

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 420 OF 2013**

Mrs. Kaberi Mondal,)
residing at Flat No. 1E, 1002 Abhishikta II,)
369/3, Purbachal, Kalitala Road,)
Kolkata 700078) Petitioner

Versus

BMA Commodities Private Limited,)
a company incorporated under the)
Companies Act, 1956 having its registered)
office at 14/1, Paul Mansion, 6, Bishop Lefroy)
Road, Kolkata 700020 and Corporate Office at)
29/5A, Dr.Ambedkar Sarani, Topsia Road,)
Vishwakarma II, Kolkata 700046) Respondent

Mr.Krishnaraj Thaker, a/w. Mr.Suraj Iyer, Mr.Mehul H., i/b. Ganesh & Co. for the
Petitioner.

Mr.Simil Purohit, a/w. Mr.Sameer Sawant for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 6th MAY, 2015

PRONOUNCED ON : 9th JUNE, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the said 'Arbitration Act'), the petitioner has impugned portion of the award dated 18th June, 2012 and the supplementary award dated 17th April, 2015 made by the arbitral tribunal thereby rejecting part of 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 whereas the respondent was the original respondent in the arbitral proceedings. For the sake of brevity, the petitioner who was the original claimant before the arbitral tribunal is hereinafter referred to as the claimant and the respondent who was the original respondent in the arbitral proceedings is hereinafter referred to as the respondent.

3. The respondent is a registered stock broker with the Securities and Exchange Board of India and also with the Bombay Stock Exchange, National Stock Exchange of India and Multi Commodity Exchange.

4. It is the case of the respondent that the claimant approached the respondent in the month of March 2011 for the purpose of opening a trading and demat account in order to purchase and sell commodities from the Commodity market both in the Multi Commodity Exchange of India Ltd. On 10th March 2011, the parties executed an agreement for opening a trading and demat account for trading in stock market, commodity market segment and future and option market. The respondent agreed to act as an intermediary of the claimant for the purpose of purchasing and selling of commodities from the commodity market.

5. It is the case of the claimant that one Mr. Priotosh Ghosh, an employee of respondent was introduced to the claimant by her brother in law as an experienced stock market advisor and responsible and senior employee of the respondent, who represented the rosy picture of high returns and huge profits within a short time by investing money in commodities in Multi Commodity Exchange of India Limited (for short MCX) through the respondent.

6. Husband of the claimant is a seaman and was posted on ship through out the year. It is the case of the claimant that the said Priotosh Ghosh took personal details of the claimant and filled up registration form and obtained various documents from the claimant and also a cheque of Rs.50,000/- in favour of the respondent. The said Mr.Priotosh Ghosh also demanded the e.mail address of the claimant. Since the claimant did not have any e.mail address of her own, she reluctantly provided e.mail address of her husband. It is the case of the claimant that she specifically instructed the said Priotosh Ghosh that all communications issued to her should be sent to her in physical form.

7. It is the case of the claimant that during the period between 14th March 2011 and 5th May 2011, the said Priotosh Ghosh on behalf of respondent collected an aggregate sum of Rs.27,50,000/- from the claimant in five installments, last of such installment was on 5th May 2011. The said Priotosh Ghosh represented to the claimant that the claimant was a nett gainer from the handful trades which she had instructed him to make in her account. It is the case of the claimant that on or about 11th May 2011 to her shock and surprise the said Priotosh Ghosh informed her for the first time that there was a reduction in her account to the tune of Rs.20 lakhs. The said Priotosh Ghosh attributed the said reduction to the fall in the global market in the aftermath of killing of Osama Bin Laden.

8. On 4th July 2011, the claimant joined her husband at Port Klang, Malaysia and returned to India on or about 25th August 2011. It is the case of the claimant that on 5th September 2011, the claimant received a telephone call from a person who refused to disclose his identity and claimed that there had been huge volume of unauthorised trading in the claimant's account as a result whereof the balance in the claimant's account had been almost reduced to nil.

9. It is the further case of the claimant that she had categorically instructed the said Priotosh Ghosh that she was not interested in any further trading after May 11, 2011. On her return she inquired with the said Priotosh Ghosh and was told that the balance had been reduced to almost NIL in her account.

10. It is the case of the claimant that the claimant and her husband, thereafter, lodged a complaint about unauthorized transactions in her account, with the Corporate office of the respondent and obtained a statement of balance amount from the respondent. The claimant came to know for the first time that there had been hundreds of transactions, all unauthorized, in her account since opening of the account in March 2011. The representative of the respondent had never shown the claimant a complete statement of account. The claimant was only shown such portions which were reflecting nett profit. The claimant also came to know that the respondent had carried out about 60 to 70 intra-day buy and sell transactions on each day and around 100 intra day transactions on certain dates. The claimant had not given any instructions for a single intra day transactions and those transactions were unauthorizedly carried out in her account.

11. It is the case of the claimant that on 14th September 2011, the claimant made several attempts to collect information from the officers of the respondent. But, they evaded her on one pretext or the other. The claimant, therefore, lodged a complaint on 14th September 2011 against the respondent at the Police Head Quarters.

