

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, (for short the said Arbitration Act), the petitioner has impugned the arbitral award dated 25<sup>th</sup> February, 2014 rendered by the arbitral tribunal rejecting the claims made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original claimant in the arbitral proceedings whereas the respondent herein was the original respondent. The petitioner is a member of Multi Commodity Exchange of India Ltd. (for short the said MCX) and carries on business as commodity brokers. The respondent was registered with the petitioner as the constituent and was executing transactions for sale and purchase of various commodities by using internet trading facility provided by the petitioner.

3. On 14<sup>th</sup> August, 2012, the petitioner and the respondent executed 'Know Your Client' form and Member Client Agreement whereby the respondent appointing the petitioner as her commodity broker for execution of transactions for sale and purchase of commodities listed for trading at the said MCX. It is the case of the petitioner that in the said Member Client Agreement, the respondent had given mandate to the petitioner for sending her Electronic Contract Notes on her email id [roshanbhinder@hotmail.com](mailto:roshanbhinder@hotmail.com) and had given authority to maintain her ledger account with the petitioner on running account basis. It is also the case of the petitioner that the respondent had also given to the petitioner authority for sending her SMS for providing her bill summary, her ledger balance and applicable margin by providing mobile no.9819190786. The respondent had executed a letter/undertaking and authorised the petitioner for adjustment of debit and credit balance of the respondent between different segments of the Exchange and between different exchanges in her ledger account amongst respondent group which includes the petitioner and BPL.

4. It is the case of the petitioner that the respondent issued a cheque dated 14<sup>th</sup> August, 2012 in favour of the respondent for a sum of Rs. 3 lacs towards the margin deposit. The petitioner gave credit of the said amount in the ledger account of the respondent. The respondent thereafter started execution of transactions for

sale and purchase of various commodities w.e.f. 16<sup>th</sup> August, 2012 by using internet trading facility provided by the petitioner. It is the case of the petitioner that during the said period of transaction, the respondent had made another three payments for an aggregate amount of Rs.95 lacs on different dates as per her obligations towards the margin and MTM losses.

5. According to the petitioner as on 30<sup>th</sup> March, 2013 the ledger account of the respondent in the books of the petitioner was showing a credit balance of Rs.35,53,150.63 and her margin ledger was showing debit balance of Rs.88,38,060/- and thereby the respondent had net debit of Rs.52,82,909.40 in MCX and there was margin shortfall. It is the case of the petitioner that the respondent had opened position of purchase of 110 lots of silver F040513. On the previous trading date i.e. 28<sup>th</sup> March, 2013 the closing rate of silver was 53,560/- per KG. According to the petitioner, the value of the respondent's open position of 110 lot of silver was Rs.17,67,61,200/-. It is the case of the petitioner that on 30<sup>th</sup> March, 2013 against the said open position there was margin shortfall upto the extent of Rs.52,82,909.40 which the respondent was under an obligation to meet with the said margin shortfall.

6. It is the case of the petitioner that when the market opened on 30<sup>th</sup> March, 2013 there was high volatility in the market price of silver in the first 8 minutes and the market was down by Rs.42/- for silver and thereafter within few minutes, the market price was down by Rs.2100/- per KG and as a result thereof, there was a huge loss of Rs.69,30,000/-. The respondent failed to deposit Rs.52,82,909.40 towards margin shortfall and to replenish MTM losses on real time basis.

7. It is the case of the petitioner that the petitioner had intimated the respondent for replenishing the losses by sending SMS but there was no payment coming from the respondent. The risk control department of the petitioner had therefore exercised their right given under the MCA and closed the open position of 110 lots of silver which resulted into MTM loss of Rs.69,33,254.49 in the account of the respondent. It is the case of the petitioner that after closing of the open position of 110 lots of silver the petitioner had informed the respondent. However, she did not raise any objection to the decision of the petitioner. The petitioner had also sent one SMS to the respondent about her bill debit amount of Rs.69,33,254.49 for close of open position and ledger debit balance of Rs.33,80,103.86. The petitioner also prepared a contract note and sent the same to the respondent by email. It is the case of the petitioner that the respondent had received SMS confirmation and ECN and never raised any objection about closing of open position by the petitioner.

8. It is the case of the petitioner that on 30<sup>th</sup> March, 2013 the ledger account of the respondent in the books of petitioner's group company BPL was showing a credit balance of Rs.34,06,935.21 and the debit balance of Rs.33,80,103.86 in MCX and there was net consolidated credit of Rs.26,831.35. On 13<sup>th</sup> April, 2013 the respondent executed transaction for purchase of 2000 shares of Reliance Industries Ltd. and 16000 shares of Steel Authority of India Ltd.

9. It is the case of the petitioner that since the respondent did not make payment against the consolidated debit, the petitioner's group company BPL had retained the delivery of 2000 shares of Reliance Industries Ltd. and 16000 shares of Steel Authority of India Ltd. It is the case of the petitioner that on 7<sup>th</sup> May, 2013, 9<sup>th</sup> May, 2013 and 13<sup>th</sup> May, 2013 there was telephonic communication between the officer of the petitioner and the respondent or her representative

wherein the respondent made a proposal that the petitioner's group company BPL would release Rs. 5 lacs to the respondent out of her credit balance with BPL against NSE transactions and immediately the respondent will transfer the same amount to the petitioner's bank account by RTGS against her debit balance. It is the case of the petitioner that on the basis of such telephonic communication and the assurance given by the respondent for online transfer of funds to the petitioner's bank account against her debit balance, the petitioner's group company BPL transferred Rs.5 lacs to the respondent's bank account by NEFT with clear understanding that respondent shall transfer the said fund to the petitioner against her debit balance lying in her ledger account.

