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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 272 OF 2019

IN

ARBITRATION PETITION NO. 902 OF 2013

Rashmi Aditya Gupta,
2901, A Wing, Lodha Bellissimo, Jacob Circle, Mahalaxmi, Mumbai 400 001

...Appellant
(*Orig. Petitioner*)

~ versus ~

Mangal Keshav Securities Ltd,
501, Heritage Plaza, 5th Floor, JP Road, Opposite to Indian Oil Nagar, Andheri (West), Mumbai 400 053

Samir Kapadia,
502, Earth Sampark, 10th Kethwadi, Main Road, 5th Floor, Mumbai 400 004

...Respondents
(*Orig. Respondents*)

Appearances

FOR THE APPELLANT	**Mr Simil Purohit**, *with Vishal Pattabiraman & Prasad Bhabal, i/b M/s. K Ashar & Co.*
FOR RESPONDENT NO.1	**Mr Piyush Raheja**, *i/b Santosh.*
FOR RESPONDENT NO.2	**Ms Alpa T Javeri.**

CORAM : G.S.Patel &
Madhav J Jamdar, JJ

DATED : 5th July 2022

ORAL JUDGMENT (*Per GS Patel J*):-

1. The Appellant takes an exception to an order of 26th November 2018 (SC Gupte, J) in an Arbitration Petition under Section 34 of the Arbitration and Conciliation Act. The Appellant challenged the award of a sole Arbitrator in an arbitration held under the Bye-laws, Rules and Regulations of the National Stock Exchange India Ltd (**"NSE"**). The Claimant in arbitration was the 1st Respondent Mangal Keshav Securities Ltd ("**MKSL**") a trading member of the NSE. The 2nd Respondent, one Samir Kapadia, is one of MKSL's sub-brokers. The claim in reference was in respect of amounts said to be due from the Appellant as a constituent of MKSL. It was specifically identified as the amount due under certain Futures and Options (F&O) transactions that MKSL claimed to have executed on the Appellant's behalf.

2. Before the learned sole arbitrator, the Appellant contended that she dealt with MKSL only for share purchase transaction on a delivery basis and never dealt in the F&O segment. She said that the transactions that MKSL claimed were on her behalf in the F&O segment were entirely unauthorised. Hence, she had no liability. One of the contentions was that the NSE regulations, including Regulation 3.10(a), made it mandatory for a trading member to have a specified margin for F&O trades. MKSL maintained no such

margin. Therefore, the Appellant argued, there could not have been any trading by MKSL on the Appellant's behalf in the F&O segment. The Appellant also said that the transactions that MKSL claimed to have done on her account were contrary to the terms of the contract as also contrary to NSE Regulations.

3. A copy of the impugned award is available from page 110. As regards Appellant's claim to innocence, or, more accurately, to being unaware and incapable of being aware of the transactions, the learned arbitrator found that the Appellant's case inspired no confidence. She was a commerce graduate with a fair income, a sizeable portfolio, three years of share market experience and, more importantly for our purposes. shown to be trading in both sectors, i.e. shares as also F&O. She was also shown as a director in at least three private companies. The learned arbitrator, on an assessment of this evidentiary material, rejected the Appellant's case and claims to innocence and incomprehension. Consequently, the learned Sole Arbitrator disbelieved the Appellant's case that she was not in a position to comprehend the purpose of the contract notes admittedly issued to her by MKSL.

4. On the question of margin, the award indicates that the Arbitrator considered Regulation 3.10 and the requirement of shares being kept towards the margin for F&O trades sufficient to meet margin requirements. The learned Sole Arbitrator returned a specific finding that the Appellant did not ask for these shares purchased by her on a delivery basis for a very long time. She filed no arbitral reference or complaint demanding a return of these

shares. That demand came only when MKSL made its demand for payment of the outstanding dues in the F&O segment.

