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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 14.01.2020

% **FAO(OS) (COMM) 50/2019**

M/S FIRST GLOBAL STOCK BROKING PVT LTD..... Appellant

Through: Mr. Rajshekhar Rao, Mr. Raghav Kacker & Mr. Areeb Y. Amanullah, Advocates.

versus

TARUN GUPTA

..... Respondent

Through: Mr. Kirti Uppal, Senior Advocate along with Ms. Aastha Dhawan & Ms.Shaini Bhardwaj, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

VIPIN SANGHI, J. (ORAL)

1. The appellant has preferred the present appeal under Section 37 of the Arbitration & Conciliation Act, 1996 to assail the order dated 10.12.2018 passed by the learned Single Judge in O.M.P. No.686/2012 under Section 34 of the Arbitration & Conciliation Act, 1996. The said objection petition had been preferred by the respondent to assail the arbitral award dated 31.01.2011 passed by the Arbitral Tribunal constituted by the National Stock Exchange of India for adjudicating the disputes between the parties, as also the appellate arbitral award dated 30.01.2012 passed by the Appellate

Arbitral Tribunal appointed by the said Stock Exchange.

2. The case of the respondent was that in August 2008, he had entered into a contract with the appellant for making investment in shares on behalf of the respondent. The respondent alleged that the contract was a discretionary trading account, and the appellant had to trade in the respondent's account by following the trade strategies of their own product, where trades are hedged to protect the capital. The respondent claimed that, on that basis, he had invested a sum of Rs.28,82,030.80/- with the appellant. The respondent initially gave a positive return. He found fluctuations in his cash balance account and made enquiries for the same from the appellant. He was given an assurance that the fluctuations were the result of trade settlements and margin requirement and that he need not worry. He had made further averments in his statement of claim with regard to his dealings with the appellant, which do not concern us at this stage. Eventually, the respondent suffered losses in his account, and consequently, claimed the amount of Rs.28,82,030/-, being his investment with the appellant. He also claimed interest on the aforesaid amount, apart from loss of income/opportunity lost of Rs.4.5 Lakhs. He claimed compensation of Rs. 1 Lakh, and legal fees and arbitration cost of Rs.2.68 Lakhs. His total claim was Rs.48,58,030.00/-.

3. The stand taken by the appellant in the arbitration proceedings was that the account of the respondent was a simple trading account, wherein he alone was responsible for all the trades undertaken in his account, and that the said trades had been undertaken on his specific instructions. The

Arbitral Tribunal as well as the Appellate Tribunal held in favour of the appellant that the account was not a discretionary trading account. Thus, the appellant was not undertaking trading at its own discretion, and the trades were not hedged to protect the capital.

4. The stand of the appellant that the trades had been undertaken on the basis of the instructions received from one Mr. Rajesh Chauhan – who, according to the appellant, acted as a sub-broker, was also disbelieved by the Arbitral Tribunal and the Appellate Arbitral Tribunal. The Tribunal and the Appellate Tribunal, consequently, dismissed the claim of the respondent since it proceeded on the basis that the trading in the respondent's account had been undertaken by him, on his own.

5. The learned Single Judge, while dealing with the objections of the respondent, found that the Tribunal, as well as the Appellate Tribunal, have ignored Regulation 3.4.1 of the National Stock Exchange of India Limited Regulations (F&O Segment), which reads as follows:

"3.4.1 Trading Members shall ensure that appropriate confirmed order instructions are obtained from the constituents before placement of an order on the NEAT system and shall keep relevant records or documents of the same and of the completion or otherwise of these orders thereof"

6. The learned Single Judge notes that the only record that the appellant had produced to claim receipt of specific instructions for the trades undertaken in the account of the respondent, were the contract notes issued by the appellant, which had not been protested against by the respondents. The learned Single Judge observes that the Tribunal had failed to consider

the plea of the respondent, that it received the first ledger statement only on 17.09.2008, whereafter he had protested against the same. The Tribunal itself had found that on the said protest, the stand of the appellant was that they were investigating the matter, and that they would report back to the respondent on the same. The learned Single Judge held that the emphasis placed by the Tribunals on the respondent's lack of protest on the contract notes, could not be accepted. While setting aside the Award, the learned Single Judge has observed in paragraphs 11 to 13 as follows:

