

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 147/2010

Reserved on: January 20, 2012.

Decision on: February 10, 2012.

ALANKIT ASSIGNMENTS LTD.

..... Petitioner

Through: Mr. J.P. Sengh, Senior Advocate with
Mr. Kshitiz Khera, Ms. Mithu Jain,
Mr. Sumeet Batra and
Ms. Ankita Gupta, Advocates.

Versus

CDR S.P. PURI (RETD) & ANR

..... Respondents

Through: Mr. Deeptakriti Verma with
Mrs. Neha S.Verma, Advocates for R-1.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

10.02.2012

1. The Petitioner Alankit Assignments Ltd. challenges in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') an Award dated 10th December 2009 passed by the learned Arbitrator in the dispute between the Petitioner and Respondent No. 1, Cdr. S.P. Puri, whereby the Petitioner has been directed to return to Respondent No. 1 all the shares which were transferred on 28th June 2004 from his account with all incidental benefits such as dividend, bonus shares, rights shares and splitting up of the shares etc.

Narration of facts

2. Respondent No. 1 entered into an agreement on 2nd January 2004 with the Petitioner, which is a trading member of the National Stock Exchange ('NSE'), for trading in securities under Code No. NV 327. Respondent No.1

also had a DEMAT account (No.10651928) with the Petitioner, which is also a Depository Participant under No. DP-IN 300118 with the National Securities Depository Ltd. ('NSDL'). Respondent No.1 also had a speed-e facility which enabled him to issue delivery instructions to the Petitioner, download his DEMAT account details and access the transaction details and statements.

3. According to the Petitioner, Respondent No.1 had on 30th March 2004 issued two cheques in favour of the Petitioner, one in the sum of Rs. 32,32,645.31 and another in the sum of Rs. 30 lakhs towards the dues in his account. It is further stated that due to heavy trading undertaken by Respondent No.1, an amount of Rs.1,08,56,840.24 was outstanding in his trading account as on 28th June 2004. According to the Petitioner it made several requests and sent reminders to Respondent No. 1 to liquidate the outstanding amount. In order to square up a part of the outstanding, Respondent No. 1 transferred securities from his DP Account No.10651928 to the Petitioner's Pool Account No.10000004 and advised the Petitioner to sell the same and adjust the proceeds against the outstanding balance. Respondent No. 1 also advised the Petitioner to re-present either the cheque for Rs.32,32,645.31 or the cheque for Rs.30 lakhs. The Petitioner states that they sold the securities transferred to their pool account by Respondent No.1 for a total value of Rs.74,85,681.24 on 29th June 2004. The cheque of Rs.32,32,645.31 dated 30th March 2004 was re-presented but was returned dishonored.

4. Respondent No.1 filed an application with the NSDL for freezing his DEMAT Account No.10651928 alleging misuse of speed-e facility by the Petitioner. A copy of the said application filed by Respondent No. 1 was received by the Petitioner on 29th June 2004. The DEMAT account was nevertheless frozen since in terms of NSDL's procedure the user of a speed-e

facility can freeze/disable/discontinue his speed-e account from his own computer without making a request to the DP/or NSDL. By a letter dated 30th June 2004 after appraising Respondent No. 1 of the above action, the Petitioner requested him to ensure that the cheque for the sum of Rs.32,32,645.31 was cleared. However, by a reply dated 8th July 2004, Respondent No. 1 denied his liability. Ultimately, after issuing notice to Respondent No.1 the Petitioner filed a complaint against him No.1 on 2nd September 2004 under the Negotiable Instruments Act, 1881.

Proceedings before NSE

5. Respondent No. 1 made a complaint to the NSE on 23rd March 2005 in Form No.1. In the opening paragraph of the said complaint, Respondent No. 1 stated as under:

“The Case

I had paid Rs.14.4 lacs by cheques to the trading member M/s. Alankit Assignments Ltd. towards investment under a specific scheme as explained in Section-C and had transferred shares worth around 3.5 lacs from my old DMAT a/c 10019234 to my new DMAT a/c 10651928. The trading member has cheated and defrauded me in a planned manner and now refuses to return my shares as placed at page 10 and money kept in margin account as reflected in the statement of a/c.

M/s. Alankit Assignment Ltd. claims to have traded in my shares on my behalf in my account but has not even provided me with the basic entitled documents needed by me to understand the a/c and prepare the reply to his alleged claim. Even NSE has failed to obtain my entitled documents/accounts requested by me and finally referred the case for arbitration.

The trading member fraudulently transferred all the shares from my DMAT a/c 10651928 to his DP pool a/c on 28th Jun-04 misusing my speed-e given to him in good faith and then allegedly sold all these shares on 29th Jun-04 without my knowledge. He further raised a bogus demand of over 32 lacs on me and presented one of my previous cheques withheld with him with malafide intentions in a clever manner. He is harassing me in all possible manners and is now threatening of legal action as well.

I am totally in distress and dark in the absence of the basic papers as mentioned in preceding paragraphs. I shall provide the details of the case after I receive the details from the trading member. However, summary of the case is placed at Section-C of this statement.”

