

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 25.06.2018

DELIVERED ON: 03.07.2018

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

OP No.643 of 2011

M/s.Aditya Birla Money Limited
(formerly known as M/s.Apollo Sindhoori
Capital Investments Limited)
Ali Towers,
55 Greams Road,
Chennai – 600 005.

...Petitioner

vs.

1.Mrs.V.Kalyani
2.Mr.Justice S.Jagadeesan,
Presiding Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Isphanai Centre,
Door No.123 – 124,
Nungambakkam High Road,
Chennai - 600 034.

3.Mr.Sridharan Krishnamurthy,
Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Isphanai Centre,
Door No.123 – 124,
Nungambakkam High Road,
Chennai - 600 034.

4.Mrs.P.S.Prema
Arbitrator,
National Stock Exchange of India Limited,
2nd Floor, Isphanai Centre,
Door No.123 – 124,
Nungambakkam High Road,
Chennai - 600 034.

...Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 06.11.2010.

For Petitioner : Mr.Krishna Srinivasan
for M/s.S.Ramasubramanian & Associates

For Respondent : Mr.Ramakrishnan Viraraghavan, SC
for Mr.G.Sivashankaran R1
R2 to R4 - Arbitrator

ORDER

The instant petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, challenging the Award dated 06.11.2010, passed by the Arbitral Tribunal dismissing the claim of the petitioner for a sum of Rs.85,78,494.34 made against the first respondent.

2.The petitioner is a registered stock broker with SEBI and also a member of National Stock Exchange India Limited and Bombay Stock Exchange Limited in both equity and derivative segments.

3.The first respondent got herself enrolled as a constituent of the petitioner on 02.04.2001 and was allotted the client code No.1245. The first respondent was carrying on trading activities in both equity and derivative segments with National Stock Exchange and Bombay Stock Exchange. The first respondent was carrying the trading activities from 03.04.2001 to 02.06.2009.

4.According to the petitioner, due to an operational error on

27.05.2009, one bill entry (NSE F&O debit bill bearing reference No:200902000466856) for an amount of Rs.42,89,247.17 was misstated in the first respondent's trading account bearing No.1245 on 26.02.2009. As a result of the aforesaid operational error an excess payout of Rs.85,78,494.34 was wrongly credited to the first respondent's Bank of India account bearing No.802410110001944 maintained by the first respondent at Anna Nagar Branch, Chennai on 02.06.2009. This was detected by the petitioner only during the internal control process on 27.11.2009. Subsequently, an investigation was carried out by the petitioner which revealed that the operational error due to the unauthorized software being installed in the petitioner's systems. It was ascertained that due to this unauthorized software which let to the error, the first respondent's bill entry was misstated which resulted in an excess payout of Rs.85,78,494.34 to the first respondent. As a result, the respondent was unjustly enriched.

5. Thereafter, the petitioner had restated the first respondent's trading account bearing No.1245 with the actual accounting entry which states that as on date, an unpaid debit balance of Rs.85,78,494.34 is pending in the first respondent's trading account. The statement of accounts as on 12.03.2009, reflecting the actual transactions have been acknowledged by the first respondent and the account statements as on 31.03.2009 and 30.06.2009 pertaining to

the first respondent's aforesaid trading account were also sent to the first respondent.

6.The petitioner by his letter dated 05.01.2010, requested the first respondent for the aforesaid unpaid debit balance of Rs.85,78,494.34. The first respondent failed to reply to the aforesaid letter dated 05.01.2010, nor did she make the payment of Rs.85,78,494.34. Thereafter, the petitioner issued a legal notice dated 06.04.2010, through their Counsel calling upon the first respondent to pay the unpaid debit balance of Rs.85,78,494.34 together with interest. Subsequently, on 24.05.2010, the first respondent had issued a detailed reply disputing her liability to pay the debit balance of Rs.85,78,494.34 to the petitioner.

