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O.S.A.Nos.288 and 289 of 2020

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 21.03.2024	Pronounced on 23.04.2024
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CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE R.SAKTHIVEL

O.S.A.Nos.288 and 289 of 2020

O.S.A.No.288 of 2020:-

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

[Sole appellant name amended vide order of this
Court dated 30.01.2024 made in CMP.Nos.964
and 972 of 2024]

...Appellant

Vs.

1.S.Gomathi Nayagam
Proprietor,
M/s.SGN Securities,
5/3-A, Upstairs, Ammaiappar Kovil,
Sannathi Street,
Ambasamudram – 627 401.



O.S.A.Nos.288 and 289 of 2020

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

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

[Respondents 2 to 5 are the arbitrators and are
given up]

...Respondents

Prayer in O.S.A.No.288 of 2020:: Original Side Appeal filed under Section



O.S.A.Nos.288 and 289 of 2020

13 of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 read with Order XXXVI Rule 9 of the Original Side Rules and Clause 15 of the Letters Patent, praying to set aside the order dated 23.01.2020 in O.P.No.266 of 2014 and thereby set aside the Arbitral Award dated 29.01.2013 in Arbitration Matter (A.M.) No.CM/C-0034/2012 and confirmed by the Appellate Tribunal vide Appellate Arbitral Award dated 25.11.2013 in Arbitration Appeal Matter (A.M.) No.: CM/C-0034/2012.

O.S.A.No.289 of 2020:-

M/s.Geojit Financial Services Ltd.,
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8th Floor, Arihant Nitco Park,
90 Dr. Radhakrishnan Salai, Mylapore,
Chennai – 600 004.

5.Hon'ble Mr.P.Chandrasekar,
Arbitrator
National Stock Exchange of India
8th Floor, Arihant Nitco Park,
90 Dr. Radhakrishnan Salai, Mylapore,
Chennai – 600 004.

[Respondents 2 to 5 are the arbitrators and are
given up]

...Respondents

Prayer in O.S.A.No.289 of 2020.: Original Side Appeal filed under Section



O.S.A.Nos.288 and 289 of 2020

13 of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 read with Order XXXVI Rule 9 of the Original Side Rules and Clause 15 of the Letters Patent, praying to set aside the order dated 23.01.2020 in O.P.No.267 of 2014 and thereby set aside the Arbitral Award dated 29.01.2013 in Arbitration Matter (A.M.) No.CM/C-0038/2012 with respect to dismissing the claims of the appellant which was confirmed by the Appellate Tribunal vide Appellate Arbitral Award dated 25.11.2013 in Arbitration Appeal Matter (A.M.) No.: CM/C-0038/2012.

For Appellant	: Mr.T.K.Bhaskar in both the cases
For 1 st Respondent	: Mr.G.Vivekanand in both the cases
Respondents 2 to 5	: Given up in both the cases



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COMMON JUDGMENT

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

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These two appeals arise out of the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

2. The appellant, a share broker and member of the National and Bombay Stock Exchanges, is aggrieved by the orders of the Section 34 Court made in the O.P.Nos.266 and 267 of 2014 dated 23.01.2020, in and by which, the petitions filed by the appellant under Section 34 of the Arbitration and Conciliation Act were dismissed confirming the awards passed by the sole Arbitrator, which were in turn confirmed by the appellate Tribunal constituted under the Bye-laws of the National Stock Exchange of India Limited.

3. O.S.A.No.288 of 2020 is against the order passed in O.P.No.266 of 2014 and O.S.A.No.289 of 2020 is against the order passed in O.P.No.267 of 2014.



The claim of the appellant in O.P.No.266 of 2014 is as follows:-

4. The appellant, which is a member of the National Stock Exchange Limited and the Bombay Stock Exchange Limited is entitled to have sub-brokers appointed to carry on transactions on behalf of the appellant. In the course of its business, the respondent an individual expressed his interest to be a sub-broker under the appellant and pursuant to negotiations that took place, the respondent was registered as a sub-broker on 23.01.2006. A certificate to that effect was also issued on the said date. A Stock Broker and Sub-Broker Agreement was entered into between the parties on 13.06.2005, which was followed by a Business Associate Agreement dated 01.04.2006.