6. The Claim by Respondent No. 1 before the NSE was as under:

“B. The Claim

1. Return of amount actually paid by me to M/s. Alankit Assignment Ltd. by cheques.	14.40 lacs
2. Interest for the period 11 th Jun 04 till 31 st Mar 05 @ 2% on 17.69 lacs (Rs.14.4 lacs + shares worth Rs.3.5 lacs)	3.46 lacs
3. Return of shares worth over 3.5 lacs transferred from my old DMAT a/c 10019234 to new DMAT a/c 10651928 as per the list at Annexure-1 (page-10)	3.50 lacs
4. Compensation on a/c of humiliation, harassment and loss of opportunity caused to us.	100.00 lacs
TOTAL	121.36 lacs

&

5. Interest for the period 1st Apr. 05 till the realization of claim.”

7. In Part-C of the statement of case filed with the NSE, Respondent No. 1 set out a summary of the case as under:

“C. Summary of the case

This is a case of cheating and fraud where I was lured and trapped into a lucrative scheme with assured good returns on investment. I invested a total amount of Rs. 14.40 lacs in installments by cheques and shares worth over 3.5 lacs were transferred from my old DMAT Account No. 10019234 against which Mr. Ashok Aggarwal of M/s. Alankit Assignments Ltd. assured me interest @ 24% per annum. He also assured me that my investment would remain safe in the margin account, which is just like a trustee account. As per his scheme, I was to invest some amount in margin a/c whereas he was to invest 8-10 times of that amount in trading a/c from huge funds at his disposal, which actually belonged to his clients and were lying idle with him at any point of time. I understand that his money was either not claimed by the investors or the payment was delayed to them, as the case may be.

Mr. Ashok Aggarwal explained me that, M/s. Alankit reinvests this money into business through investors like us who provide them the business face. Accordingly, Mr. Ashok Aggarwal told me that apparently the business would be in my name for which I had to open a separate DMAT and trading account. He also promised me 25% of profit sharing coming from this trading a/c. However it was agreed that the negative consequences or losses will be borne by Alankit, if any. He assured me that there is almost no probability of losing in a market, which is basically controlled by them and they always have advance information about it.

M/s. Alankit Assignments Ltd. also offered me an income tax saving scheme where he can provide me the capital loss certificates from one of this companies/concerns to avoid Income Tax. It did not interest me at all. Of course, I had seen such certificates being issued to various people for consideration. He had some other such schemes too but I opted for one mentioned in preceding paragraph.

M/s. Alankit Assignments Ltd. now suddenly informed me on 2nd July 04 vide their letter dated 30th June 2004 that on my instructions he had sold off shares from my account worth Rs.75,84,208.65/- on 29.06.2004 and that I have to still pay him Rs.32,72,631.59/-. Surprisingly, he was silent on the margin money of Rs.15 lacs with them since he fraudulently wanted to use one of the previously issued cheques of almost same amount to recover the alleged outstanding amount and which he did. He fraudulently used my DMAT speed-e password to transfer all the shares to his pool a/c. on 28th Jun-04. Copy of his letter is enclosed as Annexure-II at Page-H.

This cheque in question was issued on 30th March 2004 for an accounting jugglery i.e. to close the a/c of year 2003-2004 and then for reopening the next year a/c, perhaps because it does not have to be reported to authorities as per SEBI Rules. Later these cheques were reported to me to have been destroyed by Alankit. Since there was no follow up of any kind I accepted their statement to be true, lest realizing their malafide intentions and criminal plans.

On 26th Jun 04, we realized that market scenario is not good at all and his intentions had become malafide when he ruthlessly tried to mingle with the accounts of my wife and my brother-in-law. Their office staff also gave me indications that something very bad is going to happen. On this, I made requests to NSDL on 27th & 28th Jun 2004 through e-mail to Bombay office and in person to Delhi office respectively to freeze my DMAT Account and cancel my speed-e facility (Annexure-

III at page-12).”

8. Respondent No. 1 also mentioned that his wife’s shares worth Rs.7.69 lakhs were fraudulently withheld by Mr. Ashok Aggarwal and were restored to her by an intervention of the NSE after the complaint was lodged with them. It was alleged that the share of the brother-in-law of Respondent No. 1 was still held up on some technical point. Respondent No. 1 gave instructions to NSDL on 28th June 2004 to freeze the DEMAT Account. Mr. Ashok Aggarwal “reacted sharply and fraudulently transferred all the shares from his DEMAT Account to his pool account on the same date and emptied it. Later he allegedly sold these shares on 29th June 2004.” It was claimed that the Petitioner presented an old cheque of Respondent No. 1 for Rs.32 lakhs to his bank.

9. A reply was filed to the above complaint by the Petitioner in Form No.3 before the NSE on 4th May 2005. Paras 12, 13, 14 and 15 of the reply read as under:

“12. The claimant was trading on almost daily basis. He was fully aware of the transactions of his DMAT and securities trading accounts and also margin money accounts for securities trading. He was regularly being provided with all the contract notes, sale bills and other documents. He never objected in whatsoever manner until 8/10-7-04. It is patently clear this too was with malafide intention. However as advised by NSE vide letter of 6-12-04, the Respondent provided to the claimant vide letter of 22-12-04.

- A. Account statement from January 04 – upto date.
- B. Transaction details of securities sold on 29-6-04.
- C. Copies of contract notes.

13. NSE was further informed that the contract notes for the trades executed have been regularly issued to the claimant and sent through courier.

