

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP (COMM) 91/2017**

Reserved on: 18th January, 2018
Date of decision: 20th March, 2018

URMIL MODI

..... Petitioner

Through: Mr. Harish Malhotra, Sr. Adv. with
Mr. R.K. Modi, Advocate

versus

ANGEL COMMODITIES BROKING PVT LTD Respondent

Through: Mr. Vikas Tomar, Advocate

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated May, 2013 passed by the Arbitral Tribunal in Arbitration Case no. MCX/Legal/913A/12.
2. The petitioner claims that she had been dealing with M/s Angel Broking Private Limited, an associate company of the respondent since the year 2007. She submits that the said dealings were confined to the sale and purchase of shares against cash payments alone.
3. The petitioner entered into a relation with the respondent herein by executing Client Registration Form, Member Client Agreement, KYC and Risk Disclosure Statement on 23.08.2010 with regard to trading in Commodities. In the said agreement, the petitioner had expressly prohibited Contract Notes to be sent by e-mail in an electronic form and for receiving SMS alerts for the said agreement. The agreement further

prohibited the maintenance of account on a running account basis as also adjustment *inter se* between the group companies of the respondent, including and with respect to the Angel Broking Private Limited, for the trades carried out in any other Segments / Exchanges.

4. An important term of the contract was with respect to the daily settlement of the positions and the payment of margin before the commencement of trading on the next date. The same is quoted herein below:-

“2. As far as Futures Commodity Derivatives are concerned, please note and get yourself acquainted with the following additional features:-

Effect of “Leverage” or “Gearing”:

a) The amount of margin is small relative to the value of the commodity, derivatives contract so the transactions are ‘leveraged’ or ‘geared’. Commodity Derivatives trading, which is conducted with a relatively small amount of margin, provides the possibility of great profit or loss in comparison with the principal investment amount. But transactions in commodity derivatives carry a high degree of risk. You should therefore completely understand the following statements before actually trading in commodity derivatives contracts and also trade with caution while taking into account one’s circumstances, financial resources, etc.

b) Trading in Futures Commodity Derivatives involves daily settlement of all positions. Every day the open positions are marked to market based on the closing price. If the closing price has moved against you, you will be required to deposit the amount of loss (notional) resulting from such movement. This margin will have to be paid within a stipulated time frame, generally before commencement of trading on the next day.”

5. It was a condition of the contract that if the petitioner defaults in paying the daily margin and Market to Market (MTM), if any, the

respondent shall be entitled to liquidate / close out all or any of the petitioner's positions.

6. The parties were also to be governed by the guidelines and circulars of the Multi Commodity Exchange of India Ltd (hereinafter referred to as the 'MCX') and of the Forward Markets Commission (FMC).

7. The petitioner contends that though she had entered into the Member Client Agreement with the respondent, she did not carry out any transaction in the said account. It was only in September, 2011 that she came to know that a large number of transactions in commodity market had been carried out in her account causing her a huge financial loss. She further submits that as the group company of the respondent, namely Angel Broking Private Limited was holding petitioner's stocks and securities of the value of Rs. 40 lakhs and was refusing to release the same, in order to save her security, the petitioner paid an amount of Rs. 18.40 lakhs by cheque dated 21.11.2011 in favour of Angel Broking Private Limited so that her shares and securities could be transferred to a new DEMAT account opened by her with the State Bank of India. The said amount was transferred by Angel Broking Private Limited to the respondent for purportive settlement of her account with the respondent.

8. The petitioner claimed that as she had not transacted any business with the respondent and all purported transactions shown by the respondent were without her knowledge and consent, she was entitled to seek refund of an amount of Rs. 18,20,982.75 paid to the respondent and also Rs. 5 lakhs as compensation for mental agony and harassment.

9. The said dispute was referred to the panel of Arbitrators and has resulted in the Impugned Award dated May, 2013 dismissing the claim of the petitioner.

