(2002) 06 BOM CK 0079

In the Bombay High Court

Case No : Arbitration Petition No. 99 of 2000

P.R. Shah Shares and Stock Brokers (P.) Ltd. APPELLANT

Vs

BHH Securities (P.) Ltd. RESPONDENT

Date of Decision : 20-06-2002

Acts Referred:

Citation : (2002) 4 ALLMR 789 : (2002) 6 BomCR 776 : (2002) 4 MhLj 195

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : P.K. Samdani, S.K. Jain and Anil Agarwal, for the Appellant; D.D. Madon, D.R. Mehta and Nilesh Shah, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Bobde, J.—This petition is filed by the petitioners, viz., P.R. Shah Shares & Stock Brokers (P.) Ltd. against the award dated 12-10-1999 passed by the arbitrators of the Mumbai Stock Exchange under the Rules, Bye-laws and Regulations of the Stock Exchange, Mumbai. At the outset, it may be noted that the Bench comprises the following arbitrators :

(1) Hemant V. Shah,

(2) Sharad Dalai and

(3) Justice D.B. Deshpande.

Two arbitrators, i.e., Hemant V. Shah and Sharad Dalai have held the respondents, viz., BHH Securities (P.) Ltd. as entitled to recover a sum of Rs. 36,98,384.73 from Continental Securities (P.) Ltd., the respondent No. 2 herein and P.R. Shah Share & Stock Broker (P.) Ltd., i.e., the petitioners. By a separate order the third arbitrator Justice D. B. Deshpande allowed the claim of BHH Securities (P.) Ltd. against Continental Securities (P.) Ltd., i.e., the respondent No. 2 herein. The learned arbitrator has rejected the claim against P.R. Shah Share & Stock Broker (P.) Ltd., i.e., the petitioners herein. The third arbitrator has rejected the claim against the petitioners only on the ground that the arbitrators have no jurisdiction to hear and decide the claim against the petitioner since the petitioner is a member of the Stock Exchange. It may be noted that the third arbitrator has not accepted the petitioner''s defence on merits.

2. The respondent No. 1 BHH Securities (P.) Ltd., (''BHH''), made a claim against the petitioner P.R. Shah Share & Stock Broker (P.) Ltd. (''P.R. Shah Ltd.'') and the respondent No. 2 Continental Securities (P.) Ltd. (''Continental Ltd.''). According to BHH, they were approached by Miss K.C. Sheth, a director of the P.R. Shah Ltd. and also a director of Continental Ltd. She requested BHH to get a carry forward sauda in respect of 15,000 shares of BPL and 15,000 shares of Sterlite Industries Ltd. transferred to BHH on behalf of Continental Ltd. through a negotiated deal. There is no dispute about the fact that the two directors of P.R. Shah Ltd., i.e., Miss K.C. Sheth and her husband Mr. Chetan Sheth were the directors of Continental Ltd. As I understand the transaction, after hearing the learned counsels on both sides, P.R. Shah Ltd.; had contracted to purchase on behalf of Continental Ltd. the aforesaid shares. That purchase could not be completed because P.R. Shah Ltd. could not or did not obtain delivery of the shares and, therefore, the transaction was carried forward. According to BHH, P. R. Shah Ltd. through its director who is common to Continental Ltd. approached BHH for a transfer of the transaction, i.e., the transfer of its right to receive the shares to BHH with an intention that BHH should take delivery of the shares and transfer the same in the name of Continental Ltd.

3. It is clear that there is no written contract between BHH and P.R. Shah Ltd. BHH issued a contract note in the name of Continental Ltd. and the contract note stated that they had bought for the latter 15,000 shares of Sterlite Industries Ltd. The invoice is also raised in the name of Continental Ltd. On both, the Contract Note as well as the Invoice, the address of Continental Ltd. is given as C/o, P.R. Shah Shares & Stock Brokers (P.) Ltd. BHH claimed that it had a contract with P.R, Shah Ltd. and that P.R. Shah Ltd. had paid an amount of Rs. 13 lakhs to it for purchase of the shares by BHH for constituents of P.R. Shah Ltd., i.e., Continental Ltd. BHH also claimed that it had received from P.R. Shah Ltd. a sum of Rs. 4 lakhs in cash.