14. In the page 2,4 & 8 and elsewhere of the statement of case the claimant has alleged fraudulent transfer of shares from his DMAT Account no.10019234 to 10651928. It is respectfully submitted that these shares have been transferred by the claimant himself only on 28-4-04 by executing delivery instruction slips under his signatures. As such, there is no case of any fraudulent transfer. Further, it is respectfully submitted that such dispute regarding transfer of securities in the DMAT Accounts falls within ambit of NSDL DP business and not NSE trading activity, for which the present arbitration proceedings have been commenced. In view of the foregoing dispute with respect thereto and the claim made by the claimant on account of same is beyond the jurisdiction of the present arbitration and the same is as such not liable to be entertained.

15. The claimant has no approached for arbitration with clean hands. As a matter of fact, it is the Respondent who has to recover the substantial amounts from him. He has filed the present case with the ulterior motives to avoid paying the amount of Rs.32,04,343.13/-, which he owes to the Respondent in addition to interest thereupon and for which the Respondent has initiated necessary legal action.”

10. In the said reply the Petitioner set out the details of the entries in the financial statement and margin money accounts in part. It was further specifically stated as under:

“3. It is wrong and denied that the shares from claimants DMAT Account no. 10651928 to the Respondent pool account have been transferred fraudulently on 28-6-04 misusing speed-e given by him. The transfer through Speed-e can be made only by the Speed-e user by password known to him only. The claimant’s DMAT Account was activated for Speed-e facility as per agreement executed per NSDL prescribed procedure and was active since 21-4-04. The claimant has executed large number of delivery instructions through this speed-e facility. As such, he cannot now pretend ignorance about the same. Copy of the speed-e agreement is also annexed herewith. It is wrong and denied that any bogus demand of Rs. 32 lacs has been raised or presented cheque withheld with malafide intention without his instruction. It is wrong that any harassment is being caused to claimant.”

11. The Petitioner made a counter-claim against Respondent No.1 before the

NSE Arbitral Tribunal for a sum of Rs. 32,72 631.59 together with interest @ 24% per annum. In Part-II of the preliminary objections raised by the Petitioner before the NSE, it was contended that the disputes brought be recorded before the Arbitral Tribunal of the NSE since “the alleged transactions falls within the ambit of NSDL DP Business and not an NSE trading activity,” and therefore the present claim of the claimant is beyond the jurisdiction of the NSE. However, Respondent No. 1 in his rejoinder thereto maintained that “the claim of the claimant is within the limitation period and within the jurisdiction of NSE.” In his rejoinder Respondent No. 1 persisted with his case that “all the transactions in his DEMAT Account No.10651928 and trading account No.NSE 327 were done by the Respondent No.1 who is Petitioner herein belonged to the Respondent and were made at his own will and not on my instructions.” He also stated:

“I now find that the transfer of the shares made on 28th Jun-04 itself was illegal and were meant for a NSE settlement no. 2004121 and should have been immediately reversed as per the undertaking given by the Respondent. Most of these shares were later fraudulently sold in settlement no.2004123 and then in 2004163.”

The NSE Award and affirmation thereof

12. A detailed Award was passed by the NSE Arbitral Tribunal on 13th July 2005. The preliminary objections on the ground of limitation were rejected. On merits, the NSE Arbitral Tribunal held *inter alia* as under:

“14.....The copies of the documents placed at Pages 15 to 28 indicate that the Applicant was also having an Agreement dated 02-01-2004 with Alankit for trading in securities under Code NV 327 and Client ID No. 10651928. As the Applicant’s version of what happened to this account is not supported by a single document, the Respondent’s defence that he has concocted the whole story appears to be plausible. The Applicant’s version that he was assured that he cannot ever suffer loss in the market and he will always be in a “win-win” position vis-à-vis transactions in his second account NS327 which were executed by Mr. Ashok Aggarwal cannot be believed as he has to bear the consequences of the business as per the Rules and the Agreement. Further, on his own admission, he had

given a cheque on 30-03-2004 for purposes of “accounting jugglery” and he had entered into the Scheme for saving income tax, which all lead to the same conclusion that the Applicant neither played the market game as per the law or the SEBI/NSE Rules, Byelaws and Regulations.”

.....

16. The claim of the Applicant that he did not know or even have the password of his Speed-e a/c has been totally denied by the Respondent as false, with which we agree. From the Annexure to the reply of the Respondent (Pages 97-105), it is noted that the Applicant had applied for Speed-e in Client ID 10651928 and had also entered into an Agreement with Alankit for this purpose. Similarly, the contentions of the Applicant that he had issued two cheques on 30-03-2004 for over Rs.62 lacs is reasonable and tenable and the contrary contentions of the Applicant are accordingly rejected.

17. The fact appears to be that the Applicant has tried to put together a concocted story about the meeting with Mr. Ashok Aggarwal etc. to bring the claims against the Respondent, which are not in any way supported by the documents on record. The claims of the Applicant are, therefore, liable to be dismissed. It is settled law that a party which comes to a Court or Tribunal with unclean hands cannot get any relief. On the contrary, the Respondent’s case against the Applicant for outstanding dues on his trading transactions as set out in their counter-claim is sustainable as per the annexed documents and trading practice.

