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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1444 OF 2010

Rajesh Tiwari .Petitioner

v/s.

M/s. Motilal Oswal Financial Services Ltd. & anr. .Respondents

Mr.J.B.Mishra, Advocate for Petitioner
Ms A.Lamby, Advocate for Respondents

CORAM : A.A.SAYED, J.

DATE : 10.12.2015

ORDER

. This Arbitration Petition filed under Section 34 of the Arbitration And Conciliation Act, 1996 (hereinafter referred to as '1996 Act') impugns an Award of the sole Arbitrator dated 29.12.2009. By the impugned Award, the claim of the Respondent No.1/Original Claimant was allowed and the Petitioner was directed to pay a sum of Rs.6,97,307.92 to the Respondent No.1/Original Claimant with interest @ 15% p.a. on the said amount from the date of invocation of arbitration i.e. 19.03.2009 till payment.

2. It was the case of the Respondent No.1(hereinafter referred to as 'the Respondent') in the Statement of Claim was that

the Petitioner had approached the Respondent and requested for a loan against deposit of securities and/or finance for purchase of securities facility. On the basis of the representations made by the Petitioner regarding his financial soundness and repayment capacity, the Respondent had sanctioned a loan limit upto Rs.10,00,000/- for purchase of securities from time to time from the Respondent. A Loan Agreement dated 14.12.2007 came to be executed between the Petitioner and the Respondent setting out the terms & conditions more particularly mentioned in the Schedule attached to the Loan Agreement. The Petitioner had also executed Demand Promissory Note and had agreed to pay interest @ 17% p.a. As per the terms of the Agreement, the Petitioner was required to maintain a margin of 50% and if the margin requirement reached 30%, the Respondent had right of immediate sell of the securities provided by the Petitioner as collateral. The Petitioner had executed Power of Attorney in favour of the Respondent. According to the Respondent, despite due intimation, the Petitioner failed to make good the outstanding due under the loan balance and make good the margin requirements. The Respondent was, therefore, constrained to liquidate the available securities and appropriate the sale proceeds towards facility balance or loan balance of the Respondent. The details of square off carried out in the account as well as the shares squared off were set out in the Statement of

Claim. Despite appropriating the sale proceeds towards the facility balance or loan balance, the Petitioner was liable to pay a sum of Rs.6,97,307.92 which is due and outstanding in the Petitioner's account. An Advocate's notice dated 06.11.2008 was also addressed to the Petitioner. However, the Petitioner failed and neglected to make payment of the outstanding dues.

3. A Reply was filed by the Respondent to the Statement of Claim of the Petitioner. The case of the Respondent in the Reply was as follows - The entire claim made by the Respondent was bogus and was an internal monetary transaction of the sister concern, the Respondent No.2 herein named 'Motilal Oswal Securities Limited' (MOSL) and the office of both the sister concerns was the same. Both the Respondent and MOSL had initially claimed the same demand. The Petitioner refused to provide all the contract notes on the ground that they had only provided finance. A letter dated 19.03.2009 invoking arbitration was issued by the Petitioner and was written by and on behalf of MOSL. The sister concerns, who were engaged in fake and bogus transactions without the knowledge of the account holders without sending or taking the contract notes. The Petitioner had never instructed the Respondent to purchase and sell the securities as alleged by the Respondent since beginning. None of the securities or

