

GAHC010020322018



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : Arb.A./3/2018

SMC GLOBAL SECURITIES LTD
11/6B, SHANTI CHAMBERS, MAIN PUSA ROAD, NEW DELHI

VERSUS

PURUSHOTTAM KUMAR KHEMANI
C/O- MAHESWARI AND COMPANY, MISSION ROAD TINIALI,
MARGHERITA, TINSUKIA, ASSAM

2:SWAPNA RANI PAUL
1ST FLOOR
N.K. GHOSH MARKET
AT ROAD
WARD NO. 12
GUWAHATI

Advocate for the Appellant : Mr. G. N. Sahewalla, Sr. Advocate
Mr. D. Senapati, Advocate

Advocate for the respondents : Mr. S. Chamaria, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 23.04.2024

Date of Judgment : 23.04.2024

JUDGMENT AND ORDER (ORAL)

This is an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996') challenging the order dated 25.01.2018 passed in Misc.(J) Case No.135/2014 whereby the application filed under Section 34 of the Act of 1996 was rejected.

2. Before proceeding on the facts leading to the filing of the instant Appeal, this Court finds it relevant to take note of that Section 34 of the Act of 1996 is a power conferred upon the Court to set aside an arbitral award. It is well settled by various judgments of the Supreme Court that the power under Section 34 of the Act of 1996 conferred upon the Court is limited on the grounds specifically enumerated in Section 34 of the Act of 1996. The constricted powers under Section 34 of the Act of 1996 upon the Civil Court to interfere with an arbitral award is for the reason that when the parties have chosen to avail an alternative mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the Arbitrator and the role of the Court should be restricted to the bare minimum. Interference would be justified only in the cases of commission of misconduct by the Arbitrator which can find manifestation in different forms including exercise of legal perversity by the Arbitrator. It is also well settled by the Supreme Court in its judgment in the case of *Dyna Technologies (P) Ltd. vs. Crompton Greaves Limited*, reported in *(2019) 20 SCC 1* that arbitral award should not be interfered with a causal and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. It was observed that an application under Section 34 of the Act of 1996 has to be differently approached and cannot be equated with a normal appellate jurisdiction. It was further observed by the Supreme Court in the said decision that the mandate under Section 34 of the Act of 1996 is to respect the finality of the arbitral award and the party autonomy to

get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

3. The Supreme Court further in the case of *UHL Power Company Limited vs. State of Himachal Pradesh*, reported in (2022) 4 SCC 116 categorically observed that when it comes to the scope of an Appeal under Section 37 of the Act of 1996, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all more circumscribed.

4. In the backdrop of the above proposition of well settled principles, let this Court takes into account the instant Appeal for adjudication. The facts as could be seen from the materials on record shows that the respondent herein was an investor who opened a Trading and Demat Account with the respondent Company through its sub-broker one Swapna Rani Paul at Margherita. It was alleged in the statement of claim by the respondents that the said business on behalf of the sub-broker was being managed and looked after by one Swarup Paul, her son. The respondent purchased certain shares in the market through the trading member during 2011-12 and 2012-13 and made full payment thereof and these stocks were lying in the Demat Account opened by the respondent with the trading member. It was alleged by the respondent that without his consent, authority and information, the sub-broker carried out transactions in respect of the stocks of the respondent. On enquiry, it could be learnt that the value of the majority of the shares of the respondent kept in the Demat Account were wiped off due to huge trading loss which the respondent did not consent the sub-broker to indulge in. Under such circumstances, the respondent demanded the settlement of the Account and his entitlement which was not refused by the appellant herein which had resulted in filing of the arbitration proceedings alleging various illegalities against the trading member, i.e. the appellant herein.

5. Upon filing of the said arbitration proceedings, the appellant herein filed reply

stating inter-alia that the grievances so set out by the respondent had no legs to stand. The record further reveals that there were various pleadings exchanged thereupon amongst the parties.

6. The Arbitral Tribunal thereupon framed two Issues, i.e. whether the unauthorized trade in F&O segment was carried out by the trading member and what was the responsibility of an individual investor and whether he can trade in the F&O without keeping proper margin with the trading member or in other words, whether trading member can be given margin leverage to an individual investor, and if so, what extent and what limit.

7. The Arbitral Tribunal vide an award dated 26.11.2013 opined that the trading member failed in its duty to keep surveillance on its sub-broker and completely failed to comply with surveillance mechanism and the risk management and the margin requirement which led to the loss suffered by the respondent due to selling his shares without his consent to adjust the loss occurred due to unauthorized trading by the sub-broker. Accordingly, the learned Arbitral Tribunal awarded an amount of Rs.20 lakhs to be paid by the appellant herein to the respondent within 30 (thirty) days from the receipt of the said order. The counterclaim so filed by the appellant for amount of Rs.2 lakhs was ejected.

8. Being aggrieved, the appellant preferred an inter Tribunal Appeal before the Appellate Arbitral Tribunal raising various grounds on facts and law. The Appellate Arbitral Tribunal vide a detailed order dated 10th June, 2014 dismissed the Appeal and confirmed the award dated 26.11.2013 passed by the learned Arbitral Tribunal.

9. Being aggrieved, an application was filed under Section 34 of the Act of 1996 for setting aside the award passed by the Appellate Arbitral Tribunal as well as the Arbitrator before the Court of the learned District Judge at Tinsukia which was registered and numbered as Misc.(J) Case No.135/2014. The said application was dismissed vide the impugned order dated 25.01.2018 and it is under such circumstances,

the instant Appeal has been filed.

