

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 404 OF 2017**

Vinod Kumar Sharma)
(Address : Flat C-1, Indira Gandhi)
Institute (IGIDR) Campus,)
Film City Road, Goregaon East,)
Mumbai – 400 065) **..... Petitioner**

VERSUS

Yes Securities (India) Limited,)
(Address : India Bulls Finance Centre,))
Tower II, 18th Senapati Bapat Marg,)
Elphinstone Road, Mumbai – 400 013) **..... Respondent**

Mr.Vinod Kumar Sharma, Petitioner in person.

Mr.Ranjit Bhosale, a/w. Mr.Sunil Varma, Mr.Mit Shroff, i/b. M/s.Joby Mathew & Associates for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 5th SEPTEMBER, 2019

PRONOUNCED ON : 17th SEPTEMBER, 2019

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 18th January,2017 passed by the Appellate Panel of Arbitrators allowing the appeal filed by the respondent and set aside the arbitral award dated 22nd September, 2016 passed by the Arbitral Tribunal directing the respondent to pay to the petitioner a sum of Rs.54,68,063/- with interest. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original applicant whereas the respondent herein was the original respondent before the Arbitral Tribunal. The petitioner was the original respondent before the Appellate Panel of Arbitrators whereas the respondent herein was the appellant before the said Appellate Panel of Arbitrators.

3. The respondent is a stock broker registered with Securities and Exchange Board of India and a trading member of National Stock Exchange of India Limited. On or about August 2015, the petitioner approached the respondent to open a 3-in-1 account with the respondent by placing an online request to the respondent. The petitioner signed the necessary documents for opening of 3-in-1 on 8th October, 2015 and submitted those documents to the respondent. It is the case of the respondent that once the said trading account was opened by the petitioner, the petitioner was eligible for trading facilities such as delivery trades, F&O, intra-day trading, etc. According to the respondent, the petitioner was explained, the risk involved in the product. The trading in the account of the petitioner was done between 17th November, 2015 and 11th February, 2016.

4. The dispute is only in respect of trading done on 11th February, 2016. It is the case of the respondent that on 11th February, 2016, the petitioner was having certain open positions in 'Short Put Options' in NIFTY Index. It was the case of the respondent that the total exposure of the petitioner in those open positions was around Rs.10 crores and was maintaining Rs.71 lacs as margin against the said exposure. It is the case of the respondent that on 11th February, 2016, the stock markets were very volatile and had actually

witnessed the biggest crash i.e. 3.5% in a single day in the previous 22 months which was triggered mainly by a major fall in markets across the globe with certain global indices falling to its two years low.

5. It is the case of the respondent that upon noticing the high volatility and steep fall in the market at around 2.28 p.m., the respondent analysed the margin requirement in the petitioner's account. According to the respondent, the account of the petitioner was reflecting a huge margin deficit of approximate Rs.46 lacs. The petitioner had repeatedly failed to built requisite margin since 9th February,2016 despite specific requests/demands allegedly made by the respondent vide e-mails to the petitioner. The respondent allegedly tried to contact the petitioner over phone to call upon the petitioner to provide additional funds against the said shortfall and made a phone call to the petitioner on his registered mobile number 9869254479 at 2.28 p.m. considering the huge volatility witnessed on the said date. The call made by the respondent to the petitioner however allegedly went unanswered by the petitioner. The respondent thereafter tried to contact the petitioner allegedly on its registered landline number 022-28416531 at 2.30 p.m., 2.32 pm and 2.58 pm. However all these three calls made by the respondent also went unanswered.

6. It is the case of the respondent that since the petitioner was not contactable inspite of several attempts over mobile and landline number, the respondent was constrained to instruct its Customer Service team to address an e-mail to the petitioner about the shortfall/margin money requirements and accordingly the Customer Service team addressed an e-mail to the petitioner at 3.02 p.m. It is also the case of the respondent that after the said e-mail was sent by the

Customer Service team of the respondent to the petitioner, there was further steep fall in the market and the position of the petitioner had triggered the internal risk limits i.e. 75% of the margin money provided by the petitioner. The respondent accordingly allegedly made two more calls on the mobile number of the petitioner and also the landline number at 03.03 p.m. which also went unanswered.