5. The respondent set up an office at Ambasamudram, Tirunelveli District to carry out the stock broking and related activities. A Bank Guarantee was furnished on 16.06.2005, which was followed by an Agreement of Pledge of Stocks, Shares and other Securities on 02.04.2007, where certain shares were pledged with the appellant.



6. Though things were normal and the business was carried on to the benefit of both the parties, in 2008 the turn over of the respondent went down drastically, due to the global meltdown and certain issues cropped up on the distribution of commission between the parties. This resulted in termination of the Business Associate Agreement with effect from 29.02.2012. In the light of the said situation, the respondent sent a letter on 01.02.2012 informing the appellant that he is desirous of terminating the Business Associate Agreement and requiring the appellant to settle all the accounts as per the Stock Exchange Rules. The appellant sent a reply on 16.02.2012 accepting the termination and claiming that the respondent was liable to pay a sum of Rs.5,09,817.31/-. The documents relating to cancellation were also forwarded to the respondent.

7. The respondent on 20.02.2012 sent a reply stating that as per his statement of accounts he is liable to pay only Rs.73,584/- and he required the appellant to furnish its statement of accounts. This evoked a notice from the appellant on 07.05.2012 stating that the respondent is liable to pay a sum of Rs.2,07,038.09/-, which includes the debit balance owed by one of



their clients Mr.P.Boothathan.

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8. The respondent further contended that he is not liable to pay the debit balance of Boothathan. He also claimed that at the instance of the appellant an award came to be passed by the Arbitrator on 29.11.2007, wherein, it was found that Boothathan alone is liable to pay the balance due by him to the appellant and the said award was also transmitted to Tirunelveli for execution. Taking shelter under the award, the respondent claimed that he is not liable to pay the balance amount due from Boothathan.

9. The respondent also claimed that the appellant had sold the shares that were pledged with it on 12.03.2012 without his consent. Terming the sale as arbitrary and un-reasonable, the respondent raised a dispute and lodged a claim with the Arbitrators under the Rules of the Stock Exchange.



10. Another claim was also made by the respondent faulting the action of the appellant in debiting a sum of Rs.34,500/-, which is claimed to be the charges for the depository services at Rs.1,500/- per month for the period from 01.04.2010 to 29.02.2012 (for 23 months). A claim was also made for compensation of a sum of Rs.3,00,000/-.

11. Since the Rules of the Stock Exchange provided for two tiers of arbitration, the first tier of arbitration was taken up by a sole Arbitrator.

12. The appellant herein filed its statement of defence contending that from the year 2008 onwards the respondent was not properly running the business operations and he was not maintaining the office affairs as per the specifications of the agreements executed. It was also the claim that as a part of trading transactions done by the clients of the respondent's location certain amounts became due to the appellant. The appellant also claimed that as per the Business Associate Agreement the respondent/ sub-broker is obliged to collect the debit balance that accrues in the accounts of various clients, who were traded through the respondent and the respondent failed to



carry out the said obligation.

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13. Though efforts were made by the appellant to sensitise the respondent to improve his business transactions, nothing fructified. Therefore, when the respondent sought for cancellation the appellant immediately agreed for cancellation or termination of the relationship, but, it required the respondent to make good the monies that are due to him. The Bank Guarantee that expired on 15.06.2011 was also not renewed by the respondent.

14. It was also contended that as per the Business Associate Agreement the respondent is liable to make good any loss that would occur to the appellant in the transactions between the appellant and the clients of the respondent. It was contended that one Mr.Boothathan who was introduced by the respondent had transacted through the respondent and had left a debit balance in his account, which the respondent was obliged to collect or make good. Terming the failure on the part of the respondent to make good the amounts due by Mr.Boothathan, the appellant contended that



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there was no deficiency in service and the amounts that were adjusted were only the amounts that were actually due to the appellant. In view of the same, it was claimed that the respondent had no cause to complain and the claim should not be entertained.

