IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
21~08~2019	~08~2019

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.413 of 2009

K.V. Janardhana Pai,
KNG Textiles,
38/1017-A, Gopalaprabhu Road,
Cochin 682035. .. Petitioner

.Vs.

1. M/s. Kotak Securities Limited
No.229, First Floor, Baktawar,
Nariman Point, Mumbai 400021.

2. V. Natarajan, (Arbitrator)
2nd Floor, Ipshani Centre
123-123, Nungambakkam High Road,
Chennai 600034.

3. S. Subramanian (Arbitrator)
2nd Floor, Ipshani Centre
123-123, Nungambakkam High Road,
Chennai 600034.

4. R. Subramanian (Arbitrator)
2nd Floor, Ipshani Centre
123-123, Nungambakkam High Road,

Chennai 600034. .. Respondents

* * *

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 07.05.2009 passed by the learned Arbitrator in A.M.No.F&O/C-0086/2008

For Petitioner : Mr. V. Raghavachari

For Respondents: Mr. V.V. Sivakumar

ORDER

Challenging the rejection of the counter claim made by the Petitioner in the dispute before the learned Three Member Arbtrators constituted by the National Stock Exchange (NSE), the present Original Petition is filed.

2. Originally the Applicant/Respondent herein filed the claim for recovery of a sum of Rs.1,09,368.33 arising out of the trade transaction carried out by them under the Member-client agreement

dated 2-2-2006, together with future interest at the rate of 24% per annum. It is the case of the Applicant that the Respondent/Petitioner regularly carried out trades through the applicant and was allotted code No.KXJP4. The Petitioner also deposited shares lying in the Demant Account NO.12853795 as margin and executed Power of Attorney in favouyr of the Applicant for the operation of the said Demat Account. As and when the Respondent/Petitioner carried out the trades the Applicant immediately sent contract notes and all ledger statements, communication, debit mails to the email address of the respondent. As an abundant precaution applicant sent physical copies of the digital contract notes ato the residential address of the respondent. Applicant has stated that he has recoreded the conversations that had taken place between the dealer and the Respondent. The Respondent had consented to the trades in Cash as well as F & O segments and ratified the transaction throughtout the period. The Respondent/Petitioner assured to apy the margian and mark to market losses to the applicant. As on 31.3.2008, the account of the respondent was showing total outstanding balance of Rs.1,09,368.33, the account of the respondent was showing total outstanding balance on time. Inspite of the assurance the respondent failed to pay the margin and mark to market losses to the applicant. As on 31/3/2008,the account of the Respondent/Petitioner was showing toal outstanding balance of Rs.1,09,368.33 as per the combined Ledger statement which he failed to pay inspite of many requests. The applicant/Respondent therefore, had sent an Advocate's notice dated 16.5.2008 to the Respondent. Since no payment has been received, the applicant has filed Arbitration Application with the N.S.E.with supporting documents.

3. It is contended by the Respondent/Petitioner herein that the calim of the applicant is not sustainable in law or on facts and that the applicant had obtained the signatures of the respondent on its standard format document in blank without filling in all the requisite particulars. The respondent/Petitioner has denied receipt of contract notes by email or in physical form by post. The constituent is neither aware of the recordings of his conversations with the dealer nor has he given consent for such recordings. It is the contention of the Respondent/Petitioner that he had contacted the

employees/dealers/recpresentatives of the applicant several times to protgest against the trades doen by them followed by a letter dated 3.3.2008. The Respondent/Petitioner had denied that he failed to pay margins due to the applicant and that there was a loss in his account or negative margin due to the alleged decline in the Index during the months of November and December 2007. It is the further contention of the Respondent/Petitioner that he did not have any transactions or outstanding positions in the F&O segment or any debit balance accrued in his account due to the alleged square off or otherwise. In other words there are no outstanding dues in his F&O account on or after 31.12.2007 and has therefore prayed for the dismissal of the claim of the applicant with costs.

4. The Respondent/Petitioner herein also raised a counter claim for a sum of Rs.52,71,620 with interest @ 24% p.a. against the Applicant, who has wrongly sold all the shares without the consent and knowledge of the Respondent/Petitioner for a sum of Rs.1,49,06,515/- on 22.1.2008. It is his contention that he never authorised the Applicant/Respondent herein to sell the shares on 21st and 22nd January

2008. The learned Arbitrators dismissed the claim of the Respondent/Petitioner herein and also dismissed the claim petition. However, while rejecting the counter claim, the learned Arbitrators factually recorded that the Respondent/Petitioner had never given any instruction for the sale of the shares on 21st January 2008 and also recorded as follows:

> "From the above submissions made by him it is clear that the respondent very much wanted to retain the securities in his account on 21st and 22nd January 2008 and had no intention to dispose them. Further it is evident that he had not given any instruction to sell the securities on 21st January, 2008. That being the case he cannot blame the applicant for not selling the securities on 21st itself and then claim the difference in price."

