

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 01.08.2019

DATED: 09.08.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

O.S.A.No. 369 of 2018

Mrs. Uma

... Appellant

Vs.

1. M/s. Apollo Sindhoori
Capital Investments Limited, Ali Towers
Rep. by L.R.Murali Krishnan
No.55, Greams Road,
Chennai - 600 006.

2. Mr.M.V.Badrinath
Sole Arbitrator
National Stock Exchange of India Limited.,
2nd Floor, Ispahani Centre, Door No. 123-124,
Nungambakkam High Road,
Chennai - 600 034.

... Respondents

Original Side Appeal filed under Order XXXVI Rule 9 of Original Side Rules and Section 37 of Arbitration and Conciliation Act 1996 read with Clause 15 of Letters Patent against the Order/Decree dated 24.10.2017 made in O.P.No. 299 of 2009 on the file of this Court.

For Appellant : Ms. Tanya Kapoor

For 1st Respondent: Mr. Krishna Srinivas

for M/s. Ramasubramaniam Associates

J U D G M E N T

(Delivered by C.V.KARTHIKEYAN, J)

The first respondent in O.P.No. 299 of 2009 aggrieved by the order of the learned Single Judge dated 24.10.2017 allowing the said Original Petition and setting aside the award passed by the Arbitrator is before us in this Court in this Original Side Appeal filed under Clause 15 of the Letters Patent.

2. The first respondent herein, M/s. Apollo Sindhoori Capital Investments Ltd., had originally preferred a claim petition seeking resolution through arbitration of their dispute with the appellant as covenanted in the agreement dated 20.12.2005. The first respondent was incorporated under the Companies Act 1956 and was a member of the National Stock Exchange of India Limited. They are registered as a Trading Member in the Capital Market Segment and also as a Trading Member on the Derivatives Market Segment of National Stock Exchange of India Limited with SEBI . They had entered into an agreement with the appellant herein, who was termed as a Constituent and who was desirous of investing/trading in securities/contracts/other and such instruments. The agreement also provided for dealing with various segments of the stock exchange in shares/financial instruments after satisfying the genuineness and the financial soundness of both the parties. This agreement dated 20.12.2005 also contained an Arbitration clause and the said clause covenanted that any dispute or difference relating to trading on the exchange would be resolved by Arbitration in accordance with the Bye Laws, Rules and Regulations of the National Stock Exchange. Parties were specifically prohibited from taking recourse to any other legal avenue. It was covenanted that the site of Arbitration shall be Chennai City.

3. Disputes arose between the parties. An electronic mail was sent by the appellant to the first respondent on 13.03.2008 wherein she claimed that the first respondent had debited huge amounts on various dates between December 2007 and January 2008. She had specifically disclaimed knowledge of the specified transactions and also categorically stated that the transactions did not pertain to her. She also specifically mentioned that the credits made against cheques were fake and artificial credits were also made. She specifically denied confirming the balance and specifically sought rectification of wrong debits and credits in her account. The first respondent replied by stating that the transactions were effected only after receiving confirmation messages and that the Daily Contract Note was also forwarded to the E-mail ID of the appellant on daily basis. The first respondent further claimed that in the course of the transactions the appellant had incurred a debit balance of Rs.1,00,455.51/- which according to the first respondent had arisen as a result of selling and buying of shares/derivatives. The first respondent claimed that the appellant had failed to make necessary payment to clear the said debit.

4. The first respondent invoked Clause 30 of the Member Constituent Agreement read with the Bye-Laws and Regulations of the National Stock Exchange and sought a reference to adjudicate the claims through Arbitration. An Arbitrator was also

appointed. The appellant issued a reply to the claim and requested the Arbitrator to direct the first respondent to rectify the unauthorised debits. In the reply, she had specifically pointed out to six transactions and claimed that they had been done without a specific authorisation. The details are as under:-

"1. Cheque No. 219200 credited on 18.12.2007 with Rs.55,000.00 is a fake entry. This cheque is not issued by me. Copy of the statement of transactions is enclosed.

