

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

+ C.S. (O.S.) No. 1062/1997

Date of Decision: 19.12.2013

HARI OM MAHESHWARI

....Petitioner

Through: Mr. Manish Vashisht, , Mr.
Dhruv Rohatgi, Advs.
Versus

**M/S. G. E. CAPITAL TRANSPORTATION FINANCIAL
SERVICES LTD.**

(Formerly known as SRF Finance Ltd.)

....Defendant

Through: Ms. Deepika V. Marwah, Ms. P.
S. Themstingla, Ms. Worthing
Kesar, Advs.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. This is a suit for recovery of Rs. 1,20,50,000/- along with pendent-lite and future interest at the rate of 24%.
2. Plaintiff is a member of the Delhi Stock Exchange (DSE). In 1990, he was selected as a member of DSE, and was allotted a membership share after paying a total sum of Rs. 5,42,000/-. And that the defendant, a Joint Stock Company is the plaintiff's sub-broker, by virtue of an agreement dated September 7, 1992. And that vide an Memorandum of Understanding (MOU) dated April 20,

1994, the defendant agreed to purchase the membership share of the DSE as held by the plaintiff on the following conditions:

- a. The plaintiff agreed to sell his membership to defendant or its assignees at a price of Rs. 112.50 lakhs (Rupees One Hundred and Twelve Lakhs and Fifty Thousand).
 - b. Outstanding dues to the defendant were to be adjusted while making payment for the transfer of membership.
 - c. Net payment after deducting the outstanding dues became payable to the broker only after the complete transfer of the membership. Till such time, the defendant was to furnish Bank Guarantee.
 - d. The plaintiff was not to negotiate or finalise the sale deal of his membership with any other party till the expiry of the MOU.
 - e. The said MOU was stipulated to be valid till April 30, 1994 or till the signing of the formal agreement for the sale of the membership, whichever earlier.
3. The plaintiff submits that the outstanding dues arising from the sub-brokership agreement dated September 7, 1992, amounting to Rs. 18.50 lakhs was treated as earnest money. Plaintiff submits that the parties decided to enter into an MOU because the defendant was not definite as to whether the membership share was to be transferred in its own name, or in the name of an assignee promoted by it. Therefore, a stipulation was made in the MOU regarding execution

of another agreement once the specific transferee became certain from the defendant's side. Nevertheless, the plaintiff contends that the MOU dated April 20, 1994 was still a valid and binding contract between the parties because the subsequent agreement which was to be signed between the parties could not have been contrary to the terms of the MOU.

4. The plaintiff states that on April 30, 1994, there was a breach of contract by the defendant when it failed to provide the Bank Guarantee for a sum of Rs. 94 lakhs, and also failed to prepare and execute another agreement in favour of its desired assignee, as envisaged under the MOU. And that, the defendant sought an extension of time, which was mutually agreed between the parties vide another agreement on April 30, 1994, whereby the validity of the MOU was extended till May 8, 1994, while other terms of the MOU remained constant. However, the defendant yet again breached the contract on May 8, 1994, when it failed to provide the Bank Guarantee and execute an agreement. And that the plaintiff, vide its letter May 9, 1994, unilaterally allowed the defendant time upto May 31, 1994 to perform its contractual obligation, but the defendant did not show interest.
5. And that vide a letter dated May 9, 1994, the plaintiff terminated the MOU and informed the defendant regarding the forfeiture of the earnest money amounting to Rs. 18.50 lakhs. And that, on May 23, 1994, the defendant terminated the sub-brokership agreement dated

September 7, 1992 and demanded payment of Rs. 19,02,289/- from the plaintiff. In response, the plaintiff submitted a statement of accounts to the defendant on June 3, 1994, according to which only a sum of Rs. 9, 90, 313/- was payable to the defendant. Further, the plaintiff also claimed that the defendant indemnify a loss of Rs. 87,50,000/- on account of the defendant's breach of contract, which caused the plaintiff to sell the DSE membership to a third party for a sum of Rs. 25 lakhs only. And that after adjustment of Rs. 9,90,313/-, the defendant was liable to pay the balance amount of Rs. 77,59,687/- along with interest thereon @ 24% per annum w.e.f. June 3, 1994 till the date of filing of the suit, which amounts to Rs. 1,20,50,000/-.

