IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.863 OF 2013

Rajkumari Goenka
And Others ... Petitioners
Versus
Deutsche Bank A.G. ... Respondent

.....

Ms. Mamta Sadh a/w Mr. Akash Rebello and Mr. Narendra Devvansh I/b Purohit & Co. for the Petitioners.
Dr. Abhinav Chandrachud a/w Ms. Sanaya Dadachanji, Mr. Rohit Lalwani I/b Manilal Kher Ambalal & Co. for the Respondent.

.....

CORAM : S.C. GUPTE, J.

DATE : 14 JANUARY 2019

P. C. :

. Heard learned counsel for the parties.

2 This arbitration petition challenges an award passed by an arbitral tribunal in the matter of arbitration under the Rules, Bye-laws and Regulations of the Bombay Stock Exchange ('BSE'). The Petitioners are legal heirs of the deceased trading member, whereas the Respondent is a constituent of the trading member.

3 The Respondent had been transacting in sale and purchase of shares through the predecessor of the Petitioner ("trading member") on a delivery basis. The disputes between the parties arose out of trading instructions purportedly issued by the Respondent to the trading member on

21 September 1993 for sale on its behalf of 9900 shares of HDFC at a net rate of Rs.1,800/- per share. The share certificates were purportedly deliverable on receiving instructions from the trading member. The instructions were said to have been followed by a contract note issued by the trading member to the Respondent on the same date, i.e. 22 September 1993. It is the case of the Petitioners that there was a massive fire in the office of the trading member on 2 August 1994, in which several records/documents were destroyed. It is submitted that the trading member could lay his hands on the instructions of 21 September 1993, only sometime later in 1997. It is submitted that on 16 July 1997, the trading member called upon the Respondent to perform the contract reflected in the instructions and the contract note. The Respondent thereupon took a stand that there was no such transaction of sale carried out/to be carried out in September 1993 purportedly on its behalf; the Respondent had no record of any such transaction; and no such transaction was binding on the Respondent. That is how disputes arose between the parties and were referred to the arbitral tribunal of BSE.

4 By their impugned award dated 28 August 2012, the arbitrators rejected the reference. The arbitrators, in a nutshell, held that the transaction was not genuine. The arbitrators cited various reasons for their finding. In the first place, the arbitrators noted that the contract note did not reflect any brokerage and the acknowledgment of the Respondent on the contract note did not bear its stamp. The arbitrators also noted that no demand was made by the trading member till July 1997 for delivery of shares on a transaction, which was claimed to have been made in September 1993. The arbitrators noted that the purported action of the

applicant of delivery of his own shares in alleged compliance of the transaction was contrary to the rules and regulations of BSE, more particularly, Bye Law 247 A(6). The learned arbitrators also held that the claimant having failed to substantiate his claim, he was not entitled to demand delivery of shares or any value of shares, dividend or benefit. The arbitrators, accordingly, rejected the claim in their impugned award.

5 Learned Counsel for the Petitioners submits that the award is in breach of public policy of India. It is submitted that the ground of breach of Bye Law 247 A(6) could never have been held against the trading member, since this bye law was introduced much later and was not in place in September 1993 when the transaction was effected. It is submitted that since the reasons cited by the arbitral tribunal for arriving at its conclusion that the transaction was not genuine, are cumulative and one of the important reasons cited in this behalf is demonstrably wrong, the award as a whole must fall. It is submitted that it is difficult to fathom as to what extent the aforesaid reason weighed with the arbitrators, since it is not possible to delve into their mind. Leaned counsel, secondly, submits that the instructions of sale being for a net amount, the fact that the contract note did not reflect the brokerage amount charged by the trading member is neither here nor there. It is submitted that there is no requirement of law that the contract note must reflect the brokerage amount charged and in the context of the express instructions issued by the constituent for a particular net amount, the absence of brokerage amount in the contract note did not in any way reflect on the genuineness of the contract note or the transaction. Learned Counsel submits that failure to raise demand till July 1997 was adequately explained by the trading member in as much as

there was fire in his office (stated to have occurred on 2 August 1994), where several records maintained by the trading member had been destroyed. Learned Counsel submits that absence of the Respondent's bank stamp in the acknowledgment of the contract note was never a ground of challenge to the genuineness of the contract note; what was claimed was that it was part of the Respondent's office procedures to have all letters, communications and instructions on its behalf signed by two officers. Learned Counsel submits that despite the trading member having denied this practice or the resort of the Respondent to this practice in their other transactions with the trading member, the Respondent had not led any evidence on the issue and yet, without any evidence, the arbitrators upheld the Respondent's objection to the genuineness of the debit note on this ground.

6 None of the grounds urged by learned Counsel adds up to a valid objection to the arbitration award on the ground of breach of public policy or patent illegality appearing on the face of the award. Absence of mention of any brokerage amount in the contract note was not pressed into service by the Respondent to challenge the contract note as a mater of law. What was claimed was that all debit notes in connection with trading instructions of the Respondent placed with the trading member invariably reflected in the column of 'brokerage' the brokerage amounts charged by the trading member in each of the cases. In the premises, absence of such brokerage amount in the particular debit note undermined its genuineness. If the arbitrators accept this objection, there is nothing impossible or patently illegal about the same. The debit note was, in the first place, disputed by the constituent. The onus of proving its genuineness was therefore clearly

on the trading member. The fact that the debit note did not reflect any brokerage amount, the transaction amount being very large (over Rs.1.78 crores), is certainly a legitimate reflection on its genuineness. So also, non-existence of the Respondent's stamp on the contract note is a material circumstance, though this not was specifically put in issue by either of the parties. The transaction being of September 1993 and the demand having been made as late as in July 1997 for delivery of shares in pursuance of the transaction, is also an important circumstance bearing on the genuineness of the credit note and tenability of the demand. Thus, even if one grants that bye law 247 A(6) was incorrectly applied to the facts of the case, the award cannot be said to be vitiated for that reason. The other reasons cited by the arbitrators are good enough to sustain the impugned award insofar as observations on genuineness of the transaction are concerned. If one were to leave out one ground of challenge, upholding the other grounds sustaining the award, it does not amount to upholding the award by delving into the arbitrator's mind. The view taken by the learned arbitrators on this issue is clearly a possible view. It is not a view which no fair and judiciously minded person could have taken or a view which would shock conscience of the court. Besides, it is not in dispute that a regulation similar to Bye Law 247 A(6) was in place even during the relevant period.

7 Aside of reasonableness or possibility of the arbitrators' views on the genuineness of the contract note, what is central to this whole controversy is the very impermissibility of the relief sought by the trading member. What the trading member has sought in the present case is specific performance of a contract for sale of shares. Based on his plea of specific performance, the trading member seeks delivery of shares, possibly

wanting to pay the agreed sum against the contracted share price. No contract for sale of publicly traded shares can be specifically enforced. If the broker, on account of breach of such contract by the constituent by failing to deliver shares, acquires shares from the market or submits his own shares for squaring off the transaction, the most the trading member can claim is the amount of damage incurred by him in the process. It is the difference between the agreed share price and the price of the shares actually paid by the broker at the market or lost by the broker in surrendering his shares, which alone can be claimed by way of such damage. There is no such prayer in the present arbitration reference. In fact, the whole case of the trading member proceeds purely on his plea of specific performance, the only prayer being for delivery of shares against the agreed price. That, as we have noted above, was clearly impermissible. Grant of any such prayer, thus, would have been against the public policy of India.

8 In the premises, there is no merit in the arbitration petition. The petition is dismissed.

(S.C. GUPTE, J.)