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

ARBITRATION PETITION NO.826 OF 2015

CD Equisearch Private Limited .... Petitioner

vs.

Ms. Renudevi S. Choudhary .... Respondent

Mr. P.M. Mody, Senior Advocate a/w Ms. Kalpana Desai, Mr. Deepak Dhane i/by Joby Mathew & Associates, for the Petitioner.

Mr. Simil Purohit a/w Ms. Jyoti Ghag i/by M/s Thakore Jariwala & Associates for the Respondent.

Coram : **Smt. R.P. SondurBaldota, J.**
Date : 11th December, 2015

P.C.

1 This petition is filed under Section 34 of the Arbitration and Conciliation Act ("The Act") to challenge the award dated 12th November, 2014 passed by the Appellate Tribunal of National Stock Exchange. By the impugned award, the appellate tribunal has modified the award of the Arbitral Tribunal passed on 16th May, 2014. By it's award, the Arbitral Tribunal had allowed the petitioner's claim in the sum of Rs.2,41,47,198/- and directed the respondent to pay the amount to the petitioner with interest @18%

per annum on the claim from the date of the arbitration application till payment. The appellate tribunal reduced that amount to Rs.2,22,82,823/-.

2 The brief factual background of the petition is as under:

The petitioner is a company incorporated and registered under the Companies Act, 1956 and carries on business as a share and stock broker. It is duly registered as Trading Member of the National Stock Exchange of India Limited (NSE) and Bombay Stock Exchange Ltd. (BSE). It provides online brokering services to it's clients through it's website. The respondent is registered as a constituent/client with the petitioner and has been trading through the petitioner's online portal/website. For that purpose, the petitioner had given the respondent an internet facility, which was used by the respondent herself to place orders in her account. She had at all times access to her account details and position, the margin positions, ledger balances etc.

3 The respondent traded heavily in Futures and Options (F&O) segment of the NSE, in which derivatives trading is done. The derivatives / F&O trading is a form of trading, which is conducted with a relatively small amount of margin but provides the possibility of greater profits or losses in comparison to the

principal investment amount. F&O trading is restricted to certain notified scrips only. The purchase of an open position in the Future market means to agree to buy/sell at a given future date at a pre-agreed contract price. The constituent taking a position in futures gets the advantage of not having to pay the entire purchase price of the stock upfront, but rather only a small percentage of the same as margin money. Since Futures trading is complex and carries on higher risk, both the broker and the constituent have to be constantly alert and ensure that the required "margin money" is always maintained and the daily "mark to market" losses, if any are promptly paid by the constituent to the broker and by the broker to the NSE till the open position expires or is squared off.

4 The NSE collects margins from the broker, which margins are recalculated by the NSE six times a day. The margins/differential is directly debited/credited into the broker's account. If the adequate monies are not available in the broker's account, the NSE deactivates the broker's trading terminals. The margins that are prescribed and quantified by the NSE are required to be collected by the broker from the concerned client, though the broker is free to prescribe a higher rate. The prescribed margin is the bare minimum, which must be maintained by the constituent at all times without fail. If the available margin falls below the required margin, the constituent's position can be squared off by

the broker. If it is not squared off, the constituent has to immediately/forthwith make available the required margin amount. As such the constituent has to be extremely vigilant and prompt as regards maintenance of margin level. If the constituent fails to immediately bring in additional margin and the margin maintained by the client falls below the required margin level, the open position of the constituent is liable to be squared off. The broker is not required to and/or permitted to fund or finance his constituent's open positions or margin requirements. Further the NSE computes Mark to Market loss/profit on a daily basis and the same is debited/ credited to the broker who in turn has to collect or pass on the same to the constituent. Available margin is calculated after adjusting the mark to market loss/profit. At the end of the contract period, the open position is squared off and settled in cash through the NSE by pay-in/ pay-out of the difference between the purchase price and the sale price as well as release of margins.

