

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :06.02.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.82 of 2019

&

A.No.897 of 2019

M/s.Goodwill Wealth Management Pvt. Ltd

Represented by its

Head - Legal Mr.M.Sheik Sadique

New No.9, Masha Allah Building,

2nd Floor, Bheema Sena Garden Street,

Mylapore, Chennai - 600 004.

... Petitioner

vs.

Mrs. M.Amutha,

W/o. P. Mahalingam

Residing at No.36/3

Green Garden,

Thiruvalluvar Street,

Om Sakthi nagar, Kallikuppam,

Ambattur, Chennai - 600 053.

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, as amended in 2015, to set aside the award of Sole Arbitrator on the file of the National Stock Exchange of India in F & O/C-0010/2018 dated 04/01/2019.

For Petitioner

: Mr.G.Surya Narayanan

ORDER

2. Caption to the petition says it has been filed under Section 34 of the 'Arbitration and Conciliation Act, 1996' as amended in 2015 ('A & C Act' for brevity). The reference to amendment in 2015, is obviously a reference to amendments brought in by Act 3 of 2016, which came into force with retrospective effect on and from 23.10.2015.

3. Before proceeding further with this petition, it is necessary to set out that the salutary principle and sublime philosophy behind the scheme of A & C Act and the amendments made to A & C Act vide Act 3 of 2016 is 'minimum judicial intervention' in 'Alternate Dispute Resolution Mechanism' ('ADR Mechanism' for brevity). Section 34 in it's present form has to necessarily be applied in this backdrop.

4. Mr.G.Suryanarayanan, learned counsel for the petitioner is before this Court.

5. Before I advert to short facts, which are imperative for appreciating this order, it may be necessary to make it clear that learned counsel fairly submitted that the instant petition is under Section 34 (2)(b)(ii) Clauses (ii) and (iii) of Explanation 1 and Section 34 (2A). I deem it appropriate to extract both these provisions on which the protagonist of this petition has predicated his challenge to the award being an Arbitral

Award dated 04.01.2019 made by a Sole Arbitrator who is an Arbitrator under the bye laws, rules and regulations of the 'National Stock Exchange of India Limited' ('NSE' for brevity).

6. Section 34 (2)(b)(ii) and clauses (ii) and (iii) of Explanation 1 read as follows:

Section 34. Application for Setting aside arbitral award_(1).....

(2) An arbitral award may be set aside by the Court, only, if -

(a).....

(b) the Court finds that-

(i)

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1: For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i).....

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions or morality or justice.

7. Section 34 (2A) reads as follows:

'An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award'

8. To put it differently, learned counsel submits that the aforesaid award dated 04.01.2019, which shall hereinafter be referred to as 'impugned award' for the sake of convenience and clarity is being assailed in the instant petition on the grounds that it is in conflict with public policy of India and that it is vitiated by patent illegality appearing on the face of the award. Short facts necessary to appreciate this order are as follows.

9. Factual Matrix in a nutshell:

a) The respondent before me can be classified as a constituent qua NSE, who opted to trade *inter alia* in 'Futures and Options' (hereinafter referred to as 'F & O' for brevity).

b) The respondent was originally having a trade account with one Inditrade Capital Limited, the said company which is a trading member qua NSE did not provide exposure to F & O to the respondent, owing to which the respondent migrated from the said Inditrade Capital Limited to petitioner before me Goodwill Wealth Management Pvt. Ltd (hereinafter be referred to as 'GWMPL' for the sake of brevity).

c) It is not in dispute that an account which is referred to as Demat Account, which is for all practical purposes is D-Electronic Form of Holding Shares account, was opened with GWMPL.

d) In the course of trading, 5% per day on Margin short fall account was deducted from the respondent's account without notice, is respondent's primary complaint. This 5% per day deduction on the margin short fall account was deducted for the period from 04.07.2018 to 18.07.2018 totalling Rs.58,000/- (Rupees Fifty Eight Thousand only). To be noted, this Rs.58,000/- is net of taxes. If the taxes are also included, the quantum is Rs.69,347/-.

e) Claiming that such deduction of 5% margin short fall account without notice is illegal, respondent raised an arbitrable dispute.

f) It is not in dispute before me in this petition that there is a valid arbitration agreement between the parties. This valid arbitration agreement being an arbitration agreement within the meaning of Section 7 of A & C Act is traceable to Clause 24 captioned 'Dispute Resolution' in the application form/ agreement between the petitioner and the respondent. Clause 24 reads as follows:

