lakhs in favour of the sister concern of respondent No. 1 M/s. Madhukar Sheth on 12th March 2001 as a margin money to enable respondent No. 1 to make purchase on his behalf in the scrip of Amara Raja Batteries Ltd. on 12th March 2001. It is however alleged that on 12th March 2001, respondent No. 1 did not purchase the shares of Amara Raja Batteries Ltd. and accordingly the petitioner instructed his banker to stop the payment of the said two cheques and arranged for Pay Order of Rs. 50 lakhs in favour of M/s. Sheth Securities Pvt. Ltd. in lieu of the aforesaid two cheques. It is alleged that respondent No. 1 still did not purchase any shares and thus there was no need for him to hand over the Pay Order to respondent No. 1. Petitioner admitted that it was not his suggestion that he had not instructed respondent No. 1 to carry out transactions in the scrip of Amara Raja Batteries Ltd. before 2 p.m. on 9th March 2001 for which he had also received contract notes and for which the relevant information had also been provided by him to the investigating authorities. Petitioner admitted the purchase of shares on 9th March 2001 up to 2 p.m. and denied the shares of Amara Raja Batteries Ltd., to have been purchased by him after 2 p.m. on 9th March 2001. The petitioner alleged that respondent No. 1 had adequate margins lying with them for all his trades with respondent No. 1 in the scrip of Amara Raja Batteries Ltd.

(f) By letter dated 15th June 2001 petitioner acknowledged the receipt of bill for settlement No. 10 of the NSE along with letter dated 6th June 2001 showing that respondent No. 1 had purchased 394614 shares of Amara Raja Batteries Ltd. on his behalf and denied the purchase of 125000 shares of Amara Raja Batteries Ltd. allegedly made on 12th March 2001 as shown in the said bill.

(g) It is the case of respondent No. 1 that since the petitioner failed to make payment of his dues, respondent No. 1 committed default in pay-in to the NSE

and resultantly the exchange had withheld the delivery of such shares of Amara Raja Batteries Ltd. purchased by respondent No. 1 on behalf of the petitioner. As a result of non-payment, respondent No. 1 was declared defaulter by the exchange on 19th June 2001. All the shares purchased by respondent No. 1 which were in custody of the NSE except for the shares of Amara Raja Batteries Ltd., purchased by respondent No. 1 on behalf of the petitioner, were sold out by the NSE. Shares of Amara Raja Batteries Ltd., however could not be sold as SEBI had impounded the same as the investigation pertaining to the said shares of Amara Raja Batteries Ltd., was going on. Petitioner filed written statement dated 6th January 2003 before the arbitral tribunal. Respondent No. 1 filed affidavit of witness before the arbitral tribunal. Petitioner did not cross examine the said witness.

(h) NSE had filed a Company Petition bearing No. 104 of 2002 against the respondents in this Court. In the said Company Petition, the NSE filed affidavit of one Mr. Vikram Kadam in the month of July 2002. In the said affidavit it was disclosed that 394614 shares of Amara Raja Batteries were sold by the exchange for an amount of Rs. 2,45,10,069.42 and an amount of Rs. 13,82,972.50 was received towards dividend which amounts were appropriated against the dues of respondent No. 1. It is further stated that in so far as shares of Amara Raja Batteries Ltd., which were purchased by respondent No. 1 on behalf of the petitioner were concerned, the same were sold only after SEBI allowed the NSE to do so and the monies received from such sale were applied towards the discharge of liability of the first respondent and due credit had been given in that regard. In para 15 of the said affidavit, it was stated that shares of Amara Raja Batteries Ltd. purchased by respondent No. 1 on behalf of their client Mr. Harinarayan Bajaj were initially not allowed to be sold as per the directives of SEBI on account of on going investigation in respect of price rigging of the shares of the said company. It was only after clearance of SEBI, the NSE sold those shares and utilized the sale proceeds towards the liabilities of the respondent No. 1 to the NSE.

(i) It is the case of respondent No. 1 that respondent No. 1 came to know of the sale of shares by NSE and subsequent credit given only through affidavit filed by the NSE in this Court in Company Petition No. 104 of 2002 in July 2002 and accordingly respondent No. 1 filed statement on 10th December 2002 before the arbitral tribunal stating that the NSE had on 11th July 2002 given credit of Rs. 13,82,972/50 as dividend on 394614 shares of Amara Raja Batteries Ltd. and further credit of Rs. 2,45,10,069.42 for sale of those shares which were withheld by the NSE for non-payment. It is stated in the said submission/application that since the shares were purchased in the account of the petitioner herein, respondent No. 1 wished to pass on the total credit to the account of the petitioner herein and sought to reduce the claim of principal amount of Rs. 12,33,39,189.80 to Rs. 9,74,46,147.88 plus interest at applicable rate thereon till payment. A copy of the statement which was submitted by the NSE showing the credit of Rs. 25,893,041.92 towards sale of securities was annexed to the

