

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.01.2021

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.649 of 2016

M/s.Silverline Commodities
“Anna Valaagam”, No.82 Arcot Road
2nd Floor, Kodambakkam
Chennai – 600 024 ... Petitioner

Vs.

Shaik Mohamed Ameer Hamsa
A3/3, DABC Aishwaryam Phase II
4th Main Road, Nolumbur
Chennai – 600 095 ... Respondent

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award made in Arbitration No.MCX/ARB/3401A/16 dt.31.03.2016 and to pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.K.Premkumar

For Respondent : Mr.G.Suryanarayanan

ORDER

'Multi-commodity Exchange of India Limited' ('MCX' for the sake of brevity) and a 'member and client agreement dated 17.12.2013' (hereinafter 'said contract' for brevity) between the sole petitioner and

lone respondent in captioned OP constitute the nucleus of the lis before 'Arbitral Tribunal' ('AT' for the sake of brevity), which made an award dated 31.03.2016 bearing reference Arbitration Matter No.MCX/ARB/3401A/16' (hereinafter 'impugned award' for the sake of brevity).

2. Sole petitioner and lone respondent in captioned OP are member and client respectively qua MCX. To be noted, AT was constituted by a sole Arbitrator who is a former Hon'ble Judge of this Court. It is further to be noted that petitioner in captioned OP, who is a member qua MCX, was lone respondent before AT and lone respondent in captioned OP who is a client, was the claimant before AT. In this order, from here on, for the sake of convenience and clarity, sole petitioner in captioned OP shall be referred to as member and lone respondent in captioned OP shall be referred to as client. The aforementioned said contract between member and client was for derivative transactions qua MCX. This Court is informed that the trading between member and client was between 18.12.2013 and 31.03.2015. Considering the nature of the lis before AT and also owing to the limited statutory perimeter of Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, within

which the legal drill of testing the impugned award should perambulate, it is not necessary to dilate much on the transactions and the particularities thereof. Suffice to say that the commission payable together with 12% Service Tax thereon, became the bone of contention between member and client. To put it in a nutshell, while the member contended that it is entitled to commission at 0.052% if the trading volume of the client does not cross 500 crores per year and that the commission which in other words is referred to also as brokerage would be only 0.01% if the trading volume exceeds 500 crores per year, client contended that this condition has been hand written and subsequently interpolated in said contract, more particularly in the tariff sheets / charges forming part of said contract. This being the bone of contention, suffice to say that on 05.11.2015 when client sent an electronic mail requesting for full pay out qua said contract, member responded with a counter statement wherein commission / brokerage has been charged at 0.052% (obviously on the ground of trading member did not exceed 500 crores) and took the stand that there is a debit balance of Rs.1,251.17. As alluded to supra, MCX and said contract constitute the nucleus. The rate at which the member is entitled to commission/brokerage qua said contract which is the bone of contention is the epicentre of the lis before

AT. There is no dispute about constitution of the AT and therefore, it will suffice to say that AT entered upon reference qua aforementioned lis and made the impugned award *inter alia* coming to the conclusion that member cannot charge 0.052% as commission / brokerage and thereby coming to the further conclusion that client is entitled to recover Rs.10 lakhs claimed by him and that the debiting of commission/brokerage amount at 0.052% thereat is illegal. AT, owing to this finding, held that the Service Tax deduction is also bad as member is not entitled to commission/brokerage charge. AT left the parties to bear their respective costs and awarded future interest at the rate of 12% p.a.

3. Assailing the aforementioned impugned award, captioned OP has been preferred by member under Section 34 of A and C Act.

4. In the web-hearing on a videoconferencing platform today, Mr.K.Premkumar, learned counsel on record for member (petitioner in captioned OP) and Mr.G.Suryanarayanan, learned counsel on record for client (lone respondent) in captioned OP were before me, with the consent of both the learned counsel, captioned OP was taken up for final disposal and heard out.

5. A summation of contentions/arguments of learned counsel for member (sole petitioner in captioned OP) is as follows:

a) Business Rules of MCX and more particularly clause 28 thereat permits commission/brokerage upto 1% and therefore, there is no illegality in demanding commission/brokerage at 0.052%;

b) The finding of AT that no proof has been adduced by member is untenable as the entire arbitral proceedings were completed on the same day.

c) AT has not framed any issue regarding the rate at which commission/brokerage has been charged i.e., the three issues set out in paragraph 6 of the impugned award does not speak about the rate of commission/brokerage.

