

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

ARBITRATION PETITION NO. 617 OF 2014

M/s.Shaunik Infotech Pvt.Ltd.

...Petitioner

vs

India Infoline Ltd.

...Respondent

Ms.Prachi Pandya I/b. Corporate Attorney for Petitioner.

Mr.P.N. Modi, Senior Advocate with Neveille Lashkari, Jyoti Ghag and
Ganesh Ambekar I/b. Thakore Jariwala & Associates for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 6 DECEMBER 2018

ORAL JUDGMENT :

Heard learned Counsel for the parties.

2 This petition challenges an award passed by the appellate arbitral tribunal of National Stock Exchange of India Ltd.('NSE') in the matter of arbitration under NSE bye-laws, rules and regulations .

3 The Petitioner is a registered client and constituent of the Respondent, who is a trading member of NSE. The relationship between the parties has been governed by a broker client agreement executed between them on 7 November 2007. Under this agreement, the Petitioner has been dealing in both cash and F&O segments of the market through the Respondent at NSE. Disputes between the parties have arisen as a result of market conditions obtaining between 17 January 2008 to 22 January 2008. The market witnessed an unusual crash in stock prices on these dates. It was the case of the Respondent, who was the claimant before the arbitral

tribunal, that at the close of working hours on 17 January 2008, there was a large debit balance in the account of the Petitioner. The debit balance was said to be in a sum of over Rs.94 lakhs. The Respondent claimed to have given due intimation of this debit balance and called upon the Petitioner to settle the same by money or collaterals but the Petitioner did not do so. The market fell further and substantially on two consecutive dates after 18 January 2008, i.e. on 21 and 22 January 2008. By the end of trading hours of 22 January 2008, the debit balance in the Petitioner's ledger account had risen to Rs.1,17,83,079.49. As a result, the Respondent squared up the Petitioner's balance position by sale of shares. Further sales took place on 28 January 2008 and 15 February 2008 by way of squaring off the outstanding position of the Petitioner. Even after the sales, there was a debit balance in the account in a sum of over Rs.46 lakhs. The Respondent, in the premises, initiated arbitration proceedings against the Petitioner. The Petitioner raised counter claims before the arbitral tribunal for unauthorised squaring up of its position on 22 January, 28 January and 15 February 2008. The arbitral tribunal passed an award on 21 May 2010 allowing the Respondent's claim and rejecting the Petitioner's counter-claim. Being aggrieved, the Petitioner filed a challenge petition before this court. Before this court, the award was set aside by consent of parties and the matter was remanded to NSE for a fresh arbitration. On remand, the parties filed before the arbitral tribunal fresh additional pleadings and submissions. The tribunal, by its award dated 20 February 2012, once again allowed the Respondent's claim and rejected the Petitioner's counter-claim. The Petitioner thereafter carried the matter in appeal before the appellate arbitral tribunal of NSE. After hearing the parties, the appellate arbitral tribunal passed the impugned award upholding the original award

dated 20 February 2012. This appellate award is the subject matter of challenge in the present petition.

4 In support of her challenge, Ms.Pandya, learned Counsel for the Petitioner submits that the impugned award is liable to be set aside on two main grounds. In the first place, it is submitted that the award is in breach of applicable law inasmuch as it does not consider the effect of Regulation 3.10 of NSE F&O regulations and in fact, decides the matter contrary thereto. Learned Counsel, secondly, submits that the award is based on no evidence and is, accordingly, liable to be set aside as a perverse adjudication.

5 Regulation 3.10 of NSE F&O Regulations provides for margin to be placed by a constituent with the trading member as a precondition for effecting F&O trades on behalf of the constituent. The trading member is obliged to buy or sell derivative contracts on behalf of the constituent only on receipt of margin/s of such percentage as the relevant authority may decide from time to time. The trading member is also obliged to obtain a written undertaking from the constituent that the latter shall, when called upon to do so, forthwith and from time to time provide margin deposit/s and/or furnish additional margin/s as required under the rules and regulations in respect of the business done by the trading member on behalf of the constituent. The trading member has to demand from his constituent all amounts arising in respect of daily settlements in accordance with the clearing corporation regulations for business done on behalf of the former. In case of non-payment of the daily settlement by the constituent within the next trading day, the trading member is at liberty to close out

transactions by selling or buying the derivative contracts, as the case may be, unless the constituent already has an equivalent credit with the trading member. The loss incurred in this regard, if any, has to be met from the margin money of the constituent.

6 Learned Counsel for the Petitioner submits that what is central to this mechanism is the intimation to be given by the trading member to the constituent of the latter's open position and a call for the amount due in respect of daily settlement in accordance with the clearing corporation regulations. Learned Counsel submits that this regulation has been completely disregarded by the arbitral tribunals, both original and appellate, inasmuch as the tribunals have come to a definitive finding that the constituent being in a position to carry out trading transactions himself on the basis of his access to the terminal, it was for him to keep a track of the position arising out of daily settlements. Learned Counsel submits this finding is clearly contrary to Regulation 3.10.

