IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 963 OF 2010

Kirtikumar Desai ….. **Petitioner**

VERSUS

ICICI Securities Limited ….. **Respondent**

Mr.Satish Shah, a/w. Ms.Sumedha Sawant, i/b. Mr.N.N.Amin for the Petitioner.

Mr.Deepak Dhane, i/b. Jobey Mathew & Associates for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 6th OCTOBER, 2015

P.C.

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 15th January, 2010 and order dated 8th March, 2010 passed by the learned arbitrator under section 33 of the Arbitration and Conciliation Act, 1996. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original claimant whereas the respondent herein was the original respondent in the arbitral proceedings. The respondent is a trading member of the National Stock Exchange of India Limited (hereinafter referred to as the said 'NSE') inter alia in the capital market segment, in the futures and options segment and in currency derivatives segment.

3. It was the case of the petitioner that he had been engaging in trading online since around 2000 on Stock Exchange. The petitioner has been trading through his online account No.8500008212 on the said NSE through the online website portal

of the respondent. The petitioner and the respondent had entered into various agreements. The petitioner opened three accounts with ICICI Bank Limited, the principal of the respondent holding dematerialized securities. Both the savings bank account and DP accounts with ICICI Bank had been electronically linked with the respondent to provide seamless instant transfer of funds and securities both ways. On 5th January, 2007, the petitioner and the respondent executed a client agreement. On 5th January, 2007, the petitioner entered into a DP agreement with ICICI Bank Limited. The petitioner also executed a power of attorney on 5th January, 2007 in favour of ICICI Web Trade Ltd. authorizing the said company to operate the bank account and Demat Account mentioned therein on behalf of the petitioner. The petitioner also signed a letter of confirmation in favour of the said company and ICICI Bank Limited on 5th January, 2007.

4. It was the case of the petitioner that the share prices dropped very steeply in October 2008 and he sold off by actual delivery much of his shares in the earlier days with a view to buy back when market bottoms out in later days of the month. In this petition and before the learned arbitrator, the dispute was relating to certain transaction held on 24th October 2008 and 27th October 2008 when the market declined steeply. It was the case of the petitioner that prior to and upto 23rd October, 2008, the respondent used to square off the position in margin around 3.10 p.m. on each trading day. This was a little later than the earlier normal time which was between 2.45 p.m. and 3.00 p.m. and the conformity with this practice followed by many brokers.

5. It was the case of the petitioner that on 24th October, 2008, the prices of shares declined heavily and the Index known as NIFTY on the NSE had fallen by 10%. As decided by the respondent, its End of Settlement (EOS) was run by its

risk management team at 2.30 p.m. Three open sell positions of the petitioner were squared off i.e. buy orders were placed by the risk management team of respondent at 2.32 p.m. instead of the normal time of 3.00 p.m. by running a scroller for end of segment made available on the website of the respondent at 2.30 p.m. i.e. intimation of just two minutes was given. It is the case of the petitioner that the NSE did not halt trading before the scheduled closing time on that day, either in the margin segment or in any other segment. No other broker halted trading on that day.

6. It is the case of the petitioner that the respondent however allowed margin trading on 27th October, 2008 although all the Asian markets and other markets all over the world were heavily down including NSE Nifty trading in Singapore. According to the petitioner, on 27th October, 2008, the respondent decided to square off all trading position at around 1.10 p.m. instead of normal time 3.00 p.m.and gave investors, including the petitioner prior intimation of only 5-10 minutes to that effect. NSE also did not halt trading before the scheduled closing time on that day nor suspended the trading on those days before the normal closing time. It is the case of the petitioner that the petitioner was taken by surprise because of the very short time made available for such conversions through an intimation of hardly 2 and 10 minutes respectively for these two days i.e. 24th October, 2008 and 27th October, 2008 respectively and thus the petitioner was not able to initiate corrective steps to minimize his losses by arranging for delivery as per his normal practice and resultantly the petitioner suffered a loss.