7. It was the case of the respondent that the respondent thereafter made an attempt to help by exercising power provided by the petitioner and made multiple attempts starting Rs.25 lacs followed by Rs.20 lacs, Rs.15 lacs, Rs.10 lacs and Rs. 5 lacs to transfer the funds from the designated/linked bank account maintained with YES Bank Limited to enable the respondent to replenish the shortfall/margin money requirements and hold onto the open positions in the petitioner's account. However, all such efforts by the allegedly made by the respondent failed due to insufficiency of amounts in the said bank account maintained by the petitioner. The case of the respondent was that the shortfall of the petitioner had increased from Rs.46 lacs to around Rs.56 lacs from 2.30 p.m. till 03.05 p.m. and in percentage terms it had increased from 64% to 78% thereby breaching the internal risk trigger limits prescribed in the said policy. The respondent was allegedly compelled to liquidate the open positions in the interest of petitioner in accordance with the provisions of the 'KYC/Rights and Obligations document' prescribed by circular dated 22nd August,2011 issued by SEBI and squared off the position of the petitioner by placing limit orders and not market orders with an intention to minimize the losses in the account of the petitioner while squaring off from 3:05:11 to 3:11:49 in the interest of the petitioner.

8. It is the case of the respondent that at 5.01 p.m. on the same day, the petitioner addressed an e-mail to the respondent and alleged that the said square off trades by the respondent were without the consent of the petitioner and were not permissible. By e-mail sent at 5.24 p.m. by the respondent to the petitioner, the respondent informed the petitioner about the reason for squaring off the positions. Several e-mails were thereafter exchanged between the parties. It is the case of the respondent that the petitioner continued the trading with the respondent even after 11th February,2016 till 8th August,2016 and increased his turnover to Rs.275 crores as against only Rs.84 crores in the period preceding 11th February,2016.

9. The petitioner thereafter made a complaint before the Investor Services Cell of the National Stock Exchange. The Investor Services Cell informed the respondent about such complaint filed by the petitioner by letter dated 4th March,2016. The respondent replied to the said complaint on 9th March 2016 and 18th March 2016. It is the case of the respondent that on 28th March,2016, the three members of Panel of Investor Services Cell of the National Stock Exchange rejected the complaint filed by the petitioner. The dispute was thereafter referred to the arbitration. On 15th July, 2016, the petitioner filed his statement of case and claimed Rs.54,68,063/- with interest against the respondent. The respondent filed its statement of defence on 25th August,2016. The petitioner filed rejoinder on 7th September,2016. The respondent filed its written submissions before the Arbitral Tribunal on 14th September,2016.

10. On 22nd September,2016, the Arbitral Tribunal made an award directing the respondent to pay to the petitioner a sum of

Rs.54,68,063/- with interest thereon at 12% per annum from the date of filing of the arbitration reference i.e. 15th July, 2016 till payment. The respondent preferred an appeal before the Appellate Panel of Arbitrators against the said arbitral award. The Appellate Panel of Arbitrators made an award on 18th January,2017 allowing the said appeal bearing no. (Appeal Arbitration Matter No.:F&O/M-0036/2016) and set aside the arbitral award dated 22nd September,2016 passed by the Arbitral Tribunal. The petitioner filed an application before the Appellate Panel of Arbitrators under section 33 of the Arbitration and Conciliation Act, 1996 for correction of various alleged errors in the award dated 18th January,2017. The respondent filed a reply to the said application filed by the petitioner under section 33 before the Appellate Panel of Arbitrators on 2nd March,2017.

11. On 8th March,2017, the Appellate Panel of Arbitrators rejected the said application filed by the petitioner on 17th February, 2017 under section 33 of the Arbitration and Conciliation Act, 1996 on the ground that in the said application the petitioner sought to have the said award dated 18th January,2017 set aside. The petitioner has impugned the arbitral award dated 18th January,2017 and also the order dated 7th March, 2017 passed by the Appellate Panel of Arbitrators rejecting the application filed by the petitioner under section 33 of the Arbitration and Conciliation Act, 1996.

