IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.267 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-0038/2012 and confirmed by the Appellate Arbitral Tribunal vide Appellate Arbitral Award dated 25.11.2013 in Arbitration Appeal Matter [A.M] No.CM/C-0038/2012.

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

ORDER

The Claimant before the Arbitral Tribunal is the petitioner herein. The challenge is to the order passed by the Appellate Tribunal constituted under the Bye-laws, Rules and Regulations for National Stock Exchange of India Limited confirming the Award passed by the sole Arbitrator has been upheld.

2. The facts in brief which has culminated in the filing of the above Petition are as follows:

The petitioner and the respondent had entered into a Business Associate Agreement on 2.08.2005 and 01.04.2006 and had also entered into a Stock Broker and Sub-broker Agreement on 17.06.2005. The business was started by the respondent at Ambasamudram. From 2008, the petitioner came to know that the respondent was not running the business properly as per the terms of the agreement. The respondent had not collected the amounts due from certain clients which under the terms of the agreement he was obliged to collect. There was no positive action on the side of the respondent in collecting dues and therefore it was decided that the petitioner should stop the respondent's business operation.

3. The petitioner had agreed to the cancellation of the sub-broker registration and he had requested the respondent to sign certain documents. However, the respondent was reluctant to execute these documents which were essential for terminating the Sub-broker agreement. The petitioner in the meantime received a request from the respondent to reduce the minimum brokerage and acceding to the request, minimum brokerage was reduced from Rs.20,000/- to Rs.10,000/-. Meanwhile the bank guarantee issued by the respondent had expired on 15.06.2011 and the respondent did not take any steps to renew the same despite the request of the petitioner. The respondent had refused to renew the same on the pretext that he had pledged certain shares in favour of the petitioner. Meanwhile the respondent had filed a complaint with the NSE alleging contempt of arbitral proceedings and requesting release of the shares which the petitioner was retaining contrary to the Award in arbitral case No. CM/C-0066/2007.

4. The respondent had sent a notice dated 27.07.2011 demanding the release of the shares. By their reply dated 02.08.2011, the petitioner had denied the allegations and had put forward the case from the correct perspective. The petitioner had also not agreed for referring the matter to a private Arbitrator as they were bound by the Arbitral proceedings of the NSE. Thereafter the respondent by a mail dated 29.02.2012 had contended that he was ready to settle the dispute through the intervention of the Exchange. He had stated that in case the settlement was not possible, he would thereafter proceed with the arbitration mechanism. The applicant by their letter dated 29.02.2012 gave their consent for settlement talks on condition that the proceedings should not affect or tamper the termination. However since the respondent and the petitioner were unable to see eye to eye with reference to the amounts due and since the respondent refused to execute the documents for cancellation of the Sub-broker registration on flimsy grounds, the settlement did not move forward.

5. The petitioner would submit that they had thereafter

submitted the cancellation application to the BSE and NSE by executing an indemnity in favour of the Exchange. The respondent owed a sum of Rs.2,07,038.09 to the petitioner which included amounts due on the account of P. Boothanathan and S. Gomathi Nayagam respectively. The petitioner had sent a demand cum arbitration notice dated 07.05.2012 calling upon the respondent to make good the payment within 15 days from the date of receipt of the said notice. However there was no reply from the respondent. The petitioner received an email dated 16.05.2012 from the NSE forwarding a copy of the complaint dated 20.04.2012 of the respondent. The petitioner had thereafter filed the claim for recovering of a sum of Rs.2,07,038.09/- together with interest at the rate of 12 % per annum from the date of approval till realisation.

6. The respondent had contented that debiting the balance amount owed by P. Boothanathan to the commission account of the respondent was totally in violation of the Arbitration Award dated 29.11.2009. The respondent had further contended that despite getting an Award against said P. Boothanathan, the petitioner has not

executed the same but was attempting to mulct this liability on the respondent. The respondent further stated that the claim for Rs.2,07,038.09/- was not maintainable since there was no amounts due by him to the petitioner. Further without notice to the respondent, the petitioner had sold the shares pledged by him on 13.03.2012. There was no notice prior to the sale. The sale proceeds has been debited to the account of the respondent and it is not known as to how the petitioner has done so. The statement of account has also not been provided by the petitioner. Apart from cancelling the sub-broker registration with SEBI, NSE and BSE, the petitioner has also initiated Arbitral proceedings. The respondent would therefore seek for the dismissal of the claim petition.