18. The Respondent, Alankit has acknowledged that an amount of Rs.15 lacs paid by Applicant as margin money is lying with them, as his trading account has not been closed. Having regard to the facts and circumstances of the case, this amount of Rs.15 lacs shall be adjusted against the outstanding amount due to the Respondent i.e. Rs.32,72,631.59 minus Rs.15 lacs, leaving a balance amount of Rs.17,72,631.59 which is liable to be paid by the Applicant to the Respondent.”

13. Consequently, the NSE Arbitral Tribunal ordered as under:

“(i) The claims of the Applicant are dismissed;

(ii) The Respondent Alankit’s counter claim for an amount of Rs.17,72,631.59, after deducting the amount of Rs.15 lacs lying with him as margin money, is allowed against the Applicant;

- (iii) Respondent Alankit's claim for interest is rejected; and
- (iv) The Applicant, Cdr. S.P. Puri shall pay cost of Rs.10,000/- (Rupees ten thousand only) in favour of Respondent, Alankit Assignments Ltd."

14. Aggrieved by the above Award, Respondent No.1 filed O.M.P. No.395 of 2005 in this Court which was dismissed by a detailed judgment dated 27th August 2008 by the learned Single Judge. *Inter alia* it was held in paras 21, 22 and 23 of the said judgment as under:

"21. Learned counsel for the Objector had drawn my attention to the transaction statement with specific reference to entries dated 28th June 2004 in which the transaction number given is 2004121. It is an admitted case of the parties that the figure 2004 stands for the year in question and the number 121 is the specific market type settlement number. In this regard, learned counsel for the Respondent has drawn my attention to the Guide of National Securities Depositories Ltd. to trading and settlement and settlement instructions. The said instructions describe the process by which shares are transferred from delivery account of the seller to the pool account and then to receipt account of the purchaser. It is also pointed out that in the clearing account, the securities are always kept in a basket for the purpose of identification. It is not disputed that shares can be transferred from the depository to the pool account before or after the transaction. Thus transaction number 2004121 was given for all shares which were transferred from the depository to the pool account and were sold. Reference to transaction no.2004121 therefore stands explained by the Respondent. Learned Arbitrators being familiar with the dealings in the stock exchange and why and how the transaction numbers are given have not given any importance to this contention. It has been explained that these transaction numbers are given to identify the transaction so that there is no confusion. They have no other significance.

22. Transfer from depository to pool account was made by exercising option under e-speed. The Objector in his letter dated 8th July 2004 and 22nd July 2004 has denied giving any such instructions for transfer of securities from Depository Account to the pool account and has stated that the Respondent has misused e-speed facility unauthorizedly. It is however admitted that to have access to e-speed account one must have the password, which is given only to

the person enjoying the e-speed facility. Therefore, normal presumption is that it was the Objector who had given instructions from e-speed facility for transfer of securities from Depository Account to the pool account.

23. Thus learned Arbitrators are not wrong in proceeding and accepting that the Objector himself had given instructions for transfer of shares from the depository to the pool account on 25th June 2004. Thereafter, the shares were sold.”

15. In the said judgment the issue of transfer of shares from the DEMAT Account of Respondent No. 1 was discussed and it was held as under:

“Shares in the Demat Account was transferred to the pool account on 27th June 2004. Instructions in this regard were given through the Speed-e account of which the Objector had the password. The letter dated 27th June 2004 written by the Objector to National Securities Depositories Ltd. also proves that the Objector had the necessary password with him and he was aware that shares in this depository account had been transferred to the pool account. Without knowing and having access to the Speed-e account, the Objector could not have written the said letter to the National Securities Depositories Ltd. for freezing of the same and for cancellation of Speed-e instructions. Moreover, the case made out by the Objector before the learned Arbitrators was that the Respondent AAL had assured him of fixed rate of return and he had no concern with Speed-e or sale/transfer of shares. In view of the said plea it is not understood why the Objector had asked for freezing of his Speed-e instructions and his Demat Account. If the Objector had nothing to do with the purchase and sale of shares, he was not required to ask for freezing of his Demat Account and cancellation of Speed-e instructions. This also establishes that the claim of the Objector that he had made investment under an assured return scheme is false and incorrect.”

16. Respondent No. 1 then filed FAO (OS) No. 434 of 2008 which came to be dismissed by a Division Bench of this Court by judgment dated 15th January 2009. Thereafter Respondent No. 1 filed SLP (Civil) (cc 11765/2009) which was dismissed by the Supreme Court on 11th September 2009.

Proceedings before the NSDL

17. It appears that in the meanwhile on 7th April 2006, after the Award of the NSE Arbitral Tribunal, Respondent No.1 wrote to the NSDL making a request for arbitration of the dispute with the Petitioner indicating the names of three Arbitrators in the order of preference. In para 3 of the 'Facts of the Case' enclosed with his arbitration request, Respondent No. 1 claimed that he was so convinced by the explanations given by Mr. Ashok Aggarwal of the Petitioner that he "decided to avail and enjoy the Speed-e facility and applied for it on 8th January 2004 or so." Thereafter it was stated as under:

"Having won the confidence of the applicant in this manner, the said Executive Director of the Respondent Company further induced the applicant that since the method was very safe and foolproof, therefore, the password and ID under the speed-e facility could be disclosed/divulged by the applicant to the Respondent Company for ease and facility of the transactions on behalf of the applicant. The applicant was so overwhelmed and assured in his wisdom that he not only disclosed his password and ID to the Respondent but also gave him the delivery instruction book (BLANK) duly signed and both the things were misused."