5 The respondent had duly signed and executed Member-Client Agreement and Risk Disclosure Agreement with the petitioner. The risk disclosure document has been formulated by SEBI in consultation with the NSE and BSE. It specific informs the constituent of the obligations and risks involved in the trading on the stock exchanges. Then she was provided with log-in ID and

password, which permitted the respondent to log into the petitioner's online portal and execute trades in her account by herself. She was also provided the facility of access website of the petitioner, from which she had access at all times to all the back-office information and details and could view the status of her accounts, margin positions, ledger balances etc. Then a trading account was opened in the name of the respondent and a Unique Client Code was allotted to her.

6 The respondent mainly traded in options in high volumes, deep in money Strike Prices and received several crores of Rupees as premium while executing such trades. Because of the high risk and exposure, the petitioner was very particular about following it's Risk Management policy by collecting required margin and MTM on the open positions as calculated on daily basis. The margin kept by the respondent was initially in cash and shares. But later she kept margin only in the form of shares, which were pledged with the petitioner as margin/collateral. The petitioner accepted only NSE “approved list” shares as margin. Whenever the shares were removed from the “approved list” by the Exchange, the respondent would replace the same by “approved list” shares.

7 In October, 2013, the respondent had open outstanding positions mainly in NIFTY OPTIONS of various expiry dates. The shares given by her towards margin were of Flexituff International Limited (Flexituff) and Mandhana Industries Limited (Mandhana), which at the relevant time were on the NSE "approved list". On 21st October, 2013, NSE issued Circular No.1620, whereby shares of Flexituff were removed from the "approved list" w.e.f. 1st November, 2013. On 25th October, 2013, the petitioner informed the respondent about the circular and called upon her to replace the shares of Flexituff with any other shares from the "approved list" or sell the shares of Flexituff, so that the sale price/cash could be treated as margin. The respondent agreed to do so and sought for some time. She assured to replace the shares of Flexituff in a phased manner before 1st November, 2013. On 28th October, 2013, the respondent sold shares of Flexituff worth Rs.1.00 Crore. Thereafter on the next day, i.e. 29th October, 2013, there was further sale of shares of Flexituff in the respondent's account worth Rs.1.4 Crores. On the same night, the respondent sent emails alleging that the sale of shares of Flexituff was unauthorised and without her consent. On the very next day i.e. 30th October, 2013, the petitioner was served with exparte order passed by this court in Suit (L) No.978 of 2013 filed by one Pushpanjali Tie Up Private Limited (Pushpanjali) against the petitioner, the respondent, one Ms. Ekta Choudhuri, Central Depository Services Limited (CDSL)

and National Securities Depositories Limited (NSDL). Thereafter on 30th October, 2013, this court passed an order holding that the respondent had played fraud on the petitioner and the Pushpanjali, but the order of injunction was continued. The petitioner was directed to keep the sale-price of Flexituff shares in a separate account and not adjust the same in the respondent's account. It was also directed that the shares of Flexituff would not be treated or used as security.

8 According to the petitioner, it learnt for the first time from the suit proceedings that the shares of Flexituf had been pledged by Pushpanjali with the respondent by transferring the same to the respondent's Demat account as security towards the loans advanced by the respondent to Pushpanjali. The same shares were given by the respondent to the petitioner as margin. Pushpanjali had claimed that it had repaid the loan and was entitled for return of the shares.

9 The petitioner alleged that the respondent had colluded with Pushpanjali in the suit and allowed injunction orders to be passed to prevent the petitioner from selling the shares of Flexituff. In view of the orders, there was huge margin shortfall and NSE levied penalties of Rs.3,11,942.59 on the petitioner for the same. Therefore, the petitioner sent notices by email, speed post to the

respondent calling upon her to immediately arrange for additional margin of Rs.2.57 Crores by 8.45 am., on 31st October, 2015 either in cash or by shares from “approved list”. The respondent was warned that in case of failure, all her open positions would be squared off and all the balance securities would be sold. When the respondent failed to bring in immediate margin, on 30th October, 2013, the petitioner squared off all the open positions, sold the balance margin shares of Mandhana and informed the respondent about the same. But there still remained a debit balance of around Rs.2.32 Crores in the account of the respondent as on 31st October, 2013. The petitioner then called upon the respondent to pay the balance amount of Rs.2.32 crores at the foot of the account.

