IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.07.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P No.485 of 2019
&
A.Nos.4287 of 2019 & 5864 of 2019

ICICI Securities Limited
Ground Floor, Shree Sawan Knowledge Park
Plot #D-507, TTC Industrial Area, Turbhe
Navi Mumbai- 400 705
Represented by Anand Surianarayan
Chief Manager ... Petitioner

Vs.

Mr.K.Guhan ... Respondent

Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 to set aside the arbitral award dated 19.02.2019 and rectified order dated 29.03.2019 passed by the Hon'ble Appellate Arbitral Tribunal.

For Petitioners : Mr.M.Nirmal Kumar

For Respondent : Mr.B.Balachander

ORDER

The case on hand is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', hereinafter 'A and C Act' for brevity, assailing an 'arbitral award dated 19.02.2019, which has been corrected by exercising powers under Section 33 of A and C Act vide proceedings dated 28.03.2019' (hereinafter collectively referred to as 'impugned award' for the sake of convenience and clarity).

2.At the outset, it is necessary to mention that some more abbreviations and short forms would be used and they are as follows:

a) 'Investors Grievance Resolution Panel' shall be referred to as 'IGRP';

b)'Arbitral Tribunal' constituted by a sole Arbitrator shall be referred to as 'AT';

and

c) A three member Arbitral Tribunal which made the impugned award shall be referred to as 'Appellate Arbitral Tribunal' for the sake of convenience and shall be referred to by the abbreviation 'AAT'.

3. The parties before me shall be referred to by their respective ranks in instant OP for the sake of convenience and clarity. Though the language used in Section 34 of A and C Act is application, the case on hand has been given the nomenclature 'Original Petition' and therefore the case on hand is being referred to as 'OP' for the sake of brevity and

clarity.

4. In the web-hearing on a video-conferencing platform today, Mr.M.Nirmal Kumar, learned counsel on record on behalf of petitioner assisted by Mr.R.Arivoli Tamizhan and Mr.B.Balachander, counsel on record for the respondent are before me. Learned counsel on both sides consented for final hearing of the main OP. Therefore main OP was taken up and the same was heard out.

5. A perusal of the case file placed before me shows that the petitioner has filed a 62 page petition, which comes across as verbose. Likewise, there have been pleadings such as counter affidavit and reply to counter affidavit. There is no disputation that instant OP is neither an appeal nor a revision. There is also no disputation that it is not even a full-fledged review and it is mere a challenge to an impugned award within the perimeter of Section 34 of A and C Act.

6.In the light of the aforementioned obtaining legal position about which there is no disputation or disagreement before me, notwithstanding pleadings that come across as verbose, both learned counsel focused on challenge to impugned award within the contours of Section 34 of A and C Act. Therefore, instant OP is being heard out on the basis of pointed submissions made with specificity before me.

7. As already mentioned supra, learned counsel for petitioner notwithstanding the elaborate pleadings in the petition i.e., instant OP, which comes across as verbose made pointed submissions with specificity, which are as follows:

a) Impugned award is liable to be set aside under Section 34(2)(a)(iii) of the A and C Act, as according to petitioner, the petitioner was unable to present his case before AAT;

b)The impugned award is liable to be set aside under Section 34 (2)(a)(iv) of A and C Act, as according to learned counsel for petitioner, the impugned award contains decisions on matters beyond the scope of submission to arbitration;

c) It was also submitted by learned counsel for petitioner that impugned award is vitiated by patent illegality within the meaning of Section 34(2A) of A and C Act.

8. The elaboration of learned counsel for petitioner on the aforementioned points would be dealt with infra in the latter part of this order.

9. In response to the above submissions, learned counsel for respondent submitted that the petitioner had not brought to the notice of the respondent about a plan which goes by the name 'Life Time Prepaid

Brokerage' plan, which has resulted in the respondent ending up paying more brokerage for trading. Learned counsel for respondent also emphasised that the respondent came to know about the existence of such a plan from an SMS received from the petitioner company much later in point of time and this was the trigger for the entire dispute between the parties.

