

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

+ O.M.P. 360/2003

KIRAN HASIJA

..... Petitioner
Through Mr. Mukesh Anand with
Mr. Sumit Batra, Advocates

versus

M/S. ESCORTS SECURITIES LTD.
& ANR.

..... Respondents
Through: Mr. Ajay Kumar Talesara,
Advocate for R-1.

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Date of Decision : April 21, 2010.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the 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. |

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the arbitral Award dated 31st May, 2003 passed by Mr. K.S. Jaggi, Sole Arbitrator.

2. Mr. Mukesh Anand, learned counsel for petitioner-objector submits that the Agreement dated 17th January, 2000 executed between petitioner-objector and respondent-claimant is void as being violative of Punjab Registration of Money-Lender’s Act, 1938 (in short “Act,

1938”) as well as Rules 8(1)(f) and 8(3)(f) of Securities Contracts (Regulation) Rules, 1957 (in short “Rules, 1957”). He further states that if the substance and not the form of the Agreement executed between the parties is seen, the Court would find that it is in essence a money-lenders agreement rather than a credit facility Agreement. In this connection, Mr. Anand relies upon *Hyco Product (P) Ltd. Vs. Shashi Hasija* reported in *158(2009) DLT 351*; *Sobhag Narain Mathur Vs. Pragya Agrawal & Ors.* reported in *141 (2007) DLT 356*; *Vayallakath Muhammodkutty Vs. Illikkal Moosakutty* reported in *AIR 1996 SC 3288* and *Kapur Singh Vs. Firm Bhagwan Sass Sat Pal* reported in *Punjab Law Reporter Vol. LXXIII-1971 628*.

3. Mr. Anand further states that all the defences/issues raised by petitioner-objector in its reply affidavit before the Arbitrator have not been dealt with in the impugned Award. In this connection, Mr. Anand drew my attention to petitioner-objector’s reply affidavit filed before the Arbitrator wherein it has been stated that the Arbitrator had no jurisdiction to entertain the respondent-claimant’s claim petition and that in accordance with regulations and bye-laws of National Stock Exchange, the arbitral tribunal should have comprised two arbitrators and not a single individual.

4. Mr. Anand further states that prior mandatory written consent of petitioner-objector under Rules 15(2)(c) of Rules, 1957 had not been obtained for transactions in the present case. He also states that

respondent-claimant in violation of Rules, 1957 had carried out the transactions without asking for any margin money from the petitioner-objector. He states that the total exposure of a broker cannot exceed 50% of the net worth of the client. He points out that admittedly net worth of petitioner-objector in the present case was Rs. 6 lacs as mentioned in the Individual Client Application Form. He emphasises that all earlier transactions prior to 17th January, 2000 were for an amount less than Rs. 6 lacs.

5. Mr. Anand also points out that respondent-claimant had on 9th March, 2000 paid to petitioner-objector a sum of Rs. 3,01,077.86. He states that in case petitioner-objector owed an amount in excess of Rs. 70 lacs, as is now sought to be contended, petitioner-objector would have adjusted the amount rather than issuing the cheque of the aforesaid amount of Rs. 3,01,077.86 and issuing shares of Alpica Finance Ltd. on 3rd May, 2000.

6. On the other hand, Mr. Ajay Kumar Talesara, learned counsel for respondent-claimant submits that the Agreement dated 17th January, 2000 was a credit facility agreement. He points out that credit facility of Rs. 70 lacs was given by respondent-claimant to petitioner-objector because petitioner-objector had transacted/purchased shares worth Rs. 71,70,607.69 during the period 5th to 11th January, 2000. He states that in case petitioner-objector had been in default of the aforesaid amount by the settlement date, respondent-claimant would have been

forced to sell those shares to square off the transaction. According to him, the Agreement dated 17th January, 2000 was executed only to facilitate the petitioner-objector to retain the said shares.

7. Mr. Talesara states that petitioner-objector and respondent-claimant had pre-existing relationship which even predated the credit facility Agreement dated 17th January, 2000. Mr. Talesara points out that petitioner-objector has raised objections with regard to the transactions only after receipt of legal notice dated 19th July, 2000.

8. Mr. Talesara specifically denies the allegation that respondent-claimant had entered into transaction without any instruction of petitioner-objector. He states that petitioner-objector has failed to point out as to which entries/transactions have been carried out without petitioner-objector's consent.

9. Mr. Talesara submits that all arguments/defences raised by petitioner-objector in its written statement/reply affidavit had been specifically dealt with by the Arbitrator in both the impugned Award as well as the order dated 8th May, 2002 passed on an application filed by petitioner under Section 16 of Act, 1996.