2. Purchase of one lot of Aptech on 15.01.2008 (trade No. 00385491) not authorised by me.

3. Credit of Rs.70,000 by cheque number 219201 on 17.01.2008 is fake. This cheque is not at all issued by me to M/s. Apollo Sindhoori Capital Investment Limited.,

4. Credit of Rs.50,000.00 by cheque number 219199 on 09.01.2008 is a fake entry.

5. Purchase of one lot of Reliance Ind. Limited., on 18.01.2008 (trade No. 00284723) is not authorised by me.

6. Purchase of two lots of GMR Infrastructure on 04.01.2008 (trade No. 0267102 & 0589622) is not authorised by me."

5. A rejoinder had been filed in the arbitration proceedings denying the statements made in the counter affidavit. It was specifically stated that no complaint as mentioned by the appellant had been received by the Office of the first respondent. Explanations were also given for the points raised by the appellant herein.

6. A reply to this was also given by the appellant herein on 26.12.2008.

7. The learned Arbitrator then invited the parties to respond to the notice for arbitration and heard the rival submission. He then passed an award on 27.02.2009. In the award, the claim of the first respondent was dismissed. The first respondent was further directed to pay to the appellant herein a sum of Rs.2,11,410.00/- being the loss in authorised

trades. A further direction was issued to pay compensation of Rs.50,000/- towards market to market loss and mental tension owing to the acts of first respondent. The details of unauthorised trade by the first respondent in the name of the appellant had also been given.

8. This award came to be challenged under Section 34 of the Arbitration and Conciliation Act 1996 by the first respondent herein. It was primarily contended that the appellant herein who was the respondent before the Arbitral Tribunal had not raised any counter claim but still the learned Arbitrator had granted a money decree in her favour.

9. The learned Single Judge, who examined the rival contentions, set aside the award by order dated 24.10.2017 and allowed the Original Petition filed under Section 34 of the Act. The reasoning of the learned Single Judge is extracted below for ready reference:-

"12. Rejecting the claim of the petitioner is one thing and awarding a counter claim is another. Even assuming there exists a counter claim, though it is nobody's case, it is for the respondent to substantiate it. After having given findings in favour of the petitioner, the learned Arbitrator proceeded to give an award contrary to the basic principle of law. The statement of account given only by the first respondent coupled with the transaction having been made the award ought not to have been passed merely based upon surmise and inference.

13. The learned Arbitrator in the considered view of this Court was prejudiced towards the petitioner. Therefore, he took into consideration of the earlier complaint, which was only available in his personal knowledge. There is no finding that it was not the trade practice to make a debit/credit based upon an assurance of a payment through the cheque though not physically given. There is plausible explanation for the payment made subsequently. The E-mail was sent only on 13.08.2008. There is no specific finding with respect to the other two cheques. A finding was also given by the learned Arbitrator on the contract note register with a specific reference to seven trades, which include trades of higher value. This was not disputed

by the first respondent. In fact, there is no serious challenge to the contract note and the E-log. Though one cheque was not presented but debited, the same logic was adopted for other two cheques without any basis.

14. Thus from the above, this Court is of the view that it is a case where the learned Arbitrator has exceeded his jurisdiction in granting award in favour of the first respondent, though not asked for, based upon irrelevant materials. Thus, this case would certainly come under the purview of Section 34 of the Arbitration and Conciliation Act, 1996. Accordingly, the original petition stands allowed and the award passed by the Arbitrator stands set aside. No costs."

10. Heard arguments advanced by Ms. Tanya Kapoor, learned counsel for the appellant and Mr. Krishna Srinivas, for M/s. Ramasubramaniam Associates, learned counsel for the first respondent.

11. The learned counsel for the appellant reiterated the allegation that fictitious transactions had taken place in her account without due authorisation and that the arbitrator was well within his rights to render a finding with relation to the nature of the transactions complained about and to finally hold that monies were payable by the first respondent to the appellant. The arbitrator had termed it as a counter claim basing the same on the averments in the counter of the first respondent herein. The learned counsel stated that the order of the learned Single Judge required interference, and if permitted to stand, it would only encourage further dubious transactions in the trading of shares and derivatives without due authorisation from the constituents.

