

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.39 OF 2016
IN
ARBITRATION PETITION NO.873 OF 2010

Mrs. Money Nair,
Gala No.22, Shree Sai Industries,
Shrikant Industrial Compound,
Road No.21, Wagle Estate,
Thane-400 604.

.... Appellant

- Versus -

Sharekhan Ltd.,
A-206, Phoenix House,
Senapati Bapat Marg,
Mumbai-400 013.

.... Respondent

WITH

NOTICE OF MOTION NO.402 OF 2016
IN
APPEAL NO.39 OF 2016
IN
ARBITRATION PETITION NO.873 OF 2010

Mrs. Money Nair
In the matter between
Mrs. Money Nair
Vs.
Sharekhan Ltd.

.... Applicant

.... Appellant

.... Respondent

Mr. Shailesh Shah, Senior Advocate i/by
Mr. Sanjay T. Manek for the Appellant.
Mr. Deepak Sharma for the Respondent.

**CORAM: ANOOP V. MOHTA AND
S.C. GUPTE, JJ.**

DATED: MARCH 14, 2016

ORAL JUDGMENT (Per ANOOP V. MOHTA, J.):

1. Admit. The parties have filed short synopsis and written notes of submissions. The appeal is taken up for final hearing, by consent.

2. The appellant has preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) against Judgment dated 13-3-2015 passed by a learned single Judge, thereby rejecting the arbitration petition under Section 34 of the Act, that resulted into confirmation of the Award passed by learned Arbitrator under the provisions of the Bye-laws, Rules and Regulations of the National Stock Exchange of India Limited (NSE).

3. Heard learned Senior Advocate appearing for the

appellant. Insofar as availability of the Appellate Forum under the NSE is concerned, the learned single Judge, after hearing the parties, has passed the order in the Section 34 petition of the year 2010 and thereby maintained the Award passed by the learned Arbitrator of the year 2009. Submission is also made by the learned counsel for the appellant that option was available for the parties either to file an appeal before the Appellate Forum under NSE and/or file a petition under Section 34 of the Act. Learned counsel appearing for the respondent, however, resisted the contention saying that there is no question of remanding the matter back for reconsideration before the Appellate Forum. Without expressing any opinion so far as that part is concerned, including the issue of availability of the Appellate Forum as there was no objection raised before the learned single Judge and both the parties proceeded accordingly. The reasoned Judgment is passed by the learned single Judge on merits. Therefore, to avoid further delay in finalising the arbitration proceedings, we see no case to consider the aspect of availability of appeal in the present facts

and circumstances of the case. The point is kept open.

4. After hearing the learned counsel appearing for the parties, we have noted that the learned single Judge has considered the rival contentions and the documents placed on record, clearly recorded in para 6 as under:

“6. It may be stated that between 18 and 22 January 2008 there was a steep fall in the share prices and the stock market had plummeted. There is no dispute that during this period, the Petitioner was holding outstanding position in the F&O segment of NSE and had suffered heavy losses and there was continuous debit balance in her account which she was well aware of. Not only the Petitioner, but there were hundreds of Constituents (as also Trading members) who suffered heavy losses due to the huge fall in the prices of shares and there was a shortfall in their margin requirements and the margin requirements including of the mark to market losses could not be fulfilled by the Constituents during this crucial period. The Petitioner, in the present Petition, admits that she is a ‘seasoned player’ of the stock market. She was aware of the market condition. There is no explanation as to why the Petitioner issued post-dated cheques of 24 January 2008. The learned Arbitrator has rightly concluded that the Respondent was justified in squaring off her positions on 22 January 2008. Clause 1.7.5 of the Member-Client Agreement expressly provided that the Respondent was entitled to square of the transactions of the

Petitioner for non-maintenance of required margin. Having held that the Respondent was justified in squaring off the position of the Respondent, the learned Arbitrator had rightly rejected the counter claim of the Petitioner.”

5. Based upon the Judgments passed by this Court, where the requirement of considering the issue of “margin” and/or squaring off under the very same market volatility conditions during the period between 17-1-2008 and 22-1-2008, as recorded in paragraphs 7, 8 and 9 quoted below, the fact situation placed on record in this matter, in our view, is identical and justifies the impugned order. The said paragraphs 7, 8 and 9 read as under:-

“7. In Mr. Rajendra Kumar Bothra v/s. M/s. Ventura Securities Limited, 2010 Vol 112 (4) Bom BLR 1686, learned Single Judge of this Court was dealing with a somewhat similar situation as the present, when the market had crashed between 18 January 2008 and 22 January 2008. The learned Single Judge while dealing with Regulation 3.10(b) of NSE Regulations observed in para 22 of the judgment as follows:

“22 ... The requirement is that the amount should be received and credited in the Account. Merely handing over of the cheque itself is not sufficient. It is always subject to realization. In the present case

admittedly, even that cheque was bounced, a criminal case is pending with regard to the same. Once the cheque for whatever reason, which was handed over in the morning on 22.01.2008, but as noted, bounced, it is clear case of default so far as the constituent is concerned. In an unprecedented situation like this, a trading member just cannot be compelled to wait for longer time till realization of the cheque. Therefore, as there was admitted default in the payment, as per Rule 3.10(b) NSEIL (F & O Segment), the trading member has exercised the option to close down the transaction and squared off the same as recorded above. This action of constituent member, therefore, in my view, is well within the agreed terms and conditions, rules and regulations, as admittedly there was no equivalent credit with the trading member. The loss in fact therefore was met by squaring off of the account as done in the present case as there was no margin money also available in the account of the constituent.”

