$~54

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decided on:29th April, 2022*

\+ **FAO (OS) (COMM.) 147/2018**

ANGEL BROKING PVT. LTD. .....Appellant

Represented by: Mr. Ajay Monga, Mr. Ateev Mathur, Ms. Jagriti Ahuja and Mr. Devmani Bansal Advocates.

versus

URMIL MODI ..... Respondent

Represented by: Mr. Harish Malhotra Senior Advocate with Mr. Rajender Agarwal and Mr. Anoop Kumar, Advocates.

**CORAM:**
**HON'BLE MS. JUSTICE MUKTA GUPTA**

**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA**

**NEENA BANSAL KRISHNA, J. (ORAL)**

1. An appeal under Section 37 of the Arbitration and conciliation Act, 1996 *(hereinafter referred to as "the Act,1996")* read with Section 13 Commercial Courts Act, 2015 has been filed against the order dated 20th March, 2018 vide which the objections under Section 34 of the Act,1996 has been allowed and the appellant is directed to pay ₹18,20,982.75 to the respondent along with interest @ 6% per annum.

2. The facts in brief are that the appellant is a Company incorporated and registered under the Companies Act, 2013. It is a Member of National Stock Exchange of India (NSE) and provides trading in shares and securities in the cash market as well as the derivative market. The respondent opened a Demat-cum-Trading Account somewhere in the year 2007 with the appellant for the purpose of buying and selling of shares on the platform of National

Stock Exchange and Bombay Stock Exchange respectively with Angel Capital & Debt Marketing Ltd. (ACDL) and Angel Broking Ltd. (ABL). Both the Companies subsequently merged and amalgamated into Angel Broking (Pvt.) Ltd. The respondent in her claim before the Arbitrator had stated that she had been dealing with Angel Broking Pvt. Ltd. since the year 2007 and her dealings were confined to sale and purchase of shares against cash payment only. According to her Member Client Agreement and Risk Disclosure Statement dated 23rd August, 2010 respondent had clearly prohibited contract notes to be sent by email in an electric form and for receiving SMS alerts for the said Agreement. The Agreement further prohibited maintenance of account on a running account basis and also adjustment *inter se* between the group companies of the respondent including and with respect to the Angel Broking Pvt. Ltd. or the trades carried out in any other Segments/Exchanges. The contract importantly provided for a term with respect to the daily settlement of the positions and the payment of margin before the commencement of trading before the next date. It further provided that if the petitioner defaulted in paying the daily margin and market to market amount, if any, the respondent shall be entitled to liquidate/ close all or any of the respondent's position. The parties were also governed by guidelines and circulars of Multi Commodity Exchange of India Ltd. (hereinafter referred to as 'MCX') and also of the Forward Markets Commission (FMC). The respondent had asserted that even though she had entered into a Member Client Agreement with the appellant, she did not carry out any transaction in the said account. In September, 2011 she came to know that a large number of transaction in commodity market has been carried out in her account causing her a huge financial loss.

3. According to the respondent Angel Broking Pvt. Ltd. was holding respondent's stock and securities of the value of ₹40 lakhs which they refused to release and in order to save her security, she paid an amount of ₹18.40 lakhs vide cheque in favour of the appellant so that her shares and securities could be transferred to a new Demat Account opened by her with State Bank of India. Her claim was that she never transacted any business and was entitled to seek refund of ₹18,20,982.75 paid by her to the appellant aside from ₹5 lakhs as compensation for mental agony and harassment. The matter was referred to the panel of Arbitrator

4. According to the appellant, the respondent since the opening of the account, has been regularly trading in the stock market without any demur. Various trades were executed in the trading account of the respondent from MCX from time to time and respondent was receiving the contract notes and SMS alerts on the respective Email ID and phone number. The appellant was also sending monthly *Sauda Summary* to the respondent through post.

5. Ld. Arbitrator vide impugned order dated May, 2013 dismissed the claim of the respondent.

6. The respondent then challenged the impugned Award under Section 34 of the Arbitration and Conciliation Act before the learned Single Judge of this court, who after considering the rival contentions concluded that the arbitral award suffered from patent illegality. It was observed that there was an express prohibition in the contract and merely because the respondent had agreed to receive the contract notes through email from another group Company of the appellant, it could not be presumed that the respondent had agreed to receive the same even in respect of its relationship with the respondent which was admittedly governed by a separate contract.

