THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
17~06~2019	25~06~2019

CORAM

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

O.P.No.445 of 2011

M.P.Philip
No.3/301, Green Land Estate
Health Camp, Gudalur - 643211
The Nilgiris. .. Petitioner

.Vs.

1. M/s. Bhas Securities Private Ltd.,(BSPL),
   at Vi/429, Sujana Complex Main Road,
   Sulthan Bathary, Kerala 673592.

2. Mr.V. Pauldas,B.A.,B.L., - Sole Arbitrator
   Arbitration Department,
   National Stock Exchange of India Ltd.,
   Second Floor, Ispabani Centre,
   Door No.123-124, Nungambakkam High Road,
   Chennai 600034.

3. The Appellate Panel of Mr.Justice Jagadeesan
   (Presiding Arbitrator),
   Arbitration Department,
   National Stock Exchange of India Ltd.,
   Second Floor, Ispabani Centre,
   Door No.123-124, Nungambakkam High Road,
   Chennai 600034.

4. Mr.Sridharan Krishnamoorthy (Arbitrator)
   Arbitration Department,
   National Stock Exchange of India Ltd.,
   Second Floor, Ispabani Centre,
   Door No.123-124, Nungambakkam High Road,
   Chennai 600034.

5. Mrs.P.S. Prema (Arbitrator)
   Arbitration Department,
   National Stock Exchange of India Ltd.,
   Second Floor, Ispabani Centre,
   Door No.123-124, Nungambakkam High Road,
   Chennai 600034. .. Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 r/w SEBI's Circular dated 11.08.2010 regarding Arbitration Mechanism in Stock Exchange praying to set aside the Order/Award dated 06.04.2011 in Appeal (A.M.)No.CM/C0038/2010 passed by the Appellate Panel of Arbitrators thereby setting aside the award of the sole arbitrator dated 03.12.2010 passed in Arbitration Matter (AM) No.CM/C/0038/2010 with costs.

For Petitioner : Mr. T. Srinivasaraghavan

For Respondents : Mr. B. Ramamoorthy
for M/s.M. Mohamed Hasain [for R1]

ORDER

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Order of the Appellate Tribunal, setting aside the Award passed by the sole Arbitrator appointed under the Bye Laws, Rules and Regulations of the National Stock Exchange of India Ltd.,

2. The brief facts necessary for the disposal of this petition is as follows:

2.(a) The Applicant is an investor registered with the First Respondent, which is a sub-broker of the Second Respondent affiliated to National Stock Exchange Ltd., The First Respondent during their period committed serious manipulations such as short-purchase of shares against firm order placed by the Applicant, doing intra-day trades in the account of the Applicant without his knowledge or authorisation, editing holding statements to suit their convenience and cover up the manipulations, creating false records to escape detection, making off-market transactions in the account of the Applicant and also sold the shares held by the Applicant without his authorisation and thereby caused huge monetary loss of about Rs.2,13,586/- to the

Applicant.

2(b) The Applicant had placed an order with the First Respondent for purchase of 500 shares on 22.7.2008. However, First respondent purchased only 435 shares, that too only on 31.7.2008, thereby short-purchased 65 shares of Reliance Power. This has caused a loss to the Applicant. The first Respondent is not authorised to collect cheques from the clients in its name and cheques should be collected in favour of Second Respondent. Due to short purchase and other illegalities the A has lost considerable amount. Hence the Applicant made a claim for Rs.4,28,586/-.

2.b It is the defence of the First Respondent before the Sole Arbitrator that the Applicant had done only five trades after First Respondent became direct member of NSE. During these years the Applicant has not complained either CSBL or to the First Respondent regarding DP OR trading operations. His first complaint was dated on 5.6.2009. This is also the date on which First Respondent convened a client meeting at Gudalur branch even though the client did not attend

attend the meeting. It is the further contention of the First Respondent that two of its staff members of Gudalure Branch viz., Mr.T.Pandiaraj, Branch Manager and Mr.AE Vipin, Dealer have been terminated from service for illegal and unauthorised activities. Editing of Trade bills and Holding Bills was on of the problems First Respondent faced. This is the work of the said staff members together with some clients and Applicant was a party to the collusion. It is further contended that the Applicant says that he has not done any intra day trades. On the contrary he has done several intra day trades and also promptly received all the contract notes. If the traders were not authorised by them, they should have complained either to CSBL or to First Respondent. The Applicant has not made any complaint either to CSBI or to the First Respondent.