said statement dated 10th December 2002 by respondent No. 1 before the arbitral tribunal. The petitioner filed written submissions on 6th January 2003 before the arbitral tribunal in response to the said statement dated 10th December 2002 and opposed the said submission. Petitioner also contended that respondent No. 1 could not amend the statement of claim without filing formal and appropriate application as set out in Section 23(3) of the Arbitration and Conciliation Act 1996. It was contended that there was change of cause of action and the application was barred by law of limitation. Petitioner also raised an issue that since respondent No. 1 was a deemed defaulter of NSE Ltd., with effect from 30th March 2001, the entire accounts filed by respondent No. 1 was exclusively barred by Bye laws governing the arbitration proceedings at the National Stock Exchange of India and therefore any amendments/changes sought to be made by respondent No. 1 herein to the said claim would be infructuous. Petitioner also annexed a copy of letter dated 30th March 2001 from respondent No. 1 to the NSE requesting the exchange to sell all their securities lying with the exchange including the shares purchased by the clients of respondent No. 1 but not released by NSE and the shares deposited with the exchange as capital by respondent No. 1. By the said letter, respondent No. 1 herein also sought from the Stock Exchange about the break up of their net dues payable to the Stock Exchange after giving credit for the sale value of all the shares.

(j) On 28th May 2003, the arbitral tribunal rendered an award directing the petitioner herein to pay to respondent No. 1 a sum of Rs. 9,74,46,147.88 with interest thereon @ 12% p.a. from 11th June 2001 till date of payment and rejected the counter-claim made by the petitioner. The petitioner has impugned the said award in this petition.

2. (a) Mr. Andhyarujina, learned counsel appearing on behalf of the petitioner submits that the original claim filed by respondent No. 1 as on 11th June 2001 was for the purchase consideration of the shares of Amara Raja Batteries Ltd. After a period of one and half years that is on 10th December 2002, respondent No. 1 had preferred some sort of amendment application and sought to amend its claim and made claim for damages. Respondent No. 1 in the said application, for the first time had alleged that the disputed shares for which the original claim was filed by respondent No. 1 had been sold by the Stock Exchange and credit for such sale as also the dividend accrued thereon was sought to be offered by respondent No. 1 to the petitioner. It is submitted that there was thus change of cause of action and respondent No. 1 claimed damages by the said application dated 10th December 2002. Learned counsel submits that the claim made on 10th December 2002 was completely a new claim and there was a complete change in cause of action and the complexion of the original claim could not have been permitted by the arbitral tribunal. It is submitted that the said application for amendment was an improper application based on an unacknowledged and unsigned document alleged to have been maintained by the clearing corporation of Stock Exchange which even did not mention all the shares of Amara Raja Batteries Ltd. having been sold and/or any dividend having been received on the

same. Learned counsel submits that the arbitral tribunal did not render any opportunity to the petitioner to file his further written statement and/or his defence and to examine relevant witnesses on this aspect which were sought to be introduced for the first time by respondent No. 1 in the said amendment application.

(b) In the alternative, it is submitted by the learned counsel for the petitioner that even the initial claim filed by respondent No. 1 was itself not maintainable which was a claim for price of shares of Amara Raja Batteries Ltd. It is submitted that respondent No. 1 itself had accepted the fact that it never had the shares of that company for which the original claim was initiated against the petitioner. Learned counsel submits that the original claim itself was thus not maintainable. Respondent No. 1 could not claim a price for shares when those shares were not available with it. Respondent No. 1 ought to have filed a claim if any, only after NSE closed out outstanding transaction for having respondent No. 1 declared as defaulter.

(c) Mr. Andhyarujina, learned counsel submits that though the arbitral tribunal had acknowledged the fact in the impugned award that by amendment application, respondent No. 1 had placed fresh/new facts based on completely new cause of action, has not considered the issue of limitation while allowing such application for amendment. It is submitted that though respondent No. 1 was fully aware that pursuant to the request made by respondent No. 1 itself to the stock exchange to squeeze and sell the shares of respondent No. 1 outstanding on its broker's card as far back vide its letters dated 27th March 2001 and 30th January 2001, respondent No. 1 chose to file a claim to seek purchase consideration of the said shares. It is submitted that even according to NSE Ltd., as is clear from the affidavit dated 11th July 2002 filed in Company Petition by the Exchange that the computer terminal through VSAT connections and two leased line connections of respondent No. 1 was operational and functional till 17th April 2002. Respondent No. 1 could view the relevant files including debit notes/bills etc. by logging on to the extranet ISP server of the Exchange through it and could have downloaded the necessary files containing information regarding alleged sale of the said shares conducted by the Exchange. Respondent No. 1 did not file such application earlier. Learned counsel submits that thus, the application for amendment of the claim by making a claim for damages as on 10th December 2002 was barred by limitation. It is submitted that the arbitral tribunal has allowed a time barred claim.