10. In the backdrop of the above, let this Court take note of the submissions made by the learned counsel for the parties. Mr. G. N. Sahewalla, the learned senior counsel for the appellant submitted that this is a fit case for setting aside the award in terms with Section 34 (2) (b) (ii) of the Act of 1996 on the ground that the award was induced and affected by fraud or corruption. The learned senior counsel for the appellant expanding the said submission submitted that this is a case where fraud was committed by the respondent herein by submitting various fraudulent documents and on the basis of such fraudulent documents, the Award was passed, and as such, the said award so passed was in conflict with the public policy of India. The learned senior counsel for the Appellant submitted that the Appellant had filed an FIR against the Respondent and the same has been duly charge sheeted. The learned senior counsel further submitted that this very aspect of the matter was not taken into consideration by the learned Court while passing the impugned order for which the impugned order requires to be interfered with as well as the award be set aside. The learned senior counsel for the appellant further submitted that the learned Arbitrator did not consider the relevant evidence which would if taken show that the respondent herein had due notice of the trading in as much as he had received the SMS and contract notes and this very aspect of the matter was neither considered by the learned Arbitrator in the proper perspective nor was taken into consideration by the learned District Judge while passing the impugned order. The learned senior counsel for the appellant therefore submitted that this is a fit case for setting aside the Award in exercise of the Appellate jurisdiction of this Court

11. On the other hand, Mr. S. Chamaria, the learned counsel appearing on behalf of the respondent submitted that the question of fraud which has been alleged by the learned senior counsel for the appellant was for the first time raised before the Court in the proceedings under Section 34 of the Act of 1996. The question of fraud or any fraudulent documents were never raised before the Arbitrator as would be apparent from the materials on record including the details so mentioned in the arbitral award. The

learned counsel appearing on behalf of the respondent further drawing the attention of this Court to the judgment of the Supreme Court in the case of ***UHL Power Company Limited*** (*supra*) submitted that the question of interference to an arbitral award cannot be casual and in cavalier manner. The learned counsel appearing on behalf of the respondent further submitted that the perversity which has to be alleged in respect to the award has to be such a perversity which goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. He submitted that what had submitted by the learned senior counsel for the appellant is certain evidence was not appreciated in the proper perspective. The learned counsel submitted that the evidence cannot be reappreciated as if the Court under Section 34 of the Act of 1996 was sitting as an appellate Court. The learned counsel submitted that this is a fit case for dismissal of the Appeal with exemplary costs taking into account that since 2013, the appellant herein has been deprived of the fruits of the lawful award.

12. I have heard the learned counsels appearing on behalf of the parties and given anxious consideration to the submissions so made. Let this Court first take into consideration the first contention made by the learned senior counsel as regards the award to be in conflict with public policy primarily on the ground that the award was induced and effected by fraud or corruption. From the submission so made by the learned senior counsel for the appellant it transpires that it is alleged that the fraud was induced or effected on account of certain fraudulent documents being made the basis by the respondents herein to make his claim which resulted in passing of the impugned Award.

13. This Court has duly taken note of the arbitral award dated 26.11.2013 wherein the learned Arbitrator had painstakingly recorded the stand taken by the Appellant herein before the Arbitral Tribunal as stated in its reply as well as its rejoinder. There is not a single whisper in the said reply as well as in the rejoinder as regards the allegation of fraud in respect to the documents or there is a fraud committed by the respondents herein.

14. This Court further takes note of that in the intra Appeal which was filed by the Appellant against the award dated 26.11.2013, there is also no whisper of any allegation of fraud or any fraudulent documents being submitted. The gamut of the allegations which were made in the Intra Tribunal Appeal against the award dated 26.11.2013 is that the learned Arbitrator did not take into consideration the various materials on record in proper perspective. Under such circumstances, in the opinion of this Court, the said submission made by the learned senior counsel for the appellant is totally misconceived for the reasons aforementioned.

15. This leads this Court to take into account the second contention so advanced by the learned senior counsel for the appellant that the materials on record, i.e. the SMS as well as the contract notes were not taken into consideration by the learned Arbitrator as well as the Appellate Arbitral Tribunal while passing the impugned award. This Court finds it very relevant to take note of that the Court under Section 34 of the Act of 1996 cannot re-appreciate the evidence. The contours of the jurisdiction under Section 34 of the Act of 1996 can be only exercised if there is patent illegality or perversity which goes to the root of the matter. It is well settled that the expression “patent illegality” should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. It is no longer res-integra that the Courts while taking up an application under Section 34 of the Act of 1996 is prohibited to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award.

16. This Court has also duly taken note of the arbitral award passed by the learned Arbitrator dated 26.11.2013 and from the above, this Court is of the opinion that the Award so passed is a plausible view and the same could have been substituted for its own by the Court and it is also the opinion of this Court that the learned District Judge

vide its order dated 25.01.2018 had rightly rejected the application under Section 34 of the Act of 1996 in the manner well settled by the various principles laid down by the Supreme Court.

17. Under such circumstances, the question of interference by this Court in exercise of the powers under Section 37 of the Act of 1996 do not arise in view of the law well settled in the case of ***UHL Power Company Limited*** (supra).

18. Consequently, the instant Appeal stands dismissed. This Court imposes a cost of Rs.25,000/- which in the opinion of this Court is just and reasonable taking into account that since 2013, the respondents herein had been deprived of the fruits of a lawful award.

JUDGE

Comparing Assistant