

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.10.2018

DELIVERED ON : 01.11.2018

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MR.JUSTICE N.SESHASAYEE

O.S.A.No.398 of 2018
and CMP.No.17980 of 2018

Mrs.V.Kalyani ... Appellant

Vs.

- 1.Aditya Birla Money Limited,
(Formerly known as Apollo Sindhoori
Capital Investments Limited)
Ali Towers, 55, Greams Road,
Chennai-600 056.
- 2.Mr.Justice S.Jagadeesan,
Presiding Arbitrator,
National Stock Exchange of India Ltd.,
Second Floor, Isphany Centre,
Door No.123-124,
Nungambakkam High Road,
Chennai-600 034.
- 3.Mr.Sridharan Krishnamoorthy,
Arbitrator,
National Stock Exchange of India Ltd.,
Second Floor, Ispahani Centre,
Door No.123-124,
Nungambakkam High Road,
Chennai-600 034.
- 4.Mrs.P.S.Prema
Arbitrator,
National Stock Exchange of India Ltd.,
Second Floor, Ispahani Centre,
Door No.123-124,
Nungambakkam High Road,
Chennai-600 034.

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Respondents

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of
Original Side Rules read with Clause 15 of the Letters Patent

and Section 37 of the Arbitration and Conciliation Act, 1996 against the order of this court dated 03.07.2018 made in O.P.No.643 of 2011, filed under Section 34 of the Arbitration and Conciliation Act 1996 to set aside the award dated 06/11/2010.

For Appellant : Mr.Ramakrishnan Viraraghavan,
Senior Counsel
for Mr.G.Sivashankaran
Mr.S.Sathyaganesh

For Respondents : Mr.S.Shivathanu Mohan for R1
for M/s.Ramasubramaniam & Assc.

JUDGMENT

M.SATHYANARAYANAN, J.

The first respondent in O.P.No.643 of 2011 is the appellant. The appellant, aggrieved by allowing of the said original petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 [in short "Arbitration Act"] and thereby setting aside the Award dated 06.11.2010 in A.M.No.F&O/C-0027/2010 passed by the respondents 2 to 4, had filed this appeal.

2. Relevant facts leading to the filing of this appeal, briefly narrated, are as follows:

2.1. A Member and Constituent Agreement dated 05.07.2001 was executed between Apollo Sindhoori Capital Investments Limited and the appellant herein. The Apollo Sindhoori Capital Investments Limited was termed as "Member" and the appellant herein was termed as "Constituent" in the said agreement. The agreement pertains to investing/trading in contracts admitted for dealing on the Derivatives Market Segment of the National Stock Exchange [in short "NSE"]. It is relevant to extract the following Clauses of the said agreement:

"4. The constituent shall deposit with the member such sums as may be prescribed by the member from time to time as margin in addition to the deposits in the form of monies, securities or other property which may be required to open and or maintain his/her/its account. The constituent shall from time to time deposit with the member such additional margin as may be required by the member and/or as may be required under NSE Bye-Laws, Rules and Regulations in the form of monies or tradable securities which are acceptable to the member.

The member is entitled at its discretion to prevent the constituent from trading on the National Stock Exchange

unless the constituent deposits the margin or the additional margin.

The member is entitled without prior notice and its absolute discretion to adjust any dues (including but not limited to any loss or damages caused to the member) from the constituent against the margin and/or any other credit balance of the constituent available with the member and or additional margin, but not limited to any. The constituent hereby irrevocably authorises the member to sell all or any of the securities of the constituent as are available with the member (whether as margin, additional margin or otherwise) and adjust the net sales proceeds against the dues (including but not limited to any loss or damages caused to the member) of the constituent.

11. The member is not liable for any loss/damage caused to the constituents due to force majeure including but not limited to Acts of God, fire, flood, earthquake, lightning, war, rebellion, civil disturbance, strike, acts of government agencies and instrumentalities, mechanical equipment defects or failure / disruption of power supply, software defects, failure or cancellation of trades by NSE, connectivity failure, communication failure, security failure on the internet, unauthorised access theft, or any other problem technological or otherwise, that might prevent the constituent from entering or the member from executing an order or other conditions which are beyond the reasonable control of the member.