12. On 8th September 2011, the said Priotosh Ghosh filed a complaint / case against the claimant and her husband before the Chief Judicial Magistrate at

Alipore. The claimant received the summons from the 4th Court of Chief Judicial Magistrate at Alipore on 16th September 2011. On 29th September 2011, claimant lodged a claim with MCX regarding alleged unauthorized trading in her account by the respondent. On 24th October 2011, MCX forwarded respondent's reply to the claimant's complaint made on 29th September 2011. It is the case of the claimant that the said reply contained various false, untrue and incorrect statements.

13. On 25th November 2011, according to the claimant, there were further unauthorized transactions i.e. intra day buy transactions amounting to Rs.1132411.40 and intra day sell transactions amounting to Rs.1096695.60 which were carried out in the account of the claimant. On 26th November 2011, the claimant informed the respondent of further unauthorized trading in her account carried out on 25th November 2011. The claimant informed about such unauthorized trading in her account also to MCX. There was no reply to the said complaint made by the claimant to the MCX by the respondent.

14. On 29th November 2011, the claimant filed her complaint with the grievance cell of MCX. The said complaint was treated as her statement of claim. The dispute was referred to the arbitration in accordance with the bye-laws and business rules of the MCX. The respondent filed its statement of defence before the arbitral tribunal on 17th November 2012, denying the claim made by the claimant on various grounds. The primary defence of the respondent in the reply was that the claimant could not run short of margin and as the claimant ran short of margin, the respondent did not have any option but to close out and cancel the claimant's position.

15. Both the parties filed written arguments before the arbitral tribunal. None of the parties led any oral evidence in the arbitration proceedings.

16. In the meeting held on 30th April 2012 before the arbitral tribunal, the learned tribunal directed the respondents to produce various documents such as (i) SMS log statement and (ii) margin statement from May 7, 2011 to November 25, 2011.

17. The respondent also filed extract of the account of claimant on 25th November 2011 to 7th May 2011 reflecting margin money. It is the case of the claimant that even according to the said statement of account, filed by the respondent, it was clear that the ledger balance in the account of the claimant was always positive and that there was sufficient margin at all times in her account. It is the case of the claimant that in the fourth and final sitting of the reference before the arbitral tribunal which was held on 11th May 2012, in the minutes of the said meeting, the arbitral tribunal wrongfully recorded that the claimant did not have any grievance regarding the transactions in her account till 11th May 2012, though, it was her case all through out that the tradings in her account were illegal, specially the intra day transactions between March 2011 and May 2011, which were without the consent and knowledge of the claimant. The claimant by her letter dated 19th May 2011 addressed to the arbitral tribunal requested to correct the said error in the minutes of the hearing held on 11th May 2012.

18. On 18/27th June 2012, the arbitral tribunal rendered an award and directed the respondent to pay an amount of Rs.806031.69 being the closing balance in the account of claimant as on 14th July 2011 with interest at 18% p.a. from 5th July 2011 till payment. The respondent was also directed to pay to the claimant an

amount of Rs.78,186.70 which was deducted from the account of claimant as charges and tax due to trading unauthorizedly in her account from 5th July 2011 till 30th November 2011 with interest at 18% from 5th July 2011 till payment. The respondent was also directed to refund the claimant an amount of Rs.35,845.50 with interest.

19. Being aggrieved by the said arbitral award dated 18th / 27th June, 2012, the petitioner as well as the respondent filed two separate arbitration petitions i.e. Arbitration Petition No.420 of 2013 and Arbitration Petition No.854 of 2012 respectively impugning portion of the award which was against them in this court. Both the said arbitration petitions were heard together. By an order and judgment dated 17th December, 2014, this court dismissed the said Arbitration Petition No.854 of 2012 which was filed by the respondent herein. Insofar as Arbitration Petition No.420 of 2013 which was filed by the claimant herein is concerned, this court adjourned the said petition for a period of four months to enable the arbitral tribunal to resume the proceedings and to proceed with the matter in accordance with law insofar as rejection of the part of the claim made by the claimant is concerned. This court directed the arbitral tribunal to make a supplementary award within three months from the date of communication of the said order and granted liberty to the parties to apply for early hearing of the Arbitration Petition No.420 of 2013 if the supplementary award was made by the arbitral tribunal early. It is not in dispute that the said order and judgment dated 17th December, 2014 passed by this court has not been impugned by the respondent. The portion of the award by which the arbitral tribunal has directed the respondent to pay an amount of Rs.8,06,031.69 with interest at the rate of 18% per annum from 5th July, 2011 till payment became final and is binding on both the parties.

20. Pursuant to the order and judgment dated 17th December, 2014 passed by this court, the arbitral proceedings resumed before the arbitral tribunal on 25th February, 2015. In the said arbitral meeting, the claimant appeared in person and made various submissions. Mr.Kuldip Ghosh represented the respondent in the said hearing who also made various submissions. In the said meeting, the arbitral tribunal directed the respondent to submit a copy of the SMS log in support of their claim within 10 days from the date of the said meeting and also permitted the claimant to submit any documents/statement if she was so desired within 10 days from the date of the said order. The arbitral tribunal concluded the hearing and closed the proceedings for declaring the supplementary award.