12. On the other hand, Mr. Krishna Srinivas, learned counsel for the first respondent stated that the learned Single Judge had correctly set aside the award, since, the appellant herein had not raised any counter claim. It was specifically pointed out by the learned counsel that in the absence of any counter claim being raised, the arbitrator had exceeded his jurisdiction by examining extraneous matters and in arriving at a conclusion that it was the first respondent, who has to compensate the appellant herein. The learned counsel insisted that the order of the learned Single Judge required no interference.

13. We have carefully considered the arguments advanced.

14. We are of the considered view that even though the scope of Section 34 of the Arbitration and Conciliation Act is very narrow and the said proceedings cannot be treated as an appellate proceeding against the award of the arbitrator and even though, the further proceedings by way of an Appeal under Section 37 also is limited in scope to re-examine or re-appreciate facts already decided by the arbitrator, still when fraud in transactions are alleged, then every Court of law has to re-examine the decision making process to rule out interplay of fraud.

15. The learned Single Judge had specifically held that awarding counter claim by the Arbitrator was contrary to the basic principles of law and even if there had been a counter claim, the appellant herein should have proved it. He also held that the award was passed based on surmises and inferences and also by taking into consideration an earlier complaint which was only available to the personal knowledge of the arbitrator. It was also specifically found that the arbitrator had exceeded his jurisdiction. It was finally held that the case would come under purview of Section 34 of the Arbitration and Conciliation Act 1996.

16. We are also conscious of the fact that re-examination of evidence as appreciated by the Arbitrator or by the learned Single Judge would be highly inappropriate while dealing with an Appeal under Section 37 of the Act. The scope of interference with the award under Section 34 is very narrow and confined within the principles enunciated under Section 34 of the Act. The further scope of interfering with considered findings under Section 34 in an appeal under Section 37 is still narrower. But we are of the firm opinion this does not prevent us from examining the genesis of the dispute to determine whether fraud had been played during the course of the transactions in dealing with shares and if that is established, then certainly fraud prevails over every other aspect and a finding would have to be given on that issue when it is raised.

17. In the instant case, the appellant, termed as a Constituent and the first respondent, termed as a Member had entered into an agreement on 20.12.2005. This agreement was in relation to trading in shares and derivatives in the stock exchange. Naturally the agreement and transactions between the two parties were based on trust and on good faith. Breach of the same should be examined when pointed out at any stage in any proceedings even in an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996. Moreover the clause in

the agreement relating to reference of disputes to Arbitration very specifically state that the arbitration would be conducted in accordance with the Bye Laws, Rules and Regulations of the National Stock Exchange.

18. The Bye Laws of the National Stock Exchange in Chapter -II deals with arbitration generally and the procedure to be adopted in specific terms. The reference to arbitration inter alia shall deal with the following disputes:-

"Reference to Arbitration

(1) All claims, differences or disputes between the Trading Members inter se and between Trading Members and Constituents arising out of or in relation to dealings, contracts and transactions 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, fulfilment or the rights, obligations and liabilities of the parties thereto and including any question of whether such dealings, transactions and contracts have been entered into shall be submitted to arbitration in accordance with the provisions of these Byelaws and Regulations. The Exchange shall be entitled to facilitate arbitration for such disputes and parties as mentioned in the provisions of Byelaw 1, including the arbitration reference filed by Trading Member against the directions or order of the Investor Grievance Redressal Panel (IGRP), by adopting such procedures as may be prescribed by it under this Chapter."

19. It is therefore seen that the scope of the Arbitral Tribunal is not merely restricted to examining the claim made by the Member but also in examining the grievances expressed by the Constituent. It would also include examining incidental transactions and more particularly rendering a finding relating to the validity of the transactions and the obligation and liability of the parties and whether such dealings transactions and contracts have actually been entered into with authorisation of the constituent. Thus the arbitrator appointed under the Bye Laws of the National Stock Exchange has a far wider power to examine whether the Member had acted within the norms prescribed and had not violated any of the codes stipulated for the discharge of their duty based on trust and good faith vis-vis the constituent.

20. In the instant case, the appellant had raised specific instances of there being fake credits, misuse of cheques transactions without specific authorisation and such other acts of misfeasance by the first respondent. The learned Arbitrator in his wisdom had thought it fit to examine these aspects. He was bound to do so, since the terms of reference granted him the authority to examine not only the transaction complained of by the parties but also examining incidental transactions thereto relating to the validity, interpretation, fulfilment of the rights obligations and liabilities of the respective parties. It is in the course of such examination of the facts that the arbitrator had rendered a finding dismissing the claim petition filed by the respondent herein and further giving a finding that the respondent had indulged in practices which could not be termed as being acceptable as a normal course of contact.