17. The constituent accepts full responsibility for monitoring and safeguarding his/her/its account. The constituent will immediately notify the member in writing via registered post with acknowledgment due, if the constituent becomes aware of any discrepancies, theft or unauthorised use of the constituent's account, or any failure by constituent to receive an accurate written confirmation of an execution or any receipt by constituent of confirmation of an order and or execution which did not take place or any inaccurate information in the constituent's account balances, securities position or transaction history.

If the constituent fails to notify the member immediately upon the constituent's knowledge, when any of the above conditions occur, neither the member nor any of its directors, officers, employees, affiliates or subsidiaries can or will have any responsibility or liability to the constituent or to any other person

whose claim may arise through the constituent for any claim with respect to handling or mishandling or loss of an order or transaction.

23. In case of any claim/complaint/dispute or difference between the member and constituent relating to trading on the NSE, such claim/complaint or dispute or difference will be resolved only by Arbitration in accordance with the Bye Laws, Rules and Regulations of NSE. Parties shall not have recourse to any other legal avenue except and due to the extent specifically stated in the Bye-Laws, Rules and Regulations of the NSE. The venue of the Arbitration shall be in Chennai city only."

2.2. Later on, the business of Apollo Sindhoori Capital Investments Limited was taken over by M/s.Aditya Birla Money Limited - first respondent herein and accounts were also maintained between the first respondent and the appellant. The first respondent, vide notice dated 05.01.2009, has informed the appellant that there was an operational error on 27.05.2009 which resulted in one bill entry (NSE F&O debit bill bearing reference no.2009020004668560) for a sum of Rs.42,89,247.17, being misstated in the reference account on 26.02.2009 and it came to be detected as part of their Internal Controls process and it was also highlighted by their Internal Auditors recently. Thus, according to the first respondent, the said operational error had resulted in excess payout of Rs.85,78,494.34 and it was credited to the Bank of India account bearing No.802410110001944 maintained by her at Anna Nagar Branch, on 02.06.2009. It was further stated in the said notice that the said arrears has been rectified and restated in the trading account with the actual accounting entry and the statement of account for the period between 01.02.2009 to 30.06.2009 has also been enclosed for reference and perusal and the statement of account as on 30.06.2009 had also been forwarded to the appellant.

2.3. The said communication was also followed by a Legal Notice dated 22.04.2010, issued to the appellant. The appellant, on receipt of the same, sent a reply through Lawyer, denying the contents as well as receipt of the statement of account as on 12.03.2009 and pointed out that she cannot be held responsible for such an error, particularly in the light of the first respondent indulging in authorized transactions and not keeping the appellant informed about the trades and failing to send the contract note. It was also pointed out that the first respondent made several unauthorized transactions, which resulted in loss of about Rs.73 lakhs between April and June

2009 and the total loss caused exceeds Rs.93 Lakhs and took a stand that she is not liable to pay any amount, much less than the sum of Rs.85.78 lakhs demanded in the notice.

2.4. The first respondent had invoked the Arbitration Clause and accordingly, the respondents 3 and 4 had entered appearance as Arbitrators and the second respondent, being the Presiding Arbitrator of NSE. The appellant, upon receipt of the notice and papers, filed his reply statement. The first respondent, filed it's rejoinder and a reply to the rejoinder was also filed by the appellant.

2.5. The Arbitrators, in paragraph 5.2. of the Award dated 06.11.2010, had observed that there is no consistency in the averment of the applicant/first respondent in the nature of the error and further, the error does not appear to a simple debit and credit mistake, but alterations in the opening balances, from which the error has been surmised and going by the nature of the alleged error, the Arbitrators recorded a finding that it is beyond the scope of arbitration, as it pertains to interference with the accounts of the applicant/first respondent. In paragraph 5.3. of the Award, the Arbitrators noted the invocation of Arbitration Clause as per Bye-Laws, Rules and Regulations of NSE and recorded a finding that "it is for the applicant (first respondent) to establish that the operational error relates to any particular transaction entered into with the parties legally. When no evidence or material to interconnect both the operational error and the transactions, the same cannot be held that it is incidental to the trade. Moreover, the operational error is not explained as to how it happened. When the applicant plead that it is unauthorized alteration in the account, then how can it be connected with the transaction of the respondent". Hence, the Arbitral Tribunal was of the view that the subject of arbitration was beyond the scope of the Arbitration Clause provided in the NSE Regulations and opined that the claim is liable to be rejected.

