IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 25.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.236 of 2010

M/s.SBICAP Securities Ltd.,
191, Maker Tower, "F",
Cuffe Parade,
Mumbai 400 005 (Trading Member)
Rep. through its authorised representative
Sethu Murugan,
Zonal Manager,
SBI CAP Securities Ltd.,
2A Prakasam Road, Panagal Park,
T.Nagar, Chennai 600 017. ... Petitioner

Vs.

1. Janabai Vasudevan

2. V.Paul Das,
Sole Arbitrator,
Office of National Stock Exchange of India Ltd.,
2nd Floor, Ispahani Centre,
Door No.123-124, Nungambakkam High Road,
Nungambakkam Chennai 600 034. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 30.10.2009 passed by the learned Arbitrator/second respondent herein.

For Petitioner : Mr.R.Karthikeyan
For 1st Respondent : Mr.Kuberan
for M/s. Rank Associates

ORDER

Instant 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an arbitral award dated 30.10.2009 ('impugned award' for brevity) made by a Arbitral Tribunal ('AT' for brevity) constituted by a Sole Arbitrator.

2.To be noted, the Sole Arbitrator has been arrayed as second respondent in the instant OP and this Court is informed that the second respondent is a former District Judge.

3.In the scheme of A & C Act, Section 34 is slotted under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 of A & C Act also reveals that recourse to a Court against an arbitral award under Section 34 of A & C Act may be made by an 'application'. Also to be noted, caption to Section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, with regard to legal proceedings which are in the nature of recourse against arbitral awards, the same are being assigned the nomenclature 'Original Petitions' in the Registry of this Court and therefore, instant proceedings are being referred to as 'OP', for the sake of convenience and clarity.

4.Instant OP, pertains to transactions in 'National Stock Exchange' ('NSE' for brevity). SBICAP Securities Private Limited (hereinafter 'SBICAP' for brevity) is a share broker qua 'NSE'. The first respondent in instant OP is an individual who trades scrips, shares etc. and is being referred to as 'client' in the agreement between SBICAP and first respondent, being agreement dated 15.11.2005. From hereon, petitioner shall be referred to as 'SBICAP', first respondent shall be referred to as 'client' and as already mentioned *supra*, second respondent is AT.

5.It is not in dispute that under the aforesaid agreement dated 15.11.2005 (hereinafter 'said agreement'), is an arrangement between client and SBICAP primarily for trading in scrips.

6.Trading in various scrips, shares etc., *vide* said agreement continued for a period of time. In other words, it was a continuous ongoing process/ a continuous ongoing trade.

7.At some point of time, client complained that SBICAP had wrongly squared off then obtaining position pertaining to what is described in share trading parlance as derivative segment. Client sent a communication dated 17.04.2008, claiming a total sum of Rs.2,46,420/- or in other words, little over Rs.2.46 lakhs in SBICAP towards, what according to client is wrong squaring off. This Court deems it appropriate to extract the letter as it is the fulcrum of the arbitrable dispute out of which instant OP arises. This letter reads as follows:

Date: 17.04.2008

From
V.Janabai
Flat No.E1, Kothari Vatika,
No.10, East Mada Street,
Thiruvanmiyur,
Chennai-41.

To
SBI CAP Securities Limited
Chennai.

Dear Sir,

A/c.No.J020

During January to February 2008, I was having the following long positions under derivatives segment (F&O).

Sl. No.	Date	Script	Lot	No. of shares	Rate Rs.	Total Rs.
1.	03.01.2008	Unitech	1	900	540.05	4,86,045
2.	21.01.2008	Nifty	1	50	5,378	2,68,900
3.	21.01.2008	Nifty	1	50	5,262	2,63,100
					Total	10,18,045

On 22nd Jan 2008 at the start of the day, Mr.Charles of SBI Cap, told me to give a cheque for Rs.80,000/- towards MTM for the above scripts. I immediately gave a cheque No.436797 for Rs.1,00,000/- (Rupees One Lakh Only) on 22nd Jan 2008 itself at 10.30 a.m. to take care of the future position also. Mr.Charles also told me that he had conveyed the receipt of the cheque for Rs.1,00,000/- to the personnel at Mumbai. But to my surprise, I came to know that my above positions were squared off by negligent attitude of the personnel at Mumbai on 22nd January, 2008 which had resulted in a loss of Rs.2,46,420/-.

