



WEB COPY



Arb.O.P.No.9 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.01.2023

CORAM

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

Arb.O.P.No.9 of 2022

Muthian Sivathanu

... Petitioner

-VS-

Emkay Global Financial Services Limited
Regd. Office The Ruby, 7th Floor,
Senapathi Bapat Marg,
Dadar (West), Mumbai 400 028
with Chennai Office at
Door No.2C, 2nd Floor,
Century Plaza, No.560-562,
Anna Salai, Teynampet, Chennai 600 018.

... Respondent

PRAYER: Arbitration Original Petition filed under Section 34(1) of the Arbitration and Conciliation Act, 1996, pleased to set aside the arbitral award dated 01.12.2021 bearing No.A.M.No.NSECRO/0040799/20-21/ARB/APPL passed by the Arbitral Tribunal in its entirety and to direct the arbitral tribunal in accordance with Section 34(4) to continue the arbitration so as to award counter claim / claim of Rs.822,617/- with interest in favour of the petitioner.

For Petitioner : Mr.Muthian Sivathanu, Party-in-person



Arb.O.P.No.9 of 2022

For Respondent : M/s.V.Srikanth, M.Prakash Kumar

ORDER

The petitioner was a client of the respondent stock broker and traded on the National Stock Exchange (NSE) by availing of the stock broking services of the respondent. For the sake of convenience, the petitioner is referred to as the Client and the respondent as the Stock Broker throughout this order.

2. The Client provided consent for the Margin Trading Facility (MTF) offered by the Stock Broker so as to be in a position to trade without remitting the full consideration for the traded shares. MTF was extended to the Client on the terms and conditions set out in the relevant consent document. The Client also signed a declaration on 16.04.2019 to the effect that he had received and read all relevant documents relating to trade in the securities market through the Stock Broker. Thereafter, several trades were executed online by the Client over a period of time. The focal point of the present challenge is the sale of about 96,000 shares of Yes Bank by the Stock



Arb.O.P.No.9 of 2022

Broker for and on behalf of the Client on 06.03.2020. After taking into consideration and giving credit to amounts realized from the sale of the shares of Yes Bank, the Stock Broker initiated proceedings before the arbitral tribunal constituted in accordance with the bye-laws of the NSE for the recovery of a sum of Rs.6,75,943/-. In response, the Client filed a statement of defence along with a counter claim for a sum of Rs.8,22,617/-. Such counter claim represented the positive credit balance which would have been available if 96,000 shares of Yes Bank had been sold at Rs.29/- per share on 11.03.2020. The said arbitral proceedings culminated in the award dated 09.04.2021 (the First Arbitral Award). By the said Award, the claim of the Stock Broker was allowed and the counter claim of the Client was rejected.

3. Since the bye-laws of the NSE provide for a two-tiered mechanism for resolution of disputes, the Client assailed the First Arbitral Award before a panel of three arbitrators. In the appeal, the Client called upon the arbitral tribunal to reject the original claim of the Stock Broker and allow the counter claim made by the Client. By arbitral award dated 01.12.2021 (the Impugned Award), the claim of the Stock Broker was affirmed and the counter claim



was rejected.

WEB COPY

4. The Client, who is an advocate by profession, appears in-person.

The first contention raised by him is that the stamp duty on the Impugned Award was paid by the Stock Broker. According to him, this is evidence of bias and the absence of neutrality on the part of the arbitral tribunal. The second contention, which may be characterised as the principal contention, is that the Stock Broker violated the material requirements of Section 176 of the Indian Contract Act, 1872 (the Contract Act) because the relevant shares were sold by the Stock Broker/pledgee, without providing reasonable notice to the Client/pledgor. In support of this contention, the judgment of the Allahabad High Court in *Prabhat Bank Ltd. v. Babu Ram* AIR 1966 All 134, particularly paragraph 6 thereof was relied upon. In addition, the judgment of the Supreme Court in *PSA Sical Terminals v. The Board of Trustees of V.O. Chidambaranar Port Trust*, judgment dated 28.07.2021 in Civil Appeal Nos.3699 to 3700 of 2018, was placed for consideration. In particular, the extract from *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (Ssangyong)*, (2019)15 Supreme



Arb.O.P.No.9 of 2022

Court Cases 131, in the said judgment was referred to contend that an arbitral award which is perverse is liable to be interfered with on the ground of patent illegality.

5. The third ground on which the Impugned Award was challenged was that the arbitral tribunal relied upon documents which were not provided to the Client in course of arbitral proceedings. By referring to page 102 of the typed set of documents filed by the Client, internal page 20 of the Impugned Award, it was pointed out that the arbitral tribunal relied upon the call log submitted by the Stock Broker. Since such call log was not provided to the Client in course of arbitral proceedings, paragraph 41 of *Ssangyong* was relied upon to contend that a finding based on a document received behind the back of the parties by the arbitral tribunal would amount to a decision based on no evidence. Therefore, it was contended that the Impugned Award is liable to be set aside.

