

(2011) 10 SC CK 0022

In the Supreme Court Of India

Case No : Civil Appeal No. 9238 of 2003

P.R. Shah, Shares and Stock Broker (P) Ltd.

APPELLANT

Vs

B.H.H. Securities (P) Ltd. and Others

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 8

Citation : AIR 2012 SC 1866 : (2012) AIRSCW 2317 : (2011) 4 ARBLR 128 : (2012) 1 AWC 362 Supp : (2012) 2 CHN 119 : (2011) 12 JT 290 : (2012) 3 MhLj 737 : (2012) 4 RCR(Civil) 379 : (2011) 11 SCALE 668 : (2012) 1 SCC 594 : (2011) 7 Supreme 249

Hon'ble Judges : R.V. Raveendran, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : Indu Malhotra, Nish Bagchi, Vrushali Kakkar, Abhinav Agnihotri, Kush Chaturvedi, Vivek Jain, Prerna Priyadarshini and Vikas Mehta, for the Appellant; Shyam Divan Santosh Paul, Arvind Gupta, Meera Mathew, M.J. Paul, Pratap Venugopal, Surekha Raman and Dileep Poolakkot for K.J. John and Co., for the Respondent

Final Decision : Dismissed

Judgement

R.V. Raveendran, J.—The Appellant and the first Respondent are members of the Mumbai Stock Exchange, the third Respondent herein ('Exchange' for short). The constitution, management and dealings of the Exchange are governed by the Rules, Bye-laws and Regulations of the Exchange. The Rules relate to the constitution and management of the Exchange. The Bye-laws regulate and control the dealings, transactions, bargains and contracts of its members with other members and non-members. The Regulations contain the detailed procedure regarding the various aspects covered by the Bye-laws. Though the Rules, Bye-laws and Regulations of the Exchange were not made under any statutory provision, they have a statutory flavour. Bye-laws 248 to 281D provide for and govern the arbitration between members and non-members and Bye-laws 282 to 315L provide for and govern the arbitration between members of the

Exchange.

2. The first Respondent raised and referred a dispute against the second Respondent and the Appellant under the Rules, Bye-Laws and Regulations of the Mumbai Stock Exchange on 29.8.1998 (Arbitration Reference No. 242/1998) seeking an award for a sum of Rs. 36,98,384.73 with interest at 24% per annum on Rs. 35,42,197.50. In the said Arbitration Reference, the first Respondent alleged that Appellant and second Respondent are sister concerns with Ms. Kanan C. Sheth as a common Director; that Ms. Kanan C. Sheth approached the first Respondent to get the carry forward sauda in respect of 50,000 shares of BPL and 15,000 shares of Sterlite Industries Ltd. transferred with the first Respondent on behalf of the second respondent which was outstanding with the Appellant; that in pursuance of it, on 4.6.1998, the first Respondent got the sauda of 15,000 shares of BPL and 15,000 shares of Sterlite transferred to its account through a negotiated deal which is commonly known as 'all or none'; that in respect of the said transactions, the first Respondent prepared, issued and delivered the contract and bill in favour of second Respondent (Contract No. F.11/4/002 dated 4.6.1998 and Bill No. A/11/0236 dated 11.6.1998 for Rs. 1,07,30,400/- and Bill No.A.11/0236 dated 11.6.1998 for Rs. 15,50,670/-); that as the said amount remained due, the first Respondent approached the Appellant and second Respondent for clearing the said dues; that after several demands, the Appellant issued a credit kapli (Credit Slip No. 49147 dated 11.6.1998) for payment of Rs. 13 lakhs to first Respondent along with a copy of the balance-sheet (Form No. 31) for settlement (A11/98-99 for Rs. 13 lakhs); that the said kapli was rejected by the Exchange; that the first Respondent, therefore, immediately approached the Appellant and second Respondent and demanded a cheque for the said amount of Rs. 15,50,670/-; that in that behalf, the Appellant issued cheque (No. 992090 dated 11.6.1998) for Rs. 13 lakhs leaving a balance of Rs. 250,670/-; that thereafter prices of the said scripts were falling down and the first Respondent requested the Appellant and second Respondent to get the said souda re-transferred to their account; that they failed to do so, but kept on assuring that there was nothing to worry; that ultimately, at the request of the Appellant and second Respondent, the souda of 15000 shares of Sterlite was squared by selling the said shares and in respect of the squaring up of the said souda, a bill dated 19.6.1998 for Rs. 23,89,610.50 was raised by the first Respondent for the amount due by Appellant and second Respondent; that when the first Respondent demanded from Appellant and second Respondent the amounts due; they paid to the first Respondent a sum of Rs. 4.5 lakhs in cash on 18/19.6.1998; that as the souda for the 15,000 shares of BPL still remained outstanding despite requests of the first Respondent to square up the same, the first Respondent carried forward the said 15,000 shares of BPL to Settlement No. 13 and raised a bill dated 26.6.1998 showing Rs. 8,09,850/- as due to the first Respondent; and that the said carry forward purchase of 15,000 shares of BPL was again brought forward to Settlement No. 14 on 22.6.1998 and at the request of Appellant and second Respondent, the said outstanding purchase was sold on