Likewise, accepting sms communications sent by the appellant to the respondent with respect to the trade carried out on behalf of the petitioner, was held to be a perverse way of re-writing the contract between the parties and putting an onus on the innocent party rather the party in breach of the express terms of the contract. The sending of sms information was clearly barred by the respondent and if the onus of disputing such sms is also put on the party, it would defeat the very sanctity of the Agreement. It was further observed that while the Tribunal had placed reliance on large number of transactions being carried out at the behest of the respondent in the commodity market, it completely failed to take note of the entries in ledger account showing that the respondent was in a continuous debt balance since at least from 8th November, 2010 to 21st November, 2011 when the payment was made by the respondent to the appellant and was adjusted against the respondent's account with the appellant. The contract between the parties clearly provided for daily adjustment of the account maintaining daily balances as also margin was a mandatory requirement not only under the contract, but also the circulars issued by FMC and MCX and the finding of the Arbitral Tribunal that any violation thereof would not render the trade executed by the client illegal but would only make the trading member liable to penalty/ administration action, was not tenable and such interpretation would defeat the object of the circulars issued by FMC and MCX. The transcripts of the voice recording produced by the appellant on which reliance had been placed by the Arbitral Tribunal, clearly reflected that they did not relate to the placing of order by the respondent for any transaction or approval of the same *ipso facto*. The Member Client Agreement executed between the parties prohibited the inter company transfer and settlement and

the conclusion of the Arbitral Tribunal that the appellant had been authorized to transfer the funds in equity and F&AO Account for appropriation against the debit outstanding in the commodity account maintained by the appellant was also perverse as the respondent had specifically denied any such authorization being ever given to the appellant. It was finally concluded that there was no delay between 21st November, 2011 till the filing of the complaint in February, 2012 by the respondent and even otherwise she in the interregnum, was corresponding with the appellant so as to gather documents which would support her case before the Tribunal. The claim of the respondent cannot be considered as an afterthought. It was thus concluded that the impugned award suffered from patent illegality and thus, the impugned award was set aside. It was further noted that the appellant had adjusted an amount of ₹20,69,865.15 from the payment made by the respondent to the appellant but the respondent had claimed only a sum of ₹18,20,982.75, which it was liable to refund to the respondent. Accordingly, the amount of ₹18,20,982.75 as was claimed by the respondent, was directed to be repaid by the appellant along with interest @ 6% per annum w.e.f 21st November, 2011 till the date of payment. The claim for ₹5 lakhs on account of harassment and mental agony, however, was declined.

7. The appellant aggrieved by the order of the learned Single Judge allowing the objections under Section 34, has filed the present appeal under Section 37 of the Act, 1996.

8. The main grounds agitated on behalf of the appellant are that the learned Single Judge while adjudicating the objection petition, not only over reached its jurisdiction by scrutinizing the findings of the Arbitral Tribunal

but also travelled beyond the powers provided under Section 34 of the Act,1996 by granting the relief to the respondent.

9. Section 34 of the Act provides that the court can either set aside the award or uphold it but it does not contemplate any powers to modify the award or supplant it by its own judgment or order. On this ground itself the impugned order is liable to set aside.

10. The scope of Section 34 of the Act, 1996 is very limited and the court cannot reappreciate the facts as an Appellate Court over the findings of the Arbitral Tribunal. The respondent had filed a claim in the sum of ₹16,50,000/- towards the losses on account of unauthorized trading which was enhanced to ₹18,20,982.15 by the Arbitral Tribunal MCX without any justifiable reasons. Moreover, the respondent had made the final payment of ₹18.40 lakhs in discharge of her trade dues outstanding in the commodities account on 18th November, 2011 after the last trade was executed on the said date. This payment was made by her in discharge of the dues without any demur or reservations. The learned Single Judge failed to appreciate that the Arbitral Tribunal is the final arbiter of facts and law and it was not open to learned Single Judge to reappreciate the evidence and the documents as it is beyond the scope of Section 34 of the Act. It was thus submitted that the impugned order be set aside and the appeal may be allowed.

11. Submissions heard.

12. The main issue for adjudication in the present case is: *whether the court has jurisdiction and the power to modify, alter an arbitral award under Section 34 of the Act, 1996.* The relevant para of Section 34 of the Act reads as under :

*"34. Application for setting aside arbitral award— xxx xxx xxx*

*(2) An arbitral award may be set aside by the Court only if—*

*(b) the Court finds that--*

*(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*

*(ii) the arbitral award is in conflict with* ***the public policy of India.***

*[1][Explanation 1.--For the avoidance of any doubt, it is clarified that an award is* ***in conflict with the public policy of India,*** *only if,--*

*(i) the making of the award was induced or affected by* ***fraud or corruption*** *or was in violation of section 75 or section 81; or*

*(ii) it is in contravention with the* ***fundamental policy of Indian law****; or*

*(iii) it is in conflict with the most* ***basic notions of morality or justice.***

*Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the* ***'fundamental policy of Indian law' shall not entail a review on the merits of the dispute.***

*(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is* ***vitiated by 'patent illegality'*** *appearing on the face of the award:*

