

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 1174 OF 2012**

Ankit Bimal Deorah, residing at)
B 1, 307, Devdig CHS Ltd.)
Opp. Jena House, Sahar Pipeline Road,)
Om Nagar, Andheri (East),)
Mumbai 400 099) Petitioner

Versus

Microsec Captial Ltd.)
having its Registered Office at)
Shivan Chambers, 1st Floor, 53, Syed Amir)
Li Avenure, Kolkata – 700019 and having)
Its Mumbai office at 74A, Mittal Tower,)
7th Floor, 210, Nariman Point,)
Mumbai 400 021) Respondent

Mr.A.Davar, a/w. Rinku Valunju, Mr.Sunil Kaioth for the Petitioner.

Mr.Simil Purohit, a/w. Mr.Faran M.Khan, i/b. M/s.Purohit & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 14th JULY, 2015

PRONOUNCED ON : 6th AUGUST, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 the petitioner has impugned the arbitral award dated 29th May, 2012 passed by the appellate arbitral tribunal constituted under the rules, regulations and bye-laws of the National Stock Exchange of India Limited. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner herein was the original claimant whereas the respondent herein was the original respondent in the arbitral proceedings. On or about 3rd October, 2006, the petitioner executed a Member Client Agreement with the respondent for carrying out trading in F&O segment of the National Stock Exchange of India Limited and was allotted a client code by the respondent who is registered member of the National Stock Exchange of India Limited. It is the case of the petitioner that the petitioner had deposited 22,500 shares of Bombay Rayon Fashions Ltd. with the respondent as collateral against margin requirement. The petitioner executed various transactions of sale and purchase of equity shares and stock futures i.e. derivatives – F&O segment through the respondent as his broker.

3. It is the case of the petitioner that all such transactions were carried out at Malad Branch of the respondent as per the instructions of the petitioner till 21st January, 2008. According to the petitioner as per the statement given by the respondent in the month of March 2008, the margin requirement as on 21st January, 2008 was Rs.42,51,825/- against which the shares were given to the respondent as margin after hair cut worth Rs.50,90,000/- and thus had excess margin credit of Rs.8,38,575/-. However, due to mark to market loss on outstanding F&O positions, the ledger account was in debit for Rs.10,37,422/-. According to the petitioner, after both these figures were combined, there was a shortfall of about Rs.2,00,000/- only.

4. It is the case of the petitioner that the branch manager of the respondent has found the debit balance in the account of the petitioner on 11.30 a.m. on 22nd January, 2008 and informed him about the ledger debit and asked him to sell the shares worth Rs.8 lacs. Accordingly, the petitioner instructed the respondent to sell 3,500 shares of Bombay Rayon Fashions Ltd. valued approximately Rs.8 lacs.

The respondent accordingly carried out the said transaction and sold 3,500 shares out of 22,500 shares of the said company.

5. On 24th January, 2008, the petitioner squared off all outstanding F&O positions. On 25th January, 2008, the petitioner received a letter dated 22nd January, 2008 from the respondent stating that 22,500 shares of the petitioner of the said Bombay Rayon Fashions Ltd. were sold by clearing member of the respondent viz. East India Securities Ltd. It is the case of the petitioner that the petitioner immediately called upon Malad branch of the respondent and informed about the said letter. The Branch manager asked the petitioner to ignore the said letter and informed that the shares had already been repurchased and he need not worry about it. It is the case of the petitioner that the branch manager also informed the petitioner that there was some misunderstanding on the part of the respondent and very soon the amount against sales and purchase of shares would be removed from the ledger.

6. According to the petitioner, the petitioner had recovered the said sum of Rs.19,06,710/- from the respondent being the price difference between sale and purchase price of collateral shares which were sold by the respondent without the instruction of the petitioner. The petitioner accordingly filed arbitration reference before the National Stock Exchange of India Limited. Mr.A.N.Chakrabarti was appointed as the sole arbitrator. The petitioner filed a claim before the learned arbitrator. On 1st June, 2009, Mr.A.N.Chakrabarti made an award rejecting the claim of the petitioner. The petitioner filed a petition under section 34 of the Arbitration Act in this court (645 of 2009). By an order dated 21st April, 2011, this court has set aside the said award dated 1st June, 2009 by consent of both parties and directed the arbitral cell of the National Stock Exchange of India Limited to

appoint a new arbitrator for deciding the disputes between the parties keeping all contentions open.

