

(2006) 11 MAD CK 0168
In the Madras High Court
Case No : O.P. No. 1086 of 1997

S. Sridharan

APPELLANT

Vs

Appollo Sindhoori Capital Invest Ltd. and Others

RESPONDENT

Date of Decision : 08-11-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16(2), 16(3), 34

Citation : (2007) 78 SCL 434

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : S.K. Rakhunathan, for the Appellant; V. Ramakrishnan and S. Thiruvenkadaswamy, for the Respondent

Judgement

S. Rajeswaran, J.—This O. P. has been filed u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to set aside the award A. M. No. 8 of 1997, dated August 5, 1997, passed by the second respondent and to direct the respondents to pay the petitioner the costs.

2. The facts are as follows:

The first respondent is a member of the National Stock Exchange of India Ltd., the third respondent herein. The petitioner is a constituent and use the facility of the first respondent for buying and selling in stock and shares listed before the third respondent. On September 6, 1996, one Mr. Harish, representing as manager of the first respondent, met the petitioner and informed him that the petitioner would not be permitted further trading using the facility of the first respondent. He further informed him that he would be straight away dealing in respect of the petitioner's pen-ding positions and if any consequential losses should occur, the same would be taken off by the first respondent. Thus the petitioner was prevented from trading resulting the petitioner suffering a loss of Rs. 4.50 lakhs. It is the further case of the petitioner that the first respondent charged exorbitant brokerage for the petitioner when compared to others and the first respondent was due to pay a sum of Rs. 80,000 to the petitioner towards

charging over brokerage. The petitioner also suffered mental agony as he was not permitted to trade and he quantified the same at Rs. 1,00,000. Therefore he made a demand to the first respondent on September 17, 1996, for a sum of Rs. 5,50,000 together with a sum of Rs. 80,000 being the excess brokerage charged by the first respondent. After receipt of the letter dated September 17, 1996, the first respondent sent a notice on November 8, 1996, demanding a sum of Rs. 3,98,376.70 together with interest at 24 per cent. alleging the same to be the dues payable by the petitioner. The petitioner by reply dated November 13, 1996, informed counsel of the first respondent that there is no dispute which warrants adjudication by an arbitrator and there is no ground for an appointment of an arbitrator. The first respondent approached the third respondent for appointment of an arbitrator and the third respondent by letter dated February 24, 1997, directed the petitioner to submit his defence with the supporting documents. The petitioner by letter dated March 12, 1997, questioned the authority of the third respondent to appoint an arbitrator and further informed the third respondent that the claim is barred by the bye-laws of the third respondent. The third respondent sent a letter dated April 9, 1997, informing the petitioner that the various objections raised by him could be raised before the arbitrator for which the petitioner sent a letter dated April 18, 1997, informing that he is not opting to file any objection and he is not willing to take part in the arbitration proceedings. The third respondent appointed the second respondent as arbitrator and the second respondent by letter dated May 16, 1997, informed the petitioner that hearing is fixed on June 14, 1997, at Mumbai. But the petitioner clearly informed all the respondents that he is not expecting any justice and hence he would not be taking part in the proceedings. The second respondent proceeded to adjudicate the matter and passed an award for a sum of Rs. 3,98,376.70 with interest at 18 per cent, from January 8, 1997. Challenging this ex parte award dated August 5, 1997, the above O. P. has been filed u/s 34 of the Act, 1996.

3. The following grounds have been raised by the petitioner to assail the award:

- (1) The first respondent has allowed the office bearer of the third respondent to be an arbitrator which would reveal that they have colluded together to pass an award against the petitioner.
- (2) The refusal on the part of the arbitrator to change the venue from Mumbai to Chennai resulted in denial of opportunity for the petitioner to put forward his defence effectively.
- (3) The arbitrator has not applied his mind and simply accepted the claim of the first respondent.
- (4) The arbitrator is biased towards the petitioner.

4. It is seen from the records that Application No. 1580 of 2000, was filed by the petitioner herein to raise additional grounds in the above O. P. and this Court by order dated February 16, 2001, held that additional grounds sought to be raised

are in the nature of new application and therefore time-barred and hence Application No. 1580 of 2000, was dismissed. It is also brought to my notice, the appeal against the said order in O. S. A. No. 173 of 2001, filed was also dismissed.