10 The respondent reacted by filing the complaint against the petitioner, on 21st November, 2013, with the Investor Grievance Cell of NSE and demanding Rs.7.5 Crores. The complaint was however later withdrawn. Thereafter the petitioner invoked arbitration by N.S.E. and claimed an amount of Rs.2,41,47,198/- from the respondent being the then balance amount due and payable at the foot of the account. The respondent filed her written statement and counter-claim. The Arbitral Tribunal considered the rival claims and by it's award dtd. 16th May, 2014, it allowed the claim of the petitioner for Rs.2,41,47,198/- and dismissed the counter-claim of the respondent.

11 In the meantime, by it's order dtd. 5th February, 2014, this Court had dismissed the Notice of Motion filed by Pushpanjali in it's suit. The challenge to that order before the Division Bench failed. Pushpanjali then filed Special Leave Petition before the Apex Court. That Special Leave Petition was disposed off on 5th September, 2014 with a direction that the petitioner would sell the shares of Flexituff over a period of 10 days to recover it's entire dues. It was also directed that the money lying in the Escrow Account be released to the petitioner together with the interest accrued, if any. Pursuant to the order, the petitioner sold the shares and recovered it's entire claim together with interest.

12 The respondent challenged the award dtd.16th May, 2014 by filing appeal before the Appellate Tribunal of NSE. By the award dtd.12th November, 2014, the appeal was partly allowed by reducing the petitioner's claim to Rs.2,22,82,823/-. The dismissal of the counter-claim was upheld. The reason stated by the appellate Tribunal for reducing the petitioner's claim in its award is that, the petitioner was not justified in making voluminous offloading or sales on 28th October and 29th October, 2013. Allegedly, in view of the sales, the price of the scrip of Flexituff got depressed from Rs.217/- to Rs.192/-. The Appellate Tribunal was of the opinion that, benefit of sales depression in price should go to

the respondent and hence reduced the claim of the petitioner to that extent. This means in principle the petitioner's entire claim was upheld and the claim of the respondent was rejected.

13 Mr. Mody, the learned Senior Counsel appearing for the petitioner, submits that the Appellate Tribunal has mis-appreciated the facts and the material on record. It has considered irrelevant issues and irrelevant facts. He submits that, it was not even the case of the respondent that the petitioner had made any voluminous offloading/sales on 28th October, 2013. The specific complaint of the respondent was that, certain sales had been done by the petitioner on 29th October, 2013 without her knowledge and consent. Consequently, the trade on 28th October, 2013 was out of consideration and the only dispute to be considered was as regards the sale on 29th October, 2013. He submits that, admittedly on 29th October, 2013, the respondent had also traded in the same scrip. Therefore, the finding that the price of the shares got depressed on account of the voluminous offloading by the petitioner shows non-application of mind on the part of the Appellate Tribunal.

14 The reasons set out by the Appellate Tribunal for reducing the claim of the petitioner are found at paras 6.4 to 6.8. It starts by saying that the entire dispute emerges whether the action of the petitioner in having made the sales of the Flexituff to

the tune of 55,080 shares realising Rs.1,18,49,427/- on 28th October, 2013 and of 74,575 shares realising Rs.1,43,38,525/- on 29th October, 2013. However, at para 3.7 of the award, the Appellate Tribunal notes the pleadings of the respondent that on 28th October, 2013 due to non-payment of loan and in order to square up F&O position and margin shortfall, the respondent herself had sold shares to the tune of Rs.1.00 Crores. Then, according to the respondent, the petitioner was supposed to release excess shares of Flexituff at the end of the day i.e. on the evening of 28th October, 2013. This statement in the pleadings of the respondent recorded by the Appellate Tribunal is sufficient to know that there was no sale by the petitioner of any shares of Flexituff belonging to the respondent on 28th October, 2013.

