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

ARBITRATION PETITION (L) NO. 329 OF 2020

WITH

INTERIM APPLICATION NO. 1 OF 2020

J. M. Finanial Services Limited ...Petitioner.

Vs.

Preeti Pritam Nagarkar ...Respondent.

Mr. Sandeep Parikh i/b Ms. Megha Keluskar, Advocate for Petitioner.
Mr. K. P. Anil Kumar, Senior Advocate with Mr. Amit Saple with Ms. Priyanka Kumar, Advocate for respondent.

CORAM : G.S. KULKARNI, J.

DATE : 13 MARCH 2020

:ORAL JUDGMENT:

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Act") of the Petitioner-J.M. Financial Services Limited, who is a trading member and a broker registered with the National Stock Exchange and the Bombay Stock Exchange. The respondent was the constituent of the petitioner from October 2013 who had initiated trading in cash segment. The

respondent was undertaking transactions in securities through a sub-broker of the petitioner, one Mr. Ram Nimbalkar.

2. The arbitration in question held under the Rules and Regulations of the National Stock Exchange (NSE) came to be initiated by the respondent by making a claim against the petitioner for an amount of Rs. 16,37,626.32 which consisted of Rs. 12,60,072.60 towards value of the shares held by her on 31 August 2014 and valued as 2 May 2018 including benefit of Rs.54506/- towards loss of cumulative dividend and Rs. 323047.72 towards brokerage charged by the petitioner. The case of the respondent in the arbitral proceedings was of the petitioner indulging into unauthorized trading in the account of the respondent as held with the petitioner, between the period 1 September 2014 to 10 December 2015.

3. The respondent in her statement of claim contended that she had acquired a good port folio of blue chip scripts till 31 August 2014 till which time her account was operated by her. She contended that however after 31 August 2014 she was unable to do any trading for multiple reasons and most importantly because of the severe illness of her mother, who ultimately expired on 13 August 2017 and an equally serious medical condition of a mental disorder of her husband and his

hospitalization. In this regard averments were made in the statement of claim.

4. The respondent contended that in December 2017 it came to her knowledge that the petitioner has indulged in unauthorized transactions in her account from September 2014 to December 2015, which were undertaken without her instructions and consent, and taking the advantage as to how she was entrapped in her family problems and that she was abstaining from any dealings. She complained that the petitioner sold shares which were held by her prior to September 2014 without her knowledge and instructions, which had caused her substantial losses. She stated that large number of transactions were undertaken during this period. She contended it was impossible to conceive that she had undertaken these transactions in the absence of any material whatsoever to show that the transactions were at her behest. She contended that infact material was available which showed that these were transactions undertaken purely at the behest of the respondent. She further contended that there was huge debit balance shown in her account and that during this disputed period the petitioner never demanded/claimed amounts in that regard from her. She contended that it was surprising as to how such a huge debit balance in her account could be accumulated which was never a situation prior to September 2014. She also contended

that no broker can allow such debit balance to remain outstanding in respect of any of his constituent. The respondent had raised specific contention that all these transfers of shares from her holding were undertaken without any instructions and consent, as also the petitioner kept buying and selling shares and since there was no payment which was made and hence, there was no delivery of shares in relation to these transactions. She further contended that a quarterly settlement was never undertaken as per the SEBI Regulations during the disputed period and in these circumstances petitioner and his employees took advantage of this situation and engaged themselves in large trading activities by utilizing her account without her knowledge much less on any instructions and consent from her. She further contended that by indulging into these activities the petitioner earned huge brokerage amount of Rs. 323047.72 from these unauthorized transactions.