6. In response to the aforementioned submissions, learned counsel for client (sole respondent in captioned OP) made submissions, summation of which is as follows:

a) Rate of interest (as interpolated) turns on target volume of business being Rs.500 crores. This is impermissible;

b) The issue is whether there was interpolation in said contract and therefore, it cannot be gainsaid that MCX bylaws

permits charging of brokerage / commission upto 1%;

c) AT is not bound by 'The Code of Civil Procedure, 1908' ('CPC' for brevity) or Evidence Act and therefore, it cannot be gainsaid that issues have not been framed. Notwithstanding this, on a demurrer it was pointed out that Issue No.2 clearly turns on additional brokerage and therefore, it cannot be gainsaid that an issue has not been framed.

7. This Court, before embarking upon the exercise of discussing the rival submissions and giving dispositive reasoning for arriving at a conclusion, deems it appropriate to set out certain peripheral issues which are of relevance.

8. In one half of a year from now i.e., 6 months from now, captioned OP will be one half of a decade old in this Court. To be noted, captioned OP has been presented in this Court on 04.07.2016. In the light of sub-section (6) of Section 34, this is a period which is long enough to qualify as vintage in the light of timeline under A and C Act. In this regard, I deem it appropriate to remind myself about the observation made by Hon'ble Supreme Court in **Bhumi Vikas Bank** case law [**State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti** reported in (2018) 9 SCC 472] and more particularly Paragraph 26 there at, which

reads as follows:

'26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'

(Underlining made by this Court to supply emphasis and highlight, besides ease of reference)

9. I am conscious that **Bhumi Vikas Bank** case law is an authority for the broad proposition that pre-application notice under sub-section (5) is directory and not mandatory, but the observation made by Hon'ble Supreme Court in **Bhumi Vikas Bank** case law cannot be lost sight of.

10. In the course of hearing, it was also pointed out that in **Canara Nidhi Limited** principle, being law laid down by Hon'ble Supreme Court in **Canara Nidhi Limited vs M. Shashikala** reported in **2019 SCC Online SC 1244**, Hon'ble Supreme Court has held that the

scope of Section 34 is very limited. This Court has already mentioned supra or in other words, I have already alluded to supra that the statutory perimeter of Section 34 is very short or in other words, the legal landscape of Section 34 of A and C Act within which the legal drill of testing an arbitral award should perambulate is very limited. It is not only that legal landscape is limited, the entire exercise has to be by way of a summary procedure. This was in *Fiza Developers* case [*Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in (2009) 17 SCC 796]. This *Fiza Developers* principle was reiterated in *Emkay Global* case, being *Emkay Global Financial Services Ltd., v. Girdhar Sondhi* reported in (2018) 9 SCC 49 as a step in the right direction. This *Fiza Developers* and *Emkay Global* principles were reiterated in *Canara Nidhi Limited* case [*M/S. Canara Nidhi Limited vs M. Shashikala* reported in 2019 SCC Online SC 1244], which was referred to in the course of arguments by learned counsel for respondent. Therefore, I am conscious of the fact that Section 34 exercise is a one issue summary procedure. In this regard, I am also to mention that Hon'ble Supreme Court while saying 'one issue' has made it clear that an award being assailed in a Section 34 application itself becomes an issue before a Section 34 court and therefore, I am

clear in my mind that one issue does not mean that the lis itself should turn on one issue. It is a summary procedure too.

11. I also remind myself that Section 34 is neither an appeal nor a revision. It is not even a full-fledged review, but a mere challenge to an award within the limited confines and contours of Section 34. To be noted, owing to the nature of the submissions made and the grounds raised in captioned OP it has become necessary to mention this. Section 34 not being either an appeal or a revision, is a mere limited challenge to an arbitral award within the 8 pigeon holes adumbrated in Section 34 and facets of the same as explained by Hon'ble Courts in various case laws. While on this, this Court deems it appropriate to mention that 12 grounds, namely Grounds (a) to (l) have been raised in the OP and the same read as follows:

'(a) The impugned Award passed by the Learned Arbitrator, directing the petitioner to pay the sum of Rs.10,00,000/- to the respondent, is illegal, perverse, unreasonable, irregular, against the Principles of Natural Justice, against the basic notions of justice and settled legal principles and hence, the Impugned Award is liable to be set aside.