3. It is the case of the Second Respondent that the Applicant was one of the clients introduced to second respondent by First respondent and registered as a client on 10.09.2005. Since the First respondent's application for voluntary surrender is processed the Applicant was ceased to be second respondent trading client and as per his own

admission he is registered as a client with first respondent who have obtained a membership of their own on NSE. Hence, it is the contention of the second respondent that they are not responsible for the loss caused to the Applicant.

4. The learned sole Arbitrator appointed under Bye Laws, Rules and Regulations of the National Stock Exchange of India Limited, framed the following three issues :

1. Whether the claim of the applicant is true and acceptable?

2. Whether the First Respondent is liable to pay the claim of the applicant and if so to what extent?

3. Whether the Second Respondent is liable to pay the claim of the applicant and if so to what extent?

5. The learned Arbitrator found that the first respondent has not denied each every transaction detailed by the Applicant and admitted that only the staff members of the first respondent viz., Mr.T.Pandiaraj, Branch Manager and Mr.AE Vipin, Dealer have been

terminated from service for illegal and unauthorised activities. Taking note of the admission and also the First Respondent letter to the second respondent admitting the misappropriation and misallocation by the staff members of the Gudalur Branch, the learned Arbitrator has finally held that the First Respondent was responsible for the loss caused to the Applicant and passed Award for a sum of Rs.2,13,586/- with interest at 18% per annum from the date of claim petition till its realisation from the first respondent. However, he rejected the claim of Rs.2,00,000/- for mental agony. Aggrieved over the same the appeal filed before the Appellate Arbitrator Panel consisting three members, constituted as per the bye law, rules and regulations of the National Stock Exchange of India Limited. The learned Appellate Panel has set aside the Award on the ground that the matter of dispute involves some element of fraud and manipulations and does not involve pure trade related disputes which can be considered under Arbitration mechanism. It relied upon the Judgment of the Honourable Supreme Court in ***N. Radhakrishanan v. Maestro Engineers [(2010) 1 SCC 72]*** to pass such an order, against which the present petition is filed.

6. Learned counsel appearing for the Petitioner submitted that Appellate Tribunal has failed to consider the factual aspects. The First Respondent has caused loss to the Applicant due to short purchase. There is specific admission by the First Respondent that the entire loss was due to some illegal transaction by the staff members. That being the position and holding that there is fraud involved in this dispute and it has to be decided only in the other forum is against very fundamental principal of law. Learned Arbitrator ought to have taken note of the fact that the loss caused due to the illegal transaction made by the staff members of the first respondent. The first respondent being the registered broker is certainly liable for the act done by his servants. Hence submitted that the Appellate Panel setting aside the award only on the ground that there is some element of fraud cannot be sustained under the law. It is his further contention that the alleged plea of fraud or forgery never raised during the Arbitral Proceedings. They raised the above plea of fraud or forgery only during the appeal. Therefore, when the objection has not taken before the learned Sole Arbitrator under Section 16 of the Act the

learned Appellate Panel ought not to have considered such plea raised before it. Hence submitted that the Award passed by the sole Arbitrator is well reasoned and based on the factual matrix and the same has to be restored by setting aside the Appellate Tribunal Order. In support of his contention he cited the judgment of the Honourable Apex Court in ***Ayyasamy v. Paramasivam [2017-2-L.W.169]***

7. Learned counsel appearing for the respondent would contend that the Appellate Tribunal has found that there is an element of fraud and forgery involved in between the parties. The above dispute is not arbitrable. Hence the Appellate Panel set aside the order. It is his contention that the allegation in the claim petition makes it very clear that bills have been fabricated and fraud has been committed by the staff members of the First Respondent. When there is serious allegation of fraud and forgery those disputes cannot be arbitrable. The Appellate Panel has considered the above position of law and rightly set aside the Award passed by the sole Arbitrator. Hence, submitted that the petition is liable to be dismissed. In support of his contention he placed reliance of the following judgments:

1.** N. Radhakrishanan v. Maestro Engineers & others **[(2010) 1 SCC 72]

2.** Ayyasamy v. Paramasivam & Others **[2016(10) SCC 386 = 2017-2-L.W.169]

8. Undisputed facts are the Applicant is the investor registered with the First Respondent. He is having office at Sulthan Bathery with SEBI Registration No.(NSE)-INB 231194235. The First Respondent is the sub-broker of the Second Respondent. It is the case of the Applicant that the First Respondent indulged intra-day trades in the account of Applicant without his knowledge and also short purchased shares despite orders placed on 22.07.2008 whereas lesser shares were purchased on 31.07.2008, which resulted in loss to the applicant and the shares also sold from his account without his knowledge and approval. The above irregularity in transaction was committed by the First Respondent. It is not disputed by the First Respondent that the Applicant is dealing with the First Respondent. It is admitted in the defence they had done only five trades after 1st Respondent became direct member of NSE. Further it is admitted by the First Respondent that two of the staff members were responsible for the editing of Trade bills and Holding Bills and those staff members also terminated.