10. On 12<sup>th</sup> September, 2013 the petitioner filed statement of claim with the said Multi Commodity Exchange for registration of the claim and appointment of arbitrator. On 12<sup>th</sup> November, 2013 the respondent filed their reply and disputed the decision of the petitioner for closing out of her open position of 110 lot of silver dated 30<sup>th</sup> March, 2013. The petitioner denied the said allegation by filing a rejoinder. By an arbitral award dated 25<sup>th</sup> February, 2014, the arbitral tribunal rejected the claim made by the petitioner which award has been impugned by the petitioner in this petition on various grounds.

11. Mr.Narula, learned counsel for the petitioner tendered a chart showing analysis of margin shortfall insofar as account of the respondent is concerned. He submits that as on 20<sup>th</sup> March, 2013, the ledger balance in the account of the respondent was Rs.53,25,050.63 whereas the margin requirement in respect of 110 lots of silver mini was for Rs.90,26,710/-. Thus there was a shortfall of Rs.37,01,659.37. On 25<sup>th</sup> March, 2013 the margin shortfall in respect of 110 lots of silver mini came to Rs.54,19,639.37. He submits that the petitioner had sent SMS

to the respondent intimating her margin shortfall position for payment of money to meet margin requirement and maintained open position. He submits that on 26<sup>th</sup> March, 2013 the respondent made payment of Rs.20 lacs towards part of margin money. On 28<sup>th</sup> March 2013 after giving credit of Rs. 20 lacs, there was still margin shortfall of Rs.37,23,679.37. On 30<sup>th</sup> March, 2013 the petitioner closed out the open position of 110 of silver. It is submitted by the learned counsel that since there was margin shortfall and MTM losses due to reduction in the price of silver, the petitioner exercised their rights and closed open position. The respondent did not raise objection for long period and even offered to pay the amount to the petitioner.

12. Learned counsel appearing for the petitioner invited my attention to the averments made in the statement of claims filed by the petitioner and the reply of the respondent before the arbitral tribunal. He submits that the respondent in the written statement did not dispute the delivery of the margin statement by the petitioner. The respondent also did not object to the petitioner squaring up the transaction on 30<sup>th</sup> March, 2013. Learned counsel submits that the respondent had also not disputed the receipt of the SMS sent by the petitioner from time to time regarding payment of shortfall of margin money.

13. Learned counsel for the petitioner submits that the petitioner had sent electronic contract note for the trade dated 30<sup>th</sup> March, 2013 for a debit of Rs.69,33,254.49 which specifically provided for raising objection if any, to the trade shown in the said contract note within 24 hours from the receipt of the contract note. The respondent however disputed the validity of the said transaction for the first time in her reply filed before the arbitral tribunal.

14. The petitioner had also sent one SMS to the respondent on 30<sup>th</sup> March, 2013 intimating her about the debit bill of Rs.69,33,254.49 and ledger debit of Rs.33,80,103.86. He submits that the respondent did not dispute even in the arbitral proceedings about closing out of the open position of 110 lots of silver. Learned counsel invited my attention to the averments made by the petitioner in paragraphs 4 to 7 of the statement of claim to the effect that the digital contract notes and margin statements of transactions executed by the respondent were duly sent from time to time by the petitioner on email ID of the respondent and was also sent SMS for the day end debit/credit bill summary and that applicable margin in the respondent's account were also sent to the respondent on her mobile 9819190786. The respondent in paragraph 4(III) of the affidavit in reply/written statement did not dispute the contents of paragraphs 4 to 7 of the statement of claim.

15. Mr.Narula, learned counsel for the petitioner placed reliance on the judgment of this court in case of ***Uttam Chand Garg vs. Anand Rathi Shares Brokers Limited & Ors.*** in Arbitration Petition No.950 of 2011 and in particular paragraph (5) and would submit that even if there was a non compliance with the requirement of collecting margin by a trading member from the clients it would not invalidate the trades admittedly executed at the instance of the constituents. He submits that merely because the petitioner had shown some leverage to the respondent, the same would not make the transaction illegal. He submits that clause 8.6.6 of the bye-laws of the Multi Commodity Exchange read with sub bye-law (8) which provides that 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 is not mandatory but is directory. He submits that since the respondent had already made payment of Rs.20 lacs, the petitioner did not close out the transaction

earlier. Paragraph (5) of the judgment of this court in case of ***Uttam Chand Garg (supra)*** read thus :-

5. Thus, the learned Arbitrator has, after going through the documents produced before him by the parties, reached a finding on fact that on 24th September, 2010 as well as 30th September, 2010, there was sufficient margin in the account of the Petitioner and that the Petitioner has also failed to produce any evidence to substantiate his case that the Respondent had charged excessive brokerage to the Petitioner. The learned Arbitrator has further correctly held that in any event, non-compliance with the requirement of collecting margin by a trading member from the clients does not invalidate the trades admittedly executed at the instance of the Petitioner and that the requirement of collecting margin by a trading member from the clients is only meant to secure the smooth compliance of the trades executed on the Exchange.

