

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2017

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

O.P.No.299 of 2009

M/s Apollo Sindhoori Capital Investments Limited,
Ali Tiwers, 55, Greams Road,
Chennai-600 006.

Rep., by its L.R.Murali Krishnan

..Petitioner

Vs.

1.Mrs Uma,
Chipli Village,
Varada Mula, Sagar,
Karnataka-577 401.

2.Mr.M.V.Badrinath,
Sole Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Ishpahani Centre,
Door No.123-124, Nungambakkam High Road,
Nungambakkam, Chennai-600 034.

.. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 27.02.2009 and 06.04.2009.

For Petitioner : Mr.S.Shivathanu Mohan for
Mr.S.Ramasubramaniam Associates

For Respondents : Mr.S.R.Raghunathan for R1

ORDER

The first respondent herein got herself enrolled as “constituent” of the petitioner Branch in the year 2005 and accordingly, an agreement was entered into on 20.12.2005. This agreement is a Member and Constituent Agreement. The first respondent was carrying on trading activities on various dates. According to the petitioner, during the course of the transactions, the first respondent incurred a debit balance as a result of selling and buying of shares. As the first respondent became due and liable and she did not make the payment, a dispute arises invoking arbitration clause.

2. The first respondent has sent a reply stating that the petitioner has transacted in her account without consent. Despite request made to rectify the transactions, it was not done. The transactions made are all fake. Credit has been given to the cheques which have not been issued. They can be borne out by the statement issued by the petitioner and the first respondent. Hence, the first respondent made a request to the learned Arbitrator to direct the petitioner to rectify the unauthorised debits in her favour.

3. Before the learned Arbitrator, the petitioner has filed number of documents. These documents include the agreement dated 20.12.2005 and the contract notes issued in the year 2008 i.e., 04.01.2008, 15.01.2008 and 18.01.2008. The first respondent has also issued E-mail on 13.03.2008 to the petitioner. The E-mail relied upon by both counsel is reproduced hereunder.

“This is to bring to your notice that your branch at Sagar has transacted in my account 47171 without my permission. You have debited huge amount on various dates in Dec. 2007 and January 2008 and I request you to give details of such debits script wise on above two months. These transactions are not pertaining to me. This information is already given to your branch on 30.01.2008 and to rectify the same. Till date nothing has been done. No details given to me. Branch has credited Rs.50,000/- against cheque No.219199 on 09.01.2008 which is false. The cheque issued to you was 2,27,712. On 17.01.2008 your branch credited Rs.70000 against cheque No.219201 which is fake. Your branch people transacted in my account without my knowledge and instructions by

creating artificial credits. I wish to know how you have given so much of exposure to trade when the account is already in debit. Further I have not confirmed the balance till it is rectified. If at all you have received any statement of account it must have been forged one by your branch people. This is for your information.

Hence, I request you to take immediate action to rectify the wrong debits and credits in my accounts before I move to the concerned regulator. Expecting early action.”

4. The statement of account of the respondent also shows that there was some understanding between the parties with respect to the cheques issued. The understanding also reads to the inference that debits have been made on the oral assurance with respect to a cheque though not received.

5. The learned Arbitrator passed an award in the following manner.

"(i)The arbitration claim made by the Applicant,
M/s.Apollo Sindhoori Capital Investments Ltd.,

against the Respondent, Mrs.Uma is hereby dismissed.

(ii)The Applicant is directed to pay to the Respondent, Mrs.Uma the sum of Rs.2,11,410.00 (Rs.3,86,409.90 - Rs.1,75,000.00 = Rs.2,11,409.90 or Rs.2,11,410.00) being the loss in the unauthorized trades as calculated above.

(iii)The Applicant should also pay a compensation of Rs.50,000/- towards the mark to market losses or calculated losses and mental tension created to the respondent on account of the misdeeds of some dealer in its fold. Although the Respondent had not made any counter claim and had only requested for rectifying the discrepancies, with a view to ensuring that she is not put to any pecuniary loss and to instil confidence in her, the compensation is being awarded.

