

IN THE HIGH COURT AT CALCUTTA  
Ordinary Original Civil Jurisdiction  
ORIGINAL SIDE

**Present:**

**The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA**

**A.P. 641 of 2016**

**Sikha Basu**

**Vs.**

**BMA Wealth Creators Limited**

For the Petitioner : Mr. Rupak Ghosh, Adv.  
Mr. Sayak Chakraborty, Adv.

For the Respondent : Mr. Sourav Kumar Mukherjee, Adv.  
Mr. Binoy Chandra Dhara, Adv.

Last Heard on : 21.02.2020.

Delivered on : 26.06.2020.

**Moushumi Bhattacharya, J.**

1. The present application under section 34 of The Arbitration and Conciliation Act, 1996 (the Act) is against an Award dated 10<sup>th</sup> May 2016 passed by an arbitral tribunal of three arbitrators. The impugned Award upheld an award passed by a Sole Arbitrator declining relief of Rs.17,13,426/- to the petitioner (claimant in both the arbitration proceedings) on account of dues payable to the petitioner towards transactions in the stock market by the agent of the respondent trading company.

2. The petitioner had first filed a claim before the Sole Arbitrator under the By-laws, Rules and Regulations of the National Stock Exchange (NSE) and then challenged that Award before the Appellate Arbitral Tribunal under the NSE Regulations. The petitioner has challenged the Award of the Appellate Arbitral Tribunal in this application.

3. Mr. Rupak Ghosh, learned counsel appearing for the petitioner, places the relevant facts which led the petitioner to filing her claim before the Sole Arbitrator. The petitioner transferred her Demat Account to the respondent company in December 2009, the signed agreement and opening form which was dated 30<sup>th</sup> December 2009. Counsel contends that the Agreement was a fabricated document. Counsel submits that the transactions on behalf of the petitioner were in order till February 2014 and the petitioner was handed over a holding statement in February 2014 after which the petitioner instructed the respondent's agent, one Kaushik Nath, to stop all operations till 1<sup>st</sup> week of November 2014. The petitioner instructed the agent to sell some of the shares in the 1<sup>st</sup> week of November 2014 for an approximate valuation of Rs.12,45,000/-, which was reflected in the holding statement. The shares were sold as per instructions but the petitioner claims to have received only Rs.4,19,000/- with the respondent refusing to pay the balance amount, i.e. Rs.8,26,000/-. The petitioner filed a complaint dated 11<sup>th</sup> June 2015 and claimed Rs.16,47,525/- with interest at 12% per annum. Counsel submits that the account opening form had been tampered with and is inconsistent with the fact of petitioner creating an

email id much later on 20<sup>th</sup> February 2013. It is also submitted that the petitioner was not put on notice of the disputed transactions between February and November 2014. Counsel relies on *M.P. Power Generation Co. Ltd. vs ANSALDO Energia SPA* [2018 SCC Online SC 385] and *Associate Builders vs Delhi Development Authority* [(2015) 3 SCC 49] on the need to adopt a 'judicial approach' where there is a determination affects the rights of a citizen or leads to civil consequences as well on the importance of a court or authority applying its mind to the attendant facts for an effective adjudication.

4. Mr.Sourav Mukherjee and Mr.Binoy Chandra Dhara, learned counsel appearing for the respondent seek to sustain the impugned Award by resorting to the defence that the petitioner all along knew and had consented to the transactions and that the respondent had undertaken due diligence as a trading member at the relevant point of time. Counsel submits that there was no amount due to the petitioner. Counsel submits that the holding statement of February 2014 produced by the petitioner is a fabricated document. Counsel relies on *P.R. Shah, Shares and Stock Brokers Private Limited vs B.H.H. Securities Private Limited* reported in (2012) 1 SCC 594 on the embargo in re-examining the facts leading to the Award and substituting a possible view of the arbitrator with that of the court considering a challenge to an Award under section 34 of the Act.