10. The learned senior counsel for the petitioner submits that the Arbitral Tribunal has passed the Impugned Award in complete contravention of the terms of the contract between the parties. He submits that the Arbitrator has failed to take into account the fact that the petitioner had expressly prohibited the respondent from sending the Contract Notes through e-mails or SMS. *Inter se* adjustment of accounts between the group companies was also prohibited. The respondent could not prove even a single order placed by the petitioner, though it was mandatory for the respondent to have a copy of the record of the same. He further contends that mere sending of the Contract Notes through e-mails or SMS information by the respondent cannot make the petitioner liable for these transactions. He contends that the purportive undated Form relied upon by the respondent as an authorization from the petitioner to receive the Contract Notes through e-mail was a forged document and could not be relied upon by the Arbitral Tribunal. He further submits that the purportive audio recording relied upon by the Arbitral Tribunal was also fabricated and the petitioner had denied the same. In fact, this audio recording surfaced belatedly and after the respondent had already acknowledged that they do not have any such audio recording with them; this itself would be sufficient to caste a doubt on the authenticity of such audio recording. However, in spite of the same the Arbitral Tribunal placed heavy reliance on such audio recording.

11. The Senior Counsel for the petitioner has drawn my attention to the Circular dated 30.09.2009 issued by the MCX, which communicates the directives of the FMC directing that the members shall execute the trade of clients only after keeping evidence of the client placing such order, which may even be in form of sound recording. Reference is also drawn to the Circular dated 09.06.2009, which provides that for non collection of margin by members, the exchange shall levy a penalty of Rs. 2,000/- per client for each day. The petitioner has also placed reliance on the “Illustration Compliance Check List” issued by MCX on 10.01.2006, which gives detailed guidelines for maintenance of records of transactions; obtaining instructions by the members from its constituents before placing order; Contract Note compliance and the risk management compliance in form of collection of adequate margin from the client before entering any order for such client.

12. The counsel for the respondent, on the other hand, submits that the petitioner was always aware of the transactions that had taken place in her account. He submits that the Contract Notes and Bills had been regularly sent to the petitioner on her registered e-mail address and SMS of transactions was also sent on her mobile phone. He further submits that the quarterly ledger statements, which contained details of transactions of NSE F&O segment and the commodity segments, were regularly sent to the petitioner. The petitioner had also logged into the website of the respondent on a number of occasion and the said website clearly depicted the transaction carried out by the petitioner in the commodity segment. In spite of the same, the petitioner never raised a grievance regarding such transaction. It is further submitted that even if it

is assumed that the petitioner came to know of such transaction only in September 2011, she made the complaint regarding the same only in February 2012, which clearly shows that the complaint was a mere after-thought. He, therefore, submits that the Arbitral Tribunal has rightly rejected the claim of the petitioner by way of the Impugned Award.

13. I have considered the submissions made by the counsel for the parties. It is not disputed by the respondent that the Member Client Agreement executed between the parties mandated a daily settlement of all positions and in case of any loss, the margin to be made up by the petitioner before commencement of trading on the next date. It is also not disputed by the respondent that this activity was not carried out during the entire period of transaction i.e. between August 2010 to November 2011. It is also not disputed by the respondent that it has no record of any order being placed upon it by the petitioner for carrying out such transactions. It is also not disputed that in terms of guidelines and instructions issued by the FMC and MCX it was mandatory for the respondent to have kept records of such order being placed upon it. The respondent was therefore, in default and breach of not only its contract with the petitioner but also of the guidelines and directions issued by the FMC and MCX. The respondent, in my opinion, cannot benefit out of its own breach.

14. The Arbitral Tribunal, in rejecting the claim of the petitioner has inter-alia relied upon the fact that the respondent had regularly sent the Contract Notes to the petitioner on her given email account. It has relied upon a Form allegedly executed by the petitioner which authorized the

respondent to dispatch the Contract Notes for both Stock Market as also Commodities Market Trade to the petitioner through email. The authenticity of this document was denied by the petitioner and the fact of such denial has been taken notice of in paragraph 13 of the Impugned Award. However, I find that the Arbitral Tribunal does not give any finding on the authenticity of this document in the Impugned Award. On the other hand, a perusal of this document shows that it is undated and gives no reference as to why or along with which document this was given by the petitioner to the respondent. Learned counsel for the respondent is also unable to show from the Arbitral Record as to how and when this document was given by the petitioner to the respondent and what was the occasion for asking for this document from the petitioner. The authenticity of this document was therefore of prime importance and the Arbitral Tribunal has completely ignored the same in spite of recording the submission of the petitioner in this regard in the Impugned Award.