(d) Mr. Andhyarujina, learned counsel placed reliance on unreported Judgment of this Court delivered on 28th June 2005 in ARBP No. 171 of 2004 in case of Harinarayan G. Bajaj Vs. Indcap Securities & Anr. in support of his submission that on the date of amendment of the cause of action from claim of price for shares sold to claim for damages, the said claim was barred by law limitation. Reliance is placed on paragraph 4 of the said Judgment which reads thus:

4. Now perusal of the record shows that initially the claim was made by the

respondent no. 1 for the price of the shares which the Respondent no. 1 had purchased for the petitioner, therefore, the claim was not for damages and on the petitioner paying the price, the petitioner would have been entitled to delivery of the shares. Really speaking as the claim was made for the price of the shares and it being movable property i.e. the shares would stand transferred to the petitioner and the respondents would be merely holding that property till the price is paid. Therefore, it is essential part of the claim that on receiving the price, the property i.e. shares should be delivered and should not be disposed of. The moment that property is disposed of, the respondent no. 1 becomes disentitled to claim the price of the shares, because the property, the price of which has become recoverable, ceases to be in the custody of respondent no. 1. It is therefore, clear that the claim that was made after the sale was conducted, was the claim for damages. Though in allowing the amendment, the Arbitral tribunal has held that the claim has not been changed but merely the claim has been reduced by the amendment application, the same Arbitral tribunal has held that the result of sale has the effect of altering the original claim. The relevant observations are to be found in paragraph 9.3 of the Award, wherein the Arbitral tribunal has held that:-

We consider that it was necessary on the part of the applicant no. 1 to seek leave of this Panel and also give notice to the other party, if the proposal of Applicant no. 1 to sale the shares has to take place, which has the effect of altering the original claim. As already expressed by us in the earlier paragraph no. 7.2 above, the action taken by the Applicants unilaterally, is considered by us, as improper.

The Arbitral tribunal has thus clearly held that the claim made after the sale, alters the original claim. However, while considering the application for amendment, the same Arbitral tribunal has held that the claim is not being altered and it remained the same, what is being done is that merely the original claim is reduced. It is clear that by the amendment what was being done by the respondents was that the respondents were claiming damages from the petitioner, and therefore, there was an obligation to make claim within a period of six months in terms of bye-laws of the National Stock Exchange. Even if it is assumed that the amendment was not barred by the law of limitation and the claim could be made, in my opinion, on the basis of material that is available on record, the claim of damages could not have been awarded, as the new claim for damages was based on the validity of the sale unilaterally conducted in the month of October, 2001. In paragraph 7.2(c) the arbitral tribunal has observed thus, in relation to the same:-

7.2(c) One of the other points pleaded by the Respondent was the action of Applicant no. 1 to arbitrarily taken action to sell the shares after a period of nearly 7 months, without giving notice to the Respondent and without even taking leave of the Panel who were seized of the matter. The Panel of Arbitrators are inclined to find some merit in the Respondent's pleadings. When once an arbitration reference is made and a Panel is constituted for that purpose, the

claimant is not expected to take unilateral action which would change the claim made, when the same is placed before the Panel. The arbitration proceedings are quasi-judicial and as such, the matter is like sub-judice. Proper course would have been to take leave of the Panel for whatever action Applicant no. 1 proposed to do if it involves any changes. Applicant no. 1 has not adhered to this procedure. We have to express our disapproval of the unilateral action on the part of Applicant No. 1 and have to state that it was not proper. We will take suitable inference on this conduct of Applicant No. 1, while deciding the matter on merits.

The aforesaid finding of the Arbitral Tribunal shows that the Arbitral Tribunal has clearly held that the sale unilaterally held was not proper and the Arbitral Tribunal has expressed its dis-approval for having conducted such sale. It is an admitted position that the respondent no. 1 has not led any evidence to show that the sale was valid and proper and therefore, in the absence of any evidence on record and on the face of the findings recorded by the Arbitral Tribunal, the claim for damages on the basis of the sale could not have been, in my opinion, allowed by the Arbitral Tribunal. Thus, taking overall view of the matter therefore, the award made by the Arbitral Tribunal cannot be sustained and it is liable to be set aside. In the result therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside. The respondents are directed to pay cost of this petition to the petitioner as incurred by the petitioner.

(e) Mr. Andhyarujina then submits that the alleged claim was in the nature of damages and such claim had to be proved. My attention is invited to the letter dated 21st April 2002 addressed by the advocates of the first respondent to the NSE calling upon them to produce the details of sale of 394614 shares of Amara Raja Batteries Ltd., held by the exchange on account of respondent No. 1 including the date of sale and rate of sale etc., date on which delivery in respect of those shares was received by the Exchange and the date on which credit for the same was given in the account of respondent No. 1. Pursuant to the said letter, stock exchange vide letter dated 2nd March 2007 had informed respondent No. 1 that the sale of shares of Amara Raja Batteries took place during the period between 9th October 2001 to 8th November 2001. It is submitted that respondent No. 1 did not produce any evidence before the arbitral tribunal in respect of the alleged sale of the disputed shares of Amara Raja Batteries Ltd. No particulars were given by respondent No. 1 to indicate as to how the credit for the amount by virtue of which respondent No. 1 sought to amend its claim was arrived at. It is submitted that the arbitral tribunal accepted the figures as claimed by respondent No. 1 in its amendment application without verifying the authenticity of the said shares and/or gathering any details whatsoever in respect of the sale.

