
(2003) 01 BOM CK 0062
In the Bombay High Court
Case No : Arbitration Petition No. 246 of 2002

Suresh Kabra

APPELLANT

Vs

Trusted Shares and Investments Ltd.

RESPONDENT

Date of Decision : 08-01-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 5

Citation : (2005) 1 BC 160 : (2003) 2 BomCR 480 : (2004) 118 CompCas 99 :
(2003) 2 CompLJ 234 : (2003) 42 SCL 945

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Pradeep Sancheti and Prakash N. Ganwani, for the Appellant; Hiralal Thakker, J.S. Solomon, P.N. Modi and Sagar Divekar, for the Respondent

Judgement

D.Y. ChandraChud, J. 1. Admit. Learned Counsel for the contesting Respondents waive service. By consent taken up for hearing and final disposal.

2. These are proceedings u/s 34 of the Arbitration and Conciliation Act, 1996. The Petitioners are the original claimants in arbitration proceedings that were held before the Arbitral Tribunal of the Stock Exchange, Mumbai. The Petitioners challenge the award dated 31st January, 2002 of the Appellate Forum constituted by the Stock Exchange. The appellate proceedings in turn, arose out of an award dated 21st March, 2001 of the Arbitral Tribunal constituted by the Stock Exchange. The case of the Petitioners in the claim in arbitration is that on or about 2nd August, 1996, they delivered to the First Respondent, 5 lakh shares of a company known by the name of Rhutu Bearing and Estates (I) Limited ("the company") together with duly executed transfer documents under two delivery memos bearing Nos. 451 and 452. The case of the Petitioners was that these shares were delivered to the First Respondent for the purpose of sale in the open market. According to the Petitioners, the First Respondent acknowledged receipt of the shares by embossing its rubber stamp and a signature on its behalf. The First Respondent, according to the petitioners, in turn, sold and delivered the

aforesaid 5 lakh shares to one Messrs. Mahesh Kothari (M.K.) upon whom the First Respondent raised Bill Nos. 159 and 160. M.K. is alleged to have accepted the delivery of these 5 lakh shares and to have acknowledged it by a receipt dated 2nd August, 1996. The Petitioners, rely upon a compilation of documents which includes (i) Bill Nos. 159 and 160 of the First Respondent on M.K. recording that on 1st August, 1996, 3,25,600 shares and 1,74,400 shares had been bought from the First Respondent by the latter; (ii) A letter dated 23rd August, 1996 of the First Respondent to M.K. recording that the transaction had been carried out on 1st August, 1996 for which Bill Nos. 159 and 160 dated 2nd August, 1996 had been issued and, requesting M.K. to hand over a cheque of Rs. 1 crore to the bearer of the letter; (iii) A complaint by the First Respondent to the General Manager of the Investors Service Cell of the Stock Exchange recording that on 24th August, 1996, the First Respondent sent a representative for collection of a cheque, together with a Contract Note and Bill Nos. 159 and 160 dated 2nd August, 1996, and that a representative of M.K. forcibly took away the original documents after which payment was being refused; (iv) A letter dated 30th November, 1996 addressed by the First Respondent to the Second Petitioner recording that on 2nd August, 1996 the latter had approached the First Respondent for help in concluding the sale of 5 lakh shares of the Company to M.K. According to the First Respondent, the transaction was required to be done through a Member of the Stock Exchange and the First Respondent had agreed to facilitate the petitioners to complete the transaction. According to the First Respondent, the BOLT timings of the Stock Exchange were over and the transaction could not be reported to the Exchange. The First Respondent had recorded in that letter that M.K. had refused to honour the transaction as a result of which the First Respondent was required to refer the matter to arbitration. Subsequently, M.K. returned 3,73,400 shares out of 5 lakh shares given to him and the First Respondent had filed a Police Complaint in respect of the balance of the shares. The Second Petitioner was informed that the Arbitration Committee of the Stock Exchange had rejected the claim of the First Respondent for the recovery of moneys from M.K. The Second Petitioner was thereafter, asked to intimate what was required to be done by the Stock Exchange so as to safeguard the interest of the Second Petitioner. The Second Petitioner was called upon to take back 3,73,400 shares which were lying with the First Respondent. The aforesaid letter referred to the transaction between the Second Petitioner and M.K. as "your deal" and M.K. as "your party". A police complaint was also filed by the First Respondent.