5. The petitioner appeared before the arbitral tribunal and opposed the claim as made by the respondent. The principal contention of the petitioner was that the respondent never raised a grievance upto December 2017 when she for the first time claimed that she had received knowledge of illegal trading in her account. The respondent contended that in regard to all the transactions as objected by the respondent, proper mechanism was followed and from time to

time intimation by SMS on mobile phones were sent, for any grievances to be addressed. The petitioner has contended that the respondent never raised any objection in respect of the genuineness of the transactions as also no objections were raised on the SMS and e-mails sent to her. The petitioner also contended that there was certain investigation going on against the respondent's husband by the CBI. The petitioner has contended that there were also some transcripts of voice recording between the agent Mr. Ram Nimablkar and the respondent. Shortly, the case of the petitioner of the respondent being fully aware of all these transactions hence, her claim in the arbitral proceeding was not maintainable.

6. As per the bye laws of the NSE initially a sole arbitrator adjudicated the arbitral reference. Considering the rival contentions and evidence on record, the learned sole arbitrator came to a conclusion that the case of the respondent was required to be accepted, for the reason that the petitioner had not raised any demand against the respondent on the huge debit balance in her account, which was seen from the statement "ledger balance and collateral available" as submitted by the petitioner. The petitioner also confirmed and admitted of having not raised any demand against the debit balance at any time during the disputed period. It was also observed that the value of collateral securities as per the statement

was much less as compared to the debit balance on the respondent's account during the entire period of dispute. The learned sole arbitrator observed that these circumstances created a serious doubt as to which broker will allow such a huge debit balance to remain outstanding on a constituent's account and that too of a constituent who does not have sufficient collateral securities/net worth to meet the debit balance. It was also noticed that the petitioner was not transferring the shares to the applicant's beneficiary account after each purchase as specified by the exchange, but was holding in the pool account for easy sale later on. Considering these facts the learned sole arbitrator observed that the exchange needs to take necessary action against such member (petitioner)who are indulging in such activities.

7. In regard to the case of the petitioner of e-mails and SMS of the transactions being forwarded to the respondent, it was observed that these e-mails/SMS were subsequent to the pre-trade and post-trade confirmation and that mere sending of the contract through e-mail and SMS was not the only duty and responsibility of the broker, especially when the same were either not received or read or not delivered. This coupled with the fact that the petitioner never raised any demand for the purported large outstanding amount from the respondent as also never tried to find out whether respondent had received the contract knowledge or not, since the debit balance in her

account was huge. The findings of the learned sole arbitrator relevant for this purpose are required to be noted, which read thus:-

> "The respondent's claimed "placing the order is not the only evidence to decide the validity of transactions by completely ignoring all other evidence" it-self gets defeated considering the following facts on which respondent failed to act as per Rules, Regulations and Bye-laws of the Exchange:
>
> A. No production of corroborative proof for pre-trade instructions including voice recording or phone details during period of dispute.
>
> B. No receipt and payments from and/or to the applicant by respondent in spite of huge debit in applicant's account during period of dispute.
>
> C. Non transfer of shares as specified by exchange rules and regulations in the account of the applicant during period of dispute except few, since holding changed during period of dispute
>
> D.No demand of outstanding amount from applicant in spite of short fall of securities continuously for disputed period.
>
> E-Non-payment of margin to the exchange from clients account during period of dispute.
>
> F-Voluminous transactions in spite of inability of the applicant to trade during the period of the illness of near and dear ones of the applicant.
>
> G. The respondent presumptions for exchange and CDSL sending the email and SMS cannot be considered in absence of any corroborative proof.
>
> The cases referred by the respondent with reference to sending the contract notes thru registered email is the confirmation of the trades carried out in the account of applicant, is not acceptable since the basic point of placing the order by the applicant could not be proved with corroborative documents and pleadings.
>
> Considering the circumstantial evidence and events happenings as discussed above, I am of the opinion that the applicant's claim be accepted for unauthorized trades in her account. This also stand valid under the principles of natural justice.
>
> The respondents have admitted that the shares held by the applicant in her demat account with the respondent since 10th December 2015 are still lying as it is as on 2nd May 2019. However, while going thru the records of the movement of shares and holding statement as on 31.03.15, 31.03.16 and 02.05.19 submitted by respondent. It is found that there were change in holding of shares on all two occasions, i.e. from 31.03.15 to 31.03.16 and from 31.03.16 to 02.05.19 proves that there transactions during this period also have taken place, though refused by the respondent."