6. Plaintiff submits that the cause of action arose in his favour on April 30, 1994; May 8, 1994; May 9, 1994 and May 31, 1994, when the defendant neglected the MOU and failed to perform its obligations thereunder.
7. In its Written Statement, the defendant has taken the following preliminary objections. Firstly, the defendant submits that the suit is barred by limitation. Secondly, that no cause of action has arisen in favour of the plaintiff, since the suit is based on an MOU, which was never binding between the parties. And that the said MOU is no longer in existence since the plaintiff issued a letter dated May 9, 1994 terminating it. And that the said MOU was to be valid only for a fixed short duration of time, and cannot be deemed to be binding

upon the parties beyond its expiry. And that in any event, the MOU was void on account of uncertainty and vagueness, because admittedly, the name of purchaser/transferee was not finalized. And that other uncertainties such as the bar/prohibition of the DSE on the use of the Membership Share and the documentation in relation to the requirements of the rules and regulations of the DSE pertaining to eligibility of a non-member becoming a member were not clarified. And that the extension offered by the plaintiff beyond May 8, 1994 was unilateral and conditional and was further based upon the illegal forfeiture of amounts admittedly owed and outstanding to the defendant.

8. The defendant also submits that the plaintiff offered the defendant the sale of its membership share of the DSE only because the defendant company was considering it for one of its subsidiary/sister companies/assignees, and not for itself. And that as admitted by the plaintiff, it owed the defendant a sum of Rs. 18.50 lakhs arising out of the sub-brokership agreement between the parties, which was completely unrelated to the MOU. And that the said amount could only be adjusted in the event of the sale materializing and not otherwise.
9. The defendant further submits that it filed an arbitration petition u/s. 20 of the Arbitration Act, 1940, against the plaintiff, invoking the arbitration clause between the parties. And in the said arbitration proceedings, the plaintiff has not raised any counter claim with

respect to the alleged losses suffered by him, thereby clarifying that the plaintiff himself is aware that the transactions under the sub-brokership agreement dated September 7, 1992 were independent and unrelated to those under the MOU.

10. Vide Order dated August 17, 1999, the following issues were framed:

- 1) Whether the suit is barred by limitation? OPD
- 2) Whether the MOU dated April 20, 1994 is a binding contract? OPP
- 3) Whether the MOU dated April 20, 1994 was void on account of uncertainty and vagueness? OPD
- 4) Whether the defendant has committed breach of the MOU? OPP
- 5) If the Issue No. 4 is proved in affirmative, whether the plaintiff has suffered any loss on account of default of the defendant? OPP
- 6) Whether the plaintiff is estopped from claiming the loss suffered by him on account of default of the defendant for the reasons stated in para 4 of the preliminary objections of the written statement? OPD
- 7) Whether the plaintiff is entitled to receive interest on the loss suffered by him, for what period and rate? OPP
- 8) Relief.

11.I have heard the Ld. Counsels for the parties and perused through the documents placed on record. Issue wise findings are as under:

Issue 1:

12.The MOU (Ex. PW1/2) was entered into on April 20, 1994. It was valid until April 30, 1994. The validity was later extended to May 8, 1994 by mutual consent, vide agreement dated April 30, 1994 (Ex. PW1/3). The case of the plaintiff is that the breach of contract took place on May 8, 1994. Article 55 of the Limitation Act, 1963 stipulates that the limitation for filing suit for compensation on account of breach of contract is three years from the date when breach had occurred. The suit was filed on May 7, 1997 i.e. within three years from the date of the alleged breach. Therefore, the plaint is within the stipulate limitation period. I find this issue in favour of the plaintiff.

Issue 2:

13.Before I proceed to decide the remaining Issues, I find it pertinent to observe that upon a collective reading of the plaint, written statement and the Award of the arbitrator, it is apparent to me that this suit is based upon the validity and enforceability of the MOU at its very fulcrum. Excluding the Issue No. 1, the remaining issues are contingent to the outcome of Issue No. 2.

14.Ld. Counsel for defendant has placed strong reliance on the Order of this Court dated December 10, 2012, wherein it was observed:

“Between the parties to the present suit, there were arbitration proceedings, wherein, the issue of validity of the MOU dated

30.4.1994 (sic) also came up. This issue was held in favour of the present defendant and who was the claimant in the arbitration proceedings, and the arbitrator held that the MOU being a contingent contract came to an end on May 8, 1994.”