16. Learned counsel for the petitioner also placed reliance on the judgment of this court delivered on 28<sup>th</sup> March, 2005, in case of ***Pankaj Goshar vs. Fortune Equity Brokers(I) Ltd.*** in Arbitration Petition No.368 of 2003 and in particular paragraph (10) and would submit that once the petitioner had sent a statement of shortfall in margin to the respondent which showed that there was a shortfall in the margin in the account of the respondent, the same constituted a demand for payment of shortfall of margin money.

17. Learned counsel for the petitioner also placed reliance on the judgment of this court delivered on 25<sup>th</sup> March, 2011 in case of ***Amit Bharadwaj vs.M/s.Marwadi Shares and Finance Ltd.*** in Arbitration Petition No.563 of 2009 and in particular paragraph (1) in which it is held by the learned Single Judge of this court that the action of the respondent stock broker of commencing transaction without taking margin money was not only contrary to the contract between the

parties but was contrary to the statutory regulations framed by the Stock Exchange. It is held that if those regulations are not followed, a good reason will have to be given why they are not followed. If the brokers are permitted to carry on transactions contrary to the regulations framed by which they are bound, it will endanger the system itself. He submits that this judgment is reversed by the Division Bench. Relevant portion of the said paragraph of the judgment of this court in case of **Amit Bharadwaj (supra)** read thus :-

1. .... The statutory regulations have been framed by the Stock Exchange for protecting the system under which the Stock Exchange operates, the requirement has been included in the regulations for taking margin money from the constituent to protect the system and the brokers from any loss that may be suffered on account of the transactions that may be undertaken. The regulations are to be followed by the constituents and the stock brokers. The action of the respondent stock broker of commencing transaction without taking margin money was not only contrary to the contract between the parties but was contrary to the statutory regulations framed by the Stock Exchange. As the regulations have been framed for the protection of the system, in my opinion, those regulations will have to be followed. If those regulations are not followed, a good reason will have to be given why they are not followed. If the brokers are permitted to carry on transactions contrary to the regulations framed by which they are bound, it will endanger the system itself. In my opinion, the learned Arbitrator was not justified in making the award requiring the petitioner to pay the amount which was being claimed by the respondents on account of illegal and unauthorised transactions. In the result therefore, the petition succeeds and is allowed, the award is set aside.

18. Learned counsel for the petitioner submits that the Division Bench in the judgment delivered on 6<sup>th</sup> February, 2014 in case of **Marwadi Shares and Finance Ltd. vs. Amit Bhardwaj** in Appeal (L) No.314 of 2011 arising out of the said order

and judgment dated 25<sup>th</sup> March, 2011 in case of **Amit (supra)** has held that the learned Single Judge could not have come to the conclusion that the transactions were illegal when there was no factual basis or evidence in this regard led by the respondent before the arbitral tribunal. Learned counsel placed reliance on the observations of the Division Bench in paragraph (10) observing that the Division Bench was not suggesting that only because a trading member bought/sold shares and/or entered into derivative contracts with its constituent without the minimum percentage of margin money, the contracts entered into would be illegal and/or void. The Division Bench had observed that since there was no factual basis in the present case for deciding the said question, they were not going into the same and leave it open to be decided in an appropriate case. The Division Bench has set aside the said judgment of the learned Single Judge and remanded the matter back for the purpose of deciding all other grounds raised by the respondent in the arbitration petition in accordance with law. Paragraphs 9 and 10 of the said judgment of the Division Bench read thus :-

9. It would not be out of place to mention that Chapter X applies generally and there are special Regulations known as the National Stock Exchange (Future and Option Segment) Regulations for trading in Futures and Options. Since the contracts / transactions in the present case relate to Derivative Contracts, it would be necessary to analyze Regulation 3.10 of the said Regulations which reads as follows:

***“3.10 MARGIN FROM THE CONSTITUENTS***

*(a) The Trading Members must demand from its constituents the Margin Deposit which the member has to provide under these Trading Regulations in respect of the business done by the Members for such constituents.*

*The Trading Members shall buy and/or sell derivatives contracts on behalf of the constituent only on the receipt of*

*margin of minimum such percentage as the Relevant Authority may decide from time to time, on the price of the derivatives contracts proposed to be purchased, unless the constituent already has an equivalent credit with the Trading Member. The Trading Member may collect higher margins from constituents, as he deems fit.*

*The Trading Member shall obtain a written undertaking from the constituents that the latter shall when called upon to do so forthwith from time to time provide a Margin Deposit and/or furnish additional Margin as required under these Rules and Regulations in respect of the business done for the constituent by and/or as agreed upon by constituent with the Trading Member concerned.*

*The trading Member shall demand from his constituents the amounts arising in respect of daily settlement in accordance with the Clearing Corporation Regulations for business done by the Members on behalf of such constituents or such higher amounts, as the Trading Member deems fit. The Trading Member may, if so desire, for administrative convenience maintain the daily settlement margin balance upto a pre-agreed balance level to avoid collecting and paying daily settlement amount on a daily basis, which may be referred to as maintenance margin.*