"11. I have considered the submissions made by the learned counsels for the parties. It is not disputed that the petitioner had entered into an Agreement with the respondent on 18.08.2008. Though the petitioner had claimed that the account was a discretionary portfolio based on the hedge fund strategy of the respondent, the Arbitral Tribunal has disbelieved the same. The Tribunal, in fact, believed the stand of the respondent that this was a simple trading account wherein all transactions were done by the petitioner on his behest and his own risk and consequences. Once the stand of the respondent was believed by the Arbitral Tribunal, the necessary compliance of aforementioned Regulation 3.4.1 by the respondent became necessary to be considered by the Arbitral Tribunal. In the Award or the Appellate Order there is no discussion on this aspect. Regulation 3.4.1 is quoted hereinbelow:-

"3.4.1 Trading Members shall ensure that appropriate confirmed order instructions are obtained from the constituents before placement of an order on the NEAT system and shall keep relevant records or documents of the same and of the completion or otherwise of these orders thereof"

12. *The stand of the respondent that these transactions had been conducted on the basis of instructions received from Mr. Rajesh Chauhan who had acted as a sub-broker, was also disbelieved by the Arbitral Tribunal and the Appellate Arbitral Tribunal. Therefore, the sole basis of the Award was the issuance of the Contract Notes by the respondent and purported non-protest against the same by the petitioner. On the question of the protest, the Arbitral Tribunal failed to consider the plea of the petitioner that it received the first Ledger Statement only on 17.09.2008 and had thereafter protested against the same. The Arbitral Tribunal itself found that on the said protest, it was the respondent who stated that they are investigating the matter and would report back to the petitioner on the same. Therefore, the emphasis put by the Arbitral Tribunal on petitioner's lack of protest to the Contract Notes, in my opinion cannot be accepted.*

13. *In any case, in the absence of instructions/authorization being proved on record by the respondent, whether the petitioner is entitled to its claim and whether an adverse inference has to be drawn against the petitioner were questions, to be determined by the Arbitral Tribunal. The Arbitral Tribunal and the Appellate Arbitral Tribunal seem to have taken a highly simplistic view on this issue without making any reference to the correspondences exchanged between the parties for the period starting from 17.09.2008 to 14.09.2009 and 23.10.2009, when letters were addressed by the respondent to the petitioner denying their liability, and also the effect of the letter dated 25.10.2009 addressed by the petitioner to the respondent. These were vital documents to be considered by the Arbitral Tribunal."*

7. The submission of Mr. Rao, learned counsel for the appellant, is that the fact that the respondent had received the contract notes contemporaneously – when the trades were undertaken in his account, against which he did not protest, is evidence enough of the respondent

having authorized such trades. He fairly admits that the appellant – who is the trading member, does not have any confirmed order instructions on the NEAT System, and that the appellant also has not kept relevant record or document of the same, or of the completion, or otherwise, of the orders placed on it. Mr. Rao submits that, on the one hand, the respondent did not raise any objection when he was making some profit on his investment in respect of the trades undertaken in his account, on the other hand, he sought to raise an objection only when he started to make a loss.

8. Mr. Rao has also drawn our attention to Annexure-I of the contract entered into between the parties which enlist “*INVESTORS’ RIGHTS & OBLIGATIONS*”. He has specifically referred to Clauses 1.3.5 to 1.3.7, which read as follows:

“1.3 You should exercise due diligence and comply with the following requirements of the NSE/ BSE and/ or SEBI:

1.3.5 ***Give any order for buy or sell of a security in writing or in such form or manner, as may be mutually agreed.** Giving instructions in writing ensures that you have proof of your intent, in case of disputes with the member.*

1.3.6 *Ensure that a contract note is issued to you by the member which contains minute records of every transaction. Verify that the contract note contains details of order no., trade number, trade time, trade price, trade quantity, name of security, client code allotted to you and showing the brokerage separately. Contract notes are required to be given/sent by the member to the Investors latest on the next working day of the trade. Contract note can be issued by the member either in electronic form using digital signature as required, or in hard copy. In case you do not receive a contract note on the next*

working day or at a mutually agreed time, please get in touch with the Investors Grievance Cell of NSE/BSE, without delaying.