(iv)The arbitration amount of Rs.2,61,410.00 (Rupees two lakhs sixty one thousand four hundred and ten only) (Rs.2,11,410/- + Rs.50,000/- = Rs.2,61,410/-) together with interest at 12% per annum on the award amount from the date of the Award to the date of Fixed Deposit Receipt (FDR) to be made out by ASIC for a period of not less than 91 days from the Clearing Bank, where ASIC

has settlement account and deposit such FDR with the NSE. The interest payable to the constituent, Mrs.Uma from the date of FDR till the date of payment shall be the interest accrued on the FDR till the date of encashment. The amount will be in full and final settlement of her accounts with ASIC, the Applicant.

(v)The TM should take stern action against the erring dealers. It should also issue strict instructions that no dealer/employee should trade in the account of the constituents without their specific orders/authority and credits should invariably be given only against presentation of cheques in physical form and enforce this in letter and spirit.

(vi)Needless to add that not all loss making constituents lodge complaints that trades are unauthorizedly done by the dealers and whenever a genuine complaint comes from a constituent, it should be attended to with all seriousness and the TM should order for an unbiased enquiry to be conducted to find out the truth. If action is taken with a prejudiced mind, the investor confidence would be shattered and the very purpose of having a customer care division will be defeated.”

6. Though the award is termed as ex-parte, it was on merit. Despite the fact that the learned Arbitrator himself came to a conclusion that there was no counter claim, he proceeds to pass an Award in favour of the first respondent by quantifying a compensation not even sought for. While giving reasons, the learned Arbitrator took into consideration of three cheques. Though the E-mail of the first respondent dated 13.03.2008 speaks about one coupled with the fact that there is no reference about the remaining two with specific finding of making a wrong debit with reference to the bank records of the first respondent. In other words, the learned Arbitrator proceeded to apply the same ratio with reference to the cheque bearing No.219199 and applied the same to the other two cheques. The learned Arbitrator while giving a finding that the first respondent had not disputed the receipt of the contract notes, E-log etc., along with other finding that there is number of transactions *inter se* parties, nonetheless proceeded to hold that the averments as alleged by the first respondent must have been true as she was not referring and placing reliance upon the other transactions. A finding has been rendered on the methodology being adopted by the petitioner with respect to other cases.

7. The aforesaid award is sought to be challenged before this Court on very many grounds.

8. The learned counsel appearing for the petitioner would submit that it is a case of the arbitrator exceeding his jurisdiction. He has taken into consideration of extraneous factors. There was no counter claim, but yet an award was passed. The finding rendered to a single cheque has been applied to two others. He was also biased. The documents filed by the petitioner have not been looked into. The first respondent has not disputed the receipt of the contract note and E-log etc. It is not the case of the first respondent that there was no practice in vogue, by which, credit and debit would be made even before receipt of a cheque. The statement of accounts of the first respondent itself would show that a case as projected by her is not correct.

9. The learned counsel appearing for the first respondent would submit that the Arbitrator has taken into consideration of the relevant materials. It is a case of fake credit. The relief was in tune with the request made. The trade was also unauthorised. As factual findings resulted in the award, no interference is required.

10. The learned Arbitrator has given certain findings in favour of the petitioner. Accordingly, it was held that the respondent did not dispute that

she was indulging in other trades on the relevant dates. The receipt of the contract notes and E-log etc., was also not in dispute. It was also understood that there was no counter claim. The respondent has also not asked for any specific relief including one for compensation.

11. It is the petitioner, who made the claim. Though the first respondent has stated that she met the office of the petitioner on 30.01.2008, it was accordingly denied. There was no counter claim at all. The first respondent also do not claim for any compensation as fairly submitted by the learned counsel appearing on her behalf. The E-mail dated 13.03.2008 speaks about only one cheque. It also speaks about the subsequent cheques issued. The subsequent cheque was also credited. The E-mail was given only on 30.08.2008. The contract notes are between 04.01.2008 and 18.01.2008.