7. National Stock Exchange thereafter appointed a former judge of this Court as the sole arbitrator. The matter was heard afresh by the learned arbitrator. On 9th December, 2011, the learned arbitrator allowed the claim made by the petitioner. The respondent herein filed an appeal before the arbitral tribunal (Appellate Bench) on 19th January, 2012 impugning the said arbitral award dated 9th December, 2011. The petitioner filed their cross objection before the appellate bench and also filed reply to the appeal filed by the respondent. By an award dated 29th May, 2012 the appellate bench has set aside the said award dated 9th December, 2011 and allowed the appeal filed by the respondent. The said award dated 29th May, 2012 made by the appellate bench has been impugned by the petitioner in this petition under section 34 of the Arbitration Act on various grounds.

8. Mr.Davar, learned counsel for the petitioner submits that on 22nd January, 2008 there was adequate margin available with the respondent in the account of the petitioner and there was thus no need to square off the position by the respondent or by the clearing member. He submits that even if there was any shortfall in the margin money, the respondent atmost could have squared off the position first and could have crystallized the liability first and could have not sold the collaterals. He submits that the entire action of considering the mark to market loss (12 noon) by the respondent was illegal, invalid and in breach of the bye-law. He submits that the respondent did not provide any contract note in respect of the alleged sale of 22,500 shares to the petitioner. The respondent had issued a contract note only in respect of sale of 3,500 shares.

9. It is submitted that the entire alleged sale of 22,500 shares was not done under the client code of the petitioner i.e. A449. It is submitted by the learned counsel that the petitioner had already paid a sum of Rs.7 lacs on previous day and had also handed over securities to the respondent. He submits that the respondent did not make any call for additional security if according to the respondent there was any shortfall in the margin money. He submits that time to make payment of any alleged shortfall on 22nd January, 2008 did not arise. He submits that in the ledger account, the respondent has reflected the sale of total 22,500 shares and not of 3,500 shares. He submits that the stand taken by the respondent before the appellate bench was totally contrary to the stand taken by the respondent before the lower arbitral tribunal. My attention is invited to the letter addressed by the petitioner on 31st March, 2008 to M/s.East India Securities Ltd. to make enquiry about the sale effected by the said clearing member. There was no reply from the said clearing member of the respondent.

10. Learned counsel appearing for the petitioner invited my attention to the award rendered by the lower arbitral tribunal which had allowed the claims made by the petitioner. My attention is also invited to the appeal memo filed by the respondent before the appellate bench and submits that the new case was pleaded by the respondent before the appellate bench. It was alleged that the respondent had called upon the petitioner to meet the shortfall in his account, however the petitioner did not meet the said shortfall in his account.

11. It is submitted by the learned counsel for the petitioner that the action on the part of the clearing member in selling the entire collaterals of the petitioner was due to non-fulfillment of the obligation of the respondent broker qua the clearing

member and not based on any alleged default of the petitioner. He submits that the petitioner was not concerned with the default committed by the respondent qua the clearing member who had failed to meet their obligation to its clearing member. He submits that it was not the case of the respondent before the appellate bench that the respondent had instructed the clearing member to sell the entire collaterals of the petitioner. He submits that the arbitral tribunal has not given any finding that the selling of collateral was due to market loss on 21st January, 2008 or 22nd January, 2008. He submits that the selling due to market to market loss on 22nd January, 2008 (12 noon) was not permissible as per Regulation 3.10(b) of the National Stock Exchange. The respondent could not have taken a unilateral decision in the matter of sale and purchase of collateral securities on behalf of the petitioner.

12. Learned counsel for the petitioner submits that though at the end of day on 22nd January, 2008 the price of the scrip increased by about Rs.80/- and the petitioner had made a profit of about Rs.5 lacs on his open F & O position, however, if the respondent would have sold the securities at a later point of time in the day, the present claim would not have arisen at all. He submits that the respondent could not have used any alleged discretionary power to put the constituent into financial jeopardy. He submits that the respondent repurchased the shares in the account of the petitioner on the next day itself would indicate that the action of selling the securities on 22nd January, 2008 was illegal. The respondent never informed the petitioner about the repurchase of the shares on 23rd January, 2008. He submits that it was thus clear that the sell of the collateral shares on 22nd January, 2008 was without the authority and consent of the petitioner.

