IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26.08.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

<u>Original Petition No.494 of 2011</u>

Kotak Securities Limited,
1st Floor, Bakthavar,
No.229, Nariman Point,
Mumbai - 400 021.
Rep. by its Deputy Vice President
S.V.Shanth Kumar ... Petitioner

versus

1.R.Mahendran,
No.7/60/8, Kanimadam Road,
Arjugramam - 629 401.
Kanyakumari District,
Tamil Nadu.

2.PS.Prema,
Sole Arbitrator,
The Regional Arbitration Centre,
National Stock Exchange of India Limited,
2nd Floor, Ispahani Centre,
Door No.123-124, Nungambakkam High Road,
Nungambakkam,
Chennai - 600 034. ... Respondents

<u>PRAYER</u>: Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award dated 10.01.2011 passed by the second respondent / Sole Arbitrator.

For Petitioner : Mr.V.V.Sivakumar
For Respondent No.1 : Mr.P.Sunil
for Mr.T.Viswanatha Rao

ORDER

This Original Petition has been filed to challenge the award dated 10.01.2011 passed by the Sole Arbitrator.

2. The brief facts leading to file this Original Petition is as follows;

2.1. The first respondent was having a demat account and trading account with the Madurai Branch of the petitioner pursuant to KYC forms and agreements signed on 28.08.2008. In May 2009, he was transferred to Kanyakumari. It is submitted that the petitioner had sold the shares in this demat account during October-December 2009 without his consent and that he did not do any trading after his transfer to Kanyakumari and hence, he made a claim.

2.2. The petitioner denied all the allegations of the first respondent and stated that the first respondent has not furnished any breakup of the claim amount. It is his further contention that the first respondent had placed sale and buy orders for the disputed shares during October-December 2009 over phone and was fully aware of the transactions and hence, disputed the amount.

2.3. The learned Arbitrator has considered the factual aspects and observed as follows;

"6.1. The applicant has been trading with the respondent since September 2008. The pattern of transactions from that date till June 2009 (when he was transferred out of Madurai) indicates that volume of trades done in derivatives segment was very marginal, in hundreds and few in thousands, that too less than Rs.5000 per transaction. But during November and December 2009 the trades done run into thousands of rupees showing an unusual pattern. Further he was working in Kanyakkumari and has allegedly placed orders over phone. From the contract notes it is observed that the number of orders placed on certain days such as 4/11/2009 and 5/11/2009 are continuous from morning till mid afternoon, which would have required him to be constantly on phone. Being a working person, this seems to be impractical unless he was on leave during these two months. He has stated that he was not on leave during the period.

6.2. The respondent has stated that they have proof of dispatch of contract notes and the applicant has accepted receipt of SMSs and as he has not objected to the transactions with in a reasonable period, the trades are binding on him. The applicant has told that he had objected to the trades over phone and if voice recordings are made available, his averments would be substantiated. <u>The respondent has not denied availability of voice recordings but has stated that it is not mandated under SEBI guidelines and so they cannot be called for</u>. Many a time, voice recordings are submitted by the trading members to prove that orders were placed by the constituents over phone. Even though voice recordings are not mandatory, this particular stand of respondent leads one to infer that voice recordings of the applicant placing orders are not available as he did not place these orders and that it is inconvenient to produce voice recording where the objections raised by the applicant for the trades done would come to be known.

6.3. The respondent is taking shelter under the technical compliance of dispatching contract notes (mandated) and sending SMSs (which incidentally is also not mandated). The case could have been closed departmentally if it was that simple. A mere technical compliance cannot be used to shield some irregularity. In this case, the pattern of trades clearly indicates that the trades were not done by the applicant. Based on the circumstances of the case, I hold that the trades done during September December 2009 do not appear to have been done by the applicant and his claim is allowable.

6.4. As regards the claim amount, the applicant has stated that he has taken the market price as on 28/7/2010 to arrive at the claim amount; but he has not furnished any work sheet giving details of how the amount has been arrived at. The claim amount has therefore been reworked as Rs.4,84,319 on the basis of closing price of these shares as on 28/7/2010 as detailed hereunder:

Name of the company	*No. of shares*	*Closing price on 28/7/2010 (Rs.)*	*Value (Rs.)*
1.Ispat Industries	1500	17.85	26775
2.Reliance Industries (after bonus)	228	1021.25	232845
3.Reliance Natural Resources Ltd	1800	42.95	77310
4.GMR Industries	400	110.70	44280
5.Reliance Communications	120	186.25	22350
6.Infosys Equity	8	2832.10	22657
7.Tata Consultancy Services	68	854.45	58102
Total			484319

2.4. Aggrieved over the same, the present Petition has been filed.

3. The main contention of the learned counsel for the petitioner that though there is an alternative remedy in filing an appeal before the learned Arbitrator having regard to the pendency of the case for more than 5 years, the alternative remedy will not be a bar before this Court to dispose of the appeal. It is his further contention that the petitioner has not given an opportunity to cross examine the witness and hence, the award is liable to be set aside.

4. Whereas the learned counsel for the first respondent submitted that the entire amount has been paid to the first respondent by NSE. It is his further contention that the byelaws itself provides to file an appeal before 3 member Arbitrators and hence, the Petition under Section 34 of the Act is maintainable only before the 3 member Arbitrators. Hence, submitted that the present Petition is not maintainable before this Court.

5. In the light of the above submissions, I am of the view that the learned Arbitrator's reasoning is well founded and the learned Arbitrator has arrived at such findings and passed an award based on the facts. Therefore, this Court cannot sit as an Appellate Court to re-appreciate the entire facts recorded by the learned Arbitrator. It is also to be noted under Chapter 19 of the byelaws, which reads as follows;

> "(19) (a) A party aggrieved by an Arbitral Award may appeal to the Appellate Arbitrator against Arbitral Award within one month from the date of receipt of Arbitral Award and in such manner as prescribed by the Relevant Authority from time to time notwithstanding the provisions contained under Byelaw 3.
>
> (b) The Appellate Arbitrator shall consist of

three arbitrators who shall be different from the ones who passed the Arbitral Award appealed against and such Appellate Arbitrators shall dispose of the appeal by way of issue of an Appellate Arbitral Award within three months from the date of appointment of the Appellate Arbitrator.

(c) A party aggrieved by the Appellate Arbitral Award may file an application in accordance with Section 34 of the Act before the court of competent jurisdiction nearest to the address provided by Constituent in the KYC form or as per the change in address communicated thereafter by the Constituent to the trading member.

(d) The above provisions of Byelaws 1 to 18 shall be applicable to Appellate Arbitration."

6. It makes it clear that a party aggrieved by the arbitral award may appeal to the Appellate Arbitrator against the arbitral award, which consists of 3 members Arbitrators and a party aggrieved by the Appellate Arbitral Award may file an application in accordance with Section 34 of the Act but that has not been done so in this Petition.

7. Hence, the appeal ought to have been filed before this Court, at any event even assuming that an alternative remedy is not a bar to decide the issue, the Petition under Section 34 of the Act as indicated above, the learned Arbitrator was factually recorded the findings after analysing the entire aspects.

8. I do not find any infirmity in the award of the learned Arbitrator. Hence, the Petition filed by the petitioner is liable to be dismissed. Accordingly, the Original Petition stands dismissed. However, there is no order as to costs.

26.08.2019

Speaking Order/Non Speaking Order
Index : Yes / No
Internet : Yes

sri

N.SATHISH KUMAR, J.,

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