(f) Learned counsel placed reliance on the Judgment of Supreme Court in case of Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, and in particular paragraph 15 in support of his submission that the claim for damages was required to be

proved and the damages can be only the difference between the price paid and the price which would have received if resold them in the market forthwith after the purchase provided, that there was a fair market then. Paragraph 15 of the said Judgment reads thus:

15. Now the rule is well settled that damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Difficulty however arises in measuring the amount of this money compensation. A general principle cannot be laid down for measuring it, and every case must to some extent depend upon its own circumstance. It is, however, clear that in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be the difference between the price when he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith that which he had been induced to purchase by the fraud of the defendants. In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation, i.e., how much worse off was his estate owing to the bargain in which he entered into. The law on this subject has been very appositely stated in *McConnel v. Wright* by Lord Collins in these terms:-

As to the principle upon which damages are assessed in this case, there is no doubt about it now. It has been laid down by several judges, and particularly by Cotton L.J. in *Peek v. Derry*, but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect to come in, but it is an action of tort-it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, prima facie the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged.

(g) Mr. Andhyarujina learned counsel then submits that there is no evidence of even purchase price produced by respondent No. 1 and thus arbitral tribunal could not have allowed the claim for damages without any evidence in support of purchase price and/or sale price. Even the document of NSE Ltd. did not give any break-up of the shares of Amara Raja Batteries Ltd. sold and when.

(h) Mr. Andhyarujina then submits that in finding of the arbitral tribunal recorded

in paragraphs 14.3.1 and 14.3.2 of the impugned award are contradictory and cannot be reconciled. The arbitral tribunal has not decided the plea of maintainability in the impugned award. It is submitted that arbitral tribunal has obtained material information from the documents behind the back of the petitioner and has considered the same in the impugned award which is in violation of principles of natural justice. The entire award is based on no evidence.

(i) It is submitted by the learned counsel that since respondent No. 1 was declared as defaulter on 19th June 2001, no transaction entered into thereafter could be subjected to the arbitration mechanism of respondent No. 2 Exchange. Reliance is placed on Bye-law 1B of Chapter XI relating to arbitration conducted under the Rules and regulation of respondent No. 2 Exchange. It is submitted by the learned counsel that since the sale of shares according to respondent No. 1 had taken place from 9th October 2001 to 8th November 2001 which was effected post the date of declaration of defaulter of respondent No. 1, the said transactions even if executed could not become the subject matter of any arbitration though had been filed under the Bye-law Rules and regulations of the Exchange. Though the petitioner had raised these objections, the arbitral tribunal has exercised jurisdiction in respect of non arbitrable transactions and has awarded the claims made by respondent No. 1. It is submitted that as per the Bye-law 28 such the proceedings if any could have been permitted on behalf of the stock exchange only and not by the defaulter himself.

3. Mrs. Kumbhat, learned counsel appearing for respondent No. 1 on the other hand submits that respondent No. 1 had purchased shares of the said company on 13th March 2001 on instructions of the petitioner and in respect thereof, the petitioner had issued cheque of Rs. 19 lakhs towards margin in favour of respondent No. 1 and Rs. 35 lakhs towards margin in favour of the sister concern of first respondent on purchase of shares of the said company. The petitioner has not disputed the transactions or issuance of receipt of the contract notices. Since the petitioner stopped the payment of cheque of Rs. 19 lakhs which was given towards margin money and did not pay any amount, respondent No. 1 in turn could not make payment to the stock exchange and committed default in pay-in to the exchange and resultantly the stock exchange withheld the delivery of those shares. It is submitted that since there was a lower circuit in NSE, shares purchased for the petitioner by respondent No. 1 could not be sold. In view of the default committed by the petitioner in making payment of the price for those shares, respondent No. 1 committed default and was declared as defaulter by the Exchange on 19th June 2001. All the shares purchased by respondent No. 1 which were in custody of the Exchange were sold except for the shares of Amara Raja Batteries Ltd. which could not be sold since the SEBI had impounded the same in view of the investigation pertaining to the said shares. It is submitted that respondent No. 1 came to know for the first time about sale of such shares by stock exchange when affidavit filed in the month of July 2002 in Company Petition came to be served upon respondent No. 1. Learned counsel submits that since respondent No. 1 could not make payment to the stock exchange, delivery

of those shares received by stock exchange in respect of those shares was not handed over to the first respondent by the stock exchange. Since petitioner did not make any payment, question of making any delivery at that stage did not arise. Since the stock exchange had ultimately sold those shares and disclosed these facts in the affidavit filed in company petition, in the arbitration meeting held on 10th December 2002, respondent No. 1 filed a submission before the arbitral tribunal bringing these facts on record and proposed to give credit of Rs. 13,82,972.50 as dividend on 394614 shares of the said company and further credit of Rs. 2,45,10,069.42 for sale of those shares which were withheld by stock exchange for non payment and accordingly requested for permission to reduce the claim of principal amount from Rs. 12,33,39,189.80 to Rs. 9,74,46,147.88 and interest thereon.

4. Learned counsel submits that there was no change of cause of action and thus question of the said application or claim for reduction being time barred did not arise. For reduction of claim, fresh cause of action does not arise or the purpose of limitation or otherwise.

5. Mrs. Kumbhat, learned counsel then submits that merely because the Stock Exchange had withheld delivery for non payment of the price by respondent No. 1 in view of the default committed by the petitioner, it cannot be construed that respondent No. 1 had not purchased the shares for the petitioner. Delivery of shares was lying with the exchange to the credit of respondent No. 1 and this fact was verified by the arbitral tribunal before rendering the impugned award by calling for the trade files from the Exchange as is apparent from paragraph 13.1.3(a) of the impugned award.