10. Before I proceed further, it may be necessary to have a broad overview of the transaction and the dispute between the parties, in other words, a broad panoramic view that is imperative for the purpose of appreciating this order. To be noted, instant application is one under Section 34, the scope of which is very narrow and therefore, bare minimum necessary facts or in other words essential facts imperative for appreciating this order will suffice and those facts can be capsuled as follows:

a) Petitioner is a trading member (a SEBI Registered Stock Broker) having membership with Bombay Stock Exchange Limited and National Stock Exchange of India. To be noted, 'SEBI' stands for 'Security Exchange Board of India'. 'Bombay Stock Exchange' shall be referred to as 'BSE' and 'National Stock Exchange of India' shall be referred to as

'NSE'. The petitioner offers service to its client through an online web-portal.

b) Respondent is petitioner's client and therefore the respondent is a constituent qua NSE.

c) Respondent availed the services of petitioner and was trading.

d) As already delineated supra, respondent came to know about a plan which goes by the name 'Lifetime Prepaid Brokerage plan' only by way of a SMS, that too from the petitioner, respondent realized that in his trading over a period from 2012-13, he would have saved substantial sums of money by way of brokerage if the respondent was made known about this plan as he would have opted for the same. In other words, it is the case of the respondent that he would have opted for this plan if he was informed about this plan as the brokerage payable under this plan is lesser than the plan under which he was.

e)Respondent quantified this loss at Rs.13,87,817/- (Rupees Thirteen Lakhs Eighty Seven Lakhs Eight Hundred and Seventeen only). To be noted, this according to respondent is the difference between brokerage under aforesaid plan and plan he was under over a period of trading.

f) Respondent sent a letter dated 10.07.2015 to petitioner pointing out the above facts and *inter alia* claiming the aforesaid sum of money.

g) Petitioner did not reply to aforementioned letter, but subsequently responded to another e-mail sent on the same lines by the respondent being an e-mail dated 07.03.2016. The reply was largely on the lines that the brokerage charged by the petitioner is well within permissible limits and therefore, the petitioner cannot be held liable.

11. Having set out short facts in a capsule, it may now be necessary to set out the trajectory the dispute /lis has taken to reach this Court and the same is as follows:

a) The matter was first before IGRP and IGRP member made proceedings dated 21.03.2018 holding the petitioner liable or in other words, sustaining the case of the respondent.

b) Aforementioned proceedings/orders of IGRP dated 21.03.2018 was carried to the AT, which passed an award dated 23.08.2018 reversing the proceedings/orders of IGRP.

c) Matter was thereafter carried to AAT by the respondent and AAT made the impugned award i.e., award dated 19.02.2018, corrected vide proceedings dated 28.03.2019 by exercise of powers under Section 33, reversing the award of AT and resurrecting/restoring the aforementioned 21.03.2018 proceedings of IGRP.

d) Aggrieved by the impugned award made by AAT, petitioner has filed instant OP.

12. As already alluded to and delineated supra, pleadings of the petitioner comes across as verbose and caption to the petition says it is under Section 34(2) without setting out the slots under Section 34 with specificity. However, learned counsel for petitioner with absolute professionalism, has set out the slots with clarity/specificity today and the same has been set out supra. Notwithstanding repetition, the slots are set out again for clarity and they are 34(2)(a)(iii), 34 (2)(a)(iv) and 34(2A).

13. This Court now reverts to the submissions made by learned counsel for petitioner. Adverting to the first ground of attack, namely 34(2)(a)(iii), it was submitted that before AAT, the persons who represented the petitioner were not legal personnel. A new issue as to

whether the petitioner company assailed IGRP proceedings by resorting to AT was raised, but adequate opportunity was not given to explain this phenomena. This according to learned counsel for petitioner attracts Section 34(2)(a)(iii) as the petitioner company was unable to present its' case.

14.In the hearing today, this Court wanted to know whether petitioner company has in fact carried the IGRP order to AT. It was submitted that by way of its counter stand before AT, petitioner company has raised all the points to demonstrate why IGRP order is incorrect and therefore, the petitioner company was in fact before the AT.