12. Mr.Vinod Kumar Sharma, the petitioner who appears in person invited my attention to various paragraphs of the pleadings filed by both the parties, Regulations 3.10(a) and (b) of the Regulations (F&O Segment) framed by the National Stock Exchange of India Limited. He invited my attention to the statement of account furnished to the

petitioner by the respondent for the period 10th February,2016 to 12th February,2016 raising the MTM Bill of profit loss to the sum of Rs.54,68,063.02 as on 11th February,2016. He submits that the said statement was produced before the trial court showing the Notional Loss of Rs.54,68,063.02.

13. The petitioner invited my attention to the findings rendered by the Arbitral Tribunal in arbitral award dated 22nd September,2016 and more particularly in paragraphs 8 to 12 of the arbitral award and would submit that after interpreting the Regulations 3.10(a) and (b), the Arbitral Tribunal held that though under Regulation 3.10(a), the respondent could square off of the open position of the petitioner instantaneously when there is a margin shortfall in his account in this particular case, the respondent had chosen not to act as per the provisions of the said bye-law i.e. 3.10(a) but chose to act as per the Regulation 3.10(b) framed by the National Stock Exchange by sending e-mail on 3.02 p.m. on 11th February,2016. It is held by the Arbitral Tribunal that the respondent had given up their right under the Regulation no.3.10(a) and therefore it was incumbent upon the respondent to wait till 11 a.m. on the next date i.e. 12th February,2016.

14. It is submitted by the petitioner that the Arbitral Tribunal also rendered a finding that as per the provisions of Regulation 3.10(b) framed by the National Stock Exchange, the respondent was required to give time till next working day for clearing margin shortfall in the account of the petitioner. The squaring off the open 10 positions of the petitioner at 3.03 p.m. on 11th February,2016 was against their own volition. He submits that the Arbitral Tribunal rightly rejected the submission of the respondent that the market was rising after 3 p.m. on

11th February,2016 and that the petitioner would have gained profit if his 10 open positions were not squared off by the respondent. The market may go up or collapse. He submits that the Arbitral Tribunal rightly held that it was neither contended nor could be imagined by the respondent that within the short time of 3 minutes, the position would have been much different than the one at 3.02 p.m. when the e-mail was sent by the respondent to the petitioner for making payment of the shortfall in the margin money on the next day before 11 a.m.

15. Insofar as amount awarded by the Arbitral Tribunal is concerned, the petitioner submitted that the said amount was rightly awarded by the Arbitral Tribunal on the basis of the statement submitted by the respondent itself before the Arbitral Tribunal. The petitioner invited my attention to the findings rendered by the Appellate Panel of Arbitrators rendered in the award dated 18th January,2017 and in particular paragraphs 19 to 23 of the said arbitral award and would submit that though the Appellate Panel of Arbitrators also has rejected the submission of the respondent that Regulation 3.10(b) was irrelevant to the action of the respondent in sending the e-mail at 3.02 p.m. on 11th February,2016, the Appellate Panel of Arbitrators has set aside the award of the Arbitral Tribunal dated 27th September,2016.

16. The petitioner submits that though the Appellate Penal of Arbitrators has rendered a finding that the Arbitral Tribunal was right in coming to the conclusion that there was no justification for the respondent in squaring off 10 open positions of the petitioner within three minutes at 3.05 p.m. despite having exercised the option of sending the e-mail at 3.02 p.m. under Regulation 3.10(b) framed by the National Stock Exchange bye-laws, the Appellate Panel of

Arbitrators has allowed the appeal preferred by the respondent contrary to such findings rendered by it.

