IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2020

C O R A M

THE HONOURABLE Ms.JUSTICE P.T.ASHA

O.P.Nos.461 and 511 of 2011

O.P.No.461 of 2011:

Religare Broking Limited,
D3, P3B, District Centre,
Saket,
New Delhi – 110 017
(Trading Member) ...Petitioner/Appellant

(Amended as per order dated 12.03.2018 in A.No.1894 of 2018)

-Vs.-

1.Ms.Tarkeshwari Maudgil ...1st Respondent/Respondent

2.Justice S. Jagadeesan,
Mr.Sridharan Krishnamurthy and Ms.PS Prema,
Arbitrators, Appellate Arbitrators Panel,
National Stock Exchange of India Limited,
II Floor, Ispahani Centre,
Door No.123-124, Nungambakkam High Road,
Chennai – 600 034. ...2nd respondent

O.P.No.511 of 2011:

Ms.Tarkeshwari Maudgil ...Petitioner

vs.

1.Religare Broking Limited,
D3, P3B, District Centre,
Saket,
New Delhi – 110 017

2.Mr. Justice S.Jagadeesan,
C/o.NSEIL, II Floor,
Ispahani Centre,
Door No.123-124, Nungambakkam High Road,
Nungambakkam,
Chennai – 600 034.

3.Sridharan Krishnamurthy,
C/o.NSEIL, II Floor,
Ispahani Centre,
Door No.123-124, Nungambakkam High Road,
Nungambakkam,
Chennai – 600 034.

4.Mrs.P.S. Prema,
C/o.NSEIL, II Floor,
Ispahani Centre,
Door No.123-124, Nungambakkam High Road,
Nungambakkam,
Chennai – 600 034. ...Respondents

(Amended as per order dated 12.03.2018 in A.No.1895 of 2018)

Prayer in O.P.No.461 of 2011: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the impugned Award dated 06.04.2011 passed by the 2nd respondent in Appeal (A.M).No.F&O/C-0025/2010.

Prayer in O.P.No.511 of 2011: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Arbitral Award dated 06.04.2011 passed by the learned Arbitral Tribunal.

For petitioner	:	M/s.R.Sunil Kumar in both petitions
For Respondents	:	M/s.R.Lakshmi Ratan for R1 in both petitions

COMMON ORDER

Since both the petitions arise out of a Common Award this Court is also proceeded to pass a Common Order in the two petitions.

2.The claimant has challenged the Award in O.P.No.511 of 2011 and the 1st respondent has challenged the same by filing O.P.No.461 of 2011.

3.The parties are referred to herein in the same ranking as before the Arbitral Tribunal.

4.The facts in brief which are necessary to dispose of the two petitions are as follows:

The claimant had engaged the services of the respondent for trading in shares and investing in securities and other instruments under an Agreement dated 16.07.2007 (hereinafter referred to as the Member-Client Agreement). The claimant frequently travels out of Country on many occasions travelled for a considerable period of time. She would contend that the instructions for trading was always through e-mail or phone with the respondents representatives. The claimant was dealing both in cash as well as trade derivatives and it is a case that on account of failure on the part of the respondent representatives to inform her about the margin shortfall in her account she had sustained loss. That apart, the claimant has also accused the respondent of their unauthorised transactions which are also resulted shortfall and therefore, she had filed a claim for recovery of a sum of Rs.10,50,000/- for the loss suffered due to wrongful squaring off of positions held by the claimant because of margin shortfall in claimant's account and towards unauthorised transaction carried out by the respondent in the claimant account and Rs.5 lakhs towards damages for breach of trust and had also sought for 18% of interest on the amount, apart from claiming a sum of Rs.75,000/- towards arbitration costs.