15. The appellant also reiterated the fact that monies were due by the appellant to the respondent to the tune of Rs.2,07,038.09/- and a breakup of the amount due was also furnished in the statement of defence. The claim that a sum of Rs.5,09,817.31/- was due was made in the notice dated 16.02.2012 without taking into account the value of the pledged shares. The difference in the claim is only due to the fact that the pledged shares were sold and the amount was adjusted towards the amount due from the respondent. The claim made under the second issue relating to the charges payable for acting as depositor was also denied as well as the claim for compensation made.

16. The sole Arbitrator, a retired Judge of this Court, entered upon



arbitration and upon the pleadings set out *supra* framed the following questions for consideration:-

Now the question for consideration arise are:-

A) Whether the applicant voluntarily pledged the shares towards security as contended by the respondent?

And

B) Whether the respondent has absolute right to sell the pledged shares of the applicant irrespective of any dispute with regard to the quantum to be settled?

17. Upon consideration of the evidence that was placed before him, the sole Arbitrator concluded that the action of the appellant in selling the shares on 12.03.2012 itself, after intimating the appellant through email in the forenoon of the same date is arbitrary and high-handed.

18. The learned Arbitrator also concluded that the amount due from Boothathan should have been recovered by the appellant in execution of the award that it had obtained in Arbitration Case No.AM No.CM/C-0066/07. According to the learned Arbitrator, having obtained an award and without pursuing its remedy by executing the award, the appellant cannot attempt to



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make the respondent liable for the amount due under the award. On the said finding, the learned Arbitrator concluded that the respondent is entitled to a sum of Rs.1,79,247/-, being the difference between the consideration for sale of the shares i.e., Rs.2,52,831/- and the admitted amount due by the respondent i.e., a sum of Rs.73,584/-, with interest at 9% from 12.03.2012 to 27.08.2012. The Arbitrator rejected the other claims.

19. Aggrieved the appellant moved the appellate Tribunal (II tier arbitration) as per the Rules of the Stock Exchange. The appellate Tribunal also concurred with the findings of the learned Arbitrator and dismissed the appeal.

20. Aggrieved the appellant moved this Court under Section 34 of the Arbitration and Conciliation Act. The learned Single Judge also agreed with the findings of the Arbitrator and the appellate Tribunal and dismissed the Section 34 application. It is this order of the learned Single Judge made in O.P.No.266 of 2014, which is subject matter of appeal in O.S.A.No.288 of 2020.



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21. We have heard Mr.T.K.Bhaskar, learned counsel appearing for the appellant and Mr.G.Vivekanand, learned counsel appearing for the 1st respondent. The respondents 2 to 5, who are the Arbitrators have been given up.

22. Mr.T.K.Bhaskar, learned counsel appearing for the appellant would vehemently contend that all the forums viz., the sole Arbitrator, the appellate Tribunal and the Hon'ble Single Judge sitting under Section 34 had faulted the appellant for having sold the pledged shares without sufficient notice, which according to them is in violation of Section 176 of the Indian Contract Act, 1872.

23. The learned counsel for the appellant would point out that a notice of pledge was in fact given to the respondent as early as on 16.02.2012 and the Arbitrators as well as the learned Single Judge miserably failed to take note of the said notice, which had led to them concluding that there was no notice of pledge and the sale was effected within a few hours of sending the notice though email. This lapse is a very serious lapse and would amount to



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patent illegality, which would be opposed to the public policy, since the awards in this case were passed prior to the introduction of Section 34(2-A) in the Arbitration and Conciliation Act, 1996.

