IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **06.03.2019**

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P. No.313 of 2018
and A.No.2965 of 2018

M/s. Goodwill Comtrades Pvt., Ltd.,
A Company incorporated under the Companies Act,
No.9, 2nd Floor, Masha Allah Bui,ding,
Bheema Sena Garden Street, Mylapore,
Chennai – 600 004, Represented by its
Head -Legal,
Mr.M.Sheik Sadique .. Petitioner

vs.

Ms.Divya Theertha,
Residing at
No.17D, Chandna Residency, 1st Cross,
18th Main Road, Munireddy Layout,
Chikkala, Sandra,
Bangalore – 560 061. ... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Arbitration award dated 22.03.2018 in Arbitration Matter No. MCX/ARB/49184A/17 passed by the Sole Arbitrator Mr.V.Paul Das, on the file of the Multi Commodity exchange Limited.

For Petitioner : Mr.G.Surya Narayanan

ORDER

There is a sole petitioner and a sole respondent in the instant 'Original Petition' (hereinafter 'OP' for brevity).

2. Instant OP has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an arbitral award dated 22.03.2018 made by an Arbitral Tribunal constituted by a sole arbitrator. This 'arbitral award dated 22.03.2018', which is being assailed in the instant OP, shall hereinafter be referred to as 'impugned arbitral award' for the sake of convenience and clarity.

3. Before I proceed further, it is necessary to set out that recourse against an Arbitral award, as provided for in Section 34 which falls under Chapter VII of the A & C Act uses the description 'application' with regard to recourse against an arbitral award. To be precise, Caption to Section 34 reads as follows:

'*34. Application for setting aside arbitral award.*'

4. However, whenever a party takes recourse against arbitral awards, Registry in this Court is assigning the nomenclature 'Original Petition',

therefore, I am referring to the instant proceedings as 'OP' for the sake of convenience and clarity, though it is under Section 34 of A & C Act.

5. The entire lis pertains to 'Multi Commodity Exchange of India Limited' ('MCX' for brevity). It is not in dispute that bylaws made by MCX have been approved by the 'Securities and Exchange Board of India' ('SEBI' for brevity) in exercise of powers conferred under Section 9 of Securities Contracts (Regulation) Act, 1956.

6. It is also not in dispute before me that aforesaid bylaws of MCX will govern the instant case. It is also not in dispute that Clause 15 of aforesaid bylaws captioned 'ARBITRATION' deals with dispute resolution and Clause 15.4 captioned 'Reference to Arbitration' will apply.

7. In the light of the nature of challenge made before me, I deem it appropriate to extract Clause 15.4, which reads as follows:

> *' 15.4.**Reference to Arbitration**: All claims, differences or disputes between the members inter se or between a member and a constituent member or between a member and a registered non-member client or arising out of or in relation to trades, contracts and transactions executed on the Exchange and made subject to the Bye-Laws, Rules and Regulations of the Exchange or with reference*

to anything incidental thereto or in pursuance thereof or relating to their validity, construction, interpretation or fulfillment and/or the rights, obligations and liabilities of the parties thereto and including any question of whether such trades, contracts and transactions have been entered into or not shall be submitted to arbitration in accordance with the provisions of these Byelaws and Regulations that may be in force from time to time.

Provided these Bye-Laws shall not in any way affect the jurisdiction of the Exchange on the clearing member through whom such a member has dealt with or traded in regard thereto and such clearing member shall continue to remain responsible, accountable and liable to the Exchange in this behalf.

8. In a nutshell, the respondent before me who is an individual, opened a trading account with the petitioner before me namely 'Goodwill Comtrades Private Limited' (hereinafter 'GCPL' for brevity). It is also not in dispute before me that GCPL is a broker/member qua MCX.