4. The claim was resisted by P.R. Shah Ltd. on the ground that there was no contract whatsoever between it and the claimant BHH. That though it has paid an amount of Rs. 13 lakhs to BHH upon raising the invoice, it has done so by way of a loan which BHH had requested for.

5. By the award the two arbitrators, i.e., Hemant Shah and Sharad Dalai came to the conclusion that though the contract was entered into in the name of Continental Ltd., however, part payment of Rs. 13 lakhs was made by P.R. Shah Ltd. to BHH. The payment was initially made by P.R. Shah Ltd. by way of credit slip of Stock Exchange. However, as the said credit slip was rejected, the amount was paid by a cheque dated 11-6-1998 by P.R. Shah Ltd. The arbitrators took

note of the defence of P.R. Shah Ltd. that the transaction was not entered into and they have not received any bill or contract and that the amount of Rs. 13 lakhs was paid by P.R. Shah Ltd. as a loan to BHH. In order to resolve the controversy the arbitrators asked the petitioner P.R. Shah Ltd. to produce its sauda sheet for the said date which they did not on the ground that their computers were not in a working condition.

6. On facts, the arbitrators found that though the BHH did not have any account of P.R. Shah Ltd. in their books and neither was their parties name represented by a client''s note code number on the sauda sheet, however, there is a practice of entering the short name of the client which has been done. The arbitrators relying on a well-known practice observed that brokers entered into transaction with the other brokers in their own name or in their firm''s name or in the name of the different entity, which is also owned by the member broker. As a fact the arbitrators, therefore, found that P.R. Shah Ltd. had entered into transaction with the BHH in the name of its constituent respondent No. 1, i.e., Continental Ltd. In fact, the arbitrators have observed as follows :

"However, for just name sake they have given the name of respondent No. 2 (P.R. Shah Ltd.)."

Also it has been observed that "against the liability of respondent No. 1 (Continental Ltd.) payments are made by respondent No. 2 (P.R. Shah Ltd.) by making this payment they have also entered into the transaction. If transaction had not taken place, then it would have been the liability of respondent No. 2 (P.R. Shah Ltd.) with the Stock Exchange. So by transferring the transaction, the respondent No. 2 (P.R. Shah Ltd.) have transferred their liability with the applicant (BHH). Therefore, the respondent No. 2 (P.R. Shah Ltd.) is also liable in this case."

7. As regards the question of jurisdiction, the two arbitrators came to the conclusion that the transaction is in fact between two members, i.e., P.R. Shah Ltd. and BHH and, therefore, they are liable to be tried by them in exercise of their jurisdiction which was being principally exercised under Bye-law 248. The two arbitrators, therefore, directed that the BHH would be entitled to recover a sum of Rs. 36,98,384.73 along with interest at 18 per cent p.a. from Continental Ltd. If the said party fails to pay the said amount, then the entire amount of the shortfall would be made good by P.R. Shah Ltd.

8. The third arbitrator, i.e., Justice D.B. Deshpande took the view that there is no merit in the defence of P.R. Shah Ltd. that it did not enter into any transaction with BHH. The learned arbitrator, in fact, observed that two of the directors of both the companies are common and that the transaction by P.R. Shah Ltd. in the name of Continental Ltd. was transferred to the BHH through BOLT. The learned arbitrator observed that even otherwise it is clear that the fact that initially P.R. Shah Ltd. paid an amount of Rs. 13 lakhs and after the credit (kapla) under which it was paid was rejected it gave a cheque of Rs. 13 lakhs, clearly

supported the contention of BHH. The learned arbitrator, however, came to the conclusion that since P.R. Shah Ltd. was a member broker, the panel of arbitrators has no jurisdiction to hear and decide the case against the said party. The learned arbitrator, therefore, directed that the BHH may approach the proper forum for recovery of the amount due to it.