24. Reliance is also place by Mr.T.K.Bhaskar, on the judgment of the Hon'ble Supreme Court in *Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India* reported in (2019) 15 SCC 131 and the judgment in *Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49.

25. Mr.T.K.Bhaskar, learned counsel appearing for the appellant would also contend that the right of the appellant to recover the monies due by Boothathan is independent of its right to execute the award against Boothathan. He would further submit that as per the contract between the parties, the respondent herein, who is a sub-broker is bound to indemnify the appellant (main broker), in the event of any loss that is caused to the appellant in the transactions it has with the clients introduced by the sub-broker. Boothathan being one of the clients introduced by the respondent as



a sub-broker, the respondent would be liable to make good the monies that are due by Boothathan in terms of the contract between the parties.

26. Contending contra Mr.G.Vivekanand, learned counsel appearing for the respondent would submit that notice dated 16.02.2012 cannot be taken as a notice under Section 176 of the Contract Act. The learned counsel would submit that it is only the notice of demand and not a notice disclosing the intention to sell the pledged shares. According to the learned counsel, in order to constitute a valid notice under Section 176, the pledgor should convey unequivocal intention to sell the pledged goods in the even of failure to pay by a certain date. Contending that the notice dated 16.02.2012 is a general demand notice, which also includes a indication that the pledged goods will be sold, if the money is not paid, which according to him, would not satisfy the requirement of the Section 176 of the Contract Act.

27. On the liability to pay the monies that were due by the Boothathan, Mr.G.Vivekanand, learned counsel would contend that having



obtained the award against Boothathan it was the right of the appellant to have executed the said award against Boothathan or transfer the said award in favour of the respondent and required the respondent to execute the award. Having done neither the appellant, according to the learned counsel, is not entitled to adjust the monies due from Boothathan from the monies due to the respondent.

28. On the contention of the learned counsel for the parties, the following points arise for determination in O.S.A.No.288 of 2020:

1) Whether the Arbitrators and the learned Single Judge were right in concluding that the sale of the pledged share happened without proper notice?

2) Whether the learned Single Judge was right in affirming the conclusion of the Arbitral Tribunal that the appellant cannot claim the monies due from Boothathan from the respondent?

O.S.A.No.289 of 2020:-

29. Even during the pendency of the arbitration, which gave raise to



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O.S.A.No.288 of 2020, the appellant viz., the broker had lodged a claim against the respondent in AM.No.CM/C 0038 of 2012 seeking an award for a sum of Rs.2,07,038.09/- with interest at 12% per annum from the date of accrual of debit till date of making payment from the respondent.

30. This claim was sought to be substantiated contending that there was a total debit balance of Rs.2,93,449/- in the account of Boothathan who was the client introduced by the respondent, the sub-broker and a debit balance of Rs.23,895.22/- in the account of the respondent after selling the pledged shares and adjusting the proceeds, which led to a total debit balance of Rs.3,17,344.64/- due and payable by the respondent to the appellant. After deducing the commission payable to the respondent, the sub-broker which amounted to Rs.1,10,306.55/-, there was a debit balance of Rs.2,07,038.09/- due and payable by the respondent to the appellant.

31. This claim was resisted by the respondent contending that the sale of the pledged shares without notice is bad and contended that the appellant



had already obtained an award against Boothathan on 29.11.2007 and it should have resorted to execution of the award and it cannot claim the said amount from the respondent.

32. The contention of the appellant that the respondent is entitled to the sum of Rs.2,07,038.09/- from the respondent is based on Clause 5 of the Business Associate Agreement dated 02.08.2005 entered into between the appellant and the respondent. The said Clause 5 reads as follows:-

5.SECURITY DEPOSIT

5.1 The BUSINESS ASSOCIATE shall provide an interest free security deposit of Rs.1,50,000/- (One lakh fifty thousand rupees) with Geojit in the form of cash/ fixed deposit / bank guarantee from a Scheduled Bank or pledge S&P CNX Nifty / Nifty Junior shares worth Rs.3 lakhs. No interest shall be paid on this.