15. The Ld. Counsel for the defendant has contended that the suit no longer survives, because the Award, which has now become rule of the Court, has categorically held that it expired on May 8, 1994. And that the issues in this case are precluded by the rule of ‘Issue Estoppel’, which he has claimed to be different from the doctrine of ‘Res Judicata’. In support of her argument, she has placed reliance upon the decision of the Apex Court in the case of **Krishna Bahadur v. Purna Theatre and Ors., (2004) 8 SCC 229** and **Bhanu Kumar Jain v. Archana Kumar & Anr., (2005) 1 SCC 787**.
16. In response, the Ld. Counsel for the plaintiff has argued that the Award dated August 22, 2003 was strictly with respect to the sub-brokership agreement dated September 7, 1992 and not regarding the MOU dated April 20, 1994. In furtherance of this argument, he has placed reliance upon the paragraph of the said Award which observes:

“As regards the counter claim of the Respondent, the Respondent during the Arbitration proceeding held on 15.07.2003, himself admitted that his counter claim was not maintainable in Arbitration proceedings in view of his letter dated 19.05.1994 addressed to the Claimant terminating MOU dated 20.04.1994. Not only this, the Respondent stated that he

did not approach DSE for Arbitration as according to his understanding his counter claim did not fall under the jurisdiction of the bye-laws of the Exchange (DSE) and that the matter was sub-judice. In the circumstances, facts and matter of the case, I restrain myself from passing any comments on the counter claim particularly as by admission of the Respondent the matter is not within the purview of DSE and is subjudice, and, I leave it to the wisdom of the Hon'ble Court.”

17. Since the history of this litigation is a cheered one, I find it pertinent to note the observations of this Court in Order dated July 10, 2012 in **CS (OS) No. 1129/2010** titled ***M/S. G. E. Captial Services India v. Hari Om Maheshwari***:

“2. The background of the arbitral proceedings was that the plaintiff [defendant herein] and defendant [plaintiff herein] entered into a sub-broker and broker relationship by an agreement dated 7th September 1992 in terms of which the plaintiff was to place an interest free refundable security of Rs. 10 Lakhs with the defendant, which upon termination of the agreement would be repaid to the plaintiff. The defendant was a member of the Delhi Stock Exchange (‘DSE’) and was bound by its bye-laws and regulations.

3. Under a Memorandum of Understanding (‘MoU’) dated 20th April 1994, the defendant agreed to sell his membership to the plaintiff for Rs. 112.50 lakhs. The MoU was valid till 30th April 1994 and was extended till 8th May 1994. It contained an

admission that a sum of Rs. 18.5 lakhs was due from the defendant to the plaintiff. The dispute between the parties was referred to arbitration pursuant to an order dated 19th April 2001, passed by this Court in the petition filed under Sec. 20 of the 1940 [Arbitration] Act. The said order was affirmed by the Division Bench on 16th May 2002. The Supreme Court dismissed the defendant's SLP (C) No. 7733/2003 on 2nd June 2003, thus confirming the order of the Division Bench."

18. Vide the same Order, this Court also observed:

"With the time for filing objection to the Award by the defendant having expired, the Award has to be made rule of the Court. Accordingly, the award dated 22nd August 2003 is made rule of the Court."

19. Although the plaintiff preferred an SLP before the Apex Court against the above Order, it was dismissed vide Order dated January 7, 2013. Therefore, it has to be said that the Award has attained finality as a rule of the Court.

20. For the sake of brevity, the relevant portion of the Award dated 22nd August 2003 is reproduced hereunder:

"What needs to be observed in the MOU is that at no stage of MOU, the Claimant has expressly agreed to purchase membership of the Respondent. It is Respondent only agreeing to sell his membership to the Claimant. By Clause number 5 (Five) of MOU the Respondent bound himself unilaterally to the Claimant till the expiry of the MOU, (valid upto 30.4.1994), the

expiry later on extended upto 8th May, 1994. From the contents of the MOU, it is clear that the Respondent was free to negotiate or finalise the sale of his membership with any other party after the expiry of the validity period.