'24. The client and the stock broker shall refer any claims and/or disputes with respect to deposits, margin money etc., to arbitration as per the Rules, Byelaws and

Regulations of the Exchanges where the trade is executed and circulars/notices issued thereunder as may be in force from time to time.

g) As mentioned supra, this arbitration itself is by a sole arbitrator under the bye laws, rules and regulations of NSE.

h) The arbitrator, entering upon reference, examined the documents and also the respondent's spouse.

i) After this, the arbitrator returned a conclusion vide impugned award to the effect that respondent should bear 50% of the aforesaid charges that have been deducted and debited from her account. Obviously the award means that the balance of 50% has to be absorbed by the petitioner. In other words, the finding returned vide the impugned award is to the effect that the constituent and trading member (respondent and petitioner herein respectively) should absorb the deduction in equal proportions.

j) Aggrieved, the instant petition under Section 34 of the A & C Act has been filed by GW MPL.

10. Having set out the factual matrix in a nutshell, it may be necessary to proceed with a short discussion as it unfurled in the hearing,

when this original petition moved by GW MPL was listed for admission before this Court.

11. As mentioned supra, Mr.G.Suryanarayanan, learned counsel very fairly submitted that the two pivotal grounds on which this petition is predicated are that the impugned award is in conflict with Public Policy of India and that it is vitiated by patent illegality appearing on the face of the award.

12. Furthering his submissions, in this direction, learned counsel submitted that there is one sheet anchor submission which is the basis for both grounds of attack. It is learned counsel's specific say that the amounts so deducted i.e., 5% margin short fall account for the period from 04.07.2018 to 18.07.2018 is not something which GW MPL appropriated, but is an amount payable to NSE. It was also pointed out that this has been made clear in the application/agreement between the petitioner and the respondent. Learned counsel submitted that arbitrator misdirected himself by proceeding as if the entire deduction is a sum of money which has been appropriated by GW MPL by completely losing sight of the fact that these are monies payable to NSE more in the nature of penalty for the margin short falls account. There is no difficulty or dispute in accepting the submission that these are monies payable to NSE and these are levies by NSE.

13. This takes us to the impugned award.

14. A perusal of the impugned award reveals that learned Arbitrator has applied his mind to the factual matrix, the documents placed before him as well as the statement/deposition of spouse of the respondent and has found that the respondent cannot be classified as a 'novice' in NSE trading. Though the respondent cannot be classified as a novice, learned Arbitrator has referred to RMS. Learned counsel for the petitioner submits that 'RMS' stands for 'Risk Management Service'. While on this, it is deemed appropriate to place on record that in arbitral awards when abbreviations, short forms and acronyms are used, it is desirable to have the expansion of the same at least at one point after which abbreviations, short forms and acronyms, if any, can be used.

15. A perusal of the impugned award reveals that several abbreviations such as 'RMS and "F & O' have been used, but the expansions have not been given anywhere. However, learned counsel for petitioner was fair enough to give the expansion for 'RMS' and submit that it is 'Risk Management Service'. There is a specific condition in the Risk Management Service and this condition in the Risk Management Service, in the reading of the learned Arbitrator, as it unfurls from the impugned award, does not make any distinction between online trading and off line conventional trading.

16. Before I proceed further, it may be necessary to extract the specific clause in the RMS policy. It reads as follows:

'In case of any margin shortfall/pay in default, margin calls are given to the client over the recorded phone line and information of shortfall/pay in default will be informed to the client to give required funds on T + 1 day for F &O. All the shortfall/pay in default positions will be squared off after getting confirmation from the client via recorded phone line.'

17. There is no dispute that such an RMS clause exists. A reading of the aforesaid RMS clause, reveals that GWMPL had a sanctus obligation to inform the respondent and squaring off, if any, should have been done after getting confirmation from the respondent by a recorded phone call. Undisputed facts as they emerge from the impugned award as well as the hearing before this Court reveals that no such phone call was made.

18. This takes us to the two grounds on which this challenge to the award is predicated.

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19. As far as the first ground i.e., being in conflict with public policy of India, post amendment to A & C Act on and with effect from 23.10.2015, public policy and what is public policy within the meaning of Section 34 is no longer *res integra* as the same has been explained by way of an explanation. Learned counsel as mentioned supra makes a specific

reference to Explanation 1, sub-clauses (ii) and (iii) therein. To be noted, sub-clauses (ii) and (iii) of Explanation 1 to Public Policy of India have been extracted and reproduced supra. In the considered opinion of this Court, what is of utmost relevance is Explanation 2, which reads as follows:

'Explanation 2: For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.'