7. The sole Arbitrator by his Award dated 29.01.2013 has passed the following Award:

> *"a) The applicant is entitled for a sum of Rs.1,03,519.05 rounded to Rs.1,03,520/- from the respondent and respondent is liable to pay*

the same;

b) Both applicant and the respondent jointly to initiate execution proceedings for the recovery of a sum of Rs.2,07,038/- due from Mr.P.Boothanathan in accordance with the award passed in Arbitration Case No.AM No.CM/C-0066/07 dated 29.11.2007 and on collection of the same, the applicant, and the respondent are to share the same equality; and

c) Both parties are directed to bear their costs, equally"

8. The basis upon which the said Award has come to be passed is on the ground that the disputed amount claimed by the petitioner is the amount which is due from one P. Boothanathan. The petitioner has already obtained the Award on 29.11.2013 against the said P. Boothanathan, he had however not proceeded to execute the same. The Arbitral proceeding was initiated both against P. Boothanathan and

the respondent herein. The Arbitral Tribunal by its Award dated 29.01.2013 had exonerated the respondent from the liability and the liability was solely fixed on P. Boothanathan. The Arbiral Tribunal had taken note of the fact that the petitioner had not taken any steps to execute the Award despite the fact that they had obtained an Award against the said P. Boothanathan. The Arbitral Tribunal had also taken note of the fact that the sub-broker cannot initiate arbitral proceedings or execution proceedings as it is only the trading broker who could initiate the proceedings. However, the Arbitral Tribunal has proceeded to pass the order detailed supra on the ground that the respondent cannot be directed to collect the decree amount since the Award was in favour of the petitioner and it is only the petitioner who has to sign all the requisite papers and also provide assistance to the respondent in collecting the deeds. However on the other hand, if the petitioner is directed to collect the amount they may not be in a position to identify the client to fix liability for which the respondent has to be made jointly responsible.

9. The petitioner took up the matter on Appeal to the Appellate

Authority of the Stock Exchange NSE. The appellate authority also proceeded to confirm the order passed by the Arbitrator on the ground that the same was just and equitable. However the respondent has chosen not to challenge the award of the Sole Arbitrator.

10. Mr. T.K. Bhaskar, learned counsel appearing for the petitioner would at the outset contend that the Arbitral Tribunal exceeded the scope of reference and the terms of the agreement between the parties. He would contend that therefore clearly fell foul of the Judgment reported in ***AIR 1992 SC 232 in the case of "Associated Engineering Co. Vs. Government of Andhra Pradesh and another".*** The counsel has drawn my attention to the paragraphs hereinbelow extracted in support of the above contention:

> *"28. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in*

accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. It he exceeded his jurisdiction by so doing, his award would be liable to be set aside. As stated by Lord Parmoor:

".......It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which on the true construction of the submission was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties ....".

Attorney-General for Manitoba v. Kelly & Others, [1922] 1 AC 268, 276.

29. Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the Court to see what dispute was submitted *to him. If that is not clear from the award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties; the Court can look at the agreement itself. Bunge & Co. v. Dewar & Webb, [1921] 8 L1. L.Rep. 436(K.B.).*

If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders Outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can he established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is the nature of the dispute is something which has to be *determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award. See M/s. Alopi Parshad & Sons. Ltd. v. The Union of India, [1960] 2 SCR 793; Bunge & Co. v. Dewar & Webb., [1921] 8 L1. L. Rep. 436 (K.B.); Christopher Brown Ld. v. Genossenschaft Oesterreichischer, [1954] 1 QB 8; Rex v. Fulham, [1951] 2 K.B. 1; Falkingham v. Victorian Railways Commission, [1900] A.C. 452; Rex v. All Saints, Southampton, [1828] 7 B. & C. 785; Laing. Son & Ltd. v. Eastcheap Dried Fruit Co., [961] 1 L1.L. Rep. 142, 145 (Q.B.); Dalmia Dairy Industries Ltd. v. National Bank of Pakistan, [1978] 2 L1. L. Rep. 223 (C.A.); Heyman v. Darwing Ld., [1942] A.C. 356' Union of India v. kishorilal, AIR 1959 SC 1362; Renusager Power Co. Ltd. v. General Electric Company, [1984] 4 SCC 679; Jivarajbhai v. Chintamanrao, AIR 1965 SC 214;Gobardhan Das v. Lachhmi Ram, AIR 1954 SC 689, 692; Thawardas v. Union of India., AIR 1955 SC 468; Omanhene v. Chief Obeng, AIR 1934 P.C. 185, 188; F.R. Absalom. Ltd. v. Great Western*

London Garden Village Society. Limited, [1933] AC 592 (HL) and M. Golodetz v. Schrier & Anr., [1947] 80 L1. L. Rep. 647.

30. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He diagressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. See the principles state in Anisminic Ltd. v. Foreign Compensation Commission., [1969] 2 AC 147; Pearlman v. Keepers and Governors of Harrow School, [1979] 1 Q.B. 56; Lee v. Showmen's Guild of Great Britain, [1952] 2 Q.B. 329; M.L. Sethi v. R.P. Kapur, AIR 1972 SC 2379; The Managing Director. J.

and K. Handicrafts v. M/s. Good Luck Carpets, AIR 1990 SC 864 and State of Andhra Pradesh & Anr. v. R.V. Rayanim, AIR 1990 SC 626. See also Mustill & Boyd's Commercial Arbitration, Second Edition; Halsbury's Laws of England, Fourth Edition,Vol. 2."

11. He would submit that collection of dues from the clients introduced by the respondent was exclusively his liability. In the event of the client not paying the outstandings due to the petitioner, the same could be recovered form the amounts due from the petitioner to the respondent. Therefore the petitioner would contend that exercising this right they had sold the shares.

12. The learned counsel appearing on behalf of the respondent would contend that the petitioner has sold the shares without any notice to the respondent. She would contend that to date the statement of accounts have not been forth coming from the petitioner. She would further contend that the agreement of pledge gave authority to the petitioner to sell only if margin is not maintained. She would contend that on termination of contract there was no question

of the margin been maintained. Therefore she would contend that the very sale of the shares was illegal and that apart the respondent was not liable to pay any amounts due towards the accounts of P.Boothanathan since the petitioner had obtained an Award which they, in their wisdom, had not executed.

13. Heard the parties and perused the papers.

14. The reference to the Arbitral Tribunal was the right of the petitioner to claim the sum of Rs.2,07,038.09/- due from one P. Boothanathan, the client introduced by the respondent. The Arbitrator after observing as follows in paragraph 15 of the Award which is extracted hereinbelow

> *" Though there is some force in the contentions of the applicant that it is the duty of the respondent to collect all the dues from the client and clear the debits and in case of any default, it is open to the applicant to adjust*

the same from and out of amount due to the respondent, after careful consideration of both pleas and after analyses of the rules and bye-law, this Tribunal is of the view that such liberty to the applicant is available in case if there is no award against the defaulting client. The reason is, it is for the applicant to initiate action by way of arbitration to claim the debits from the clients. The sub-broker is not authorized to initiate the arbitration by way of claim petition against the defaulted clients. Then once the sub-broker assists the trading member to get the award by the trading member, thereafter it is the duty of the trading member to initiate recovery proceedings. This is because the trading member being the applicant in the arbitration proceedings, initiated for the collection of the debits against the said clients. The applicant alone entitled to

> *sign the requisite papers and to initiate recovery proceedings by way of execution of the award amount. The respondent has no right to apply for execution of the award obtained by the applicant. "*

has proceeded to fix joint liability on the petitioner and the respondent. There is no reasoning given as to how the Arbitral Tribunal has arrived at a joint liability. The further observation that the Award against P.Boothanathan has to be jointly executed by the petitioner and the respondent, is also legally not possible, since it is the petitioner who has been given the award. The Tribunal has clearly exceeded the jurisdiction by directing the execution of the Award received in another proceeding in the present claim. There is also no reasoning as to how the respondent is liable to pay a sum of Rs.1,03,519.05 especially when the Award given in favour of the respondent in the Arbitral proceedings initiated by the respondent against the petitioner is once again reiterated by the Sole Arbitrator.

15. On a conspectus of the above, the Award dated 29.01.2013

of the Sole Arbitrator confirmed by the Appellate Authority by their Award dated 25.11.2013 is liable to be set aside and is accordingly be set aside.

23.01.2020

mrn

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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Represented by its Authorised Signatory Mr.Harila.G

P.T.ASHA, J.,

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