

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment 06.07.2017	Date of Pronouncing Judgment 16. 11.2017
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CORAM

THE HONOURABLE JUSTICE DR.ANITA SUMANTH

O.P.No.512 of 2009

Mr.A.R.Kumarasamy

... Petitioner

-VS-

1. Kotak Securities Ltd
Nirlon house, 5th floor,
Dr.Annie Besant road, Worli
Mumbai - 400 025.
2. M/s.Kash Investment Solutions
15 & 16, rattan bazaar,
Chennai - 600 003.
(Franchise).
3. Sri.S.Subramanian (Presiding Arbitrator)
Arbitrator,
C/o. National Stock Exchange of India Ltd.
II Floor - Ispahani Centre
123-124, Nungambakkam High Road,
Chennai - 600 034.
4. Sri Ramanathan Subramanian
Arbitrator,
C/o. National Stock Exchange of India Ltd.
II Floor - Ispahani Centre
123-124, Nungambakkam High Road,
Chennai - 600 034.
5. Sri.V.Natarajan,
Arbitrator,
C/o. National Stock Exchange of India Ltd.
II Floor - Ispahani Centre
123-124, Nungambakkam High Road,
Chennai - 600 034.

... Respondents

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the award made by the 2nd respondent in his proceedings AM.No. F&O/C-0082/2008 dated 20.03.2009.

For Petitioner : Mr.A.S.Kailasam
for M/s.A.S.Kailasam & Associates

For Respondents : Mr.V.V.Sivakumar - R1

ORDER

The petitioner herein was the 1st respondent and the 1st respondent herein, the claimant, in proceedings for Arbitration conducted by the Tribunal comprising respondents 3, 4 and 5. The present Original Petition is filed challenging an award passed by the Tribunal dated 20.03.2009.

2. Detailed submissions of Mr.A.S.Kailasam, learned counsel for the petitioner and Mr.V.V.Sivakumar, learned counsel appearing for the first respondent have been heard.

3.The first respondent (in short 'Kotak') is a trading member of the National Stock Exchange of India, of which, the petitioner is a constituent having been introduced by the 2nd respondent. A Trading and Demat account was opened by the petitioner with Kotak, and a Member-Client agreement entered into inter se dated 10.2.2007 (in short 'Agreement'). The transaction is governed by the Rules and Regulations of the National Stock Exchange of India.

4. In the course of the transaction between the parties, disputes arose between the parties on account of certain transactions undertaken by Kotak on behalf of the petitioner, that were according to the petitioner, not authorized by it. The arbitration clause was invoked and the matter referred to Arbitration before a sole Arbitrator. A claim of an amount of Rs.9,08,401/- was raised by Kotak upon the petitioner. The 2nd respondent, the sub-broker, was not made a party to the claim. The claim was contested by the petitioner who impleaded the 2nd respondent and raised a counter claim jointly and severally as against Kotak and the 2nd respondent for a sum of Rs.56,25,809/-. The matter thus stood referred to the Arbitral Tribunal. After hearing the parties, the Tribunal passed an award adverse to the petitioner and directing him to pay to Kotak a sum of Rs.9,08,401.10 with interest at the rate of 12% from date of award till date of realization. The 2nd respondent stood discharged. In passing the award, the Tribunal, after hearing the parties, took note of the entire conspectus of facts as well as the evidences filed.

5. The main argument of the petitioner both before the Arbitral Tribunal as well as in this petition is that Kotak, in collusion with the 2nd respondent, undertook the activity of trading in futures and options without the knowledge and express consent of the petitioner. As a result, the petitioner would allege that funds were being diverted by Kotak to trading activities contrary to the agreement entered into and misusing the power of attorney given by him. He would allege that he came to know of the same only in July 2007. He would also point out that he was not kept in the know as far as these transactions were

concerned and received no intimation in this regard. The aforesaid transactions resulted in a debit in his account that the petitioner attributed solely to mismanagement by Kotak and the second respondent.

6.Mr.Sivakumar, referring to agreement dated 10.02.2007, would point out that the transactions had been carried out strictly in accordance therewith. There had been sufficient disclosure of risk at the outset by Kotak. The member-client agreement is a comprehensive agreement that sets out all terms and conditions for the conduct of the transactions on behalf of the constituent. Annexure 4 of the agreement, makes a comprehensive disclosure extracted below:

'You must know and appreciate the investment in Equity shares, derivative or other instruments traded on the Stock Exchange(s), which have varying element of risk, is generally not an appropriate avenue for someone of limited resources/limited investment and/or trading experience and low risk tolerance. You should therefore carefully consider whether such trading is suitable for you in the light of your financial condition. In case you trade on NSE/BSE and suffer adverse consequences or loss, you shall be solely responsible for the same and NSE/BSE, its clearing corporation/clearing house and/or SEBI shall not be responsible, in any manner whatsoever, for the same and it will not be open for you to take a plea that no adequate disclosure regarding the risks involved was made or that you were not explained the full risk involved by the concerned member. The constituent shall be solely responsible for the consequences and no contract can be rescinded on that account. You must acknowledge and accept that there can be no guarantee of profits or no exception from losses while executing orders for purchase and/or sale of a security or derivative being traded on NSE/BSE'.