3. The case of the First Respondent is that the Petitioners had approached it after the trading hours of the Stock Exchange on 2nd August, 1996 and sought its help in concluding the transaction between the Petitioners and M.K. which is a firm of brokers on the Bombay Stock Exchange. This transaction related to the proposed placement of 5 lakh shares of the Company in question. According to the First Respondent, the trading time was over whereupon the Petitioners represented that they did not desire that there should be any delay in the

transaction. The case of the First Respondent is that the Petitioners stated that they had shares along with transfer deeds and a list of shares ready which should be directly delivered to M.K. However, since it was necessary to put the said transaction through a broker on the Stock Exchange, the First Respondent was requested to depute a member of its staff together with a rubber stamp of the First Respondent to be affixed on the reverse of the transfer deeds. According to the First Respondent, it was the Petitioners who requested it to raise two bills on M.K. for the aggregate sale of 5 lakh shares at the rate of Rs. 20 per share, in a total amount of Rs. 1 crore, following which this was done by the First Respondent. Thereafter, the First Respondent at the behest of the Petitioners deputed a member of its staff along with the bills for collection of payment from M.K. on behalf of the Petitioners. The Bill/contract was, however, torn off by a representative of M.K. However, 3,73,400 shares were returned subsequently by M.K. to the First Respondent. The First Respondent claimed that it had filed arbitration proceedings and a complaint against M.K. but, in the arbitration proceedings, the arbitral forum had concluded that there was no claim recoverable by the First Respondent on behalf of the Petitioners from M.K. In other words, the defence of the First Respondent was that (i) it denied having received the original share certificates from the Petitioners, (ii) it denied the existence of any transaction between the Petitioners and the First Respondent as alleged by the Petitioners; (iii) the 5 lakh shares were delivered by the Petitioners directly to M.K.; (iv) Delivery Memo Nos. 451 and 452 were not genuine; (v) the First Respondent or its representatives had not signed the delivery memos; (vi) the shares were delivered by the Petitioners to M.K. directly and the First Respondent had affixed its rubber stamp on the transfer deeds, raised bills on M.K., demanded payment, filed a complaint and instituted arbitration proceedings against M.K. acting at the behest of the Petitioners; (vii) 3,73,400 shares were delivered back to the First Respondent by M.K. and these the First Respondent was ready and willing to deliver to the Petitioners.

4. The Arbitral Tribunal of the Stock Exchange by its award dated 21st March, 2001 directed the First Respondent to deliver to the Petitioners 3,73,400 shares of the Company and to pay to the Petitioners Rs. 25,32,000 together with interest at 12% p.a. from the date of the reference till realisation. The Arbitral Tribunal rejected the contention of the First Respondent that it was merely acting as a conduit in the transaction between the Petitioner and M.K. and in holding thus, relied upon the following circumstances viz., (i) A complaint which had been filed by the First Respondent against the representative of M.K. contained a statement that the First Respondent had delivered 5 lakh shares of the Company to the representative of M.K. on 2nd August, 1996; (ii) Out of the aforesaid quantity of 5 lakh shares, a quantity of 3,73,400 shares was received back by the First Respondent from M.K.; (iii) The representative of the First Respondent had affixed a rubber stamp of the First Respondent and signed the transfer deeds on behalf of the First Respondent; (iv) The contract was between the First Respondent and M.K. and, therefore, the First Respondent was entitled to take all