*The trading member may keep the unutilised margin deposits of its Constituents in bank deposits and pay interest accrued thereon to its Constituents or utilise the same as per the instructions of such Constituents.*

*(Emphasis Supplied)*

These Regulations have been specifically framed under Chapter III of the Bye Laws of the NSEIL for the purpose of dealing in derivative contracts. A perusal of Regulation 3.10 clearly shows that the trading members shall buy and/or sell derivative contracts on behalf of the constituent only on receipt of a minimum percentage of margin as the relevant authority may decide from time to time, on the price of the derivative contracts proposed to be purchased, unless the constituent already has an equivalent

credit with the trading member. The said Regulation also permits the trading member to collect a higher margin from the constituent as he deems fit. In the present case, neither from the reply filed before the learned Arbitrator by the Respondent or in the Arbitration Petition No.563 of 2009, there appears to be any factual basis and/or evidence led as to what was the minimum percentage of margin required under Regulation 3.10 of the said Regulations. It is only when the factual basis for the same was laid by the Respondent in his reply before the Arbitrator, could the Respondent have even sought to contend that the contracts / transactions entered into by the Respondent with the Appellant were rendered illegal and/or unauthorised in view of the fact that they violated Regulation No.3.10. If the Respondent had led evidence to the effect that a certain amount was payable as margin under Regulation No.3.10 and the same was not paid, then maybe the Respondent could have contended that the contracts entered into with the Appellant were illegal and/or unauthorized. However, in the present case, we do not find any such factual basis and/or evidence led by the Respondent to establish as to what was the minimum percentage of margin required to be deposited by him with the Appellant under Regulation 3.10. At the cost of repetition, we may add that on a perusal of the reply of the Respondent dated 30th October, 2008 filed before the learned Arbitrator, we do not find a contention raised by the Respondent that in view of the fact that no requisite margin money was deposited with the Appellant as required by Regulation 3.10, the contracts/transactions have been rendered illegal and/or unauthorised.

10. In view thereof, we find that the Learned Judge could not have come to the conclusion that the transactions were illegal when there was no factual basis or evidence in this regard led by the Respondent before the Learned Arbitrator. We may hasten to add that we are not for a moment suggesting that only because a trading member bought/sold shares and/or entered into derivative contracts with its constituent without the minimum percentage of margin money, the contracts entered into would be illegal and/or void. Since there is no factual basis in the present case for deciding the said question, we are not going into the same and leave it open to be decided in an appropriate case. In view

thereof, we are of the opinion that the order of the Learned Single Judge cannot be sustained and is therefore liable to be set aside.

19. Learned counsel for the petitioner also placed reliance on the judgment of this court delivered on 28<sup>th</sup> February, 2011 in case of ***Shreepalkumar Pukharaj vs. Edelweiss Securities Ltd.*** in Arbitration Petition No.297 of 2010 and in particular paragraph (9) and would submit that since the respondent never raised objection against the petitioner closing out the open position of the respondent and had not disputed the factum of receipt of all the contract notes and SMS etc., the respondent cannot be permitted to urge at the belated stage that the said transaction was illegal for want of demand of margin money.

20. Mr.Narula, learned counsel for the petitioner also placed reliance on the judgment of this court delivered on 1<sup>st</sup> October, 2012 in case of ***Shankarlal V.Keswani vs. India Infoline*** in Arbitration Petition No.446 of 2012 and in particular paragraph 17 and would submit that this court while construing the bye-law 247A(5) of the Bombay Stock Exchange Limited has held that the said bye-law gives a discretion to the member broker to close out the transaction by selling the securities within two days or seven days as the case may be in case the purchaser commits default in making full payment to the member broker. The said bye-law is not mandatory. Paragraph 17 of the said judgment of this court in case of ***Shankarlal V.Keswani (supra)*** read thus :-

17. On reading of bye-law 247A(5) I am of the view that it gives a discretion to the member broker to close out the transaction by selling the securities within two days or seven days as the case may be in case of the purchaser's committed default in making full payment to the member broker. The said bye-law is not mandatory. There may be a situation where a client may assure the broker of payment at the earliest with a request not to close the transaction or may be in genuine

difficulty. In this case, the respondent has been able to demonstrate before the Appellate arbitral tribunal that there were three meetings held between the petitioner and office bearers of the respondent in which the request was made by the petitioner not to close the transaction and the assurance was made to pay the balance amount shortly. It is not in dispute that father of the petitioner was sick and later on expired. Considering these facts and evidence on record, the appellate arbitral tribunal has given finding of facts holding that there was no reason to disbelieve the respondent broker that the petitioner had approached the broker with a request to withhold the sell of the shares and that entry was taken into consideration only as justification for the time selected by the broker to dispose of shares and not with a view to extend limitation. Similarly after interpreting the bye-law 247A(5) the Appellate Bench has given a finding that it would be business of the broker to select time of sell of shares. In my view if the member broker does not close the account and sell the securities so as to mitigate the loss that would be caused to the client, under bye-law of the Stock Exchange, the client is not prevented from giving instruction to the member broker to close the transaction and sell the securities so as to mitigate the loss if any. In absence of any such instruction from the client to close the transaction and if the broker has accommodated the client on his request by postponing rights to close the transaction by sell of securities for sometime, no fault can be found with the member broker in not closing the transaction forthwith on there being debit balance in the account of the client/constituent.