20. A perusal of Explanation 2 reveals that a test as to whether there is any contravention qua the fundamental policy of Indian law shall not entail a review on the merits of the dispute. This is in tune with the salutary principle and sublime philosophy underlying the scheme of A & C Act and the amendment to the same on and with effect from 23.10.2015, which has been alluded to supra in the earlier part of this order by me. In other words, this petition is neither an appeal nor a revision. It is not even a review. It is a mere challenge to an award and there cannot be a review of the award on merits.

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21. Having said that, this Court is of the convinced view that the view taken by the Arbitrator with regard to 50% being absorbed by GW MPL for violation of aforesaid RMS is a plausible view which does not require any judicial intervention. This takes us to the second ground on which the protagonist of this petition pitched himself on i.e., Section 34

(2A) wherein it was canvassed that impugned award is vitiated by patent illegality appearing on the face of the award.

22. As mentioned supra, learned counsel submitted that the Arbitrator losing sight of the fact that GWMPPL has not appropriated the money and that money has already been paid to NSE has been lost sight is patent illegality appearing on the face of the award.

23. A close and careful consideration of the impugned award reveals that this is not a patent illegality. It is my considered opinion that a patent illegality on the face of the impugned award should be such that it shocks the judicial conscience of the Court. To be noted, this is based on /by drawing inspiration from Associate Builders principle laid down by Hon'ble Supreme Court in (2015) 3 SCC 49. I do not find any such patent illegality in the award. The proviso to Sub-Section 2A assumes significance. Proviso to Sub-section 2A reads as follows:

'PROVIDED that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.'

24. A perusal of proviso to Sub-Section 2A reveals that the impugned award cannot be set aside, merely on the ground that there is an erroneous application of law by re-appreciation of evidence. In the instant case, owing to the narrative supra, this Court is unable to persuade itself to

believe that there is an erroneous application of law. It is merely a reference to RMS and undisputed non-compliance with a Clause in the RMS. This takes us back to the pivotal and primordial submissions made by protagonist of this petition i.e., the learned Arbitrator losing sight of the fact that monies so deducted which is the subject matter of the claim is not one appropriated by GW MPL but are monies payable to NSE more in the nature of penalties. A careful perusal of the factual matrix as well as the impugned award reveals that it cannot be gainsaid that the learned Arbitrator has lost sight of this aspect. All that the learned Arbitrator has said is that the monies so deducted, though payable to NSE, shall be equally absorbed by GW MPL and the respondent. The reason given by/logic of learned arbitrator is that both are equally responsible for the state of affairs, which resulted in the deduction of 5% short fall in the margin alluded to supra.

25. According to learned Arbitrator, petitioner GW MPL is responsible owing to non-compliance with the aforesaid Clause in RMS and the respondent cannot be classified as some one completely ignorant, one because it was not clear to respondent in the application itself and two because respondent considering the kind of transaction she has made with the previous trading member i.e, Indtrade Capital Limited, which according to the learned Arbitrator is prolific, is not a novice qua NSE trade. There can be no dispute or disagreement that there is a condition in this regard in

the application, but that does not absorb GW MPL petitioner of its responsibility in terms of squaring off qua respondent by a recorded telephonic call as per specific Clause in this regard in RMS. Therefore, the learned Arbitrator has come to the conclusion that both parties to the contract are equally responsible for the state of affairs and therefore they have to absorb the penalty paid to NSE equally. It follows as a sequitur that the learned Arbitrator has not lost sight of the fact that the monies deducted are to be paid to NSE, but he has only said monies so deducted and payable/paid to NSE shall be equally absorbed by GW MPL and the respondent, namely the 'trading member' and the 'trading constituent' respectively as one can put it in NSE trade parlance.

26. In the light of the narrative supra, the dispositive reasoning of this Court for arriving at a conclusion in this petition is based on the principle laid down by Hon'ble Supreme Court in ***Fiza Developers & Inter-Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.*** reported in **(2009) 17 SCC 796**. ***Fiza Developers*** principle laid down by Hon'ble Supreme Court is to the effect that a petition under Section 34 of the A and C Act is a single issue summary procedure being a special remedy provided under a special enactment. ***Fiza Developers*** principle is also to the effect that being a special remedy provided under a special enactment which has to be dealt with expeditiously. This ***Fiza Developers*** principle has been reiterated by Supreme Court subsequently in ***Emkay Global Financial Services Limited Vs. Girdhar***

Sondhi reported in **(2018) 9 SCC 49**, wherein Hon'ble Supreme Court held that Fiza Developers principle is a step in the right direction and that petitions under section 34 of A and C Act are to be disposed of by way of summary procedure.

