

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 20.10.2015
Date of Decision : 28.10.2015

Appeal No. 182 of 2015

Mr. Harinarayan G. Bajaj
406, Commerce House
140, Nagindas Master Road
Fort, Mumbai- 400 023

...Appellant

Versus

1. The Bombay Stock Exchange Limited
Jeejeebhoy Towers, Dalal Street,
Mumbai- 400 001

2. Madhukar Sheth
603, Elizabeth Apartment
BSM Road,
Mumbai- 400 013

...Respondents

Mr. Shailesh H. Bajaj, Chartered Accountant for the Appellant.

Mr. Kingshuk Banerjee, Advocate i/b Wadia Ghandy & Co. for
Respondent No. 1

Mr. Purvish Jitendra Malkan, Advocate for Respondent No. 2

CORAM: Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member

Per: Justice J.P. Devadhar

1. Appellant is aggrieved by the order passed by the Bombay Stock Exchange Limited (“BSE” for short) on February 12, 2015. By that order the BSE has declined to register the Arbitration Application filed by the appellant against the respondent no. 2 on the ground that although the Division Bench of the Bombay High Court has set aside the Award

passed by the Arbitral Tribunal of BSE, the respondent no. 2 has challenged the said decision before the Apex Court and therefore, during the pendency of the said proceedings before the Apex Court, the Arbitration Application filed by the appellant cannot be entertained and referred to the Arbitral Tribunal for its fresh decision.

2. Facts relevant for the present appeal are as follows:-

- a) On June 15, 2001 the respondent no. 2, a member of BSE initiated Arbitration Proceedings against the appellant claiming an amount of ₹ 1,58,39,459.57. In the said Arbitration Proceedings the appellant filed a counter claim amounting to ₹ 27,62,427.27.
- b) The Arbitral Tribunal of the BSE by its Award dated November 07, 2003 allowed the claim of the respondent no. 2 and rejected counter claim of the appellant on the ground that the said amount of ₹ 27,62,427.27 was adjusted against the purchase transactions of the appellant with the respondent no. 2's broking entity, which transactions were found to be valid and subsisting by the Arbitral Tribunal.
- c) Challenging the aforesaid Award, appellant filed Arbitration Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (" 1996 Act")

for short) before the Bombay High Court. It is not in dispute that in the said Arbitration Petition appellant had challenged the decision of the Arbitral Tribunal in allowing the claim of respondent no. 2 as also the decision of the Arbitral Tribunal in rejecting the counter claim of the appellant.

- d) By a judgement and order dated July 26, 2004 Learned Single Judge of the Bombay High Court dismissed the Arbitration Petition filed by the appellant under Section 34 of the 1996 Act. Challenging the aforesaid order, appellant filed an appeal and by a judgement and order dated September 04, 2014 a Division Bench of the Bombay High Court allowed the appeal filed by the appellant and set aside the Award.
- e) Challenging the aforesaid Division Bench decision of the Bombay High Court dated September 04, 2014 the respondent no. 2 has filed a Special Leave Petition (“SLP” for short) before the Apex Court and the same is pending.
- f) In the meantime on December 30, 2014 appellant filed an Application before the BSE seeking reference of the dispute between the appellant and respondent

no. 2 (which was registered as counter claim in the earlier arbitration proceedings) to the Arbitral Tribunal of the Stock Exchange. By the impugned communication dated February 12, 2015 the BSE declined to accept the Arbitration Application on the ground that the respondent no. 2 had filed an SLP against the Division Bench decision of the Bombay High Court dated September 04, 2014. Challenging the aforesaid communication of BSE dated February 12, 2015 present appeal is filed.

3. Mr. Shailesh Bajaj, Authorized Representative of the appellant submitted that under Bye Law 260(2) of the Bye Laws framed by BSE it was obligatory on part of the Stock Exchange to entertain the application filed by the appellant especially when the Award made by the Arbitral Tribunal is set aside by the Bombay High Court. Since the Apex Court has not stayed operation of the Division Bench decision of the Bombay High Court, it is submitted on behalf of the appellant that the Arbitration Application ought to have been accepted subject to decision of the Apex Court in the SLP Filed by the respondent no. 2.