6. Mrs. Kumbhat then submits that whenever orders are placed by the constituent, broker member puts the order on their terminal and purchases/sell the shares/securities which come to the account of the broker maintained by NSE against the code number of that particular client. All these securities are routed through the clearing house which acts as a common agent of the trading members/participants for receiving or giving deliveries of securities. Reliance is placed on Clause 16 of By-Laws of NSE. It is submitted that the constituent is under obligation to pay to the broker purchase price of the shares before pay-in day in order to enable the broker to make payment to NSE for the purchases made by him on pay-in day. After making payment on pay-in day shares are released by NSE on pay-out day. Learned counsel submits that from the date of filing of claim and thereafter till those shares were sold by the NSE, those shares were lying with the NSE to the credit of respondent No. 1 under code number of the petitioner. If the petitioner would have paid the purchase price, respondent No. 1 would have paid that amount to NSE and NSE would have released the said shares. As per clause 5 of Chapter X of Bye-Laws, NSE has right to close out the position of the constituent.

7. Mrs. Kumbhat placed reliance on Member and Constituent Agreement and in particular Clauses 2 and 3 which provides that if the constituent is incapable of

paying for the shares purchased by him, trading member has right to close out and for the loss if any incurred, constituent will be liable for the same. All traders, transactions and contracts are subject to rules, regulations and guidelines issues by the SEBI and NSE. Petitioner has not disputed the execution of client agreement. Mrs. Kumbhat learned counsel submits that respondent No. 1 was not aware of the sale of shares by NSE till affidavit came to be filed by NSE in company petition. No sooner the sale is brought to the notice of respondent No. 1, appropriate submission for reduction of claim was made by respondent No. 1 before the arbitral tribunal. The unsigned letter which the petitioner is now disputing was filed by NSE along with their affidavit filed in this Court which was forming part of record before the arbitral tribunal. Learned counsel submits that till the date of filing of statement of claim, shares were not sold by NSE. In the alternative, learned counsel placed reliance on Section 23(3) of the Arbitration and Conciliation Act which permits a party to make amendment to his claim or defence during the course of arbitration proceedings. It is submitted that cause of action commences from the date of knowledge. Though there was no change of cause of action as pleaded by the petitioner, in the alternative even if that was so, the application for reduction of claim was within time as the same was filed within six months from the date of knowledge of sale of shares derived from the affidavit filed by NSE in company petition in this Court. The arbitral tribunal has considered these aspects in detail and has rendered a finding of fact. Learned counsel submits that respondent No. 1 could not have derived knowledge of sale of share earlier in view of admitted position that bolt of the first respondent was deactivated by the NSE to the knowledge of the petitioner.

8. Mrs. Kumbhat learned counsel distinguished the Judgment delivered by learned Single Judge of this Court in case of Harinarayan Bajaj (supra) and also the Judgment of Supreme court in case of Trojan & Co. (supra). It is submitted that the facts before this Court in case of Harinarayan Bajaj were totally different. Shares were in custody of the broker and the same were sold unilaterally by the broker without intimating the constituent during pendency of arbitration proceedings and without taking leave of the arbitral tribunal. The arbitral tribunal had rendered a finding that the sale of shares unilaterally by the broker was not proper. Application for amendment was made after one year and two months after selling the said shares, though the broker was fully aware of the sale of shares as the broker himself had sold the shares. It is submitted that however, in the facts of this case, the shares were in custody of NSE and were sold by NSE much after filing of the claim by the first respondent before the arbitral tribunal. Since the shares were sold by NSE under bye-laws, question of leading any evidence to show that the sale was valid and proper did not arise. Learned counsel distinguished the Judgment of Supreme Court on the ground that in this case the shares were sold by NSE. NSE disclosed the said fact in affidavit and had annexed copy of statement which was on record of the arbitral tribunal and could not have been disputed. The NSE was empowered to sell such

shares in view of the default committed by the first respondent in view of the non-payment of the dues by the petitioner. It is submitted that Judgment of this Court and the Supreme Court relied upon by the petitioner are thus of no assistance to the petitioner.

9. In so far as submission of the petitioner that the arbitral tribunal have considered the trade files of the Exchange ex-parte and without giving an opportunity to the petitioner is concerned, learned counsel submits that as per Chapter VII (b) of the Bye-Laws, arbitral tribunal is empowered to verify the record as maintained by the computer processing units of the Exchange which record shall constitute valid evidence in any dispute or claim between the constituent and the member of the exchange or between the trading member of the Exchange inter-se. It is submitted that thus, there is no substance in this objection raised by the petitioner.

10. Mrs. Kumbhat, learned counsel invited my attention to various paragraphs of the impugned award and would submit that the award rendered by the arbitral tribunal is well reasoned award and each and every contention of the petitioner as well as respondent No. 1 are dealt with in detail by the arbitral tribunal and findings of fact have been rendered which cannot be interfered with and/or re-appreciated by this Court u/s 34 of the Arbitration and Conciliation Act 1996.