shares as alleged by the Respondent were purchased as per the instructions of the Petitioner. The Respondent through their branch office situated at Buxar have lured the Petitioner for the financing scheme of share purchasing by claiming to provide the loan for the said transaction. There was no appraisal of the Petitioner about his financial soundness and repayment capacity by the Respondent. The Agreement along with other documents with various blanks were signed in good faith by the Petitioner. At the time of signature, it was not mentioned that what is the loan amount. There were shares of Rs.75,000/- approximately available in the depository account bearing No.1201092600166950 opened with MOSL standing in the name of the Petitioner. The said shares were transferred to the account of the Respondent for the purpose of sanction of loan. The Petitioner had no knowledge thereafter about the transactions in the safe depository account. The said depository account of the Petitioner had never been used for the sale transaction and therefore, the Petitioner had never been made aware that after the transfer of shares of Rs.75,000/- what happened to his depository account or his shares. Pursuant to the agreement being executed on 14.12.2007, the Petitioner had been following up with the local branch offices and the regional office of the Respondent situated at Ranchi but he did not receive proper response. Between 14.12.2007 till the square off of the account on 24.01.2008, the Respondent behind the back and without knowledge of the Petitioner opened a new depository account in the name of the Petitioner without his consent and signature. In the new depository account, transactions were done by the Respondent without intimation and without any signature. The Respondent had also opened a Bank account in the HDFC Bank without knowledge of the Petitioner which was used for the purchase of shares and money realized by the Respondent to the said Bank. There are transactions reflected in the newly opened depository account in the name of the Petitioner for further amount of Rs.15,00,000/- without any permission, authority and knowledge of the Petitioner. The Petitioner came to know about the alleged transactions only after the Respondent filed the claim. The Respondent had indulged in financial fraud. For the first time, the Petitioner came to know partially about the transactions only when a letter dated 01.09.2008 was received by him from the local District Buxar office of MOSL. The Petitioner by letter dated 19.09.2008 through his Advocate replied to the said letter wherein it was pointed out that MOSL has no locus standi as there was no privity of contract between MOSL and the Petitioner. There was a Tripartite Agreement entered into between MOSL, Narolia Securities Pvt. Ltd. and the Petitioner. In the said letter, Advocate for the Petitioner had also demanded statement of account of the Respondent. The Petitioner was still recently under the impression that the old depository account had been under operation but after inspection of the documents he came to know that for the bogus and fraudulent transactions, a new depository account was fraudulently opened by the Respondent. Learned Advocate for the Petitioner had also called for the details of contract notes of the alleged transactions to which there was no response.

4. After for about two months i.e. on or about 06.11.2008, the Respondent for the first time after squaring off of the loan account of the Petitioner, wrote a letter through Advocate demanding an amount of Rs.6,95,218.11. The Petitioner had replied to the said letter by his Advocate's letter dated 27.11.2008 denying the contentions and calling upon the Advocate to furnish contract notes for the transactions as per SEBI guidelines, statement of the loan account, statement of HDFC Bank etc. There was fraudulent nexus between the Respondent and MOSL. Thereafter, local branch manager of Buxar District of MOSL by a letter dated 11.11.2008 also demanded the same dues from the Petitioner. The said letter was replied by the Advocate for the Petitioner. It was not understood under what circumstances, and under what basis on which, on transfer of shares worth Rs.75,000/-, a loan of Rs.10,00,000/- was sanctioned by the Respondent. The

Respondent had only got signature of the Petitioner on the Agreement in the Buxar District (Bihar) on blank pages and without verifying the soundness and repayment capacity and without maintaining minimum margin limits. Even after the alleged date of square off, further transactions have been done by the Respondent to the tune of Rs.15,00,000/- i.e. higher than the alleged sanction limit of Rs.10,00,000/- without freezing fraudulently opened account on the date of the alleged square off i.e. 24.01.2008.

5. The loan Agreement was not valid as the Agreement was entered into on 14.12.2007 and the stamp duty was paid by franking on 11.07.2007 i.e. six months after franking. No notice under article 5.2 was served upon the Petitioner calling for maintaining the margin or deficiency of margin. The Power of Attorney was never signed by the Petitioner in the city of Mumbai and before any Notary Public in the city of Mumbai. Under the Circular dated 18.11.1993 of SEBI, the contract notes is to be furnished within 24 hours. Further more the exposure limit as per the SEBI Circular in respect of the transactions can be done only upto ten times and the transactions could have been done to the tune of Rs.7,50,000/- and the transaction in the present case was done to the tune of Rs.15,00,000/-.