4. Mr. Banerjee learned counsel appearing on behalf of BSE submitted that the appellant is seeking re-adjudication of the same arbitration reference which was subject matter of earlier arbitration reference. However, since the Bombay High Court while setting aside the Award passed by the Arbitral Tribunal has held that the dispute could be

referred back to arbitration only if the respondent no. 2 agrees to such reference and since respondent no. 2 has not accepted arbitration and filed SLP, BSE has deemed it fit to reject the application. Counsel for BSE further submitted that if this Tribunal holds to the contrary then BSE would abide by that decision.

5. Mr. Malkan, learned counsel appearing on behalf of respondent no. 2 on the other hand submitted that although the Arbitration Petition filed under Section 34 of the 1996 Act contained a ground to challenge the rejection of counter claim, no such argument was advanced at the hearing of the Arbitration Petition before the Learned Single Judge. On perusal of the order passed by the Learned Single Judge of the Bombay High Court on July 26, 2014 it becomes clear that no arguments were advanced against the decision of the Arbitral Tribunal in rejecting the counter claim. Therefore, the appellant who is guilty of not arguing the ground taken in the Arbitration Petition before the Learned Single Judge, cannot now make a grievance that the ground taken in the arbitration proceedings has not been considered. In support of the above contention reliance is placed by the counsel for respondent no. 2 on a decision of the Apex Court in case of Daman Singh vs. State of Punjab reported in LXXXVII BOM LR at Page 290.

6. Counsel for respondent no. 2 further submitted that in the Memorandum of Appeal filed against the decision of the Learned Single Judge appellant had not taken a ground that the counter claim has been

wrongly rejected. Moreover, Division Bench decision of the Bombay High Court reveals that no argument was advanced relating to the rejection of the counter claim by the Arbitral Tribunal as well as the Learned Single Judge of the Bombay High Court. Relying on a decision of the Kerala High Court in case of Girija and Ors. vs. Rajan and Anr. reported in I.L.R. 2015 (1) Kerala 910 and a decision of the Apex Court in the case of Ramchandra S. Mahajan vs. Damodar T. Tanksale reported in (2007) 6 SCC 737 counsel for respondent no. 2 submitted that the plea against rejection of counter claim though raised but not argued before the Learned Single Judge and not raised and argued before the Division Bench of the Bombay High Court would operate as res-judicata and hence the appellant is not entitled to reagitate the issue relating to the counter claim. Accordingly counsel for respondent no. 2 submitted that there is no merit in the appeal and the same is liable to be dismissed.

7. We have carefully considered the rival submissions.

8. It is not in dispute that in the Arbitration Petition filed under Section 34 of the 1996 Act, the appellant had specifically taken a ground that the Arbitral Tribunal was not justified in rejecting the counter claim of the appellant. Although argument of the appellant in relation to rejection of counter claim is not to be found in the decision of the Learned Single Judge, the Division Bench of the Bombay High Court in para 43 of its order specifically quotes the basis on which the Arbitral Tribunal rejected the counter claim of the appellant and thereafter sets aside the Award in its entirety. Once the Division Bench of the Bombay

High Court has set aside the Award passed by the Arbitral Tribunal, in its entirety it is not open to the respondent no. 2 to contend that the Award is partially set aside and that the Award stands confirmed to the extent it rejects the counter claim of the appellant. In other words, when a Division Bench of the Bombay High Court allows the appeal filed by the appellant and sets aside the Award passed by the Arbitral Tribunal completely, respondent no. 2 is not justified in contending that the Award to the extent it rejects the counter claim stands confirmed even after the Division Bench of the Bombay High Court has set aside the Award.

9. Fact that the Division Bench of the Bombay High Court while setting aside the Award has recorded only the willingness of respondent no. 2 to approach the Arbitral Tribunal by December 31, 2014, cannot be a ground to presume that the Division Bench of the High Court while setting aside the Award has precluded the appellant from pursuing the counter claim by reagitating the same before the Arbitral Tribunal. Division Bench of the Bombay High Court has basically set aside the Award of the Arbitral Tribunal which allowed the claim of respondent no. 2 on technical grounds and therefore, recorded willingness of the respondent no. 2 to go before the Arbitral Tribunal. When the Division Bench of the Bombay High Court has allowed the respondent no. 2 to reagitate his claim before the Arbitral Tribunal, it obviously means that the appellant is permitted to reagitate his counter claim. It is impossible to hold that the Division Bench of the Bombay High Court while setting aside the Award in its entirety, has permitted the respondent no. 2 to

reagitate the claim before the Arbitral Tribunal but restrained the appellant from reagitating the counter claim especially when there is nothing in the Division Bench decision of the Bombay High Court to suggest that the appellant is precluded from reagitating his counter claim even when the Award is set aside at the instance of the appellant.