24.6.1998 and 25.6.1998 and in that behalf, a sum of Rs. 5,42,065/- became due vide bill dated 1.7.1998. According to first Respondent, all the bills were drawn on second Respondent, as required by the Appellant, as the contract dated 4.6.1998 was in the name of second Respondent; that Ms. Kanan C. Sheth Director of Appellant and first Respondent accepted the said bills assuring payment and both were jointly and severally liable to pay the amounts due.

3. The first Respondent also alleged in the arbitration reference claim that in view of the non-payment of the amounts due, it wrote a letter dated 2.7.1998 to the Executive Director of the Exchange to prevail upon and direct the Appellant and second Respondent to pay the amount due, but in spite of the Exchange forwarding a copy of the said letter to appellant and second Respondent, the amount remained due; that therefore, the Executive Director of the Exchange through its Investors Service Cell permitted the first Respondent to file an arbitration claim against Appellant and second Respondent. As a sum of Rs. 35,42,197.50 remained due in spite of demands by adding interest, the total sum due as on 29.8.1998 was Rs. 36,98,384.73.

4. Both the second Respondent and the Appellant filed their objections dated 3.3.1999 urging several common grounds with identical wording which, according to the first Respondent, showed that the Appellant and the second Respondent were colluding with each other, apart from the fact that they had two common Directors. In its statement of objections, the Appellant contended that the Arbitral Tribunal of the Exchange had no jurisdiction to enter upon the reference for want of a contract and want of arbitration agreement between the first Respondent and the Appellant. The Appellant also denied that the transaction between the first Respondent and second Respondent was carried out by the first Respondent, for and on behalf of the Appellant and under instructions from the Director of the appellant. The Appellant contended that the first respondent had made a claim based on fabricated documents. It was also contended that the arbitration reference was bad in law on account of misjoinder of parties and misjoinder of causes of action. It was submitted that the Appellant was a member of the Exchange and the second Respondent was not a member of the Exchange and the Exchange had a different set of Arbitration Rules governing arbitration in regard to disputes between members and arbitration in regard to disputes between member and a non-member. The Appellant also contended that the sum of Rs. 13 lakhs paid by it to the first Respondent by cheque dated 11.6.1998, was not an amount paid in connection with the aforesaid transaction, but was a loan advanced by the Appellant to the first Respondent.

5. The disputes were heard by a three-member Arbitral Tribunal consisting of Justice D.B. Deshpande, Mr. Hemant V. Shah and Mr. Sharad Dalal as members. The arbitral tribunal called upon the Appellant to produce its souda sheets of the dates on which the transactions took place as alleged by the first Respondent but the appellant stated that they could not produce those sheets as their computers

were not in a working condition. When the Arbitral Tribunal enquired whether there were any documents to show that Rs. 13 lakhs was advanced as a loan to first Respondent (as contended by the Appellant), the Appellant informed the Arbitral Tribunal that there were no documents to show that it was a loan.