12. Rejecting the claim of the petitioner is one thing and awarding a counter claim is another. Even assuming there exists a counter claim, though it is nobody's case, it is for the respondent to substantiate it. After having given findings in favour of the petitioner, the learned Arbitrator proceeded to give an award contrary to the basic principle of law. The statement of account given only by the first respondent coupled with the

transaction having been made the award ought not to have been passed merely based upon surmise and inference.

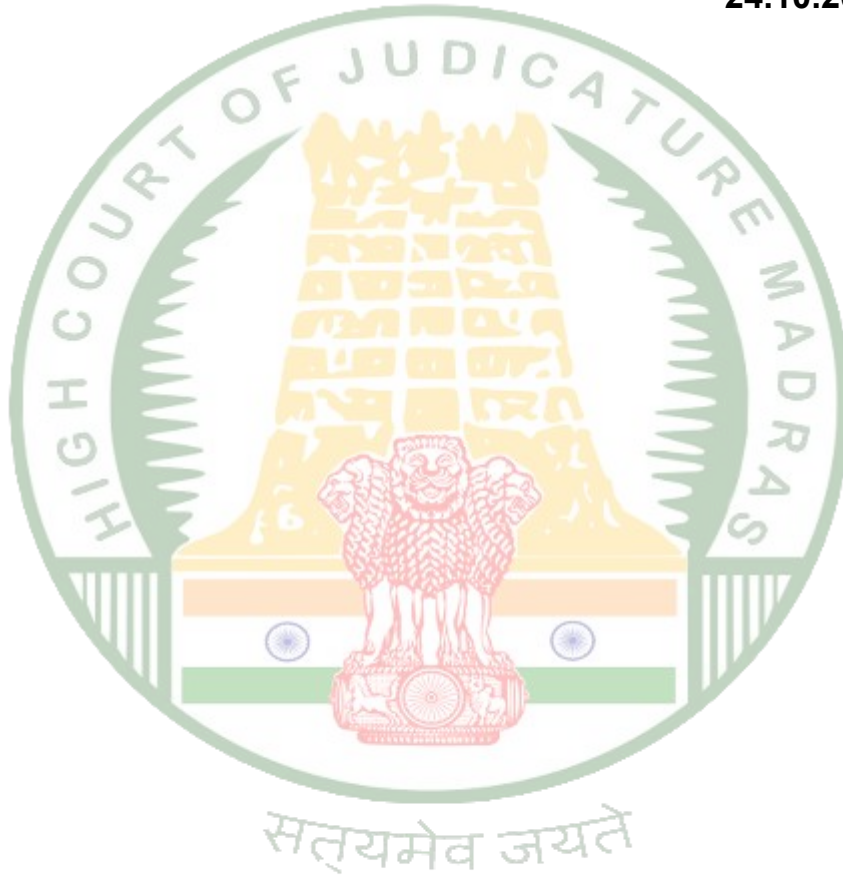
13. The learned Arbitrator in the considered view of this Court was prejudiced towards the petitioner. Therefore, he took into consideration of the earlier complaint, which was only available in his personal knowledge. There is no finding that it was not the trade practice to make a debit/credit based upon an assurance of a payment through the cheque though not physically given. There is plausible explanation for the payment made subsequently. The E-mail was sent only on 13.08.2008. There is no specific finding with respect to the other two cheques. A finding was also given by the learned Arbitrator on the contract note register with a specific reference to seven trades, which include trades of higher value. This was not disputed by the first respondent. In fact, there is no serious challenge to the contract note and the E-log. Though one cheque was not presented but debited, the same logic was adopted for other two cheques without any basis.

14. Thus from the above, this Court is of the view that it is a case where the learned Arbitrator has exceeded his jurisdiction in granting award in favour of the first respondent, though not asked for, based upon irrelevant materials. Thus, this case would certainly come under the

purview of Section 34 of the Arbitration and Conciliation Act, 1996. Accordingly, the original petition stands allowed and the award passed by the Arbitrator stands set aside. No costs.

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