<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY</u>

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 652 OF 2012

Anmol Mantri ….. **Petitioner**

VERSUS

Monarch Comtrade Pvt. Ltd. ….. **Respondent**

Mr.Simil Purohit, a/w. Mr.Farhan Khan, i/b. Purohit & Co. for the Petitioner.

Ms.Kranti Anand, a/w. Mr.Vijay Kamat for the Respondent.

CORAM : <u>R.D. DHANUKA, J.</u>

DATED : 8th APRIL, 2015

<u>P.C</u>.

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 21st November, 2011 passed by the learned arbitrator of the Multi Commodity Exchange of India Limited. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original respondent whereas the respondent was the original claimant in the arbitral proceedings.

3. The petitioner appointed the respondent as his broker to carry out transactions on Multi Commodity Exchange as well as NCDEX through one M/s.RSD Securities & Financial Services. It is the case of the petitioner that all the payments were made by the petitioner to the respondent through its authorised agent M/s.RSD Securities & Financial Services. The petitioner carried out transactions through the respondent w.e.f. 29th April, 2010 and continued his transactions upto 1st September, 2010.

4. There is no dispute about the transactions carried out by the respondent on behalf of the petitioner for the period upto 1st September, 2010.

5. It is the case of the petitioner that the petitioner had paid various amounts from time to time to the respondent by cheques as well as in cash. As on 1st September, 2010 there was debit balance in the account of the petitioner with the respondent of Rs.1,15,775.64. It is the case of the petitioner that as against the said debit balance of Rs.1,15,775.64, the petitioner had paid a sum of Rs.1 lacs on 8th September, 2010 to the respondent leaving the balance amount of Rs.15,775.64. The respondent was holding securities of the petitioner as against the said debit balance.

6. It is the case of the petitioner that since the petitioner was getting messages from the respondent regarding alleged transactions purportedly carried out in his account and regarding alleged dues payable by the petitioner, the petitioner instructed the said M/s.RSD Securities and Financial Services to sell his securities lying with the respondent. The petitioner was informed that all his securities had been already sold and that there was a huge debit in his account. It is the case of the petitioner that for the first time vide its letter dated 26th October, 2010 the said M/s.RSD Securities & Financial Services forwarded to the petitioner a copy of the ledger account, contract notes and bills alleging that a sum of Rs.5,75,991.31 was due and payable by the petitioner to the respondent. The petitioner thereafter addressed a letter through his advocate on 1st November, 2010 to the said M/s.RSD Securities & Financial Services disputing the transactions. The respondent vide their letter dated 26th October, 2010 called upon the petitioner to withdraw the said notice and to pay the alleged dues of the respondent.

7. The respondent ultimately filed a claim against the petitioner before the

learned arbitrator under the provisions of the rules and regulations of the Multi Commodity Exchange of India Limited inter alia praying for a sum of Rs.5,75,991.31 togetherwith interest. The said claim was resisted by the petitioner.

8. On 22nd November, 2011, the learned arbitrator passed an award in favour of the respondent and directed the petitioner to pay a sum of Rs.3,28,371/- with interest thereon at the rate of 12% per annum from 6th April, 2011 till the date of the payment. The said arbitral award has been impugned by the petitioner in this petition filed under section 34.

9. Mr.Purohit, learned counsel appearing for the petitioner invited my attention to the pleadings and documents and also the findings rendered by the learned arbitrator. Reliance is also placed on the bye-laws of the Multi Commodity Exchange and in particular bye-laws nos. 8.1 to 8.6.10. Learned counsel submits that even according to the respondent there was a debit balance in the account of the petitioner as on 1st September, 2010. Even if according to the respondent though the demand for margin money was made upon the petitioner and if the petitioner had failed to pay such margin money under those bye-laws of the Multi Commodity Exchange Ltd., the respondent was bound to square up the transaction immediately upon such shortfall of margin money. He submits that the learned arbitrator however in violation of the mandatory bye-law has considered the cut-off date as 22nd September, 2010 when the respondent had illegally carried out two transactions gold Dec-2010.