10. Mr. Talesara lastly submits that neither the exposure of broker exceeded 50% net worth of petitioner-objector nor the transaction had been carried out without margin money inasmuch as the shares which had been purchased against the credit facility Agreement were always

pledged to the respondent-claimant and remained in their custody and possession.

11. In rejoinder, Mr. Anand states that respondent-claimant's version is contrary to record and is belied by its own statement of account. He states that respondent-claimant's statement of account itself shows that petitioner-objector had a credit balance of Rs. 1,90,463.46 on 12th January, 2000. He further states that from the statement of account furnished by respondent-claimant itself, it would be apparent that respondent-claimant had on one single day, namely, 19th January, 2000 purchased shares worth Rs. 71,70,607.69 on behalf of petitioner.

12. Mr. Anand further submits that respondent-claimant had in its claim statement not pleaded the fact that it had purchased the shares on behalf of petitioner-objector between 5th to 11th January, 2000. In this connection, he places reliance upon a judgment of this Court in ***Rama Tube Company Vs. Jay Rapid Roller Ltd.*** reported in **102 (2003) DLT 672** wherein it has been held that evidence as well as arguments can only be raised within the factual matrix mentioned in the pleadings.

13. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in **(2008) 13 SCC 80**, after referring to a catena of judgments including ***Oil & Natural Gas Corporation Ltd.*** (supra) has held that an arbitral

award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy. Even though Section 34 of Act, 1996 permits a Court to interfere on the ground of an arbitral award being violative of public policy, various judgments of the Supreme Court place an extremely restricted and limited interpretation on the term ‘public policy’ (Refer to *State of Rajasthan & Ors. Vs. Basant Nahata* reported in (2005) 12 SCC 77).

14. In fact, the Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.* reported in (2006) 11 SCC 181 has succinctly summed up the scope of interference by this Court by stating “the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc.....”

15. It is settled legal position, both under Arbitration Act, 1940 and to a even greater extent under Act, 1996, that arbitral tribunal’s decision is generally regarded as final and courts cannot substitute its own evaluation on questions of law and facts to come to the conclusion that arbitral tribunal has acted contrary to the bargain between the parties. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisalment of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it

will not be for the Courts to take upon itself the task of being a judge on the evidence before the arbitrator (Refer to *M/s. Sudarsan Trading Co. Vs. Government of Kerala and Anr.* reported in (1989) 2 SCC 38).

16. Consequently, this Court is of the view that findings of fact given by the Arbitrator are not liable to be interfered with unless such findings are perverse and unconscionable. Moreover, as held in *Lesotho Highlands Development Authority Vs. Impregilo SpA and others* reported in 2005 UK HL 43, arbitrators do not exceed their powers simply by making a mistake. In *Burchell Vs. Marsh* reported in 58 U.S. 344 (1855), the United States Supreme Court held that if an award is within submission, and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

17. In my opinion, the credit facility Agreement dated 17th January, 2000 is not void as it is neither violative of Act, 1938 and/or Rules, 1957. I am of the view that the Agreement dated 17th January 2000 is in essence and substance not a money lenders agreement. In fact, lending and borrowing of funds by a trading member in connection with or incidental to or consequential upon the securities business neither attracts the Act, 1938 nor the Rules 8(1)(f) and 8(3)(f) of Rules,

1957. Security Exchange Board of India, Secondary Market Department has vide its circular dated 7th May, 1997 has also taken the same view. The said circular reads as under :-

*SECURITIES AND EXCHANGE BOARD OF INDIA
SECONDARY MARKET DEPARTMENT
Mittal Court, A Wing, Gr. Floor,
224, Nariman Point, Mumbai 400 021*

*SMD/POLICY/CIR-6/97
May 07, 1997.*

*To Executive Directors/Presidents/
Managing Directors of all Stock Exchanges.*

Dear Sir,

Based on the suggestions/representations received from various Stock Exchanges, SEBI has examined the applicability of Rule 8(1)(f) and 8(3)(f) of the Securities Contract (Regulation) Rules, 1957, relating to Fund Based Activities of Brokers. It has been opined that borrowing and lending of funds, by a trading member, in connection with or incidental to or consequential upon the securities business, would not be disqualified under Rule 8(1)(f) and 8(3)(f).