9. Respondent before me, is therefore, a client qua GCPL and a constituent qua MCX.

10. It is the case of the respondent before me (claimant before the 'Arbitral Tribunal' which shall hereinafter be referred to as 'AT' for brevity) that she opened a trading account with GCPL in Malleshwaram Branch of GCPL in

Bangalore in early 2016. The pay-in margin of Rs.1,35,000/- lakhs in the month of August 2016 through Corporate Website Gateway was made, is respondent's say (as can be culled out from the impugned arbitral award). It is the case of the respondent before me that she observed unauthorized trading had taken place some time in August, 2016 without her knowledge or consent. While, pulling out the daily and monthly contract reports and messages, respondent came to know about the unauthorized trading and she brought it to the notice of GCPL and followed it up with the Branch Manager, Regional Branch Manager and Zonal Head. It is respondent's further case that there was no response and therefore, the respondent met the Managing Director of GCPL.

11. It is also respondent's specific case that GCPL has received investments in the name of 'Portfolio Management Services' ('PMS'). The pay-in margin details as can be culled out from the respondent's claim petition before AT reads as follows:

Pay-in Margin as follows:

Axis Bank Saving A/c: 916010010265690	***Total***
9/Aug:100000, 9/Aug:35000,	*1,35,000*

12. Alleging that one Mr.Venugopal Reddy, Senior Branch Manager of

GCPL, Malleshwaram Branch had transferred funds to the tune of Rs.90 lakhs from his personal bank account to more than 69 trading accounts of GCPL as well as several individuals in GCPL, respondent before me invoked the aforesaid arbitration clause of MCX and went before AT claiming a sum of Rs.1,35,000/-.

13. To be noted, respondent's case set out supra is, as can be culled out from the claim petition (respondent was claimant before AT), impugned arbitral award and case file placed before me.

14. GCPL, which was sole respondent before AT, entered appearance and resisted the claim on the grounds that respondent before AT had independent transaction with Mr.Venugopal Reddy, that the arrangement with GCPL was not PMS, but a private contract with Venugopal Reddy, that there is an Electronic-Mail from the respondent, wherein respondent had acknowledged that there is a debt, that there was no unauthorized trade and if that had been so, the respondent would not have paid monies.

15. GCPL made a claim of Rs.3 lakhs towards costs which is in the nature of a counter claim.

16. AT, conducted an enquiry and a perusal of the impugned arbitral award reveals that the respondent before me, as claimant, attended the enquiry. GCPL was represented by Mr.Ravi Ramiah, Mr.M.Shardel Shah, Mr.Chinndurai and Mr.Prabhakar Sivaraman armed with an authorization letter. There was oral hearings and arguments were heard. Further perusal of the impugned arbitral award reveals that parties have also produced documents in support of their respective stated positions, though the same have not been marked as exhibits.

17. After such enquiry, AT passed the impugned arbitral award acceding to a part of the respondent's claim. As mentioned supra, respondent, as claimant before AT, made a claim of Rs.1,35,000/-, but AT has acceded to the claim in part and awarded Rs.67,500/- with interest.

18. A perusal of the impugned arbitral award reveals that AT has chosen to accede to only a part of the respondent's claim, as the respondent has approached the AT after one year and five months. While, the alleged unauthorized transaction has taken place in August of 2016, the claim petition has been made only in January of 2018 and therefore, on this basis, AT has held that GCPL and the respondent before me have to share the loss equally.

19. Mr.G.Surya Narayanan, learned counsel on record for petitioner GCPL before me made submissions, which can broadly be summarized as follows:

a) It is not a PMS, but a private contract between the respondent and Venugopal Reddy.

b) The allegation of respondent before me (claimant before AT) is in the nature of fraud and it is impermissible for AT to go into such aspects.

c) AT has completely ignored and considered communications from the respondent before me wherein according to the learned counsel the respondent has acknowledged existence of debt, though this was placed before AT.

20. On the aforesaid three pronged attack, learned counsel submitted that this three pronged attack would snugly fit into Section 34(2)(a)(iv) and 34(2)(b)(ii) read with sub-clauses (ii) and (iii) of Explanation 1 therein.

21. I perused the case file placed before me, the impugned arbitral award and considered the submissions made by learned counsel for petitioner.