10. He submits that on one hand the learned arbitrator has held that the respondent could not have carried out fresh transaction once there was a shortfall of margin money as on 1st September, 2010 on 27th September, 2010 and on the other hand has accepted the submission of the respondent that it was in view of the

good relationship maintained between the parties and the payment record of the respondent, the cut off date could not be considered as 1st September, 2010. Learned counsel submits that even if the cut off date was considered as 27th September, 2010, the learned arbitrator did not consider the square up of transaction as of 27th September, 2010. The learned arbitrator has only set aside the new transactions carried out by the respondent on 27th September, 2010 but did not consider the position, if the account of the petitioner would have been squared of either on 1st September, 2010 or at the most on 27th September, 2010.

11. Learned counsel placed reliance on the judgment of this court in case of ***M/s.BMA Commodities Pvt.Ltd. vs. Ms.Kaberi Mondal*** in Arbitration Petition No.854 of 2012 delivered on 17th December, 2014 and in particular paragraphs 55 to 59 and would submit that since the respondent was under the obligation to comply with the bye-laws of Multi Commodity Exchange and in view of the alleged shortfall in the margin money had not squared off the transaction, the respondent was not entitled to make any claim against the petitioner due to his own violation of the bye-laws. Paragraphs 55 to 59 of the said judgment in case of ***M/s.BMA Commodities Pvt.Ltd.(supra)*** read thus :-

> 55] Bye-law 8.2.2 clearly provides that every member of the Exchange executing transactions on behalf of the client shall collect from the clients the margins specified from time to time, against their open positions within such time as may be prescribed by the Relevant authority. By-law 8.5 provides that failure to pay any variation margin may lead to the exchange members being deactivated/suspended and declared as defaulters by the exchange. The relevant authority may also take such other measures including disciplinary actions, against the defaulting members as it may deem fit. Bye-law 8.6.1 provides that no clearing member shall directly or indirectly enter into any arrangement or adopt any procedure for the purpose of evading or assisting in the evasion of the margin requirements prescribed under the bye-laws, rules and

regulations or any orders issued thereunder. The clearing member has to account for the margin deposits received from the constituent.

56] Bye-law 8.6.5 clearly provides that an exchange broker may close out an open position of a client when the call for further margin or any other payment due is not complied with by the client. Byelaw 8.6.6 provides that a clearing member may close out an open position of a constituent member when the call for further margin or any other payment due is not complied with by the constituent member. Bye-law 8.7 provides that every clearing member shall collect from constituent members, with whom he has an agreement to provide clearing and settlement services as per these bye-laws, all such margins as specified by the relevant authority on the transactions executed by constituent members for clearing and settlement.

57] A perusal of record indicates that the respondents have failed to prove that any demand was made by the respondent on the claimant for deposit of any margin money, even if there was a debit balance in the account of claimant on a particular date. On the contrary, the records produced by the respondent itself indicates that the respondent has carried out large number of transactions, including purchase transactions, in the account of the claimant on the date of debit balance. It is thus clear that the claimant would not have given any such instructions to the respondent for carrying out such transactions on behalf of the claimant.

58] In my view the respondent has failed to produce any proof of any instructions from the claimant to carry out any such transactions or that the transactions were carried out by the claimant herself online or that she was personally present to carry out such transactions in the office of the respondent and also having failed to prove that the respondent had demanded any margin money, which the claimant had failed to deposit and, therefore, the respondent was justified in squaring off of the transactions, standing in the account of claimant. In my view, since the respondent has carried out the transactions

> without demanding any margin money from the claimant and without any instructions from the claimant though there was debit balance, all such transactions carried out by the respondent, without any instructions and without any demand for margin money, were unauthorised and no such debit could have been made in the account of claimant in respect of such unauthorised transactions. A trading member who has carried out any such transactions in breach of bye-laws of MCX cannot make any claim against the constituent and/or debit any amount to the account of the claimant in respect of such unauthorised transactions.
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> 59] A perusal of arbitral award indicates that the arbitral tribunal has rendered a finding of fact that there was a credit balance of Rs.20 lakhs in the account of the claimant on 10th May 2011 and, therefore, it was reasonable to conclude that the “Hold” instruction was issued by the claimant to Mr.Priotosh Ghosh on or immediately after 10th may 2011. The arbitral tribunal has also rendered a finding that there was no evidence produced by the respondent and that the respondent had not questioned the entries in the telephone bills filed by the claimant for the period 20th March 2011 to 26th June 2011, showing that there had been no record of any telephone talks between her and the respondent. It is also held by the arbitral tribunal that the respondent had expressed inability to produce any visitor's book to substantiate the allegations that the claimant used to visit its office frequently to instruct its agent Mr.Priotosh Ghosh about her trading.