necessary steps for recovering the sale price of the shares. The First Respondent had failed in the arbitration initiated against M.K. on the ground that the transaction had been carried on beyond the trading hours and had not been reported to the Stock Exchange. Equally, the Arbitral Tribunal found the case of the Petitioners that they had delivered 5 lakh shares of the Company to the First Respondent for the purpose of selling the same in the open market as unacceptable. The Tribunal noted that this was directly inconsistent with what had been set up by the Petitioners in the rejoinder which was that the shares had been sold to the First Respondent, that this transaction was a spot transaction and hence the First Respondent was bound to pay the price within 15 days of the sale. The Tribunal noted that the theory of there being a transaction of sale by the Petitioners to the First Respondent was not supported by any agreement between the parties, a contract note or bill. The Arbitral Tribunal then noted that Bill Nos. 159 and 160 were dated 2nd August, 1996, while the delivery memos bearing Nos. 451 and 452 under which 1,74,400 shares and 3,25,600 shares were delivered to the First Respondent were also of the said date. These documents showed that the shares were received by the First Respondent and transfer was effected on 2nd August, 1996. However, the two lists which were alleged to accompany the delivery memos showed that while the first sent together with Delivery Memo No. 451 relating to 1,74,400 shares was dated 2nd August, 1996, the second which was sent with Delivery Memo No. 452 relating to 3,25,600 shares was dated 1st August, 1996. Faced with these difficulties, the Petitioners had changed their version by contending that though the transaction was initiated on 1st August, 1996, it was finalised on the next date. The Arbitral Tribunal noted that the two lists which were hand written contained an endorsement requesting M.K. to receive shares. Thus, while endorsements of acknowledgement of receipt on the delivery memos were made by the representative of the First Respondent, endorsements of acknowledgement of receipt on the two lists had been made by M.K. The Tribunal held that it was only after the First Respondent addressed a letter dated 30th November, 1996 calling upon the Petitioners to take steps to protect their own interest, that the Petitioners had belatedly sought to act in the matter. Significantly, the Arbitral Tribunal found that at the time when the alleged transaction had been entered into, there were only a few transactions in the market of the Company in question, involving a small quantity of shares and that the price was far below the contracted sale price of Rs. 20 per share under the transaction in question. The conclusion of the Tribunal was that these transactions were entered into perhaps in collusion with M.K. to artificially raise the price of the shares of the Company. Having said this, the Arbitral Tribunal, however, held that as the transaction had failed, both the Petitioners and the First Respondent must suffer the consequences and while the Petitioners must take back the 3,73,400 shares received back from M.K. the First Respondent must pay to the Petitioners the contractual price of 1,26,600 shares that were not received back from M.K. at the contracted rate of Rs. 20 per share. It was in these circumstances that the Arbitral Tribunal ultimately directed the First Respondent to return 3,73,400

shares and to pay an amount of Rs. 25.32 lakhs to the Petitioners towards the cost of 1,26,600 shares.

5. Appeals were thereafter filed before the Appellate Bench constituted under the Rules. Bye-laws and Regulations of the Stock Exchange, Appeal No. 15A of 2001 was filed by the First Respondent while Appeal No. 18A of 2001 was filed by the Petitioners. In so far as the appeal that was filed by the First Respondent was concerned, the Appellate Bench held that the First Respondent was not liable to pay anything whatsoever to the Petitioners towards the balance 1,26,600 shares. Appeal No. 18A of 2001 filed by the Petitioners was rejected. The First Respondent has, however, been directed to deliver to the Petitioners 3,73,400 shares of the Company which admittedly had been received by the First Respondent. In arriving at its findings, the Appellate Bench of the Stock Exchange has placed reliance on the following circumstances; (i) The Petitioners had not produced any bill or contract supposed to have been issued by the First Respondent in their favour; (2) There was no privity of contract with the First Respondent; (iii) The Petitioners could not produce any evidence to establish their relationship as a client of the First Respondent; (iv) The Petitioners had not title to the shares in question; (v) The Petitioners had admitted that the transaction in question was not routed through the BOLT system of the Stock Exchange; (vi) The Petitioners had no books of account and had not paid any Income Tax on the capital gains involved in the alleged sale of shares worth Rs. 1 crore. The other reasons which have weighed with the Appellate Bench include the inconsistency in the story of the petitioners since the Petitioners had initially committed themselves to there being two dates of delivery, 1st and 2nd August, 1996. The Petitioners had failed to produce the originals of the Delivery Memos and even the Xerox copies contained several discrepancies. The Petitioners had not availed of the opportunity to produce any evidence inter alia of M.K. In sum and substance, the Appellate Bench has accepted the contention of the First Respondent that the transaction in question was one between the Petitioners and M.K. for which the latter would have to account to the Petitioners.