8. On the above findings, learned sole arbitrator partly allowed the claim as made by the respondent as under:-

> (A) The claim of the Applicant is partly allowed from her prayer.
> (B) Respondent is directed to pay Rs. 9,71,796.60 Ps to the Applicant along with interest @ 18% from the date of filing the application till realisation.
> (C) No Order as to costs.
> NSEIL is directed to file one copy of the Award/Order which is engrossed in triplicate with requisite non-judicial stamp and forward one copy each to the Appellant and Respondent and one copy to be retained with NSEIL for record."

9. The petitioner being aggrieved by the award passed by the learned sole arbitrator approached the three member appellate arbitral tribunal as constituted under the Rules and Regulations of National Stock Exchange. Before the arbitral tribunal an application came to be moved on behalf of the petitioner titled as "application for producing voice recording and transcripts" as contained in a Compact Disc. The prayer was that the said transcript be taken on record. This according to the respondent was a belated attempt to introduce fresh evidence and that too before appellate arbitral tribunal.

10. The appellate tribunal considering the rival contentions as also the evidence on record found no merit in the case as urged on behalf of the petitioner. The appellate tribunal accordingly, confirmed the award as passed by the learned sole arbitrator dismissing the appeal of the petitioner, however, with a modification that 18% interest which was awarded by the sole arbitrator, be modified to 9% per annum. The

relevant observations of the appellate arbitral tribunal and the operative award as contained in paragraph 11 and 12 which reads thus:-

> "11. There is nothing in the evidence on record to show that the Respondent had placed the order for the trades that were executed in her account. The Appellant stated that it did not have that evidence to prove that the disputed trades were executed only after the placement of order by the Respondent. However, it was asserted at the time of oral hearing that SEBI guidelines only put the obligation on the trading member to send ECN and keep a record. There was no obligation or requirement to get OK or confirmation from the client. In case a transaction was without instructions, the client should raise the objection on receipt of the SMS and ECN. The respondent relied on the judgment of Bombay High Court in Bharat M N Vs. Satish Ashok Sabni (arbitration petition no. 43 of 2002) in which it was held that the arbitrator was bound to consider all the transactions which were supported by contract notes. On the other hand, the Counsel for the Respondent referred to Regulation 3.2.1 of NSE cash segment which cast a regulatory obligation on the Trading Member to obtain confirmed order instructions before placement of the order and to keep the records or document of the same. He also referred to the Bombay High Court Judgment dated 9th June 2015 in Kaberi Mandal Vs. BMA Commodities in which the Court rejected the contention that even if there was noncompliance by a member of the bye-laws or the directive issued by the exchange, it would not invalidate the alleged transaction and that a trading member having carried out any trade in violation of such bye-laws or regulation, cannot make any claim or debit any amount to the account of the constituent in respect of such unauthorized trade. The Bombay High Court judgment referred to by the Appellant is, therefore, clearly not applicable in the present case. In our considered opinion, the Lower Tribunal had rightly held that the transactions executed during the disputed period that is from 1st September 2014 to 10th December 2015 were unauthorised and therefore the trades needed to be deleted from her account. Further it was noticed that in spite of large number of transactions, there were no pay ins and pay outs during the whole of the disputed period and the Appellant has not denied the finding of the Lowere Tribunal that the accounts of the respondent were not settled on monthly or quartelry basis as also that the shares purchased were not transferred to the Demat account of the respondent and that she did not have adequate collaterals to meet the debit balance. These facts cannot be ignored as the additional factors for coming the conclusion about the legality or the validity of the disputed trades. While there may have been a very long delay on the part of the respondent in seeking redressal in the arbitration proceedings at NSE for the unauthorized trades in her account, but that by itself cannot be a ground for denying her the rightful reliefs and in case such delay has not created any equities in favour of the Appellant. We, therefore, find no merit in the appeal dated 19th July 2019 preferred by M/s J M Financial Services and dismiss the same. However, having regard to the facts of the case, the order for payment of interest @ 18% from the date of the

