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

SUMMONS FOR JUDGMENT NO.65 OF 2015
IN
COMMERCIAL SUMMARY SUIT NO.140 OF 2015

Geofin Comtrade Ltd. .. Plaintiff
v/s.
National Spot Exchange Limited .. Defendant

Mr. Chirag Shah a/w Ms. Priya Rombade i/b. Ashwin Duggal & Associates for the plaintiff.
Mr. Ashish Kamat a/w Sumeet Nankani i/b. Vaish Assocaites for the defendant.

CORAM : A. K. MENON, J.
DATED : 27TH APRIL, 2022.

P.C. :

1. In a suit filed for recovery of a sum of Rs.1,97,60,246/- and interest thereon, the plaintiff seeks a decree on the Summons for Judgment. The particulars of claim in the plaint sets out two elements constituting the entire amount of Rs.1,97,60,246/-. Firstly there is Margin Money in a sum of Rs.1,38,64,382/-. Secondly there is a Security Deposit of Rs.7,50,000/-. Interest is

computed on aforesaid two amounts at 18% p.a. The principal sum that is payable by the plaintiff to the defendant is not in dispute. It proceeds on the basis that at all material times, the plaintiff was a member of the defendant Exchange and in accordance with its Rule and Bye-laws, the petitioner had executed a Trading-cum-Clearing Membership Agreement. A sum of Rs.7,90,150/- was paid upon such membership being granted out of which a sum of Rs.7,50,000/- was refunded. The balance was towards VSAT charges and annual subscription. A receipt to this effect has been issued on 6th April, 2010 as seen from Exhibit E. Thereafter it appears that over a period of time, trades were carried out and on 31st July, 2013 the Exchange announced closure and suspension of trading from August 2013. The defendants issued statements with relating to the margins deposited with the defendant and the plaintiffs claim is based on those margin statements which according to the learned counsel for the plaintiffs are the acknowledgments of amounts that are due to the plaintiff.

2. On 18th December, 2014, the plaintiff is believed to have demanded refund of these amounts i.e. Rs.1,38,64,382/- and Rs.7,50,000/-. It is contended that over and above these amounts

a sum of Rs.298 crores was recoverable from the defendant towards monies due to the clients of the plaintiff who were then registered with them. The plaintiff issued a letter of demand dated 18th December, 2014 copy of which appears at Exhibit 'I'. There was no reply to this request for payment. Thereupon the plaintiff is seen to have issued a demand notice claiming outstanding amounts through their Advocate on 10th April, 2015, copy of which is appears at Exhibit 'J'. There is no reply to such demand notice either.

3. The learned counsel for the plaintiff has taken me through the averments in the plaint, the provisions of the membership agreement and in particular he has invited my attention to Exhibit 'G-1' to 'G-4' in support of his contention that the amounts were paid over by the plaintiff to the defendant. In particular, reference is made to Exhibit 'H-1' to 'H-4' under which the defendant acknowledged the aforesaid deposits towards Margin and towards Security Deposit. Exhibit 'H-1' to 'H-7' are identical formats with collateral details as on the dates specified in the subject column. They reflect margin deposits, type of deposits such as cash, Bank Guarantees (BG) and FDR (Fixed Deposits). The amounts deposited are also set out, so also the period of

expiry of these deposits. It is therefore contended that there is no defence to the claim, the amount as demanded has not been paid and therefore it is contended that the suit is liable to be decreed.

4. On behalf of the defendants, the learned counsel for the defendant has urged that there is no admitted liability, maintainability of the suit has been called into question. It is contended that the suit is not maintainable under Order XXXVII Rule 2 because it is not based on agreement in writing. It is not based on an enactment or under any negotiable instrument. The acknowledgment of liability that is propounded by the plaintiff is sought to be denied on the basis of the computer generated statement for information purpose only. The learned counsel for the defendant has invited my attention to the footnote to that effect in each of these statements at Exhibit 'H-1' to 'H-7' which records that it is a computer generated statement and therefore for information only. He invites me to hold that these are not acknowledgments but only provide information. No liability can accrue on the basis of these statements.