5.2 Geojit will recover any outstanding dues owed 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



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transferred as 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.

33. This arbitration was also referred to the same Arbitrator, a retired Judge of this Court. The Arbitrator however found that having obtained an award, the appellant ought to have executed it. The Arbitrator however found that the applicant is entitled to 50% of the amount due from Boothathan and directed payment of the said sum, by the respondent to the appellant. The Arbitrator also directed that both the appellant and the respondent should jointly initiate execution proceeding for recovery of a sum of Rs.2,07,038/- due from Boothathan and upon collection of the same, they will share the proceeds equally.

34. The respondent did not challenge the said award. The appellant however filed an appeal as per the Rules of the Stock Exchange to the appellate Tribunal. The appellate Tribunal, which consisted of three Members found that the award is just and equitable and therefore it cannot be set aside.



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35. Aggrieved the appellant moved this Court in O.P.No.267 of 2014.

The learned Single Judge set aside the award in its entirety by the order dated 23.01.2020. It is this order which is subject matter of challenge in O.S.A.No.289 of 2020.

36. Mr.T.K.Bhaskar, learned counsel appearing for the appellant would vehemently contend that the learned Single Judge was not right in setting aside the award, which was partially in favour of the appellant. Drawing our attention to the award of the learned sole Arbitrator, where he had held that the appellant would be entitled to recover a sum of Rs.1,03,519.05/-, rounded off to R.1,03,520/- and it gave liberty to initiate execution proceedings for recovery of Rs.2,07,038/- due from Boothathan under the award dated 29.11.2007. Mr.T.K.Bhaskar, learned counsel for the appellant would further contend that in the original petition for setting aside the award which is against the appellant, the learned Single Judge was not right in setting aside the award that was in its favour also. The learned counsel would also point out that as far as the respondent is concerned the



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award of the appellate Tribunal had become final since he had not challenged it by way of a Section 34 application.

37. Contending contra Mr.G.Vivekanand, learned counsel appearing for the respondent would contend that the language of the Section 34 of the Arbitration and Conciliation Act,1996 enables the Court to set aside an award if it is in conflict with the public policy of India or it is vitiated by patent illegality under sub-Section 2-A after 23.10.2015. Contending that if the Court comes to a conclusion that the award is opposed to public policy of India, irrespective of the fact that the applicant has partially succeeded before the Arbitrators, the Section 34 Court can set aside the entire award and relegate the parties to fresh arbitration if they are so advised.

38. The learned counsel would also contend that the conclusion of the learned Single Judge that having not collected the amount under the award dated 29.11.2007, the appellant cannot exercise its right under clause 5 of the Business Associate Agreement is flawed and the learned Single Judge has travelled beyond the scope of the agreement between the parties and



reference to the arbitration while concluding that the appellant ought to have executed the award against Boothathan.

39. We have considered the rival submissions and the following points arise for determination in O.S.A.No.289 of 2020:

1) Whether the learned Single Judge was justified in setting aside the entire award at the instance of the appellant, who had partially succeeded before the arbitral Tribunal?

2) Whether the Single Judge was right in concluding that the appellant cannot seek recovery of the outstanding of Boothathan from the respondent?

Point No.1 in O.S.A.No.288 of 2020:

40. We shall first take up the first point in O.S.A.No.288 of 2020 as it is independent of the other three. The sole ground on which the Arbitrator,



the appellate Tribunal as well as the Single Judge had rejected the defence of the appellant is that the pledged shares were sold without sufficient notice, which is in violation of Section 176 of the Contract Act. Section 176 of the Contract Act reads as follows:-

176. Pawnee's right where pawnor makes default.—

If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

41. A perusal of the awards as well as the order of the learned Single Judge would show that all of them have gone on the premise that notice of sale itself was given a few hours prior to the sale. The learned Arbitrator



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(Tier-I) has recorded that the shares that were pledged were sold on 12.03.2012 at 3.20 p.m. A E-mail regarding sale of the shares was sent to the respondent by the appellant on 12.03.2012 at 10.37 a.m., stating that the shares will be sold and the proceeds will be adjusted. Though the Arbitrator had referred to the letter dated 16.02.2012, he had completely dis-regarded the fact that the letter dated 16.02.2012 had also warned the respondent that the pledged shares will be sold, if the monies are not paid on or before 09.03.2012.

