IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.266 of 2014

M/s. Geojit BNP Paribas Financial Services Ltd.,
11th Floor, 34/659-P, Civil Line Road,
Padivattom,
Cochin- 682 024,
Represented by its Authorised Signatory Mr.Harila.G

...Petitioner

Vs

1. Mr. S. GomathiNayagam,
Proprietor,
M/s. S.G.N. Securities,
5/3-A, Upstairs, AmmaiapparKovil,
Sannathi Street,
Ambasamudram- 627 401.

2. Hon'ble Mr.Justice S.Jagadeesan (Retd.)
Sole Arbitrator,
National Stock Exchange of India
8th Floor, Arihant Nitco Park,
90 Dr. Radhakrishnan Salai, Mylapore,
Chenai- 600 004.

3. Hon'ble Mr. Justice K. Sampath (Retd.,)
Presiding Arbitrator,
National Stock Exchange of India,
8th Floor, Arihant Nitco Park,
90 Dr.Radhakrishnan Salai, Mylapore,
Chennai - 600 004.

4. Mr.P. Paul Das,
Arbitrator,
National Stock Exchange of India,
8th Floor, Arihant Nitco Park,
90 Dr.Radhakrishnan Salai, Mylapore,
Chennai - 600 004.

5. Mr. P. Anand
Arbitrator,
National Stock Exchange of India,
8th Floor, Arihant Nitco Park,
90 Dr.Radhakrishnan Salai, Mylapore,
Chennai- 600 004.

...Respondents

PRAYER: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 29.01.2013 in Arbitration Matter [A.M.] No: CM/C-0034/2012 and confirmed by the Appellate Arbitral Tribunal vide Appellate Arbitral Award dated 25.11.2013 in Arbitration Appeal Matter [A.M] No.CM/C-0034/2012.

For Petitioner : Mr.T.K. Bhaskar
For Respondents : Ms. Rajani Ramadoss

ORDER

The respondent before the Arbitral Tribunal is the petitioner herein. The Section 34 Petition is filed challenging the order passed by the Appellate Tribunal constituted under the Bye-laws, Rules and Regulations for National Stock Exchange of India Limited in and by which the Award dated 29.01.2013 of the sole Arbitrator has been upheld. The sole Arbitrator had directed the petitioner herein to pay the respondent the sale proceeds of the shares sold by petitioner which was pledged with them by the respondent without any prior notice.

2. The facts in brief necessary for disposing of the above Petition are as follows:

The respondent herein who is a registered sub-broker had entered into a Stock Broker and Sub-Broker Agreement on 15.06.2005 with the petitioner, this was followed by a Business Associate Agreement dated 01.04.2006 between the two.

3. The agreement between the two was that the respondent would set up and manage an office for stock brokering and other related activities at Ambasamudram. The bank guarantee was executed on 15.06.2005 by the respondent in favour of the petitioner herein. On 02.04.2007, the respondent had also executed an agreement of pledge of stock and shares and other securities in favour of the petitioner. The respondent had pledged his shares in the following companies:

1. Infosys- 20 shares
2. Larsen & Toubro - 40 shares
3. Satyam Computers- 20 shares
4. Siemens - 50 shares
5. Tat Consultancy - 80 shares

4. It is the case of the respondent that although initially the business had taken of well however from the year 2008, the turnover had drastically reduced in view of the global stock market meltdown. As a consequence, certain issues cropped up between the petitioner and the respondent with reference to the distribution of commission

and therefore the respondent desired to terminate the business associate agreement with effect from 29.02.2012. This decision was conveyed to the petitioner vide the respondent's letter dated 01.02.2012 and the respondent had requested the petitioner to settle his accounts as per the Stock Exchange and SEBI Rules. On 16.02.2012, the petitioner had responded in the affirmative, by their letter dated 16.02.2012, however with a rider that the termination can be only with effect from 01.03.2012 and upon the respondent paying the sum of Rs.5,09,817.31/- which was due and owing by him to the petitioner. On the very next day that is on 17.02.2002, the petitioner had forwarded the NSE Sub Broker Cancellation Letter, Business Associate Cancellation Agreement and other documents under cover of the letter dated 17.02.2012 and requested the respondent to sign the said documents.

5. The respondent had sent a reply on 20.02.2012 informing the petitioner that as per their records it was only a sum of Rs.73,584/- that was due and payable to the petitioner and without the statement of accounts it would not be possible to sign the agreement. He

therefore requested the respondent to furnish him with the statement.