Script	Lot	No. of shares	Rate	Total Rs.
Unitech	1	900	329	2,96,100

Script	Lot	No. of shares	Rate	Total Rs.
Nifty	2	100	4,755.25	4,75,525
			Total	7,71,625

O/C of squaring on 22.01.2008
Purchase Cost : Rs.10,18,045/-
Less: Squared off amount : Rs. 7,71,625/-

Net Loss : Rs.2,46,420/-

Mr.Charles and the personnel at Mumbai have utter disregard for the rules and are not concerned about the service to the customers. Whatever the amount at whatever the time, they demanded I used to pay it immediately. There is not a single occasion where the cheques issued by me were returned unpaid or I had not paid the required amount.

Due to the wrong squaring off the position in Unitech and Nifty I have not only suffered the loss, but also the subsequent Trading by which the accrual of profits are prohibited. You would be well aware that in F&O Trading profits can be earned not only when the price index raises but also when the price/index goes down, in equal measure by means of short selling.

My reputation is also questioned by your negligent action which give me mental agony.

I never expected this tile of thing from an organization which is subsidiary of a great State Bank Of India. If this message goes to the public, nobody would have trust in your organization.

In view of the above, I request you at least to compensate the entire loss, even though the interest element is involved in it. I request you to consider my case favourably at an early date otherwise, I will be constrained to resort to other remedies including legal remedy for redressal of my genuine grievances. Even then if any loss occurs to me, it should be the responsibility of Mr.Charles who happens to be the contact person for my transactions.

Yours faithfully,
Sd/-
17.04.2008
(V.JANABAI)

8.The request of the client was not acceded to in its entirety, though this Court is informed that there were some negotiations between client and SBICAP in this regard, SBICAP offered to payout a certain sum of money and the quantum was unacceptable to client.

9.It is not necessary to delve into these aspects of the matter as it is not in dispute that client invoked arbitration clause in the said agreement, AT entered reference and arbitration proceedings were held.

10.Before the AT, client reiterated her complaint which is captured in the aforesaid letter dated 17.04.2008 or in other words, this is client's claim before AT. This was resisted by SBICAP on two grounds. One ground is limitation. SBICAP took a plea that the claim/arbitration ought to have been triggered within six months from the date on which the dispute arose. This was by placing reliance on NSE Rules. The second plea was on merits and that plea was to the effect that squaring off was owing to short fall in the market and it was not owing to negligence on the part of SBICAP. Client filed a reply statement. In reply statement, the claim was reiterated that squaring off was only owing to negligence on the part of SBICAP and there was no short fall on the part of the client qua margin to be maintained and it was also submitted that the exposure position did not warrant squaring off.

11.Based on the aforesaid rival pleadings, AT framed two issues and the same (as can be culled out from the impugned award) reads as follows:

"Issue No.1:

Whether the claim of the applicant is barred by limitation period?

Issue No.2:

Whether the claim of the applicant is true and acceptable and if so to what amount the applicant is entitled to from the respondent?"

12.With regard to limitation, AT came to the conclusion that the arbitration claim made on 11.08.2008 was within six months from 29.02.2019 and therefore it is not barred by limitation. However, both the learned counsel before me i.e. Mr.R.Karthikeyan for SBICAP and Mr.Kuberan of M/s.Rank Associates (law firm) for client very fairly brought to the notice of this Court a circular issued by SEBI. This circular of SEBI dated 09.02.2011 bears reference CIR/MRD/DSA/2/2011. It was brought to the notice of this Court that SEBI had made it clear that the limitation period has been modified as three years in terms of Limitation Act 1963. Therefore, it may not be necessary to even advert to the six months limitation period prescribed under NSE Rules. In other words, if three years is the limitation period, the commencement of arbitral proceedings within the meaning of Section 21 of

A & C Act is clearly within three years and therefore, it is not necessary to examine on this aspect of the matter. This takes us to issue No.2. This Court places on record it's appreciation for the fair approach of learned counsel for the SBICAP in bringing to the notice of this Court aforesaid circular of SEBI and pointing out that limitation is three years and not six months.