6. The Arbitral Tribunal made an award dated 12.10.1999. The majority (Mr. Hemant V. Shah and Mr. Sharad Dalal) held that the transaction had taken place as alleged by the first Respondent and therefore the Appellant and second Respondent were liable for the amounts claimed. The third arbitrator, in his minority view, while agreeing with the other two arbitrators that the claim against second Respondent as claimed deserved to be allowed, held that the claim against the Appellant ought to be rejected as the Arbitral Tribunal appointed by the Exchange had no jurisdiction to hear and decide the first Respondent's claim against the Appellant and the first Respondent should approach the proper forum seeking relief against the Appellant. Therefore, the Arbitral Tribunal made an award as per the decision of the majority holding that the first Respondent was entitled to recover Rs. 36,98,384.73 from second Respondent along with interest at 18% per annum, as demanded, from 4.6.1998 till realization with a further direction that if the second Respondent failed to pay the said amount along with interest, then the entire amount or the shortfall amount, if any, shall be made good by the Appellant. In effect, there was an unanimous award for the sum of Rs. 36,98,354.73 with interest at 18% from 4.6.1998 to the date of payment against the second Respondent; and in regard to the appellant, the majority held the Appellant was liable to pay if second Respondent did not pay the amount, whereas the third arbitrator held that the Arbitral Tribunal could not arbitrate the dispute with reference to Appellant.

7. The second Respondent did not contest the award nor pay the amount. The Appellant filed an application u/s 34 of the Arbitration and Conciliation Act, 1996 ('Act' for short) challenging the award dated 17.10.1999. A learned Single Judge of the Bombay High Court after exhaustive consideration, dismissed the said application. Dealing with the contention that in an arbitration under Bye Law No. 248 in regard to a dispute between a member (first Respondent) and a nonmember (second Respondent), there cannot be an award against a member (appellant), on the ground that Bye Law 248 did not apply to a dispute between two members, the learned Single Judge held as under:

If, in a dispute between a member and non-member an incidental or connected claim against another claim cannot be referred for arbitration under Bye-law 248 and the Claimant is compelled to resort to two proceedings before different for a, then the possibility of multiplicity of findings at variance with each other by different for a cannot be ruled out. In my view it would be most undesirable to adopt a construction which would bring about the possibility of two for a reaching different conclusions where the cause of action is based on same set of facts. As noted above, the two for a are differently constituted and such a possibility cannot be ruled out. In the circumstances, I am of the view that a claim against

the member can be entertained under Bye-law 248 where the said claim is incidental to or connected to a claim against a non-member. I am of the view that the claim made by the BHH in the present case is such a claim.

The intra-court appeal filed by the Appellant was dismissed by a Division Bench of the Bombay High Court by the impugned judgment dated 16.9.2002. The said decision is under challenge in this appeal by special leave.

8. The following three contentions were urged by the Appellant:

(i) Under Bye Law 248, there can be arbitration only in regard to a dispute between a member and a nonmember. A dispute between two members will have to be decided under Bye Law 282. The constitution of the Arbitral Tribunal, the procedure followed and remedies available were completely different in regard to a claim of a member against a non-member and claim of a member against another member. Therefore, there could not be a single arbitration in regard to a claim of a member against a non-member and another member.

(ii) The Arbitral Tribunal ought to have held that there was no contract between first Respondent and that the Appellant and the claim of the first Respondent against the Appellant was based on fabricated documents.

(iii) The Arbitral Tribunal had passed the award by making use of their personal knowledge in regard to the transactions and not on the material on record before them and therefore the award was vitiated.

Re: Contention (i)

9. At the outset, it should be noticed that the arbitration in this case is not an ad hoc arbitration under an arbitration agreement executed between the parties, but was an institutional arbitration under the Bye Laws of the Exchange. All claims, differences, complaints and disputes between two members in relation to any bargain, dealing, transaction or contract is arbitrable by virtue of the parties being members of the Exchange and there is no need for a separate arbitration agreement. In fact, the question whether there was any such bargain, dealing, transaction or contract between members is itself a question that was arbitrable, if there was a dispute. We may in this behalf refer to the relevant Bye-Laws. Bye-law 248 provides for reference to arbitration of any dispute between a member and non-member. Clause (a) thereof relevant for our purpose is extracted below:

All claims (whether admitted or not) difference and disputes between a member and a non-member or non-members (the terms 'non-member' and 'non-members' shall include a remisier, authorized clerk, a sub-broker who is registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights, obligations and liabilities or remisiers, authorized clerks,

sub-brokers, constituents, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange.