27. This Court has also borne in mind the observation made by Hon'ble Supreme Court in **State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti** reported in **(2018) 9 SCC 472**, wherein adherence to time limit specified under sub-section (6) of section 34 of A and C Act for disposal of section 34 petitions has been emphasised. To be precise, Hon'ble Supreme Court in **Bhumi Vikas Bank Samiti** case has opined that every endeavour shall be made to dispose of petitions under section 34 of A and C Act within the time limit specified under sub-section (6) of section 34, though **Bhumi Vikas Bank Samiti** is a case law and an authority for the proposition that sub-section (5) of section 34 of A and C Act is procedural and not mandatory. This Court has also borne in mind that this aspect of the matter referred to in **Bhumi Vikas Bank Samiti** by Hon'ble Supreme Court has been reiterated in **Emkay Global Financial Services Limited** also.

28. Be that as it may, when the above said narrative is tested in this petition under section 34 of A and C Act using the aforementioned principles as touchstone for such a test, it leads one to the inevitable decision that the impugned award is neither opposed to public policy nor vitiated by any patent illegality appearing on the face of the record. In other words, there

is absolutely no ground for judicial intervention qua impugned award.

29. Though obvious, this is only an order wherein and whereby this Court has refused judicial intervention qua the impugned award under Section 34 of A & C Act. In other words, if GWML or respondent are entitled to refund from NSE, this order will not come in the way and will not impede such a process. To be noted, though this legal position is obvious, this clarification is made at the request of Mr.G.Surya Narayanan, learned counsel for petitioner GWML. Considering the nature of submissions made before me, I refrain from imposing costs.

This Original Petition fails and the same is dismissed. No costs. Consequently, the connected application is also dismissed.

06.02.2019

gpa/mp

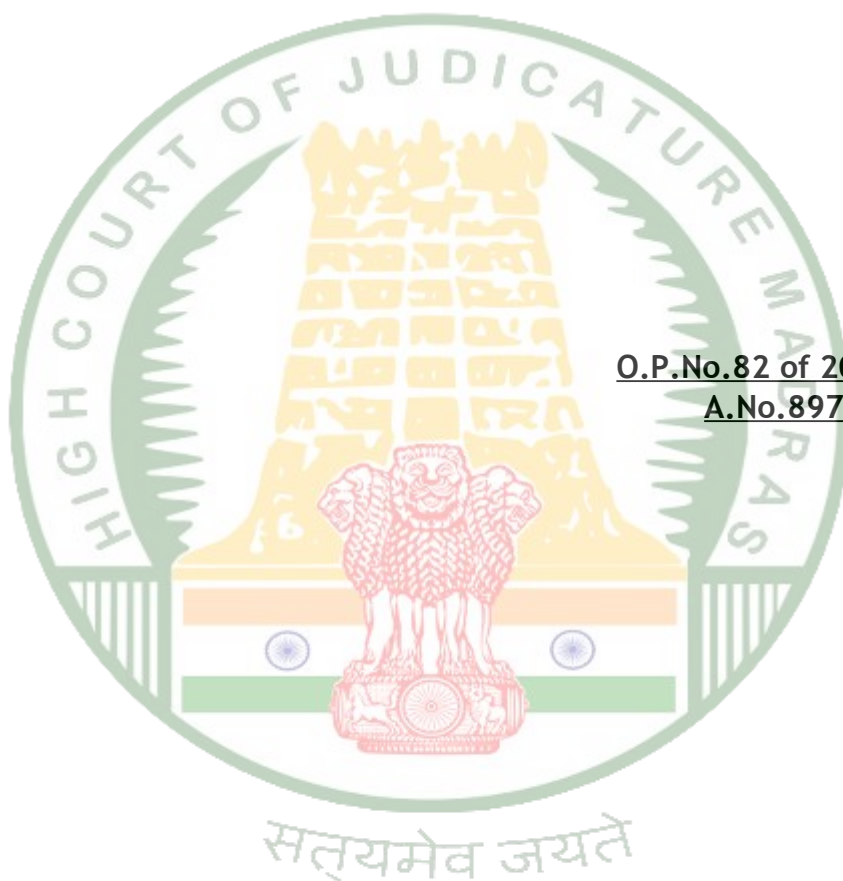
Speaking Order/Non-speaking order

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M.SUNDAR.J.,

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