(b) The learned Arbitrator without framing an issue/point with regard to the alleged insertion of additional condition in the agreement has rendered a findings for the same as if the additional condition was written subsequent to the signing of the agreement by

the respondent herein and such a findings is illegal, incorrect and perverse and consequently, the Impugned Award is liable to be set aside.

(c) The Findings of the learned Arbitrator that "conceedingly there is no sale or purchase between 31.03.2015 and 16.12.2016 between the parties and despite demand from the respondent/applicant, the payments were not made to him", is absolutely incorrect and false. In fact the respondent/applicant knowing fully well about the additional condition and requested the petitioner/respondent to grant six months' time to achieve the target and that is why for the first time, the respondent/applicant makes a demand on 05.11.2015 and no other previous claim and immediately the same was replied by the petitioner, pointing out the additional condition contained in the agreement. In other words nowhere it was conceded by the petitioner about the demand of the respondent and hence rendering such findings without any documentary proof is incorrect, illegal and consequently the Impugned Award is liable to be set aside.

(d) The findings of the learned Arbitrator that the "additional condition written in the agreement does not form part of the printed form, but an interpolation incorporated just above the signature of the applicant. This additional condition has not been authenticated by the applicant by affixing his signature adjacent to the condition on the printed agreement form." These findings are perverse because the admitted rate of commission as well as the additional condition were written in the agreement and not printed and the applicant/respondent herein signed the agreement below the additional condition, thereby authenticating the same and therefore the question of writing the additional condition after the signature of

the applicant/respondent herein does not arise. Further none of the matters (fill-ups) written in blue ink in the agreement does not contain the signatures of the respondent and hence disputing the additional condition alone on the ground that it does not contain the counter signature of the respondent is incorrect, without any basis and such an argument advanced by the Arbitrator is unsustainable in law and on facts and consequently the Impugned Award is liable to be set aside.

(e) The next findings of the learned Arbitrator that the "entire agreement as well as tariff sheets plus charges, expenses etc., are in terms of the printed format prescribed by the Exchange. The Commission agreed to between the parties as reflected in the tariff sheet is 0.01% but the addition of 0.052% (add) throws considerable doubt on the very agreement itself" and these findings are also unsustainable in law and on facts because none of the rules of the MCX Exchange restricts or bars the fixation of different rate of commission. Being so how the learned Arbitrator came to such a conclusion that the rate of commission should be only as fixed by the Exchange and if it so, there is no need or necessity to go for an arbitration to decide the dispute between the parties and the Exchange itself can direct the petitioner/Trading member to pay out the alleged dues to the respondent/client.

(f) The next findings of the learned Arbitrator that the "respondent had not examined any one to prove the introduction of stipulation was made on the date of agreement. Despite challenging the interpolation, the person who incorporated such a condition at the time of entering the contract has been examined to prove the genuineness or truth of the additional condition, assuming to be valid" and these findings of the learned Arbitrator is incorrect, false

and perverse, because the entire arbitration proceedings started at 11.30 a.m. and ended at 12.00 O' clock in a hottest haste. Moreover the person who wrote the additional condition was very much available and present in the arbitration proceedings, but no question was asked from him regarding the writing the additional condition either by the learned Arbitrator or by the applicant/respondent herein. First of all no opportunity was afforded to the petitioner to examine the person who wrote the additional remuneration and on this ground alone, the Impugned Award is liable to be set aside.

(g) The petitioner submits that as per Volume 7 of the MCX Exchange Business Rules, published on 19.03.2009 which deals with the "Charging of Brokerage from Clients" - The brokerage amount charged by a member to his client must be shown separately in the contract notes to be issued by the members to their clients. The Maximum permissible brokerage rate is 1% in case of non-delivery transactions and 2% (plus expenses) in case of transactions resulting into delivery." Therefore, there is no minimum permissible brokerage as alleged by the learned Arbitrator and consequently the fixing the additional condition is well within the rights and powers of the Trading Members/petitioner herein and on this ground alone the Impugned Award is liable to be set aside.