6. Submissions to the contrary were made by learned counsel for the Stock Broker, Mr.V.Srikanth. His first contention was that the Client had



Arb.O.P.No.9 of 2022

consented to the terms and conditions for MTF. By drawing reference to clauses 6, 7, 11 and 18 thereof, learned counsel submitted that the Client had agreed that the Stock Broker had the discretion to decide on the stocks in respect of which MTF would be provided. If any shares are de-listed from the approved MTF securities list of the Stock Broker, the Client shall be under an obligation to pay the full consideration in respect thereof upon receiving a margin call. He further submitted that communications may be sent to the Client through SMS/Whatsapp/e-mail/voice calls and that the Stock Broker has the authority under clauses 17 and 18 to liquidate available securities if the deficiency in the amount of margin is not made good within the time limit specified therein.

7. The next submission of learned counsel was that the Client did not raise a dispute upon liquidation of securities by the Stock Broker. Instead, it was the Stock Broker who made the claim before the single member arbitral tribunal for the short fall that remained due and payable by the Client after giving credit to amounts realized by the sale of Yes Bank shares. It was only in course of such arbitral proceedings that the Client made a counter claim.



WEB COPY

8. By drawing reference to the e-mail sent by the Stock Broker on 06.03.2020, learned counsel pointed out that the Client was put on notice that Yes Bank had been removed from the approved MTF list and that unless the dues were cleared before 9.30 A.M, action would be taken. By advertng to the reply dated 11.03.2020, particularly paragraph 3 thereof, learned counsel pointed out that the authority of the Stock Broker to sell the securities was not disputed by the Client. The grievance of the Client was confined to the price at which the shares were sold. By referring to paragraphs 9 to 15 of the claim made by the Stock Broker before the single member arbitral tribunal, learned counsel submitted that the Stock Broker had set out the particulars of the margin call, including the request made to the Client to make good the short fall on or before 9.30 A.M on 06.03.2020. In support of his submissions, **Ssangyong** was relied on to conclude that no case is made out for interference with the Impugned Award.

9. In light of the rival contentions, the question that arises for consideration is where the Client has made out a case warranting interference under Section 34 of the Arbitration and Conciliation Act, 1996 (the



Arbitration Act). At the outset, it should be noticed that the arbitral proceedings commenced after the entry into force of Act 3 of 2016. The law relating to interference with an arbitral award after the entry into force of Act 3 of 2016 was dealt with extensively in ***Ssangyong***. In paragraph 41 of ***Ssangyong***, the Supreme Court concluded that an award would be held to be patently illegal if such award is perverse. An award based on no evidence or by ignoring vital evidence or by relying upon irrelevant evidence was held to be perverse. The Supreme Court also recognized in paragraph 37 of ***Ssyangyong*** that the illegality should go to the root of the matter and that mere erroneous interpretation or application of the law does not warrant interference. The present dispute should be decided by keeping in mind the above legal frame work.

10. The first ground of challenge was that the Impugned Award was executed on a stamp paper procured by the Stock Broker. Merely because the stamp paper was procured by one party to the dispute, it cannot be concluded that the arbitral tribunal was biased. Indeed, it is common practice in arbitral proceedings for one of the parties to pay for transportation, accommodation,



hall rent and the like subject to subsequent adjustment. Therefore, this ground is liable to be rejected out of hand.

11. The principal ground raised by the Client is that the requirements of Section 176 of the Contract Act were not complied with. Section 176 deals with the rights of a pledgee to sell the pledged goods upon reasonable notice to the pledgor. In the context of dematerialized securities, the creation of a pledge is governed by the Depositories Act, 1996 read with the Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018. Regulation 58 thereof deals with the manner of creation of a pledge in respect of dematerialized securities. The relevant documents should be examined to ascertain the rights conferred thereby on the Stock Broker. The terms and conditions pertaining to the MTF are on record. Clauses 7, 11, 17 and 18 thereof are set out below:

"7. EMKAY shall provide MTF only in respect of such shares, as may be permitted by Stock Exchange / SEBI. EMKAY shall have the sole discretion to allow MTF on the shares even



*though they are part of Exchange / SEBI specified list. List of eligible shares as permitted by EMKAY under MTF (EMKAY Approved MTF Securities List) shall be displayed on the website of EMKAY. **If any share is delisted from EMKAY Approved MTF Securities List, Clients shall make payment of full purchase consideration against such shares on receiving margin call within the prescribed time, failing which EMKAY shall be at liberty sell such shares without further notice to Clients. Such de-listing of securities may also result in margin shortfall for other securities covered under MTF and Clients shall ensure that margins are topped up / payments made to avoid liquidation of securities.***