Therefore, it is the contention that the Applicant has not complained the same to the CSBL or to the First Respondent immediately.

9. Learned Sole Arbitrator taking note of the specific admission of the First Respondent that the staff members of the First Respondent viz., T.Pandiaraj, AE.Vipin have been committed such Act, they have been terminated from the service for the illegal and unauthorised activities and held that the first respondent cannot escape simply shifting the blame on their staff members who are running Gudalore Branch and merely because the First Information Report registered against the above staff members same will not relieve the first respondent. It is to be noted that when short purchase has been established on facts and trading also done beyond the period which the Applicant has given a consent and it is clear misuse of the trust reposed and created by the first respondent who is the sub broker of the second respondent. When the person particularly involved in the trading in shares they should be more vigilant since investing in the share market is always risky. Sometimes it may lead to serious consequences. First Respondent had contract and trading on behalf of

the Applicant he ought to have taken steps. Merely because his staff committed some misappropriation and fabrication, the Applicant cannot be non-suited on the ground of fraud and forgery involved in the dispute.

10. Whatever the malpractices or fabrication of documents made by the staff members, First respondent being the employer certainly liable for the Act done by the staff. Therefore, merely he has lodged FIR against his staff, it cannot be said that there is fraud or forgery involved in the entire dispute between the parties. The short purchase alleged by the Applicant was not disputed. Similarly, the loss claimed by the applicant is also not in dispute. Such being the scenario, the learned Appellate Panel holding that FIR has lodged against the Appellant and proceeded the issue on the ground that each is blaming the other for fraud and forgery and both parties dispute the genuineness of various documents and held that there is an element of fraud, therefore, it is not arbitrable. The finding of the Appellate Panel in para 8 of the above judgment is misconception of fact. As already stated as noted by the Arbitrators loss and short purchase of shares is

not in dispute. Fabrication of documents by its own staff is also not in dispute. Therefore, the question of fraud or forgery between the Applicant and First Respondent does not arise at all. It is the First Respondent should have taken a care and protect the interest of the investors in the share marketing, but they have not done so. Therefore, this Court is of the view that the Appellate Tribunal view is contrary to the facts and cannot be sustained under law. Though the judgment in ***Radhakrishnan v. Maestro Engineers & Others reported in 2010 (1) SCC 72*** the Honourable Apex Court has held that when there is serious allegation of fraud and serious malpractice on the part of the respondent such dispute can be settled only in the Court by detailed evidence by either parties, it cannot be gone into by Arbitrator. The Appellate Panel has relied upon this judgement to set aside the Award passed by the sole Arbitrator.

11. It is to be noted that the above judgment of the Apex Court is also considered in the subsequent judgment in ***Ayyasamy v. Paramasivam & Others [2016(10) SCC 386 = 2017-2-L.W.169]*** wherein the Honourable Supreme Court held that mere allegation of

fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court and held that in Radhakrishnan case came in the back ground of serious allegation of fraud. Therefore, considering the nature of the allegation raised by the respondent for the first time that too before the Appellate Panel, this Court is of the view that the same has been made only to avoid the Arbitral Proceedings. Admittedly short purchase and loss were not disputed and fabrication of documents by the staff also not in dispute. Therefore the issue of the fraud between the Applicant and the First respondent does not arise at all in this case. Accordingly the well reasoned order of the sole Arbitrator is liable to be restored. Hence, the order of the Appellate Panel is set aside and the original award passed by the sole Arbitrator is restored.

12. In the result, the Original Petition is allowed. The findings of the Appellate Panel is set aside and the original Award passed by the sole Arbitrator is restored. No costs.

25.06.2019

Index : Yes / No
Internet: Yes
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To

M/s. Bhas Securities Private Ltd.,(BSPL),
at Vi/429, Sujana Complex Main Road,
Sulthan Bathary, Kerala 673592.

N. SATHISH KUMAR, J.
ggs

Pre-delivery order in:
O.P.No.445 of 2011

25.06.2019