21. Learned counsel for the respondent on the other hand would submit that even according to the statement showing the analysis of margin shortfall tendered by the petitioner before this court, there was a margin shortfall in the sum of Rs.37,23,679.37 as on 28<sup>th</sup> March, 2013. The said margin shortfall increased to Rs.54,19,639.37 according to the petitioner on 25<sup>th</sup> March, 2013. He submits that thus if according to the petitioner, there was already margin shortfall as far back as on 20<sup>th</sup> March, 2013, the petitioner ought to have close out the open position on the

next day of the margin shortfall on 20<sup>th</sup> March, 2013. He submits that the respondent received the demand for margin money of Rs. 20 lacs on phone sometime prior to 20<sup>th</sup> March, 2013 which respondent complied with by depositing the said amount of Rs. 20 lacs with the petitioner. He submits that even after payment of Rs.20 lacs according to the petitioner, there was a margin shortfall of Rs.32,31,319.37 as on 27<sup>th</sup> March, 2013 and of Rs.37,23,679.37 as on 28<sup>th</sup> March, 2013. He submits that the petitioner thus in any event ought to have closed out the open position immediately after such margin shortfall continued in respect of the payment of Rs.20 lacs made by the respondent i.e. either on 27<sup>th</sup> March, 2013 or 28<sup>th</sup> March, 2013. The petitioner however illegally carried out the transaction only on 30<sup>th</sup> March, 2013.

22. The learned counsel for the respondent submits that in the impugned award, the arbitral tribunal has rendered a finding of fact that if due to the volatility, there was a shortfall in the margin, the petitioner could not have squared of the position of the respondent without first having made a demand on the respondent to deposit the additional money within the stipulated time framed which was not done by the petitioner. The arbitral tribunal has held that the petitioner was not justified in squaring of the open position of the respondent and has rightly rejected the claims made by the petitioner. He submits that the arbitral tribunal has interpreted the bye-law 8.2 to 8.6.6 of the Multi Commodity Exchange which interpretation is a possible interpretation and thus cannot be substituted by another interpretation by this court.

23. He submits that if there was any debit balance according to the petitioner in the accounts of the respondent, the petitioner should have demanded further margin money. The respondent received a phone call from the petitioner for depositing

Rs.20 lacs which the respondent had complied with the said requisition and deposited the said amount.

24. Learned counsel for the respondent placed reliance on the judgment of this court delivered on 17<sup>th</sup> December, 2014 in case of ***M/s.BMA Commodities Pvt. Ltd.vs.Ms.Kaberi Mondal*** in Arbitration Petition No.854 of 2012 with Arbitration Petition No.420 of 2013 in case of ***Ms.Kaberi Mondal vs.BMA Commodities Pvt. Ltd.*** and in particular paragraphs 32, 33, 55 to 58 and 60 and would submit that this court has interpreted the same bye-law of the Multi Commodity Exchange which provides for payment of margin money and obligation of the broker to close out the open position of the constituent member in case of failure on the part of the constituent to comply with the call for further margin or if any payment is due by the constituent to the clearing member. A trading member of the Multi Commodity Exchange if carries out any such transactions in breach of bye-laws of the Multi Commodity Exchange, he cannot make any claim against the constituent and/or debit any amount to the account of the constituent in respect of such unauthorised transactions. Paragraphs 32, 33, 55 to 58 and 60 of the said judgment reads thus :-

32] The learned Counsel further placed reliance on bye-laws 8.4, 8.6.5 and 8.6.6 of the MCX which provide for payment of margin money and the right of the broker to close out open position of a constituent member in case of failure on the part of the constituent to comply with the call for further margin or if any payment is due by the constituent to the clearing member. By law 8.4, 8.6.5 and 8.6.6 of MCX are extracted as under:-

“8.4 Members of the Exchange shall deposit initial margin in cash or may furnish Fixed deposit or bank guarantees or such other instruments as maybe specified by the Exchange from time to time to fulfill the initial margin requirement in respect of open positions. Variation margin shall be paid only in cash or cheque, or

by electronically debiting the account of the member of the exchange with the designated Clearing bank of the Exchange.”

“8.6.5 An Exchange member 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;”

“8.6.6 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;”

33] It is submitted by the learned Counsel that no a single call was made by the respondent for payment of any margin money. Pursuant to the directions of the arbitral tribunal, the respondent had filed statement showing the account of the claimant before the arbitral tribunal. Learned counsel invited my attention to the said statement which was on record before the arbitral tribunal for the period 7th March 2009 to 26th November 2011. It is submitted that there was credit balance in the account of the claimant, except on 3 dates i.e. 13th July 2011, 19th July 2011 and 1st August 2011, when the claimant was admittedly out of India. The respondent was not in a position to produce any record before the arbitral tribunal as to when the respondent had made any calls for deposit of margin money, as mandatory under clause 8.6.5 and 8.6.6 of the by laws of MCX. The learned Counsel invited my attention to clause 8 of the member - constituent agreement entered into between the claimant and the respondent which also provides for payment of margin money and the right of trading member to call for margin money which provides in the event of the constituent not making any deposit of the margin money, the trading member is not allowed to make any individual trading on behalf of the constituent. Clause 8 of the member constituent agreement entered into between parties is extracted as under:-

“8. Payment of Margins : The daily margin requirement

can be adjusted against the collateral maintained by the Constituter with the Member. The Member shall accept from the Constituent further order, which, if executed, will add to the open positions, only if the balance collateral is adequate to meet the initial margin on such new positions. If the balance collateral is not adequate for adjusting the daily margin requirement, the Constituent shall deposit the additional margin as required by the Member. The Constituent shall also be obliged to pay the shortfall of the daily margin, if any, on the immediate succeeding business day when the Member raises such additional margin requirement. The Constituent shall not be permitted to create any new open positions, until receipt of such additional margin.