5.The claimant and the respondent had entered into the Agreement and as per some of the salient features of the Agreement, it is seen that the respondent had been appointed as a claimant's agent and was required to buy and sell shares on the specific instructions of the respondents through e-mail to the respondent representatives. The Agreement enjoined the respondent to send a trade confirmation slip by E-mail within the time specified to the claimant and in case, this trade was unauthorized the claimant could raise objections on those transactions. Once an objection was raised the respondent was duty bound to clarify the objections raised. The Agreement further provided that the respondent would co-operate in redressing the grievances of the claimant with reference to such transactions routed through it and objections for bad delivery of shares, etc., The Agreement further stipulated that the claimant agreed that the conversations between the respondent or their representatives, be recorded and that such recording can be made use of by the respondent when required. The Agreement further provided that any dispute between the parties should be resolved through the intervention of the NSE subject to its Bye-laws and Regulations.

6.The claimant would further submit that while she was trading there was a shortfall in the margin that she was supposed to maintain. In the meanwhile, the claimant had also sold some of her positions worth of $.72,045.42 and on 17.10.2007, she had bought 12 lots of NIFTY Futures and on 18.10.2007 she had sold 6 lots but even then she was not kept apprised of the fact that there was a shortfall in the margin account. She further contended that the respondent ought to have squared off her account on the very same day i.e., 18.10.2017. However, the respondent had squared off the account only on 19.10.2017 when the value of the shares had come down. Further, the squaring off has taken place without notice to her.

7.The claimant submitted that the unauthorised transactions had taken place on 24.10.2007, 02.01.2008, 14.01.2008 and 15.01.2008. It is her further case that these unauthorized transactions which were purchase of shares had led to a margin shortfall and squaring off of unauthorised buys resulted in a loss to the claimant. The claimant would submit that the respondent had adopted unethical practices. It is also her further case that despite her request for clarifications, the respondent had not come forward to satisfactorily clarify the same.

8.In view of the above, the claimant had requested the NSE grievances Redressal Cell by E-mail dated 20.07.2007, 02.01.2008 to provide assistance. The respondent had submitted their reply dated 11.07.2008 along with the documents in response to the claimant's letter dated 04.04.2008. The claimant would further submit that the respondent had taken contradictory stands which did not inspire confidence and consequently, she was constrained to initiate the arbitration proceedings.

9.The respondent had submitted a reply *inter alia* contending that the complaint was barred by limitation as per the provisions of Chapter XI Clause 3 of the Bye-laws of the NSE. Apart from the above, the respondent had further contended that the applicant had in her complaint clearly submitted that she was aware of the margin shortfall in her account for which she had sold her positions worth a sum of Rs.72,000/-. The respondent would state that on 18.10.2007 the claimant had logged in and traded as a result of which the margin increased. When the claimant was Online she could have taken note of the margin shortfall which is displayed on the Web Page. There was a margin shortfall on 17.10.2007 as well as on 18.10.2007. Though the claimant was aware of the margin shortfall, she had not taken steps to replenish the same and therefore, on 19.10.2007, the respondent had to step in and reduce the shortfall by squaring off the account.

10.As regards the unauthorised transaction, the respondent would contend that each and every transaction that has taken place on behalf of the claimant was only on her express instructions and the claimant who has not lodged a complaint immediately is now trying to make a claim over a non existent issue.

11.The learned Arbitrator on considering the evidence on record and also taking note of the trade customs and usage dismissed the claim of the petitioner insofar as it related to unauthorised transactions by holding that the transcript of the audio produced on the side of the respondent would clearly prove that the transactions have been initiated only on the specific instructions of the claimant herself.

12.As regards the margin shortfall the learned Arbitrator had observed that the claimant's contention that the respondent was under an obligation to notify the margin shortfall is without any basis. The learned Arbitrator had extracted the provisions of clause 40(b) of the Member Client Agreement which has been marked as Ex.C.1 the clause in question clearly shows that the onus is on the client (in the instant case, the claimant) to ensure that the margin/security is maintained with the stock broker in the form and manner required. The clause further details that in case of a short fall, the client whether or not the stock broker inmates the shortfall, should make necessary arrangement to replenish the same immediately. The learned Arbitrator had also observed that the claimant had come to know about the margin shortfall on 18.10.2007 and she ought to have topped her account. The learned Arbitrator however observed that the respondent is liable to pay a sum of Rs.2,36,675/- to the claimant since the respondent had not taken any steps to alter the position of the respondent on 18.10.2007, when there was already a margin shortfall in the account of the claimant. The learned Arbitrator had given a detailed Chart showing the price of the shares sold on 18.10.2007 and its price on 19.10.2007 which would clearly demonstrate that by delaying the sale by a day, the price of the share has drastically fallen and therefore the sale had fetched only a sum of Rs.2,36,675/-. The Arbitrator held that it is not only the claimant but also the respondent who should take steps immediately considering the volatile nature of the market vis-a-vis the share price. It is challenging the said Award both the parties are before this Court.