17. The petitioner placed reliance on the judgment of this court in case of ***Kritika Nagpal vs. Geojit Financial Services Ltd.*** in ***Arbitration Petition No. 47 of 2009*** and other connected matters delivered on 14th July, 2016 and also judgment of this court in case of ***Bonanza Commodities Brokers Pvt. Ltd. vs. Mrs. Roshanara Bhinder*** in ***Arbitration Petition No.195 of 2015*** delivered on 16th April, 2015 and would submit that if according to the respondent, there was a shortfall of margin money on the part of the petitioner, the respondent ought to have exercised right under the Regulation 3.10(a) of the regulation and not under 3.10(b).

18. Mr. Ranjit Bhosale, learned counsel for the respondent on the other hand invited my attention to Regulations 3.10 (a) and (b) and would submit that the petitioner was an online client and was trading in F&O Segment. He had complete access to the margin requirement reflected on the terminal operated by him. He submits that on 11th February, 2016, there was a huge crash in the market. There was a margin shortfall of Rs.25 lacs initially in the account of the petitioner. The margin in the account of the petitioner available with the respondent was only in the sum of Rs.71 lacs. Several calls were made on the registered mobile of the petitioner and also on the landline on 11th February, 2016 for making deposit of the shortfall of the margin money. The petitioner however did not respond to any of the calls made by the office of the respondent. The margin requirement thereafter went upto Rs. 46 lacs. Such calls were made by the office of the respondent to the petitioner between 2.28 p.m. to 2.58 p.m.

19. It is submitted that the respondent attempted to help the petitioner by exercising the power provided by the petitioner and made multiple attempts starting Rs.25 lacs followed by Rs.20 lacs, Rs.15 lacs, Rs.10 lacs and Rs. 5 lacs to transfer the funds from the designated/linked bank account maintained by the petitioner with YES Bank Limited. The respondent however failed due to insufficiency of the amount in the said bank account of the petitioner.

20. It is submitted by the learned counsel that the shortfall of the petitioner had increased from Rs.46 lacs to around Rs.56 lacs from 2.30 p.m. till 03.05 p.m. and in percentage terms increased from 64% to 78% thereby breaching the internal risk trigger limits prescribed in the said policy. He submits that though the respondent had sent e-mail to the petitioner at 3.02 p.m. for deposit of the shortfall in margin money by 11 a.m. on 12th February, 2016, the said demand made by the respondent was actually not exercising the right under Regulation 3.10 (b) but was issued under Regulation 3.10 (a). He submits that the respondent had rightly exercised its right under Regulation 3.10(a) in view of the fact that the market had crashed on that day and there was no sufficient margin money in the account of the petitioner with the respondent. The petitioner had also deliberately ignored the calls of the respondent for demand of the margin money. He submits that in these circumstances, the respondent was justified in squaring off of the open position of the petitioner between 3.05 p.m. and 3.11 p.m.

21. It is submitted by the learned counsel that at around 4.07 p.m. ,the petitioner had sent e-mail to the respondent not to square off his open position. He submits that the petitioner did not dispute that

there was no sufficient margin available in the account of the petitioner with the respondent or balance in the bank account of the petitioner. He submits that the shortfall in the margin money, in the account of the petitioner was clearly reflected on the terminal operated by the petitioner and thus even otherwise, the respondent was not required to send any demand notice for deposit of deficit payment of margin money. He submits that in this case, there was already the shortfall of margin money in the account of the petitioner on 9th February, 2016 itself. He submits that Regulation 3.10(b) applies in respect of the non-payment of daily settlement by the constituent and was not applicable in the facts of this case at all. It is submitted by the learned counsel that till 4 p.m., the petitioner had not even opened the e-mail sent by the respondent to the petitioner demanding the margin money by 11 a.m. on 12th February, 2016.

22. Learned counsel for the respondent invited my attention to clauses 4(V), (VII), (X), (XI) and XVI of the 'Non Mandatory Document' annexed to the constituent agreement and would submit that the said document also provided for mandatory requirement for payment of margin money and empowers the broker to square off the open position in the event of the constituent committing any default in removing the shortfall in margin requirement. Learned counsel invited my attention to the reply of the respondent dated 9th March, 2016 to the Investor Services Cell in response to the complaint filed by the petitioner contending that till such time, the petitioner was below 70% loss, the Risk Department of the respondent was comfortable to hold till next date as communicated to the petitioner in its e-mail, however, since the loss had exceeded 78% within a matter of few minutes, the respondent could no longer hold the position and thus had squared off

the open position of the petitioner on 11th February,2016.