7.In view of the dispute, the petitioner referred the dispute to Arbitration in accordance with the Arbitration clause. In accordance with the Arbitration clause, the National Stock Exchange of India Limited by its letter No.NSE/CRO/ARBN/10-116138-X dated 16th August 2010, appointed the second, third and fourth respondents as the Arbitrators to decide the dispute between the petitioner and the first respondent on merits. The Arbitral Tribunal acted upon the reference and commenced the Arbitration after giving notice to the petitioner as well as the first respondent. The claim statement was

filed by the petitioner seeking recovery of a sum of Rs.85,78,494.34 together with interest at the rate of 24% per annum from 2nd June 2009 from the first respondent.

8.A preliminary objection was raised by the first respondent before the Arbitral Tribunal that the claim of the petitioner is not an arbitral dispute since the claim is not a trading dispute but is based on the alleged mistake of entry in the first respondent's trading account maintained by the petitioner. According to the first respondent, the claim arising out of an operational error in the books of accounts on 26th February 2009, is not arising out of the trading account maintained by the first respondent with the National Stock Exchange. Hence, according to the first respondent, the claim is not an arbitral dispute as per the Arbitration clause contained under the agreement.

9.The Arbitral Tribunal after hearing both the parties to the dispute allowed the preliminary objection raised by the first respondent and held that the claim made by the petitioner on account of alleged operational error resulting in wrongful credit entry in favour of the first respondent goes beyond the scope of the Arbitration as it pertains to interference with the trading account of the first respondent.

10.In view of the said finding, the Arbitral Tribunal dismissed

the claim of Rs.85,78,494.34 made by the petitioner against the first respondent. Since the preliminary objection raised by the first respondent was allowed, the Arbitral Tribunal has observed in the impugned Award that other arguments and counter arguments relating to limitation, correctness of accounts, etc. have not been considered in detail as the main claim has been treated as beyond the scope of Arbitration.

11. Aggrieved by the Arbitral Award dated 06.11.2010, the petitioner who was the claimant in the Arbitration has filed the instant petition under Section 34 of the Arbitration and Conciliation Act.

12. From the facts leading to the filing of the instant petition under Section 34 of the Arbitration and Conciliation Act, it is clear that the only issue which will have to be decided by this Court is whether the claim made by the petitioner before the Arbitral Tribunal is an arbitral dispute within the scope of the Arbitration clause contained under the agreement between the parties.

13. Mr. Krishna Srinivasan, learned Counsel for the petitioner drew the attention of this Court to the applicable Arbitration clause which is in accordance with Bye-laws, Rules and Regulations of National Stock Exchange. The Arbitration clause reads as follows:

"(1) All claims, differences or disputes between the Trading

Members inter se and between Trading Members and Constituents arising out of or in relation to dealings, contracts and transactions made subject to the Bye-laws, Rules and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their validity, construction, interpretation, fulfilment or the rights, obligations and liabilities of the parties thereto and including any question of whether such dealings, transactions and contracts have been entered into shall be submitted to arbitration in accordance with the provisions of these Byelaws and Regulations. The Exchange shall be entitled to facilitate arbitration for such disputes and parties as mentioned in the provisions of Byelaw 1, including the arbitration reference filed by Trading Member against the directions or order of the Investor Grievance Redressal Panel (IGRP), by adopting such procedures as may be prescribed by it under this Chapter."

14. According to the learned Counsel for the petitioner, the Arbitral Tribunal has erred in dismissing the claim of the petitioner to be beyond the scope of Arbitration. According to him, the Arbitration clause has made it explicitly clear that all claims, differences or disputes between the trading members and the constituents including any incidental claims can also be referred to Arbitration. The claim made by the petitioner seeking recovery of money from the first respondent on account of an operational error in the trading account is

a claim arising out of the member constituent agreement and therefore, is well within the scope of Arbitration as per the Arbitration clause.

15.The learned Counsel submitted that the operational error in the trading account of the first respondent which happened on 27.05.2009 resulting in a wrong credit entry is incidental to the transaction and hence the claim made by the petitioner before the Arbitral Tribunal is an arbitral dispute.