21. The claimant vide her letter dated 7th March, 2015 to the Multi Commodity Exchange contended that the last accounts statement shown to her on 30th April, 2011 which covered trades upto 29th April, 2011 did not contain the details of trade carried out till 29th April, 2011 and therefore she was unaware of the trades carried out in her account without her permission/authorization. She contended that even according to the statement and submissions made by the respondent before the arbitral tribunal, there was shortfall of margin money only on three days and after those three days, the respondent unauthorizedly bought huge volume. She also placed reliance on bye-law 8.6.5 of Multi Commodity Exchange regarding rights and obligation of member to close out an open position of a client only when the call for further margin or any other payment due was not complied with by the client. It was contended by her that during the entire period starting from 14th March, 2011 to 25th November, 2011, the respondent did not make any call to the claimant for payment of any margin money and thus all the transactions were done unauthorizedly. She also placed on record that no SMS was received by her. The only few SMSs which she had received during the initial days were about the

market tips and there was no mention about the details of the alleged trades. On 9th March, 2015, the respondent submitted copies of the alleged SMS log to the Multi Commodity Exchange of India Ltd. as directed by the arbitral tribunal in the meeting held on 25th February, 2015.

22. On 7th April, 2015, the arbitral tribunal rendered a supplementary award and rejected the claims of the claimant for the Part II period i.e. from 10th May, 2011 to 4th July, 2011 holding that no case had been made out to that effect by the claimant. Pursuant to the liberty granted by this court, the claimant amended the present petition and the impugned the supplementary award dated 7th April, 2015 on various grounds.

23. Learned counsel for the claimant invited my attention to various documents forming part of the record before the arbitral tribunal and also the pleadings filed by both the parties. He also placed reliance on the order and judgment dated 17th December, 2014 delivered by this court in this petition alongwith Arbitration Petition No.854 of 2012. He submits that insofar as the part of the award which was in favour of the claimant which was impugned by the respondent by filing a separate arbitration petition is concerned, is rejected by this court by the said order and judgment and has not been impugned by the respondent by filing any appeal. He submits that the portion of the said award which was the subject matter of the Arbitration Petition No.854 of 2012 filed by the respondent has achieved finality.

24. Learned counsel for the claimant submits that this court in the said order and judgment dated 17th December, 2014 has disbelieved and has rejected the submissions made by the respondent insofar as the dispute covered by the third period is concerned. Reliance is placed on paragraphs 48, 50, 53, 54 and 58 of the

said order and judgment and it is submitted that this court has already held that the respondent had failed to produce any proof of any instructions from the claimant to carry out 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. It is held by this court that the respondent also had failed to prove that the respondent had demanded any margin money, which the claimant had failed to deposit or that the respondent was justified in squaring off of the transactions, standing in the account of the claimant. It is held that a trading member who had carried out any such transactions in breach of the bye-laws of Multi Commodity Exchange cannot make any claim against the constituent and/or debit any amount to the account of the claimant in respect of such unauthorized transactions. This court also upheld the findings of the arbitral tribunal that there was a credit balance for all the period, except on three dates when there was no demand or call for margin money on the respondent from the claimant. Learned counsel submits that all these findings rendered by this court are binding on both the parties as the same are not challenged by the parties.

25. Learned counsel for the claimant submits that the findings rendered by the arbitral tribunal in the supplementary award and more particularly in paragraph (16) of the supplementary award is contradictory and inconsistent with the findings recorded in paragraphs 16 to 20 of the original award rendered by the arbitral tribunal. He submits that though the arbitral tribunal in paragraph 16 has referred to the alleged findings in paragraph 25 of the original award, as a matter of record there was no finding recorded in paragraph 25 of the original award. Only submissions made by the claimant were recorded in the said paragraph. He submits that the respondent had failed to produce the voice recording alleged to have been recorded. The respondent did not examine Mr.P.Ghosh. The entire

supplementary award is based on the presumptions and surmises. He submits that in the original award, the arbitral tribunal had accepted the case of the petitioner that the claimant had not issued any instructions for carrying out any disputed transactions.

26. Learned counsel for the claimant strongly placed reliance on the circular dated 23rd February, 2011 issued by the Multi Commodity Exchange issued under the provisions of rules, bye-laws, business rules and and circulars of the Exchange issued in accordance with the directives issued by the Forward Markets Commission that all contract notes issued to the individual investors other than the corporate investors shall be in physical form and the contract notes shall be delivered at the address of the client. In the said circular, it is also mentioned that the delivery of the contract notes to an address either e-mail or physical address other than that of the client shall be deemed to be non delivery of the contract notes.

27. Learned counsel placed reliance on clause 5 of the said circular which provided that a detailed statement of account should be sent every month to all the clients if he has entered into minimum of three transactions in that month. He submits that admittedly the respondent has not delivered any contract notes in physical forms to the claimant in accordance with the said circular. Learned counsel submits that the respondent had admitted this position by making a statement before the arbitral tribunal in the meeting held on 25th February, 2015. Learned counsel for the claimant submits that since the respondent was bound to comply with the circulars and the bye-laws which were mandatory, the entire trading carried out in the account of the claimant was totally illegal and not binding upon the claimant. The respondent had failed to show any evidence that such

trades were carried out by the respondent on the instructions of the claimant or that any such order was placed by the claimant for any such trade upon the respondent.