15 Mr. Purohit, the learned advocate for the respondent refers to para 12 of the written statement filed by the respondent before the Arbitral Tribunal, wherein the respondent states as under:

> "12 I say that on 25.10.2013, the Applicants informed me that Flexi shares have been removed from approved list with effect from 01.11.2013. Since the Flexituff shares pledged with the Applicants were 5,25,000 shares and as per the approved list, the shares that could have been pledged by broker were only 6733 as per the approved NSE list, therefore, the margin was only short by Rs.15/- lakhs and it is unconceivable that

> the Applicants in order to square up the open position made voluminous sale of 55,080 shares realising Rs.1,18,49,427/- on 28.10.2013 and 74,575 shares realising Rs.1,43,38,525 on 29.10.2013 of Flexituff shares lying in our account whereas sale of only Rs.15/- lakhs would have been sufficient. It is evident that on 31.10.2013, the Applicants illegally squared up our total stock lying with him in our Demat account and squared up total outstanding position of option."

According to him therefore, there in an allegation made in the para of sale of the scrip of Flexituff by the petitioner on 28th October, 2013. The statement pointed out by Mr. Purohit cannot be taken as the case of the respondent that on 28th October, 2013, the petitioner had sold the shares of Flexituff belonging to the respondent. Because there is no specific and clear assertion in the written statement of any such sale made. The statement referred to from para 12 is in the nature of an argument as regards the requirement of margin. In the very next para i.e. at para 13 of the written statement, the respondent refers to sale made by herself without specifying the number of shares sold by her and the exact amount realised from the sale. In any case even in the submissions filed on behalf of the respondent, there is no reference to the sale made by the petitioner on 28th October, 2013. In the circumstances, there is substance in the argument of Mr. Mody that there has been misreading of the record and pleadings by the Appellate Tribunal as regards the sale of shares by the petitioner on

28th October, 2013. Consequently, the entire reasoning for fall in the price of shares on account of the alleged action on the part of the petitioner becomes baseless and deserves rejection rendering the award perverse.

16 As regards the sale of shares on 29th October, 2013, the respondent admits that she had executed trades till 12.30 pm. According to the petitioner, she had in fact executed trades till 3.19 pm.. In any case, admittedly, the respondent herself had sold certain shares of Flexituff on that day and the sale was not by the petitioner alone. Mr. Mody also submits that the petitioner cannot be accused of dumping of the shares, which allegedly resulted into fall of the price of the shares, since the contract note shows that the sales were spread throughout the day. The Appellate Tribunal has not even taken into consideration the specific case of the petitioner that on 29th October, 2013 till 3.19 pm., the respondent had herself executed trades from her online terminal and the record of trade-logs produced by the petitioner. With the admission of trade by the respondent on the very day, the finding of the Appellate Tribunal is seen to be contrary to the record and discloses non-application of mind on the part of the learned members of the Appellate Tribunal. Further since the Arbitral Tribunal of NSE as well as the Appellate Tribunal have upheld the right of the petitioner to sell the shares of Flexituff, there could be

no question of the petitioner voluminously offloading the sales. Next, there are no details of fall in the price of shares of Flexituff brought on record to indicate that the alleged fall in the price was only on account of the trades by the petitioner on 29th October, 2013. There is no nexus established between the sale of shares by the petitioner on 29th October, 2013 and the fall in the price of shares. The award of the Appellate Tribunal therefore cannot be sustained. The petition is allowed. The impugned Award of the Appellate Tribunal dtd. 12th November, 2014 is set aside.

(Smt. R.P. SondurBaldota, J.)