6. A Rejoinder was filed by the Respondent to the Reply filed by the Petitioner before the learned Arbitrator wherein, it was stated that after executing the Agreement on 14.12.2007, the Respondent was assigned an account code XBA62 and thereafter, the Respondent started funding the Petitioner from 15.12.2007, as per his request against the sale/purchase of securities carried out by him. The first loan transaction dated 15.12.2007 was for Rs.4,685.95. Thereafter, the Petitioner continued to avail loan on regular basis and also made regular payments as reflected in the Ledger Statement of the Petitioner. The Applicant is an independent company and was not in any way concerned with the business carried out by MOSL. The letter under the signature of MOSL was inadvertently written but the same was on the letter head of the Respondent. The Petitioner is a businessman and had assured the Respondent of his financial soundness at the time of account opening, the fact of which is evident from the KYC and Bank details as provided and only after verifying income details of the Petitioner, loan of Rs.10,00,000/- was sanctioned. After executing the Loan Agreement and availing the loan facility from December, 2007, the Respondent now in 2009, after the Petitioner filed the present Arbitration proceedings, was disputing the Loan Agreement etc. which was unacceptable. The Respondent with a view to comply with the terms of Loan Agreement also opened a new

demat account and HDFC Bank account. The Respondent had not retained a copy of the account opening form duly filled and signed by the Petitioner. However, it had a copy of the ECS mandate form signed by the Petitioner, and a copy whereof is at Annexure II and a copy of the DP Agreement is at Annexure I. It was evident that the Petitioner had himself with complete knowledge and for his own convenience opened the said DP account and HDFC bank account. In furtherance to opening the said accounts the Petitioner had carried out transactions in the said demat account and HDFC Bank account from December, 2007. The shares of Rs.72,795.70 provided by the Petitioner to the Respondent way of margin security in addition to the securities purchased by him through the loan facility and held in his new demat account. The statement of the Petitioner's position dated 27.12.2007 reflecting the details of the securities and additional margin provided by the Petitioner on 26.12.2007 was annexed and marked as Annexure III. The Respondent in the Rejoinder has also set out the details of the additional margin provided by the Petitioner as on 26.12.2007. The Petitioner had carried out transfer of the shares from his old demat account No.1201092600166950 and to the newly opened demat account No.1201090002203498. This act of the Petitioner clearly reflects his intention to facilitate the loan transaction carried out by him in his account for which he has provided the shares as additional margin security. The demat statements were issued to the Respondent on a regular basis. A copy of the demat statement along with POD was annexed as Annexure IV to the Rejoinder. The letter dated 01.09.2008 was inadvertently issued by MOSL without the knowledge of the Respondent. The highest amount of the loan disbursed to the Petitioner was Rs.4,18,840.34 on 05.01.2008 against which the margin security held was to the tune of Rs.8,96,573.50 as on 04.01.2008. The Respondent has never disbursed an amount exceeding the loan facility of Rs.10,00,000/- as per the Schedule of Terms. A copy of the Statement of client's position as on 04.01.2008 was annexed and marked as Annexure IV to the Rejoinder. At no point of time, the Petitioner disputed squaring off carried out by the Respondent as per its right under the Loan Agreement. In fact, the Petitioner continued to avail loan facility even after 23.01.2008. On account of accrued debit balance, it was the Respondent, who has halted all the transactions thereby disallowing the Petitioner to take any further loan facility and thereafter, issued a notice dated 06.11.2008 through their Advocate. The same was evident from the ledger statement. The Respondent was regulated by RBI and not by SEBI guide lines. On the basis of the pleadings of the parties and on the material on record, the impugned Award dated 29.12.2009 came to be passed by the learned Arbitrator as indicated in para 1 hereinabove.

7. I have heard learned Counsel for the parties and perused the material on record.

8. The case of the Petitioner before the Arbitrator essentially was that the Respondent/Original Claimant and MOSL were sister concerns and were engaged in fake and bogus transactions without the knowledge of the Petitioner and that no Contract Notes and other documents were sent to him. According to the Petitioner, the Respondent had squared off account of the Petitioner on 24.01.2008 after transferring his shares worth Rs.75,000/- from his old demat account to a new depository account in his name, behind his back and without his knowledge and without his consent and signature. According to the Petitioner, the Respondent had also opened a Bank Account in HDFC Bank without his knowledge. Now, it is an admitted position that the Petitioner was holding the depository account prior to the Loan Agreement with the Respondent and he had been trading in shares and securities through MOSL much before he availed the loan against the shares from the Respondent by executing the Loan Agreement dated 14.12.2007. The Petitioner admits in para 3 of his Reply to the Statement of Claim that his shares of Rs.75,000/- were

transferred to the Demat account of the Respondent for the purpose of sanction of loan. The Learned Arbitrator in paras 7.0 to 7.21 of the impugned Award held as follows :-