13. Learned counsel for the petitioner then submits that the appellate tribunal

totally overlooked the provisions of the risk disclosure agreement signed by the parties which clearly provided that the mark to market loss had to be calculated as per the closing price of the day and the constituent had to make payment against the same in the next trading day. The respondent therefore could not have sold the collateral on the basis of intra-day mark to market position at 12 noon.

14. Learned counsel for the petitioner states that the appellate tribunal has totally overlooked the averments made by the petitioner in his statement of claim that the branch manager of the respondent had already communicated about the repurchase of shares by the respondent's head office at Kolkata on 23rd January, 2008. He submits that the various findings rendered by the appellate bench are totally perverse and contrary to the provisions of bye-laws, rules and regulations of the National Stock Exchange of India Limited.

15. Mr.Purohit, learned counsel appearing for the respondent on the other hand submits that the petitioner had admittedly accepted all the transactions carried out upto 21st January, 2008. There was a debit balance of about Rs.22,31,000/- in the account of the petitioner according to the respondent. He submits that even according to the petitioner there was debit balance of Rs.10 lacs as on 21st January, 2008. He submits that on 22nd January, 2008, the market had recovered. He submits that it was the case of the petitioner himself that the petitioner had instructed to sell 3,500 shares on 22nd January, 2008 which would clearly indicate that there was a shortfall in the mark to market even according to the petitioner. The petitioner has admitted this position which was duly recorded by the appellate bench. The petitioner did not apply for clarification of the award by making any application under section 33 of the Arbitration Act. It is submitted that the respondent broker was entitled to take appropriate decision in view of the market

being in volatile condition, whether to square off the transaction or not.

16. My attention is invited to the stock broker client agreement and it is submitted that under the said agreement, all dealings of the petitioner through member were subject to the rules, bye-laws and regulations of National Stock Exchange and its clearing corporation, guidelines prescribed by SEBI and in force from time to time and circulars as may be issued by National Stock Exchange of India Limited of its clearing corporation/clearing house and in force from time to time. He submits that thus even if the said clearing member had disposed of the collaterals of the petitioner, the same was in accordance with the bye-laws and the agreement entered into between the parties and was binding upon the petitioner. Learned counsel for the respondent submits that various findings rendered by the appellate bench are findings of fact and being not perverse, no interference is permissible with such finding of fact.

17. Learned counsel appearing for the respondent placed reliance on the judgment of this court delivered on 1st December, 2014 in case of **ANS Pvt.Ltd. vs.Jayesh R.Ajmera** in Arbitration Petition No.447 of 2012 and submits that the award rendered by the lower arbitral tribunal accepting the claims made by the petitioner has merged with the award of the appellate tribunal and even if the award rendered by the appellate tribunal is set aside by this court, both the awards will have to be set aside. He submits that even if the award of the appellate bench is set aside by this court, it would not *ex-facto* restore the original award passed by the lower arbitral tribunal.

18. Mr.Davar, learned counsel appearing for the petitioner made an attempt to distinguish the judgment of this court in case of **ANS Pvt.Ltd. (supra)** and would

submit that if this court is persuaded to set aside the award rendered by the appellate bench, the award rendered by the lower arbitral tribunal would be restored.

REASONS AND CONCLUSIONS

19. A perusal of the record indicates that it was the case of the respondent before the lower arbitral tribunal that as on 21st January, 2008, there was a debit balance of Rs.10,37,422/- in the account of the petitioner. As soon as the market opened on 22nd January, 2008 the market hit lower circuit and at around 12.00 noon almost all the margin of the petitioner in the form of stock was wiped off. It was also the case of the petitioner that in addition, there was fresh mark to market debit of Rs.21,82,266/- which togetherwith mark to market of 21st January, 2008 of Rs.10,37,422/- was totaling to Rs.32,19,688/- and for that purpose 19,500 shares of the said company Bombay Rayon Fashions Ltd. given as stock margin by the petitioner were sold at the rate of Rs.200.32 per share amounting to Rs.39,06,240/-.