2.6. The respondents 2 to 4 - Arbitrators, having recorded the said findings in paragraph 5.4 of the Award, observed that all the 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 and passed an Award dismissing the claim of the Applicant/first respondent for an amount of Rs.85,78,494.34 made in Form-I and directed both the parties to bear their respective cost of Arbitration and the cost of the proceedings to the NSE is to be borne by the Applicant.

2.7. The applicant/claimant in the said arbitral proceedings, aggrieved by the dismissal of the claim petition, filed O.P.No.643 of 2011 under Section 34 of the Arbitration Act

before this Court and it was entertained and notices were ordered and the first respondent therein/appellant has also filed her written statement.

2.8. The learned Single Judge, on appraisal of facts and materials, has formulated an issue "Whether the claim made by the petitioner (first respondent) before the Arbitral Tribunal is an arbitral dispute within the scope of the Arbitration Clause contained under the agreement between the parties?" The learned Judge, after extracting the Arbitration Clause and considering the rival submissions, recorded a finding in paragraph 25 of the order that the ambit of reference is very wide as seen from the Arbitration Clause and therefore, found force in the submission made by the learned counsel appearing for the petitioner therein/first respondent herein. In paragraph 26 of the order, the learned Judge expressed the view that the Arbitral Tribunal failed to take note of the fact that the claim made by the petitioner/first respondent arises only out of the agreement between the parties and the correctness of the 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 and the scope and ambit of Arbitration Clause is very wide. In paragraph 27 of the impugned order, the learned Judge has recorded a finding that the award of the Arbitrator is perverse, patently illegal and shocking the conscience of the Court and accordingly, interfered with the Award and allowed the original petition by setting aside the impugned Award passed by the Arbitrators and also granted liberty to the first respondent to initiate fresh Arbitration against the first respondent as per the Arbitration Clause contained in the agreement in accordance with law.

2.9. The first respondent in the said original petition, aggrieved by the allowing of the said original petition, has filed his appeal.

3. Mr.Ramakrishnan Viraraghavan, learned Senior Counsel assisted by Mr.G.Sivashankaran and Mr.S.Sathyaganesh, learned counsel appearing for the appellant/first respondent in the claim petition made the following submissions:

(i) Clause 23 of the Member and Constituent Agreement dated 05.07.2001 entered in to between the parties which contain the relevant clauses has been ignored in the impugned order and the Arbitral Tribunal had also held that there is no consistency in the averment of the applicant/first respondent in the nature of the error and further, the error does not appear to be a simple debit and credit mistake, but alterations in the opening balances from which the error has been surmised and as such, it is beyond the scope of Arbitration and apart from the said finding, in paragraph 5.3. of the Award, has recorded a further

finding that there is no evidence or material to interconnect both the operational error and the transaction and therefore, it cannot be held that it is incidental and the first respondent also failed to explain the factual error and since the said factual finding came to be passed by the Arbitrators by appreciating the materials, the said findings are incapable of interference under Section 34 of the Arbitration Act and in any event, it cannot be termed as irrational, perverse or based on no evidence and patently illegal.

(ii) There cannot be a claim in respect of single entry or transaction and entire account ought to have been reconciled.

(iii) The scope of power under Section 34 of the Arbitration Act is akin to review and unless there is a patent error which appears on the face of the record, it cannot be termed as perverse or patent illegality.

Therefore, the learned Senior Counsel appearing for the appellant prays for allowing of this appeal and thereby dismissing the original petition filed by the first respondent.

4. Per contra, Mr.S.Shivathanu Mohan, learned counsel appearing for the first respondent has invited the attention of this Court to the relevant Arbitration Clauses as well as the Award of the Arbitrators and would submit that despite holding there is no arbitral dispute, still the Arbitrators went on the merits on the case and the same is impermissible in law. It is further represented by the learned counsel appearing for the first respondent that the terms of the Arbitration Clauses are very wide and the said fact has been well appreciated by the learned Judge and he correctly reached the conclusion to set aside the Award with liberty to initiate fresh arbitration proceedings and it cannot be found fault with. The learned counsel appearing for the first respondent would further submit that in pursuant to the liberty granted, fresh statement of claim has been submitted to NSE which would cover the account/transaction between the parties and the said entity is expected to appoint fresh set of Arbitrators and even otherwise, the first respondent is to invoke the Common Law Remedy, which is a time-consuming process and therefore, prays for dismissal of this Original Side Appeal with costs.