> "7.0 <u>REASONING & CONCLUSION</u>
>
> 7.1 It is the case of the Claimant that the Petitioner Mr.Rajesh Tiwari availed the loan facility against shares by executing the Master Loan Agreement along with schedule(s) of terms, Power of Attorney, Demand Promissory Note etc. The Claimant had sanctioned a limit of Rs.10,00,000/- with interest @ 17% p.a. to the Petitioner.
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> 7.2 It is stated by the Claimant that as per the terms of Loan Agreement entered in to by the parties on 14.12.2007, the Petitioner is required to maintain a margin of 30%. If the margin requirement falls 30% or below, the Claimants have the right sell the securities provided by the Petitioner as collateral. The terms "margin" and "loan" are defined in para 5.5(j) hereinabove.
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> 7.3 The Claimant on 23.01.2008 had squared off the shares collateral provided by the Petitioner under the Master Loan Agreement since the margin requirement was not occupied by the Petitioner. The details of margin requirement and square off details are given under para 3.5 hereinabove. There remained a debit of Rs.6,59,426.50/- after square off and receipt of amount of sale proceeds of square off of collateral securities.
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> 7.4 It is contended by the Claimant that the Petitioner continued to avail loan facility up to 10.07.2008 even after square off of collateral securities of the Petitioner.

7.5 It is an admitted fact that the Petitioner had executed Master Loan Agreement along with schedule(s) of terms, Power of Attorney, Demand Promissory Note etc. However, the only contention of the Petitioner is that all the documents were signed in blank forms in good faith.

7.6 It is also an admitted fact that the Petitioner had transferred certain shares worth approx. Rs.75,000/- [as enumerated in table under para 5.5 (e) hereinabove] by way of margin on 26.12.2007 from his own demat account No.1201092600166950 to his newly opened demat account No.1201090002203498.

7.7 Before dealing with the issues raised by the Petitioner, let us first understand how the loan facility scheme of Claimant works.

7.8 The loan facility is provided to clients on certain terms more particularly described in the Master Loan Agreement. Whenever, the client buys shares the amount of purchase is funded by the Company providing such loan facility and duly debited to the Client's account maintained by the Company providing such loan facility. The shares so purchased are kept in the separate demat account specifically opened for transactions under the loan facility. The said demat account is handled by the Company providing such loan facility against shares under Power of Attorney.

7.9 Whenever the client sells shares, the amount is credited to the client's account on receipt of sale proceeds and the shares are delivered for pay-in obligations of the client.

7.10 It is pertinent to note that funds provided by the Company are transferred to the Client's own Bank A/c. and bought shares are transferred to the Client's Demat a/c. In case of sale, the sale proceeds are deposited by the Client in his own bank a/c and later transferred to Company providing the loan and shares are transferred from Client's own a/c to meet the obligations towards sale.

7.11 Whenever there is debit in such ledger account of the client's loan account, an interest is debit at the rate of interest agreed by and between the parties as mentioned in the Master Loan Agreement.

7.12 It is pertinent to note that the shares so purchased by the Client is lying in his own demat account through handled by the Company providing loan facility under Power of Attorney and is treated as collateral margin.

7.13 The Company providing loan facility to its client it is express condition that the client shall maintain 30% margin.

7.14 The Company providing loan facility against shares has right to square off collateral securities as per following clause of the Master Loan Agreement:

Article 2 Clause 9. The amounts paid by the borrower under one or more Schedule(s) of terms may, at the discretion of the Lender, be appropriated by the Lender towards amount payable by the Borrower under other schedule(s) of terms. Further, notwithstanding anything contained herein the Lender shall always have the power to sell/transfer or otherwise dispose of any and/or all collateral security in favour of the Lender in respect of that/those facility balance(s) and appropriate the same towards satisfaction of amounts due to the Lender on account of facility balance(s) in respect of other facilitates.