18. In para 9, it was stated by Respondent No.1 as under:

"9. The applicant was also being cautioned by the staff of the Respondent to be careful since according to them the Respondent Company and its Directors had gone dishonest. This alerted the applicant, who decided to change the password and ID under the speed-e facility, which in good faith had been disclosed to the Respondent by the applicant in the manner stated hereinabove. The applicant did not remember the password and ID orally and could not locate the diary where the applicant had jotted down the password and ID. In these facts and circumstances, on 26th June 2004, the applicant when he went to the Office of the Respondent along with his wife, requested the Respondent to freeze the applicant's account to disable the speed-e facility, however, the staff of the Respondent in their Noida Office did not receive the request of the applicant on the pretext that their Executive Director Shri Ashok Agarwal was away to Mumbai and the freezing of the account, etc. as also disabling of the speed-e facility could be effected only after he was to come back from Mumbai."

19. Thereafter it was stated that Respondent No. 1 to get the Petitioner to freeze his account, made a request to NSDL to freeze his account and to disable the speed-e facility. The specific case of Respondent No. 1 before the NSDL was as under:

“18. The matter, which is to be considered by the Arbitral Tribunal is whether the transfer of the shares was or was not in order and in case the Arbitral Tribunal comes to the conclusion that the transfer of the shares from the DEMAT Account of the applicant to the pre-notified Pool Account of the Respondent was not in order, or was contrary to the undertaking (Annexure ‘A’) or was tainted by fraud/misrepresentation or were not due to the Respondent or were result of an ‘error’ then in terms of the undertaking annexed as Annexure ‘A’, the entire lot of the shares must revert back to the applicant’s DEMAT Account.”

20. Respondent No.1 requested for the re-transfer of the shares that were transferred to the pool account of the Petitioner from the DEMAT Account of Respondent No.1 on 28th June 2004 with all consequential facilities.

21. In its reply before the NSDL the Petitioner raised a specific objection as to the maintainability of the claim. After setting out all the facts concerning the claim of Respondent No. 1 before the NSE Arbitral Tribunal ending in its rejection, it was stated by the Petitioner in para 2 of its reply under the caption “Preliminary Objections” as under:

“2. The present application is also liable to be reject in as much as by the aforesaid Arbitral Award dated 13-7-2005 of the Arbitral Tribunal under the aegis of NSE, not only the allegations of the applicant were held to be unfounded and false and the claim of the applicant rejected in toto, but the said Arbitral Tribunal allowed the entire counter claim of the Respondent herein and awarded in its favour and against the applicant net amount of Rs.17,72,631.59 as well as cost of Rs.10,000/-. Undisputedly, the applicant has not paid any amount whatsoever to the Respondent in satisfaction of the said Arbitral Award dated 13-7-2005. In view thereof the present claim made by the applicant is exfacie not maintainable.”

22. In his rejoinder to the above paragraph 2, Respondent No. 1 referred to the fact that O.M.P. No. 395 of 2008 challenging the NSE Arbitral Tribunal's Award was pending and further that "the present claim is not at all affected by the said proceedings."

Impugned Award of the NSDL Arbitrator

23. One of the first issues considered by the learned Arbitrator appointed by the NSDL ('the NSDL Arbitrator') was whether the previous proceedings before the NSE Arbitral Tribunal which ended in the rejection of the claim of Respondent No. 1, which Award was affirmed up to the Supreme Court, constituted *res judicata* and barred the fresh claim by the Respondent No. 1 before the Arbitrator appointed by the NSDL.

24. In the impugned Award dated 10th December 2009, the learned NSDL Arbitrator held that the NSE Arbitral Tribunal did not decide the scope of its jurisdiction when it passed an Award in favour of the Petitioner herein. Since it was admitted by the Petitioner that shares of 12 companies which were transferred from the DEMAT Account of Respondent No.1 were not listed on the NSE, the dispute in that regard could not have been disposed of by the NSE Arbitral Tribunal. Relying on the decision in ***Swamy Atmanand v. Sri Ramkrishna Tapovanam (2005) 10 SCC 51***, the learned NSDL Arbitrator held that the provisions of Section 11 of the Code of Civil Procedure, 1908 ('CPC') did not apply to arbitral proceedings. In answering the question whether the NSE Arbitral Tribunal had concurrent or parallel jurisdiction to decide the question presented in the claim, the learned NSDL Arbitrator held that since it was a dispute between a Participant and the claimant about the erroneous or fraudulent transfer of shares, and therefore it was only the NSDL Arbitral Tribunal which had the jurisdiction to decide such issue. Since it was not a claim, difference or dispute between trading members *inter se* or

between a trading member and constituents relating to trading of shares, the NSE Arbitral Tribunal did not have the jurisdiction to decide such claim. It was further observed as under:

“Merely because the claimant had the dual capacity of being a client and the Respondent a trading member for the purpose of trading in NSE also, this situation was not affected.

46. Question of erroneous transfer of shares kept as deposit with the depository participant to the pool account of the Respondent had not arisen and could not have been raised in the case before the arbitral tribunal under the NSE bye laws and regulations. There the questions posed (sic. posed) had been quite different.”