5. This Court paid it's best attention to the rival submissions and also perused the entire materials placed before it.

6. Clause 23 of the Member and Constituent Agreement dated 05.07.2001 entered into between the first respondent - Apollo Sindhoori Capital Investments Limited, now known as Aditya Birla Money Limited says that in case of any claim/complaint/dispute or difference between the Member and Constituent relating to trading on the NSE, such claim/complaint or dispute or difference will be resolved only by way of Arbitration in accordance with the Bye-Laws, Rules and Regulations of NSE and the parties shall not have recourse to any other legal avenue except and to the extent specifically stated in the Bye-Laws, Rules and Regulations of NSE and the venue of the Arbitration shall be in Chennai only.

7. The appellant herein had also filed some documents along with reply to the rejoinder and it forms part of the typed set of documents filed in this appeal. The Securities Exchange Board of India had issued a Circular dated 11.08.2010 to the Managing Director/Executive Director of all Stock Exchanges, which includes National Stock Exchange and it deals with the Arbitration Mechanism in Stock Exchanges and yet another Circular dated 31.08.2010.

8. It is not in serious dispute that the arbitration proceedings to be initiated shall be in accordance with the Bye-Laws, Rules and Regulations of NSE. It is relevant to extract the Arbitration Clause contained in the Bye-Laws and Rules and Regulations of NSE:

"(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 Bye laws and Regulations. The Exchange shall be entitled to facilitate arbitration for such disputes and parties as mentioned in the provisions of Bye law 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."

The said Clause covers all eventualities and it is very pertinent to point out at this juncture and once again reiterated that as per Clause 23 of the Member and Constituent

Agreement dated 05.07.2001 entered into between the appellant and the respondent viz., Apollo Sindhoori Capital Investments Limited, in case of any claim/complaint/dispute or difference between the Member and Constituent relating to trading on the NSE, such claim/complaint or dispute or difference will be resolved only by way of Arbitration in accordance with the Bye-Laws, Rules and Regulations of NSE and the parties shall not have recourse to any other legal avenue except and to the extent specifically stated in the Bye-Laws, Rules and Regulations of the NSE.

9. The Arbitration Clause and Bye-Laws of NSE extracted supra would also say that all claims, differences or disputes between the Trading Members inter se and between Trading Members and Constituents arising out of or in relating to dealings, contract 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 Bye-Laws and Regulations. In the considered opinion of the Court, the transactions referred to in the said Clause would definitely have a very wide meaning.

10. The word "transaction" came up for consideration in the following decisions:

10.1. In Messers G.S.Ramaswamier and Sons, Madura v. The Commissioner of Income Tax, Madras [Madras 58 L.W.37], it was observed that "the word 'transaction' has a very wide meaning. It can be applied to any particular act done in the carrying on of a business;..... is the carrying on or completion of an action or a course of action."

10.2. In Periasami Kachirayar and Others v. Varadappa Kachirayar (died) and others [A.I.R. (37) 1950 Madras 486], the word "Transaction" in the context of Section 13(a) of the Evidence Act was considered and the judgment of Calcutta High Court in Gujjalal v. Fattehlal [6 C.L.R. 439] was also referred to and it was observed in the said decision that "transaction" in its ordinary sense denotes some business or dealing which is carried on or transacted between two or more persons."

10.3. In Channoo Mahto and Others v. Jang Bahadur Singh and Others [AIR 1957 Patna 293], in paragraph 18 it was observed that "A 'transaction' is something already done and completed; a 'proceeding' is either something which is now going on, or, if ended, is still contemplated with reference to its progress or successive stages. A 'transaction', in the ordinary sense of

the word, is some business or dealing which is carried on, or transacted between two or more persons. A 'transaction', as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were".

11. Therefore, this Court is of the considered view that the Arbitration Clause contained in the Member and Constituent Agreement dated 05.07.2001 and the Bye-Laws, Rules and Regulations of NSE are having a very wide meaning.