(h) The learned Arbitrator has committed grave error in rendering a finding that "fixing of Trading Volume is not permissible in terms of the byelaws of MCX. Levying brokerage, in the event of trading volume of the applicant falling below a particular volume is not authorized and it is illegal and therefore it is unenforceable in terms of the bye-laws and exchange rules." The petitioner submits that none of the Bye-laws of MCX prevents or bars the Trading Member from fixing the Trading Volume with the clients and if it is

so, how the learned Arbitrators renders such a finding even without affording fair and reasonable opportunity of hearing to the petitioner herein to refute the same and such a findings and Award is liable to be set aside.

(i) The petitioner submits that none of the rules of the MCX Exchange restricts or bars the fixation of different rate of commission. Being so how the learned Arbitrator came to such a conclusion that the rate of commission should be fixed only as per the Exchange norms and if it is so, there is no need or necessity to go for an arbitration to decide the dispute between the parties and the Exchange itself can direct the petitioner/Trading member to pay out the alleged dues to the respondent/client.

(j) The learned Arbitrator erred in rendering a finding that the petitioner herein was silent between 31.03.2015 and 16.10.2016 and this findings equally applicable to the respondent herein also, who claims to recover the money from the petitioner kept silent for all these days. In fact till 05.11.2015 the respondent did not make any demand, because he has agreed to do the agreed volume within a time frame of six months and the petitioner with a view to allow him to achieve the target waited till then and this generosity cannot be termed as a silence or put against the petitioner/Trading Member to pass the Impugned Award.

(k) The fixing the interest at the rate of 12% per annum on the award amount from the date of claim petition is too high, inflatory and liable to be reduced.

(l) The entire Arbitration Proceedings are irregular, illegal and unsustainable in law and liable to be set aside.'

12. This Court having set out the aforementioned peripheral issues,

now plunges into the discussion and dispositive reasoning qua the submissions before this Court.

13. The first submission is that the Business Rules of MCX permits charging of brokerage / commission upto 1%, but this is no argument as the crux and gravamen of the lis is, whether there was hand written interpolation in the tariff sheets/ charges forming part of said contract. This will be dealt with infra.

14. AT in the impugned award more particularly in Paragraph 11 has only held that fixing trading volume as the stipulation is not permissible under the bylaws of MCX. Therefore the plea that the Business Rules of MCX, more particularly clause 28 thereat, permits brokerage / commission upto 1% does not aid the member in the case on hand. Therefore, the contention of learned counsel for respondent that fixing 500 crores is impermissible and interpolation of same in said contract is the issue and not whether commission / brokerage 0.052%. is permissible. Be that as it may, it is not even necessary to go into this aspect of the matter as AT has come to the conclusion that there has been handwritten interpolation in the said contract. The tariff sheets/charges and relevant portion as placed before me as part of the case is as follows:

Tariff Sheets / Charges

2. Details of future dealings, fees and commissions, application, service and other time-wise expenses shall be as follows:

S.NO	NAME THE TYPES OF CHARGES FROM CLIENTS	CHARGES DETAILS
1	COMMISSION	0.01% / 0.0025% (max) *
2	SERVICE TAX	12% ON COMMISSION
3	EDUCATIONAL CESS	3% ON SERVICE TAX
4	TURN OVER CHARGES	0.0015% ON TURNOVER + SERVICE TAX AND EDUCATIONAL CESS
5	STAMP DUTY	
a.	If relating to the purchase or sale of cotton including seeds or kapas for ginning cotton.	Thirty Paise for every unit of transaction or part thereof.
b.	If relating to the purchase or sale of bullion or specie.	a. Ten Paise for every unit of kilogram of silver or part thereof. b. Fifty Paise for every unit of one kilogram of gold or part thereof. c. One rupee for every unit of 250 mswarans or part thereof.
c.	If relating to the purchase or sale of oilseeds: 1. Groundnuts, 2. Linseed, 3. Cotton seed, 4. Other seeds.	Fifty Paise for every unit of 25 metric tonnes or part thereof.
d.	If relating to the purchase or sale of goods of any kind, and mineral oils in bulk or any kind.	Ten Paise for every Rs.2500 part thereof of the value of any kind, mineral oils in bulk or any kind.

* All Charges are subject to the discretion of the concerned authorities being charged.

And the maximum amount of the above charges for every year shall be Rs. 1000/-.

Charges payable in cash, unless otherwise specified.