28. Learned counsel for the claimant also placed reliance on the judgment of this court in case of ***Bonanza Commodities Brokers Pvt. Ltd. vs. Roshanara Bhinder*** in ***Arbitration Petition No.195 of 2015*** decided on 16th April, 2015 and would submit that this court has followed the view taken by this court in the order and judgment dated 17th December, 2014 passed by this court in this arbitration petition and has held that the bye-laws issued by Multi Commodity Exchange of India Ltd. 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. Paragraph 35 of the said judgment reads thus :-

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 20th March, 2013 which continued till 29th March, 2013 even though the respondent made payment of Rs.20 lacs to the petitioner on

26th 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 29th March, 2013.

29. Learned counsel for the claimant placed reliance on the judgment of Supreme Court in case of ***Delhi Development Authority vs. R.S.Sharma and Company, New Delhi (2008) 13 SCC 80*** and more particularly paragraph 21 thereof and would submit that since the supplementary award rendered by the arbitral tribunal and the original award insofar as the part of the claim of the claimant is rejected by the arbitral tribunal is patently illegal, this court has ample power to set aside such illegal award. Paragraph 21 of the said judgment of Supreme Court in case of ***Delhi Development Authority (supra)*** reads thus :-

21. From the above decisions, the following principles emerge:

(a) An Award, which is

(i) contrary to substantive provisions of law ; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996 ; or

(iii) against the terms of the respective contract ; or

(iv) patently illegal, or

(v) prejudicial to the rights of the parties,

is open to interference by the Court under Section [34\(2\)](#) of the Act.

(b) The award could be set aside if it is contrary to :

(a) fundamental policy of Indian Law; or

(b) the interest of India; or

(c) justice or morality;

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the Award in respect of Claim. 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties.

30. Learned counsel for the claimant placed reliance on the judgment of Supreme Court in case of ***Oil and Natural Gas Corporation Ltd. vs. Western Geco International Ltd. (2014) 9 SCC 263*** and more particularly paragraphs 23 and 30 to 33 and would submit that if court finds that there is any miscarriage of justice in the impugned arbitral award, this court can modify the impugned award and can allow the claims made by the claimant before the arbitral tribunal.

31. Mr. Purohit, learned counsel for the respondent on the other hand submits that even if this court comes to the conclusion that the part of the claim made by the claimant has been wrongly rejected by the arbitral tribunal which is a subject matter of this arbitration petition and ought to have been allowed by the arbitral tribunal, this court while exercising the powers under section 34 of the Arbitration and Conciliation Act, 1996 cannot make an award and cannot allow such claims under section 34 of the Arbitration Act.

32. Insofar as delivery of the contract notes in physical forms to the claimant by the respondent is concerned, learned counsel submits that the respondent had sent such contract notes to the claimant by e-mail. He submits that even if there is any non compliance of the circulars issued by Multi Commodity Exchange Ltd. by the respondent, it would not make any transactions carried out by the respondent at the instance of the claimant illegal. In such a situation, Multi Commodity Exchange Ltd. only can take action against the member for non compliance of such circulars. He submits that in any event even in respect of the admitted transactions, the claimant had accepted those transactions based on electronic communication. He submits that without receipt of contract notes, the claimant would not know the nature of details of the trade in the account of the claimant. It is submitted that since the claimant had made payment to the respondent on several occasion, it was clear that the claimant was fully aware of the transaction and could not place any ignorance by raising false plea that the contract notes were not delivered to the claimant. He submits that the making of payment to the respondent is also a part of the sequence of event of the transaction entered into between the parties. He submits that since the claimant had admittedly issued 'hold instruction', it presupposes her knowledge of transaction.

33. Learned counsel for the respondent placed reliance on the complaint which was made by the claimant to the grievance cell of Multi Commodity Exchange of India Ltd. on 29th November, 2011 in which she had categorically alleged that she was told about the market condition being volatile which would clearly indicate that she was fully aware of the position in the market and also about her pending order.

34. Learned counsel for the respondent then submits that since the claimant had accepted the part of the trades, it presupposes that the claimant had placed order also in respect of the other disputed transaction and which had taken place during the period between 14th March, 2011 to 4th July, 2011. He submits that the claimant had failed to give any bifurcation of claim in her pleadings before the arbitral tribunal and had claimed lumpsum amount of Rs.24.50 lacs though even according to the claimant she had not suffered loss more than Rs.9.5 lacs.