6. On 07.05.2012, the respondent had issued a notice calling upon the petitioner to pay a reduced sum of Rs. 2,07,038.09/- which included amounts due from one P.Boothanathan. The respondent had refuted the claim since the petitioner had already got an Award in their favour against the said P.Boothanathan and in the said proceedings the Arbitrator had exonerated the respondent from any liability. The petitioner had filed execution proceedings for recovery of the said amount and therefore, it was the case of the respondent that the petitioner cannot claim the said amount from the respondent as the respondent was not liable to pay the same. However, the petitioner had unilaterally sold the shares pledged by the respondent without prior notice to the respondent allegedly to set off this due from out of the amounts due to the respondent. Therefore the respondent had come forward with the complaint that the petitioner should pay him the sum of Rs.6,09,307/- which included not only the sale consideration for the shares sold but refund of the sum deducted towards NSDL penalty and compensation for non-issue of the NOC.

7. The defence to this claim by the petitioner herein was that from 2008 the petitioner had found that the respondent was not running the business properly and was also not maintaining the office affairs as per the agreement between the two. The respondent was not coming forward to perform his obligations and in fact had sought for a modification of the minimum brokerage clause with reference to the income generated through him. Since similar request had been received from others the petitioner reduced the minimum brokerage criteria from Rs.20,000 to Rs.10,000/- which has been extended from time to time to tide over the prevailing market condition. It was also the case of the petitioner that the bank guarantee which was originally furnished by the respondent had expired on 15.06.2011 and thereafter the respondent had not come forward to renew the same. The petitioner would contend that the shares pledged by the respondent was for replenishing the deficiency in the margin exposure for trading stock which had reduced on account of failure on the part of the respondent from collecting the outstanding from one P.Boothanathan.

8. The respondent had sent a notice on 27.07.2011 calling upon the petitioner to release the shares and to nominate a private Arbitrator. While the process was on, the respondent had intimated their intention to terminate the Business Associate Agreement with the petitioner. The petitioner inturn had replied that a sum of Rs.6,46,565/- was due from the respondent to which there was no reply. On 02.02.2012, the respondent had sent a reply disputing the petitioner's claim and seeking a copy of the statement of accounts. According to the respondent he was only liable to pay a sum of Rs.73,584/- to the petitioner. The petitioner vide reply dated 24.02.2012 had clarified the details of the outstanding and also enclosed the statement of account and this reply did not evoke any response from the respondent thereby constraining the petitioner to take steps as per the Rules.

9. As the respondent had not signed the cancellation agreement, the petitioner had moved the NSE to cancel the same and they had also filed an application for cancellation the Sub Broker Agreement.

10. Ultimately the respondent would contend that a sum of Rs.2,07,038.39/- was due from the respondent which included the debit balance due from P.Boothanathan and Gomathinayagam towards recovery of the amount outstanding from them. The petitioner had sold the shares pledged only after due notice to the respondent and therefore the claim had to be dismissed.

11. The parties had invoked the arbitration clause and initiated the proceedings before the National Stock Exchange.

12. The Arbitrator after perusing the records and the affidavit available on file came to the conclusion that the sale of shares pledged was effected without prior permission of the respondent. The learned Arbitrator had held that the petitioner had wrongly directed the respondent to pledge the shares although they had the security of the bank guarantee which was totally in contravention of the provisions of Clause 5 of the Business Associate Agreement. The sole Arbitrator also observed that the petitioner had not given any prior notice to the

respondent before the sale of shares. The learned Arbitrator has observed that by an email dated 12.03.2012 sent at 10.37 am the petitioner's had informed the respondent that they would be selling the shares pledged by him with them. At 3.20 pm on the very same day the shares were sold and this would clearly demonstrate that the sale was a unilateral action without the consent of the respondent. The Arbitrator had granted the relief with reference to the refund of the sale consideration in respect of the shares less the admitted amount due from the respondent to the petitioner and passed an Award stating that the respondent was entitled to a sum of Rs.1,79,247/- with interest 9 per cent per annum from 12.03.2012 to 27.08.2012. The claim with reference to penalty and compensation was rejected.

13. This Award was taken up on an Appeal to the Appellate Authority constituted under the provisions of the Rules. The Arbitral Appellate Tribunal consisted of three Members and by their order dated 25.11.2013 confirmed the Award of the sole Arbitrator. It is challenging this Award that the petitioner is before this Court.

14. Mr.T.K. Bhaskar, learned counsel appearing on behalf of the petitioner would contend that the observation of the Arbitral Tribunal as confirmed by the appellate authority that the petitioner has without any authority sold the shares pledged is absolutely erroneous.

15. He would contend that the pledging of shares has been voluntarily done and in the case of any shortfall, the said shares pledged could be sold in order to maintain the margin. He would further contend that the Tribunal has totally overlooked that the bank guarantee and pledge are two different securities and does not overlap one another.