7. It is the case of the petitioner that the respondent by their e-mail however offered only compensation of Rs.20,117/- to the petitioner though the petitioner had suffered a total loss of Rs.5,58,365.85 on 27th October, 2008 as a result of

arbitrary and hasty squaring off resorted to by the respondent two hours before the normal time provided by NSE under the bye-laws and regulations of the NSE. The petitioner therefore initiated redressal proceedings before SEBI and NSE complaint cell which resulted in arbitration of the dispute between the petitioner and respondent by his application dated 5th August, 2009. Mr.G.A.Nayak was appointed as a sole arbitrator to adjudicate upon the dispute between the petitioner and the respondent. Pursuant to the liberty granted by the learned arbitrator, the petitioner herein filed a statement of claim before the learned arbitrator. The petitioner made a claim of Rs.5,58,365.85 and for interest ad cost. The said claim was resisted by the respondent by filing a statement of defence. By an award dated 15th January, 2010, the learned arbitrator rejected the claim made by the petitioner and directed that the cost of the arbitration to be borne by the parties equally. The petitioner has impugned this arbitral award in this petition filed under section 34 of the Arbitration and Conciliation Act, 1996.

8. The petitioner thereafter filed an application before the learned arbitrator on 10th February, 2010 under section 33 of the Arbitration and Conciliation Act, 1996 alleging certain clerical and typographical errors in the said impugned award and also requested for interpretation of the specific points in the award. By an order dated 8th March, 2010, the learned arbitrator corrected the typographical and clerical errors or errors of similar nature in the said award which was referred to in the annextures to the said order. Insofar as application in respect of the alleged corrections setout for Annextures 2 and 3 are concerned, the learned arbitrator rejected the said request or interpretation of the specific point on the ground that the same was not covered under section 33 of the Arbitration and Conciliation Act, 1996 and that the petitioner herein was seeking review of the impugned award which was beyond the power of the learned arbitrator. The petitioner has

impugned the arbitral award as well as the order dated 8th March, 2010 passed by the learned arbitrator in this petition under section 34 of the Arbitration and Conciliation Act, 1996.

9. Mr.Shah, learned counsel appearing for the petitioner invited my attention to the various provisions of the trading regulations (Capital Market Segment) and more particularly clauses 2.4.1, 2.4.2, 3.3, 3.11, 3.12, 4.3.1 to 4.3.5, 4.4.1 to 4.4.16, 4.5.3 and would submit that the trading hours are already prescribed by the NSE and the members of the NSE could carry out the trading on behalf of the constituent only during those trading hours. He submits that the trading member has to carry out trading in accordance with the provisions of trading regulations, bye-law and other provisions of the law.

10. It is submitted by the learned counsel that it was nowhere stated in the regulations that the trading member was entitled to square off the account of constituent in any case where the constituent was a defaulter and thus the squaring off transaction by the respondent of the petitioner was in breach of the guidelines and the terms of the agreement entered into between the parties and also of the trading regulations. He submits that admittedly the power to halt trading vest with the NSE Before the scheduled closing time and not by the member. He submits that however in this case the learned arbitrator overlooked the fact that by effecting an early stoppage of trading, the respondent in fact purported to effect the settlement of the petitioner's account or a period amounting to less than one day which was not permissible under the rules and regulations framed under the said Act. He submits that the learned arbitrator has failed to exercise jurisdiction vest in him by law and has decided contrary to the terms entered into between the parties and the trading regulations.

11. It is submitted by the learned counsel for the petitioner that the learned arbitrator has without applying his mind rejected the application for clarifications made by the petitioner under section 33 of the Arbitration and Conciliation Act, 1996 substantially.

12. Learned counsel for the respondent on the other hand supported the findings rendered by the learned arbitrator. He submits that the respondent had not undertaken the margin trading activity. The respondent had offered the margin product with margin funding to the petitioner where the broker provide funding upto certain limit and charge to his client to buy shares. He submits that the agreement between the petitioner and the respondent was for intra-day product under which the buying or selling positions were taken by the client by paying a certain margin amount which varies from scrip to scrip and in case a client wishes to take delivery of the shares bought or wishes to carry forward the position for another two days, he would be required to bring in additional margin as was required. He submits that the petitioner had access and facility to trade online, using the online portal of the respondent just like other customers and the petitioner had signed all such agreements such as account opening form, for opening trading account with the respondent bank, Demat account and bank account with ICICI Bank and also other agreements (online) from time to time. He submits that it was the petitioner's independent decision in all trades which determined his returns i.e. profit and loss accordingly. The petitioner had full and independent control over his online trading account including decision making. The respondent had acted only as a platform made available for online trading. In support of this submission, learned counsel appearing for the respondent invited my attention to the agreement entered into between the parties including extra

general terms and conditions.