35. Learned counsel for the respondent submits that in her account filed before the arbitral tribunal, the claimant had reduced her claim from Rs.27.50 lacs to Rs.19 lacs. She had also admitted the general conversation between the claimant and the representative of the respondent on phone. The arbitral tribunal has disbelieved the story of the claimant that though there was conversion between the claimant and the remisier, the same did not pertain to the disputed transaction but only was regarding the general tips given to the claimant by the respondent. He submits that after order and judgment of this court dated 17th December, 2014, the arbitral tribunal has after hearing both the parties has rendered a reasoned supplementary award and has rendered a finding of fact which are not perverse. This court thus cannot interfere with these findings of fact. He submits that the arbitral tribunal has interpreted the terms between the parties which interpretation is in any event is a possible interpretation and cannot be substituted by any other interpretation by this court. Learned counsel submits that admittedly the claimant had received SMS for trade executed during the Part I period, however, had not made any complaint that the claimant had not received any contract notes or that the respondent had committed any violation of the circular issued by the Multi Commodity Exchange of India Ltd.

36. Learned counsel for the respondent submits that though the claimant was directed to submit bifurcation of her claim by the arbitral tribunal, the claimant refused to file any such bifurcation. The arbitral tribunal was thus justified in rejecting the entire claim made by the claimant. He submits that there was no inconsistency in supplementary award as canvassed by the claimant.

37. Insofar as judgment of this court in case of ***Bonanza Commodities Brokers Pvt. Ltd. (supra)*** relied upon by the claimant is concerned, the learned counsel for the respondent sought to distinguish the said judgment on the ground that in the said matter, the claim of the constituent was rejected by the arbitral tribunal on the ground of non payment of margin money though there was no demand for margin money made by the member. He submits that in this case, the claim of the claimant is not rejected on the ground of non payment of margin money though demanded by the respondent.

38. In rejoinder, learned counsel for the claimant invited my attention to the written statement filed by the respondent before the arbitral tribunal in which the respondent had raised one of the main issue against the claimant while opposing her claim about the non payment of margin money inspite of alleged demand raised by the respondent for the entire period including the period which is a subject matter of this petition. He submits that it was not the case of the respondent before the arbitral tribunal that the claimant was sent details of the transaction by SMS or by e-mail for the period in question. He submits that insofar as the alleged SMS logs filed by the respondent pursuant to the directions issued by the arbitral tribunal is concerned, the authenticity of such alleged SMS logs was not proved by the respondent before the arbitral tribunal. The arbitral tribunal thus could not have considered such alleged SMS logs which were not

received by the claimant. Learned counsel submits that even in the complaint made by Mr.P.Ghosh on 7th September, 2011, it was clearly mentioned that there was alleged trading carried out in the account of the claimant in several commodities other than silver which would clearly indicate that all such transactions which were not contemplated or agreed to be carried out under the agreement entered into between the parties were carried out unauthorizedly by the respondent. The claimant had also not agreed to carry out any share trading.

39. Insofar as delivery of the contract notes by e-mail is concerned, learned counsel submits that the alleged delivery of some of the contract notes by e-mail if any, was on the e-mail ID of the husband of the claimant who was all throughout sailing and there was no facility of internet available to the husband of the claimant. He submits that in any event the said e-mail ID of the husband of the claimant was given as and by way of correspondence address. The claimant had never received the ECN form. There was no reference to any SMS made in the original award rendered by the arbitral tribunal.

40. Insofar as submission of the learned counsel for the respondent that the claimant was aware of the volatility of the market condition is concerned, the claimant referred to the volatile condition of the market due to the sudden death of Osama Bin Laden and not because of any information alleged to have been provided about the alleged trades made by the respondent or their remisier in the account of the claimant. He submits that from the statement of account alleged to have been delivered by the respondent, the claimant would not come to know about the details of the transaction alleged to have been carried out by the respondent on behalf of the claimant. He submits that the findings rendered by the arbitral tribunal in the supplementary award is based on the alleged SMSs and

ECN which were not received by the claimant.

41. Insofar as bifurcation of claim is concerned, learned counsel for the claimant submits that in paragraph (13) of the impugned award itself, the arbitral tribunal has given bifurcation of the claim made by the claimant and thus there is no substance in this submission made by the learned counsel for the respondent.

REASONS AND CONCLUSION :

42. The present dispute relates to the alleged transactions during the period between 11th May, 2011 to 4th July, 2011. This court in the order and judgment dated 17th December, 2014 had made various observations insofar as disputes for the period between 11th May, 2011 and 4th July, 2011 was concerned. In paragraph (70) of the said order and judgment, it was held by this court that the claimant was entitled to invoke the provisions of section 34(4) of the Arbitration and Conciliation Act for remission of the part of the award, insofar as the claim was rejected by the arbitral tribunal ignoring bye-laws, business rules and provisions of the Act and having rendered inconsistent findings. The arbitral tribunal resumed hearing after passing of the said order and judgment by this court dated 17th December, 2014 and heard the parties on 25th February, 2015.

43. Before the arbitral tribunal, it was contended by the claimant that the last statement shown to the claimant by the respondent was on 30th April, 2011 which covered trades upto 29th April, 2011. The claimant had not received any physical contract notes or even the statement of account for subsequent period. The claimant had not executed any agreement with the respondent for receiving digital contract notes. The arbitral tribunal has summarized the submissions made by the parties in the minutes of the hearing held on 25th February, 2015. The claimant

contended that she was cheated from the very first day as trades were carried out without her instruction. She had handed over a cheque of Rs.9,00,000/- to Mr.Priyotosh Ghosh on 4th May, 2011. It was stated by her that the total loss incurred in her account for the unauthorized trades carried out by Mr.Priyotosh Ghosh w.e.f. 4th May, 2011 till 5th July, 2011 was Rs.9,93,822/- only. However, her claim was for Rs.27,50,000/- for all the unauthorized trades carried out from 14th March, 2011 to 25th November, 2011. It was her case that for the first time on 6th September, 2011 she learnt that some contract notes were sent to her husband's e-mail ID which he could not access for a long time as internet facility was not available in the ship in which he sailed at that time.