***Provided*** *that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.*

13. Section 34 of the Act makes provision for the supervisory role of

courts for review of arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, when *an award is* ***in conflict with the public policy of India,*** *which includes* cases of fraud, breach of fundamental policy of Indian law and breach of public morality. The other ground provided under Section 34 is **patent illegality**. It specifically provides that an award cannot be set aside on the ground of erroneous application of law or on re-appreciation of fact. In the decision of *McDermott International Inc. Vs. Burn Standard Co. Ltd.* (2006) 11 SCC 181, a reference was made to the decision of *U.P. State Handloom Corpn. Ltd. Vs. Asha Lata Talwar* 2009 SCC OnLine All 624 and observed that under Section 34 of the Act of 1996 there is a departure from the scheme of Section 16 in the 1940 Act where perhaps the court was given wider amplitude of powers. The Apex Court interpreted the scope of interference under Section 34 and observed that the court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. The scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. Under Section 34(2) of the Act 1996 the court is empowered to set aside an arbitral award on the grounds specified therein. There is no specific power granted to the court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34(4) of the Act, then the court would be acting no different from an appellate court which would be

contrary to the legislative intent of the Section 34 of the Act, 1996. The court shall decline to decide the claim that had been rejected even if wrongly by the learned Arbitrator.

14. In the decision of *Dyna Technologies (P) Ltd. Vs. Cromption Greaves Ltd.* (2019) 20 SCC 1, the Supreme Court noted that only when there is complete perversity in the reasoning then it can be challenged under the provisions of Section 34 of the Act. The power vested under Section 34(4) of the Act, 1996 to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid the challenge based on the aforesaid curable defects under Section 34 of the Act.

15. Delhi High Court in *Nussli Switzerland Ltd. Vs. Organizing Committee, Commonwealth Games*, 2014 SCC OnLine Del 4834 observed that if a party succeeds in the objections to the award, the court at best can set aside the award under Section 34 of the Act, 1996, but it does not empower the court to modify an award. It would be open to the party concerned to commence fresh proceedings (including arbitration).

16. The decision of *McDermott International (supra)* has been referred to by the Supreme Court in *Kinnari Mullick vs. Ghanshyam Das Damani* (2018) 11 SCC 328 and in *Dakshin Haryna Bijli Vitran Nigam Ltd. vs. Navigant Technologies (P) Ltd.* (2021) 7 SCC 657 and it has been held that there is no power with the court to modify an arbitral award. To recognise such power to modify, revive or vary the award under Section 34 of the Act would be to ignore the previous law contained in 1940 Act and also to ignore that 1996 Act was enacted on UNCITRAL Model Law on International Commercial Arbitration, 1985 which makes it clear that given

the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right" namely either to set aside an award or to remand the matter under the circumstances mentioned in Section 34 of the Act, 1996.

17. In its recent judgment in *National Highway Authority of India vs. M. Hakeem* (2021) 9 SCC 1, the three Judges Bench of the Apex Court referred to **Redfern and Hunter on Internation Arbitration (6th Edn.)** in regard to setting aside of an award wherein it was observed that the purpose of challenging an award before the national court at the seat of arbitration is to have that court declare all, or part, of the award as null and void. If an award is set aside or annulled by the relevant court, it will usually be treated as invalid, and accordingly unenforceable, not only be the courts of the seat of arbitration, but also by national courts elsewhere. Following complete annulment, the claimant can recommence proceedings because the award simply does not exist – i.e. the status quo ante is restored. *The reviewing court cannot alter the terms of an award nor can it decide the dispute based on its own vision of the merits. Any new submission of the dispute to arbitration after annulment has to be undertaken by commencement of new arbitration with a new Arbitral Tribunal.*

18. In the decision of *M. Hakeem* (supra) the Apex Court reaffirmed that if one were to include the power to modify an award under Section 34 of the Act, 1996, one would be crossing the *Laxman Rekha* as the Parliament clearly intended to confer no power of modification of an award under Section 34 of the Act, 1996. While entertaining appeals under Section 34 of the Act, 1996 the court is not actually sitting as a Court of appeal over the

award of the Arbitral Tribunal and therefore, the court would not re-appreciate or re-assess the evidence.

19. It was concluded in *M. Hakeem* (supra) by the Apex court that the position of law stands crystallized today. The findings of facts as well as of law, of the Arbitrator/ Arbitral Tribunal are ordinarily not amenable to interference either under Section 34 or Section 37 of the Act. The scope of interference is only where the finding of the Tribunal is either contrary to the terms of the contract between the parties, or ex facie, perverse, that interference by this Court is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act.

20. Clearly the learned Single Judge traversed in to the facts of the case to arrive at a contrary finding which was against the express dictat of Section 34 of the Act barring the court from setting aside the award by re-appreciation of evidence and substituting it by allowing the claim of the respondent. The impugned order dated 20th March, 2018 is therefore, set aside leaving the parties to refer their matter afresh to Arbitration.

**(NEENA BANSAL KRISHNA)**
**JUDGE**

**(MUKTA GUPTA)**
**JUDGE**

**APRIL 29, 2022/va**