

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No.407/2009**

% **Date of decision: 19th August, 2009**

Motilal Oswal Securities Ltd. Petitioner

Through: Mr. Neeraj Malhotra, Advocate

Versus

Sandeep Paul Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1 The petition under Section 34 of the Arbitration Act, 1996 with respect to the arbitral award dated 22nd January, 2009 in so far as it directs the petitioner to pay a sum of Rs.92,35,914/- to the respondent is for admission.

2 The petitioner is a Stock Broker Member of the National Stock Exchange of India Limited (NSE). The respondent was a client/constituent of the petitioner. According to the petitioner, a sum of Rs.28,63,727.45 p. was due from the respondent. The respondent denied the said claims. This led to the disputes being referred to arbitration in accordance with the byelaws of NSE. The respondent, before the arbitral tribunal, while denying the claim of

the petitioner also contended that the petitioner had without authorization and unlawfully retained his shares valued on 4th January, 2008 at Rs.2.3 Crores; the respondent thus besides seeking the return of the said shares, also made a counter claim against the petitioner for total sum of Rs.2,92,556.91 p. including on account of unauthorized trades, illegal transaction charges, wrongful losses created due to unauthorized trades and excess brokerage charges.

3 The arbitral award holds the sum of Rs.28,63,727.45 p. to be due from the respondent to the petitioner. The arbitral tribunal has also rejected the counter claim of the respondent for unauthorized trades, illegal transaction charges, wrongful losses created due to unauthorized trades and excess brokerage charges.

4 The arbitral tribunal however found merit in the contention of the respondent that even if according to the petitioner the sums aforesaid were due to it from the respondent, the petitioner could have sold of the shares of the respondent to the extent necessary to realise the outstanding and returned the rest of the shares to the respondent on 4th January, 2008, being the date when the disputes arose. The respondent contended before the arbitral tribunal that the value of the shares had gone down since 4th January, 2008 and he was entitled to the value of the shares as on 4th January, 2008, from the petitioner.

5 The arbitral tribunal found that the respondent had on 4th January, 2008 not asked the petitioner for return of the shares; it was further found that the said claim was made for the first time on 5th August, 2008 while making the counter claim. The arbitral tribunal thus held that the respondent could at best claim the value

of the shares as on 5th August, 2008, whereafter inspite of the counter claim of the respondent for return thereof the petitioner continued to hold the said shares.

6 The arbitral tribunal in Para 11 of the award further applied itself as to the differential of the value from 5th August, 2008 should be qua which date; it was observed that the other date would have to be the date on which the shares are ultimately returned by the petitioner to the respondent. The arbitral tribunal however to avoid any confusion calculated the differential between 5th August, 2008 and 14th January, 2009. Though in the award it is not recorded as to how the date of 14th January, 2009 has been arrived at but since the award is dated 22nd January, 2009, it appears that 14th January, 2009 was the date when the hearing was concluded before the arbitral tribunal.

7 Having held so, the arbitral tribunal found the differential in value between the two dates to be of the value of Rs.92,35,914/- and after allowing the petitioner to deduct Rs.28,63,727.45 p. due from the respondent, directed the petitioner to pay the balance amount with interest to the respondent.

8 The counsel for the petitioner had at the time of hearing on 27th July, 2009 contended that the shares of the respondent so held by the petitioner and the differential in value whereof has been allowed to the respondent, were held by petitioner as collateral and the petitioner could not have sold the said shares on 4th January, 2008 so as to realise the amount approximately of Rs.28 lacs due to it. On this contention, the hearing was adjourned on that day for today to enable the petitioner to file before this court the agreement

regarding the deposit of the shares by the respondent with the petitioner as collateral security.

9 The petitioner has filed a copy of the agreement dated 12th February, 2007 with the respondent. However since the court was unable to find any reference therein of the shares deposited as collateral, query was made from the counsel for the petitioner in this regard. The counsel states that this agreement does not pertain to the shares deposited as collateral i.e. the shares with respect to the differential value whereof the award against the petitioner has been made. It is stated that the agreement with respect to the said shares deposited as collateral/security was separate and distinct from the agreement copy whereof has been filed before this court and that the said agreement was oral. The counsel for the petitioner has further relied upon Sections 148 and 152 of the Contract Act and Section 47 of the Sale of Goods Act to content that the petitioner could not have sold the said shares which were with it by way of bailment without instructions of the respondent and that the petitioner as bailee, in the absence of any special contract, is not responsible for the loss, deterioration of the things i.e. the shares bailed. It is also argued that since monies have admittedly been found due from the respondent to the petitioner and which the respondent was earlier disputing, the petitioner had a lien with respect to the aforesaid shares.