23. Learned counsel for the respondent placed reliance on page 490 of the compilation of the documents and would submit that the petitioner in this case had made an attempt to carry out one more transaction on 11th February,2016 at 13:09:10 which transaction was rejected by the system on the ground that there was shortfall of margin money in the account of the petitioner.

24. It is submitted by the learned counsel that the Appellate Panel of Arbitrators has rightly considered the crucial aspect that if the respondent would have waited for squaring off the position till 11 a.m. of 12th February,2016, the loss would have been more in the account of the petitioner and thus the respondent was justified in squaring off the open position of the petitioner on 11th February,2016 itself.

25. Learned counsel for the respondent placed reliance on the judgment of this court delivered on 5th March,2012 in case of ***HSBC InvestDirect Securities (India) Ltd. vs. Ms.Manishaben Ghanshyabai Patel in Arbitration Petition No.157 of 2010*** and in particular paragraphs 7 to 12 and the judgment of this court delivered on 14th March, 2016 in case of ***Mrs.Money Nair vs. Sharekhan Ltd. in Appeal No.39 of 2016*** and in particular paragraphs 5, 6 to 8 and would submit that Regulation 3.10 (b) was not at all applicable for the purpose of demanding margin money and thus the said notice send by e-mail for demanding margin money could not have been construed as a demand under Regulation 3.10(b) but ought to have considered as if under Regulation 3.10 (a) of the regulations. Learned counsel for the respondent made an attempt to distinguish the judgment relied upon by

the petitioner on the ground that the facts before this court in both these judgments were totally different.

26. In rejoinder, the petitioner submits that both the Arbitral Tribunals have rendered a finding that the respondent having issued notice of demand for margin money under Regulation 3.10 (b) had given up its right, if any, under Regulation 3.10 (a) and thus could not have squared off of the open position of the petitioner before 11 a.m. of 12th February, 2016. He invited my attention to pages 33, 68 and 72 of the petition and would submit that the contract note issued by the respondent clearly reflected the position of the account of the petitioner which was rightly considered by the Arbitral Tribunal while allowing the claims made by the petitioner.

27. It is submitted by the petitioner that the findings that Regulation 3.10 (b) was invoked by the respondent being concurrent and not having been impugned by the respondent, the respondent cannot be allowed to challenge the said findings across the bar in the petition filed by the petitioner.

REASONS AND CONCLUSION

28. It was the case of the respondent itself that there was a shortfall in margin money requirement on the part of the petitioner since 9th February, 2016 itself. There was a stiff fall in the market on 11th February, 2016. It is the case of the respondent that the respondent had tried to contact the petitioner on the registered mobile and the landline between 2.30 p.m. and 3 p.m., but the petitioner was not responding to those phone calls. The respondent had accordingly sent e-mail at 3.02

p.m. on 11th February, 2016 calling upon the petitioner to deposit the difference between the margin money before 11 a.m. on 12th February, 2016. Under Regulation 3.10 (a), it is the obligation on the part of the trading member to demand from the constituent, the margin deposit which the member has to provide under those Trading Regulations in respect of the business done by the members for such constituents. The trading member is authorized to buy/sell derivatives contracts on behalf of the constituent only on the receipt of margin of minimum such percentage as the relevant authority may decide from time to time, on the price of the derivatives contracts proposed to be purchased, unless the constituent already has an equivalent credit with the trading member.