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15. On appreciating the above (which was a piece of evidence before AT) it was the AT which came to the conclusion that Serial No.1 'charges details' column has been interpolated subsequently post signing and a foot note has also been added. This turns on the **Hodgkinson** principle. **Hodgkinson** principle is an age old principle laid

down by an English Court in *Hodgkinson Vs. Fernie (140 ER 712)*. However, what is of relevance is *Hodgkinson* principle is recognized by Indian Courts, more particularly in the oft-quoted *Associate Builders* case [*Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49]. To break it down and put it in simplistic terms, *Hodgkinson* principle means AT is the best Judge of quantity and quality of evidence before it subject of course to certain caveats. In the considered view of this Court, this is a classic case where *Hodgkinson* principle comes into play. AT has noticed the handwritten part / added footnote and has come to the conclusion that it is an interpolation. I do not intend to re-appreciate the evidence before AT. This gets doused with the next point argued by learned counsel for member i.e, that no opportunity was given for providing proof. There is nothing on record to demonstrate that the member, as sole respondent before AT, sought for an opportunity to let in evidence and the same was denied. In this view of the matter, this Court is of the considered view that it cannot be gainsaid that AT did not give opportunity to let in evidence merely because arbitral proceedings were completed in a day as rightly pointed out by learned counsel for respondent. The member knew what it was called upon to demonstrate before the AT or in other words,

what was actually the bone of contention. This issue has been categorically articulated by the claimant in his complaint and relevant paragraph reads as follows:

'When I have opened the commodity trading account with them they have fixed the commission of 0.01% as the turnover and other government charges as per the rule. I have signed in the agreement for 0.01% commission only. There are no other special conditions has been made on that time and later stage also. Now they have included some other condition on the tariff sheet intentionally not to give the balance to me.'

16. This takes us to the question of issue not being framed by AT. AT no doubt is not bound by 'The Code of Civil Procedure, 1908' ('CPC' for brevity) or by the Indian Evidence Act, 1872 owing to Section 19(1) of A and C Act. Therefore, the question of any trappings of Order XLI Rule 31 of CPC cannot be raised in Section 34, but in the case on hand, it is not necessary even to go into those aspects. This Court is convinced that the Issue No.2 certainly turns on the question as to whether the member is entitled to debit additional brokerage of 0.052% and that the same was interpolated. To be noted, relevant portions of the pleadings have already been extracted and reproduced supra.

17. This Court has already extracted and reproduced supra the 12

grounds raised in the OP. This Court is of the considered view that they are in the nature of grounds in a regular first appeal under Section 96 of CPC. In the light of the aforementioned case laws, namely ***Fiza Developers***, which was reiterated in ***Emkay Global*** and ***Canara Nidhi***, this Court cannot countenance such grounds.

18. The only ground which come close to anything that can fit into any of the pigeon holes under Section 34 is perversity about which there is a passing reference. With regard to perversity, as already alluded to supra, captioned OP has been presented in this Court on 04.07.2016 and therefore applying the ***Ssangyong*** principle being principle law laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in (2019) 15 SCC 131, captioned OP will be governed by post 23.10.2015 regime of A and C Act or in other words by A and C Act as obtaining today i.e., A and C Act as amended by amending Act 3 of 2016 with retrospective effect on and from 23.10.2015. In this view of the matter, perversity ground was explained by the Hon'ble Supreme Court in oft-quoted ***Associate Builders*** case which was rendered prior to 23.10.2015 i.e., on 25.11.2014 to be precise, and this came to be explained further (regarding impact of 23.10.2015 amendment) in

Ssangyong case law, which was rendered post 23.10.2015. In the oft-quoted **Associate Builders** case perversity was dealt with in Paragraphs 31 and 32, which read as follows:

'31.The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32.A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a

decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.'

19. In paragraph 41 of ***Ssangyong*** case, adverting to Paragraphs 31 and 32 of ***Associate Builders*** case, Hon'ble Supreme Court has categorically held that on and from 23.10.2015 the aforesaid paragraphs 31 and 32 touching upon perversity will not be available in that original form and it is available only as a patent illegality ground under sub-section (2-A) of Section 34 of A and C Act. This means patent illegality under sub-section (2-A) as circumscribed by the two limbed proviso. The two limbed proviso says that mere erroneous application of law cannot become a ground for dislodging an arbitral award, but post 23.10.2015 it will still be available as a ground of patent illegality under sub-section (2A) of Section 34. To be noted, patent illegality was available as a ground of challenge to an arbitral award even prior to 23.10.2015, but that was not by way of a statutory provision, but by way of judge made law being law laid down by Hon'ble Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.***, reported in

(2003) 5 SCC 705 and the relevant paragraph is Paragraph 31 and the same reads as follows:

Paragraph 31 of Saw Pipes case law

'31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the

court. Such award is opposed to public policy and is required to be adjudged void.'