5. On a specific query from the court as to the defence to the refundable amount admittedly received by way of security deposit

and then the Margins, the learned counsel has invited my attention to two affidavits in reply. The first of these affidavits is dated 21st September, 2015. It extensively deals with correspondence and various defences that are sought to be set out including a portion as to the true facts of the case. It relies upon the suspension notice received from the Union Government of Ministry of Consumer Affairs and it is contended that the business of the Exchange had to be suspended on account of these developments.

6. The learned counsel for the defendant has invited my attention to the specific defence in the affidavit contained in paragraphs 21 and 26. An additional affidavit was belatedly sought to be filed and that was permitted on payment of costs and so as not to deprive the defendants of their defence. That affidavit is dated 20th April, 2022. The affidavit annexes a copy of the Trading-cum-Clearing Membership Undertaking dated 31st March, 2010, Undertaking for Internet Based Trading dated 8th April, 2010, copy of the bye-laws, Rules and the letter from the Forward Markets Commission, Food and Public Distribution to Department of Consumer Affairs, Government of India. Actual pay out letters are also annexed. Reliance is placed on the averments in the

affidavit and the provisions of the bye-laws. The bye-laws that have been brought to my attention in support of the defences are as follows;

(i) the definition of the expression 'Margin' in Definition no. 2.51;

(ii) Bye-law no.8 which deals with 'Margins' in 10 sub-bye-laws.;

(iii) Bye law no.9.5 and 9.6; and

(iv) Bye-law no.12 which deals with 'Settlement Guarantee Fund'.

7. It is contended on behalf of the defendants that in view of their right to adjust these amounts of Margin money, the plaintiff cannot claim refund at all, since all the amounts lying to the credit of the plaintiffs have been adjusted towards payouts as set out in paragraph 21 of the first reply. It is contended that a total 65 payouts paid till 21st November, 2014 of a total sum Rs.2,11,95,971.24 which is in excess of this suit claim out of total margin of Rs.32,11,60,097/- pertaining to non-defaulting member of the Exchange, the plaintiff is being a non-defaulting member.

8. It is the defendant's case that the plaintiff owes the exchange money. However, the contention is that payouts were made upon

the approval of Forward Markets Commission and the Exchange is not liable to refund any of these amounts. It is then contended that by virtue of the bye-laws and in particular bye-law no.12, the exchange was required to maintain a Settlement Guarantee Fund. That provision includes the right of utilization of the security deposit and additional deposits, if any. The amounts deposited by the non-defaulting members was to be refunded subject to proof of contents specified of the relevant authority. The composition of the authority is set out under clause 2.68 which refers to the Board of Directors/ any Committee of the Board of Directors/ any Committee appointed by the Board of Directors or other committee. It is contended that pursuant to bye-law 12.6 and 12.8 the amounts lying to the credit of the plaintiff have been utilized. However, I find that bye-law 12.8 refers to obligations of defaulting members and therefore not applicable to the plaintiff.

9. In the present case the plaintiff is not a defaulting member on the other hand defendant expressly acknowledged to be a non-defaulting member. There is no benefit that can be drawn from bye-law 12.8 as far as bye-laws 12.1 to 12.6. I do not find these bye-laws to be of any assistance to the defendant except to

consider the case that the amounts of the security deposits and the margin money have been adjusted in payouts as per paragraph 21 of the affidavit in reply but even then it is also pertinent to mention that bye-law no.12 does not contemplate adjustment of margin. "Margins" are specifically defined and deposits do not constitute Margins. On a fair reading, none of the bye-laws or sub-bye-laws of bye-law no.12 has been shown to me as an amount adjustable towards dues of a non-defaulting member. It is in the case of a defaulting member alone that adjustments may be made. Bye-law no.12.8 can be pressed into service where a member fails to meet his settlement obligations and if a member is declared as a defaulter, the Relevant Authority may utilize the Settlement Guarantee Fund as also any amount that has been paid by the defaulter member other than bank guarantee deposit. In the present case, since the defendants have admitted that the plaintiff is a non-defaulting member, the cause to exercise the power to adjust money does not exist. In view of the above, the contention of the defendant cannot be accepted and it is therefore rejected.

