

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	22.10.2019
Judgment pronounced on	30.10.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.796 of 2012

Ms.Sandhya Malhotra

... Petitioner

Vs.

1.M/s.Motilal Oswal Securities Ltd.

Palamspring Centre 2nd Floor,
Next to D.Mart, Link Road, Mald(w),
Mumbai – 400 064.

2.S.Subramanian

Presiding Arbitrator

Panel of Arbitrators

National Stock Exchange of India Ltd.

2nd Floor, Ispahani Centre,

Door No.123-124, Nungambakkam High Road,
Nungambakkam, Chennai – 600 034.

3.C.Rangamani

Arbitrator,

Panel Arbitrators

National Stock Exchange of India Ltd.

2nd Floor, Ispahani Centre,

Door No.123-124, Nungambakkam High Road,
Nungambakkam, Chennai – 600 034.

4.Ramanathan Subramanian,
Arbitrator, Panal Arbitrators,
National Stock Exchange of India Ltd.
2nd Floor, Ispahani Centre,
Door No.123-124, Nungambakkam High Road,
Nungambakkam, Chennai – 600 034.

... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 02.04.2009 passed by the Panel Arbitrators Mr.S.Subramanian, Mr.C.Rangamani and Mr.Ramanathan Subrmanian in Arbitration matter No.F and O/C – 0314 / 2008 in the matter of dispute between the Petitioner and the Respondents and consequently dismiss the Respondents claim petition and allow the counter claim made by the Petitioner.

For Petitioner : Mr.PL.Narayanan

For Respondents : Mr.P.V.Balasubramaniam
for M/s.BFS Legal for R-1

ORDER

The respondent in the Arbitration is the Petitioner herein. The Petitioner was a trader in securities both in the cash segment and in the Futures and Options(F&O) segment of the National Stock Exchange. This trading activity was carried out through the first Respondent herein, which

is a registered broker as per the applicable bylaws and regulations of the National Stock Exchange(NSE) and the Securities and Exchange Board of India(SEBI). In respect of the alleged short fall in margin requirements and Mark to Market(MTM) loss related requirements, the first Respondent herein resorted to squaring-off of the positions of the Petitioner in the F & O segment. By such squaring-off, adjustments were made. After making such adjustment, the first Respondent claimed the balance from the Petitioner and upon non-payment thereof, initiated Arbitration Proceedings as per the bylaws of the NSE. In the said Arbitration Proceedings, the first Respondent, by its claim statement, made a claim for Rs.14,73,022.82 from the Petitioner towards the outstanding debit balance of the Petitioner along with interest thereon at 18% per annum. By reply and counter claim dated 23.10.2008, the Petitioner denied the claim and made a counter claim for a sum of Rs.1,65,00,000/- towards the value of the Petitioner's securities along with interest thereon at 18% per annum. The first Respondent herein adduced documentary evidence and exhibited 8 documents as Exs.A1 to A8 and the Petitioner herein exhibited 6 documents as Exs.R1 to R6. Upon consideration of the pleadings, the Arbitral Tribunal framed three issues and, by Arbitral Award dated 02.04.2009(the Award), the Arbitral Tribunal disposed of the matter by allowing the claim of a sum of Rs.14,73,022.88 with interest thereon at 12% per annum from the date of the claim statement till the date of

payment. The counter claim was dismissed. The said Award is impugned in this Petition under Section 34 of the Arbitration and Conciliation Act, 1996(the Arbitration Act).

2.I heard Mr. PL.Narayanan, the learned counsel for the Petitioner, and Mr. P.V. Balasubramaniam, the learned counsel for the first Respondent.

3.The learned counsel for the Petitioner provided a brief outline of the nature of trading in the F & O segment. In specific, he pointed out that such trading is only permissible in specified lots. He further submitted that, unlike in the cash segment, wherein settlement is by way of payment and delivery, in the F & O segment, it is sufficient if the trader maintains margin money. He further submitted that depending on the nature of the derivative contract, losses and gains are calculated on a MTM basis and adjustments are made in the trading account of the trader. He also submitted that it is an established trade practice to receive and provide credit on receipt of cheques from the trader.