15. The Arbitral Tribunal placed great emphasis on the fact that the Contract Notes in relation to the Stock Market were being received by the petitioner on the same email ID and such transaction has not been denied by the petitioner. In my opinion, once there is an express prohibition on service of Contract Notes through email on the petitioner in the contract document itself, reliance of the Arbitral Tribunal on the conduct of the parties in relation to another contract was totally unfounded.

16. Learned senior counsel for the petitioner submits that as far as the contract of the petitioner with Angel Broking Private Limited is concerned, the petitioner had authorized the sending of the Contract

Notes through email. In any case, as noted above, once there is an express prohibition in the contract, it was for the respondent to have proved before the Arbitral Tribunal that the petitioner had changed the instructions for receipt of Contract Notes and had agreed to receive the same through email. Merely because for another Group Company the petitioner had agreed to receive the Contract Notes through email, it could not have been presumed that the petitioner had agreed to receive the same even with respect to its relationship with the respondent, which admittedly is governed by a separate agreement.

17. The Arbitral Tribunal further relies upon the SMS communication sent by the respondent to the petitioner with respect to the trade carried out by the respondent on behalf of the petitioner. Here again, the Arbitral Tribunal does not at all deal with the contention of the petitioner that in the contract the petitioner had prohibited the receipt of this information through SMS. The Tribunal merely states as such information was sent by the respondent to the petitioner through SMS and the petitioner never objected to the same, the petitioner cannot deny her liability for such transaction. In my opinion, this is a perverse way of rewriting the contract between the parties and putting the onus on the innocent party rather than the party in breach of the express contractual terms. If the Arbitral Award is to be accepted, in spite of the petitioner prohibiting the receipt of the information regarding trade through SMS, it would be her onus and duty to dispute such trade on receipt of each information on the SMS, failing which liability will be fastened on her. A question first should have been asked to the respondent as to why it sent such SMS information when the petitioner had barred the same. In the world of

spam messages and unsolicited calls and messages, if the onus of disputing such SMS is also to be on a party, it would defeat the very sanctity of the agreement entered into between the parties.

18. The Arbitral Tribunal, further curiously relies upon a Form filled by the petitioner while registering her complaint against the respondent wherein against question nos.6 and 7 it had been filled that the Contract Notes were received by way of hard copy by post. It was not even the case of the respondent that hard copies of the Contract Notes had been sent by the respondent to the petitioner. Clearly, while filling up the form there was a mistake made by the petitioner. The same could not have been the basis of rejecting her claim.

19. While much reliance has been placed by the Arbitral Tribunal on the large number of transactions being carried out at the behest of the petitioner by the respondent in the Commodity Market, the Arbitral Tribunal completely failed to take note of the fact that the ledger account filed by the respondent before the Arbitral Tribunal showed that the petitioner had a continuous debit balance since at least 08.11.2010 to 21.11.2011 when the payment was made by the petitioner to Angel Broking Private Limited and was adjusted against the petitioner's account by the respondent. As noted above, the contract between the parties clearly provides for a daily adjustment of the account. The petitioner was to also make up the margin before commencement of trading on the next day. In the present case, learned senior counsel for the petitioner submits that the petitioner had not made any payment to the respondent for its alleged commodity trade during the entire period of the contract i.e. between August 2010 to November 2011. It is further alleged that the

respondent had never demanded any amount towards margin money or MTM from the petitioner during this entire period. The only explanation given by the respondent for not doing so is that the respondent had security in the form of shares held by the petitioner in her DEMAT Account with Angel Broking Private Limited. It is however, not shown by the respondent as to how these shares could have acted as security with the respondent for the margin money or for alleged liability owed by petitioner to the respondent in the commodity trade. No such authorization from the petitioner has been referred to me.

20. Maintaining daily balances as also the margin is a mandatory requirement not only under the contract but also the circulars and directions issued by the FMC and MCX. The Arbitral Tribunal holds that though the circulars and directions issued by FMC and MCX prescribed mandatory maintenance of the record of placement of order in writing but any violation thereof will not render the trade executed by the client illegal, it would only make the trading member liable to penalty/administrative action. In my opinion, the circulars and directions issued by the FMC and MCX were intended to obviate disputes as have arisen in the present case i.e where client disputes having placed any order on the Member for making transaction on their behalf. The respondent cannot be allowed to benefit out of its own fault. If the interpretation of the Arbitral Tribunal is to be accepted, for such default, respondent may be penalized by the FMC and MCX, however, it would still gain from the transaction made on behalf of the client, though the client disputes having given any such direction or order to the trading

member. Such interpretation cannot be accepted and would defeat the object of the Circulars/Directions issued by the FMC and MCX.

