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

ARBITRATION PETITION NO.838 OF 2013

Nirmal Bang Commodities Pvt. Ltd. … Petitioner
Versus
Sanjay Kumar Sinha … Respondent

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Mr. Trushar Bhavsar a/w Mr. Ajay Khandhar and Mr. Jayant Gaikwad I/b Ajay Khandhar & Company for the Petitioner.

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CORAM : S.C.GUPTE, J.

DATE : 26 NOVEMBER 2018

P. C. :

. Heard learned Counsel for the Petitioner.

2 This petition challenges an award passed by a Sole Arbitrator in a reference between the parties. The reference was in respect of disputes arising out of a member client agreement executed between the parties for transactions on a commodity exchange platform, namely, MCX. It was the case of the Respondent, who was the applicant before the arbitral tribunal, that he was approached by one Kamlesh Kumar Gupta ("Kamlesh") and Sanjay Kumar Shrivastawa ("Sanjay") for opening an account with the Petitioner, who was the respondent before the arbitral tribunal. It was his case that Kamlesh and Sanjay took his signature on blank forms of the Petitioner for transactions on the exchange; that he had issued cheques in favour of the Petitioner aggregating to Rs.3,50,000/- on the basis of a promise made by the two for profits of 10 per cent on the amount invested

by him. It was his case that appropriate undertakings/bonds were executed on the instructions of Kamlesh stating the entire facts. It was his case that since profits were not paid to him and he became suspicious, he started making enquiries, whereafter he was able to get hold of a copy of his account statement showing only a balance of Rs.1210.36 as of 4 October 2010. It was his case that Kamlesh and Sanjay and through them the Petitioner, without his permission or instructions, did business in his account and caused a huge financial loss to him. The Respondent, accordingly, sought refund of the investment of Rs.3,50,000/- with appropriate interest and penalty. It was the case of the Petitioner herein before the learned arbitrator that the Respondent had made payments towards transactions on the exchange aggregating to Rs.3,50,000/- and had taken a payout of Rs.5,000/-; that contract notes of the relevant transactions were sent to him as and when the same were due and no dispute was raised on the transactions at any time. It was submitted that trade bills were conveyed on the registered number of the Respondent and statements of funds were dispatched periodically as prescribed by the exchange.

3 On these pleadings and documents, the learned arbitrator came to a conclusion that the so called internal investigation report upon the Respondent's complaint in this behalf with MCX contained only bare details of his account; there was no mention of any investigation carried out in respect of the serious allegations levelled by the Respondent; the complaint was not pursued any further by the Petitioner. The Petitioner's submission that Sanjay was not acting at its behest or at the behest of Kamlesh, was not accepted by the arbitrator. Kamlesh was admittedly the

authorised person of the Petitioner registered with MCX. The learned arbitrator observed that the agreement produced in this behalf was admittedly on a non-judicial stamp paper purchased in the name of Kamlesh, who was the authorised person of the Petitioner registered with MCX. The Petitioner's contention that for the agreement, the Respondent could not hold the Petitioner accountable, was not found by the arbitrator to be convincing or acceptable. The learned arbitrator observed that even the mobile number mentioned in the client registration form of the Respondent was incorrect. The learned arbitrator noticed that before registering the mobile number or email-ID, no due diligence was carried out by the Petitioner and that in the context of an incorrect mobile number and a disputed email-ID in the account opening form, the Petitioner's submission that it was sending soft copies of all relevant documents to the Respondent carried little weight. The learned arbitrator also noticed that none of the hard copies of the consignment notes purportedly sent by the Petitioner to the Respondent bore his signature. The learned arbitrator also noted that the Petitioner could not submit a single receipt copy/proof of delivery of any hard copy of any physical document such as welcome letter, KYC document, member-client agreement, contract note, bill, periodical statement of account, margin statement etc., which it was required to send to the Respondent. The learned arbitrator noticed that the Respondent had made his initial complaint within six to seven months of commencement of the transactions in his account and that considering the serious nature of the allegations contained therein, for safeguarding its own interest and reputation and the legitimate interest of its client, the Petitioner trading member was expected to carry out a thorough investigation into the matter and in the process, take into safe custody the relevant proof of delivery of important documents sent to the Respondent from time to time. The learned arbitrator also noticed, in the context of the relationship between Kamlesh and the Petitioner on the one hand, and Kamlesh and Sanjay on the other hand, that not only was the agreement of 25 April 2010 between the parties executed on a non-judicial stamp paper purchased in the name of Kamlesh, but that when the Respondent lodged a complaint with MCX, Sanjay executed another agreement on 11 March 2011 with the Respondent for withdrawal of the latter's complaint to MCX against the Petitioner. The learned arbitrator observed that if, as claimed by the Petitioner, it had no business relationship with Sanjay, there was no reason for him to call for withdrawal of the Respondent's complaint to MCX against the Petitioner. Taking an overall view of the matter, the learned arbitrator came to a conclusion that whatever Sanjay did, was at the behest of Kamlesh, who was admittedly an authorised person of the Petitioner herein on MCX and that the Petitioner must be held to be accountable for the loss caused to the Respondent as a result of the acts of Sanjay and Kamlesh.

4 The views and the conclusions of the learned arbitrator recounted above are clearly possible views. This court is not expected to re-appreciate evidence whilst considering any challenge to an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996. Learned Counsel for the Petitioner relies on Section 238 of the Indian Contract Act, 1872. Relying on this section, learned Counsel submits that for any misrepresentation or fraud committed by an agent acting in the course of his business, for his principal to be held responsible such misrepresentation or fraud must be committed in the course of the

principal's business and not misrepresentation or fraud committed by the agent for himself or in his own business, and which does not fall within the agent's authority; this latter action does not affect the principal. There is, in the first place, nothing to show that any such plea was actually advanced before the arbitrator. There is no such indication even in the grounds of challenge forumulated in the petition. The learned arbitrator, at any rate, in terms came to a finding that Sanjay was merely acting at the behest of Kamlesh, who was an authorised representative of the Petitioner and thus, in the course of his business for his principal, namely, the Petitioner herein, and accordingly, for his acts, the Petitioner is responsible as principal. Be that as it may, even if one were to assume that Section 238 of the Indian Contract Act, 1872 is attracted in the facts of the case, that the award is not in accordance with Section 238 is no ground to set aside the award. Proviso to sub-section (2A) of Section 34 of the Arbitration and Conciliation Act, 1996, makes it clear that a mere erroneous application of law does not result in a patent illegality, rendering the award amenable to a challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

5 Learned Counsel for the Petitioner alternatively submits that the claim amount of Rs.3,45,000/- includes a loss of Rs.39,287.83 which was the Respondent's loss on NCDEX, which is a separate exchange having its own rules, bye-laws, etc. and an arbitrator appointed under MCX rules and bye-laws could not have allowed that claim. The award does not indicate that any such plea was raised in the submissions before the arbitrator. The award deals with a claim of Rs.3,50,000/- made on behalf of the Respondent, who claimed to be a constituent of the Petitioner, who is stated to be a trading member of MCX. The claim is on the basis of cheque

payments aggregating to Rs.3,50,000/- made to the Petitioner. The amount is directed to be reimbursed in the award. The impugned award, accordingly, cannot be faulted on the ground that it allows the claim of any loss in some other account.

6 There is, in the premises, no merit in the arbitration petition. The petition is dismissed.

(S.C. GUPTE, J.)