4.With regard to the specific facts of this case, he submitted that the Petitioner did not receive contract notes in respect of the trade in securities from the first Respondent herein. He further submitted that it

was unnecessary for the first Respondent to resort to squaring-off of the positions of the Petitioner on 22.01.2008. In fact, he submitted that the Petitioner did not receive any demand notice from the first Respondent with regard to the alleged short fall in margin money requirements or in respect of MTM losses. With specific reference to the alleged trading that was carried out for the purposes of squaring-off on 22.01.2008, he referred to Ex.R5, which is a communication dated 22.01.2008 from the Head, Corporate Affairs of the Bombay Stock Exchange(BSE). He pointed out that the said communication is to the effect that there were operational problems in the Derivative Trading and Settlement System Exchange(DTSSE) and that this problem was subsequently set right. Significantly, he pointed out that it is stated in the said communication that "consequently trading in the F & O segment of the exchange started late by 20 minutes from the scheduled time of 10.55 a.m." According to the learned counsel, the said Ex.R5, which is a vital document, was completely disregarded by the Arbitral Tribunal. In order to substantiate the submission, he referred to the relevant contract notes at pages 5 & 6 of the III – Volume of documents filed by the Petitioner and pointed out that the trade for the purpose of squaring-off allegedly took place between 11:06 to 12:54 on the relevant date, namely, 22.01.2008 and except for the last trade at 12.54 p.m., all the other trades were within the period when trading in the F & O segment had not commenced on

account of the operational problems referred to in Ex.R5. He also pointed out that contrary to requirements, the trade numbers are not mentioned in the relevant contract note. He next referred to the statement of the account issued by the first Respondent in respect of the trading account of the Petitioner (p.57 of Volume III of the typed set of papers) and pointed out that it is clear from the said statement of account that the cheque dated 21.01.2008 for a sum of Rs.11,50,000/- was not taken into consideration in the statement of account for the purpose of reckoning the short fall. He also pointed out that the said statement reflects that three cheques for a sum of Rs.12,00,000/- each were handed over on 21.01.2008 and submitted that the said cheques should have been taken into consideration for the purpose of determining margin short fall. With regard to the stop payment instruction relating to the said cheques, he submitted that such stop payment instruction was issued on 23.01.2008 in view of the unlawful squaring-off that had been done by the first Respondent on 22.01.2008. I put a question to the learned counsel for the Petitioner as to whether the details of trading in relation to the squaring-off were requested from the NSE. In response, he pointed out that the said details were requested for by letter dated 17.06.2008. He further admitted that the requested details were provided by NSE by reply dated 11.07.2018, which is at pages 23 to 25 of Volume I of the typed set of papers filed by the Petitioner. On the basis of the above

submissions, the learned counsel for the Petitioner submitted that the Arbitral Tribunal had disregarded material evidence and trade practice with regard to giving credit for cheques and, therefore, the Award is liable to be set aside. In support of these submissions, the learned counsel referred to the judgments, which are set out below along with context and principle:

(i) **MD. Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd (2004) 9 SCC 619**, wherein the Hon'ble Supreme Court held that the omission to take into consideration a relevant fact amounts to misconduct by the Arbitrators.

(ii) **International Airports Authority of India now known as Airport Authority of India vs. Hotel Leela Venture Limited, (2007) 109 BOM LR 1757**, wherein the Bombay High Court set aside the Award on the basis that the documentary evidence had not been considered by the Arbitral Tribunal.