6. Counsel appearing on behalf of the Petitioners urged several submissions for the consideration of the Court which were thus :

(i) The Appellate Bench, it was submitted, erred in holding that there was no privity of contract between the Petitioners and the First Respondent as no contract or bill was issued by the First Respondent in favour of the Petitioners. The submission was that the transaction had been admitted by the First Respondent;

(ii) The Appellate Bench, it was urged, had erred in holding that the Petitioners had no title to the shares. It was no one's case that the shares were stolen property and the fact that the shares were delivered by the Petitioners to the First Respondent had been admitted which was sufficient to disentitle the First Respondent to raise such a plea;

(iii) The Petitioners were not concerned with the wrong doing of the First Respondent or with the findings in the dispute that was raised by the First Respondent against M.K. The onus was on the First Respondent to prove his case that there was no contract or dealing between the First Respondent and the Petitioners and it was at the instance of the Petitioner that the First Respondent put a seal on the transfer deeds for delivery of the shares to M.K. It was for the First Respondent to examine witnesses on its behalf;

(iv) The originals of the delivery memos had not been called for though they were seen and verified by the Deputy General Manager of the Stock Exchange;

(v) The finding that M.K. is liable to account for 1,26,600 shares is perverse.

7. On the other hand, it has been urged on behalf of the First Respondent that in the present case (i) There was a total absence of any contract note or any other document suggesting any contract for the sale or purchase of shares or any other transaction between the Petitioners and the First Respondent; (ii) Inconsistent and contradictory pleas were set up by the Petitioners in respect of the alleged transaction. In the statement of claim, the Petitioners had alleged that they delivered to the First Respondent, the said shares with duly executed transfer documents for the purpose of selling the same in the open market. A patently inconsistent case was subsequently set up this the shares had been sold to the First Respondent; (iii) The Petitioners had not mentioned in the statement of claim at what rate the said shares were sold to the First Respondent or even the basis on which the claim of Rs. 1 crore had been arrived at; (iv) There was a complete failure on the part of the Petitioners to establish their title to the shares in question despite an order of this Court dated 7th December, 1999 in Writ Petition No. 1899 of 1999; (v) The Petitioners had, in fact, paid an amount of Rs. 7.05 lakhs in September 1996 to the First Respondent in two installments together with an amount of Rs. 12 lakhs which was due and payable to the First Respondent. It was inconceivable that this amount would have been paid if any amount was due and outstanding from the First Respondent to the Petitioners.

8. In assessing the challenge to the correctness of the arbitral award, it would be necessary at the outset for the Court to reiterate the parameters of the jurisdiction u/s 34 of the Arbitration Conciliation Act, 1996. The statement of objects and reasons accompanying the Arbitration and Conciliation Act, 1996 shows that the purpose of the Act was to reduce to the minimum judicial intervention with arbitral awards. Section 5 of the Act, therefore, provides that no judicial authority shall intervene except to the extent and as provided by the Part. The grounds for judicial intervention are delineated in Section 34 and it has been provided that an arbitral award can be set aside only on one of the grounds set out in the section. In *Vijaya Bank v. Maker Development Services (P.) Ltd.* [2001] 4 CompLJ. 385 (Bom.) B.N. Srikrishna, J. (as the Learned Judge then was) speaking for a Division Bench of this Court held that a mere error of law does not constitute a breach of public policy. It would also be necessary for this Court to follow the binding principles laid down in the subsequent judgment of a

Division Bench consisting of Mr. Justice H.L. Gokhale and Smt. Justice Nishita Mhatre in *BFIL Finance Ltd. v. G. Tech Stone Ltd.* [Appeal No. 284 of 2002 in Arbitration Petition No. 499 of 2001]. Holding that it was impermissible for the Single Judge while exercising jurisdiction u/s 34 of the Act to substitute his views for that of the Arbitrator, Mr. Justice H.L. Gokhale, speaking for the Division Bench held thus :

"That apart, from the two paragraphs which we have quoted above, it is very clear that the learned Single Judge was substituting his own views over that of the Arbitrator. That was clearly outside his jurisdiction. It is quite possible that the learned Single Judge had another view of the matter. That is not the jurisdiction which is vested while looking into the question of the legality or validity of the award when it is challenged u/s 34 of the Act. Similarly as far as the question of public policy is concerned, by linking it with natural justice and thereafter linking it to law of limitation, the learned Judge has found fault with the majority judgment. This very approach has been criticised by a Division Bench of this Court in the case of *Vijaya Bank (supra)*. In that judgment, the Division Bench clearly observed that the expression "public policy" cannot mean contravention of law simpliciter. That being the judgment rendered by a Division Bench, we are bound by the same and we have no reason to differ there from "