16. He would further draw the attention of the Court to Clause 5 of the pledge agreement dated 02.04.2007. He would also draw the attention of the Court to the letter dated 18.03.2010 received from the respondent wherein the respondent had reiterated their request for refund of the commission without insisting upon the minimum concession clause. He would also submit that the shares have been voluntarily pledged and the same has been admitted by the

respondent. Since they had not disputed the said contention made by the petitioner in the letter dated 11.11.2010, the learned counsel for the petitioner would contend that the Arbitral Tribunal has not considered the terms of the agreement which clearly empowers the applicant to sell the shares in order to mitigate the loss.

17. Per contra learned counsel appearing on behalf of the respondent/claimant would contend that there is an inordinate delay in recovering the amount due from P.Boothanathan. The counsel would contend that the petitioner had obtained an Award against P.Boothanathan on 10.10.2007 and had not taken any steps to execute the same but has sold the shares pledged by the respondent on 13.03.2012. The Learned Arbitrator has rightly taken note of the fact that the Clause 5 of the Business Associate Agreement did not contemplate security both in the form of bank guarantee as well as in the form of pledge of shares and that it was totally erroneous on the part of the petitioner to contend that both forms of security was contemplated under the agreement.

18. He would contend that the Arbitral Tribunal has considered the evidence on record as well as the their related records in detail to come to the conclusion that the respondent was entitled to a sum of Rs.1,79,247/- together with interest at 9 per cent from 12.03.2012 to 27.08.2012.

19. Heard the counsel on either side and perused the records.

20. The short point for consideration in this Petition is whether the Tribunal below has rightly interpreted the right of the petitioner to sell the shares pledged and adjust the proceeds towards the amount due from the respondent invoking Clause 5 of the Business Associate Agreement. Clause 5 would read as follows:

" 5. Security Deposit:

5.1 The Business Associate shall provide an interest free security deposit of Rs.1,40,000/- (Rupees One Lakh Fifty Thousand Only) with Geojit in the form of cash/fixed deposit/bank guarantee from a

Schedule Bank or pledge S&P CNX Nifty/Nifty Junior shares worth Rs.3 lakhs as the case may be. No interest shall be paid on this.

5.2. Geojit will recover any outstanding dues owned by the Business Associate to Geojit including debit balance in the accounts of clients serviced by the Business Associate from the security deposit. The balance will be released to the Business Associate.

5.3. In case, this Agreement is terminated as stated herein or cancelled or the Business Associate arrangement is transferred to a third party at the request of the Business Associate, the security deposit shall be released/refunded only on expiry of 6 months from the date of execution of cancellation/cancellation-cum-takeover Agreement."

21. A reading of this Clause would indicate that the Business Associate Agreement should provide the security deposit either in the form of cash/fixed deposit/bank guarantee from a schedule bank or by pledge of shares. Therefore a reading of the Clause would clearly indicate that the security deposit can be either in the form of bank guarantee or in the form pledge of shares. The Arbitral Tribunal has observed that in the instant case the petitioner has taken security deposit both in the form of a bank guarantee as well as in the form of pledge of shares. The bank guarantee was due to expire only in the year 2011 whereas the pledge of shares has taken place on 02.04.2007. The petitioner has requested that the contract between the two be cancelled with effect from 29.02.2012 to which the respondent had insisted that a cancellation deed be executed. However, the petitioner had agreed in principle that the termination shall be with effect from 01.03.2012. The sale of the pledged shares had been due by the petitioner to make good the amounts that fell due from the client P.Boothanathan a client of the respondent. The records would reveal that the petitioner had obtained the Arbitral Award

against the said P.Boothanathan. However, they have not taken steps to execute the said Award. Without executing the said Award the petitioner has proceeded to sell the shares without reasonable notice to the respondent. The records would reveal that on 12.03.2012 at 10.37, the petitioner had intimated the respondent that they would be selling the shares and by 3:30 a mail was sent informing the respondent that the shares had been sold. The sale is totally in violation of the provisions of Section 176 of the Indian Contract Act. The action of the petitioner clearly indicates that no opportunity whatsoever had been given to the petitioner to even respond to the mail intimating the sale of the shares. Therefore the finding of the Tribunal below the sale of the shares is erroneous is perfectly in order. The Tribunal below and Appellate authority have arrived at the conclusion on considering the evidence placed on record and this Court exercising jurisdiction under Section 34 cannot reappreciate the evidence especially when the Award under challenge does not suffer from any perversity or patent illegality or is against public policy. Consequently the Petition challenging the Award dated 29.01.2013 of the sole Arbitrator confirmed by the Appellate Authority by their Award dated 29.01.2013 stands dismissed.

23.01.2020

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Index : Yes/No
Speaking order/non-speaking order

To,
1. Mr. S. GomathiNayagam,
Proprietor,
M/s. S.G.N. Securities,
5/3-A, Upstairs, AmmaiapparKovil,
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