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5. In response and to the contrary, the learned counsel for the first respondent submitted that the Petitioner was fully aware about the trading account details and e-mail account, which was specifically created for communication in relation to the said trading account. In this regard,

he referred to the letter dated 08.08.2006 from the first Respondent to the Petitioner wherein the said details are specified. With regard to Ex.R5, he submitted that the said document is a communication from the Head, Corporate Affairs of the BSE and that it is not an official communication. He further submitted that, by letter dated 11.07.2008, NSE confirmed and provided to the Petitioner details of trading that took place on 22.01.2008 in the F & O segment on behalf of the Petitioner and that this communication establishes beyond doubt that the NSE was operational and that the squaring-off trades did take place within the stated period on 22.01.2008. Therefore, he stated that the contention of the learned counsel for the Petitioner that trading was suspended during that time on 22.01.2008 on account of operational problems is liable to be rejected. He, thereafter, referred to the Award. In particular, he referred to paragraphs 7 to 9 of the Award. By referring to the said paragraphs, the learned counsel for the Petitioner pointed out that the Arbitral Tribunal duly considered the contentions of both parties and, thereafter, recorded the finding that the Petitioner had calculated the deficit without taking into account the margin requirement of Rs.69,44,740.55. If the said margin requirement is added to the MTM loss requirement of Rs.41,18,007/-, the Arbitral Tribunal concluded that the total shortfall of the Petitioner on 21.10.2008 would be Rs.55,35,026.70.

6.The learned counsel for the first Respondent further pointed out that the Arbitral Tribunal also took into consideration the submission of the three cheques for an aggregate value of Rs.36,00,000/- and the contention on the basis of the said cheques and concluded that this cannot be reckoned for purposes of meeting the margin and MTM requirements because the cheques were not honoured due to the stop payment instructions and one cheque for Rs.8 lakhs was not delivered at all. On the above basis, he submitted that the Arbitral Tribunal held that it is clearly proved that there was margin deficit and also non availability of funds to meet the MTM losses which had resulted in squaring-off of the positions. He also pointed out that the Arbitral Tribunal recorded that the learned counsel for the Petitioner/Respondent therein admitted that, on 21.01.2008, the Petitioner herein did not have funds in the bank account for the purpose of honouring the cheques for Rs.36,00,000/-. After referring to the said admission, the Arbitral Tribunal considered the submission of the Petitioner herein that she could have mobilized funds and honoured the cheques, if squaring-off had not been done on 21.01.2008, and rejected the said submission on the basis that the Petitioner herein had not made arrangements to top-up the bank balance and, on the other hand, did not have funds in the account on 21.01.2008. The learned counsel for the first Respondent, thereafter, referred to clause 2 of the Agreement between the Petitioner and the first Respondent which

deals with the payment of margin and enables the first Respondent to square-off outstanding positions without notice to the Petitioner/client if the Petitioner/client fails to make margin payment as demanded by the stock broker. By referring to the said clause, the learned counsel for the first Respondent contended that the squaring-off was done as per powers conferred on the stock broker by the said clause 2 and that, therefore, it is not liable to be interfered with by this Court. In this connection, he also referred to the pleadings of the first Respondent herein before the Arbitral Tribunal at Paragraph 3-k to the effect that the Petitioner herein was duly called and informed on 21.01.2008 as to the margin and MTM requirements in her account and also that the Petitioner herein had instructed the first Respondent to square off/sell her shares. On the basis of the above submissions, the learned counsel for the first Respondent concluded by stating that the Arbitral Tribunal duly examined the evidence on record and concluded that the claim for short fall after squaring-off is liable to be paid by the Petitioner to the first Respondent. Therefore, he submitted that there are no infirmities in the Award so as to warrant interference under Section 34 of the Arbitration Act. In support of this submission, the learned counsel referred to the judgments in **Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49** and **The State of Jharkhand and Others vs. M/s. HSS Integrated SDN & Another, Special Leave To Appeal (C) No.13117 of 2019, judgment**

dated 18.10.2019, and concluded by emphasising the limited scope for interference with an arbitral award especially with regard to appraisal of evidence and construction of contract.