arbitration application till payment is does not appear to be justified. It is observed that there was no agreement between the parties regarding the rate of interest. Therefore, in the light of the new provisions of sub-section (7) of Section 30 of the Arbitration and Conciliation Act, 1996, in our opinion, the interest of justice would be met if the Appellant is directed to pay interest only at 9% per annum from the date of this Award.

12. In view of what is stated above, we do not find any merit in the appeal dated 19th July, 2019 preferred by the Appellant and dismissed the same and pass the following Appellate Award.

1. The appeal dated 19th July 2019 filed by the appellant is dismissed and the Award dated 21st June, 2019 passed by the Lower Tribunal is affirmed. Therefore, instead of 18% p.a. the Appellant will pay Rs. 9,71,796.60 ps to the Respondent along with interest @ 9% from the date of this Award till the date of payment.

2. There is no order as to the costs.

3. The Award is signed and issued in three originals, one of each of the parties and one for the record of the National Stock Exchange of India Limited (NSE)."

11. Mr. Parikh, learned counsel for the petitioner in assailing the concurrent findings as arrived at by both the forums below has made extensive submissions. The submissions are however, similar to what was contended before the arbitral tribunal. Mr. Parikh's contention is that both the awards completely overlook the evidence on record, which depicted that the respondent had sufficient knowledge of the transactions which were undertaken from her account from 1 September 2014 to 10 December 2015. Mr. Parikh has drawn my attention to this knowledge of the respondent contending that the petitioner had placed on record ample details of the SMS, emails, etc., which were sufficient notice to the respondent of the transactions as undertaken by the respondent in her account. It is his submission that impugned awards are thus, required to be held to be illegal as material evidence is completely overlooked by the arbitral tribunal(s).

He submits that findings as recorded by the arbitral tribunal are, therefore, required to be held to be perverse. Mr.Parikh would contend that the respondent having sufficient knowledge and information in regard to the transactions which also clear from the fact that she provided for details of the transactions in the income tax returns and this was clear from her written submissions as made before the appellate tribunal. In this context, Mr. Parikh would refer to paragraph 4-C of the written statement of the respondent.

12. The next contention of Mr. Parikh is that the findings of the appellate tribunal are required to be held perverse also on the ground that the application as made by the petitioner to place on record the transcripts of the voice recording came to be rejected by the appellate tribunal.

13. Mr. Parikh then has contended that during the relevant period, there was no need for the petitioner to maintain any written record in relation to the transactions in as much as it was for the first time that the SEBI by circular dated 22 September 2017 had made it mandatory to have instructions in writing and thus, there was no requirement prior to the circular to have any writing in regard to any transaction which would be held between the constituent and trading member. To support this contention that such a mandate came to be also

recognized by the Circular dated 22 September 2017. Mr. Parikh has referred to a judgment dated 13 May 2019 of the Division Bench of Calcutta High Court dated 2 July 2017. There are no other points as urged by Mr. Parkh.

14. On the other hand, Mr. Anil Kumar, learned counsel for respondent submitted that both the impugned awards answer all the points which are urged by Mr. Parikh as these are the very issues which are raised before the arbitral tribunal which were considered on facts/evidence and stood rejected at both the levels of the arbitral process. He would submit that this is a clear case in which many unauthorized transactions were undertaken in the account held by the respondent with the petitioner. He would submit that none of the transactions which were objected by the respondent and as undertaken by the petitioner during the relevant period was at the behest of the respondent and or with the consent of the respondent. He submits that accordingly, a rightful claim was made before the arbitral tribunal qua the loss suffered by the respondent. The respondent's claim being tested on the evidence, the same came to be granted by the learned sole arbitrator and confirmed by the arbitral tribunal. My attention is drawn to the various findings by both the forums disbelieving the case of the petitioner. Mr.Anilkumar would accordingly submit that the petition be dismissed.