5. The first respondent entered appearance and filed a counter statement. It is stated by the first respondent that the appointment of the second respondent as arbitrator by the third respondent is in accordance with the contract and bye-laws of the third respondent and the second respondent is not an officer of the third respondent, but he is an independent arbitrator. As per the contract itself the arbitration shall be in accordance with the bye-laws and the courts in Mumbai would have exclusive jurisdiction. The petitioner having agreed to such a contract cannot now complain and insist that the arbitration venue should have been in Chennai only.

6. Heard both learned Counsel for the petitioner and learned Counsel for respondents Nos. 1 and 3. I have also gone through the documents and the judgments referred to by them in support of their submissions.

7. I have considered the rival submissions carefully and the two decisions relied on by the first respondent.

8. A plain reading of the award would make it very clear that the second respondent arbitrator has gone into the entire dispute elaborately by applying his mind to the entire facts of the case.

9. The second respondent was also aware of the fact that the petitioner remained absent and considered the stand that would have been taken by the petitioner if he had participated in the arbitration proceedings. Therefore it cannot be said that the second respondent arbitrator has not applied his mind and he was biased against the petitioner.

10. In fact, the second respondent arbitrator framed the following issues:

Issue No. 1 : Whether the arbitrator has jurisdiction to entertain the claim ?

Issue No. 2 : Whether the applicants prove that there...?

Issue No. 3 : Whether the claim in dispute is barred by limitation ?

Issue No. 4 : Whether the applicants prove that a sum of Rs. 3,98,376.70 together with interest thereon at the rate of 24 per cent. per annum is due and payable by the respondent to the applicant from the respective due dates of payment ?

Issue No. 5 : Whether the applicants are entitled to the costs of the arbitration proceedings from the respondents ?

Issue No. 6 : What order ?

11. For the issue, whether the arbitrator has jurisdiction to entertain the claim,

findings were given by the second respondent, as under:

22, My findings on the aforementioned issues are as follows:

Issue No. 1 : In the affirmative.

Issue No. 2 : In the affirmative.

Issue No. 3 : In the negative.

Issue No. 4 : In the affirmative.

Issue No. 5 : In the affirmative.

Issue No. 6 : Final order.

23. Reasons.-My brief reasons for the above findings are as follows:

Issue No. 1 : I have carefully gone through the entire record, including the exhibits and statements of accounts, etc. referred to and relied upon by the parties. As regards the jurisdiction of the arbitrator, it may be noted that the applicants have relied upon the various contract notes sent to the respondent. The contract notes clearly mention that all or any point in dispute member of the exchange shall be referred to the arbitrator as per the rules and regulations of the National Stock Exchange of India Ltd. (NSEIL). In the contract note there is a specific clause regarding the reference to the arbitration. In the instant case, I had the benefit of perusing at least 3 contract notes, viz.

(i) The first contract Note No. 2608, sett No. 2 for the period from May 29, 1996, to June 4, 1996. The transaction is in respect of various shares, viz., Knoll Pharma (Boots) Pharmaceuticals, K. C. Pharma Ltd. and S and S Power. The contract note is issued by member acting for constituent as brokers and agents and is subject to the jurisdiction of the courts in Bombay ;

(ii) Second contract Note No. 2608, sett No. 24, dated June 12, 1996, to June 18, 1996, the same was in respect of the shares of State Bank of India ;

(iii) The third contract note is bearing No. 3276, sett. No. 25, and covers the period from June 19, 1996, to June 25, 1996. The same is in respect of shares of all 3 lots of Shakti Sugars and one lot TISCO. It is pertinent to note that all the notes bear the signature of the... (sic) whose genuineness has not been challenged.

24. The perusal of the contract notes as well as the attendant circumstances will justify the conclusion that an arbitration agreement has come into existence. An arbitration agreement is in writing if it is contained in.

(a) a document signed by the parties ;

(b) an exchange of letters, telex, telegrams or other means on telecommunication which provide the record of the agreement ; or

(c) an exchange of statements and claims and defence in which the existence of the agreement is alleged by one party and not taking by the other. It would thus be seen that the arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if the dispute arose between them in respect of subject matter of the contract such dispute shall be referred to arbitration. It is only then, that such a dispute would spell out an arbitration agreement.

25. It is also noteworthy to bear in mind that the respondent has admitted about his dealing and about his having entered into the contract notes of the transaction at a certain point of time. It has been judicially held, that submission to arbitration need not be signed by both the sides. It must however, be in writing. It may be contained in a contract which need not be signed by other party. The contract may be accepted orally and in such case, the concerned party would be bound by submission clause. Having regard to the aforesaid facts in question and law on the subject, I am of the opinion, that it is satisfactorily proved that I, as an arbitrator have jurisdiction to entertain the subject matter of the claim. Accordingly, I answer the above issue in the affirmative.