Further, held that,

> "he can look forward a remedy is only the restoration of those shares to his account after his paying back the consideration of the sale proceeds of Rs.1,49,06,514.98 credited to his Bank Account with KMBL."

As against the rejection of the counter claim the present Original

Petition has been filed with various other grounds.

5. Learned Counsel Mr.V. Raghavachari appearing for the Petitioner mainly contended that the Arbitrators have specifically recorded the factual finding that the Petitioner has not given any instruction for sale of the shares on 21.1.2008. The Applicant is authorised sell the shares. The counter claim ought to have been awarded. The counter claim has been made on the basis of differential share value on 21.1.2008 and subsequently on 22.1.2008. Therefore, it is his contention that the Arbitrators have not even gone to that aspect and substantial provision of law has been violated. Section 211 and 212 of the Indian Contract Act have fully ignored. Hence the Award is in violation of the public policy of India. When the substantial provision of law has not taken note of by the learned Arbitrators, the Award rejecting the counter claim is result of patent illegality and violation of public policy of India. Further, the direction of the Arbitrators for restoration of shares, as it was already sold to the third parties, without making third parties to the proceedings would also patent illegality and the learned arbitrators directed the Petitioner to

pay a sum of Rs.1,49,06,514.98 for such restoration is also illegal. Hence it is his contention that the Award has to be set aside.

6. Whereas the learned Counsel Mr.V. Sivakumar appearing for the Respondent/Applicant would submit that no ground has been made under Section 34 to assail the impugned Award. The submission with regard to the so called breach on the part of the Applicant has not raised in the grounds of the original petition. It is the contention of the learned counsel that the issue of the so called unauthorised sale of the Petitioner's shares has been accurately dealt with in the last para of the Award pertaining to the Respondent's counter claim. The Petitioner has not clarified before the Tribunal on what basis he had arrived a sum of Rs.52,71,620/- and made a counter claim without any evidence. This court cannot re-appreciate entire evidence. Hence he prayed for dismissal of the Original Petition.

7. It is well settled that the scope of interference of the Award under Section 34 of the Arbitration and Conciliation Act is very limited. The Supervisory role is to kept minimum level and the interference of

the award is possible only when the ground set out in the section 34 of the Act is made out.

8. The scope of interference of the Award is dealt by the Apex Court in the following judgments:

8(a) Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honoruable Apex Court has held that an Award can be set aside if it is contrary to:

a) fundamental policy of Indian law; or

b) the interest of India; or

c) justice or morality; or

d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

8(b). The power of the Court to set aside the Award would be exercised only in cases where the Court finds that the Arbitral Award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Act. In the case on hand, considering the entire findings of the Arbitrator this court do not find any materials to show that this case requires interference under Section 34 of the Act. In **Swan *Gold Mining Ltd., v. Hindustan Copper Ltd reported in 2015(5) SCC 739*** the Honourable Apex Court has held as follows:

"12. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. 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 is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal."

"13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."

"21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

8(c). The Honourable Apex Court in ***McDermott International Inc., v. Burn Standard Co.,Ltd., [2006 (11) SCC 181]*** explained the term patent illegality and held that patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

8(d). A Division Bench of this Court in ***Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another [2018 (6) MLJ 588]*** also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

8(e). In ***Associate Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49***, the Honourable Apex Court has held that a contravention of the substantive law of India would result in the death knell of an arbitral award. Violation of Indian statutes i.e., the award which is, on the fact of ti, patently in violation of statutory provsions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect administration of justice and would be regarded as being contraty to the fundamental policy of Indian law.

Furthermore, the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of indian law. This must be understood in the sense that tsuch illegality must go to the root of the matter and cannot be of a trivial nature. This agains is a really a contravention of Section 28(1)(a) of the Act 1996. The Honoruable Apex Court further held as follows:

'42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub-heads:

42.1.(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

'28.Rules applicable to substance of dispute._ (1) Where the place of arbitration is situated in India_

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.' 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality _ for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> "28. Rules applicable to substance of dispute.
>
> (1)... ... ...
>
> (2) ... ...
>
> (3) In all cases, the Arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.'