15. I have heard learned counsel for the parties. I have perused the awards of the sole arbitrator as also of the appellate tribunal with their assistance. I have also perused the relevant documents.

16. It is not in dispute that the respondent held a trading account with the petitioner. There is also no material to disbelieve and/or to attribute any perversity to the findings as recorded by the learned sole arbitrator that there was no material placed on record which would show that the respondent had authorized the petitioner to undertake the large number of transactions, as undertaken in her account between the period from 1 September 2014 to 10 December 2015. In fact Mr. Parikh has conceded to the fact there were no such instructions in writing or there was no other material which would show such instructions to the petitioner to make such transaction. It also needs to be observed that both the learned arbitrators and also the appellate arbitral tribunal observed that it was difficult to conceive a situation that the petitioner could keep the debit amounts outstanding/due from the respondent for such substantially long period and permit to maintain such debit balance. Further it was difficult to conceive that despite such existing debit balance such large trading could be permitted or could be undertaken in the respondent's account. The arbitral tribunal has noted that inspite of such large number of transactions, there were no pay in's and pay out during the

whole disputed period and more particularly that the accounts of the respondents were not settled on monthly or quarterly basis as also the shares purchased were not transferred to the Demat account of the respondents as there were no adequate collaterals to meet the debit balance. These are the findings of fact which are recorded by both these forums below. These findings of facts have remained undisputed by the petitioner.

17. In the light of the above findings, it is difficult to accept Mr. Parikh's contentions which is nothing but an argument in desperation. There was no material to believe the petitioner's case that the respondent had ordered these transactions, or that the respondent had knowledge of these transactions. The question however, was not merely of any knowledge but as to whether such transactions were undertaken on the behalf of the respondent and at her instance. None of the arguments of Mr. Parikh would persuade me to disbelieve the findings of facts which have arrived by both forums. In the absence of any material much less any acceptable material which would go to show that infact the transactions for the period in question were at the behest of the respondent, it can not be said that the findings of the arbitral tribunal(s) are perverse and/or contrary to the evidence on record. The petitioner never felt it appropriate to examine his sub-broker Mr.Nimbalkar who was sought to be examined before the

appellate arbitral tribunal and in my opinion rightly rejected being a belated attempt and that too to merely place on record the transcript of his voice recording which was not legally relevant. The fact remains that there was no material whatsoever brought on record by the petitioner to indicate that these transactions were infact were transactions undertaken by the respondent and they were at her request. Further, even to deal with the shares/securities which were held by the respondent and which were acquired prior to the disputed period, there was no authorization whatsoever from the respondent and as such loss was caused to the respondent on account of such unauthorized acts of the petitioner in dealing with these shares as clearly recognized by the both the forums.

18. In the facts of the present proceedings by Mr. Parikh's reliance on the decision of the Division Bench of Calcutta High Court, in my opinion, is not well founded. The facts remains that in the said case as observed by the Division Bench in paragraph 25 it was proved in the arbitral proceedings that the respondent in the said case authorized the transactions. The facts of the present case are absolutely in variance wherein there is no material to show any authorization by the respondent in favour of the petitioner to deal with the such huge quantity of shares.

19. In view of the above discussion, in my opinion, no case is made by the petitioner for this court to exercise jurisdiction under Section 34 of the Arbitration and Conciliation Act and hold that the award(s) are patently illegal or suffers from any illegality so as to be set aside any of the limited grounds available under Section 34 of the Act.

20. The petition is accordingly dismissed.

21. Interim application would also not survive. It is accordingly, dismissed.

22. No costs.

sd/-
[G.S. KULKARNI, J.]