If the Constituent defaults in paying the daily margin, the Member shall be entitled to liquidate/close out all or any of the Constituent's positions, without prejudice to the Member's right to refer the matter to arbitration. Any and all losses and financial charges on account of such liquidation/closing out shall be charged to and borne by the Constituent. The Member is permitted in its sole and absolute discretion to impose additional margin (even though not imposed by the Exchanges, the Clearing Corporation/Clearing House) and the constituent shall be obliged to fulfill such additional margin requirements.”

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. Bye-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. Bye-law 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.

60] Insofar as the issue of margin money is concerned, it is held by the arbitral tribunal that there was credit balance for the all the period, except on three dates. The respondent had admittedly not issued any call money notice to the claimant to make good the short fall on those three dates and on the other hand, had done brisk trading on those dates in her account, without any margin, which indicates that the allegations about trading in her account without her consent, can hardly be brushed aside. The arbitral tribunal also rendered a finding after perusal of the copy of the passport, showing that claimant was out of India from 5th July 2011 till 24th August 2011 and there had been no communication between the parties and the respondent was not able to make out a case that the claimant had carried out online trading from abroad. The respondent had carried out 332 transactions during the concerned period out of which 116 were new sauda and remaining were sale of transactions, either before or after expiry date.

### **REASONS AND CONCLUSIONS**

25. I have heard the learned counsel appearing for the parties at length and have considered the rival submissions. A perusal of the record indicates that on 20<sup>th</sup> March, 2013 even according to the petitioner, there was a shortfall in margin money in the sum of Rs.37,01,659.37 in respect of open position of 110 lots of silver mini. The said open position continued till 29<sup>th</sup> March, 2013. The shortfall

in margin money according to the petitioner as on 25<sup>th</sup> March, 2013 was at Rs. 54,19,639.37. According to the petitioner, the respondent made payment of Rs.20 lacs towards part of margin money on 26<sup>th</sup> March, 2013 and thus the said shortfall in margin money was at Rs.34,28,329.37 as on 26<sup>th</sup> March, 2013. The shortfall of margin money continued on 27<sup>th</sup> March, 2013 and 28<sup>th</sup> March, 2013. As on 28<sup>th</sup> March, 2013, the shortfall in margin money according to the petitioner was at Rs.37,23,679.39.

26. A perusal of the pleadings filed by the petitioner before the learned arbitrator clearly indicates that it was the case of the petitioner that on 28<sup>th</sup> March, 2013, at the end of trading hours, the respondent had open position of 110 lots of silver 040513, ledger credit of Rs.35,53,150.60 and closing rate of silver contract expiring on 4<sup>th</sup> May,2013 on MCX was Rs.53,564/-. It was the case of the petitioner that on 30<sup>th</sup> March, 2013, the next trading day as 29<sup>th</sup> March, 2013 being a holiday, as soon as the market opened, there was a huge volatility in the price movement of silver. During the first eight minutes, the price of the silver was down by Rs.42/-. Then there was a sudden drastic downfall in the price of silver and within next 3 – 4 minutes, the price movement of silver was Rs.2100 downside. Within 12 minutes of market open the price of silver was Rs.51,444/-. It was the case of the petitioner in the arbitral proceedings that due to drastic downfall in price of silver and that too within such short span of time, just after few minutes of market open, the credit balance of the respondent got completely exhausted due to sudden mark to open loss and mark to market loss came to Rs.69,33,254.49 within next 3 to 4 minutes. It was averred by the petitioner that as a result, the respondent had a debit balance of Rs.33,80,103.86 after adjusting the credit balance available with the petitioner. It was the case of the petitioner that the movement was so drastic that it was practically not possible to strike a

conversation with the respondent. The petitioner even tried to contact/inform the respondent but by the time they did so, the respondent's position got squared off and she suffered losses.

27. It is also stated in the rejoinder filed by the petitioner before the arbitral tribunal that the respondent had always made payments or rather paid her margins against her open position or to increase her position. It was alleged that the respondent always deposited part margin on her position and promised to deposit remaining amount in coming days, but never complied on it.

28. A perusal of the reply filed by the respondent in the arbitral proceedings indicates that it was her case that on 26<sup>th</sup> March, 2013, there was a shortfall due to fall in the price of silver and the petitioner therefore required to deposit Rs.20 lacs in the account which was immediately paid by the respondent. The respondent had always kept making payment as and when required by the petitioner. It was the case of the respondent that she was never informed or was called upon by the petitioner to make payment of any amounts at any point of time and the petitioner had squared up her position at Rs.69 lacs clubbing in her equity account without any intimation. It was also the case of the respondent that at no point of time, the respondent had authorised the petitioner to adjust margins or debits for any exchange. The respondent also denied all the allegations which were contrary to and/or inconsistent with whatever was stated in the said reply.