11. In so far issue of maintainability of application for amendment on the ground that on the date of making such application or on the date of sale of shares by the NSE, respondent No. 1 had been already declared as defaulter and not such claim could be made by respondent No. 1 is concerned, it is submitted that respondent No. 1 has not made any new claim before the arbitral tribunal by such submission made on 10th December 2002 but has only sought to give credit of the sale price and dividend given to the first respondent by NSE by reducing the claim made against the petitioner. Such deduction of claim in the proceedings thus could be made by respondent No. 1 and the same was maintainable.

12. In re-joinder, Mr. Andhyarujina learned counsel appearing for the petitioner submits that nature of claim was changed from recovery of price for shares which was not permissible after expiry of period of limitation. Findings rendered by the arbitral tribunal is contradictory. The initial claim made by first respondent for recovery of price itself was not maintainable. Arbitral tribunal has not considered the plea of damages based on subsequent transaction. Arbitral tribunal allowed the impugned application after arguments were over. After declaration of respondent No. 1 as defaulter, even such application for amendment ought to have been made by NSE and not by respondent No. 1.

Reasons and Conclusions:

13. Whether there was any change of cause of action and application for amendment was barred by law of limitation?

Persual of the impugned award indicates that the arbitral tribunal has rendered a finding that respondent No. 1 had purchased various shares of Amara Raja Batteries Ltd., on behalf of the petitioner on 10th March 2001 and had issued contract notes in respect thereof. Since the petitioner did not make payment in respect of those shares, respondent No. 1 could not make payment to NSE. NSE accordingly did not deliver those shares to respondent No. 1 who in turn, could not give delivery of those shares to the petitioner. It is not in dispute that NSE had withheld the delivery of shares of Amara Raja Batteries Ltd., for settlement No. 10 pending investigation of complaint of manipulation and on completion of investigation released the withheld securities in July 2001. Once the shares were withheld by NSE in view of non-payment of price by respondent No. 1 in view of non-payment of consideration by petitioner to respondent No. 1 question of delivery of those shares by NSE to respondent No. 1 and respondent No. 1 in turn to the petitioner did not arise. The shares were withheld by NSE in view of pending investigation. Respondent No. 1 thus could not sell those shares themselves. Under the Bye-Laws of NSE, the NSE had right to dispose of those shares and close out the transaction in view of the default. On the date of filing statement of claim by respondent No. 1 against the petitioner before the arbitral tribunal, admittedly shares were not delivered to respondent No. 1 by the NSE and/or withheld. The petitioner could not expect delivery of those shares in view of default in making payment in respect of those shares to respondent No. 1 either from respondent no. 1 or from NSE. NSE subsequently suspended the membership card of respondent No. 1 and declared respondent No. 1 as defaulter on 19th June 2001. Respondent No. 1 thus had no role in sale of the said shares and could come to know about the sale of those shares only through the Exchange in the affidavit filed in this Court.

14. A perusal of statement of case filed by respondent No. 1 before the arbitral tribunal, it is clear that the claim was made on the premise that the petitioner had committed default in making payment to respondent No. 1 which caused their default in pay-in to the NSE. The petitioner has not made payment in response to the notices issued by respondent No. 1 for recovery of their dues from the petitioner. The cheques issued by the petitioner were dishonoured. Respondent No. 1 accordingly prayed for sum of Rs. 12,33,39,189.80 with interest from the petitioner and claimed damages in the sum of Rs. 100 crores. During the pendency of arbitration proceedings, NSE had filed a company petition for winding up against the first respondent. In the said company petition, the NSE filed an affidavit disclosing about the sale of shares of Amara Raja Batteries Ltd., and the amount realized from sale of such shares and the dividend received thereon. The NSE gave credit of the said amount to respondent No. 1 against the amount due and payable by respondent No. 1 to the NSE. Respondent No. 1 came to know about the sale of those shares by the NSE only after service of the said affidavit filed by the NSE. Respondent No. 1 accordingly filed a submission bringing these facts on record and showed its desire to give credit of the amount credited to its account by the NSE on sale of those shares and also dividends to

the petitioner and sought to reduce its claim against the petitioner. A perusal of the submission/application dated 10th December 2002 clearly indicates that respondent No. 1 wanted to pass on the total credit received from the NSE on sale of their shares and dividend to the account of the petitioner and to reduce the claim after giving such credit. In my view, claim for reduction of existing monetary claim in view of the sale of those shares by NSE during pendency of arbitration proceedings and for dividend did not change any cause of action. Cause of action remains the same. Initially the claim made by respondent No. 1 was also for recovery of money from the petitioner. In view of the default committed by the petitioner and appropriated from the account of respondent No. 1 by the NSE by giving credit on sale of shares and dividend, application by respondent No. 1 for reduction of claim was warranted. If respondent No. 1 would not have disclosed these subsequent events occurred during the pendency of arbitration proceedings and would not have given credit in respect of sale of shares and receipt of dividend which came to the knowledge of respondent No. 1 upon receipt of affidavit filed by the NSE, it would have amounted to suppression of subsequent events on the part of respondent No. 1. In my view, reduction of claim would not amount to fresh cause of action and question of application of limitation to such application for reduction of claim did not arise.