10. The only other defence that is agitated is that there is an agreement referred to arbitration by virtue of bye-law 3.1.2

which provides that in all claims, difference and disputes, irrespective of whether the Exchange is a party or not, these disputes shall be referred to arbitration as provided in the Bye-laws and Business Rules and Regulations referred to therein. If conciliation fails. The plaintiffs have expressly pointed out that no attempt has been made for conciliation despite having demand by letter dated 18th December, 2014. Thereafter the defendant has been silent in responding thereto in denying the contentions of the plaintiff and effectively by not filing an affidavit to controvert the plaintiff's case. The contention urged by the counsel that the arbitration agreement has been suppressed from the court and hence unconditional leave is granted has no merit. The fact that bye-laws have been referred to in the instant case are sufficient and it was for the defendant to have raised this issue at the very outset which it did not. It filed an affidavit in reply on 21st September, 2015 which is silent on the aspect of referring the dispute of refund to arbitration. The defendant therefore waived its objection for the instant having been seeking to obtain leave to defend the suit. It is only on a subsequent date 20th April, 2022, after 7 years an additional affidavit in reply was filed. The defendant thought it fit to raise an objection on the ground that there is an arbitration agreement between the parties.

11. In my view it is not open for them to non-suit the plaintiff on that ground having failed to raise the objection at the relevant time and having effectively sought to defend the claim. After filing an affidavit running into 29 paragraphs and annexing numerous documents of 100 pages, to contend today that the suit must be dismissed or referred to arbitration is of no avail. As on date one thing is clear that amounts said to have been deposited with the defendant Exchange are admittedly deposits.

12. In the course of submissions, I have called upon the defendant to demonstrate where these payouts were effected till November 2014. However, there is absolutely no material on record in the original first affidavit or in the second affidavit which demonstrates how these payouts have adjusted margin and security deposits of the plaintiff under the relevant bye-laws. In response to this, my attention has been invited by the defendant in paragraph 3.9(l) in which it is contended by the deponent that from 6^{th} to 8^{th} August, 2013 a team of officers from the Forward Markets Commission visited the defendant to ascertain the actual position of the settlement obligations, Settlement Guarantee Fund,

etc. and it is pursuant to the letter dated 12th August, 2013 addressed by the Forward Markets Commission to the Department of Consumer Affairs to make the relevant adjustments. Reference is made to 65 payouts amounting to Rs.347.93 crores thereby recouped total margin of Rs. 2,11,95,971.24 out of the total margin of Rs.32,11,60,097/- all of which are said to be pertaining to non-defaulting members. The plaintiff is, as stated above a non-defaulting member.

13. Perusal of Exhibit 'F-1' to 'F-4' relied in support reveal that these are communications from the Government of India Forward Markets Commission under the Department of Consumer Affairs addressed to Axis Bank and dealing with the current account of the defendant Exchange. None of these pertain to the affairs of the plaintiff. The sample payout letters and documents relied upon are not in connection with the plaintiffs claim. In fact these exhibits are relied upon merely samples. Despite a second chance granted to file a detailed affidavit, paragraph 21 has not been demonstrably explained, I am therefore unable to accept these defences.

14. As a consequence, I find that the defendant is not entitled to

leave to defend except on condition of deposit of the suit claim. I therefore pass the following order;

(i) The defendant shall deposit a sum of Rs.1,46,14,382/- within a period of eight weeks from today.

(ii) If the deposit is made, written statement shall be filed within a period of further eight weeks from the date of deposit.

(iii) If the written statement is not filed, liberty is granted to apply for a decree after obtaining certificate of non-deposit and filing original documents.

(iv) Summons for Judgment is disposed in the above terms.

(A. K. MENON, J.)