12. Learned counsel appearing on behalf of the respondent on the other hand submits that in view of good relations between the parties and in view of the payment regularly made by the petitioner in past to the respondent, even if the respondent did not square off the transaction on the date of the first shortfall of the margin money which was not paid by the petitioner though demanded by the respondent, it was at the discretion of the respondent member to decide whether to square off the transaction immediately or to wait till the respondent desires. She submits that the respondent therefore accordingly waited for sometime and

squared up the transaction. She submits that the learned arbitrator has not considered the debit balance as on the date of squared off the transaction on 6th October, 2010 but has considered the debit balance as on 27th September, 2010. She submits that in so far as the fresh transaction carried out by the respondent is concerned, learned arbitrator has set aside those two transactions. Learned counsel submits that the learned arbitrator has rendered a finding of fact and thus this court can not interfere with such finding of fact under section 34 of the Arbitration and Conciliation Act, 1996.

13. A perusal of the award indicates that it is a common ground that there was a debit balance of Rs.115775.64 as on 1st September, 2010 in the account of the petitioner with the respondent. Though the petitioner had alleged before the learned arbitrator that the petitioner had made payment of Rs.1 lacs to the respondent as against the debit balance of Rs.1,15,775.64 and only a sum of Rs.15,775.64 was due and payable, the learned arbitrator has considered the relevant provisions of the bye-laws which prohibits from making any payment in cash to the member by the constituent. I, therefore, do not propose to interfere with that finding of the learned arbitrator in so far as cash payment Rs.1 lac alleged to have been made by the petitioner to the respondent is concerned.

14. The question however that arises is whether the respondent ought to have squared off the transaction though admittedly there was a debit balance in the account of the petitioner with the respondent as on 1st September, 2010 by complying with the provisions under bye-laws 8.1 to 8.6.10. In my view, even if there was no part payment of Rs. 1 lacs as found by the learned arbitrator in the impugned award after 1st September, 2010 and before 27th September, 2010, since there was no further payment made by the petitioner to cover up the shortfall in margin money, the respondent was bound to square up the open position after 1st

September, 2010 immediately.

15. A perusal of the award indicates that the learned arbitrator however has overlooked the mandatory bye-laws applicable to the parties and has held that in view of the good relation maintained between the parties and in view of the position of the payment, the respondent was justified in not squaring up of the transaction till 27th September, 2010. A perusal of the record indicates that at the same time, the learned arbitrator has held that since there was shortfall in margin money, the respondent could not have been carried out any fresh transactions in the account of the petitioner without deposit of the further margin money by the petitioner. In my view, the award shows totally inconsistency and discloses patent illegality on the face of the award.

16. In my view the learned arbitrator has decided contrary to and in violation of the mandatory bye-laws.

17. This court in case of ***M/s.BMA Commodities Pvt.Ltd. (supra)*** has considered the same provisions of the Multi Commodity Exchange of India Limited and has held that trading member has to carry out such transactions in accordance with the provisions of bye-laws of Multi Commodity Exchange and if such transactions are carried out in breach of such bye-laws, such trading members cannot make any claim against the constituent and/or debit any amount to the account of the constituent in respect of such unauthorised transactions. I am respectfully bound by the judgment of this court in case of ***M/s.BMA Commodities Pvt.Ltd. (supra).***

18. A perusal of the record indicates that the learned arbitrator has taken a cut off date for the purpose of deciding the liability of the petitioner on 27th September, 2010 when the respondent had carried out two unauthorised transactions in the

account of the petitioner. In my view there was no basis for the learned arbitrator to decide such cut off date as of 27th September, 2010. There was already a shortfall in margin money as on 1st September, 2010. The cut off date considered by the learned arbitrator is thus arbitrary and contrary to the bye-laws of the Multi Commodity Exchange. The award shows total perversity on the face of it. The findings rendered by the learned arbitrator are totally perverse and this court has thus ample power under section 34 of the Arbitration Act to set aside such perverse findings and illegal award. I, therefore pass the following order :-

(a) Arbitration Petition is made absolute in terms of prayer (a).

(b) Impugned award dated 21st November, 2011 is set aside.

(c) No order as to costs.

[R.D. DHANUKA, J.]