44. A perusal of the minutes of the said hearing shows that it was the case of the respondent that the physical contract notes were not sent to the claimant. All the contract notes were sent to the e-mail ID of the husband of the claimant. The respondent admitted that they had not complied with the circular dated 23rd February, 2011 issued by the Multi Commodity Exchange of India Limited in regard to the contract notes and submission of account. The respondent contended that they did not receive any communication from the claimant in regard to her purported 'hold instruction' on 10th May, 2011. It was the case of the respondent that the claimant was fully aware of all the trades as she was provided with ECNs and SMS and she never called for or complained of any non-receipt of account information.

45. Insofar as delivery of contract notes in physical form and statement of account is concerned, it was urged by the learned counsel for the respondent that even if the respondent had not complied with the bye-laws and the circulars and had not delivered the contract notes and statement of account, it would not

invalidate any transaction but at the most could invite some action from the Multi Commodity Exchange of India Limited.

46. This court in the same matter in its order and judgment dated 17th December, 2014 has dealt with this issue at length. After considering the bye-laws, business rules and directives dated 30th September, 2009 issued by Multi Commodity Exchange of India Limited it has been held that the members shall execute the trade online only after keeping evidence of the client placing such order, which may be in the form of sound recording and shall keep evidence of having dispatched the contract notes to the client. This court after considering the business rules and in particular 27(2) held that the contract notes must be delivered within 24 hours of the transaction made by and on behalf of the clients and proof of delivery of the same was required to be preserved by the member. The delivery of contract note to client must be in physical form only unless a client had specifically indicated his preference for contract notes in electronic form.

47. It is provided that if any client needs electronic contract notes, he has to be provided with ECN declaration form via e-mail as per the format and procedure given at Annexure XXVII. The said rule also provided that a detailed statement must be sent every month and proof of delivery of the same should be preserved by the member. This court has rendered a finding that the respondent could not produce any delivery of the contract notes or that the claimant had submitted any request for electronic contract notes. This court held that since the respondent broker had not complied with the directives issued by the Forward Markets Commission and also the business rules issued by the Multi Commodity Exchange of India Limited and its bye-laws, the arbitral tribunal ought to have considered these mandatory provisions required to be followed by the broker and could not

have accepted such transactions as valid in the account of the claimant.

48. This court held that since the respondent had failed to produce the proof of delivery of the contract notes and also the copy of the ECN form, no cognizance of the copies of such contract notes could have been taken by the arbitral tribunal. This court has also rendered a finding that the respondent had failed to produce before the arbitral tribunal any proof of delivery of contract notes or any proof of demand of any margin money and also did not produce any proof of voice record during the period between March 2011 and November 2011 in support of the plea that the claimant had given any oral instructions to carry out any transactions from abroad.

49. This court held that since the respondent had carried out 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. It is held that a trading member who has carried out any such transactions in breach of bye-laws of Multi Commodity Exchange of India Limited could not have made any claim against the constituent and/or debit any amount to the account of the claimant in respect of such unauthorised transactions. It is not in dispute that the findings rendered by this court in the order and judgment dated 17th December, 2014 have not been impugned by the respondent by filing any appeal and such findings and conclusion rendered by this court in the said order and judgment are binding on both the parties.

50. In my view, the circulars, bye-laws, business rules framed by the Multi Commodity Exchange of India Limited are mandatory and the respondent having admittedly committed violation thereof and having carried out transaction contrary to and in violation of such bye-laws, business rules and directives issued by Multi Commodity Exchange of India Limited cannot make any claim and/or debit any amount to the account of the constituent in respect of such unauthorized trades.

51. I am not inclined to accept the submission of of the learned counsel for the respondent that even if there was non-compliance of the bye-laws, business rules or directives issued by the Multi Commodity Exchange of India Limited by a member, it would not invalidate the alleged transactions between the constituent and the members and at the most it could only invite an action from the Multi Commodity Exchange of India Limited for such non-compliance and/or for violation.

52. A perusal of the original award and the records and proceedings clearly indicates that the respondent had opposed the claims made by the claimant on the ground that there was demand of margin money made by the respondent which was not met with by the claimant and thus the respondent was justified in squaring off the account of the claimant. The arbitral tribunal had rejected the said submission of the respondent. This court has upheld the part of the award by which the claim of the claimant was partly allowed by the arbitral tribunal. Admittedly, the respondent has not challenged the said order and judgment dated 17th December, 2014.