12. From the above, it is very clear that this issue was decided after going through the entire records including the contract note and I am in agreement with the said findings given by the second respondent arbitrator.

13. In *Viraj Holdings v. Motilal Oswal Securities P. Ltd.* [2003] 115 Comp 13 Cas 102 : [2003] 4 R. A. J. 176, the Bombay High Court held that the contract note executed in accordance with regulation No. 3.5 of the National Stock Exchange which is framed under the Securities Contracts (Regulation) Act, 1956, signed only by the registered broker and containing a stipulation that the contract would be subject to rules, bye-laws and regulations, which in turn provide for arbitration can constitute a valid arbitration agreement.

14. In the order dated March 6, 2006, in O. P. No. 151 of 2001, I have also observed that when the bye-laws and regulations of the National Stock Exchange govern the field, the petitioner cannot resile from his contractual obligations by saying that he would not submit to arbitral proceedings as there is no clause for referring to arbitration in the agreement.

15. It only the petitioner bona fide questioned the existence of the arbitral agreement, then he ought to have appeared before the second respondent arbitrator and filed an application u/s 16(2) and (3) of the Act, 1996. Therefore the petitioner cannot assail the award on the ground that there is no valid arbitration agreement.

16. In so far as the question of limitation aspect is concerned, the second respondent arbitrator considered this question and framed an issue for which he rendered the finding as follows:

27. Issue No. 3.-That takes me to the consideration of the next issue, viz.,

whether the claim in dispute has been barred by limitation. In this respect, the case of the respondent is that the period of limitation for making an application for arbitration is 90 days. According to the respondent, the said statutory period of 90 days has to be reckoned from the date on which the alleged default has occurred. In the instant case, the constituent was stopped from doing any trading with effect from September 6, 1996, in the midst of settlement No. 36 of 1996 (ending on September 10, 1996) and if any debit existed, as claimed by the trading member, then 90 days period of limitation should be calculated from the first date of the default, i.e., September 11, 1996. Under those circumstances, the respondent submitted that the present claim for arbitration ought to have been filed on or before December 9, 1996.

28. On the other hand, the applicants have relied upon the date of January 8, 1997, as the relevant date for the last (sig.) that day the transaction in respect of ACC and KCB shares were effected. Hence, according to the applicants their application for referring the matter to the arbitration proceedings is well within time, i.e., within 90 days from January 8, 1997. It is that date, which the applicants have relied upon as the date for the squaring off position. I am inclined to accept the submission of the applicants in that behalf and accordingly I hold that the present claim is within time and accordingly, I answer the above issue in the negative and hold that the application has been made within the period of limitation.

17. Learned Counsel for the petitioner made an attempt to assail the award on the ground of limitation also even though no specific ground was taken by the petitioner in the petition. Learned Counsel for the first respondent made his objections by submitting that this issue could not be agitated as there was no ground raised in the petition filed by the petitioner. Even though I find force in the submission of learned Counsel for the first respondent, I still consider the ground of limitation also. The second respondent arbitrator relied on the date January 8, 1997, as the relevant date as on that date the transaction in respect of ACC and KCB shares was effected and held that the claim is within the time. Further, the statement of account is also enclosed with the claim petition. That apart, by notice dated November 8, 1996, the first respondent called upon the petitioner to pay a sum of Rs. 3,98,376.70 within 7 days from the date of receipt of the letter failing which it would be deemed that the petitioner is disputing the amount. To this letter, a reply was sent by a letter dated November 13, 1996, by the petitioner intimating that no amount is due from him and thereafter by letter dated February 12, 1997, the first respondent approached the third respondent for referring the matter to arbitration. If these facts are considered and taken into account, it has to be held that the first respondent has made application for arbitration within 90 days from the date of the dispute.

18. I am also rejecting the contention of the petitioner that the second respondent arbitrator has simply passed the award without application of mind. On the other hand the award under challenge is a reasoned one that too on the

basis of evidence adduced before him. The petitioner instead of participating in the arbitration proceedings and submitting all his objections, has chosen not to contest the claim petition and making the last minute desperate attempt before this Court after suffering an award.

19. Hence, I do not find any merit in the above O. P. and the same is dismissed. No costs.