21. The Arbitrator had framed the following issues:-

"1. Fake credits of Rs.55,000/- on 18.12.2007, Rs.70,000/- on 17.01.2008 and Rs.50,000/- on 18.01.2008.

ii. Unauthorised purchase of two lots of GMR Infra. On 04.01.2008, one lot of Aptech on 15.01.2008 and one lot of Reliance Ind. On 18.01.2008."

22. The Arbitrator finally granted the following award:-

"(i) the arbitration claim made by the Appellant, M/s. Apollo Sindhoori Capital Investments Ltd., against the Respondent, Mrs. Uma is hereby dismissed.

(ii) The applicant is directed to pay to the respondent, Mrs. Uma the sum of RS.2,11,410.00 (Rs.3,86,409.90 - Rs.1,75,000.00= Rs.2,11,409.90 or Rs.2,11,410.00) being the loss in the unauthorised trades as calculated above.

(iii) The Applicant should also pay a compensation of Rs.50,000/- towards the mark to market losses or uncalculated losses and mental tension created to the respondent on account of the misdeeds of some dealer in its fold. Although the respondent had not made any counter claim and had only requested for rectifying the

discrepancies, with a view to ensuring that she is not put to any pecuniary loss and to instil confidence in her, the compensation is being awarded.

(iv) The arbitration amount of Rs.2,61,410.00 (Rupees two lakhs sixty one thousand four hundred and ten only) (Rs.2,11,410/-+Rs.50,000/-= Rs.2,61,410/-) together with interest at 12% per annum on the award amount from the date of the Award to the date of Fixed Deposit Receipt (FDR) to be made out by ASIC for a period of not less than 91 days from the Clearing Bank, where ASIC has the settlement account and deposit such FDR with the NSE. The interest payable to the constituent, Mrs.Uma from the date of FDR till the date of payment shall be the interest accrued on the FDR till the date of encashment. The amount will be in full and final settlement of her accounts with ASIC, the Applicant.

(v) The TM should take stern action against the erring dealers. It should also issue strict instructions that no dealer/employee should trade in the account of the constituents without their specific orders/authority and credits should invariably be given only against presentation of cheques in physical form and enforce this in letter and spirit.

(vi) Needless to add that not all loss making constituents lodge complaints that trades are unauthorisedly done by the dealers and whenever a genuine complaint comes from a constituent, it should be attended to with all seriousness and the TM should order for an unbiased enquiry to be conducted to find out the truth. If action is taken with a prejudiced mind, the investor confidence would be shattered and the very purpose of having a customer care division will be defeated."

23. We hold that the Arbitrator was justified in examining the issues raised relating to fake credits and unauthorised credits of shares. As pointed out above, the scope of arbitral proceedings in the agreement and under the Bye Laws of the National Stock Exchange is wide enough to resolve all disputes relating to trading on the Stock Exchange.

24. The reasoning of the learned Single Judge that the Arbitral Tribunal had exceeded jurisdiction has to be interfered with. The Arbitral Tribunal had given its finding based on the transactions between the parties. These transactions have been reduced in the form of statements of accounts and the statement of accounts constituted the transactions made through cheques and other Negotiable Instruments. They are available for perusal and for analysis. If on analysis of the same, the Arbitral Tribunal had come to a specific finding that the claim of the respondent is to be rejected, then it could not be said that the findings were based on extraneous materials. We are afraid that we have to interfere with the order of the learned Single Judge.

25. Accordingly, the order of the learned Single Judge is set aside and the Original Side Appeal is allowed and the award of the Arbitral Tribunal is confirmed. No costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

vsg
To

1. The Sub Assistant Registrar
Original Side
High Court, Madras 104.

+2 Ccs to Mr.S.R. Raghunathan, Advocate sr 68268
+1 CC to M/s. Ramasubramaniam Associates, sr 68383.

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MP(CO)
SP(24/01/2020)