Yours sincerely,

*Sd/-
M.D. PATEL
EXECUTIVE DIRECTOR
SECONDARY MARKET DEPARTMENT*

18. The Arbitrator in the impugned Award has also observed as under :-

“The Claimant also relied upon corporate communication dated January 4, 1999 of National Stock Exchange. The said corporate communication further clarified ‘Fund Based Activities’. As per said communication, borrowing and lending of funds by stock broker in connection with or incidental to securities business would not be disqualified under Rule 8(1)(f) and 8(3)(f) of Securities Contract (Regulation) Rules, 1957. The Claimant further submit that

said credit facility was extended to Respondent to finance/invest in shares and debentures and other securities at the National Stock Exchange and the said credit facility is legal and valid.”

19. In my opinion, the view expressed by the Arbitrator is a plausible and possible one and, consequently, it calls for no interference in Section 34 proceedings.

20. Moreover, upon perusal of the impugned Award and the order dated 8th May, 2002 passed by the Arbitrator, I am of the opinion that all the defences/issues raised by the petitioner-objector in its written statement/reply affidavit have been dealt with by the Arbitrator.

21. It is settled law that an arbitrator is not expected to write a judgment like a court of law. In the present case, I find that the Arbitrator has given cogent reasons for rejection of the defences/issues raised by petitioner-objector in her written statement/reply affidavit. Some of the observations of Arbitrator in the order dated 8th May, 2002 as well as impugned Award are reproduced hereinbelow :-

A) Order dated 8th May, 2002

Whether the appointment of sole Arbitrator is in accordance with agreement between the parties?

The main contention of the Applicant/Respondent with respect to issue No. 2 is that as per Rules and Regulations of National Stock Exchange/SEBI as regard to appointment of arbitrators is that the dispute required to be referred to arbitration of two arbitrators of the National Stock Exchange, one to be appointed by each party. Therefore, the appointment of present Sole Arbitrator is null and void and in violation of rules and regulations of National Stock Exchange/SEBI.

The claimant in reply submits that Credit Facility Agreement and Member Client Agreement are two independent agreement. The claimant has invoked the Clause 18 of the Credit Facility Agreement to enforce the liability of Respondent under the Credit Facility Agreement dated 17.1.2000 which envisages appointment of Sole Arbitrator in case of dispute between the parties to the agreement.

The perusal of letter dated September 12,2000 of claimant through counsel Sh. Satish Kumar, reveals that the claimant has invoked the Clause 18 of Credit Facility Agreement to enforce the financial liability incurred by Respondent for the purchase of and for investment in shares and/or debentures and/or such other securities.

The clause 18 of the agreement envisages arbitration and clause 18.1 prescribed the procedure for appointment of sole Arbitrator. The clause 18.1 stipulates that in case of any dispute or differences arising between the parties thereto, then either party shall give to the other notice in writing of such dispute on difference and same shall be settled without recourse to the courts in accordance with the provisions of the Arbitration and Conciliation Act, 1996 at New Delhi by a Sole Arbitrator to the appointed by ESL.

The procedure for appointment of arbitrator has already been agreed upon by the parties.

Moreover, the Applicant/Respondent did not raise the issue of arbitration by the arbitral Tribunal consisting of two arbitrator appointed by each party in any of her correspondence in reply to notice of claimant to invoke arbitration clause.

In view of above facts and circumstances the issue No. 2 is decided against the Applicant/Respondent

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The second contention of the Respondent that terms and conditions of agreement dated 17.1.2000 were not adhered and strictly as no margin money was maintained. The dispute upon reference is with respect to credit facility extended by claimant to Respondent. The Respondent in its reply dated 18.9.2000 admitted certain transaction undertaking by claimant on behalf of Respondent. The Respondent also admitted the letter dated 15.2.2000 issued by the NSE for maintained margin money. Therefore, in view of above facts I do not find any force in the contention of Respondent that no transaction were carried out after 17.1.2000.

Therefore, in view of the above discussions the issue No. 3 is decided against the Respondent.

Accordingly I hold that the arbitral Tribunal has jurisdiction to entertain the present claim of claimant.”

B) Award dated 31st May, 2003

14. That the second objection of the Respondent is that as per information disclosed by Respondent to Claimant in its application for grant of credit facility, the annual income of Respondent has been shown as Rs.60,000/- only which means that maximum lending credibility which can be granted to the Respondent should be to the tune of Rs. 6 Lacs only.