7. The above clause specifically draws attention to investment, not only in equity, but also in derivative and other instruments traded on stock exchanges,

all at varying levels of risk. Thus the averment of the petitioner to the effect that he was unaware that his funds were being utilized for trading activities appears misplaced and contrary to the terms of the agreement. This has been taken into account by the Arbitrator who comes to the conclusion that the activity of trading in futures and options as well as the decisions taken by Kotak were in accordance with the agreed terms between the parties.

8. Yet another argument of the petitioner was that the activities undertaken by the respondents had resulted in substantial trading exposure that ought to have been managed and limited judiciously by the respondents. The exposure limits have been set out in clause 3 of the agreement and the Agreement records the consent of the petitioner herein to abide by the limits set in this regard by the respondent/Exchange Clearing Corporation/SEBI from time to time. The arguments on this score thus are also devoid of any merit.

9. I have perused the award in the light of the facts as presented by both learned counsel. The Tribunal has considered all averments raised in detail. The Tribunal notes that an e-mail address had been created by the respondents for the petitioner, XH489@kotaksec.com, with his knowledge and consent. It is also a fact noted by the Arbitral Tribunal that details of the contracts were being forwarded via the aforesaid e-mail id to the petitioner. SMS alerts had also been sent to the registered mobile number that had been furnished by the petitioner being 9442969243.

10. With regard to the exposure to the derivatives market and the positions taken by Kotak on behalf of the petitioner, the contention before the Tribunal as before me was that the petitioner had specifically instructed the respondent on 21.01.2008 to square off all open positions, but that Kotak had failed to carry out the instructions. The Tribunal returns as a factual finding that there is absolutely no evidence for the instructions stated to have been given on 21.01.2008. The Tribunal notes the submission of Kotak to the effect that 21.01.2008 and 22.01.2008 were black days in trading where several members were closing out the positions of all their clients and any instruction, if received from the petitioner would have been complied with immediately.

11. The various issues raised in the Original Petitions are matters of fact that have been taken into consideration by the Arbitral Tribunal in arriving at a conclusion thereupon. The scope of a challenge under section 34 is narrow and has to come within the ambit of the grounds set out under section 34(2) of the Act. In *Navodaya Mass Entertainment Ltd. Vs. J.M. Combines*, (MANU/SC/0735/2014) a Division Bench of the Supreme Court reiterates the aforesaid settled position of law at Paragraph 6, extracted below:

'6. In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. (See: Bharat Coking Coal Ltd. v. L.K. Ahuja MANU/SC/0335/2004 : (2004) 5 SCC 109; Ravindra and Associates v. Union of India MANU/SC/1761/2009 : (2010) 1 SCC

80; *Madnani Construction Corporation Private Limited v. Union of India and Ors.* MANU/SC/1869/2009 : (2010) 1 SCC 549; *Associated Construction v. Pawanhans Helicopters Limited* MANU/SC/7630/2008:(2008) 16 SCC 128; and *Satna Stone and Lime Co. Ltd. v. Union of India and Anr.* MANU/SC/7640/2008: (2008) 14 SCC 785.)'

12. A Division Bench of this Court, in the case of *Rajiv Gandhi National Institute of Youth Development Vs. Saravana Constructions Pvt. Ltd.*, (MANU/TN/2573/2014 - O.S.A.No.45 of 2009 dated 19.11.2014) holds in para 14 as follows:

' 14. The scope of an application under Section 34 of the Arbitration and Conciliation Act is very limited. The Court exercising jurisdiction under Section 34 of the Act is not an Appellate Court. The decision taken by the Arbitrator should be given finality. The Arbitrator is expected to interpret the provisions of the contract taking into account the laws of the land. When the Arbitrator gives a finding by interpreting the contractual terms, the same is binding on the parties unless it is shown that the Tribunal exceeded its brief and committed patent illegality. In short, there should be a patent illegality arising from statutory provisions or contractual provisions to set aside the award. It is true that the Court is empowered to set aside the award in case the award shocks the conscience of the Court. However, there is no question of re-appreciating the materials relied on by the Arbitrator for the purpose of taking a different decision on merits. '

13. The principles to be noted by the Court in entertaining a challenge under section 34 of the Act have summarised by this Court in *Pearlite Liners Pvt Ltd vs The Controller of Stores and Shir Pradeep Ambare, Chief Materials Manager-Mech* (MANU/TN/0163/2014) at para 21, extracted below:

'21. The scope for interference with an arbitral award, under section 34 was summarised by me in a decision rendered recently, The principles laid down therein are :

(i) that this Court cannot re-appreciate evidence [see *Ravindra Kumar Gupta vs. Union of India* {MANU/SC/1857/2009 : AIR 2010 SC 972}];