1.3.7 Facility of Trade Verification is available on NSE/BSE website (www.nse-india.com / www.bseindia.com), where details of trade as mentioned in the contract note may be verified from the trade date upto five trading days. Where trade details on the website, do not tally with the details mentioned in the contract note, immediately get in touch with the Investors Grievance Cell of NSE/BSE.” (emphasis supplied)

9. He has also relied upon the undertaking-cum-authority letter (Annexure-III) given by the respondent to the appellant, wherein he, inter alia, agreed as follows:

“5. I/ We request you to consider my/ our telephonic instruction for order placing/ order modification/ order cancellation as written instruction and give us all the conformation on telephone unless instructed otherwise in writing.

x x x x x x x x x

8. *I/We agree to receive contract notes, bills, ledgers, transaction statement (statement of funds/securities) etc. in electronic form for all trades/ transactions executed through you at the email id (s) registered with you as per the below mentioned terms and conditions:*

1. *My/our non-verification or non-accessing of the contract notes on regular basis shall not be a reason for disputing the contract note at any time.*

2. *I/We confirm that contract notes, bills, ledgers, transaction statement (statement of funds/securities) etc. sent by you from time to time to my/our email id shall be deemed to have been*

delivered to me and it shall be presumed that the same is in order unless any discrepancies are given in writing to M/s First Global Stockbroking Pvt. Ltd. within 24 hours of receipt of the same. Non-receipt of bounced mail notification by the member shall amount to delivery of the contract note at the e-mail ID(s) registered with you.

In case of any failure in system at your end, contract notes, bills, ledgers, transaction statement (statement of funds/securities) etc. will be issued in physical form and sent to my/ our correspondence address, which shall be binding on me/us.

3. *I/We hereby state that the handing over of the said contract(s) / bill(s) /confirmation notes or any communication in respect of my/our transactions relating to my / our trading account with M/s First Global Stockbroking Pvt. Ltd. to any of the email addresses or to the communication address as registered with you, shall be treated as due discharge of obligation of the Member unless the Rules and Regulations and bye-laws of SEBI and the stock exchange(s).” (emphasis supplied)*

10. On the other hand, Mr. Uppal, learned senior counsel for the respondent submits that the stand taken by the appellant before the Arbitral Tribunal was that the respondent had acted through a sub-broker, namely Mr. Rajesh Chauhan, and that the instructions were given to the appellant by the respondent's sub-broker Mr. Rajesh Chauhan to undertake the trades. This stand of the appellant was disbelieved – both by the Tribunal, as well as the Appellate Tribunal, as noticed by the learned Single Judge. He points out that it is only after the rejection of the said stand that the appellant is seeking to contend that it had received instructions to undertake the trades

from the respondent directly.

11. Mr. Uppal submits that the respondent is an IT professional and he had only entrusted his savings to the appellant on the assurance of the appellant that it would undertake trading in the account of the respondent, on its discretion, by ensuring that the trades are hedged to protect the capital.

12. He further submits that even if the account of the respondent is treated to be a trading account – in terms of the contract signed between the parties, there is nothing to show that the trades were undertaken in the respondent's account on his specific instructions. He points out that, admittedly, the appellant had not complied with the Regulation 3.4.1 aforesaid. He further submits that reliance placed on Clauses 1.3.5, 1.3.6 & 1.3.7 of Annexure-I to the contract, as also on Clauses 5 & 8 of the undertaking-cum-authority letter is of no avail, since even the said clauses relate to giving of instructions in writing and of the appellant maintaining a record thereof, in respect whereof there is no proof. He submits that mere communication of contract notes ex-post facto, i.e. after the trades have been undertaken in the respondent's account, do not tantamount to giving of instructions before such trades are undertaken.