9. Thus, it is clear that as a matter of fact all the three arbitrators have found that P.R. Shah Ltd. was a party to the transaction though the contract was not entered into in its name. The difference in opinion and the order is only on account of the fact that P.R. Shah Ltd. is a member broker and, therefore, the forum for arbitration is different.

10. At this juncture, it would be necessary to set out the two for a contemplated by the Rules, Bye-laws and Regulations of the Stock Exchange, Mumbai. The first category of arbitration is ''Arbitration other than between members''. Bye-law 248(a) which is relevant, reads as follows :

"All claims (whether admitted or not) difference and disputes between a member and a non-member (the terms non-member and non-members shall include a remisler, authorised 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, fulfilment or validity or in relation to the rights, obligations and liabilities of remislers, authorised 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."

Bye-law 249 provides that such an arbitration shall be referred to the arbitration of a sole arbitrator or of three arbitrators to be appointed by the executive director or by the parties from the panel of arbitrators constituted by the Governing Board. The second category of arbitration is ''arbitration between members''. Bye-law 282 provides as follows :

"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 common in the Exchange''s computerized trading system or in execution of any trades on or by such trading system) or anything or 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."

Bye-law 285 provides that when such a reference is made to the Arbitration Committee, it shall be heard by a sole arbitrator or by three of its members to be specified either generally. Rule 285 further provides that such arbitration shall be heard by the members of the Stock Exchange. Bye-law 290B provides for an appeal to the Arbitration Committee and rule 295 provides for second appeal therefrom to the governing body.

11. Mr. Samdani, the learned counsel for the petitioners contended that the claim against the petitioners P.R. Shah Ltd. could never have been decided under the panel of arbitrators which was constituted under Bye-law 248. According to the learned counsel, that bye-law provides only for an arbitration between a member and non-member and the petitioner being a member was clearly outside the purview of the penal of arbitrators. Mr. Samdani, relied on the contract notes at Exhibit A-1 which is clearly issued in the name of Continental Ltd. and makes no reference to P.R. Shah Ltd. except that the address of Continental Ltd. is given as being C/o. P.R. Shah Shares & Stock Brokers (P.) Ltd. The learned counsel also referred to the invoice which is raised by BHH in favour of Continental Ltd. and not in favour of P.R. Shah Ltd.

12. At the outset, Mr. Madon, the learned counsel for the respondent No. 1 raised a preliminary objection to the above contention raised on behalf of the petitioners on the ground that this contention though raised before the arbitrator, is no where pleaded in the petition and, therefore, the petitioner is not entitled to raise it. Grounds (a) and (b) of the petition which are relevant, read as follows :

(a) There is no privity of contract between the petitioners and the respondent No. 1 and in the absence of any contract, the learned arbitrator ought not to have proceeded against the petitioners.

(b) The subject contract note dated 4-6-1998 based on which the present reference has been filed is in the name of respondent No. 2 and, therefore, the reference ex facie is not maintainable against the petitioners.

The above grounds do not specifically refer to the Bye-law 248 and there are no specific words to the effect that the arbitration panel constituted under Bye-law 248 has, therefore, no jurisdiction to entertain the reference against the petitioners. It is, however, clear on reading the petition as a whole that the preliminary objection does not have much substance. In the petition, there are clear averments in paragraph 6 to the effect that "the Arbitral Tribunal has no jurisdiction to enter upon the reference and deal with the purported claim of the respondent No. 1, i.e., BHH against the petitioners for want of written contract and more specifically for want of arbitration agreement between the petitioner and respondent No. 1." The petitioners have totally denied "any transaction purportedly having been carried out/done/under gone by the respondent No. 1 for and on behalf of the petitioners or under instructions of the petitioners, written or otherwise, under the purported contracts and bills annexed to the statement of claim as falsely contended and alleged. It is, thus, submitted that the Arbitral Tribunal had no jurisdiction to proceed with the reference against these petitioners. The petitioners crave leave to refer to and rely upon the written statement and written arguments filed by the petitioner in the arbitration proceedings."