The perusal of individual client registration application (EXHIBIT 3) reveals that the above mentioned application was given for the purpose of entering in to Member Client Agreement which was entered between the parties on 8/3/1998. Moreover, the value of portfolio held by Respondent cannot be relevant for the purpose of ascertaining the credit worthiness of prospective client since the value of portfolio keeps on changing with the daily trend of the stock market. However, the present dispute relates to Credit Facility Agreement dated 17/1/2000 (EXHIBIT 5). The clause 1.1 of Credit Facility Agreement specifically held that the Claimant agreed to arrange a credit facility up to Rs. 70 Lacs for financing the purchase of and for investment in shares and/or debentures and/or such other securities. The Respondent specifically agreed to avail said credit facility up to Rs. 70 Lacs only.

The perusal of Statement of Account (EXHIBIT 165) filed by Claimant reveals that several transactions were carried out on behalf of Respondent by the Claimant at National Stock Exchange. The amount of transactions on realization was duly credited into the account of Respondent and outstanding amount was correspondingly reduced in proportion. The outstanding amount in the account of Respondent as on 19/1/2000 was Rs. 69,80,144.23. The Respondent never objected to any particular entry of statement of account. The Claimant in the affidavit of Dr. Ashok Aggarwal, tendered in evidence, has specifically stated that the Respondent in the settlement period from 5/1/2000 to 11/1/2000, traded heavily on the National Stock Exchange and a sum of Rs. 71,70,607.69 was debited in her trading account resulting in a total debit balance of Rs. 69,80,144.23. The Claimant further states that on the demand of Claimant made to Respondent to clear the outstanding amount, the Respondent expressed her inability to clear the outstanding amount

immediately and requested the Claimant to arrange for her financial assistance or credit facility to finance the purchase of and for investment in shares and debentures or such other securities at the Stock Exchange and assured the Claimant that she would clear the outstanding amount in her trading/broking account within a fixed time frame. Accordingly, credit facility agreement dated 17/1/2000 was executed and credit facility to the tune of Rs. 70 Lacs was sanctioned in the favour of Respondent by the Claimant Company. The Respondent never objected to these entries or transactions till the issuance of legal notice dated 19/7/2000 by the counsel of Claimant. The perusal of statement of account (EXHIBIT 165) maintained by Claimant in the usual course of business and execution of credit facility agreement by Respondent, corroborate the explanation given by the Claimant to the objection/issue raised by Respondent. Therefore the second objection of Respondent is without any merit, hence dismissed.

15. The third objection of Respondent is that as per rule 15(2) (c) of Securities Contract (Regulation) Rules, 1957 all transactions is to be carried out on the written instructions of the client. In the present case, all the transactions were not carried out on the written instructions of the Respondent, therefore, Respondent is not liable to the outstanding amount arisen out of these instructions. The Respondent placed reliance on the acts, rules, regulations of Securities and Exchange Board of India and rule 15(2)(c) of said rules. The rule 15 relates to Books of Account and other documents to be maintained and preserved by every member of recognized Stock Exchange. The rule 15(2)(c) relates to written consent of clients in respect of contracts entered into as principal.

The learned counsel for the Claimant submits that the Claimant being member of National Stock Exchange act as agent but not as principal for the transactions carried out at National Stock Exchange. The Claimant act as agent of Respondent for carrying out the transaction on behalf of Respondent. Moreover, the custom/practice of trade is followed by the members of Stock Exchanges. The written consent as mentioned in rule 15(2)(c) is with respect to transactions carried out by member as principal or without disclosing its status as agent of its client. The counsel for Claimant further states that the Contract Notes were duly sent to the clients after any transaction is carried out for and on their behalf. In the present case the Contract notes and Combine Bills were duly dispatched to the Respondent. The courier receipt are Exhibited as EXHIBITS 153-158. I find that the reply of Claimant to the objection of Respondent has

force, therefore, I reject the objection of Respondent being devoid of any merit.

16. That the next contention of the Respondent is that as per circular no. 1/4/SC/83, dated 28/1/1983, rule 5, the Claimant has to dispatch/communicate to the client on the same day, the Contract Notes regarding the transactions carried out in a day and same should be acknowledged by the client. The counsel for Respondent submits that Contract Notes were never sent/dispatched to the Respondent by the Claimant, therefore the Respondent is not liable to outstanding amount due towards these transactions. The counsel for the Claimant submits that the Contract Notes/Combine Bills were duly dispatched/communicated to the Respondent. The proof of dispatch of Contract Notes and Combine Bills are Exhibited as EXHIBIT 153-158. The perusal of Contract Notes and receipt filed by Claimant in proof of dispatch of Contract Notes and Combine Bills reveals that the Contract Notes/Combine Bills were duly dispatched by the Claimant to the Respondent. Moreover, the Respondent never objected to any transaction specifically and claimed to settle the account on 9/3/2000 with the Claimant.