5. First and foremost, the Sole Arbitrator's Award of 29<sup>th</sup> December 2015 needs to be looked into for understanding the impugned Award which is under challenge in this application. The Sole Arbitrator found that the petitioner had full knowledge of the trading made in her account and that the petitioner was

unable to prove her allegation of the holding statement dated 7<sup>th</sup> February 2014 being a forged and fabricated document and could not also prove that the fabrication was done by the respondent. The Arbitrator was also of the view that the petitioner proved that she had full knowledge of the trade carried on through her account till February 2014. The petitioner challenged this Award before the Appellate Arbitral Tribunal which resulted in the impugned Award dated 10<sup>th</sup> May 2016, by which the petitioner's appeal was dismissed as being devoid of substance.

6. The petitioner has challenged the impugned Award on the ground of being perverse and ignoring material evidence and has also assailed the Award on the ground of being in conflict with the public policy of India. Counsel has relied on *Associate Builders vs Delhi Development Authority* reported in (2015) 3 SCC 49 on public policy being a ground for setting aside an award under section 34 of the Act.

7. On perusing the impugned Award, the reasons for dismissing the petitioner's challenge to the first award have been clearly stated. The Tribunal was of the view that the appeal was devoid of substance as the transactions made on behalf of the petitioner by the respondent's agent was with the knowledge and consent of the petitioner. The Tribunal was further of the view that the Contract Notes, holding statements, ledger statements, transcript, SMS, ECN logs, emails, etc. indicated that the petitioner was negligent in respect of her account and also did not keep track of the Contract Notes and SMSs which were sent to the petitioner's mobile number containing the details of the transactions

executed in her account. Moreover, the petitioner did not object to any of the 'disputed' transactions despite being put on notice of the same by the respondent on a regular basis. The Tribunal also found the petitioner's claims to be contradictory inasmuch as mentioning different amounts in the course of the proceedings and containing inconsistencies with the loss computed on account of the unauthorised trade in her Demat account. There were other factors which contributed to the Tribunal declining relief to the petitioner including the petitioner failing to pin-point the specific period when the disputed transactions were executed as well as being unable to prove any of the claims against the respondent.

8. In an application under section 34 of the 1996 Act, the Court has to see whether the Award impugned should be set aside on any of the grounds available under section 34, namely the procedural matters in 34 (2)(a) or on the substance of the award under 34(2)(b) which includes an award being in conflict with the public policy of India which is clarified in sub-clauses (i) to (iii) to *Explanation 1* (contrary to section 75 or 81; in contravention with the fundamental policy of Indian law; in conflict with the most basic notions of morality or justice) or if an award is vitiated by patent illegality apparent on the face of the award under 34 (2-A). The fetter on a court against re-appreciation of evidence or a review on the merits is stated in *Explanation 2* to Section 34(2)(b) and the proviso to 34 (2-A). Recent decisions of the Supreme Court and the High Courts have stressed not only on the curbs imposed on courts against engaging with the facts and evidence but also against substituting a plausible view taken by the arbitrator on

those facts by that of a court sitting in a section 34 jurisdiction. The arbitrator is seen as the final authority on the appraisal of facts and unless such appraisal is found to be perverse or manifestly unreasonable, the Award should remain undisturbed. The award impugned in this proceeding has to be tested against the present position of the law in relation to applications for setting aside of arbitral awards.