29. On the other hand Regulation 3.10 (b) provides that in case of open purchase position undertaken on behalf of the constituents, the trading member shall be at liberty to close out the transactions by selling derivatives contracts, in case the constituent fails to meet the obligations in respect of the open position within next trading day for the execution of the full contract or within next trading day of the contract note having been delivered, unless the constituent already has an equivalent credit with the trading member. The loss incurred in this regard, if any, shall be met from the margin money of the constituent. The said regulation further provides that in case, the open purchase position undertaken on behalf of the constituents, the trading member shall be at liberty to close out the transactions by selling derivatives contracts if the constituent fails to meet the obligation in respect of the open position within next trading day of the transaction having been executed on the F&O Segment of the Exchange for the concerned settlement period. Loss on the transaction, if any, shall be deductible

from the margin money of the constituent.

30. It is not in dispute that the respondent had called upon the petitioner to pay deficit shortfall in margin money by 11 a.m. on 12th February, 2016. The said notice was given under Regulation 3.10 (b) and not under 3.10 (a). In my view, the Arbitral Tribunal was thus right in holding that since the respondent had already granted time to the petitioner to pay deficit margin till 11 a.m. of 12th February, 2016, at 3.02 p.m., within three minutes of sending such e-mail to the petitioner, the respondent could not have squared off 10 open positions of the petitioner.

31. The Appellate Panel of Arbitrators also upheld this finding in the arbitral award rendered on 18th January, 2017 against the respondent. In paragraphs 19 and 22 of the award rendered by the Appellate Panel of Arbitrators, it is held that the Arbitral Tribunal was right in holding that the respondent was bound to wait till the next date i.e. 12th February, 2016 at 11 a.m. before squaring off open position of the petitioner. Admittedly, the respondent had not challenged these findings rendered by the Appellate Panel of Arbitrators. The said finding of fact thus had attained finality and cannot be challenged across the bar by the respondent in this arbitration petition filed by the petitioner.

32. The next question that arises for consideration of this court is whether after rendering the finding that the Arbitral Tribunal was right in holding that the respondent was bound to have waited till next date i.e. 12th February, 2016 at 11 a.m. before squaring off the open position of the petitioner, whether the Appellate Panel of Arbitrators could have

still allowed the appeal filed by the respondent on the ground that if the respondent would have waited for squaring off the open position till 12th February, 2016 at 11 a.m., the loss would have reached Rs.64,96,133/-. In my view, the conclusion drawn by the Appellate Panel of Arbitrators in the award dated 18th January, 2017 is ex-facie inconsistent and contradictory to the findings rendered by the Appellate Panel of Arbitrators itself. The conclusion drawn by the Appellate Panel of Arbitrators shows perversity and patent illegality.

33. The Appellate Panel of Arbitrators had not set aside the findings of the Arbitral Tribunal holding that the respondent having chosen not to act as per the provision of Regulation 3.10 (a) but having chosen to act as per the provision Regulation 3.10 (b) by sending e-mail at 3.02 p.m. on 11th February, 2016, the respondent could not have squared off the open position of the petitioner.

34. The Arbitral Tribunal had rendered a finding that it was neither contended nor could be imagined by the respondent that within a short span of 3 minutes, the position would have been much different than the one at 3.02 p.m. when the e-mail was sent by the respondent to the petitioner and thus there was no justification for suddenly squaring off the 10 open positions of the petitioner within three minutes of sending e-mail at 3.02 p.m. to the petitioner.

35. I am not inclined to accept the submission of Mr. Bhosale, learned counsel for the respondent that the e-mail sent by the respondent ought to have been considered as e-mail under Regulation 3.10 (a) and not under Regulation 3.10 (b).

36. This court in case of **Kritika Nagpal** (supra) has construed Regulation 3.10 (a) and 3.10 (b) of the Regulation (F&O Segment) issued by the National Stock Exchange of India Limited which were under consideration before two Tribunals below. It is held by this court that under the said Regulation, trading member can buy or sell derivatives contracts on behalf of the constituent only on the receipt of margin of minimum such percentage as the relevant authority may decide from time to time, on the price of the derivatives contracts proposed to be purchased, unless the constituent already has an equivalent credit with the trading member. This court after construing the Regulation 3.10(b) has held that in case of open sale position undertaken on behalf of the constituents, the Trading Member shall be at liberty to close out transactions by effecting purchases of derivatives contracts if the constituent fails to meet the obligation in respect of the open position within next trading day of the transaction having been executed on the F&O Segment of the Exchange for the concerned settlement period. In this case, the petitioner had not instructed the respondent to have any fresh transaction. Regulation 3.10 (b) providing for exercising the right to close out the transaction by the trading member on compliance of the conditions setout therein only had been attracted in the facts of this case.