7.By way of rejoinder submissions, the learned counsel for the Petitioner handed over a synopsis of submissions. In particular, he made three submissions. First that the trade in the securities of ITC and RNRL were not taken into consideration by the first Respondent while calculating the margin and MTM requirements. Secondly, the cheque for Rs.11,50,000/- was not taken into account while computing margin requirements and thirdly that the three cheques for an aggregate sum of Rs.36,00,000/- were not taken into account contrary not only to trade practice but also to the regulations of NSE which require that cheques that are received from the client, recorded in the books of the trading member on or before the transaction day(T)/T+1 and deposited by the trading member by T+1/T+2 shall be considered if cleared within T+5 days. On the contrary, in the instant case, the cheques were handed over by the Petitioner to the first Respondent on 21.01.2008 and the squaring-off was done on 22.01.2008 without waiting until 23.01.2008, which is T + 2. In the sur-rejoinder, the learned counsel for the first Respondent pointed out that the Petitioner did not adduce any evidence of trade practice with regard to giving credit for cheques immediately upon receipt. He further

submitted that the regulations that are annexed to the synopsis by the Petitioner may be an updated regulation that does not apply to this dispute. He further submitted that the trade in the securities of RNRL and ITC were taken into consideration before computing the margin requirement of Rs.69,44,740.55, as explained in the sur-rejoinder before the Arbitral Tribunal at Paragraph 3-q at page 72 of Volume 1 of the typed set of papers. His last submission was that the Petitioner had taken an inconsistent stand with regard to the squaring-off. In specific, he submitted that, on the one hand, the Petitioner contended that the squaring-off was done, without the Petitioner's knowledge and consent, allegedly when the NSE was not functioning due to operational problems between 10.55 a.m. and 11.55 a.m. on 22.01.2008, whereas, on the other, the Petitioner stated that she issued stop payment instructions because of the squaring-off on 21.01.2008. In effect, the submission of the learned counsel for the first Respondent was that unless the Petitioner was fully aware about the squaring-off on 21.01.2008, the Petitioner could not have issued stop payment instructions because of the squaring-off.

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8.The records were examined and the oral and written submissions of the learned counsel for both sides were considered carefully. The Award discloses that the contentions of the Petitioner with regard to the margin requirements and MTM requirements were duly

considered by the Arbitral Tribunal. After duly considering the evidence with regard to the margin requirements and MTM requirements, the Arbitral Tribunal recorded in Paragraph 8 that, as on 21.01.2008, after taking into consideration the margin requirement and MTM loss requirements, the total shortfall of the Petitioner herein was Rs.55,35,426.70. In effect, the margin requirement was Rs. 69,44,740.55 and the MTM loss requirement was Rs. 41,18,007, which aggregates to Rs. 1,10,62,747.55. After giving credit to the credit balance of Rs.55,27,721, the outstanding would be about Rs.55.35 lakhs. On the basis of the said factual finding, the Arbitral Tribunal concluded that it is clearly proved that there was margin deficit and non availability of funds to meet the MTM Loss, which resulted in squaring-off of the positions of the Petitioner.

9.As regards the contention that the trades with regard to squaring-off could not have taken place at the stated time on 22.01.2008, the communication dated 16.05.2008 from the NSE enclosing details of the transactions, with trade time, trade number, etc., is a complete answer. With regard to the submission of three cheques for the aggregate value of Rs.36,00,000/-, the Arbitral Tribunal adverted to the admission by the learned counsel for the Petitioner that sufficient funds were not available in her Bank account on 21.01.2008 and, thereafter, entered the