13. Having heard learned counsels and perused the impugned order as well as the award and the appellate award, we are of the view that there is no merit in the present appeal. The stand of the respondent before the Arbitral Tribunal was that the account maintained by him with the appellant was a discretionary trading account, wherein the appellant was to undertake hedged trades, by adoption of the trade strategies which the appellant adopts

in respect of its own products. This stand of the respondent was rejected by the Tribunal and the Appellate Tribunal in the face of the contract entered into between the parties, which show that the account of the respondent was a simple trading account.

14. The appellant had also claimed that the instructions were received from the sub-broker Mr. Rajesh Chauhan, and on the basis of those instructions, trades have been undertaken in the account of the respondent. This stand was also rejected by the Arbitral Tribunals. Therefore, it was essential for the appellant to establish that the trades had been undertaken on the specific instructions of the respondent. It was also essential for the appellant to show compliance of Regulation 3.4.1 – which would have been complied with, had the instructions, in fact, been received from the respondent. Admittedly, the appellant is not in a position to substantiate the so-called instructions received from the respondent before undertaking the trades. There is no log maintained of the so called instructions.

15. The fact that the contract notes were communicated to the respondent contemporaneously is neither here, nor there. Contract notes come into existence only after the trade is undertaken on the Stock Exchange. They record the concluded transaction and, in no way, convey exercise of discretion and judgment by the trading account holder of the particular trades – before the trade is undertaken. Since the claim of the respondent was that it was represented to him that a discretionary trading account would be operated by the appellant, it was not even expected of him to protest the undertaking of the hundreds of the trades in his account, since it was his

belief and assumption that the appellant was undertaking such hedged trades following the trade strategies of its own products.

16. Moreover, it appears that the respondent did raise objections when he became aware of the account position, and the appellant also assured the respondent that it was looking into his grievances. There would be no reason for the appellant to give any such comfort or assurance to the respondent, had it been a simple trading account operated by the respondent as per his own decisions.

17. Clause 1.3.5 of Annexure-I – which enumerates the “*INVESTORS’ RIGHTS AND OBLIGATIONS*”, specifically talks about the giving of instructions in writing, or in such other form or manner as may be mutually agreed. There is no other mutually agreed manner established by the appellant. It’s claim that the trades were undertaken on the instructions of the named sub-holder has been rejected. This Clause, therefore, goes against the submission of the appellant.

18. Clauses 1.3.6 and 1.3.7 merely casts an obligation on the appellant to issue the contract notes containing all the details, and to inform the accountholder that facility of trade verification is available at NSE/ BSE on their websites. They instruct him to get into touch with the Investors Grievance Cell of BSE/ NSE, in case the accountholder finds any discrepancy. These clauses relate to the issuance of, and the manner of dealing with the contract notes. They do not relate to the manner of giving of instructions by the investor.

19. Clause 5 of the undertaking-cum-authority letter merely contains a request in the prescribed form of the respondent to the appellant to consider his telephonic instruction for order placing/ order modification/ order cancellation as written instruction and to give to him all the confirmations on telephones unless instructed otherwise in writing. There is nothing to show that such a request was acceded to. Moreover, even if such telephonic instructions were to be received and acted upon, in terms of Regulation 3.4.1, the Trading Member was obliged to maintain and preserve the complete log. Admittedly, that has not been done.

20. Clause 8 of the undertaking-cum-authority letter merely states that the respondent agreed to receive contract notes/ bills/ ledgers/ transaction statements, etc. in telephonic form for all trades/ transactions executed through the appellant on his e-mail ID registered with the appellant. The respondent was obliged to raise his disputes with regard to any discrepancy in the contract notes within a time bound manner.

21. The aforesaid clauses, in our view, in no way establish that the trades undertaken by the appellant in the account of the respondent were on prior written instructions from the respondent.

22. We, therefore, do not find merit in the submission of Mr. Rao. The appeal is, accordingly, rejected leaving the parties to bear their own costs.

23. Since Mr. Rao has placed the aforesaid clauses before us in support of his submissions, we have dealt with the same. We, however, leave it open to the Arbitral Tribunal to deal with the said submissions, and our

observations are made only for the purpose of this order.

VIPIN SANGHI, J.

SANJEEV NARULA, J.

JANUARY 14, 2020

B.S. Rohella