15. In my considered view, this puts an end to the campaign of the petitioner under Section 34(2)(a)(iii). The reason is, petitioner company was very much before the AT and the award made by AT, being award dated 23.08.2018, was one that was tested by AAT in the tiered Arbitration that has been provided for and therefore, there cannot be any grievance and it cannot be gainsaid that the petitioner company was unable to present its' case. In this regard, it is also to be noted that the fact that both sides were represented is recorded by AAT in the impugned award and the relevant portion reads as follows:

'On receipt of the above arbitration appeal matter, notices

were issued to the parties concerned on 27.12.2018 for enquiry on 24.1.2019 at 11 Am at the office of the National Stock Exchange of India Ltd., New No.2, Nawab Garden, Murugappa Road, Kotturpuram Chennai – 600 085. Accordingly the enquiry was held on 24.01.2019 at 11 AM. at the above said premises. The appellant appeared in person and on the side of the respondent, one Mr.Anand Suryanarayanan and Mr.Henry Dhana Singh appeared through an authorization letter dated 24.1.2019. The arguments of both parties were heard and their documents were perused by us.'

16.This takes us to the next aspect of the challenge. The next aspect of the challenge, as delineated supra, was predicated and posited on Section 34(2)(a)(iv). Learned counsel for petitioner submitted that AAT has gone into the question as to petitioner company not having challenged the IGRP order and this, according to learned counsel for petitioner, tantamounts to wandering or in other words, it tantamounts to giving decision on matters beyond the scope of submission to arbitration.

17.I have carefully considered this submission and I have also carefully read through the orders/awards of IGRP, AT and AAT.

18.It is the undisputed case of petitioner company that what the petitioner company wanted to assail qua IGRP proceedings/order dated 21.03.2018 has been done before the AT and the award dated 23.08.2018 came to be passed by AT thereafter. The tiered arbitration essentially is

Chapter 11 of NSE bylaws which provide for these three tiers. In these three tiers, after the IGRP order went in favour of respondent, it would have been appropriate for the petitioner company to carry it to the AT, but that is not of consequence as it is the undisputed case before me today that the petitioner company in fact raised all these points against IGRP order before the AT albeit as a respondent and it was considered. Thereafter in the three tiered arbitration clause, when AAT examined the award of the AT, both sides had by then articulated their grounds, ventilated their grievance before the AT and the award of the AT in its entirety was before the AAT.

19.AAT, which is a three member Tribunal constituted by a former Hon'ble Judge of this Court, a former learned Judge of District judiciary in this State and another learned Member has examined the award of the AT besides hearing both sides and has made the impugned award. In this view of the matter, as there is no disputation that Chapter 11 of NSE bylaws captioned 'Arbitration' serves as the arbitration agreement between the parties within the meaning of Section 2(1)(b) read with Section 7 of A and C Act, it comes to light clearly that arbitration proceedings between the parties is tiered vide a tiered arbitration agreement, in the instant case, both parties to the proceedings have gone through all the three tiers and ultimately the third tier has passed the impugned award, which is its verdict. Therefore, it cannot be gainsaid that the impugned award has wandered and it contains decisions on matters beyond the scope of submission to arbitration merely because it has embarked upon the exercise of examining whether the petitioner company has challenged the proceedings of the IGRP. Therefore, I have no hesitation in holding that impugned award is not hit by the vice of Section 34(2)(a)(iv) as projected before me i.e., the wandering ground i.e., that it contains decisions on matters beyond the scope of submission to arbitration.

20.This takes us to the last point of challenge, which was convassed. The last point of challenge is that the impugned award of AAT is vitiated by patent illegality within the meaning of Section 34(2A) of A and C Act. A perusal of the case file placed before me reveals that instant OP has been presented in this Court on 24.06.2019. In other words, it is post 23.10.2015. Applying the recent ***Ssangyong*** principle being ratio and dicta laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) Scconline (SC) 167,*** Section 34(2A), as in the statute book today, has to be applied.