25. According to the learned NSDL Arbitrator, this Court while disposing of the application under Section 34 of the Act could not have decided the point since “at the most the same question was only collaterally or incidentally in issue and any such decision would not amount to res judicata.”

26. On the merits of the case, it was held by the learned NSDL Arbitrator as under:

“50. On the face of it the delivery of shares listed at NSE, not listed at NSE and not listed either on NSE or BSE, in hot or unholy haste, by 40 instructions within the short period of one minute fifty seconds for settlement of 2004121 dated 25.06.2004 while the same were neither sold or settled under that settlement number or on that date to NSE in the pool account was either erroneous or fraudulent and cannot be said to be innocent transaction carried out bona fide. Admittedly a part of such shares were sold under settlement No.2004123 on 29.06.2004, a part was sold through Apaar Finance and Investment Ltd. and cheque received was credited in the account of the claimant, remaining shares of 4 companies were suspended for trading and were retained by the Respondent. Such transaction cannot be justified on the ground that the claimant had been running in heavy debit account for some time past.

27. Accordingly, the learned NSDL Arbitrator directed that “all those shares which were transferred on 28.06.2004 from the account of the

claimant be transferred back to him with all incidental benefits such as dividend, bonus shares, rights shares, splitting of shares etc.”

Submissions of counsel

28. Mr. J.P. Sengh, learned Senior counsel for the Petitioner submitted that the impugned Award was contrary to law and deserved to be set aside under Section 34 of the Act. Referring to Explanation VIII of Section 11 CPC, Mr. Sengh submitted that the proceedings before the NSDL Arbitrator were barred on the principles of *res judicata*. He submitted that the earlier Award dated 13th July 2005 of the NSE Arbitral Tribunal had decided the claim based on the same cause of action against Respondent No. 1. The said Award had been upheld by the learned Single Judge and Division Bench of this Court as well as by the Supreme Court. Referring to the specific case of Respondent No. 1 before the NSE Arbitral Tribunal and the findings thereon, it is submitted that the matters sought to be agitated before the learned NSDL Arbitrator were directly and substantially in issue in the earlier claim decided by the NSE Arbitral Tribunal. He also referred to an order dated 31st August 2006 passed by Justice P.K. Jain (retired) who had initially presided over the arbitration proceedings of the NSDL in which he gave his *prima facie* opinion that “the subject matter in these proceedings was directly and substantially involved in the earlier claim filed and decided by the Arbitral Panel appointed by NSEIL.” Consequently, Justice Jain stayed the NSDL arbitral proceedings to await the final disposal of O.M.P. No.395 of 2005.

29. Mr. Sengh referred to the statement of claims filed by Respondent No. 1 before the NSE and that filed before the NSDL to indicate that the averments concerning the alleged fraudulent transfer of shares from the DEMAT Account by misusing the said speed-e password, the presentation of cheque by the Petitioner with alleged *mala fide* intention, the alleged misuse by the

Petitioner of the speed-e facility of the Respondent No.1 and the freezing of his DEMAT account were identical in both. These were matters directly in issue before the NSE Arbitral Tribunal and decided by it. Mr. Singh referred to the decision in ***K.V. George v. Secretary to Govt., Water & Power Department, Trivandrum (1989) 4 SCC 599*** in which it was held that the principles of constructive *res judicata* applied to arbitration proceedings. He then referred to the decision in ***Mumbai International Airport Private Limited v. Golden Chariot Airport (2010) 10 SCC 422*** to urge that Respondent No. 1 had elected to go before the NSE Arbitral Tribunal and having failed before it ought not to be permitted to re-agitate the same issues before the NSDL Arbitral Tribunal. He also referred to the decisions in ***Annaimuthu Thevar v. Alagammal (2005) 6 SCC 202***, ***Sulochana Amma v. Narayanan Nair (1994) 2 SCC 14***, ***Bharat Sanchar Nigam Limited v. Motorola India Private Limited (2008) INDLAW SC 1495***, ***S.N. Malhotra & Sons v. Airport Authority (2008) 149 DLT 757***, ***DDA v. Alkarma AIR 1995 Delhi 132***, ***Shakambari & Company v. Union of India*** (order dated 19th September 2008 in A.P. No.351 of 2006 of the Calcutta High Court), and ***Kohinoor Rubber Works v. Union of India*** (decision dated 23rd March 2006 of the Delhi High Court in O.M.P. No.33 of 1987).

30. Mr. Deeptakirti Verma, learned counsel for Respondent No. 1 submitted that in his petition before the NSE Arbitral Tribunal Respondent No.1 had limited his claim to:

- “(i) Return of the amount of Rs.14.40 lacs actually paid by Respondent No.1 to the Petitioner by way of cheques,
- (ii) return of shares worth about Rs.3.5 lacs transferred from the old DEMAT Account of Respondent No. 1 to the new DEMAT Account opened by him with the Petitioner bearing number 10651928,
- (iii) interest for the period 11.06.2004 to 31.03.2005 @ 2% on the

amounts mentioned in (i) and (ii), &

- (iv) compensation of Rs.100 lacs on account of humiliation, harassment and loss of opportunity caused to Respondent No.1.”