29. A perusal of the arbitral award indicates that the arbitral tribunal had rendered a finding that after considering the risk disclosure document that if the closing price had gone against the client, he had to deposit the amount of notional loss generally before the commencement of trading next day. The petitioner could not have squared off the open position of the respondent due to mark to market loss

in any case before demanding additional funds. It is held that in this case admittedly there was a huge volatility in the price of silver on 30<sup>th</sup> March, 2013 and if due to the said volatility, there was a shortfall in the margin, the petitioner could not have squared off the position of the respondent without first having made a demand on the respondent to deposit additional money within a stipulated time frame which was not done by the petitioner. The arbitral tribunal has rendered a finding that the petitioner was thus not justified in squaring off the position of the respondent and accordingly rejected the claims made by the petitioner. In my view the arbitral tribunal had considered the pleadings, the documents and also the agreement entered into between the parties and after considering the same has rendered a finding of fact. The petitioner could not have squared off the open position of the respondent without demanding any additional amount. In my view the findings rendered by the arbitral tribunal is in consonance with the provisions and bye-laws of the Multi Commodity Exchange of India Ltd. and also the agreement entered into between the parties and are not perverse and thus no interference with such findings of fact is permissible under section 34 of the Arbitration and Conciliation Act, 1996.

30. Insofar as judgment of this court in case of ***Pankaj Goshal (supra)*** is concerned, a perusal of the said judgment indicates that this court has while considering the issue of limitation has held that if the statement of accounts was forwarded to the debtor by the creditor, the purpose of forwarding that statement of account was to call upon the debtor to pay the amount. It is held that the demand for payment can be made when the right to claim the payment accrues. The right of the respondent to demand the payment was the cause of action of the respondent against the petitioner. In this case, the petitioner could not prove that the petitioner had raised the demand for margin money from time to time though even according

to the petitioner there was a shortfall continuously in the account of the respondent since 20<sup>th</sup> March, 2013 which continued till 29<sup>th</sup> March, 2013. The judgment of this court in case of ***Pankaj Goshar (supra)*** thus does not assist the petitioner in any manner whatsoever.

31. Insofar as judgment of this court in case of ***Amit Bharadwaj (supra)*** relied upon by Mr.Narula, learned counsel for the petitioner is concerned, this court in the said judgment while dealing with the provisions of the bye-laws of the National Stock Exchange held that the statutory regulations had been framed by the Stock Exchange for protecting the system under which the Stock Exchange operates and the requirement had been included in the regulations for taking margin money from the constituent to protect the system and the brokers from any loss that may be suffered on account of the transactions that may be undertaken. It is held that if the brokers are permitted to carry on transactions contrary to the regulations framed by which they were bound, it would endanger the system itself. This court in the said judgment has set aside the arbitral award by which the constituent was directed to pay the amount to the broker which was claimed on account of illegal and unauthorised transaction without demanding margin money.

32. A perusal of the judgment of the Division Bench delivered on 6<sup>th</sup> February, 2014 in case of ***Marwadi Shares and Finance Ltd. vs. Amit Bhardwaj*** arising out of the learned Single Judge in case of ***Amit Bharadwaj*** referred to aforesaid indicates that the Division Bench has set aside the judgment of the learned Single Judge on the ground that there was no factual basis and/or evidence led by the respondent constituent before the learned arbitrator that the broker had not demanded margin money and thus the learned Single Judge could not have decided the said issue without there being any factual basis led by the constituent. The Division Bench clarified that the issue regarding illegality of the

contracts/transactions entered into between the parties thereto on the ground that they violated the bye-laws and the regulations of the Stock Exchange would not be allowed to be raised before the Learned Single Judge as the same had been concluded by the said order. The Division Bench clarified that since there was no factual basis in that matter for deciding the said question, the Division Bench was not going into the same and left it open to be decided in an appropriate case. It is thus clear that though the Division Bench has set aside the judgment of the Learned Single Judge in case of **Amit Bharadwaj**, the same is not set aside on the ground that the transactions carried out by the broker without compliance of the mandatory requirements under requisition 3.10 of demanding margin money in case of shortfall, the transaction was illegal but has set aside on the ground that there was no factual basis or evidence led by the constituent before the learned Single Judge and thus the same could not have been decided by the learned Single Judge. The views expressed by the learned Single Judge that the broker having carried out transaction in violation of the regulations and thus could not make any demand against the constituent is not set aside on merits. In my view the judgment of the Division Bench of this court in case of **M/s.Marwadi Shares and Finance Ltd. (supra)** thus does not assist the case of the petitioner.

33. Insofar as the judgment of this court in case of **Uttam Chand Garg (supra)** relied upon by the learned counsel for the petitioner is concerned, in that matter, the constituent had admitted that the trades were executed by the broker at his instance. It was also admitted that there was adequate margin money for the transactions to be carried out on behalf of the constituent with the broker. Considering this position, this court held that since the learned arbitrator had rendered a finding that there was sufficient margin in the account of the constituent and in view of the admitted position that the trades were executed at the instance of

the constituent, no interference with the arbitral award under section 34 of the Arbitration Act was warranted. In my view the said judgment does not apply to the facts of this case at all. In this case even according to the petitioner, there was huge shortfall in the margin money and it was not the case of the petitioner that the square up of the transaction on 30<sup>th</sup> March, 2013 carried out by the petitioner was at the instance of the respondent. The judgment of this case in case of ***Uttam Chand Garg (supra)*** does not assist the case of the petitioner.