13. Having regard to the aforesaid averments and averments in paragraph 4 of the petition. I am of the view that taking the petition as a whole the petitioner must be taken to have raised the point which is being urged on their behalf. Mr, Madon, the learned counsel for the respondent No. 1 referred to a decision of the Division Bench of this Court in Vastu Invest & Holdings (P.) Ltd, v. Gujarat Lease Financing Ltd. 2001 (2) Mah. LJ. 565, for the proposition that a ground not being specifically pleaded cannot be allowed to be urged. In the view I have taken of the pleadings, it is not necessary to consider the application of that decision in the facts of the present case.

14. The question, therefore, is whether the dispute between a member and a member can be decided by an arbitration panel under Bye-law 248 (a) reproduced hereinabove. On a plain construction of the said Bye-law, it is clear that the Bye-law is intended to provide for arbitration of all claims, differences and disputes between a member and member and a non-member which may arise out of or in relation to dealing, transaction and contract made subject to the Rules, Bye-laws and Regulations of the Stock Exchange. The answer to the question that arises in this case depends on the meaning that may be attributed to the following words "or with reference to anything incidental thereto." If these words are construed as qualifying only the preceding words "in relation to dealing, transaction and contract", then there is no doubt that a reference between a member and a member and a non-member cannot be decided under Bye-law 248(a). If, however, one looks to the setting of the rule, its context and the text, it appears that the words "or with reference to anything incident thereto" are intended to qualify all that which precedes them, that is to say, they are intended to enable the resolution of a dispute between a member and a non-member and a member, where the dispute between the member and other member is incidental to the dispute between the member and the non-member. There is no other Bye-law whereunder a dispute between a member and a non-member in which another member is also involved or concerned can be agitated upon or can be referred to arbitration.

15. According to Mr. Samdani, the learned counsel for the petitioner, the claim against the petitioner who is a member could only have been decided under Bye-law 282. This argument cannot be accepted in view of the fact that the petitioner P.R. Shah Ltd. was not the only party to the claim but merely one of the parties the other being a non-member, ie., Continental Ltd.

16. If the scheme of the Bye-laws is to be construed in such a manner that dispute between member and non-member can only be referred for arbitration under Bye-law 248 and dispute between member and member can only be referred for arbitration under Bye-law 282, it would mean that if & member has

as dispute with a non-member and a member, the member would necessarily, have to split the claim and that part of the claim which would be against a non-member would be referred for arbitration under Bye-law 248 and that part which is against the member would be referred for arbitration under Bye-law 282. Where, however, a member has some claim and seeks a satisfaction of the claim jointly or severally against a member and a non-member, the same would not be referable to arbitration either under Bye-law 248 or Bye-law 282.

17. Mr. Samdani, the learned counsel next submitted that if it is held that a claim against the member such as a petitioner can be referred for arbitration under Bye-law 248 and decided in accordance therewith and not under Bye-law 282, it deprives the member of a right of an appeal. That is clearly an inescapable consequence of holding that a member may be proceeded against under Bye-law 248(a). It must, however, be remembered that it is the right of the claimant to avail of one out of two or several remedies that may be available to him. Where, the claimant elects to avail of a remedy under Bye-law 248 against the member and fails, he would be equally deprived of the two appeals which would be available had the reference been made under Bye-law 282. The difficulty that is posed, namely, the deprivation of an appeal in my mind would not be determinative factor in such a case. What would determine the construction of the Bye-law in question would be whether the construction achieves the purpose for which it was designed.

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

19. In the result, there is no merit in the petition which is hereby dismissed. There shall be no order as to costs.

20. At this stage, Mr. Samdani, the learned counsel for the petitioner seeks stay of this order. The effect and operation of this order shall be stayed for a period of six weeks from today.