37. Be that as it may, the respondent issued such notice of demand under Regulation 3.10 (b) and had granted time to the petitioner to deposit the margin money by 12th February, 2016 11 a.m. In my view, the Arbitral Tribunal as well as the Appellate Panel of Arbitrators were right in holding that the respondent ought to have waited for squaring off the 10 positions of the petitioner till 12th February, 2016 11 a.m. The judgment of this court in case of **Kritika Nagpal** (supra) squarely

applies to the facts of this case. I am respectfully bound by the said judgment. In case of ***Bonanza Commodities Brokers Pvt. Ltd.*** (supra) also similar view had been taken by this court while interpreting the relevant provision framed by the Multi Commodity Exchange of India Ltd.

38. Insofar as judgment of this court in case of ***HSBC InvestDirect Securities (India) Ltd.*** (supra) relied upon by Mr.Bhosale, learned counsel for the respondent is concerned, the facts before this court in the said judgment were totally different. The trading member had not squared off the open position of the constituent before expiry of the time prescribed in the notice for deposit of alleged shortfall of margin money. The said judgment delivered by this court was decided *ex-parte* and in absence of the respondent constituent. Be that as it may, the said judgment would not assist the case of the respondent and is clearly distinguishable in the facts of this case.

39. Insofar as the judgment of this court in case of ***Mrs.Money Nair*** (supra) relied upon by the learned counsel for the respondent is concerned, the said judgment does not apply even remotely to the facts of this case. The facts before the Division Bench of this court in the said judgment were totally different and are even otherwise are clearly distinguishable in the facts of this case.

40. Insofar as submission of the learned counsel for the respondent that the petitioner himself had tried to carry out the transaction on 11th February,2016 at about 1 p.m. and such transaction was declined on the ground that there was a shortfall in the margin money and thus the petitioner was fully aware of such shortfall of margin money in his

account is concerned, learned counsel for the respondent could not dispute that the Appellate Panel of Arbitrators has not considered the said alleged document while allowing appeal preferred by the respondent. This court cannot consider the documents which were not considered by the Appellate Panel of Arbitrators and to probe into the mind of the Appellate Panel of Arbitrators and supplant reasons in the arbitral award rendered in favour of the respondent on that ground. No cognizance of the said alleged document thus can be taken into consideration by this court at this stage in the petition filed by the constituent who had lost before the Appellate Panel of Arbitrators.

41. Insofar as the quantum of loss allowed by the Arbitral Tribunal is concerned, the said amount is awarded by the Arbitral Tribunal based on the loss of the petitioner resulting from squaring off the open position of the petitioner contrary to the Regulation 3.10 (b) and has been allowed on the basis of the documents produced by the respondent itself including contract notes.

42. In my view, the award rendered by the Appellate Panel of Arbitrators allowing the appeal filed by the respondent shows patent illegality and thus deserves to be set aside. I, therefore, pass the following order :-

(a) Arbitral award dated 18th January, 2017 passed by the Appellate Panel of Arbitrators in Appeal Arbitration Matter No.:F&O/M-0036/2016 filed by the respondent is set aside.

(b) Appeal Arbitration Matter No.:F&O/M-0036/2016

filed by the respondent is dismissed.

(c) The arbitral award dated 22nd September, 2016 passed by the Arbitral Tribunal in Arbitration Matter No.:F&O/M-0036/2016 allowing the claim made by the petitioner is upheld.

(d) In view of the order aforesaid, this court need not go into the correctness of the order dated 7th March, 2017 passed by the Appellate Panel of Arbitrators.

(e) Arbitration Petition No.404 of 2017 is allowed on the aforesaid terms.

(f) There shall be no order as to costs.

(R.D.DHANUKA, J.)