7.15 The claimant has demonstrated such squaring of collateral security on 23.01.2008 by providing the details in their re-joinder to which the Petitioner has failed to provide any defence. On the contrary, there are other transactions even after squaring off till 10.07.2008 in the Petitioner's account.

7.16 It is contended by the Petitioner that he was not aware of the transactions in his account nor of opening of demat account and HDFC Bank account in his name. The Claimant has provided explanation to this with documentary evidence.

7.17 It is pertinent to note though accepting and admitting the transfer of shares by way of collateral there is nothing on record that why the Petitioner had transferred such shares or have not demanded back the shares so transferred.

7.18 It is on record that the Petitioner was aware of the following:-

(a) Signs Master Loan Agreement along with other documents.

(b) Transferred shares from his own Demat a/c. 1201092600166950 to Demat a/c. No:1201090002203498 (newly opened).

(c) Executed Power of Attorney to operate demat a/c.

(d) Executed Mandate for ECN for transferring funds from HDFC Bank A/c. standing in the name of the Petitioner.

(e) The Claimant issued periodical statement of transactions and holding for demat A/c. No.1201090002203498 POD submitted by Claimant.

(f) No complaints received in respect of transactions in demat a/c. nor any counter-claim preferred by the Petitioner in respect of shares transferred as stated in para 5.5(e) hereinabove nor any attempt was made by the Petitioner to call back the said shares deposited as collateral.

All the above facts prove that the Petitioner was aware of the transactions and were duly authorized by him for the transactions carried under Master Loan Agreement by the Claimant M/s. Motilal Oswal Financial Services Ltd. on behalf of the Petitioner.

7.19 In view of the allegations and contentions as stated by the Petitioner it is also pertinent to note that the Petitioner has never objected to any transactions in his demat account or bank account, in spite of receiving the demat statement periodically from the Claimant. The Petitioner had every opportunity to raise objections but had been silent till the Claimant sent his first legal notice to the Petitioner and subsequent arbitration proceedings. During the personal hearings held under the present Arbitration, the Petitioner has failed to neither prove his contentions by way of oral arguments and/or submissions with documentary evidence nor have objected to interest debited in his account against debit balance. Furthermore, the Petitioner has not raised any counter-claim for the shares transferred as collateral which goes to prove that he had availed loan facility from the Claimant. The allegations and contentions are therefore considered as afterthought on the part of the Petitioner to

> escape the losses incurred by him.
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> 7.20 Having considered the submission, documents and arguments put forth by both the parties, I conclude that a sum of Rs.6,97,302.92/- is due and payable by the Petitioner to the Claimant.
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> 7.21 I consider interest @ 17% p.a. on the due amount of Rs.6,97,302.92, the same rate of interest as agreed by and between the parties in the schedule(s) of terms provided in the Master Loan Agreement."

9. The Learned Arbitrator thus arrived at finding of fact after examining the material on record that the Petitioner was aware of the transactions under the Loan Agreement executed between the Petitioner and the Respondent. It is well settled that it is impermissible for the Courts in exercise of its limited jurisdiction under Section 34 of the 1996 Act to re-appraise and interfere with the findings of facts arrived at by the Arbitrator. It cannot be said that there is any perversity in the findings of the learned Arbitrator. It is an admitted position that the Petitioner had signed the Loan Agreement dated 14.12.2007. It is pertinent to note that the transactions in securities by the Petitioner through MOSL (Respondent No.2), who is registered with the SEBI/Stock Exchange as a Broker is a separate and independent transaction and governed by a separate Agreement executed between the Petitioner and MOSL. It would not be permissible for the Petitioner

to agitate his grievances as regards the illegality or otherwise of the transactions in securities carried out through MOSL, as that was a separate dispute and independent from the loan transaction of the Petitioner with the Respondent and it was not within the scope of reference before the learned Arbitrator. The Petitioner, if aggrieved by the transactions in securities ought to have invoked arbitration as provided under the Rules, Bye laws & Regulations of the relevant Stock Exchange. Admittedly, the Petitioner has not questioned those transactions by invoking the said arbitration. There is also no explanation by the Petitioner what prevented him from questioning those transactions by invoking arbitration as stated above.