5. Before Gupte J, an argument was canvassed that the requirement of Regulation 3.10(a) is of a margin amount in cash and not in collateral securities. This, it was submitted, is to enable the trading member, in this case MKSL, to expeditiously reimburse itself for the transacted shares. If the credit balance is insufficient for the purposes of a derivatives or a F&O contract, then the trading member is required to close the transaction to mitigate loss and must then recover the amount due from margin money. The submission before Gupte J was that if the trading member did not demand the margin and yet permitted the constituent, a person such as the Appellant, to carry on with the transactions, this was not only contrary to the regulations. rendering the contract vulnerable, but would be at the sole risk and cost of the trading member. The result would be an unrecoverable amount or loss.

6. Before Gupte J, the Appellant then submitted, as Mr Purohit does on her behalf before us now, that the financial statement issued by MKSL shows that from about 11th September 2008 the account of the Appellant was in a debit balance. This could only mean, Mr Purohit submits, that the margin money had been exhausted and there was no possibility of further transactions in the F&O segment.

7. Our task in appeal is not to assess either the award or the order of the learned Single Judge as one might do in a regular First Appeal. That is clearly prohibited. Indeed the law on this subject is

sufficiently settled by the decision of the Supreme Court inter alia in *Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India*.[1] That decision traced the evolution of the law from previous judgments including in particular the decision of the Supreme Court itself in *Associate Builders v Delhi Development Authority*[2] and also showed how some of the principles enunciated in *ONGC Ltd v Western Geco International Ltd*[3] could no longer survive. In *Union of India v Recon*,[4] a decision by one of us (GS Patel J), this court attempted an eliciting of the governing principles that thus emerged from *Ssangyong Engineering*. The relevant portion of Recon is extracted below:

> **17.4** This yields the following result:
>
> **(i)** A lack of a '*judicial approach*', being the *Western Geco* expansion, is not available per se as a ground of challenge.
>
> **(ii)** A violation of the principles of natural justice is a ground for challenge as one under Section 18 read with Section 34(2)(a)(iii) — that is to say, not under the 'fundamental policy' head nor the 'patent illegality' head, but distinctly under this sub-section.[5]
>
> **(iii)** A lack of reasons is a patent illegality under Section 34(2-A).

1(2019) 15 SCC 131.

2 (2015) 3 SCC 49.

3 (2004) 9 SCC 263.

4 2020 SCC OnLine Bom 2278 : (2020) 6 Mah LJ 509 : (2020) 6 AIR Bom R 613 : (2021) 1 Bom CR 167.

5 34(2)(a)(iii): the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings **or was otherwise unable to present his case**.

(iv) In *interpreting the contract*, the arbitral view must be *fair-minded* and *reasonable*. If the view is one that is *not even possible*, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.

(v) '*Perversity*' as understood in *Associate Builders*, is now dishoused from '*fundamental policy*' (where *Western Geco* put it), and now has a home under '*patent illegality*'. This includes:

(A) a finding based on no evidence at all;

(B) an award that ignores vital evidence; and

(C) a finding based on documents taken behind the back of the parties.

I believe this is not an exhaustive listing.

Combining (iv) and (v) above, therefore, while the explicit recognition or adoption of the *Wednesbury* unreasonableness standard (introduced in *Western Geco*) is probably done away with, there is even yet a requirement of reasonableness and plausibility in matters of contractual interpretation. If the *interpretation of the contract* is utterly unreasonable and totally implausible — the view taken is not even possible — a challenge lies. Therefore: an award that was impossible either in its *making* (by ignoring vital evidence, or being based on no evidence, etc) or in its *result* (returning a finding that is not even possible), then a challenge on the ground of 'perversity' lies under Section 34(2-A) as a dimension of 'patent illegality'.

