

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

+ **FAO Nos. 435/2016 and 492/2016**

% **Reserved on: 4th May, 2017**
Pronounced on: 9th May, 2017

+ **FAO No. 435/2016**

ANGEL BROKING LTD. Appellant
Through: Mr. Devmani Bansal and Ms.
Jagriti Ahuja, Advocates.

versus

SHARDA KAPUR Respondent
Through: Mr. M.C. Dhingra and Ms. Priya
Puri, Advocates.

+ **FAO No. 492/2016**

SHARDA KAPUR Appellant
Through: Mr. M.C. Dhingra and Ms. Priya
Puri, Advocates.

versus

ANGEL BROKING LTD. Respondent
Through: Mr. Devmani Bansal and Ms.
Jagriti Ahuja, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. (i) These are two appeals filed against the same judgment of the court below dated 6.5.2016.

(ii) FAO No. 435/2016 is filed by M/s Angel Broking Ltd., respondent in the proceedings under Section 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as 'the Act') in the court below, and which was also the respondent in the arbitration proceedings. This FAO No. 435/2016 is filed impugning the judgment dated 6.5.2016 of the court below which while dismissing the objections filed by Ms. Sharda Kapur under Section 34 of the Act, (the respondent in FAO No.435/2016) seeking relief of the return of the shares, however granted interest at the rate of 18% per annum with annual rest w.e.f 31.8.2012 till realization on the principal amount of Rs.21,70,143/- and which relief was not granted by the Arbitration Award. The court below has also awarded compensation of Rs.5 lacs to the respondent Ms. Sharda Kapur, and which relief is also a relief which was not granted by the Award.

(iii) FAO No.492/2016 is filed by Ms. Sharda Kapur, the objector in the court below under Section 34 of the Act. Objections under Section 34 of the Act were filed pleading that the Arbitration Award should not have granted the monetary amount but instead the Arbitration Tribunal by the Award should have directed return of the shares which were illegally traded and sold by the broking firm M/s Angel Broking Ltd.

2. The crux of the disputes between the parties was the allegation of Ms. Sharda Kapur that her broking firm M/s Angel

Broking Ltd. did various trades in future and option segment in the market without her consent and knowledge, and therefore, M/s Angel Broking Ltd. was bound to return the shares which were illegally traded in the future and option segment of the market.

3. The facts of the case are very aptly stated by the court below in paras 3 to 11 of the impugned judgment, and therefore, instead of my own language I would reproduce these paras 3 to 11, and which paras read as under:-

“3. The case of the Objector/Claimant as per claim petition dated 04.09.2012 is that she is widow aged 76 years. She entered into a Member-Client Agreement with M/s Angel Broking Ltd. in the year 2004-2005. She used to undertake both long term and short term investments in the stock market and used to place orders telephonically. As on 01.04.2011 she had a credit of about Rs.3.34 lacs in BSE Account and a debit of Rs.3.98 lacs in NSE Account maintained by her with M/s. Angel Broking Ltd. As per her case even though she was suggested by Branch Manager of the respondent to trade in Future & Options but she declined the same on the plea that she cannot take risk or afford losses on account of risks involved therein at her current age and position.

4. Still sometimes in August 2011 she was apprised by the same Manager Shri Rakesh Sharma that there is debit balance of around Rs.6 lacs and that she needs to deposit some payment. She apprised Mr. Sharma that after setting off her credit balance in the BSE account her maximum debit should be around Rs.2.6 lacs against which she paid sum of Rs.1.5 lacs by cheque. But still within a month thereof she was told that her debit balance has now become Rs.11 lacs instead of the same reduced to Rs.1.1 lac. She took up the issue with the Regional Office of M/s Angel Broking Ltd. at Moti Nagar and was told that there were transactions in the F&O Segment in which a loss of around Rs.10 lacs was booked.