9. The Arbitral tribunal in the impugned Award agreed with the findings of the Sole Arbitrator and declined relief to the petitioner on the primary consideration that the petitioner was negligent towards the trading from her account despite regular intimations of such by the respondent and that the petitioner failed to object to the transactions at the relevant point of time. The conclusion of the tribunal was based on a plethora of documents including Contract Notes, holding and ledger statements, SMS and ECN (electronic contract notes) logs, voice recordings, email chains, etc. from where the petitioner's knowledge of the transactions was concluded. The petitioner's contradictory claims made at different points of time have been specifically stated in figures (Rs.16,47,525/- as opposed to Rs.15,07,525/-). These conclusions can also be found in the first award which was passed by the Sole Arbitrator which is more detailed but comes to the same set of findings, namely, that the petitioner could not prove her claims in respect of the disputed transactions and that the transactions were executed with her full knowledge and consent. The reasons given by the Tribunal in the impugned Award are based on the documentary evidence before the Tribunal in the backdrop of the contentions of the parties

before it. None of the findings can be said to be such as would defy logic or found to be divorced from the relevant facts.

10. Although counsel for the petitioner has challenged the Award as being perverse on the ground of the Arbitral Tribunal having ignored vital evidence, the reasons disclosed do not reflect any such infirmity. One of the main grounds of challenge is that the Tribunal failed to consider that the petitioner could not have been intimated of the disputed transactions by email since her email account was created on 20th February, 2013, cannot be accepted for two reasons. First, the Tribunal found that the petitioner was regularly informed of the transactions executed in her account through SMSs to her registered mobile number. Second, the fact of the petitioner's knowledge was not dependent only on intimations sent by email but also from other means including ECN logs, voice recordings, etc. which were taken into account by the Tribunal and pointed to the conclusion that the petitioner had been negligent to the trade despite being informed of the disputed transactions.

11. The second challenge is based on the Tribunal overlooking the fact of the respondent not being able to produce documents showing that the transactions had been authorised by the petitioner. This issue would also be belied from the impugned Award which specifically records the delivery and despatch of documents of trade such as Contract Notes, SMSs sent to the petitioner's registered mobile number, ledger statements, ECN logs, email chains etc. which were considered by the Tribunal. Based on these documents, the Tribunal came to the conclusion that the petitioner had been highly negligent of and inattentive

to her account and had been in regular receipt of the documents of delivery. The Tribunal also concluded that the petitioner's claims were vague and loaded with contradictions. The Award of the Sole Arbitrator also lists the 7 documents produced by the respondent indicating delivery and due diligence carried out by it as a trading member. Neither of the Awards indicate that the conclusion drawn from the documentary evidence was such that no reasonable man could have arrived at such conclusion in the given circumstances or that the findings were vitiated on account of ignorance of vital evidence. The views of the Tribunal are credible and reasonable and are based on the factual contentions put forth by the parties. This is not a case where the court would deem it necessary to venture into the factual domain which was adequately dealt with by the Arbitral Tribunal on account of perversity or patent illegality appearing on the face of the Award. The extent of interference by a court on the factual score has been substantially curtailed under section 34 of the 1996 Act.

12. The reliance of the petitioner on *Associate Builders* would have been relevant if the Award was found to be in conflict with public policy of India or lacking in 'judicial approach' (paragraph 29 of the Report), in the sense of being whimsical or capricious in the manner of dealing with the subject matter or failing to comply with the principles of natural justice (paragraphs 28 and 30). The Award impugned does not suffer from any of these infirmities. The enumeration of the grounds on which an award may be set aside in paragraph 25 of *M.P. Power Generation* also does not help the petitioner as the present Award does not fall under any of the categories which had been outlined by *Associate*



Builders relating to the limits of a court's power under section 34 of the Act. On the other hand, *P.R.Shah* reinforces the embargo on reassessing evidence in a challenge to an award to see if a different decision could have been arrived at.

13. Although the respondent was not represented on the last few occasions when this matter was taken up for hearing and did not submit its Notes of Arguments, this Court is of the view that the Award can be tested on the grounds under section 34 and the materials on record notwithstanding the absence of the party who seeks to sustain the award. The court only has to see whether the grounds of challenge are borne out from the Award under challenge.

14. For the reasons as stated above, this Court finds no merit in the present application and A.P. No. 641 of 2016 is accordingly dismissed.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

**(MOUSHUMI BHATTACHARYA, J.)**