20. It was the case of the respondent that the respondent did not receive any assurance/confirmation from the petitioner regarding payment of mark to market debit. The respondent accordingly tried to analyze real position on 22nd January, 2008 and conceived various options. According to the respondent since the petitioner did not give any assurance to make payment of previous day mark to market debit and sold 3500 shares of Bombay Rayon Fashions Ltd. out of margin to clear mark to market debit of earlier day, they understood that the petitioner would not make payment for mark to market debit and if the position of the petitioner continued, there would have been uncovered debit balance.

21. A perusal of the award rendered by the lower arbitral tribunal indicates that the lower arbitral tribunal has after interpreting risk disclosure agreement and also the rules, bye-laws and regulations of the National Stock Exchange has rendered a finding that the respondent could not have calculated the mark to market on real time basis and the said action was accordingly illegal and was barred by the regulations and contradictory to their own risk disclosure document. It is held that the respondent ought to have intimated the petitioner about such illegal transaction carried out due to alleged shortfall at 12 noon on 22nd January, 2008. The respondent admitted before the lower arbitral tribunal that the respondent did not send any contract note by e-mail or sent any letter about the said transaction on 22nd January, 2008. The petitioner came to know about the said transaction only on 23rd January, 2008.

22. The lower arbitral tribunal also took cognizance of the fact that if there was a debit balance in the account of the petitioner, the respondent could have squared off the position but they would not have required to sell the shares as collaterals. The lower arbitral tribunal also has rendered a finding that in this case there was sufficient margin provided by the petitioner. It is held that since the respondent realized that the shares were sold on 22nd January, 2008 in a wrong manner or as per the judgment and speculation of the respondent, the respondent repurchased those shares on 23rd January, 2008 and thus due to such wrongful activities of the respondent, no loss could be caused to the petitioner. The lower arbitral tribunal accordingly allowed the claim of Rs.19,06,710/-.

23. A perusal of the memo of appeal filed by the respondent before the appellate bench indicates that the respondent for the first time alleged that the respondent had approached the petitioner and required the petitioner to immediately meet the

shortfall in his account, however the petitioner had failed and neglected to pay the said amount of shortfall in his account and only instructed the respondent to sell 3500 shares. It was pleaded in the appeal memo that the collateral securities of the petitioner were kept deposited by the respondent with its clearing member and the respondent had instructed its clearing member to sell the said 19,000 shares of the petitioner of the said Bombay Rayon Fashions Ltd. lying in the account of the petitioner and accordingly the said shares were sold by the clearing member. No such plea was raised by the respondent before the arbitral tribunal. The respondent did not produce any such instruction alleged to have been issued by the respondent to the clearing member. The finding of the lower arbitral tribunal that the respondent having committed illegal transaction and having realized the same, repurchased the shares on 23rd January, 2008 has not been impugned.

24. A perusal of the appeal memo also indicates that the respondent had pleaded that the respondent could not prepare the contract notes for the said transaction held on 22nd January, 2008 since the same was directly executed by the clearing member. It was the case of the respondent in the appeal memo that the respondent herein had repurchased the said 22,500 shares as per the instructions of the petitioner for which the respondent had forwarded electronic contract notes on 23rd January, 2008.

25. A perusal of the impugned award rendered by the appellate bench indicates that the appellate bench has rendered a finding that the respondent herein took a decision to sell the collateral shares to sell margin requirement through clearing member and the clearing member left no alternative but to sell collateral securities of all such clients of the respondent including the petitioner. The respondent urged before the appellate bench that the respondent had communicated a list of all the

defaulter clients of the respondent to the clearing member with an instruction to sell off the collateral securities of all such clients and accordingly the clearing member has sold such securities. No such documents were placed before the lower arbitral tribunal nor were produced by the respondent before the appellate bench.

26. The appellate bench has held that the action on the part of the respondent for sale of collaterals on 22nd January, 2008 was just and proper and was bonafide and was taken by the respondent in the best of interest of the petitioner. The appellate bench has accepted the submission of the respondent that purchase of shares on 23rd January, 2008 was done by the petitioner himself. The appellate bench has held that if the respondent would have squared off the position first, then the mark to market losses in the account of the petitioner and in order to clear that mark to market debit, the respondent would have again to sell the collaterals and that would have adversely affected the position of the petitioner twice.