(ii) that reasonableness of the reasons given by the Arbitrators cannot be challenged and there is no power for reappraisal of evidence [see *Sudarsan Trading Co. vs. The Government of Kerala* {MANU/SC/0361/1989 : AIR 1989 SC 890}];

(iii) that once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the Arbitrator and the Court cannot substitute its decision thereupon [see *Sudarsan Trading Co. vs. The Government of Kerala* {MANU/SC/0361/1989 : AIR 1989 SC 890}];

(iv) that the power of this Court under Section 34 is not the same as that of an Appellate Court [see *Lal Builder vs. Union of India* {MANU/DE/4498/2009}];

(v) that the Arbitrator is the sole Judge of quality and quantity of evidence adduced and the approach of the Court should be to support it rather than destroy it [see *Tamil Nadu Civil Supplies Corporation Ltd. Vs. G.S.N.Exporters* {MANU/TN/0202/2008 : 2008(1) TLNJ 603}]; (vi) that the Arbitrator is the sole Judge of the facts as well as law and had the right to interpret the contract and that the Court cannot substitute its own opinion for that of the Arbitral Tribunal with regard to quality, quantity and appreciation of evidence, import of documents and interpretation of contract [see *Samho Gunyoung Co. Ltd. Vs. Flakt (India) Ltd.* {MANU/DE/1062/2009}];

(vii) that the interpretation of a contract may fall within the realm of the Arbitrator and the Court will not interfere unless the reasons adduced by the Arbitrator are found to be perverse or based on wrong proposition of law [see *G. Ramachandra Reddy vs. Union of India* {MANU/SC/0998/2009 : 2009(6) SCC 414}]'

14. In the present case, no grounds have been made out to warrant interference in the impugned award. The arguments raised have been considered by the Arbitrator and the petitioner would urge re-appreciation of the facts and evidences that have been placed before the Arbitrator and taken into consideration by him. This is impermissible in the context of the narrow scope for interference under section 34 of the Act. The arguments relating to the scope and terms of engagement inter se the parties as well as the various submissions of the petitioner have been taken into account by the Arbitrator who has arrived at a possible view in conclusion.

15. In the context of the above discussion as well as the case law referred to, this Original Petition fails and is dismissed. No Costs.

16.11.2017

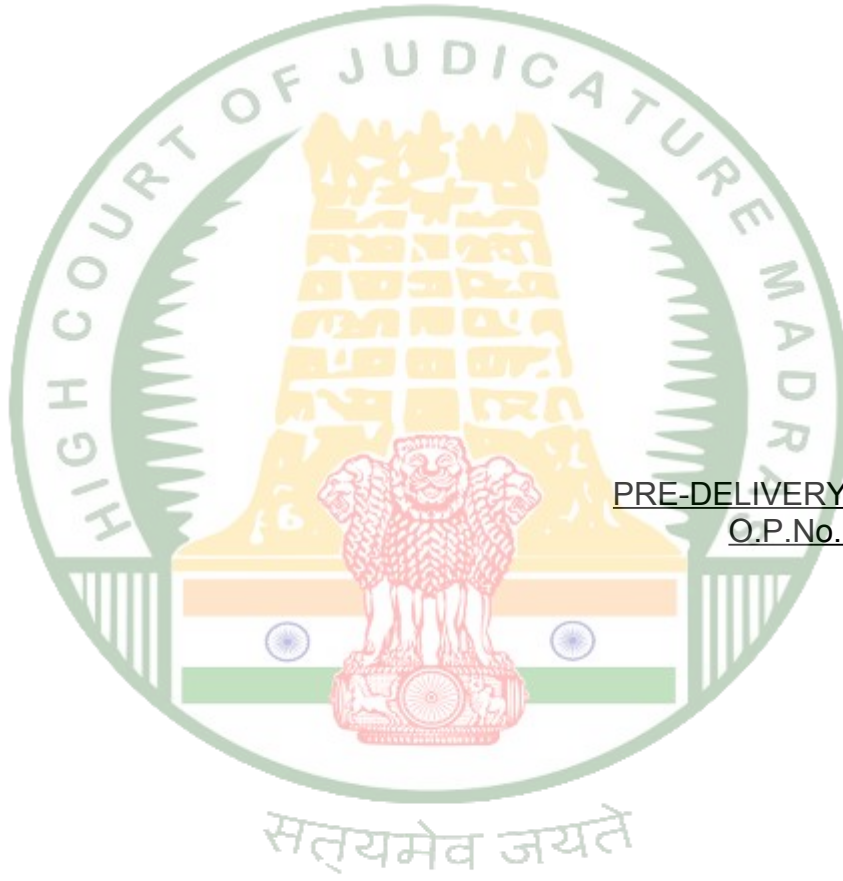
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Dr.ANITA SUMANTH,J.

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PRE-DELIVERY ORDER IN
O.P.No.512 of 2009

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