53. There was no plea raised by the respondent that the claimant was informed about the alleged transaction by sending SMS. A perusal of the directions issued

by the arbitral tribunal in the meeting held on 25th February, 2015 clearly indicates that the respondent was directed to submit a copy of the SMS logs in support of their claims within 10 days from the date of the said meeting. The respondent had alongwith their covering letter dated 9th March, 2015 which was received by the Exchange on 12th March, 2015 had filed the details of the alleged SMS logs. The arbitral tribunal did not give any further opportunity to the petitioner to deal with such alleged SMS logs.

54. The claimant vide her letter dated 7th March, 2015 filed before the arbitral tribunal contended that no SMS was received by the claimant except few SMS which she had received during the initial stage. A perusal of the supplementary award indicates that though the respondent had not proved before the arbitral tribunal about the delivery of the SMS which the respondent relied upon after closure of the hearing and though the claimant had denied having received such SMS except few SMS which were about the market tips, without giving any further opportunity to the claimant, the arbitral tribunal rendered a finding against the claimant by drawing an inference that the claimant could not clarify as to why she did not respond to the post trading SMS sent to her registered telephone number by the respondent during the relevant period. The impugned award is in violation of principles of natural justice and has been delivered by considering unproved documents.

55. A perusal of the original award indicates that in paragraphs 15 to 25 of the original award, the arbitral tribunal has rendered various findings in favour of the claimant whereas the conclusion drawn in paragraph (26) thereof was inconsistent with such finding of fact. This court has observed such inconsistency while passing the order and judgment dated 17th December, 2014. A perusal of the

supplementary award indicates that the arbitral tribunal sought to make it clear that the observations made in paragraph (26) was based in the findings in paragraph (25) as well as what had been found in paragraph (16). On one hand, the arbitral tribunal had accepted the case of the claimant that the claimant could not be faulted with to take plea that she had verbally instructed the agent of the respondent i.e. 'hold instruction' on or about 10th May, 2011 and that was accepted by the agent without demur and on the other hand has held that the transaction for the period between 11th May, 2011 to 4th July, 2011 were carried out by the respondent which was to the knowledge of the claimant.

56. In my view once the arbitral tribunal had held that the claimant had given 'hold on instructions' to the respondent which were not withdrawn by the claimant, the arbitral tribunal could not have come to the conclusion at the same time that the transactions were still carried out on the instructions of or to the knowledge of the claimant post such 'hold instruction' issued by the claimant. The award shows non-application of mind and total inconsistency and contradictions in the impugned award. Though this court in the said order and judgment dated 17th December, 2014 had given an opportunity to the arbitral tribunal to resume arbitral proceedings so as to eliminate the ground of challenge and to remove the inconsistency in the impugned award, the arbitral tribunal on the face of it has created further inconsistency in the impugned supplementary award.

57. Insofar as the reliance on the complaint made by the claimant before the grievance cell of the Multi Commodity Exchange of India Limited is concerned, a perusal of the said complaint indicates that the claimant had disputed all the transactions and had demanded the entire amount of deposit made by the claimant. A perusal of the complaint filed by Mr. Priyotosh Ghosh also clearly indicates that

even according to that complaint, several transactions in different commodities had taken place in the account of the claimant having the volume of crores which transactions of those commodities were not even contemplated in the agreement entered into between the parties. Arbitral tribunal completely overlooked these crucial piece of evidence in the impugned award and has rejected the claim of the claimant based on presumptions and surmises.

58. A perusal of the impugned award also indicates that the arbitral tribunal has rejected the claim of the claimant also on the ground that the claimant had failed to furnish the break up of her claim of Rs.27,50,000/-. It was the case of the claimant that all the transactions carried out by the respondent were unauthorized and accordingly the claimant had asked for the refund of entire amount with interest. Even in the original award made by the arbitral tribunal, it was observed by the arbitral tribunal that the claimant had repeatedly submitted that trading done in her account from 14th March, 2011 was unauthorized. The findings now rendered by the arbitral tribunal in the supplementary award that the claimant did not make any grievance in respect of the alleged transaction forming part of this dispute is totally contradictory and inconsistent with the findings rendered in the original award and shows patent illegality on the face of the award.

59. Though on one hand, the arbitral tribunal has rendered a finding in the original award that the submission of the claimant that she had given 'hold instructions' on 10th May, 2011 was not opposed by the respondent and by Mr.Priyotosh Ghosh who alone could have confirmed whether she had any verbal discussion with him in that matter and on the other hand rendered inconsistent finding that the claimant failed to clarify that she had telephonic talk with Mr.Priyotosh Ghosh on few occasion during the disputed period but she had never

instructed him for a fresh trading. In my view if according to the respondent there was a discussion on the telephone conversation between the claimant and the said Mr.Priyotosh Ghosh about the alleged transaction, the arbitral tribunal totally overlooked the fact that even to prove such allegation, the respondent either ought to have produce the voice recording or ought to have examined Mr.Priyotosh Ghosh to controvert such allegation which the respondent had failed. The award shows total perversity and patent illegality on the face of the award.