22. With regard to the first ground, on which the impugned arbitral award is assailed i.e., that it is not a PMS, but a private contract between the respondent before me and one Mr.Venugopal Reddy, it is not in dispute that Mr.Venugopal Reddy was the Branch Manager of Malleshwaram Branch of GCPL. In this backdrop, AT, after considering the submissions and the documents placed before it, has come to the conclusion that GCPL cannot take a plea that they are not responsible for the individual irregularities committed by their employee, who was introduced to their clients as a single point of contact and as such, they are vicariously liable for all the irregularities committed by their employee. Relevant portion as articulated in the impugned arbitral award reads as follows:

> *'....The respondent cannot take a plea that they are not responsible for the individual irregularities committed by their employees as he was introduced to their clients as a single point of contact and as such, they are vicariously liable for all the irregularities committed by their employees....'*

23. Thereafter AT has opined that all the trades of the respondent before me and others were done by GCPL through their employee Mr.Venugopal Reddy only through PMS. This articulation in the impugned arbitral award reads as follows:

> *'.......So I am of the considered opinion that all the trades*

of the applicant and others were done by the respondent through their employee Mr.Venugopal Reddy only through PMS.....'

24. Even before me, it is not in dispute that Mr.Venugopal Reddy was the Branch Manager of GCPL in its Malleswaram Branch in Bangalore. Technically if GCPL is a broker/member qua MCX, Venugopal Reddy is a sub-broker. Under these circumstances, I find that there is no ground to interfere with the impugned arbitral award with regard to the aforesaid findings returned by AT particularly, as there cannot be any review on merits of the dispute and there cannot be any re-appreciation of evidence.

25. There should be patent illegality and it should be so patent that it should appear on the face of the award and patent illegality should be such that it vitiates the impugned arbitral award. In my considered opinion, an illegality on the face of the award is something which can be seen/detected without resorting to an inferential process. In this view of the matter, I do not find this ground convincing enough to call for judicial intervention qua impugned arbitral award under Section 34 of A & C Act.

26. While on this, I deem it appropriate to deal with the third ground in three pronged challenge to the impugned arbitral award. The plea that AT has failed to look into communications, does not carry GCPL any further in the

instant petition under Section 34, as these are all in the realm of AT owing to the peculiar factual matrix of this case. Once AT has come to the conclusion that GCPL is liable, albeit, vicariously for the activities of its employee/Branch Manager of Malleswaram Branch, who is technically a sub-broker, this pales into insignificance. I am unable to persuade myself that this can be a ground calling for judicial intervention qua impugned arbitral award under Section 34 of A & C Act.

27. With regard to the allegation of fraud, learned counsel for petitioner pressed into service two case laws. One is Gandhi Industrial Corporation case reported in **2007 13 SCC 236 [The Security Printing and Minting Corporation of India Limited vs. Gandhi Industrial Corporation]** and the other is N.Radhakrishnan's case reported in **(2010) 1 SCC 72 [N.Radhakrishnan vs. Maestro Engineers and Ors.]**.

28. Gandhi Industrial Corporation case was pressed into service for the principle that if the Court finds that impugned arbitral award is perverse, it is not powerless to interfere with the matter.

29. There is no difficulty with the proposition that if an arbitral award is perverse or it is vitiated by patent illegality on the face of it, this Court is

not powerless as long as the challenge to the award is within the contours and confines of Section 34 of A & C Act. However, Gandhi Industrial Corporation case is completely different on facts. A perusal of facts in Gandhi Industrial Corporation case reveals that it is a case where the Arbitrator therein had resorted to a clause in the tender and came to a conclusion regarding fiscal liability when tender itself had fructified into a contract. Hon'ble Supreme Court held that once a tender has fructified into a contract, the arbitrator cannot go back to some clauses in the tender to interpret the covenants between the parties particularly when there is no consensus between the parties or no other material/documentation to show that tender clauses will still apply. This clearly comes out in paragraph 8 of the order of Hon'ble Supreme Court and the relevant portion in paragraph 8 reads as follows:

> *'8. ....The view taken by the Arbitrator that since it was not the condition when the tender was floated is not correct as after the complete contract having come into existence, there is no purpose to refer to the terms of tender. What is binding is the completed contract and not the terms of offer of the advertisement. Whatever may be the offers in the advertisement, once the completed contract has come into existence, this is binding..........'*

30. With regard to N.Radhkrishnan's case, it arises out of a petition under Section 8 of A & C Act and that was a case where the Court found it

appropriate to have the mater heard out by a Civil Court as complicated questions of fact and law were considered to arise in the same.