27. It is also held that the petitioner was clearly in default in meeting his mark to market requirement and the respondent was within its right either to square off the position or to liquidate the collateral in its best judgment. In my view the appellate tribunal has rendered an award based on the totally new plea raised by the respondent for the first time in the appeal memo and at the stage of argument which were totally absent before the lower arbitral tribunal and were inconsistent with the stand taken by the respondent before the lower arbitral tribunal. In my view the respondent had changed their entire story in view of various findings rendered by the lower arbitral tribunal against them which story was totally inconsistent, contradictory and after thought.

28. Be that as it may, even before the arbitral tribunal, the respondent was not able to produce any document or proof in support of their plea that the respondent had demanded any additional margin money on 22nd January, 2008 before squaring off the collaterals through the clearing member. The respondent also did not produce any document to show that the respondent had instructed the clearing member to square off the securities of all their constituents including the petitioner. In my view various findings rendered by the appellate tribunal are thus based on the conjectures and based on no evidence.

29. In my view, if the action of the respondent in squaring off the collaterals on 22nd January, 2008 was proper and was warranted considering the market condition, the respondent would not have repurchased those shares on 23rd January, 2008. The appellate bench in my view has totally overlooked this crucial aspect of the matter and erroneously accepted the plea of the respondent that the said repurchase of the share on 23rd January, 2008 was by the petitioner himself. The award rendered by the appellate tribunal shows patent illegality and perversity on the face of the award. Learned counsel appearing for the respondent could not justify this action on the part of the respondent even in the present proceedings as to why those shares were repurchased on 23rd January, 2008, if the action on the part of the respondent in squaring off the entire collaterals on 22nd January, 2008 was just, proper and bonafide. Learned counsel also could not demonstrate as to how the sell of the collaterals of the petitioner by the clearing member which was ex-facie for the default committed by the respondent of their obligation qua the clearing member could be to the account of the petitioner. In my view the loss suffered in repurchase of those collaterals on 23rd January, 2008 thus could not have been to the account of the petitioner.

30. Insofar as submission of the learned counsel for the respondent that even if this court proposes to set aside the impugned order passed by the appellate bench, the award rendered by the lower arbitral tribunal cannot be restored is concerned, on perusal of the judgment delivered by this court in case of **ANS Pvt.Ltd. (supra)**, it is clear that this court while referring to two tier arbitration under the rules and bye-laws of the Bombay Stock Exchange of India Limited has held that when the reference go through both the tiers, the award of the first arbitral tribunal clearly merges with the award of the appellate tribunal and once the appellate award is rendered, it is only that award which holds the field and the award which can be said to be in existence. It is held that setting aside of the award of the appellate tribunal does not, thus *ipso facto* restore the original award passed by the first arbitral tribunal. It is held that if the original award passed by the first arbitral tribunal has to be restored after setting aside the appellate award, it would clearly amount to rewriting of an arbitral award. The original award of the first arbitral tribunal not being in existence any more, restoration of such an award was bringing into effect a new award not in existence. This clearly is impermissible within the jurisdiction of this court under section 34 of the Arbitration and Conciliation Act, 1996. It is held that the parties may in that case be left to their own devices to consider their respective positions and adopt suitable steps, as they may be advised.

31. In view of the judgment of this court in case of **ANS Pvt.Ltd. (supra)**, I am of the view that prayer (b) of the petition in which the petitioner seeks restoration of the award rendered by the lower arbitral tribunal on 9th December, 2011 and seeks direction against the respondent to pay awarded sum with interest cannot be granted. In my view the award of the learned sole arbitrator rendered on 9th December, 2011 has merged with the arbitral award rendered by the appellate

arbitral tribunal on 29th May, 2012. Even if the said award dated 29th May, 2012 is set aside, the award dated 9th December, 2011 rendered by the sole arbitrator cannot be restored. This court cannot direct the respondent to pay the amount awarded under the award rendered by the lower arbitral tribunal under section 34 of the Arbitration and Conciliation Act, 1996. Prayer (b) of the arbitration petition is thus rejected. It is for the petitioner to adopt appropriate proceedings in accordance with law as may be advised.

32. I, therefore, pass the following order :-

Impugned award rendered by the appellate arbitral tribunal dated 29th May, 2012 at Ex.A is set aside. Arbitration petition is made absolute in terms of prayer (a). There shall be no order as to costs.

[R.D. DHANUKA, J.]