8. The same principles would apply to a Section 37 appeal as they do to a Section 34 challenge Petition.

9. The submission by Mr Purohit today before us is that the failure to appreciate the regulation is contrary to the 'fundamental policy of Indian law'. That submission, in our view is ill-founded. An incorrect application of the law does not render an award vulnerable only for that reason. The restricted level of judicial interference is because of the mandate in the Arbitration Act itself which speaks of minimal judicial interference. The statutory objective is to provide by means of arbitration, a form of alternate dispute resolution, a quick and speedy disposal or adjudication resulting in effective and quick enforcement. This is why the approach of Courts has in the recent past seen a distinct paradigm shift from a close examination to a more hands-off approach.

10. We cannot accept Mr Purohit's submission that the award is a non-speaking or unreasoned award.

11. What the learned Single Judge held in paragraph 3 of the impugned order, in the context of the margin money requirement and the conduct of the Appellant was simply this. He concluded that the view of the arbitrator was clearly a plausible view supported by evidence on record, and therefore did not call for interference under Section 34. As to the question of the regulation and the margin money requirement, the learned Single Judge considered the judgment cited before him in *Kritika Nagpal v Geogit Financial Services Limited*[6] and held that the judgment does not talk about the margin money being only in cash. It speaks about security provided by the constituents at the same time. In other words, the learned

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62016 SCC OnLine Bom 4854.

Single Judge held, providing security by collateral in lieu of margin money in cash is not impermissible. Even otherwise, the learned Single Judge said, the arbitrator's view was a plausible view. That the shares were held as collateral, including for F&O transactions in fulfilment of the relevant regulation, was, the learned Single Judge held, not a view that could be said to be such that no fair or judicially-minded person could ever have arrived at.

12. The *Ssangyong Engineering* enunciation on the question of the 'fundamental policy of Indian law' is not that an erroneous application of law violates the proscription. The expression 'fundamental policy' speaks to the consideration that underlies every statute, for instance, violation of the principles of natural justice. Something more than contravention of law is required to attract the bar of public policy under the Act: *Vijay Karia v Prysmian Cavi E Sistemi SRL*;[7] *Banyan Tree Growth Capital LLC v Axiom Cordages Limited*.[8] In fact, *Ssangyong Engineering* itself makes it clear that a challenge is permissible on the ground that the award violates the fundamental policy of Indian law but also clearly says that no challenge can be entertained because there is "an erroneous application of law".

13. As to the financial statements and what they showed about the debit balance, this was a matter of appreciation of evidence, something clearly exclusively within the domain of the arbitral tribunal. The learned Single Judge held that there is nothing to indicate that the debit balance shown in the financial statements for

7 (2020) 11 SCC 1.

8 (2020) SCC Online Bom 781.

a particular period took into account the value of the shares kept as collateral to meet the margin requirements. He then went on to hold, correctly in our view, that this is after all a matter of evidence. An arbitral view on evidence — that, at the relevant time, MKSL had the requisite shares sufficient to account for margin money — would be a plausible view. It could not be said to be a view unsupported by an evidence or a view formed by taking into account irrelevant material or disregarding relevant material.

14. Implicit in Mr Purohit's submission is that all evidence of the Appellant's conduct must be ignored and must count for nothing: her not demanding back the shares placed as margin, her very late disavowal of the contract notes, the compelling evidence of her trading activities, wealth and means, her directorships, and her claim to wide-eyed innocence and bottomless ignorance about the very activity in which was engaged. It is not possible, in our view, to wholly ignore all this material. The learned Sole Arbitrator was correct in taking account of it, as was Gupte J.

15. In the impugned order, Gupte J referred to the decision of Supreme Court in *Associate Builders*. He held that once it is found that the arbitrator took a view that was possible and which could be sustained, it is impermissible for a Section 34 Court to upturn the award.

16. We are entirely in agreement with the views of the learned single Judge.

17. We see no merit in the Appeal. It is dismissed.

18. There will be no order as to costs.

(Madhav J Jamdar, J) **(G. S. Patel, J)**