31. On the other hand, before the NSDL Arbitral Tribunal the reliefs sought by Respondent No. 1 were as under:

- “(i) Return of the shares which were transferred to the pool account of the Petitioner herein from the DEMAT Account of Respondent No. 1 on 28.06.2004 with all incidental benefits,”
- (ii) compensation of Rs.10 lacs for the harassment, torture, mental agony, etc. caused to the applicant for illegal and fraudulent acts of the Petitioner herein in contravention of all norms,
- (iii) pin-point the failure in the system and to make suitable recommendations to the NSDL to take such steps as to prevent similar frauds, where DP and trading member is the same,
- (iv) recommendation of suitable action against the Petitioner herein for having indulged in fraudulent activities and breaching the rules and regulations framed by the NSDL, &
- (v) payment of costs of Rs.1 lac to Respondent No.1.”

32. Therefore, according to Respondent No.1 the reliefs claimed in both fora were not the same.

33. Mr. Verma submitted that before the NSE Arbitral Tribunal, Respondent No. 1 did not claim ownership of the shares that were transferred by the Petitioner to its Pool Account on 28th June 2004 or assail the action of the Petitioner in so transferring the shares to its Pool Account. Therefore, Respondent No. 1 did not seek the relief of return of its shares before the NSE Arbitral Tribunal. Reference was made to the stand taken by the Petitioner before the NSE Arbitral Tribunal that it had no jurisdiction. The said objection

was not considered by the NSE Arbitral Tribunal since the issue of legality of transfer of securities from the DEMAT Account of Respondent No.1 to the Pool Account of the Petitioner never arose for consideration by the NSE Tribunal and no decision was required to be given thereon.

34. It was submitted that even assuming that certain aspects in respect of transfer of shares from the DEMAT Account of Respondent No.1 to the Petitioner's Pool Account fell for consideration by the NSE Arbitral Tribunal, such issues arose for consideration only collaterally and incidentally, and not directly and substantially. Therefore, the findings or observations in respect of such issues by the NSE Arbitral Tribunal would not result in the bar of *res judicata* becoming applicable. Reliance is placed on the decisions in ***Madhvi Amma Bhawani Amma v. Kunjikutty Pillai Meenakshi Pillai (2000) 6 SCC 301***, ***Sajjadnashin Sayed v. Musa Dadabhai Ummer (2000) 3 SCC 350*** and ***Gram Panchayat of Village Naulakha v. Ujagar Singh (2000) 7 SCC 543***. It is submitted that since the NSE Arbitral Tribunal could not have disposed of matters exclusively within the jurisdiction of NSDL Arbitral Tribunal, the confirmation of the Award of the NSE by the learned Single Judge and the Division Bench of this Court would not preclude attention of the Arbitral Tribunal of the NSDL to the legality of transfer of shares on 28th June 2004 from the DEMAT Account of Respondent No. 1 to the Petitioner's Pool Account.

35. Relying on the decisions in ***Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy (1970) 1 SCC 613***, ***M/s Sudarshan Trading Co. v. Government of Derala (1989) 2 SCC 38***, ***Puri Construction Pvt. Ltd. v. Union of India (1989) 1 SCC 411***, Mr. Verma submitted that the Award of the learned NSDL Arbitrator was within jurisdiction and did not call for interference. Mr. Verma further submitted that the Court exercising

jurisdiction under Section 34 of the Act would not re-examine the case and sit in appeal over the decision of the Arbitrator on a particular issue. Reference was made to the decisions in ***Tarapore and Company v. Cochin Shipyard Ltd. Cochin (1984) 2 SCC 680*** and ***Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd. (2007) 8 SCC 466***.

Was the claim before the NSDL Arbitrator barred by res judicata?

36. One of the principal issues that arise for consideration is whether the impugned Award of the learned NSDL Arbitrator holding that the proceedings brought before him by Respondent No.1 were not barred by the principle of *res judicata* is sustainable in law.

37. The basic principle of *res judicata* is encapsulated in the substantive part of Section 11 CPC. The Explanations thereto further explicate and in some instances widen the scope and ambit of operation of the said principle. The purpose of Section 11 CPC is to prevent multiplicity of proceedings and accord finality to an issue “which directly and substantially had arisen in the former suit between the same parties.” In ***Sulochana Amma v. Narayanan Nair*** it was explained that the principle of *res judicata* was based on public policy as well as private justice. Therefore, it would apply “to all judicial proceedings whether civil or otherwise. It equally applies to entire judicial proceedings of the Tribunal other than the Civil Court.” In the said judgment the rationale behind Explanation VIII added to Section 11 CPC was discussed. A reference was made to the report of the Law Commission which recommended the removal of the anomaly in Section 11 CPC and bringing within its fold “the conclusiveness of an issue in a former suit decided by any Court, be it either of limited pecuniary jurisdiction or of special jurisdiction, like Insolvency Court, Probate Court, Land Acquisition Court, Rent Controller, Revenue Tribunal etc.” Thereafter it was observed as

under: (SCC, p. 18)

“Explanation VIII is wide enough to include a court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and in harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as *res judicata* in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies. This question is no longer *res integra*.”