42. The relevant portion of the letter dated 16.02.2012 reads as follows:-

“Also, take notice that as per your statement of accounts an amount of Rs.5,09,817.31 is outstanding and due to us (shares pledged with us as securing has not been taken into account). In view thereof you are hereby requested to make necessary arrangements to make the payment of above said amount on or before 09.03.2012. Otherwise we will be constrained to sell those shares pledged with us without any further notice to your and proceeds thereof shall be adjusted towards the total amount owed to us (Emphasis Supplied). Further that in case the



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sale proceeds are not sufficient enough to fully satisfy the amount owed to us as per the statement of accounts we will be constrained to initiate appropriate legal proceedings against you, for which you will be made liable for all cost and consequences arising there from, please note. ”

43. Mr.T.K.Bhaskar, learned counsel would contend that while appellate forum and the learned Single Judge had not adverted to the above said letter at all, the sole Arbitrator though refers to it, has omitted to take note of the above vital portion which serves as a notice required under Section 176 of the Contract Act.

44. Mr.T.K.Bhaskar, learned counsel would heavily rely upon the language of Section 176 of the Contract Act, which states only a reasonable notice should be given and in the case on hand more than 15 days notice has been given and therefore the conclusion of the Authorities viz., the Arbitrator, the appellate Tribunal and the learned Single Judge that no reasonable notice was given to the respondent before the sale of shares is factually incorrect. The learned counsel would submit that this factual error is not a minor factual error, but, it is a major factual error which would



vitiate the award itself. The learned counsel would also point out that the notice is very specific, it specifies the amount payable, it specifies the date by which the amount shall be paid and it conveys a clear intention on the part of the pawnee to sell the security, if payment is not forthcoming within the date specified in the notice. This notice dated 16.02.2012, according to the learned counsel, would satisfy the requirements of Section 176 of the Contract Act and therefore, the award which concludes that there was no notice prior to the sale is vitiated by an error on the face of it.

45. The order of Section 34 Court also, according to the learned counsel, is totally flawed, since, it was passed in ignorance of a very vital document dated 16.02.2012. The learned counsel would also contend that the learned Judge has not referred to the letter dated 16.02.2012 itself in the award, which amounts to rendering a finding relating to the illegality of the sale perverse. Reliance is placed on the judgments of the Hon'ble Supreme Court in *Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49 and *Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India* reported in (2019) 15



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46. In *Associate Builders vs. Delhi Development Authority* (*supra*), the Hon'ble Supreme Court has pointed out that an award can be set aside on the ground that it is opposed to public policy of India, if it is patently illegal or if the award is perverse. In paragraph No.32 of the judgment in **Associate Builders**, the Hon'ble Supreme Court had while dealing with the test of perversity observed as follows:-

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, 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.”

47. As we have already pointed out the awards as well as the order of the learned Single Judge ignores the notice dated 16.02.2012 completely, which makes the award perverse. In paragraph No.31 of the said judgment the Hon'ble Supreme Court had laid down a three pronged test as to perversity, they are,

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrived at; or

(iii) ignores vital evidence in arriving at its decision.



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48. Such decision would necessarily be perverse. We have no doubt in our mind that the award of the Arbitrator, Appellate Tribunal as well as the order of the learned Single Judge would come within the third ground, inasmuch as they have been passed in ignorance of the very vital evidence in the form of the letter dated 16.02.2012, wherein, the appellant had made it very clear that it will be constrained to sell the shares, if the money is not paid on or before 09.03.2012 and the shares were eventually sold on 12.03.2012. Section 176 does not require the pawnee to specify the date of sale.