31. In the instant case, there are no such complications. GCPL's case is that the action of Venugopal Reddy are independent of GCPL and it cannot bind GCPL though he was the Branch Manager of Malleswaram Branch of GCPL in Bangalore and though he was the sole point of contact for clients of GCPL who are in effect constituents qua MCX. Therefore, N.Radhakrishnan's case also does not advance the case of the petitioner in the instant case as the facts are completely different.

32. In my considered opinion, Section 34 of A & C Act is a delicate and fine legal balance between sacrosanct finality of arbitral awards and sanctity of judicial review. While, finality of arbitral awards is no doubt, sacrosanct judicial review also has its own sanctity attached to the scheme of legal proceedings and Section 34 of A & C Act is a delicate and fine legal balance between the two.

33. Therefore, in the light of 'Alternate Dispute Resolution Mechanism' ('ADR Mechanism' for brevity), I am of the considered opinion that Section 34 is clearly a delicate legal balance between the finality of arbitral awards which is

sacrosanct and judicial review which is sanctus. Therefore a challenge to an arbitral award under Section 34 of A & C Act has to necessarily perambulate within the contours and confines of Section 34 of A & C Act.

34. With regard to the aforesaid three pronged attack to impugned arbitral award, in the light of this court sustaining the finding that GCPL is vicariously liable and GCPL cannot wash its hands off after holding that Venugopal Reddy is the single point of contact for its Malleshwaran Branch, second ground of attack touching upon fraud stands doused. With regard to third ground of attack pertaining to not considering an electronic mail, AT is the best judge of the quantity and quality of evidence before it and the issue turns on a slightly different compass in the light of the factual matrix of this case, alluded to supra, owing to which there may be no impact qua aforementioned communications.

35. The three pronged attack fits into two legal provisions as alluded to supra and the two legal provisions are, Sections 34(2)(a)(iv) and 34(2)(b)(ii) read with clauses (ii) and (iii) of Explanation 1 therein. These provisions translate into saying that (a) impugned arbitral award contains decisions on matters beyond the scope of submission to it and (b) it is in conflict with public policy of India owing to being in contravention with fundamental policy of

Indian law besides being in conflict with most basic notions of morality or justice. This is culled out on the basis of submissions made before this Court.

36. With regard to Section 34(2)(a)(iv), i.e., containing decisions on matters beyond the scope of submission to it, in the light of the vicarious liability finding, Section 34(2)(a)(iv) ground campaign comes to an end. With regard to fundamental policy of Indian law and most basic notions of morality or justice, as laid down in ***ONGC Ltd. v. Western Geco International Ltd.***, reported in ***(2014) 9 SCC 263***, the three distinct juristic principles in this regard are, judicial approach, principles of natural justice and irrationality / perversity. While for the first principle, the test is fidelity of judicial approach, second does not arise in the instant case and for the third, the test is Wednesbury principle of reasonableness. As in the reading of this Court, impugned arbitral award gives cogent reasons, there is fidelity of judicial approach. Likewise in the considered opinion of this Court, it is certainly not a decision which no reasonable person would arrive at on the basis of facts and material before him (Wednesbury principle of reasonableness test). To be noted, this conflict with public policy of India ground and the test qua the same has been applied keeping in mind that the same does not entail a review on merits of the dispute.

37. In the instant case, I am unable to persuade myself to believe that the petitioner has made out a case within the contours of Section 34 of A & C Act calling for judicial intervention qua impugned arbitral award under Section 34 of A & C Act.

38. In the light of all that have been set out supra, the instant OP fails and the same is dismissed. However, considering the nature of the submissions made and considering the fact that the respondent has not chosen to enter appearance and contest this OP, I deem it appropriate to say that there will be no costs. Consequently, connected miscellaneous petition is closed.

06.03.2019

vsm/mp

Speaking Order

Index : Yes/No
Internet: Yes

M.SUNDAR. J.,

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