Therefore I do not find any merit in said objection of Respondent, hence dismissed."

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18. The next contention of the Respondent is that the Respondent settled the account of Claimant on 9/3/2000, after the receipt of letter of Claimant dated 18/2/2000. Then Respondent further alleged that the Claimant gave a cheque of Rs. 3,00,000/- vide cheque no. 288780 drawn on HDFC Bank, K.G. Marg, New Delhi after the settlement of account and the Respondent has also purchased on 3/5/2000, the shares of Alpic Finance Ltd. for a total sum of Rs. 24,865/- and the amount was duly paid to Claimant and physical delivery of shares was also given to the Respondent.

The counsel for Claimant submits that a cheque of Rs. 3,01,077.86 dated 10/3/2000, bearing no. 288780 was issued towards settlement of Badla Account of Respondent with the Claimant and was not issued against the Broking/Trading Account of Respondent and the present claim has been filed in respect of amount outstanding against Respondent towards Broking/Trading Account. The Claimant also annexed copy of relevant extract of Badla Account of Respondent and same is Exhibited as EXHIBIT 161. The counsel for the Claimant denied the transaction for the purchase of shares of M/s. Alpic

Finance on 3/5/2000 for a total sum of Rs. 24,865/- and the alleged delivery of shares to the Respondent. The Claimant submits that 500 shares of Alpic finance Ltd. were purchased on 8/2/2000 by the Claimant on behalf of Respondent in Settlement No. NIN 2000006. The Claimant sold 500 shares of Alpic Finance on behalf of the respondent on 14.3.2000 in Settlement No. 2000011 and the delivery was due in Settlement No. 2000012. The 500 shares of Alpic finance went into bad delivery and were auctioned on Stock Exchange vide settlement No. NIA 2000013 for Rs. 24,865/-. The Respondent paid the sum of Rs. 24,865/- and shares were handed over to her for rectification of bad delivery. The Claimant has exhibited the delivery documents in respect of 500 shares of Alpic Finance, issued by National Securities Clearing Corporation Ltd., which is the clearing corporation of National Stock Exchange as EXHIBIT 162-164. That from the perusal of Exhibits 161, 162 to 164, I find force in the submissions of the counsel for Claimant. But I do not find any merit in the said contention/objection of Respondent, hence dismissed.

22. Consequently, the view taken by the Arbitrator with regard to margin money, prior written consent and subsequent payments to petitioner-objector is a plausible and possible view.

23. I also find that it is not the petitioner-objector's case that for some transactions written consent was given, while for some others the said procedure was not followed. Upon perusal of the arbitral record, I find that for the undisputed period, that means, prior to 17th January, 2000 petitioner-objector had indulged in 'heavy transactions' on the stock exchange. In fact, the combined bill dated 12th January, 2000 indicates that petitioner-objector had sold shares for Rs. 33,74,571,11/- only after it had purchased shares worth Rs. 31,83,577.11/-. Also, if the respondent-claimant has waived practice directions with regard to margin money, then it has only waived a security in its favour and

petitioner-objector cannot make a virtue out of that. In any event, as found by the Arbitrator, the respondent-claimant was always secure as it had the pledged shares in its possession.

24. Though it is correct that there is no pleading in the claim petition that credit facility agreement had been entered into to avoid petitioner-objector's being declared a defaulter or its excess shares being sold off, I find that there is a reason with regard to the same. Though the transaction of purchase of shares has been carried out between 5th to 11th January, 2000, the amount became due and payable only when the respondent-claimant raised its combined bill, that is on 19th January, 2000. Consequently, the credit facility agreement was executed prior in time when the said purchase amount became due and payable. Moreover, in arbitration proceedings, the strict rules of pleadings as envisaged by the Code of Civil Procedure and Indian Evidence Act do not apply. I find that in the present case, there has been substantial compliance of the principles of natural justice which is mandated by the Act, 1996. (Refer to Sections 18 and 19 of Act, 1996)

25. In any event, one cannot lose sight of the fact that petitioner-objector has not disputed the execution of the credit facility agreement dated 17th January, 2000. Though it is the petitioner-objector's case in the present proceedings that credit facility agreement was not acted upon, I am of the view that petitioner-objector has failed to discharge

that burden, especially keeping in view the contract notes and combined bills which were placed on record before the Arbitrator.

26. Consequently, present petition being devoid of merits is dismissed but with no order as to costs.

MANMOHAN,J

APRIL 21, 2010

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