10 However the agreement dated 12th February, 2007 permits the petitioner to sell the shares of the respondent. The counsel for the petitioner also admits that in exercise of power under the said agreement the petitioner has been selling shares of respondent; however distinction is sought to be made between those shares and

shares held as collateral. The written agreement between the parties does not permit such distinction. The counsel for petitioner has drawn attention to the reply filed by the petitioner before the arbitral tribunal, to the counter claim of the respondent where expression “collateral” has been used.

11 I find that the petitioner in para H (i) at internal pages 10 and 11 of its rejoinder cum reply dated 29th September, 2008 to the counter claim of the respondent, filed before the arbitral tribunal (and copy whereof is filed along with the petition) has unequivocally admitted that the petitioner under the MCA (which the counsel for the petitioner agrees refers to the agreement dated 12th February, 2007 Supra) had all rights to sell the shares of the respondent held by the petitioner as collateral and further that it is only in good faith and with a view to avoid any dispute from the respondent with regard to the same that the petitioner had restrained itself from selling the shares available with it as collateral and chose to file the arbitration claim against the respondent; the petitioner on this ground justified the holding back of the shares. I also find that the petitioner has in its additional submissions dated 29th September, 2008 before the arbitral tribunal and copy whereof is filed as Annexure P-4 to the petition also justified the holding back of the said share only for the reason of a debit balance in the account of the respondent and not for the reason of not being able to sell the said shares as is now being contended before this court. Attention of the counsel for the petitioner has been drawn during the hearing to the said admissions on the part of the petitioner before the arbitral tribunal.

12 The aforesaid admissions show that the case set up before the

arbitral tribunal was not as is made out before this court. Not only is the petitioner not entitled to urge new points in a proceedings under Section 34 of the Act but this also takes care of the grievance of the petitioner in this petition of the arbitral tribunal having not dealt with the aforesaid aspect of the case.

13 In this regard it may also be noticed that the petitioner had filed an application under Section 33 of the Act before the arbitral tribunal in which plea was raised that inspite of the petitioner seeking consent of the respondent for sale of the shares, the respondent had denied the said consent. The said application was rejected by the arbitral tribunal vide order dated 9th April, 2009 inter alia on the ground that the points raised therein were outside the ambit of the Section 33. The arbitral tribunal while disposing of the said application also recorded that the issues raised in the application had been considered by the arbitral tribunal in its award.

14 The counsel for the petitioner has next contended that there is no sanctity whatsoever for the date of 14th January, 2009 with reference whereto the differential in value of the shares has been calculated. I have already noted above that the same appears to be the day of conclusion of hearing before the arbitral tribunal. Nothing contrary to substantial or procedural law or public policy is found in the arbitral tribunal choosing the date of 14th January, 2009 in this regard. Had the arbitral tribunal left the said date to be the date on which the shares are finally returned by the petitioner to the respondent, the same would have created an ambiguity in the award and left a vagueness as to the date with respect whereto the differential in price had to be calculated.

15 It has also to be remembered that the arbitration aforesaid is under the byelaws of NSE. The arbitral tribunal comprised of three member brokers of the NSE. The statutory byelaws of the NSE provide for arbitration to enable expeditious disposal of disputes by experts who have knowledge of the trade and business in the said shares. The parties having agreed to the arbitration of such expert panel, unless it is perverse or shocks the judicial conscience of this court, this court even if of a different opinion, cannot interfere with the award.

16 The counsel for the petitioner has lastly argued that the award is highly unjust against the petitioner in as much as the petitioner has not earned / gained anything from the said shares, the differential in value whereof it has been directed to pay to the respondent. Though that position may be factually correct but is untenable in law. The test is not whether the petitioner has gained anything or not but as to whether the petitioner has caused any loss to the respondent or not. Here the arbitral tribunal has found and in the opinion of this court rightly that the petitioner instead of on the date of the disputes selling the shares of the value of its claim, as the petitioner was entitled to do under the agreement with the respondent and returning the balance shares to the respondent, continued to hold on to the entire shares. The volatility in the prices of such stocks and shares cannot be known better to anybody than to the petitioner itself. The petitioner is deemed to know that if acting contrary to the agreement with the respondent or not exercising any right, even if in good faith, as the case of the petitioner itself was before the arbitral tribunal, the petitioner would be liable for the loss if any caused to the respondent by such an action in contravention of the agreement. Had the petitioner in accordance with the

agreement sold the shares worth its claims and returned the remaining shares to the respondent, the respondent could have sold those shares. The value of shares has in the interregnum fallen the arbitral tribunal has found the petitioner liable to compensate such loss to the respondent. The fact remain that the petitioner by being too careful has caused loss to the respondent; a loss cannot be without a remedy and the said remedy has been allowed by the arbitral tribunal against the petitioner.

17 In the aforesaid circumstances no merit is found in the petition. The same is dismissed in limine.

**RAJIV SAHAI ENDLAW
(JUDGE)**

August 19, 2009
J