16.The learned Counsel then drew the attention of this Court to the corrected statement of accounts of the first respondent maintained with the petitioner for the period from 01.02.2009 to 12.03.2009 and submitted that the said statement of accounts has been duly acknowledged and confirmed by the first respondent. Therefore, according to the learned Counsel, the first respondent having confirmed the receipt of the corrected statement of accounts cannot take a contrary stand thereafter disputing the payment due to the petitioner. According to the learned Counsel, in all the statement of accounts sent to the first respondent, the ID of the first respondent namely ID No.1245 and the name of the first respondent is clearly mentioned and therefore, the claim made by the petitioner before the Arbitral Tribunal arises out of the member constituent agreement between the petitioner and the first respondent and therefore, it is an

arbitral dispute.

17. Per contra, Mr. Ramakrishnan Viraraghavan, learned Senior Counsel for the first respondent would submit that the claim arising out of an operational error is not a trading dispute and hence, it is not an arbitral dispute in accordance with the Arbitration clause. According to him, the Arbitration clause only contemplates reference to disputes "relating to trading on National Stock Exchange", whereas the claim of the petitioner does not relate to trading on the National Stock Exchange. The claim plainly and simply relates only to alleged accounting error in the books of accounts of the petitioner. The learned Counsel submits that mere accounting claims will not fall within the scope of the Arbitration clause and therefore, it is not an arbitral dispute. He submitted that the Arbitral Tribunal has rightly concluded that the claim is not an arbitral dispute since it merely pertains to interference with the account of the first respondent with the petitioner.

18. The learned Senior Counsel for the first respondent further, submitted that the corrected statement of accounts dated 25th June 2010 for the period from 01.02.2009 to 24.06.2009, reveals a debit entry of only Rs.42,89,247.17 whereas the claim of the petitioner before the Arbitral Tribunal is for a sum of Rs.85,78,494.34. Therefore, according to the learned Counsel, the claim made by the petitioner before the Arbitral Tribunal is not a trading dispute as it

does not arise out of any contractual obligation under the agreement between the petitioner and the first respondent.

19.The learned Senior Counsel for the first respondent drew the attention of this Court to the following three judgments of the Hon'ble Supreme Court:

(i)(2015) 3 SCC 49 – Associate Builders vs Delhi Development Authority.

(ii)(2015) 5 SCC 739 – Swan Gold Mining Limited vs Hindustan Copper Ltd.

(iii)(2015) 14 SCC 21 – National Highways Authority of India vs ITD Cementation India Limited

20.Relying upon the decision in the case of Associated Builders cited supra, he would submit that only when the finding of the Arbitral Tribunal is based on no evidence or the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at, or ignores vital evidence in arriving at its decision, this Court can interfere with the Award under Section 34 of the Arbitration and Conciliation Act.

21.Relying upon the decision in the case of Swan Gold Mining Limited cited supra, the learned Counsel submits that the Arbitrator's decision is generally considered binding between the parties and

therefore, the power of the Court to set aside the Award would be exercised only in cases where the Court finds that the Arbitral Award on the face of it is erroneous and patently illegal and is controversial to the provisions of the Act and it is also a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator.

22.Relying upon the decision in the case of National Highways Authority of India cited supra, the learned Counsel submits that the Court under Section 34 of the Act cannot interfere when the view taken by the Arbitral Tribunal after considering the material on record and the terms of contract is certainly a possible view.

23.After relying upon the above referred decisions, the learned Counsel submitted that the Award passed by the Arbitrator is a valid Award and there is no patent illegality in the same.

24.As observed earlier, the only point for consideration is whether the claim made by the petitioner is an Arbitral dispute or not. The Arbitration clause has also made it clear that all claims, differences or disputes with reference to anything incidental thereto shall also be referred to Arbitration. The statement of accounts furnished to the

first respondent by the petitioner also discloses the client ID Number of the first respondent. The statement of accounts also discloses the name of the first respondent as well as the alleged wrongful entry of Rs.42,89,247.17.

25.As seen from the Arbitration clause, the ambit of reference is very wide, this Court finds force in the submissions made by the learned Counsel for the petitioner that the finding of the Arbitral Tribunal is not an arbitral dispute as it goes beyond the scope of Arbitration clause is certainly perverse, irrational, illogical and patently illegal.