34. Insofar as judgment of this court in case of ***Shreepalkumar Pukharaj (supra)*** relied upon by the learned counsel for the petitioner is concerned, this court considered the findings of fact rendered by the learned arbitrator that the respondent had been issued and delivered the contract notes as well as bills which were received, retained and accepted by the constituent without raising any objection. There was no documentary evidence that the constituent had objected to any of the transactions. In this case it is an admitted position that on 30<sup>th</sup> March, 2013 when the petitioner squared up the open position of the respondent, the same was alleged to have been done due to sudden volatility in the market and the said transaction was done by the petitioner on their own without even intimation to and without demanding any further deposit from the respondent. The judgment of this court in case of ***Shreepalkumar Pukharaj (supra)*** thus does not assist the petitioner.

35. This court in case of ***M/s.BMA Commodities Pvt. Ltd.(supra)*** has dealt with the same provision i.e. bye-laws of the Multi Commodity Exchange of India Ltd. and more particular bye-laws 8.2.2 to 8.6.5 and has held that since the broker had carried out the transactions without demanding any margin money from the constituent and without any instructions from the constituent though there was a debit balance, all such transactions carried out by the broker without any

instructions and without any demand for margin money were unauthorised and no such debit could have been made in the account of the constituent in respect of such unauthorised transactions. It is held that a trading member who had 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 constituent in respect of such unauthorised transactions. In this case also it is clear beyond reasonable doubt that even according to the petitioner there was huge shortfall in the margin money atleast since 20<sup>th</sup> March, 2013 which continued till 29<sup>th</sup> March, 2013 even though the respondent made payment of Rs.20 lacs to the petitioner on 26<sup>th</sup> March 2013. There was a shortfall in the margin money according to the petitioner in the sum of Rs.34,28,329.37 as on 29<sup>th</sup> March, 2013.

36. In my view the whole purpose of such bye-laws in the Multi Commodity Exchange of India Ltd. is to provide safeguard that there is mitigation of loss and thus it makes mandatory for the broker to square off the transactions immediately upon there being a shortfall which according to the broker had not been paid by the constituent inspite of demand. If the petitioner would have squared off the open position when there was shortfall of margin money prior to 30<sup>th</sup> March, 2013, the petitioner would not have faced the volatility in the market on 30<sup>th</sup> March, 2013. In my view since the petitioner had not carried out their obligation by squaring up the transactions when there was a shortfall in the margin money and which according to the petitioner was not paid by the respondent though demanded, the petitioner cannot be allowed to make any claim against the respondent constituent for such unauthorised transactions carried out by the petitioner in the account of the respondent. In my view the bye-laws referred to aforesaid are mandatory and the transactions carried out in violation of such mandatory bye-laws would not make the broker entitled to make any claim against the constituent based on such

unauthorised trade effected by the broker.

37. Insofar as judgment of this court in case of ***Shankarlal V.Keswani (supra)*** relied upon by the learned counsel for the petitioner is concerned, a perusal of the said judgment indicates that this court has dealt with bye-law 247A(5) of the Bombay Stock Exchange Limited which is extracted as under :-

(5) In case of purchases on behalf of client, Member brokers shall be at a liberty to close out the transactions by selling the securities, in case the clients fails to make the full payment to the Member Broker for the execution of the contract within two days of contract note having been delivered for cash shares and seven days for specified shares or before pay-in day (as fixed by Stock Exchange for the concerned settlement period), whichever is earlier; unless the client already has an equivalent credit with the Member. The loss incurred in this regard, if any, will be met from the margin money of that client.

38. Considering the said bye-law which provided a liberty to the broker to close out the transactions by selling the securities, in case the clients failed to make the full payment to the broker for the execution of the contract, this court held that the said provision was not mandatory but was discretionary. In my view the said bye-law considered by this court and bye-laws which are the subject matter of this petition are totally different. Under bye-laws 8.6.5 to 8.6.6 of the Multi Commodity Exchange, the broker is under an obligation to liquidate/close out any of the position of the constituent if the constituent default in paying the daily margin. Those bye-laws have been interpreted by this court at length in the judgment delivered by this court in case of ***M/s.BMA Commodities Pvt. Ltd. (supra)*** which squarely applies to the facts of this case. In my view, the judgment of this court in case of ***Shankarlal V.Keswani (supra)*** does not assist the petitioner and is clearly distinguishable in the facts of this case.

39. In my view, the findings rendered by the learned arbitrator are also based on the interpretation of the agreement entered into between the parties which interpretation is a possible interpretation and thus cannot be substituted by another interpretation under section 34 of the Arbitration Act.

40. In my view the petition is devoid of merits. I, therefore, pass the following order :-

- (a) Arbitration Petition No.195 of 2015 is dismissed.
- (b) There shall be no order as to costs.

***(R.D. DHANUKA,J.)***