21. As far as the reliance of the Arbitral Tribunal on the voice recording produced before it by the respondent, a bare perusal of the transcript of the conversation would show that the same does not relate to placing of an order by the petitioner for any transaction or approval of the same post-facto. In any case, it is rightly contended by the learned senior counsel for the petitioner that this voice recording cannot take the place of the record of transaction as mandated in the circulars issued by the FMC and MCX.

22. The Arbitral Tribunal also records that there is no dispute that Angle Broking Private Limited has been authorized to transfer the fund in its equity and F&O account for appropriation against the debit outstanding in the commodity account maintained by the respondent. This finding is also perverse as Member Client Agreement executed between the petitioner and the respondent prohibited such inter-company transfer and settlement. The petitioner had specifically denied such authorization even in the claim filed before the Arbitral Tribunal. It was for the respondent to prove that it had such authorization from the petitioner. Admittedly, no such proof was filed before the Arbitral Tribunal.

23. As far as the contention of the respondent that there was a delay in lodging the complaint by the petitioner inasmuch as the cheque had been issued by her on 21.11.2011 and the complaint was filed only in February, 2012, the same is only stated to be rejected. There is no inordinate delay between 21.11.2010 and February, 2012. Even

otherwise, as contended by learned senior counsel for the petitioner, the petitioner during the *interregnum* was corresponding with the respondent so as to gather some documents which would support her case before the Arbitral Tribunal. It is rightly contended that in these letters the petitioner has intentionally avoided use of harsh language so that the respondent is not put to guard against sharing such documents with the petitioner. However, the same cannot amount to the claim of the petitioner to be considered as an afterthought.

24. Learned senior counsel for the petitioner has placed reliance on the judgment of this Court in ***Angel Broking Ltd. v. Arti Jain & Anr.***, 2014 SCC Online Del 994, to contend that even in that case the transaction had been carried out by Angle Broking Limited without authorization and an Award had been passed in favour of the respondent therein, which was upheld by this Court. Learned counsel for the respondent, on the other hand, relied upon the judgment of this Court in ***M/s National Highways Authority of India v. M/s Oriental Structural Engineers Pvt.Ltd.*** AIR 2015 Delhi 79 and ***Smt.Vinita Arora v. M/s Escorts Securities Ltd. & Anr.***, 2010 SCC Online Del 1629, to submit that this Court in exercise of its power under Section 34 of the Act cannot sit as a Court of appeal.

25. In ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49, Supreme Court after scrutinizing the provision of Section 34 of the Act and various prior judgments therein has held as under:-

“29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held: (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held: (SCC) p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

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36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

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42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India-

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

26. In my opinion, the Impugned Award has to be set aside applying the above very limited grounds for setting aside an Award under Section 34 of the Act.

27. For the reasons stated above, the Impugned Award is liable to be set aside. The question would now be what relief is to be granted to the parties. As it is an admitted case that the respondent has adjusted an amount of Rs.20,69,865.15 from the payment made by the petitioner to Angel Broking Private Limited, the same should be refunded by it to the petitioner. However, keeping in view the fact that in the Statement of Claim filed by the petitioner before the Arbitral Tribunal, only an amount of Rs.18,20,982.75 had been claimed by the petitioner, I direct that the respondent should pay to the petitioner a sum of Rs.18,20,982.75 along with interest @ 6% p.a. with effect from 21.11.2011 till the date of payment. As the petitioner was also negligent in the course of transaction with the respondent inasmuch as in spite of receiving repeated emails and SMS informing the petitioner of the transactions being carried out by the respondent on her behalf, she never protested against the same, I hold that the petitioner shall not be entitled to the damages of Rs.5 lacs as claimed by her in her Statement of Claim before the Arbitral Tribunal and the Impugned Award denying such claim of the petitioner is upheld.

28. The petition is allowed in the above terms with no order as to cost.

NAVIN CHAWLA, J

MARCH 20, 2018/rv/Arya