15. The arbitral tribunal has dealt with this issue in paragraph 14 to 15.2 of the impugned award. The arbitral tribunal has rendered a finding that reduction in the amount of claim was within the scope of reference and was not a new claim. The learned tribunal has held that limitation for making reduction in claim does not apply. Respondent No. 1 offered the credit of sale price to the petitioner. It is also held that if respondent No. 1 would not have passed on the credit to the petitioner, it would have amounted suppression of fact by respondent No. 1. The arbitral tribunal also rendered a finding that delay in getting knowledge of credit by the first respondent was beyond their control and the tribunal was required to hold that the delay was on justified grounds. The arbitral tribunal also considered the reduction made in the claim amount to be appropriated and allowed the reduction in the claim made by the first respondent. It is held that pay-out for the concerned settlement was withheld only in July 2001 for which respondent No. 1 was declared a defaulter on 19th June 2001 and thus respondent No. 1 would not have any role in any sale of the said shares and could come to know about the said sale of shares only after receiving copy of affidavit filed by NSE in company petition. In my view, the arbitral tribunal was justified in allowing the submission/application of the first respondent for reducing the claim amount in view of the sale of those shares by the NSE subsequently and by giving credit of dividend amount received on such shares. The arbitral tribunal has rightly rejected the plea of limitation and objection of the petitioner opposing the application for amendment. The findings rendered by the arbitral tribunal are not perverse and cannot be interfered with.

16. In so far as unreported Judgment of this Court in case of Harinarayan Bajaj (supra) relied upon by the petitioner is concerned, a perusal of the said

Judgment indicates that during the pendency of arbitration, the broker who had delivery of shares had unilaterally without approval of the arbitral tribunal had sold those shares and after more than a year had applied for amendment and sought to make a claim for damages. Though the arbitral tribunal had rendered a finding that the sale of shares unilaterally by the broker was not proper and has expressed its dis-approval for conducting such sale, arbitral tribunal had allowed relevant amendment and allowed the claim. This Court held that admittedly respondent No. 1 broker therein had not led any evidence to show that the sale was valid and proper and therefore in the absence of any evidence on record and on the face of the findings recorded by the arbitral tribunal, the claim for damages on the basis of the sale could not have been allowed by the arbitral tribunal. Taking over all view of the matter this Court was pleased to set aside the impugned award in the said petition. However in this case, the shares purchased by respondent No. 1 on behalf of the petitioner were with the NSE. Delivery was withheld by NSE in view of the non-payment by respondent No. 1 which could not be paid in view of the default committed by the petitioner. Investigation was ordered by SEBI. The NSE thereafter sold those shares and gave credit of the amount realized and also the dividend received to the account of respondent No. 1. In this case sale was not effected by the first respondent broker but was by the NSE itself by exercising powers under the Bye-Laws and Rules and Regulations of the NSE. Admittedly in that case, the broker had applied for amendment after more than six months though it was to the knowledge of the broker that he himself had sold the shares. In my view, the facts before this Court in case of Harinarayan Bajaj (*supra*) are totally different and are clearly distinguishable with the fact of this case. The said Judgment of this Court thus is of no assistance to the petitioner.

17. Whether damages were proved?

It is not in dispute that the shares withheld by the NSE were subsequently sold and this fact was disclosed by the NSE in its affidavit filed in company petition which was brought on record of this proceedings. A perusal of the impugned award clearly indicates that the petitioner himself relied upon copy of affidavit of NSE in winding petition against respondent No. 1 in which it was stated by NSE that 394614 shares of Amara Raja Batteries Ltd. which were purchased by respondent No. 1 but not paid were sold by NSE later. The arbitral tribunal had considered the contract notes and several documents produced by respondent No. 1 on record and also considered the trade files of NSE and recorded a finding that the trade files of the NSE record indicated that the trades were done in the client's code of the petitioner and that record was a credible evidence. Arbitral tribunal also considered the submission of the petitioner that he wanted to buy the shares of such company on 12th March 2001 on which margin money was tendered and it was difficult to accept his contention that purchase of shares was foisted on him. Arbitral tribunal considered that the petitioner had not chosen to make a request for cross-examination of the witness nor came forward to give a counter affidavit to disprove the contents of the affidavit of the author whose

affidavit was filed by respondent No. 1. Arbitral tribunal gave a finding that a purchase of 1,25,000 shares was made as per the instructions of the petitioner. Execution of a transaction was made on behalf of the petitioner.

18. In my view, the contract notes and other relevant documents were on record before the arbitral tribunal. Under Chapter VII 1(b) of the Bye-Laws of NSE provides that for the purposes of any dispute the record as maintained by the computer processing units by the Exchange shall constitute valid evidence in any dispute or claim between the constituents and the trading member of the Exchange or between the trading members of the Exchange inter-se. The arbitral tribunal has rightly considered the authentic and valid record of NSE and has rightly allowed the claims made by respondent No. 1. The purchase price of those shares was already on record. The amount recovered on sale of shares and dividend was brought on record by placing the affidavit filed by NSE in company petition on record of arbitration proceedings before the arbitral tribunal. The arbitral tribunal rightly gave credit of sale proceeds and the dividend received from the original claim made by respondent No. 1 and have rightly allowed the claims made by the first respondent excluding damages. No other evidence was required to be led by respondent No. 1 to prove its claim. The arbitral tribunal has considered the entire material and evidence on record and has rendered a finding of fact and has allowed the claim. This Court cannot re-appreciate the evidence led by parties before the arbitral tribunal u/s 34 of the Arbitration and Conciliation Act 1996.