*11. Clients shall receive all communications either through SMS / Whatsapp Messages / Internet / E-Mail / Message displayed on Terminal / Voice Calls / Display on Website etc. regarding confirmation of orders or trades, margin calls, **decision to liquidate positions / security etc. under MTF.** It is the sole*



responsibility of Clients to monitor communications sent to them on an immediate basis and act upon the same. Clients shall not hold EMKAY responsible for any loss arising out of their own inaction post receipt of communication from EMKAY.

17. On receipt of 'margin call', the Clients shall make good such deficiency in the amount of margin placed with the EMKAY by 12 noon of T+1 day failing which EMKAY shall be entitled to liquidate funded and / or margin securities as applicable. However EMKAY shall be entitled to reduce / liquidate positions due to market volatility or reduction in Risk Cover below 15% even before the Clients top up Margins. If the debit is not cleared due to closure of Funded Stocks, EMKAY shall have the right to adjust available margin amounts / liquidate available Margin Stock to clear debit balances. In case of extreme volatility in the market, EMKAY may demand payment of margin forthwith and prescribed time for making margin payment shall be construed accordingly. Decision of EMKAY in



relation to market volatility shall be final and binding without EMKAY having to provide any reason for the decision to Clients.

18. If required margin is not provided within the prescribed time, Clients shall be treated as "Client in Margin Default". EMKAY shall not be obliged to notify Client in Margin Default of the liquidation of shares, ahead of liquidation. EMKAY shall not be obliged to liquidate shares proportionate to the shortage in margin. Any loss arising from liquidation of the shares shall to be account of Clients. Clients shall forthwith pay EMKAY any unpaid dues outstanding in the account after liquidation of the shares." (emphasis added).

12. On perusal of clause 7, it is clear that the Stock Broker was vested with the discretion of extending MTF only in respect of such shares, as may be permitted by the relevant stock exchange or SEBI. In addition, the Stock Broker was conferred the right to de-list shares from the approved MTF



securities list. In such event, the Client was required to pay the full purchase consideration in respect of such shares on receiving a margin call. As per clause 11, margin calls could be made through SMS / Whatsapp / e-mail and clause 17 provides that the Client shall make good such deficiency in the amount of margin by 12 noon of T+1 day, failing which the Stock Broker is entitled to liquidate the securities. Indeed, in specified circumstances, liquidation by the Stock Broker is permitted even before the margin is topped-up by the Client. If any amounts remain unpaid after such liquidation, as per clause 18, the Client is required to make good the shortfall. In addition to the above, the Client also provided an undertaking to the Stock Broker. Clause (c) thereof, which is relevant, is set out below:

"(c) In case there is a debit balance in my / our account, you are authorized to sell at any point of time the shares / securities held by me / us or held on my / our behalf, at your sole discretion. Any profit or loss made on such transactions will be to my / our account as it would have occurred on normal purchase / sale made by me / us. I / We also agree to pay the balance amount, if any after deducting credit of sale of shares."



Arb.O.P.No.9 of 2022

WEB COPY

13. As is evident from clause (c) of the undertaking, the Stock Broker is authorized to sell the shares / securities held by the Client if there is a debit balance in the account of the Client. From the above clauses of the MTF consent document and the undertaking, it appears that the Client authorized the Stock Broker to sell available shares to make good deficiencies in margin after making a margin call in such regard. Effectively, a contract of agency was formed between the parties. These documents do not provide a basis to draw the conclusion or even inference that a pledge was created over the Yes Bank shares of the Client in favour of the Stock Broker. Without doubt, the Client contended before the arbitral tribunal that the case is governed by Section 176 of the Contract Act and, upon consideration of such submission, the arbitral tribunal recorded a finding that Regulation 58 of the SEBI (Depositories and Participants) Regulations governs in the context of the invocation of a pledge of dematerialized securities. The said conclusion of the arbitral tribunal may not be entirely convincing but the question that remains open for consideration is whether such conclusion goes to the root of the matter and calls for interference under Section 34 of the Arbitration Act.



WEB COPY

14. As noticed earlier, the documents on record do not provide a basis to conclude that a pledge in favour of the Stock Broker was created in respect of the Yes Bank shares of the Client but there is sufficient basis to conclude that the Stock Broker was empowered to sell those shares for and behalf of the Client as an agent. The relevant part of paragraph 37 of ***Ssangyong***, which is instructive as regards patent illegality as a ground for interference, is set out below:

“ 37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law....”