5. Despite all her complaints and objections, her debit balance rose to almost Rs.20 lacs on 31.10.2011 apparently, as Shri Rakesh Sharma was trading in her F&O Account without any intimation or knowledge. This debit balance peaked to Rs.27.16 lacs on 29.08.2012 on account of these unauthorized transactions.

6. On 18.06.2012 and 07.08.2012 Ms. Sharda made a complaint to M/s. Angel's Head office and SEBI respectively. M/s. Angel denied that they are at fault and the closed her complaint.

7. On 29.08.2012 she received a call followed by an e-mail from M/s Angel Broking that there is a debit balance of Rs.27,16,066/-. Thereafter, M/s Angel Broking sold off her shares lying with them to the tune of around Rs.27,16,066/- Out of this, Ms. Sharda could identify and relate to transactions only worth Rs.5.70 lacs and as such there was a wrongful and unauthorized booking of loss of Rs.21.70 lacs in her account out of which Rs.20.79 lacs was only in the F&O Segment. It is in this backdrop that the claim petition was preferred before NSE Arbitration Panel praying therein that her stock holdings as on 30.08.2012 (typed as 30.06.2012), which was sold by M/s. Angel Broking for Rs.21,70,143/- be restored back while showing a debit balance of only Rs.5,70,981/- in her account, which she is willing to pay.

Respondent's/Broker Case-

8. M/s Angel Broking Ltd. had in their reply accepted that Ms. Sharda was their client since 24.03.2005 and had been trading with them and that there was no dispute between them for good five years upto 2010. According to them, Ms. Sharda had been trading even under the F&O segment with them right from May 2010 onwards. These transactions which are sought to be derived by Ms. Sharda were pleaded to be within her knowledge and information. It is their case that she never objected to any of the transactions. M/s. Angel denied that they ever accepted that their Manager Shri Rakesh Sharma was doing unauthorized trading in her account in the F&O Segment. According to them all the transactions were conducted in her alone both in her share accounts as well as F&O and were carried out as per her instructions and as such they are entitled to recovery of Rs.27.16 lacs.

First Arbitral Order-

9. Upon hearing both the sides, Ld. Arbitral Tribunal rejected this claim petition vide a detailed award dated 22.02.2013.

Appellate Arbitral Order:-

10. Aggrieved by this Award Ms. Sharda preferred an Appeal before NSE Appellate Arbitration Tribunal. This appeal was allowed by the Tribunal vide Award dated 27.09.2013 whereby it ordered that M/s Angel Broking shall give credit of Rs.21,70,143/- to Ms. Sharda.

Modification of Appellate Arbitral Order-

11. Thereupon, Ms. Sharda moved an application U/s 33 of Arbitration and Conciliation Act seeking modification of the relief granted to the effect that her stock holding as on 30.08.2012 be restored back apart from seeking interest @ 24% per annum. However, this plea was not accepted by the Appellate Tribunal and it was declined vide order dated 13.01.2014.”

4. It is therefore seen that Ms. Sharda Kapur was successful in getting a money decree by the Award of the Arbitration Tribunal, but she was not satisfied with the same inasmuch as the Arbitration Tribunal had denied the relief of return of her shares as also interest. Ms. Sharda Kapur had applied for modification of the Award under Section 33 of the Act claiming interest on monetary relief allowed by the Award but this application was dismissed. Ms. Sharda Kapur hence filed objections under Section 34 of the Act in which she challenged the denial of the relief of return of the shares as was asked for by her in her claim petition in the arbitration proceedings and she also alternatively claimed in the Section 34 petition, interest and compensation which were denied to her by the Arbitration Award.