The contention of the Learned Counsel appearing on behalf of the Petitioners is that the arbitral award is in breach of the public policy of India and that the reasons which have weighed with the Appellate Bench are perverse and would warrant the interference of this Court. The Learned Counsel urged that these were, therefore, no findings in the eyes of law. In considering whether a case for the interference of this Court has been made out, it would be necessary for the Court to highlight several aspects of the case which show a complete lack of bona fides in the conduct of the Petitioners. In the statement of claim which was filed in the arbitral proceedings, the foundation of the claim was that the Petitioners had on or about 2nd August, 1996 delivered to the First Respondent, 5 lakh shares of the Company in question "for the purpose of selling the same in the open market". These shares, according to the Petitioners, were delivered together with duly executed transfer documents. According to the Petitioners, these shares were in turn, sold and delivered by the First Respondent to M.K. On the other hand, in paragraph 28 of the statement of claim, it was sought to be alleged that the Petitioners had sold the aforesaid shares to the First Respondent. In paragraph 4(b) of the rejoinder that was filed before the Arbitral Tribunal, the Petitioners sought to set up a case that "they had sold the said 5 lakh shares to the Respondents". The Arbitral Tribunal of the first instance referred to this inconsistency in the case which had been set up by the Petitioners. The Arbitral Tribunal adverted to this inconsistency in paragraph 16 of the award and in paragraph 17 noted that the alleged transaction of sale by the Petitioners to the First Respondent was not supported by any agreement between the parties or by a contract note or bill. It was in these circumstances, that the Tribunal noted that right until 30th November, 1996 when the Petitioners

received a communication from the First Respondent, the Petitioners had not considered it fit to call upon the First Respondent to issue a contract note or bill. Another material circumstance is a complete failure on the part of the Petitioners to advert to the price at which the shares were allegedly sold to the First Respondent. There is merit in the contention which has been urged on behalf of the First Respondent that there was no basis upon which an award of Rs. 1 crore was prayed for in the statement of claim. The Arbitral Tribunal of the first instance also adverted to the fact that at the time when the alleged transactions were entered into, there were only a few transactions relating to the shares of the Company in question and the price was far below Rs. 20 per share which was the alleged price reflected in the transaction in dispute. The Tribunal was, therefore, of the view that this was really a transaction which was entered into perhaps in collusion with M.K. in order to artificially raise the price of the shares of the Company. Apart from this circumstance, there are significant discrepancies in the two lists of shares produced by the Petitioners. The Arbitral Tribunal has adverted to these discrepancies in its award. The Learned Counsel appearing on behalf of the Petitioners has assailed the findings of the Arbitral Tribunal in so far as the failure of the Petitioners to prove their title to the shares is concerned. However, it would be material in this context to advert to an order dated 7th December, 1999 that was passed by a Division Bench of this Court in Writ Petition No. 1899 of 1999 to which the Petitioners herein were parties. In the order of the Division Bench, the Court recorded the statement on behalf of the Securities and Exchange Board of India (SEBI) that the authority will complete the enquiry against the Petitioners within 12 weeks provided that the Petitioners cooperate with the enquiry and produce all necessary documents and information as called for by SEBI including their source of title to the shares of the Company in question, Rhutu Bearing and Estates (I) Ltd. In this context, the failure of the Petitioners to substantiate their title is a matter which cannot be excluded from consideration. The Learned Counsel appearing on behalf of the First Respondent has placed reliance on the affidavit which was filed before SEBI on behalf the First Respondent in which the transaction in question has been explained. I am of the view that it is not necessary to enquire into these factual aspects of the case any further. Having regard to the limited parameters of the jurisdiction of the Court u/s 34, it would not be permissible for this Court to interfere with the award upon a reappraisal of evidence or by substituting the Court's opinion for the reasons which have weighed with the Appellate Bench. I have adverted to the material on the record only in order to determine as to whether within the limited parameters that are available to the reviewing Court, a case for interference has been made out. The case of the petitioners is anything but bona fide and honest and I am of the view that apart from the reasons which have weighed with the authorities below, this Court would be slow to intervene in favour of the Petitioners who have neither been candid, nor fair in their dealings. In the circumstances, I do not find any merit in the Arbitration Petition. The Arbitration Petition is accordingly rejected.