20. Therefore, in the instant case it is patent illegality under sub-section (2-A) and therefore, it is clearly circumscribed by the two limbed proviso. The two limbed proviso makes it clear that re-appreciation of evidence is forbidden. In the light of re-appreciation of evidence being forbidden and in the light of **Hodgkinson** principle alluded to and delineated supra, this Court is of the considered view that no ground has been made out for judicially intervening qua impugned award under Section 34 of A and C Act. After all, Section 34, which is neither an appeal nor a revision, is a delicate balance between the sanctity of finality of arbitral award ingrained in Section 35 read with minimum judicial intervention principle ingrained in Section 5 on one side and the sacrosanct judicial review forming part of substantive due process of law.

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21. Before concluding, to be noted, with regard to Service Tax part, it was submitted that the question of Service Tax will arise only if the member is entitled to the commission as claimed. The submission of learned counsel for respondent is that the Service Tax question is a mere sequitur to the commission/brokerage finding and therefore, there is no error much less an error warranting intervention under Section 34 of impugned award with regard to Service Tax aspect. In the light of the discussion thus far and dispositive reasoning, this Court unhesitatingly comes to the conclusion that there is no ground for intervention qua impugned award and therefore captioned OP cannot but be dismissed.

Captioned OP is dismissed, but there shall be no order as to costs.

18.01.2021

Speaking order: Yes/No

Index: Yes/No

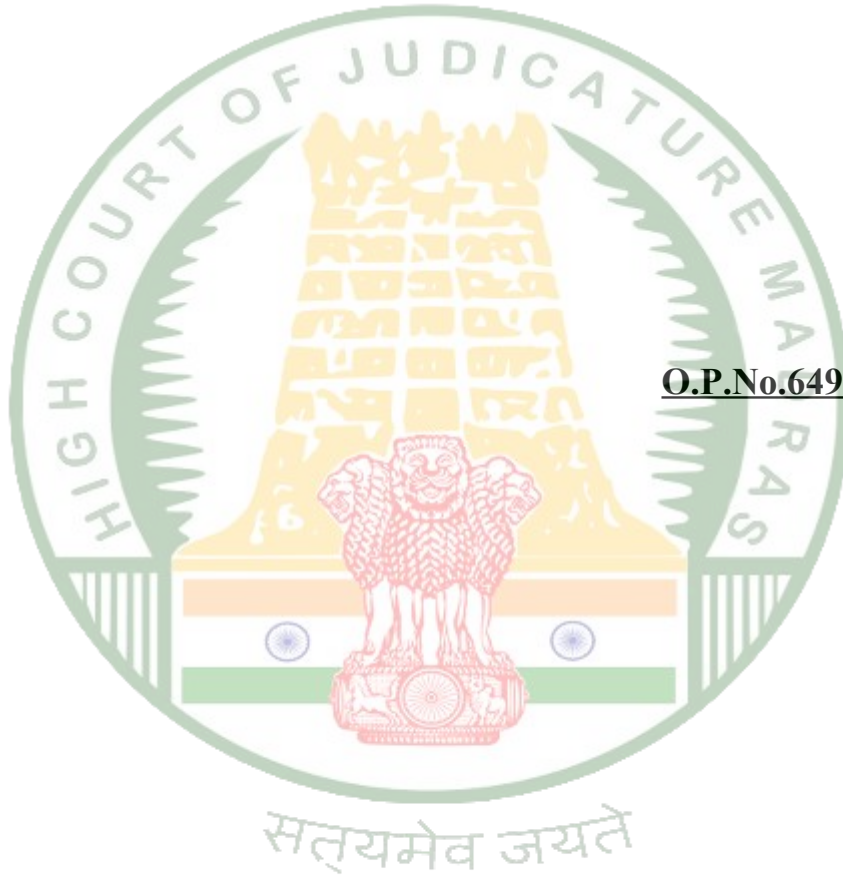
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