10. Once the Division Bench of the Bombay High Court has set aside the Award and allowed the appeal filed by the appellant, there is no reason as to why the Division Bench of the Bombay High Court would allow only the respondent no. 2 to reagitate his claim and disallow the appellant to reagitate his counter claim. In the absence of any finding recorded to that effect in the order passed by the Division Bench of the Bombay High Court it is impossible to hold that even after setting aside the Award at the instance of the appellant, the Division Bench of the Bombay High Court has prohibited the appellant from reagitating his counter claim.

11. In para 3(ooo) of the Arbitration Petition filed under Section 34 of the 1996 Act the appellant had specifically pleaded that the arbitrators had erred in rejecting the counter claim of the appellant. Even though in the judgment of the Learned Single Judge there is no reference to the arguments advanced by the appellant in respect of the Arbitral Tribunal rejecting the counter claim, in ground (vv) of the Memorandum of Appeal, appellant had pleaded that the Learned Single Judge failed to appreciate that the Award of the Arbitral Tribunal was unreasoned and

failed to address many of the contentions raised by the appellant. Even though the said ground in the Memorandum of Appeal does not specifically refer to the rejection of the counter claim, the Division Bench of the Bombay High Court, in para 43 of its order dated September 04, 2014, has inter alia quoted that portion of the Award which relates to rejection of the counter claim of the appellant by the Arbitral Tribunal and thereafter proceed to set aside the Award in its entirety. Once the Division Bench of the Bombay High Court has set aside the Award in its entirety, argument of respondent no. 2 that the appellant had not argued before the Bombay High Court against the decision of the Arbitral Tribunal in rejecting the counter claim does not survive at all.

12. Reliance placed by counsel for respondent no. 2 on the decision of the Apex Court in case of Daman Singh (supra) is misplaced. Unlike in the case of Daman Singh (supra), it is not the case of the appellant that the Division Bench of the Bombay High Court has failed to take into consideration the ground taken in Memorandum of Appeal in relation to rejection of counter claim. In fact, it is the case of the appellant that since the Division Bench of the Bombay High Court has allowed the appeal filed by the appellant and set aside the Award on technical grounds, the appellant is entitled to reagitate the counter claim before the Arbitral Tribunal. In other words, grievance of the appellant is not against the Division Bench decision of the Bombay High Court but against the decision of the BSE in refusing to implement the Division Bench

decision of the Bombay High Court. Thus, the decision of the Apex Court in case of Daman Singh (supra) is wholly distinguishable on facts.

13. Similarly, decision of the Kerala High Court in case of Girija & Ors. (supra) and decision of the Apex Court in case of Ramachandra S. Mahajan (supra) are distinguishable on facts. In fact, the decision of the Apex Court in case of Ramachandra S. Mahajan (supra) supports the case of the appellant, because, in that case, while setting aside the judgments and decrees of the Courts below and remanding the Suit to the Trial Court, the Apex Court had specifically recorded that since rejection of counter claim being not pursued in the cross objections, the rejection of counter claim would stand confirmed. In the present case, there is no such finding recorded and the Division Bench of the Bombay High Court has in fact allowed the appeal filed by the appellant and set aside the Award in its entirety. Thus, the aforesaid decisions relied upon by the counsel do not support the case of respondent no. 2.

14. Once the Award passed against the appellant was set aside in its entirety by a Division Bench of the Bombay High Court at the instance of the appellant on technical grounds, then, under Bye Law 260(2) framed by BSE, the appellant became entitled to reagitate the issue before the Arbitral Tribunal. Fact that the respondent no. 2 has challenged the Division Bench decision of the Bombay High Court, before the Apex Court could not be a ground for BSE to reject the application filed by the

appellant, especially when the Apex Court has not even stayed operation of the Division Bench decision of Bombay High Court.

15. For all the aforesaid reasons we set aside the impugned order of BSE dated February 12, 2015 and allow the appeal. We further direct BSE to entertain the Arbitration Application filed by the appellant subject to the decision of the Apex Court that may be passed in the SLP filed by the respondent no. 2 against the Division Bench decision of the Bombay High Court. We make it clear that we have not expressed any opinion on merits of the case.

16. Appeal is disposed of in the above terms with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

28.10.2015
Prepared & Compared By: PK