

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**FAO No.348 of 2016 (O&M)
Date of decision:19.01.2016**

M/s Anand Rathi Commodities Ltd. ... Appellant

Vs.

Mr. Om Parkash and another ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Ashok Gupta, Advocate and
Mr. Eklavya Gupta, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

C.M.No.1063-CII-2016

For the reasons stated in the application, duly supported by an affidavit, delay of 27 days in re-filing the appeal is condoned.

C.M. stands disposed of.

FAO No.348 of 2016 (O&M)

The appellant-Member is aggrieved of the order dated 09.10.2015, whereby, the objections filed under Section 34 of Arbitration and Conciliation Act, 1994 (for short '1996 Act'), seeking setting aside of the Award, have been dismissed.

Mr. Ashok Gupta, learned counsel for the appellant-

Member submits that the award, whereby a sum of ₹1,62,375/- along with interest at the rate of 10% per annum from the date of the application, i.e., 10.04.2013 awarded by the Arbitrator, is not in consonance with Clause 8 of the Agreement entered into between respondent No.1 and Member Client Agreement dated 23.01.2008. In support of his aforementioned contention, he has drawn attention of this Court to Clause 8 which reads thus:-

“8 Payment of Margins: The daily margin requirement can be adjusted against the collateral maintained by the Constituent with the Member. The Member shall accept from the Constituent further order, which, if executed, will add to the open positions, only if the balance collateral is adequate to meet the initial margin on such new positions. If the balance collateral is not adequate for adjusting the daily margin requirement, the Constituent shall deposit the additional margins as required by the Member. The Constituent shall also be obliged to pay the shortfall of the daily margin, if any, on the immediate succeeding business day when the Member raises such additional margin requirement. The Constituent shall not be permitted to create any new open positions, until receipt of such additional margin.”

He further submits that Constituent did not deposit cheque of ₹50,000/- but only gave number of the same and this fact has been

duly informed on telephone, but the same was not complied with, in essence, it is the fault of Constituent and therefore, its claim before the Arbitrator was not maintainable, as member had defaulted.

I have heard learned counsel for the appellant-Member and appraised the paper book.

The Arbitrator while considering the rival contention of the learned counsel for the parties to the lis, gave the following findings which read thus:-

“9. The contention of the representative of the respondent is that as per the policy of the respondent the positions of the appellant could have been saved from liquidation, had the applicant physically deposited the cheque with the branch of the respondent and dealer sent scan copy thereof to the Head Office. It was argued that the applicant had not delivered the cheque physically in the branch and had only furnished to the dealer its particulars. Therefore, the Head Office had no option in the wake of the mounting M to M loss but to square off the standing position of the applicant to minimize his losses. The applicant, on the other hand, has submitted that it has been the practice of the respondent that whenever an intimation about margin M to M requirement was given to him he only intimated the particulars of the cheque which he intended to deliver and on that basis his

standing position used to be saved from squaring up. He has referred to certain transactions in the past. In the statement of defence, the respondent has not stated that physical deposit of the cheque by the applicant – Constituent was mandatory as per MCA/ KYC documents, Rules and Regulations of the Exchange to enable the Trading Member to save his standing position. Anyhow, the applicant was informed of the requirement of about Rs.60,000/- margin/M to M at about 7.51 p.m as advised by the dealer he was required to pay Rs.50,000/- in order to save his open positions. He immediately gave particulars of the cheque for Rs.50,000/- which he intended to deliver to the respondent. The conversation between the applicant and the dealer of the respondent, which had taken place at 7.51 p.m, CD recording and transcription of which has been filed by the respondent, does not show that the dealer had asked the applicant to deliver the cheque physically in the office and only thereafter standing position would be saved from squaring off. Instead after noting down the particulars of the cheque he sent those particulars by Email to the Head Office. The standing position of the applicant were squared off by the Head Office after almost one hour of this communication. There is neither any allegation nor

any proof that the Head Office informed the dealer that the cheque should be collected from the applicant in physical form to be taken note of. There was plenty of time for the Head Office to inform the dealer and the dealer to the applicant if it was necessary for the applicant to have delivered the cheque in physical form in the branch office of the respondent for saving the standing position on 2.1.2013. The representative of the respondent was stated that the dealer had informed the applicant by his mobile telephone number but no proof thereof has been produced. There was no reason for the branch office of the respondent for not keeping the record of the conversation about such a communication like the records of the conversation which he had with the applicant at 7.51 p.m or 8.52 p.m when the applicant was informed about the squaring off the transaction.

10. Therefore, in the totality of the facts and circumstance, it is clear that the respondent squared off the standing open position, six lots (7,500 quantity) of open positions of Natural Gas contracts without giving any opportunity to the applicant to physically deliver the cheque of Rs.50,000/- to meet out the margin/ M to M requirement.

11. The transaction of the conversation between the

dealer and the applicant, which had taken place at 8.52 p.m shows that after intimating the applicant – Constituent the respondent has squared off the standing positions, the dealer had suggested that the position could be re-created if cheque of Rs.1,25,000/- is delivered to him and he sent scan copy thereof to the Head Office to buy back the position. In other words, at that time the respondent insisted upon the physical delivery of the cheque by applicant before buy back of his squared off positions. No such demand was made when margin / M to M requirement was intimated by the respondent on 2.01.2013.

12. As regards the loss, which was suffered in the closing out of the open position on 2.1.2013, the applicant has alleged that it was Rs.1,62,375/- which has not been disputed by the respondent in the statement of defence. Accordingly, it is held that the applicant is not entitled to recover loss of Rs.43,250/- suffered by him in the squaring off of the open position on 1.12.2012 but he is entitled to receive the loss of Rs.1,62,375/- suffered by him on account of closing out of his standing position by the respondent on 2.1.2013.

13. As a result, award in the sum of Rs.1,62,375/- is passed in favour of the applicant – Constituent and

against the respondent – Trading Member. In case, the amount is not paid within 30 days, the respondent-Trading Member shall further pay interest at the rate of 10% per annum on the awarded amount from the date of the application, i.e., 10.04.2013, to the date of full payment.”

On going through the aforementioned findings, I am of the view that there is no report that communication to the Constituent to deliver the cheque, has been given, therefore, rightly so the appellant could not comply with the provisions of Clause 8 of the agreement. The aforementioned arguments, in my view, would not fall within the provisions of Section 34 of 1996 Act.

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has now been raised in the aforementioned appeal has already been answered by the Hon'ble Supreme Court in catena of judgments, wherein it has been laid down that until and unless the award suffers from illegality as statutorily prescribed under Section 31 (3) of the Act, the same cannot be interfered with. In this context I intend to refer the judgments of Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49** and **Navodaya Mass Entertainment Ltd. Vs. J. M. Combines (2015) 5 SCC 698**. In the aforementioned judgment the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and

unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only in these circumstances it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embarked on a path by substitution in its own view. The arbitrator has dealt with the dispute which was contemplated and was within the scope of it.

In my view the award of the Arbitrator does not suffer from any illegality, in as much as, the Arbitrator who is expert has dealt with the matter and decided the claim of respective claimants to the parties to the *lis*.

It is now a settled law that the Arbitrator is the sole judge of quality and quantity of the evidence before him and decide on the basis of the available evidence.

In my view, no error of law arise from the award, as well as, order impugned. The award is perfect and justified.

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

(AMIT RAWAL)
JUDGE

January 19, 2016
savita