13. He submits that clause 11 of the General Terms and Conditions provides for auto square off. Under the said provisions the respondent member had a discretion to square off the position of the petitioner in various circumstances setout therein. In case of margin trade, if the open position was neither squared off nor converted to delivery by the client within the stipulated time and where mark to market loss on the open position has reached stipulated % of the margins placed with the respondent and the petitioner had not taken any steps either to replenish the margin or reduce the mark to market loss, the member has discretion to square off the position of the client. In other cases where the margin or security placed by the client falls short of the requirement or where the limits given to the client had been breached or where the client had defaulted of their existing obligation client had agreed that although the auto square off would trigger is pre-defined, subsequent to which member could exercise its discretion to carry out the square off within a reasonable period of time, the actual execution could happen at a price different from the trigger point and the client agreed to bear the loss based on actual executed price. It is provided that the specified percentage was than 16% and could be modified by the respondent member from time to time. My attention is invited to frequently asked question on the margin product which was also annexed to the agreement entered into between the parties.

14. Learned counsel placed reliance on clause 22 of the Letter of Confirmation annexed to Ex.C to the petition in which the petitioner had acknowledged that he was fully aware of the risk involved in the online trading activities, including the risk involved due to unauthorized access or any technical difficulties and had specifically agreed to hold the respondent harmless from any or all claims and

agreed that the respondent shall not be liable for any loss, actual or perceived, caused directly or indirectly by the Government restriction, exchange or market regulation, suspension of trading, war, strike, equipment failure, communication line, failure, system failure, security failure on the internet, unauthorized access, theft, or any problem, technological or otherwise or other condition beyond the control of the respondent that might prevent the petitioner from entering an order or the respondent from executing an order. The petitioner has further agreed that he would not be compensated by the respondent for lost opportunity, i.e. notional profits on buy/sell orders, which could not be executed. He submits that thus the claim made by the petitioner towards notional profit was contrary to clause 22 of the said Letter of Confirmation and thus the learned arbitrator has rightly rejected the said claim for a notional profit. He submits that the said claim made by the petitioner was even without any justification and evidence.

15. Learned counsel appearing for the respondent submits that on 24th October, 2008, the petitioner himself had squared off all his position except in case of three positions. The petitioner did not dispute the said transactions carried out on 24th October, 2008. He submits that the petitioner did not square off the said pending position of 27th October, 2008 till the end of the settlement time trigger. He submits that the price of the shares came down heavily and more than 16% and thus the respondent was entitled to square off the transaction not only in the interest of the respondent but also in the interest of the petitioner.

16. Learned counsel for the respondent invited my attention to various findings of fact rendered by the learned arbitrator and submits that insofar as transaction carried out on 24th October, 2008 is concerned, the learned arbitrator has compared the price at which the transactions were squared off at 2.32 p.m. and the closing

price on that date. He submits that the learned arbitrator has rendered a finding that even if the transaction would have been squared off at the end of the settlement the petitioner would have still suffered loss. Insofar as the transaction squared off on 27th October, 2008 is concerned, he submits that the learned arbitrator has rightly rejected the contention of the petitioner and has rightly upheld the action of the respondent for squared off transaction prior to the end of settlement date by rendering various reasons which are based on the interpretation of the terms of the contract and the trading regulation.

17. A perusal of the agreement entered into between the parties including the general terms and conditions and more particularly clause 11 clearly indicates that the respondent member was entitled to square off the transaction in case of various eventualities provided therein including the situation when the current market price breached the specified percentage of 16% when compared with the previous day's closing price for that script. It is not in dispute that the market price on 27th October, 2008 came down more less than 16% of the previous day closing price. The risk management team of the respondent thus was right in my view to square off the transaction prior to the end of the settlement time. In my view the learned counsel appearing for the respondent is right in his submission that intra-day transaction was governed by the agreement entered into between the parties in view of the fact that the product designed was different from the cash segment transaction.