Point No.2 in O.S.A.No.288 of 2020 and Point Nos.1 and 2 in O.S.A.No.289 of 2020:

49. As far as this issue is concerned, the sole Arbitrator had taken a mid-path, whereby, he has recognized the right of the appellant to recover the losses caused on account of transactions of Boothathan partially and he has also directed the appellant to levy execution of the award obtained by it against Boothathan. This has been confirmed by the appellate Tribunal.



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We find that the learned Single Judge was right in setting aside the award in its entirety, inasmuch as this award can be straight away termed as perverse, because it decides something which the Arbitrator or the appellate Tribunal were not called upon to decide.

50. The award that was impugned in O.P.No.267 of 2014 would be covered by the second principle laid down by the Hon'ble Supreme Court in paragraph No.31 of the *Associate Builders vs. Delhi Development Authority* (*supra*), that is, it takes into account something irrelevant to the decision which it arrives. Clause 5 of the Business Associate Agreement, which has been extracted *supra* would show that it will be open to the broker to take either security deposit or bank guarantee or pledge of shares. It does not prohibit a broker from taking both forms of security viz., bank guarantee as well as pledge. The action of the broker in taking both forms of guarantee cannot be said to be illegal or un-authorised. As the facts in this case would point out that the sub-broker or the business associate viz., the respondent herein failed to renew the bank guarantee. Therefore, the finding of the learned Judge that taking two forms of guarantee or security is



incorrect cannot be sustained.

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51. The learned Judge has held that having obtained an award the appellant should have executed it. When a guarantee is available and when the law is settled that the guarantors liability is co-existent with that of the principle debtor, it is open to a creditor to recover the monies from the surety. The creditor cannot be faulted for not having proceeded against the principle debtor. Therefore, the conclusion of the learned Single Judge that the appellant should have proceeded against Boothathan under the award it had obtained against him is directly against the well settled principles of contract of guarantee.

52. We are therefore unable to uphold the said conclusion. We find that the said conclusion militates against the well settled provisions of Indian law which, amounts to the conclusions being opposed to the public policy. We are therefore compelled to point out that the learned Single Judge was wrong in concluding that the appellant had no right to recover the monies due from the Boothathan from the respondent on the strength of clause 5 of the Business Associate Agreement.



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53. We are however unable to accept the contention of Mr.T.K.Bhaskar, learned counsel that the learned Single Judge ought not to have set aside the entire award. We agree with the contention of Mr.G.Vivekanand, learned counsel on his reading of Section 34 of the Arbitration and Conciliation Act. Once an application is filed under Section 34 seeking to set aside the award, it is the entire award that is subject matter of challenge. The Court cannot split up the award and set aside the portion that is against the party applying under Section 34, while retaining the remaining portion of the award.

54. While we uphold the order of the learned Single Judge, we must point out that the conclusion of the learned Single Judge relating to the right of the appellant to recover the monies that belong to Boothathan are not acceptable to us, as they are opposed to the fundamental principles of law of guarantee. This answers both the points in O.S.A.No.289 of 2020 and the second point in O.S.A.No.288 of 2020.



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55. In view of the foregoing discussions, **O.S.A.No.288 of 2020** will

stand **allowed** and the order of the learned Single Judge as well as the award of the appellate Tribunal and that of the Arbitrator will stand set aside. It will be open to the parties to seek re-arbitration in the light of the findings rendered by us above. **O.S.A.No.289 of 2020** will stand **dismissed** affirming the setting aside of the award and the parties will be at liberty to seek re-arbitration in the light of our observations made herein above. We direct the parties to bear their own costs in these appeals.

(R.SUBRAMANIAN, J.)

(R.SAKTHIVEL, J.)

23.04.2024

dsa

Index : Yes

Internet : Yes

Neutral Citation : Yes

Speaking order



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