

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO.187 OF 2015**

Mukesh Mansukhbhai Kanani

....Petitioner

vs

Edelweiss Financial Advisors Ltd.

...Respondent

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Mr. J.M. Puranik, a/w. Mr. G.R. Sawant, for the Petitioner.

Mr. Shyam Kapadia, a/w. Mr. Kunal Parekh, i/b. Thakore Jariwala & Associates, for the Respondent.

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CORAM : S.C. GUPTE, J.**DATED: 13 MARCH 2019****(ORAL JUDGEMENT):**

. This arbitration petition challenges an award passed by Appellate Arbitral Tribunal of National Stock Exchange. By the impugned award, the tribunal directed the Petitioner herein, who was the constituent of the Respondent sharebroker, to pay to the Respondent a sum of Rs.15,89,399.69 together with interest. This sum was said to represent the dues owed by the Petitioner to the Respondent under a member client agreement for trading on the National Stock Exchange.

2. The relationship between the parties and the dues owed by the Petitioner to the Respondent at the foot of his trading account are not matters of dispute. What is disputed by the Petitioner, and on which the arbitral tribunal has held against him, is (i) maintainability of the arbitration reference on account of time bar and (ii) justifiability of the

Respondent's claim on account of the latter's breach of his obligations under the applicable regulations. It is submitted that the Respondent's claim was time barred, since it was made more than three years after the last entry in the trading account. Secondly, it is submitted that under Clause 3.11 of Part A of Capital Market Regulations of NSE (constituent in default), as explained by clarifications issued by the National Stock Exchange, the Respondent, as a trading member, was bound to sell the Petitioner's securities held by him by the fifth trading day from the date of pay-in, i.e. at T+5. It is submitted that had the Respondent complied with this obligation, no amount would have been due by the Petitioner to the Respondent in the trading account.

3. So far as limitation is concerned, the arbitral tribunal, in its award, has held that the last transaction in the account was admittedly of the trade executed on 3 November 2010 and it was also an admitted fact that the Petitioner herein had paid an amount of Rs.35 lakhs to the Respondent trading member on 4 November 2010. The arbitral tribunal observed that the period of limitation for the sake of the arbitration reference, as per the relevant provisions, would come to an end on 31 December 2019, i.e. three years after the end of the quarter, during which the last entry was made in the account. The arbitral tribunal held that since the arbitration reference was filed on 29 November 2013, the same was within time. No fault can be found with this assessment by the arbitral tribunal. The arbitral tribunal has correctly applied Article 113 of the Schedule to the Limitation Act to the facts of the case. The member client agreement between the parties indisputably shows that the Petitioner had settled for quarterly settlement of fund/securities. In

other words, the settlement of the account had to be on a quarterly basis. Since the last entry is made in the account in the quarter commencing from 1 September 2010 and ending on 31 December 2010, the settlement of the account *inter alia* based on such entry was due as at 31 December 2010 and, if that is so, the period of limitation available for invoking the arbitration agreement is upto 31 December 2013, i.e. for a period of three years when the right to sue accrues in accordance with Article 113. Learned Counsel for the Petitioner relies on the judgment of **State of Punjab vs. Gurdev Singh**¹ in support of his case on limitation. **Gurdev Singh's** case involved a challenge to dismissal from service. The Supreme Court held that the right to sue could be said to have accrued in favour of the employees concerned on the date of passing of the order of dismissal or on the date of rejection of departmental appeal/revision against such order. In the present case, the right to sue can be said to have arisen when the Petitioner failed to settle the account at the end of the quarter in which the last entry was made in the account. The suit, reckoned by that date, as noted above, was within time. The case of **Pankaj Goshal vs. Fortune Equity Brokers (I) Ltd.**², referred to by learned Counsel for the Petitioner, also does not help the Petitioner. It merely reaffirms the position that the period of limitation for reference of a dispute to arbitration commences from the same date on which the cause of action for institution of a suit arises. In **Pankaj Goshal's** case the trading member had sent a statement of account, which our court treated as a clear demand for payment. The court held that as, even according to the trading member, his right to demand payment arose on the date he sent the statement of account, the cause of action for

1 (1991) 4 Supreme Court Cases 1

2 ARBP/368/2003 dtd. 28/3/20015, Coram: D.K. Deshmukh, J.

claiming payment arose on that date; for accrual of such cause of action, it was not necessary that the constituent should dispute his liability in writing; non-payment itself amounted to refusal to pay. This statement of law has no bearing on the facts of our case. There is, thus, no infirmity in the impugned award so far as the arbitrator's view on limitation is concerned.