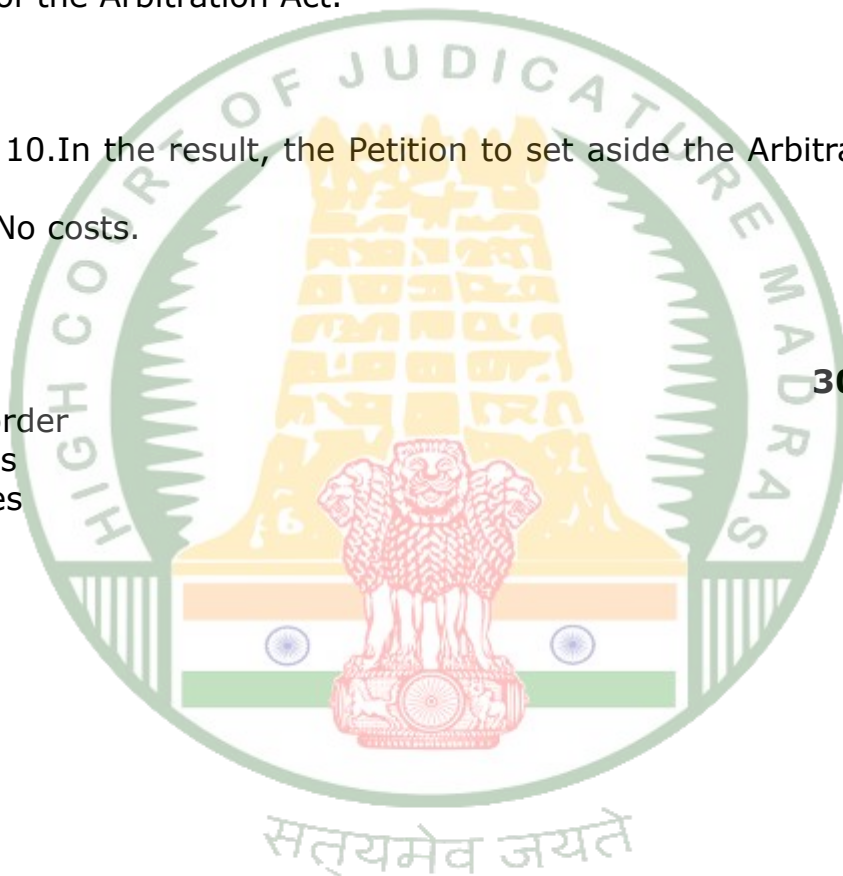
finding that in view of the fact that the Petitioner had not topped-up the account on 22.01.2008, the argument that the Petitioner would have made arrangements for funds so as to ensure that the cheques are not dishonoured cannot be countenanced. The contention of the learned counsel for the Petitioner that the cheque for Rs.11,50,000 was not reckoned in the Ledger Account does not appear to be correct on examining the said Ledger Account at p.51 of Volume III of the typed set of papers. Even the contention on the basis of the NSE regulations, in this regard, cannot be accepted because the said regulations are targeted at members, such as the first Respondent herein, and the object of the regulation is to ensure that only realised cheques should be reckoned for margin requirement purposes. Thus, these conclusions of the Arbitral Tribunal are based on a reasonable and fair appraisal of the evidence and it cannot be said that vital or even material evidence was disregarded. Therefore, the judgments cited by the learned counsel for the Petitioner are inapplicable to this case. Hence, I do not find reason to interfere with the said findings. Similarly, as regards the counter claim, the Arbitral Tribunal held that the counter claim would be maintainable only if the claim is rejected because the counter claim proceeded on the assumption that the squaring-off is erroneous and that if squaring off had not been done, the Petitioner would have had about Rs.90,00,000/- in her margin account and would have made a profit of Rs.75,00,000/- by selling

positions at a later point of time. On account of the Arbitral Tribunal holding that the claim by the first Respondent herein is valid, the counter claim of the Petitioner herein was rejected. Once again, such rejection is on the basis of valid reasoning which does not warrant interference under Section 34 of the Arbitration Act.

10. In the result, the Petition to set aside the Arbitral Award is dismissed. No costs.

Speaking order
Index: Yes
Internet: Yes

30.10.2019



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SENTHILKUMAR RAMAMOORTHY, J.
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