15. The documents on record clearly evidence that the Client authorized the Stock Broker to sell the relevant securities if there is deficiency in margin, provided a margin call was made. In these



circumstances, it cannot be said that the Impugned Award is patently illegal merely because of an erroneous appreciation of the interplay between Section 176 of the Contract Act and Regulation 58 of the SEBI (Depositories and Participants) Regulations. Indeed, as stated earlier, neither Section 176 nor Regulation 58 appears to be applicable in the present case. Thus, on this aspect, while the interpretation by the arbitral tribunal may not be convincing, the Impugned Award cannot be construed as patently illegal.

16. I now turn to the next ground on which the Impugned Award was assailed, namely, that the arbitral tribunal relied upon call logs produced by the Stock Broker. In internal pages 7 and 8 of the Impugned Award, the documents relied upon by the Client were set out. Likewise, at internal pages 12 and 13 of the Impugned Award, the documents relied upon by the Stock Broker were set out. As correctly contended by the Client, the call logs are not listed at internal pages 12 and 13 of the Impugned Award. Although there is a reference to order logs and price movement (annexure J), it was pointed out correctly that the order logs contained particulars of the orders placed for securities and not calls made by the Stock Broker to the Client. In



the list of documents set out by the arbitral tribunal, the margin call e-mail of the Stock Broker is included. In the said e-mail, the Stock Broker informed the Client that a call was made to him on 05.03.2020 and that the said call was not answered. It is further stated therein that Yes Bank was removed from the approved list and, therefore, the dues should be cleared on or before 9.30 A.M. The receipt of this e-mail is not denied by the Client. Indeed, there is reference thereto in the reply of 11.03.2020 and no denial of the call.

Paragraph 3 of such reply is significant and is, therefore, set out below:

"3. Nodoubt you have a legal right to sell yesbank since you gave loan on that share but you are bound to act DILIGENTLY AND WITH UTMOST CARE EXPECTED OF A CREDITOR IN ENCASHING THE SECURITIES. As per Indian Contract Act, the creditor is bound to act without negligence and for the best price possible. But you are acted with UNDUE HASTE AND WITH MALAFIDE MOTIVES as clearly evident from the following facts viz. a) the average price of yesbank on 06.03.2020 is around Rs15 and the maximum rate is Rs.18 and closing rate is above 16 (b) the previous day i.e. 05.03.2020 the price of yesbank



WEB COPY



Arb.O.P.No.9 of 2022

was Rs.37 and the next day i.e. price of yesbank on 09.03.2020 is Rs.22/23 and on 11.03.2020, it is 29. Nothing prevented you to sell 50% of yesbank at average rate of about Rs.16 to Rs.18 and to keep balance quantity for the next two days so that you would have seen the restoration of price of yesbank to 29 today. Hence you acted with mala fide intention or with INSANITY."

17. It should also be noticed that the Client filed a petition under Section 33 of the Arbitration Act in respect of alleged errors in the Impugned Award. In paragraph 8 of the petition, the Client referred to the call log in the following manner:

"8. Whether the arbitrators may clarify why the arbitrators failed to mention in page 20 of their award whether alleged call log at 10.14 PM would be sufficient evidence and what prevented the opposite party i.e trading member to send an email communicating notice of sale of stocks."

From the above, it appears that the Client did not contend in the Section 33 petition that the call logs had not been provided to him in course of arbitral proceedings. Hence, it cannot be concluded that the call log was not received



Arb.O.P.No.9 of 2022

by the Client.

WEB COPY

18. Under Section 34 of the Arbitration Act, any error which goes to the root of the matter warrants interference but not other errors. There is documentary evidence on record that a margin call was made on the Client. In fact, the relevant communication also refers to the phone call made to the Client on 05.03.2020 and his failure to respond thereto. In these circumstances, even proceeding on the assumption that the call log had not been produced earlier by the Stock Broker, the Impugned Award is not vitiated on that account because the Client admits that there was a deficiency in margin and also admits the right of the Stock Broker to liquidate the securities for such failure. Thus, when the Impugned Award is examined in context, it cannot be concluded that it suffers from a patent illegality warranting interference under Section 34 of the Arbitration Act.

19. For the reasons set out above, the challenge is rejected and Arb.O.P.No.9 of 2022 is dismissed. In the circumstances, there will be no order as to costs.

19/21



Arb.O.P.No.9 of 2022

WEB COPY

19.01.2023

rna/rrg

Index : Yes / No

Internet : Yes / No

SENTHILKUMAR RAMAMOORTHY,J

rna/rrg

20/21



WEB COPY



Arb.O.P.No.9 of 2022

Arb.O.P.No.9 of 2022

19.01.2023