4. Coming now to the merits of the Respondent's claim, the only argument advanced by the Petitioner, as noted above, is that the Respondent was bound, under Regulation 3.11 of NSE Capital Market Regulations, to sell the securities of the Petitioner held by him (there being no dispute that the Respondent in fact was holding these securities) on the fifth trading day reckoned from the date of pay-in. Learned Counsel submits that as at this date, the close out price of the securities declared by the exchange was sufficient to satisfy the Respondent's outstanding claim and this price should be treated as the price, at which the securities should be deemed to have been closed out and, accordingly, credit should be given to the constituent, i.e. the Petitioner. The learned arbitrator has construed Regulation 3.11 to mean that the trading member was at liberty or had the requisite discretion to sell the securities of the constituent held by him but there was no mandatory requirement or obligation on the part of the trading member to do so. The arbitral tribunal was of the view that the trading member would not be dis-entitled to relief for not having resorted to sale envisaged in Regulation 3.11. This view of the tribunal is clearly a possible view of the particular regulation. The Respondent had relied

upon the case of **Nidhi Verma vs. Prabhudas Liladher Pvt. Ltd.**³ before the arbitral tribunal. That case involved Regulation 3.0 of Part-A of Futures & Options Segment of NSE, which has a similar provision as the regulation, with which we are concerned in the present case, namely, Regulation 3.11 of NSE Capital Market Regulations. Both regulations involve the expression that the trading member “shall be at liberty” to close out the transactions by sale of securities. Whilst interpreting Regulation 3.10, the Division Bench of this Court in **Nidhi Verma's** case noted that liberty to close out the transaction would involve an element of discretion in the trading member. The arbitral tribunal noted that though the reference in **Nidhi Verma's** case was to Regulation 3.10 of Futures & Options Segment of NSE, the principle of the judgment was applicable even to our case in respect of Regulation 3.11 of Capital Market Regulations of NSE. The tribunal observed that both regulations gave a right to sell to the trading member. The arbitrators were of the view that this right could not be said to be coupled with an obligation to sell when there are no corresponding instructions from the constituent. This is clearly a possible interpretation of Regulation 3.11. It cannot be termed as an impossible view or a view which no fair or judiciously minded person would take or a view which shocks the conscience of the Court.

5. Learned Counsel for the Petitioner submits that the clarifications issued by NSE in respect of Regulation 3.11 make it clear that in case the trading member fails to sell the securities for any reason whatsoever, the securities are deemed to have been closed out at the

3 2013 SCC OnLine Bom 323

close out price declared by the exchange for the fifth trading day from the pay-in day. In the first place, the clarifications issued by NSE are of 26 April 2012, that is to say, after the cause of action accrued in favour of the Respondent trading member in the present case. Secondly, and in any event, the clarifications do not suggest that sale of securities on or before the fifth trading day of the pay-in day is an obligation of the trading member. The clarifications are in respect of debit balances in the client's account and explain particularly their treatment vis-a-vis violations relating to funding and collaterals as margins. Be that as it may, even in the face of a provision such as the one referred to by the learned Counsel for the Petitioner, providing for a deeming close out price, does not rule out the interpretation of the regulation proposed by the arbitral tribunal. It is possible to say that this deeming price is to be treated for considering the loss, if any, on account of the close out, which shall be to the account of the constituent and not as an obligation to dispose of the securities not later than the fifth day of the pay-in date. The arbitral tribunal has held that the reference to T+5 should be limited as a provision for restraint of liability, if any, and should not be equated with the right to dispose of the securities; it does not bar a transaction at a later date. The arbitral tribunal was of the view that no constituent could assert that the trading member ought to first sell the shares, encash the proceeds and then claim the shortfall, if any. The arbitrators were of the view that if such a stand were to be adopted, it would tantamount to granting liberty to the constituent to commit breach of contract, leave the trading member to recover the pay-in obligations only by disposing of shares and claim only the shortfall, if any. The arbitrators observed that the right to sell the shares of the constituent may be considered as one of

the means of recovery by the trading member and not a mode of payment by the constituent for his purchase of shares. In other words, the arbitrators held the regulation to be an enabling provision and not a mandatory obligation of the trading member. This, as we have noted above, is clearly a possible construction of the regulation and does not merit any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

6. Accordingly, there is no merit in the arbitration petition. The petition is dismissed.

(S.C. GUPTE, J.)