In this regard, it is to be noted that Section 34(2A) ,which deals with patent illegality as in the statute book today contains a proviso, which 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 reappreciating evidence.'*

21. The aforementioned proviso makes it clear that it consists of two limbs. Those first limb is mere erroneous application of law cannot be a ground to set aside an arbitral award as being hit by the vice of patent illegality and the second limb is re-appreciation of evidence is forbidden in proceedings under Section 34 while testing an arbitral award for patent illegality. This Court has consciously reminded itself of the proviso to Section 34(2A). This Court has also reminded itself that Section 34 itself is a summary procedure going by ***Fiza Developers*** principle laid down by Hon'ble Supreme Court being ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in ***(2009) 17 SCC 796,*** which was reiterated as a step in the right direction in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49.*** More importantly in very recently

rendered ***Canara Nidhi*** case [***M/s. Canara Nidhi Limited vs M. Shashikala*** reported in ***2019 SCC Online SC 1244],*** Hon'ble Supreme Court has held that Section 34 is clearly summary proceedings and the relevant paragraph in **Canara Nidhi** case is Paragraph 20, which reads as follows: .

> *'**20.** By perusal of the award, it is seen that before the arbitrator, Respondent 1 filed her written statement and the other respondents also filed separate written statements. It was contended that the documents were forged. Both parties adduced oral and documentary evidence. The appellant led evidence by examining two witnesses Balakrishna Nayak (PW 1) and B.A. Baliga (PW 2) and exhibited documents P-1 to P-47. Respondents 1 and 2 also examined five witnesses viz. M. Shashikala (RW 1), Mamatha alias Mumtaz Hameed (RW 2), Latha (RW 3), Chitralekha Umesh (RW 4) and B.R. Nagesh (RW 5). Respondents 1 and 2 also produced documentary evidence, Exts. R-1 to R-13. As held by the District Judge, the grounds urged in the application can very well be considered by the evidence adduced in the arbitration proceedings and considering the arbitral award. Further, in the application filed by Respondents 1 and 2 seeking permission to adduce evidence, no ground was made out as to the necessity of adducing evidence and what was the nature of the evidence sought to be led by Respondents 1 and 2. <u>The proceedings under Section 34 of the Act are summary proceedings and is not in the nature of a regular suit</u>. By adding sub-sections (5) and (6) to Section 34 of the Act, the Act has specified the time*

period of one year for disposal of the application under Section 34 of the Act. The object of sub-sections (5) and (6) to Section 34 fixing time-frame to dispose of the matter filed under Section 34 of the Arbitration Act, 1996 is to avoid delay and to dispose of the application expeditiously and in any event within a period of one year from the date of which the notice referred to in Section 34(5) of the Act is served upon the other party. In the arbitration proceedings, the parties had sufficient opportunity to adduce oral and documentary evidence. The High Court did not keep in view that Respondents 1 and 2 have not made out grounds that it is an exceptional case to permit them to adduce evidence in the application under Section 34 of the Act. The said directions of the High Court amount to retrial on the merits of the issues decided by the arbitrator. When the order of the District Judge dismissing the application filed by Respondents 1 and 2 does not suffer from perversity, the High Court, in exercise of its supervisory jurisdiction under Articles 226 and 227 of the Constitution of India, ought not to have interfered with the order passed by the District Judge and the impugned judgment [M. Shashikala v. Canara Nidhi Ltd., 2014 SCC OnLine Kar 12666 : (2014) 6 Kant LJ 311] cannot be sustained.'

(Underlining made by this Court to supply emphasis and highlight)

22.It is made clear that I have reminded myself of the two limbs to the proviso to Section 34(2A) and the ***Canara Nidhi Ltd.,*** principle with regard to Section 34 being a summary procedure while testing this patent illegality challenge. I now proceed to set out the articulation of learned counsel for petitioner with regard to this ground of patent illegality.