13.The learned counsel appearing on behalf of the respondent would contend that the respondent and the claimant had entered into an Agreement which is the document binding both parties. The Clause in the Agreement clearly stipulates that it is for the claimant to keep track of the margin amount and it is the claimant who is bound to replenish the same as soon as the shortfall is noticed. He would also argue that as per the terms of the agreement between the parties, wherein the respondent is not bound to intimate the claimant about the short fall in her account and it was the sole responsibility of the claimant to ensure that she maintains the requisite balance. He would further argue that the claimant is very much aware about the shortfall since, there would be a pop up whenever she is trading. He would further contend that the Arbitrator has not only included the shares which has been sold by the respondent but also the shares which have been sold by the claimant to maintain the margin to arrive at a loss of Rs.2,36,675/-. The counsel would argue that the price at which the shares have been sold by the claimant should be deducted. He would therefore contend that prayer relating to recovery should be set aside. He would further draw the attention of the Court to Clause 43 of the Agreement in which it has been stated that the timing of the sale etc., will be at the discretion/instructions of the claimant and such a sale cannot be called into question by the claimant. He would therefore submit that the Award should be set aside insofar as it relates to the fact that the Arbitrator has totally not considered the terms of the Agreement between the parties and had exceeded the scope of reference by granting the prayer for the loss on account of fall in share prices.

14.The learned counsel for the claimant on the other hand would contend that the Arbitrator ought to have allowed the claim since the claimant had been able to demonstrate that the respondent had not intimated the claimant about the shortfall and further had sold the shares for a loss. He would argue that once the Arbitrator was of the opinion that the respondent had not taken any steps to mitigate the loss, the Tribunal below ought to have allowed the claim insofar as it relates to the margin shortfall. The learned counsel had not made any submissions with reference to the unauthorised transactions. The counsel would rely on the Judgment of the Hon'ble Bombay High Court reported in **CDJ 210 BHC 751 (M/s.Ventura Securities Limited v. Apeksha Rajendra Bothra of Mumbai) in** support of his arguments that the trader has responsibility to exercise due diligence while transacting business, particularly, when attempting to sell the shares belonging to the claimant. The learned counsel would further therefore seek to have the order confirmed.

15.Heard the learned counsel appearing for the claimant and the learned counsel for the respondent and perused the material on record.

16.The only ground that has been put forward by the respondent is that the Arbitrator had exceeded the scope of reference since he has not considered the terms of Agreement between the parties. The argument is based on the clause 40(b) of the Agreement which says that it is for the claimant to ensure that the margin level is maintained and in case of the short fall it is for the claimant to make up the shortfall *suo motu* immediately.

17.The learned Arbitrator has taken note of the Agreement and observed that there is also a duty cast on the trading member to ensure that the loss is mitigated by squaring off at the earliest and not allowing the value of the shares to drop. A perusal of the Award would clearly indicate that the learned Arbitrator has taken note of the value of the shares as on 17.10.2007 when there was the shortfall in the margin money and on 18.10.2007 and 19.10.2007 when the respondent/Trading Member had sold the shares to ensure the shortfall in the margin is offset.

The Arbitrator has appreciated the terms of Agreement in a particular manner which appears to be plausible. In such a view of the matter, this Court exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, cannot be rewrite the finding of the Arbitrator. On a conspectus of the above discussion, the petitions filed by both the claimant as well as the respondent deserves to be dismissed and is accordingly dismissed.

23.01.2020

Internet : Yes/No
Index : Yes/No
Speaking / Non-Speaking
mps

P.T. ASHA. J,

mps

O.P.Nos.461 and 511 of 2011

23.01.2020