Arbitration between members of the Exchange is provided for in Bye Law 282 which is extracted below:

All claims, complaints, differences and disputes between members arising out of or in relation to any bargains, dealings, transactions or contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto (including claims, complaints, differences and disputes relating to errors or alleged errors in inputting any data or command in the Exchange's computerized trading system or in execution of any trades on or by such trading system) or anything to be done in pursuance thereof and any question or dispute whether such bargains, dealings, transactions or contracts have been entered into or not shall be subject to arbitration and referred to the Arbitration Committee as provided in these Bye-laws and Regulations.

10. The Appellant contends that as the provisions for arbitration are different in regard to a dispute between a member and a non-member and in regard to a dispute between two members, there cannot be a common arbitration in regard to a claim or dispute by a member against another member and a non-member. It is pointed out that in regard to the arbitration in the case of a non-member, the reference is to three arbitrators, each party appointing one arbitrator and the Executive Director of the Exchange appointing the third arbitrator, one of the three arbitrators being a non-member (vide Bye Law 249). On the other hand, in the case of a dispute between a member with another member, the matter is referred to the Arbitration Committee of the Exchange and the said Committee will appoint a three member Tribunal, known as the lower Bench (vide Bye Law 285); and in regard to such arbitration between a member and another member, an appeal is available from the lower bench of Arbitration Committee to the Arbitration Committee constituted by the governing Board. In the case of a dispute between a member and a non-member, no such institutional appeal is available. The Appellant contends that the valuable right of appeal was denied by holding a joint arbitration against Appellant and second Respondent.

11. Reliance is placed on the decision of this Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, wherein this Court held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves the parties, some of whom are parties to the agreement while some are not, Section 8 of the Act was not attracted and the subject matter of the suit could not be referred to arbitration, either wholly or by splitting up the causes of action and the parties. The decision in Sukanya Holdings will not apply as we are not concerned with a suit or a situation where there is no provision for arbitration in regard to some of the parties.

12. In this case, the first Respondent had a claim for Rs. 36,98,354.73 jointly against second Respondent and the Appellant. According to the first Respondent, it entered into the transaction with second Respondent on the instructions of the Appellant and on the understanding that the Appellant will also be liable and in fact, the Appellant accepting its liability, had also paid Rs. 13 lakhs as part-payment. It is not disputed that Appellant and second Respondent were closely held family companies managed by the same person (Ms. Kanan C. Sheth). According to Appellant the share holdings in Appellant was Kanan C. Seth: 105,000 shares, Chetan M. Sheth: 45000 shares and Jasumati P. Shah: 150,000 shares and the shareholdings in second respondent company was Kanan C. Sheth: 100 shares and Chetan M. Sheth: 100 shares.

13. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B & C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration. In this case though the arbitration in respect of a non-member is under Bye-law 248 and arbitration in respect of the member is under Bye Law 282, as the Exchange has permitted a single arbitration against both, there could be no impediment for a single arbitration. It is this principle that has been applied by the learned Single Judge, and affirmed by the division bench. As first respondent had a single claim against second Respondent and Appellant and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it is not possible to accept the contention of the Appellant that there could not be a common arbitration against appellant and second Respondent.

Re: Contention (ii)

14. A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The arbitral tribunal has examined the facts and held that both second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by

the first respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye Law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of second respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground u/s 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

Re: Contention (iii)

15. The Appellant contends that the arbitration had used personal knowledge to decide the matter. Attention was drawn to the following observation in the award by the majority:

Also, it is known fact which is known to the arbitrators that as per the market practice such kind of transactions of one Broker takes place with another Broker either in their own name or in their firm's name or in the name of different entity which is also owned by the member." Same way these transactions are done by Respondent No. 2 (appellant herein) in the name of Respondent No. 1 (second Respondent herein).

An arbitral tribunal cannot of course make use of their personal knowledge of the facts of the dispute, which is not a part of the record, to decide the dispute. But an arbitral tribunal can certainly use their expert or technical knowledge or the general knowledge about the particular trade, in deciding a matter. In fact, that is why in many arbitrations, persons with technical knowledge, are appointed as they will be well-versed with the practices and customs in the respective fields. All that the arbitrators have referred is the market practice. That cannot be considered as using some personal knowledge of facts of a transaction, to decide a dispute.

Conclusion

16. In view of the above, we find no reason to interfere with the judgment of the High Court and the appeal is accordingly dismissed.