9. It is not in dispute originally the claim was preferred by the Respondent/Applicant for a sum of Rs.1,09,368.33 and the above

claim was dismissed. No appeal whatsoever filed. The crux of the issue is with regard to the Award in respect of the counter claim. It is the specific case of the petitioner before the Arbitral Tribunal that he is never authorised to sell the shares on 21st and 22nd January 2008. However, the shares have been sold on 22.01.2008. If the shares were sold on 21st January 2008 at the best possible price, the same would have been fetched a total sum of Rs.2,01,78,135. Therefore, the Petitioner has claimed the difference in the price of the securities on the two dates as loss caused due to negligence of the Trading Member and their failuare to inform the Petitioner about the alleged losses. The learned Arbitrators in their finding recorded that on 21.1.2008 there was no instruction by the petitioner for the sale of shares and the Petitioner had very much wanted to retain the securities in his account on 21st and 22nd Jaunary 2008 and he had no intention to dispose them. He has not instructed the Respondnet to sell securities on 21st January 2008. Hence, he cannot blame the Respondent/applicant for not selling the securities on 21st January 2008 and then claim the difference in price. Therefore, the learned Arbitrators rejected the counter claim. It is to be noted that the

Respondent is a Corporate Member of the National Stock Exchange and the Petitioner herein is the constituent and the Respondent was acting as agent of the petitioner herein.

10. It is the specific case of the Petitioner before the Arbitral Tribunal that the Respondent has wrongly sold the shares without consent or knowledge of the petitioner on 22.1.2008 and he has not authorised to sell the shares on 21st and 22nd January 2008 also. The learned Arbitrators factually recorded that the Petitioner has not instructed the sale of the shares on 21.8.2008 and he wanted to retain the shares on 21st and 22nd Jaunary 2008 and he has no intention to dispose of the shares. Having found that the shares have been sold without any instructions the Learned Arbitrators have not gone to the issue whether the counter claim is liable to be allowed or not. Whether the trading member has right to sell the shares without the instruction of the prinicpal namely the constituent. In this regard it is useful to refer Section 211 of the Indian Contract Act:-

211. Agent's duty in conducting principal's

> ***business:-*** *An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it. —An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it.*

11. The above section makes it mandatory on the part of the agent to conduct the business according to the direction of the principal. When the agent acts otherwise, if any loss sustained, he must make it good to his principal and if any profit accrues, he must account for it. Section 212 of the Indian Contract Act deals with Sill and diligence required from the agent.

12. As per section 212 of the Indian contract Act the agent is

bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business and he is always bound to act with reasonable diligence and use such skill as he possesses and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

13. From the reading of the above section 211 makes it very clear that when the agents have acted against the direction of the principal which resulted in the loss, he must make it good to the principal. The learned Arbitrators have not taken note of the substantial provision of law. On the other hand, the learned Arbitrators in fact passed an Award for restoration of the shares to his account after paying back the consideration of the sale proceeds of Rs.1,49,06,514.98 credited to his Bank acctount with KMBL. It is also relavant to be noted that the shares have already transferred to the third parties. The restoration of the shares without the presence of the third parties who purchased the shares is also in view of this court is

patent illegality and on that ground also the Award has to be set aside. Besides the substantial provision of law i.e., Section 211 and 212 of the Contract Act has not been followed while passing order. Having factually found that agent has acted without the directions from the principal dealing with the shares, which resulted a loss, the Arbitrators ought to have given further opportunities to the parties to adduce evidence as to the loss actually caused. Such exercise also not done by them. When the substantial provision of law has not been followed while passing the Award, such Award is certainly violation of fundamental policy of India as held in the ***Associated Builders' case*** (supra)

14. In view of the above, the Award is certainly in contravention to the public policy of India and substantial provision of law and also suffer from patent illegality and the same is liable to be set aside. Accordingly, the finding of the learned Arbitrators in respect of the counter claim alone is set aside and the National Stock Exchange is directed to reconstitute the Arbitral Tribunal within one month from the date of receipt of copy of this Order, to decide the loss on account of

unauthorised sale of shares afresh on merits after giving opportunities to both sides. On such reconstitution, the learned Arbitrator(s) shall dispose of the matter within four months from that date.

15. In the result, the Award of the learned Arbitrators with regard to the Counter Claim alone is set aside. The Original Petition is disposed of directing the National Stock Exchange to reconstitute the Arbitral Tribunal within one month from the date of receipt of copy of this Order to decide the loss on account of unauthorised sale of shares afresh on merits, and on such reconstitution, the learned Arbitrator(s) shall dispose of the matter within four (4) months from that date. No costs.

30.08.2019

Index : Yes / No
Internet: Yes
Speaking/Non-speaking order
ggs
Copy to:

1. M/s. Kotak Securities Limited
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N. SATHISH KUMAR, J.
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Pre-delivery order in:
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