18. A perusal of clause 22 of the Letter of Confirmation read with clause (3) thereof clearly indicates that the petitioner was prohibited from making any claim based on lost opportunity and notional profit on buying or selling order which could not be executed. In my view the claim for notional profit made by the

petitioner was thus contrary to the agreement entered into between the parties and more particularly clause 22 of the Letter of Confirmation.

19. A perusal of the record also indicates that the petitioner did not raise any grievance in respect of the transaction squared off on 24th October, 2008. The submission of the learned counsel for the petitioner is that instead of two minutes to 10 minutes, the respondent ought to have given 45 minutes. A perusal of the statement of claim filed by the petitioner does not indicate that any such plea was raised by the petitioner that respondent ought to have given 45 minutes intimation before squaring off the transaction.

20. A perusal of the record indicates that the learned arbitrator has rendered a finding of fact that there was gradual fall of the prices of the three shares and closing price of those shares were lesser than those squared off of 24th October, 2008. The learned arbitrator was of the view that had the petitioner allowed the time till the end of the day, there was no reason to believe that he would have earned more notional profit than what he had actually earned at the time of square off, as the prices shown in the table mentioned in the award did not support his contention.

21. Insofar as the transaction squared off on 27th October, 2008 is concerned, the learned arbitrator has rendered a finding of fact that the stock markets experienced the similar trends on 27th October, 2008 also forcing the risk management team of the respondent to take charge of the situation and enforce the risk containing measures at 1.15 p.m. thereby curtailing the trading hour by two hours. It is held that there was no irregularity in the action of the respondent as it was well documented in the margin trading product, constituents were given advance notice

on 24th October, 2008 and 27th October, 2008 and yard stick was used uniformly with transparency. It is also held that it was difficult to give sufficient advance notice/warning at times due to very high volatility in the market and inability of the trading members to assess the rate of swiftness with which the prices reached the set ceiling/price barrier.

22. On interpretation of trading regulations and the agreement entered into between the parties, the learned arbitrator has held that the trading decision of deciding the validity or correctness of such risk containing parameters/norms adopted by the respondent was outside the scope of the arbitration. The learned arbitrator has also rejected the submission of the petitioner that he was not aware of the plus minus 16% price trigger due to small fonts used in the scheme details or not prominently displayed in the website since the petitioner was informed with long experience.

23. In my view, the findings rendered by the learned arbitrator that the petitioner would not have suffered any loss even if the transaction would have squared off at the closing of the settlement time insofar as transaction carried out on 24th October, 2008 and similarly in respect of the transaction carried out on 27th October, 2008 is not perverse and is based on the data made available to the learned arbitrator by both the parties and thus no interference is thus permitted under section 34 of the Arbitration and Conciliation Act, 1996.

24. The learned arbitrator in my view has interpreted the provisions of trading regulation and the agreement entered into between the parties and has rightly held that the respondent was entitled to square off the transaction once the current market price breached 16% when compared with the previous date closing price. In my view the interpretation of the learned arbitrator is a right interpretation.

Even if the interpretation of the learned arbitrator is considered as a possible interpretation, such interpretation cannot be substituted by another interpretation by this court under section 34 of the Arbitration and Conciliation Act, 1996.

25. In my view the claim made by the petitioner was even otherwise prohibited under the terms of the contract entered into between the parties and was hypothetical and was not based on any evidence. The learned arbitrator has thus rightly rejected the said claim.

26. Insofar as submission of the learned counsel for the petitioner that the learned arbitrator could not have rejected the application made by the petitioner under section 33 of the Arbitration and Conciliation Act, 1996 or that the said rejection was without application of mind is concerned, a perusal of the application made by the petitioner and the order passed by the learned arbitrator thereof clearly indicates that the interpretation suggested by the petitioner and/or the corrections alleged were in the nature of the review of the award made by the learned arbitrator on merits and did not fall within the purview of power of section 33 of the Arbitration and Conciliation Act, 1996. The learned arbitrator has already corrected the typographical errors or the clerical errors which were pointed out by the petitioner in the said order which were permitted to be corrected under section 33. In my view there is thus no merit in this submission of the learned counsel appearing for the petitioner also.

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

Arbitration petition is dismissed. No order as to costs.

[R.D. DHANUKA, J.]

CERTIFICATE

Certified to be true and correct copy of the original signed order.