7 The impugned award proceeds on the footing that the Petitioner had an open position as at the close of 17 January 2008 or opening hours of 18 January 2008 and an intimation of such open position with a call to pay the outstanding amount was in fact made by the Respondent trading member. The tribunal has accepted the evidence of the open position as disclosed by the ledger account of the Petitioner maintained in regular course of its business by the Respondent and also the Petitioner's own admission that a call for additional funds was indeed made by the Respondent. The observations made by the arbitral tribunal concerning the Petitioner's own obligation to keep a track of its open

position and make good the settlement amounts due are important in the context of what happened on 21 and 22 January 2008 rather than the open position as at the opening of the trading hours of 18 January 2008. Insofar as the open position on 18 January 2008 is concerned, the arbitral tribunal clearly appears to have proceeded on the basis of the Respondent's case that it had intimated the same to the Petitioner and called for replenishment of the outstanding. Not only was this requisition not complied with by the Petitioner on 18 January 2008, but that the market fell further on two consecutive trading days thereafter, leaving a larger outstanding position on the part of the Petitioner. The view expressed by the arbitral tribunal, in the overall context of what happened on 18, 21 and 22 January 2008, is clearly a possible view of the material placed before the arbitral tribunal by the parties. It cannot be said either that the arbitral tribunal wholly disregarded Regulation 3.10 of NSE F&O Regulations or made its award in breach of the regulation. The manner in which the regulation is applied by the arbitral tribunal to the facts of the case exhibits a possible view, which a fair or judiciously minded person could well have arrived at. It is not a view which could be said to shock the conscience of the court. As the Supreme Court has noted in the case of **Associate Builders vs. Delhi Development Authority**¹, a mere error in applying law does not imply breach of public policy or a patent illegality. The public policy violation has to be so unfair or unreasonable as to shock the conscience of the court; likewise, a patent illegality must not only be apparent on the face of the award, but must also go to the root of the matter. The impugned award in the present case does not exhibit either.

¹ (2015) 3 SCC 49

8 Learned Counsel, in the alternative, submits that the award is based on no evidence and that is one of the working tests of perversity suggested by the Supreme Court. Learned Counsel submits that there was no evidence before the arbitral tribunal that there was any call on 18 January 2008 on the part of the Respondent to make good the outstanding position of over Rs.94 lakhs. Learned Counsel submits that the Petitioner's admission, which was possibly the only piece of evidence before the arbitral tribunal, was only to the extent of a call of Rs.4 lakhs made on 18 January 2008 by the Petitioner and not of the whole outstanding position of over Rs.94 lakhs. For an award to be termed as a perverse award, that is to say, an award such as no reasonable person duly instructed in law could have ever arrived at, it must be based on no evidence. If the award is capable of being supported by some evidence, the challenge court is not expected to go beyond the award and assess the sufficiency or otherwise of the evidence. That is exclusively within the province of the arbitrator. In the present case, there was evidence, firstly, of the open position of the Petitioner itself as disclosed by the ledger account maintained in the course of its business by the Respondent and, secondly, there was evidence that as a result of its outstanding position, a call was indeed made by the Respondent to the Petitioner. The arbitrators did not find merit in the suggestion that this call was for only Rs.4 lakhs. The arbitrators noted that in the face of a proven outstanding of over Rs.94 lakhs, there would be no possibility of a call for a paltry amount of Rs.4 lakhs. That is a possible view and it is based on some evidence of the fulfilment of the requirement of Regulation 3.10. The arbitral tribunal, in this context, also observed that it was an admitted fact that the Petitioner was an on-line constituent of the Respondent and had access, in the first place, to the relevant information

of its account at all times. In other words, it could be said to be aware of the position of its account from time to time through the on-line terminal. The Petitioner's own case before the arbitral tribunal was that its system was down after 22 January 2008. The arbitral tribunal observed that the record before the tribunal, thus, suggested that the Petitioner was aware of the position of the account at least till 22 January 2008. Besides, there were communications like the contract notes, SMS, email, telephone calls and direct contact with the Respondent's relationship manager. The arbitrators' observations that in the instant case, a demand for margin was made by the Respondent but the Petitioner had paid only Rs.4 lakhs, which was grossly insufficient to meet the shortfall even after the same was accounted for by reducing the debit balance in the Petitioner's account and accordingly, there was no breach of F&O Regulations or member-client agreement on the part of the Respondent, are clearly possible views, i.e. views based on some evidence. The arbitrators have not used any irrelevant or non-germane material or disregarded any relevant or germane material for arriving at the same.

9 In the premises, there is no merit in the challenge. The arbitration petition is dismissed. In the facts of the case, there will be no order as to costs.

(S.C. GUPTE, J.)