5. The interest claim and compensation has been awarded by the court below in favour of Ms. Sharda Kapur by observing as under:-

“16. Be that as it may, one fact which has come on record quite crystal clear is that the Stock Broker was found at fault of not only doing unauthorised trading in the account of its client but unauthorisedly sold the client's portfolio. I have no hesitation in concluding that the impugned award passed by Ld. Appellate Tribunal dated 27.09.2013 and the additional order of 13.01.2014 did not do complete justice to the Objector herein. This ratio can be simply drawn from the fact that Ms. Sharda is expected to feel satisfied by receiving the value of the shares which the broker got four years ago without taking into account the loss suffered by her during this period. Also no compensation was provided to her for not being able to enjoy her any interest for four years and rather at her age of 74 years she was constrained to do litigation. Also no adverse consequence ever reached the respondent Broker despite being guilty.

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22. As such, the Appellate Award dated 27.09.2013 stands modified to the effect that respondent Broker shall pay Rs.21,70,143 alongwith interest @ 18% per annum with annual rest w.e.f 31.08.2012 till actual realisation.

23. Also on account of illegal deed of M/s Angel Broking Company of carrying out unauthorised tradings into their client's act and booking losses more than Rs.21 lacs therein moreso when she is a widow as well as senior citizen aged 76 years, respondent Broker deserves to compensate their client for all this. As such on account of compensation as well as litigation cost, M/s Angel Broking Company directed to pay a compensation of Rs.5 lacs to their client Ms. Sharda apart from the above. On account of illegal different deeds of the stock broking company of trading in the account of unauthorisedly of their client who is widow and aged around 76 the respondent stock broker is further burdened to pay Objector a compensation of Rs.5 lacs. Section 34 petition stands disposed of."

6. The sole issue in this case is that whether the court below or this Court has a power under Section 34 of the Act to modify the Award and grant additional reliefs not granted by the Award or grant the alternative reliefs which were prayed for in the arbitration proceedings but were denied by the Award.

7. In my opinion, the issue is no longer *res integra* and this issue has been decided by a judgment of this Court in the case of ***Puri Construction P. Ltd. and Ors. Vs. Larsen And Toubro Ltd. and Anr., 2015 SCC OnLine Del 9126***. The Division Bench of this Court has considered the two divergent views as regards the power of the court to modify the Award by granting reliefs which are not granted by the Award, and this Court held that courts do not have the power to modify the Award and grant additional or alternative reliefs which were not granted by the Arbitration Tribunal. It was held that civil courts

hearing objections under Section 34 of the Act have only power to set aside the Award and thereafter parties are free to again invoke arbitration proceedings to seek the reliefs which have been denied to them. The relevant observations of the Division Bench of this Court in the case of ***Puri Construction P. Ltd. (supra)*** are contained in paras 117 and 118 of its judgment and which paras read as under:-

"117. The Allahabad High Court in *Managing Director v. Asha Talwar*, 2009(5) ALJ 397 held that the Court under Section 34 does not have the power to grant the original relief prayed for before the arbitrator. This was relied upon by a learned Single Judge of this Court in *Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd.*, 188 (2012) DLT 172 to hold that the Court cannot correct the arbitrator's errors or remand the matter to the arbitrator. It was held that:

*"51. The view of the Allahabad High Court in *Managing Director v. Asha Talwar* appears to be consistent with the scheme of the Act, and in particular Section 34 thereof which is a departure from the scheme of Section 16 of the 1940 Act which perhaps gave the Court a wider amplitude of powers. Under Section 34(2) of the Act, the Court is empowered to set aside an arbitral award on the grounds specified therein. The remand to the Arbitrator under Section 34(4) is to a limited extent of requiring the Arbitral Tribunal "to eliminate the grounds for setting aside the arbitral award". There is no specific power granted to the Court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognized as falling within the ambit of Section 34(4) of the Act, then the Court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act. Accordingly, this Court declines to itself decide the claims of CNPL that have been wrongly rejected by the learned Arbitrator."*