13.A careful perusal of the discussion of AT with regard to issue No.2 reveals that the view taken by AT is clearly not only a possible but plausible view also and as the AT has held that SBICAP has squared off client's position on 22.01.2008, even after accepting a cheque for Rs.1,00,000/- before the start of NSE business and without giving any opportunity to the client to cover up the margin position before the start of next working day of NSE viz., 23.01.2008. AT has also returned a finding that the reasons adduced by SBICAP on 22.01.2008 is not acceptable and AT has held the same by relying on an electronic mail dated 21.04.2008 from SBICAP which brings to light that the squaring off has been done without even informing the branch at Chennai. AT has appreciated this piece of evidence and according to this message, the squaring off was done in the morning for those clients who had not remitted the margin amount. On this basis, AT has come to a conclusion that the contentious squaring off is clearly unilateral and this is against the spirit of said contract.

14.Learned counsel for SBICAP which is petitioner in instant OP before me submitted that this view is in conflict with public policy of India as according to the learned counsel for SBICAP, it is in contravention with fundamental policy of Indian law.

15.Fundamental policy of Indian law has been explained by Hon'ble Supreme Court in *Associate Builders Vs. Delhi Development Authority* reported in *(2015) 3 SCC 49* by reiterating the elucidation of fundamental policy of Indian law made by Hon'ble Supreme Court in *ONGC Ltd. v. Western Geco International Ltd.* reported in *(2014) 9 SCC 263.*

16.The three juristic doctrines with regard to fundamental policy of Indian law laid down by Hon'ble Supreme Court in *Western Geco* (albeit with a caveat that it is not exhaustive) are (i) judicial approach, (ii) adherence to principles of natural justice and (iii) irrationality/perversity.

17.The tests for aforesaid three juristic doctrines have also been laid down by Hon'ble Supreme Court. Test for judicial approach is to test whether the impugned award shows fidelity of judicial approach. Test for principles of natural justice is *audi alteram partem.* With regard to the third juristic doctrine, it was held that the test is the time honoured W*ednesbury principle of reasonableness*. Learned counsel for SBICAP submitted that the third juristic doctrine viz. irrationality/perversity will be attracted in the instant case. In other words, the first and second juristic doctrines viz. judicial approach and adherence to principles of natural justice are not grounds on which instant OP is predicated. This takes us whether the impugned award is vitiated by irrationality/perversity. As alluded to supra, the test for irrationality/perversity is the time honoured W*ednesbury principle of reasonableness*, which in simple terms means that the decision arrived at is so unreasonable that no reasonable person will arrive at such a conclusion on the basis of material before him. One more facet added to this by Hon'ble Supreme Court is that it should be so unreasonable that it shocks the conscience of the Court.

18.In the light of the narrative *supra*, this Court has no difficulty in coming to the conclusion that the view taken by AT is not only a possible view, but it is a plausible too. Therefore, this Court is unable to persuade itself to believe that the impugned award is hit by the vice of irrationality/ perversity. To be noted, as a general principle in a given case even if this Court has a different view, considering the contours and confines of Section 34 of A & C Act, it is impermissible to substitute the views of this Court as long as the impugned award is not hit by vice of irrationality/perversity.

19.The aforesaid thumbnail sketch of facts/narration will suffice as the impugned award has been tested by this Court by reminding itself that the Hon'ble Supreme Court in *Fiza Developers and Inter-Trade Private*

Limited Vs. AMCI (India) Private Limited reported in *(2009) 17 SCC 796* has held that Section 34 of A & C Act is a summary procedure and this principle has been reiterated by Hon'ble Supreme Court in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49 as a step in the right direction.

20.Owing to all that have been set out supra, instant OP fails and the same is dismissed. However, considering the nature of the matter, trajectory of the hearing and the submissions that were made before this Court, it is deemed appropriate to leave the parties to bear their respective costs.

25.03.2019

Index : Yes/No
Internet : Yes
gya

M.SUNDAR, J.

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