38. The above legal position was reiterated in *Annaimuthu Thevar v. Alagammal*. The applicability of the principle of *res judicata* to arbitral proceedings was reaffirmed in *K.V. George v. Secretary to Govt., Water & Power Department, Trivandrum*. There the Supreme Court referred to its earlier decision in *Satish Kumar v. Surinder Kumar AIR 1970 SC 833* which held as under:

“The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. **After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference....** This conclusion according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, **if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent.** This position also has not been and cannot be seriously disputed.” (Emphasis supplied)

39. It is therefore settled law that the principle of *res judicata* applies to

arbitral proceedings. Relevant to the facts of the present case, Explanation VIII to Section 11 CPC is a complete answer to the contention of the learned counsel for Respondent No.1 that since the NSE Arbitral Tribunal had no jurisdiction to decide the issue concerning fraudulent transfer of shares from the DEMAT Account of Respondent No. 1 to the Pool Account of the Petitioner, and since such issue could be decided only by the NSDL Arbitral Tribunal, any decision given by the NSE Arbitral Tribunal on that point would not operate as *res judicata*. The purpose of insertion of Explanation VIII in Section 11 CPC was precisely to overcome such a contention.

40. It is sought to be contended by Respondent No. 1 that the factual averments made by him before the NSE Arbitral Tribunal were different from those made before the NSDL Arbitral Tribunal. While this is not entirely correct as can be seen on comparing his averments in both the arbitral proceedings, some of which have been extracted hereinbefore, a litigant cannot be permitted to plead incorrect or inconsistent facts before two fora in relation to the same transactions. The extracts of the averments show that Respondent No. 1 specifically pleaded before the NSE Arbitral Tribunal about the transfer from his DEMAT Account having been made by Shri Ashok Aggarwal of the Petitioner “fraudulently”. Respondent No.1 concedes that when “superficially considered” there is an overlap of the issues pleaded before both Tribunals and that as far as the NSE Arbitral Tribunal was concerned “it was merely an incidental issue”. On the contrary, it is found that this was an issue specifically pleaded specifically by Respondent No. 1 before the NSE Tribunal and put in issue directly before it. In para 13 of its Award the NSE Arbitral Tribunal notes that “The Applicant’s main complaint is regarding the alleged fraudulent actions of the Respondent under an unwritten agreement with one Mr. Ashok Aggarwal stated to be a Director of Alankit.” However this case of Respondent No.1 was held in para 15 to be “neither legal

nor supported by any documents on record.” As the portions of the said Award extracted before show, Respondent No.1 was held to have “tried to put together a concocted story...which are not in any way supported by the documents on record.”

41. The fact that the Petitioner herein raised an objection before the NSE Tribunal as to its jurisdiction to decide the dispute which objection was not decided, cannot be of any help as far as Respondent No.1 is concerned. He had throughout maintained that his claim before the NSE Tribunal was maintainable. In rejoinder to the Petitioner’s reply to the statement of claim of Respondent No. 1 before the NSE Tribunal, Respondent No. 1 reiterated that the NSE Tribunal has jurisdiction to decide his claim which specifically included the plea concerning fraudulent transfer of shares from his DEMAT Account.

42. The NSDL Tribunal in the impugned Award appears to have erred in holding that the NSE Arbitral Tribunal lacked jurisdiction to decide that issue and therefore its Award on that aspect would not constitute *res judicata*. The NSDL Arbitral Tribunal has overlooked Explanation VIII of Section 11 CPC.

43. The contention of Respondent No.1 that the case pleaded by him before the NSE Arbitral Tribunal did not involve the legality of the transfer of shares and did not ask for the return of shares but only return of shares of about Rs.3.5 lakhs deserves to be rejected. A perusal of the impugned Award of the NSE Arbitral Tribunal shows that this point was in fact pleaded initially by Respondent No. 1 and specifically noticed and negatived by the NSE Arbitral Tribunal. Further, the learned Single Judge of this Court also delved into this aspect and held against Respondent No.1. It was confirmed by the Division

Bench of this Court as well as by the Supreme Court. It is therefore not possible to agree with the submission of Respondent No. 1 that the issue decided by the learned NSDL Arbitrator was not directly and substantially in issue in the arbitral proceedings before the NSE Arbitral Tribunal, or that the proceedings before the former were not barred by the principle of constructive *res judicata*.

Doctrine of Election

44. There is also merit in the contention that Respondent No. 1 having opted to go before the NSE Arbitral Tribunal with a claim on several grounds, including one relating to alleged fraudulent transfer of shares, and having invited the decision of the NSE Arbitral Tribunal would be precluded on the doctrine of election from going before the NSDL Arbitral Tribunal. In ***Mumbai International Airport Private Limited v. Golden Chariot Airport*** the doctrine of election was explained thus (SCC, pp.435-436):

“45. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in *Scarf v. Jardine (1882) 7 AC 345* wherein the learned Lord formulated: (AC p. 361)

“... a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act ... the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.”

.....

49. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* 1964 AC 993 the Privy Council held that: (AC p. 1018)

“... a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.”

50. Ashutosh Mookerjee, J. speaking for the Division Bench of the Calcutta High Court in *Dwijendra Narain Roy v. Joges Chandra De* AIR 1924 Cal 600, held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.”

Conclusion

45. The learned NSDL Arbitrator erred in overlooking the clear legal position. The impugned Award dated 10th December 2009 is contrary to law and suffers from a patent illegality. It is accordingly set aside.

46. The petition is allowed with costs of Rs. 20,000 which shall be paid by Respondent No.1 to the Petitioner within four weeks.

S. MURALIDHAR, J

FEBRUARY 10, 2012

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