Consequently, the learned Single Judge while dismissing the Petition held that the action of the member of Stock Exchange in squaring off was justified as per the Bye-laws, Rules and Regulations of the NSEIL, which require upfront payment of margin “each day”.

8. In *HSBC Invest-Direct Securities (India) Ltd. v/s. Ms. Manishaben Ghanshyabai Patel, 2013(1) Bom CR 171*, learned Single Judge of this Court has considered Regulation 3.10(b) of NSE Regulations pertaining to Future and Option Segment and observed in paras 7, 9 and 10 as follows:

“7. The relevant Regulation 3.10(a) and 3.10(b) of NSE Regulations pertaining to Future and Option segment are as under:

‘3.10(a) The Trading member must demand from its constituents the margin deposit which the member has to provide under the Trading regulations in respect of business done by members for such constituents.....

3.10(b) In case of nonpayment of daily settlement by the constituent within the next trading day, the Trading member shall be at liberty to close out transactions by selling or buying the derivatives contracts as the case may be, unless the constituent already has an equivalent credit with the trading member. The loss in this regard, if any, shall be met from the margin money of the constituent.’

9. Regulation 3.10(b) deals with the non-payment of daily settlement by the constituent within the next trading day. That has nothing to do with the nonpayment of margin money. The contentions of the contract and basically clause 2, as referred above, the Arbitrator has failed to consider whereby the Respondent agrees to pay initial margins, withholding margins, special margin or such other margins as are necessary by the Member of the Exchange. The Member is also permitted to collect additional margin as per his sole and absolute discretion. The client is under obligation to pay such margins within the stipulated time. The Arbitrators further failed to consider clause 5 of the Member constituent agreement, whereby the Member is permitted to liquidate and close out all or any of the clients

position for non-payment of margin or other amounts outstanding debts and adjust the profit of such liquidation or close out, if any against the client's liability and obligation. It is also agreed that any and all loss and financial charges on account of such liquidation/closing out shall be charged to and borne by the client. Therefore, the Petitioner being member is entitled to close out the transaction if the Respondent/client failed to make the margin amount or any other amount.

10. The learned Arbitrators therefore having held that there was a short-fall of margin for the Open position, but wrong in holding that the Respondent was not required to pay the margin and the Petitioners illegally squared off the position at 10.26 am on 29 October 2008. Regulation 3.10(b) cannot be referred and read to adjudicate the issue with regard to the margin money. It is applicable for nonpayment of daily settlement by the constituent and not nonpayment of margin money as observed.”

9. In M/s. Angel Capital & Debt Market Limited v/s. Mrs. Rajkumari Laddha, 2013(7) LJSoft 99, learned Single Judge of this Court was again considering the issue of margin requirements when there was a fall in the market between 17 January 2008 and 22 January 2008. In paras 4 and 8 of the judgment the learned Single Judge has held as follows:

“4. ...The sequence, therefore, shows that though there was shortfall right from 17 January 2008 till 21 March 2009, the Respondent failed to fulfill his obligations by making prompt payment, as

required. The Petitioner, therefore, has exercised the discretion on 22 January 2008, in no way can be stated to be against the bye-laws.

8. In view of the typical market position and the nature of transaction and the bye-laws provides and permits the share brokers to exercise the discretion, as the liberty is provided to close out the transaction at appropriate position/time and if the trader takes action accordingly by exercising his discretion and the market experience, therefore to say it is contrary to the law and/or the regulation, is unsustainable. There is nothing to justify the same except the observations so made by overlooking the factual position on record.”

6. It was within the knowledge of the appellant that the market was collapsing since 18-1-2008 itself. Some amount was also paid and recorded in the account of the petitioner/appellant towards the credit side of 21 & 22-1-2008. On other two days, there was debit shown in the account of the appellant. Since the due amount was not paid in time, though asked for, the default resulted into the impugned action. The deposit of subsequent post-dated cheque dated 24-1-2008, even if any, as sought to be contended, is also of no assistance. In totality, the decision taken is well within the scope and power

of the arbitral tribunal.

7. Even on merits, after hearing the learned senior counsel appearing for the appellant and in view of the findings recorded by the learned Arbitrator and further confirmed and elaborated upon by the learned Judge, no case is made out for interference with the same. There is no case of perversity made out.

8. The appellant's submission with regard to the availability of stock with the respondent, in the given facts and circumstances as recorded above, also has no substance, since there was a reason for the emergent decision in view of the market crash. The discretionary decision taken on that day in the volatile market situation cannot be said to be arbitrary or against the contract or the law. Given the nature of commercial transactions and knowledge of the volatile market and its effect, if the respondent felt compelled to take such a decision, which was permissible under the contract, we see no reason to

interfere with the same. The learned Arbitrator has not found fault with the same and so has the learned Judge.

9. In the result, no case having been made out by the appellant for interference with the impugned order, the appeal is dismissed.

10. In view of dismissal of the appeal, Notice of Motion No.402 of 2016 in Appeal No.39 of 2016 does not survive and it accordingly stands disposed of.

(S.C. GUPTE, J.)

(ANOOP V. MOHTA, J.)