19. Whether initial claim made by respondent No. 1 was not maintainable?

Petitioner did not make any payment to respondent No. 1 though purchased shares of the said company Amara Raja Batteries Ltd. Respondent no. 1 was required to make payment to the Stock Exchange on the stipulated date. Respondent No. 1 was declared defaulter. Stock Exchange sold various shares of the first respondent to appropriate the dues of the Stock Exchange due from the first respondent. The claim for recovery of price of shares thus in my view was maintainable and is rightly allowed by the arbitral tribunal. The submission of Mr. Andhyarujina that respondent No. 1 could not have claimed price for shares since it did not have delivery of shares has no merits. Physical delivery of such shares could not have been with the first respondent since the petitioner did not make any payment to the first respondent and first respondent in turn could not make payment to Stock Exchange. The delivery thereof was withheld by the Stock Exchange was subsequently sold. In my view, claim of respondent No. 1 was thus maintainable.

20. The arbitral tribunal has rendered a finding that the petitioner never applied for cross-examination of the witness whose affidavit was filed by the first respondent nor led any oral evidence. There is thus no merit in the submission of Mr. Andhyarujina that there was no opportunity given to the petitioner for leading any evidence or to cross-examine the witness.

21. Alleged Violation of principles of natural justice by the arbitral tribunal by verifying the records of stock exchange.

Arbitral tribunal in my view has rightly verified the record of the Stock Exchange to ascertain the position whether any such transaction were carried out by the petitioner with the first respondent. Respondent No. 1 had already produced on record the contract notes and ledger account. Under the relevant Bye-laws of NSE, such trade files/records are authentic records and can be relied upon in arbitration proceedings. The petitioner having falsely denied the transaction thus cannot raise such plea. The arbitral tribunal, in my view was not bound to issue any witness summons for verifying the records of the Stock Exchange. There is thus no merit in submission made by Mr. Andhyarujina that the arbitral tribunal violated any principles of natural justice while verifying the records of the Stock Exchange.

22. Whether there is any contradictory finding recorded by the arbitral tribunal in paragraph 13.1.1(b) and 13.1.3(a)?

A perusal of both these paragraphs does not indicate that arbitral tribunal has rendered any contradictory finding. Arbitral tribunal has held that the application for amendment does not introduce a new claim and the reduction in the amount of claim was within the scope of reference. Though the circumstances brought on record establishes that change in the complexion of the claim from non-payment of purchase value into loss/damages caused to the petitioner, it was justified since such a change was necessitated and cannot be read in isolation. On reading of the entire paragraph as a whole, in my view, there is no contradiction/inconsistency in the findings rendered by the arbitral tribunal. Court has to see the entire award and not few sentences of the award in isolation.

23. Whether application for amendment can be made by respondent No. 1 after becoming a defaulter?

It is not in dispute that sale of shares by NSE was during the period 9th October 2001 to 8th November 2001. Respondent No. 1 was already declared a defaulter. Such transaction was not carried out by the first respondent itself. The sale was effected by the NSE by exercising its powers under the Bye-laws Rules and Regulations of the NSE. The NSE had given credit of the amounts realized to the first respondent including dividend. Respondent No. 1 had in turn offered credit of the said amount to the petitioner by reducing its claim. There was no separate cause of action in view of such sale effected by the NSE or giving credit in respect thereof to respondent No. 1 or passing of that credit to the petitioner by the first respondent. The arbitration proceedings were already pending. The transaction had been already entered into between the parties before respondent No. 1 was declared as defaulter. Bye-law (1B) of Chapter XI clearly provides that the provisions of Bye-laws (1) and 1(A) shall be applicable to all claims, differences, disputes between the parties mentioned therein for all dealings, contracts and transactions made subject to the Bye-laws, Rules and Regulations

of the Exchange provided such dealings, contracts and transactions had been entered into between the parties mentioned therein prior or to the date on which the trading member was either declared a defaulter or expelled or has surrendered his trading membership. Respondent No. 1 has not carried out any transaction after becoming a defaulter.

24. The application for amendment and/or reduction of claim was thus maintainable and need not be made by the NSE. In my view, there is no merit in the submission made by Mr. Andhyarujina. A perusal of the impugned award indicates that the arbitral tribunal has considered all the material produced by both the parties on record and have rendered a finding of fact. Arbitral tribunal has also interpreted the Bye-laws, Rules and Regulations of the Stock Exchange which interpretation in my view, was not only a possible interpretation but correct interpretation. This Court cannot substitute a possible interpretation of the arbitral tribunal by taking a different view. This Court cannot re-appreciate the finding of fact rendered by the arbitral tribunal as the same are not perverse. Petition is devoid of merits. I therefore pass the following order. Arbitration petition is dismissed. There shall be no order as to costs.