This view was subsequently adopted by this Court in *Bharti Cellular Limited v. Department of Telecommunications*, 2012(4) ARB LR 473(Delhi), *State Trading Corporation of India Ltd. v. Toepfer International Asia PTE Ltd.*, 2014(3) ARB LR 105, and *Delhi Development Authority v. Bhardwaj Brothers* AIR 2014 Delhi 147. A Division Bench of the Madras High Court in *Central Warehousing Corporation v. A.S.A. Transport*, (2008)3 MLJ 382 also held that once an award has been set aside, consequential reliefs cannot be granted under Section 34. The Court noted:

"17. Though we are not in a position to concur with the reasoning of the learned Single Judge, we are in complete agreement with the ultimate

order of the learned Single Judge in setting aside the award. However, the further direction given by the learned Single Judge directing the appellant to appoint an arbitrator at Chennai and for conducting the arbitration are to be set aside as it cannot be given as an order of the Court. Useful reference can be had to the judgment of the Supreme Court in the case of McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181, wherein it was held that the 1996 Act makes provisions for supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. Hence, in an application taken out under Section 34 of the Act, the Court can set aside the award leaving the parties free to begin the arbitration again if it is desired."

118. This Court is inclined to follow the decisions in Central Warehousing Corporation, Delhi Development Authority, State Trading Corporation of India Ltd., Bharti Cellular Limited, Cybernetics Network Pvt. Ltd. and Asha Talwar. The guiding principle on this issue was laid down by the Supreme Court in McDermott International Inc. (supra), where the Court held:

"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

Although the Madras High Court in *Gayatri Balaswamy* (supra) appropriately noted that these observations in *McDermott International Inc.* were not in the context of the specific issue being dealt herewith, this Court is of the opinion that it is determinative of the Court's approach in an enquiry under Section 34 of the Act. Indeed, a Court, while modifying or varying the award would be doing nothing else but "*correct[ing] the errors of the arbitrators*". This is expressly against the dictat of *McDermott International Inc.* Further, if the power to remit the matter to the arbitrator is read into Section 34, it would render inexplicable the deliberate omission by Parliament of a provision analogous to Section 16 of the Arbitration Act, 1940 in the present Act. Section 16 of the 1940 Act specifically armed courts with the power to remit the matter to arbitration. Noticeably, the scope of remission under the present Act is confined to that prescribed in sub-section (4) of Section 34. Besides the Division Bench rulings of this Court in *Delhi Development Authority, State Trading Corporation of India Ltd.*, this was also noted by a Full Bench of the Bombay High Court in *R.S.*

Jiwani v. Ircon International Ltd., 2010 (1) Bom CR 529, where the Court held:

"An award can only be set aside under the provisions of Section 34 as there is no other provision except Section 33 which permits the arbitral tribunal to correct or interpret the award or pass additional award, that too, on limited grounds stated in Section 33... It is also true that there are no parimateria provisions like Sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of Section 34 read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award."

On the other hand, the Calcutta High Court in *Snehasis Bhowmick* did not analyse this distinction, or the specific observations of the Supreme Court in *McDermott International Inc.* quoted above. Further, the decisions in *Numaligarh Refinery and Harishchandra Reddy* (supra) did not discuss the Court's power to modify, vary or remit the award under Section 34 of the Act. Therefore, in light of the dictum in *McDermott International Inc.* and the difference in provisions of the 1940 Act and the present Act, this Court holds that the power to modify, vary or remit the award does not exist under Section 34 of the Act. (underlining added)

8. It is therefore clear that the court below while passing the impugned judgment could not have granted interest and compensation which was granted inasmuch as this would result on the court modifying the Award by granting reliefs which were not granted by the Award. In view of the ratio in the case of ***Puri Construction P. Ltd.(supra)*** the Award could only be set aside and the parties thereafter had to invoke arbitration proceedings for seeking reliefs which were denied but held by the court hearing objections under Section 34 of the Act to be wrongly denied. Therefore, I hold that the court below has wrongly granted interest and compensation to Ms. Sharda Kapur by the impugned judgment and also that this Court cannot grant the relief in

FAO No. 492/2016 that the Award of the Arbitration Tribunal be modified in that instead of granting monetary relief Ms. Sharda Kapur should be held entitled to return of her share holdings illegally traded by M/s. Angel Broking Limited.