23.Learned counsel for petitioner submitted that the impugned award has relied on material which is not relevant, ignored most relevant evidence and has proceeded on the basis of no evidence. It was also submitted that owing to respondent carrying the IGRP proceedings to AT his rights qua IGRP order stood relinquished, falls for consideration within this ambit.

24.I have carefully considered the impugned award before me. The clincher in the impugned award is, it says that the trading member i.e., the petitioner company before me was not able to produce any proof to show that choice of Lifetime Prepaid Brokerage plan was informed to the respondent at the time of admitting him as a client. This is articulated in Paragraph 4 of the impugned award and the relevant portion reads as follows:

> *'4......Trading Member (Respondent) was not able to produce any proof to show that the choice of life time brokerage plan was available was informed to the appellant at the time of admitting him as a client. Hence, charging higher brokerage to the appellant when a plan of lower brokerage was available, is definitely a wrong procedure adopted by the respondent through which the appellant sustained a loss of Rs.13, 87, 817/- and the calculation of this loss was never disputed by the respondent.'*

25.To be noted, the sum claimed by the respondent before me according to him is the difference in the brokerage for the trading period qua the plan which he opted and the plan about which he was put on notice. To be noted, this difference or rate are all matters which are not in dispute, which has also been noticed by the AAT in the impugned award.

26.With regard to IGRP proceedings not being assailed, it is very clear from the submissions made today that the petitioner company has raised (albeit as a respondent) all that it needs to qua IGRP proceedings before the AT and the award of AT dated 23.08.2018 was only before the AAT and that the respondent could have opted to choose another trajectory to recover the money awarded to him by the IGRP is another matter altogether. The fact that the matter was carried to AAT via AT adopting tiered arbitration mechanism is not in dispute and therefore this Court cannot embark upon the exercising of re-appreciating the evidence before AAT. Though there is no erroneous application of law, even if there be one qua the impugned award, the first limb of proviso to Section 34(2)(a)(iv) makes it clear that mere erroneous application of law cannot be a ground. Whether it is a mere erroneous application of law is a question which need not necessary be embarked upon for the purpose of this case. What is mere erroneous application of law is also something which is not necessary for the purpose of giving dispositive reasoning in this case, as this Court is unable to find any erroneous application of law in the impugned award.

27.Therefore, the no evidence part, does not hold water and it cannot be gainsaid that irrelevant evidence has been looked into as the award of the AT was very much before the AAT. It cannot also be gainsaid that most relevant evidence has been overlooked as it nobody's case that evidence produced was not looked into.

28. Owing to all that have been set out supra, considering the narrow scope available under Section 34 to test an arbitral award or in other words to decide a challenge to an arbitral award and considering that it is a summary procedure, this Court is unable to convince itself that there is any ground to interfere, much less interfere and set aside the impugned award made by AAT. All the three points raised with utmost specificity and focus by the learned counsel for petitioner have been considered.

29. This Court has not entering into the merits of the matter, but for the limited purpose of appreciating this order, facts have been captured and from the facts that have been captured supra, it is clear that

the petitioner company did not put on wise the respondent regarding the availability of a particular plan and it is also not in dispute that there is a difference in the rate of brokerage between the plan opted by the respondent and the plan about which the respondent was not informed. The differential for the period of trading and the volume of trading are not in dispute. As already mentioned, there was recourse to Section 33 of A and C Act qua impugned award. To be noted, a typographical error qua numbers had crept into 19.02.2019 award of AAT, the sum of Rs.13,81,817/- was corrected as Rs.13,87,817/- vide proceedings dated 28.03.2019 by resorting to Section 33 of A and C Act.

30.In the light of the narrative thus far and owing to discussion and dispositive reasoning set out supra, instant OP fails and the same is dismissed. Consequently, A.No.4287 of 2019 for stay also stands dismissed. In the light of dismissal of stay application, A.No.5864 of 2019 for vacating stay is closed. There shall be no order as to costs.

22.07.2020

Speaking order: Yes/No
Index: Yes/No
gpa/sgl

M.SUNDAR.J.,

gpa/sgl

O.P.No.485 of 2019

22.07.2020