12. Incidentally, an issue has also arisen for consideration as to "whether the alleged wrong credit entry pleaded by the first respondent can be the subject matter of arbitration?"

13. This Court, in the earlier paragraphs, has pointed out that Clause 23 of the Member and Constituent Agreement dated 05.07.2001 says that any claim/complaint/dispute or difference should be resolved only by way of Arbitration in accordance with the Bye-Laws, Rules and Regulations of NSE.

14. In P.Dasaratharama Reddy Complex v. State of Karnataka [(2014) 2 SCC 201], the decision in K.K.Modi v. K.N.Modi [(1998) 3 SCC 573] has been referred to and the said decision deals with the pre-requisites for a valid arbitration agreement and it is relevant to extract paragraph 22 of the said decision:

"22. One of the questions formulated by this Court was whether Clause 9 of the memorandum of understanding constituted an arbitration agreement and whether the decision of the Chairman, IFCI constituted an award. The two-Judge Bench [K.K. Modi v. K.N. Modi, (1998) 3 SCC 573] first culled out the following attributes of an arbitration agreement: (K.K. Modi case [K.K. Modi v. K.N. Modi, (1998) 3 SCC 573] , SCC p. 584, paras 17-18)

'17. ... (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal.

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.' "

15. In *Oriental Insurance Company Limited v. Narbheram Power and Steel Private Limited* [(2018) 6 SCC 534], the Hon'ble Supreme Court following the decision in *Jumbo Bags Ltd. v. New India Assurance Co. Ltd.*, [(2016) 2 L.W.769], held that if disputes are barred from reference to arbitration, such disputes are not covered by Arbitration Clause.

16. In the subsequent decision in *United India Insurance Co. Ltd. and Others v. Hyundai Engineering and Construction Co. Ltd. and Ors.* [2018 (10) Scale 72], the factum of existence of an arbitration agreement in the Insurance Policy came up for consideration and in paragraph 10, it was observed that "If a Clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest. The Hon'ble Supreme Court had approved the decision of this Court in *Jumbo Bags Ltd. v. New India Assurance Co. Ltd.*, [(2016) 2 L.W.769] and also extracted paragraph 32 of the said decision as under:

"32. I am of the view that the remedy of arbitration is not available to the petitioner herein in view of the arbitration Clause specifically excluding the mode of adjudication of disputes by arbitration, where a claim is repudiated in toto. The remedy would thus only be of a civil suit in accordance with law."

17. In the case on hand, there is no exclusion Clause relegating the parties to recourse to other legal proceedings and in fact, Clause-23 of the Member and Constituent Agreement dated 05.07.2001 specifically says that in case of any claim/complaint/dispute or difference between the Member and

Constituent relating to trading on the NSE, such claim/complaint or dispute or difference will be resolved only by way of Arbitration in accordance with the Bye-Laws, Rules and Regulations of NSE and the parties shall not have recourse to any other legal avenue except and to the extent specifically stated in the Bye-Laws, Rules and Regulations of the NSE.

18. The Arbitration Clause containing the Bye-Laws, Rules and Regulations of NSE, which has been extracted supra, is also very widely worded, which covers the present dispute also. A perusal of the Arbitral Award would disclose that though a finding has been recorded that the subject matter of arbitration is beyond the scope of Arbitration Clause provided under NSE regulations, still, the Arbitrators proceeded further and adjudicated the dispute on merits by recording their findings in paragraph 5.3 of the Award. The learned Judge has rightly observed that the award of the Arbitrators suffers on account of perversity and it also amount to patent illegality.

19. This Court, on an independent application of mind to the entire materials, is of the considered view that there is no error apparent or perversity attached to the said findings recorded by the learned Judge and finds no merit in this appeal.

20. In the result, this Original Side Appeal is dismissed, confirming the order dated 03.07.2018 made in O.P.No.643 of 2011. However, in the circumstances of the case, there shall be no order as to costs. Consequently, the connected miscellaneous petition is dismissed.

21. Since the dispute is nearly several years old, both parties, shall expedite, cooperate and conclude the arbitral proceedings at the earliest possible time.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To:

The Sub Assistant Registrar,
Original Side Section, High Court, Madras.

+2cc to Mr.G.Sivashankaran, Advocate sr.no.75472

O.S.A.No.398 of 2018

nr 26/11/2018