Clause number 2 (two) of the MOU allows the Claimant to adjust the liability of the Respondent to the Claimant while making payment for purchase and transfer of membership. It does not authorize the Respondent to adjust the liability in case of MOU is not put through in the shape of a formal agreement. Instead the clauses 8 (eight) and 5 (five) clearly lay down the expiry date of MOU and give free hand to the Respondent for sale of Membership to any other party.”

21. The tribunal further observed:

“Now comes the question of lawfulness of the act of the Respondent in having appropriated his liability to the Claimant by cancellation of MOU dated 20.04.1994 vide his letter dated 09.05.1994.

On a very careful reading of MOU dated 20.04.1994, I opine that this is a case which falls within section 35 of Contract Act i.e. a contingent contract. The Claimant and Respondent to the MOU had fixed time for the subsequent certain event, namely signing of a formal agreement for sale of membership by 30.04.1994, and is extended upto 08.05.1994, failing which the MOU stood expired, and thereafter the Respondent stood free to sell his membership to another party. Upon the said event not

happening i.e. non-signing of a formal agreement for sale of membership, within the time fixed, the MOU became void. The words and language of the MOU is clear and unequivocal. It admits only of one interpretation and that is the intention of the parties was the understanding was operative upto 30.04.1994 and as extended upto 08.05.1994 and that the understanding was to lapse and exhaust itself in the event of the signing of formal agreement for sale of membership not taking place.

The law in such cases is clearly laid down in the matter of Maharaj Krishan v. Iqbal Krishan by Hon'ble Delhi High Court [1991 DLT 693]. I, therefore opine and hold that the act of the Respondent in having appropriated the money due by him to the Claimant is unjustified and unlawful."

22. Therefore, I find no merit in the argument of the plaintiff that the Award does not make any findings regarding the MOU dated April 20, 1994. This Court, vide its Order dated April 19, 2001, referred the dispute between the parties to arbitration. The terms of reference were not only regarding the amounts due under the sub-brokership agreement dated September 7, 1992 but also the appropriation of the said outstanding amount by the plaintiff in furtherance of breach of the MOU. Though the Ld. Arbitrator refrained from making any findings regarding the counter-claim of the plaintiff, upon a careful reading of the Award it is clear that the arbitrator did so only because the said claim was the subject matter of this suit. However, his desistance in adjudicating the counter-claim cannot be

interpreted to mean that the determination of the validity and enforceability of the MOU was beyond his mandate.

23. The findings of the Ld. Arbitrator have been upheld all the way till the Apex Court and his Award has attained finality. In the case of ***Bhanu Kumar Jain v. Archana Kumar & Anr.***, (2005) 1 SCC 787, the Apex Court observed:

“There is a distinction between ‘issue estoppel’ and ‘res judicata’. Res Judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties. Whereas the doctrine of issue estoppel is evoked against a party. If an issue is decided against a party, the party would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord. However, the doctrine of issue estoppel as also ‘cause of action estoppel’ may both be attracted. A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as done in the previous proceedings. In such an event the bar in relation to all points decided, save and except allegations of fraud and collusion.”

24. Therefore, following the finding of the Ld. Arbitrator in the Award dated August 22, 2003, which has attained finality, I find that the MOU a contingent contract which expired on May 8, 1994. Since no agreements were executed in furtherance of the MOU, there is

no basis for any cause of action between the parties, because the plaintiff was free to sell his membership share to anyone after the expiry of the MOU. It is also pertinent to reiterate that the MOU did not envisage any consequences for breach thereof. At maximum, it can be termed as an agreement to enter into an agreement. In any event, the plaintiff himself terminated the MOU on May 9, 1994, and he is now estopped from seeking enforcement of rights arising therefrom. The MOU may have been entered into between the parties as a consequence of their business relationship stemming from their sub-brokership agreement dated September 7, 1992, but it cannot by any stretch be said that the MOU was an extension of the sub-brokership agreement. I see no basis for the existence of a cause of action in the instant suit. Issue No. 2 is decided against the plaintiff in accordance with the Award dated August 22, 2003. All consequential reliefs arising therefrom are also liable to be rejected. The suit is accordingly dismissed.

M.L. MEHTA, J.

DECEMBER 19, 2013

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