60. A perusal of the arbitral award also indicates that the arbitral tribunal has rejected the claim of the claimant also on the ground that the claimant had not given any bifurcation of the claim of Rs.27,50,000/- in the statement of claim or in the arbitral proceedings. A perusal of the record indicates that it was all throughout contended by the claimant that the claimant had disputed all the transactions as unauthorized and had demanded the amount of Rs.27,50,000/- which was paid by the claimant to the respondent. A perusal of the minutes of the hearing held on 25th February, 2015 clearly indicates that the arbitral tribunal had recorded the submissions made by the claimant that she had handed over the cheque of Rs.9,00,000/- to Mr.Priyotosh Ghosh on 4th May, 2011. The total loss incurred in her account for the unauthorized trade carried out by Mr.Priyotosh Ghosh w.e.f. 4th May, 2011 till 5th July, 2011 was Rs.9,93,822/- only. However, her claim was for Rs.27,50,000/- for all the unauthorized trades carried out from 14th March, 2011 to 25th November, 2011.

61. A perusal of the supplementary award clearly indicates that the arbitral tribunal itself in paragraphs 6, 7 and 17 has summarized the claims made by the claimant. In my view even if the arbitral tribunal was not convinced with the entire claim made by the claimant but only in respect of part thereof, the arbitral

tribunal could not have rejected the entire claim on the premise that there was no bifurcation given by the claimant in the statement of claim or during the course of hearing before the arbitral tribunal. In my view there is thus no merit in the submission made by the learned counsel for the respondent that there was no bifurcation given by the claimant or that the arbitral tribunal was justified in rejecting the claim made by the claimant on that ground.

62. Insofar as submission of the learned counsel for the respondent that the claimant was fully aware of the condition of the market being volatile while issuing a 'hold instruction' which presupposes that the claimant was fully aware of the transactions carried out in her account is concerned, in my view there is merit in the submission of the learned counsel for the claimant that such instructions were given by the claimant to hold on the transactions in view of sudden demise of Osama Bin Laden. There is thus no merit in the submission of the learned counsel for the respondent.

63. Insofar as submission of the learned counsel for the respondent that the claimant had made various payments to the respondent and had reduced her claim from Rs.27,50,000/- to Rs.19,00,000/- which presupposes that various transactions had taken place at the instance and on instructions of the claimant is concerned, in my view there is no merit in this submission of the learned counsel for the respondent. The respondent had failed to produce the delivery of the contract notes or statement of account or proof of any verbal instruction issued by the claimant to carry out such transaction. Merely because the claimant had reduced her claim would not mean that she had not proved even other part of the claim which could have been awarded by the arbitral tribunal.

64. A perusal of the complaint filed by Mr. Priyotosh Ghosh would clearly indicate that large number of transactions were carried out in the accounts of the claimant in respect of several commodities, the trading whereof was not even contemplated in the agreement entered into between the parties and were thus unauthorized. The arbitral tribunal completely overlooked this crucial fact in the impugned award. A perusal of the record also indicates that the claimant had never received the ECN form. The respondent had failed to prove the receipt of any ECN form from the claimant. There was no reference to any SMS alleged to have been sent by the respondent to the claimant made in the original award rendered by the arbitral tribunal.

65. This court in case of ***Bonanza Commodities Brokers Pvt. Ltd. (supra)*** has after adverting to the judgment of this court in this case has held that such bye-laws of Multi Commodity Exchange of India Limited are mandatory and the broker member cannot make any claim against the constituent based on any unauthorized trade effected by him.

66. Supreme Court in case of ***Delhi Development Authority (supra)*** has held that if the arbitral award is contrary to substantive provisions of law or against the terms of the respective contract and if it is unfair and unreasonable, the same can be set aside under section 34(2) of the Arbitration and Conciliation Act, 1996. The judgment of Supreme Court in my view squarely applies to the facts of this case. I am respectfully bound by the said judgment.

67. Insofar as submission of the learned counsel for the claimant that if this court comes to the conclusion that the arbitral tribunal has illegally rejected the claim of the claimant and the award is perverse and shows patent illegality, this

court can allow such claim under section 34(2) is concerned, this issue raised by the petitioner was also raised when this court had heard this petition alongwith Arbitration Petition No.854 of 2012. In paragraph (69) of the said order and judgment dated 17th December, 2014, this court has already rejected this contention and has held that the court cannot correct the errors of the arbitral tribunal under section 34 of the Arbitration and Conciliation Act, 1996. It can set aside the award wholly or partly and cannot correct an error and cannot make an award under section 34 of the Arbitration Act. I do not propose to take any different view in the matter. The view taken by this court is based on the judgment of Supreme Court in case of *McDermott International Inc., vs. Burn Standard Co. Ltd. & Others* reported in **(2006) 11 SCC 181**, I am thus not inclined to accept the submission of the learned counsel for the claimant that this court can allow the claim made by the claimant before the arbitral tribunal even if it comes to the conclusion that the award was perverse and patently illegal.

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

- (a) Portion of the impugned award dated 18th June, 2012 and supplementary award dated 7th April, 2015 made by the arbitral tribunal thereby rejecting the claim of the petitioner in the sum of Rs.19,43,968/- and interest thereon and cost is set aside.
- (b) Arbitration petition is disposed of in the aforesaid terms.
- (c) No order as to costs.

(R.D. DHANUKA,J.)