10. The contention that the Petitioner was not offered inspection of the original documents relied upon by the Respondent before the learned Arbitrator also cannot be accepted. The Applicant was initially given inspection of the documents on 30.06.2009. It is an admitted position that the photocopies of the relevant documents were annexed by the Respondent to their Rejoinder. The original of some of the documents were not in the custody of the Respondent. Moreover, the original documents of which inspection was sought was in relation to the transactions between the Petitioner and MOSL and it was not within the scope of the learned Arbitrator to rule upon the issue

whether the transactions between the Petitioner and MOSL at the relevant Stock Exchange were bad. Even otherwise, it is seen that though MOSL was not a party to the arbitration proceedings, the Petitioner has chosen to add MOSL as Respondent No.2 in the present Petition. MOSL has filed a Compilation of Documents which includes copies of the Tripartite Agreement for Trading, E-Logs for contract notes and ledger, POD for Demat and Demat Transaction Statement. It is pointed out by the learned Counsel that the documents were sent to the Petitioner on the email id which was created on the request of the Petitioner and he was assigned a Unique Client Code 'XBA62' and all the information and documents was available to the Petitioner also on the website of MOSL to which he had access and the Petitioner in the Tripartite Agreement agreed that the digital signed contract notes be provided through internet. The learned Counsel submitted that had the Petitioner filed arbitration proceedings under the Rules, Bye laws and Regulations of the relevant Stock Exchange questioning the transactions in securities the said documents would have been pointed out to that Arbitral Tribunal. However, the Petitioner did not choose to question those transactions and did not invoke arbitration proceedings and cannot question those transactions before the learned Arbitrator who has passed the impugned Award as the learned Arbitrator had no jurisdiction to adjudicate upon those transactions.

11. It is also not possible to accept the plea of the Petitioner that there has been any violation of principles of natural justice as no opportunity of hearing was given to him by the learned Arbitrator. As a matter of fact, the learned Arbitrator has recorded in the Minutes dated 29 August 2009 that as per consent given by both the parties the sole Arbitrator shall pass the Award on the basis of the written submissions filed by both the parties. There is no request made by the Petitioner seeking a personal hearing in the matter. As a matter of fact, a letter was written by the Petitioner to the learned Arbitrator as late as on 28.11.2007 wherein he has not sought any personal hearing and has specifically stated that the purpose of writing the letter was only to request the learned Arbitrator to consider all the points in the matter so that he can get justice.

12. It is an admitted position that the Petitioner had signed the Power of Attorney. His contention, however, is that the franking in respect of the stamp duty paid on the Power of Attorney is dated 11.06.2007 however the Loan Agreement was signed on 14.12.2007 which was after a period of 6 months and therefore the Loan Agreement was not valid. It is not possible to accept this contention. It

is required to be noted that the Petitioner admits to have executed the Loan Agreement and he is really speaking estopped from questioning the validity of the Loan Agreement. In any event, in the case of ***Grasim Industries Limited And Another vs. Agarwal Steel***, ***(2010) 1 Supreme Court Cases 83***, it was held by the Supreme Court that the document would not become invalid if the date of stamp paper used is 6 months prior to the execution thereof. Even otherwise it appears that this contention was not at all raised by the Petitioner before the Learned Arbitrator. It is pertinent to note that the Petitioner did not question the transactions on his own and it is only when he suffered losses in the stock exchange transactions and after a notice was served upon him, he chose to question the loan transactions without questioning the transactions carried out at the Stock Exchange by him through MOSL. Under Clause 3.3 of the Loan Agreement, the Respondent was empowered to dispose of the securities by sale without reference to the Petitioner, if the value of the margin fell to the percentage specified in the Schedule of the Loan Agreement and without giving any notice to the Petitioner for making up the margin. In the circumstances, there is no merit in the contention of the Petitioner that under Clause 5.2 of the Loan Agreement, the Respondent was required to give three days notice in case of any default by the Petitioner. The issues raised by the Petitioner appear to be an afterthought.

13. For the reasons stated above, the Petition is dismissed. No order as to costs. However, in the facts & circumstances of the case interest of justice would be served by modifying the rate of interest from15% to 9% from the date of reference till payment.

(A.A.SAYED, J.)