9. Learned counsel for Ms. Sharda Kapur relied upon paras 49 and 50 of the judgment of the Division Bench of this Court in the case of *M/s. Chennai-Ennore Port Road Co. Ltd. vs. M/s. RDS Project Ltd., FAO (OS) No. 426/2015* decided on 15.3.2016 and it was accordingly argued on the basis of those paras 49 and 50 that the court hearing objections under Section 34 of the Act has power to grant additional reliefs which are not granted by the Award. For the sake of convenience paras 49 and 50 of the judgment in the case of *M/s. Chennai-Ennore Port Road Co. Ltd.(supra)* are reproduced below:-

“49. The only argument advanced on this issue is that under Section 34 of the Arbitration and Conciliation Act, 1996, unlike the Arbitration Act, 1940 there is no power vested in a Court to modify an award and thus any error in an award must result in the award being set aside as a whole, leaving it to the parties to work their way forward.

50. Now, if an error in an award is of a kind which needs modification by giving reasoning which is akin to a core reasoning the argument advanced may be considered. But where the error is akin to one of computation, the correction would not be a modification strictly so called. To correct means to make something free from an error. To modify means to make partial changes to.”

10. In my opinion, the aforesaid paras cannot be read as setting aside the ratio of the earlier Division Bench judgment dated

30.4.2015 in the case of *Puri Construction P. Ltd. (supra)*. Also in paras 49 and 50 reproduced above of the judgment of *M/s. Chennai-Ennore Port Road Co. Ltd. (supra)* there was only a correction of a computational error i.e the court did not give additional reliefs which were not granted by the Arbitration Tribunal. Therefore, the judgment in the case of *M/s. Chennai-Ennore Port Road Co. Ltd. (supra)* does not help Ms. Sharda Kapur to successfully contend that courts under Section 34 of the Act while setting aside the Award can grant the reliefs which were prayed for in the arbitration proceedings but not granted by the Arbitration Tribunal.

11. Learned counsel for Ms. Sharda Kapur then in support of his argument sought to place reliance upon certain observations made by a Division Bench of this Court in para 8 of the judgment dated 1.10.2015 in *FAO (OS) No. 448/2014 titled as National Highways Authority of India Vs. M/s. Sricon Infrastructure Pvt. Ltd.*, but I do not find anything in para 8 of this judgment by which it has been in any manner held by the Division Bench of this Court that the Award of the Arbitration Tribunal can be modified by granting the relief which is not granted by the Arbitration Tribunal. In para 8 of the judgment in the case of *National Highways Authority of India (supra)* the court has only granted the claim as prayed for in the arbitration at Rs. 4100/- per

cu.metre instead of a sum awarded of Rs. 4900/- per cu.metre by the Award. Accordingly, the judgment in the case of *National Highways Authority of India (supra)* does not help Ms. Sharda Kapur to contend that a court hearing objections under Section 34 of the Act can grant reliefs which were not granted by the Arbitration Tribunal when the Award is set aside by the court hearing objections under Sections 34 of the Act.

12. In view of the above discussion, FAO No. 435/2016 is allowed and the reliefs granted by the impugned judgment of interest and compensation as per paras 22 and 23 are set aside and quashed. FAO No. 492/2016 of Ms. Sharda Kapur will stand dismissed as neither the court below nor this Court can grant the relief of return of the shares as is being prayed by Ms. Sharda Kapur and which relief though prayed for in the arbitration proceedings was denied and Ms. Sharda Kapur was only granted a money decree Award.

13. Appeals are disposed of accordingly, leaving the parties to bear their own costs.

MAY 9, 2017
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VALMIKI J. MEHTA, J