26.This Court is of the considered view that the Arbitral Tribunal failed to take note of the fact that the claim made by the petitioner arises out only under the agreement between the parties. The dispute whether the entry made by the petitioner in the account of the first respondent is a correct entry or a wrong entry can be decided only by the Arbitral Tribunal which is indeed an incidental claim arising out of the agreement entered into between the parties. The scope and ambit of Arbitration clause is very wide which includes any question relating to validity, construction, interpretation, fulfilment or the rights, obligations and liabilities of the parties and the Arbitration clause also

makes it very clear that any incidental claim can also be decided by the Arbitral Tribunal.

27. This Court is of the considered view that the Arbitral Tribunal has given an erroneous finding by holding the claim of the petitioner goes beyond the scope of Arbitration. The finding of the Arbitrator is certainly perverse and amounts to patent illegality shocking the conscience of this Court. Hence, this Court will have to necessarily interfere with the Award dated 06.11.2010. The decisions relied upon by the learned Counsel for the first respondent supports the case of the petitioner and not the first respondent since the petitioner has been able to establish that the finding of the Arbitrator is perverse and amounts to patent illegality. This Court, therefore, holds that the Award of the Arbitrator is perverse and patently illegal and shocking the conscience of this Court.

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28. Accordingly, the Award dated 06.11.2010, passed by the Arbitral Tribunal comprising of the second, third and fourth respondents as the Arbitrators is set aside and the instant petition is allowed. The petitioner is given liberty to initiate fresh Arbitration against the first respondent as per the Arbitration clause contained in the agreement in accordance with law. However, there shall be no order as to costs.

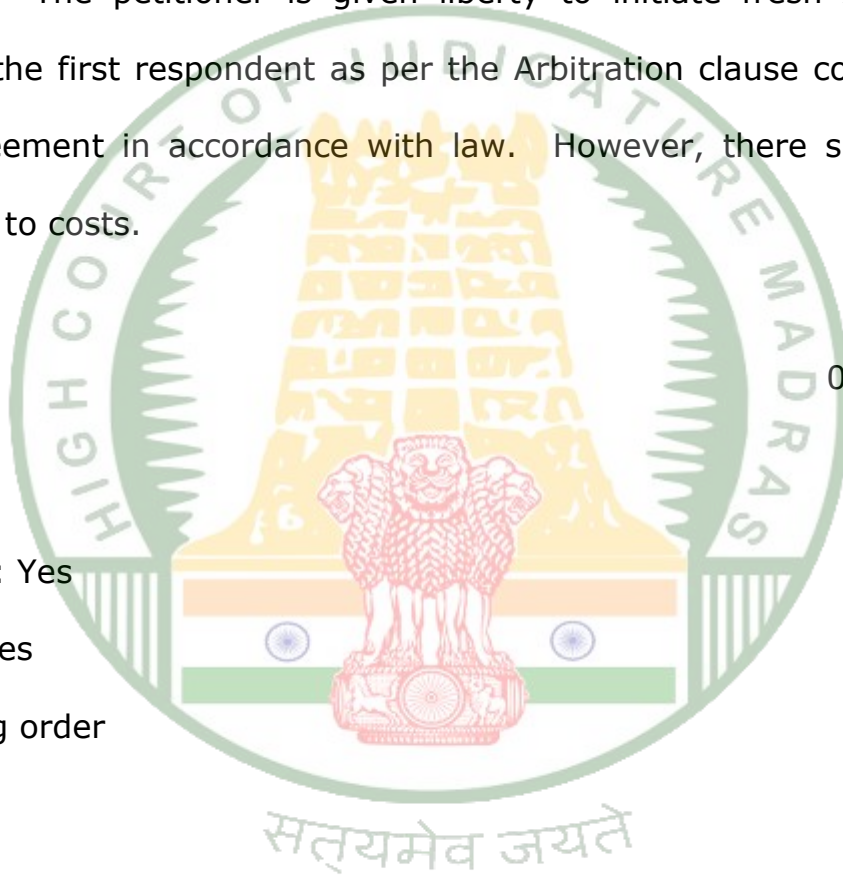
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Internet: Yes

Index: Yes

Speaking order



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