

Kavita S.J.

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

ARBITRATION PETITION NO.742 OF 2017

Nirmal Bang Securities Pvt. Ltd., ...Petitioner

Versus

Mr. Erach Khavar ...Respondent

WITH

ARBITRATION PETITION NO.228 OF 2018

Mr. Erach Khavar ...Petitioner

Versus

Nirmal Bang Securities Pvt. Ltd., ...Respondent

Mr. Naushad Engineer, Mr. Sharad Bansal, Mr. Jayant Gaikwad, Ms. Pushpa Prajapati i/b Ajay Khandhar & Co. for Petitioner in ARBP 742/2017 and for Respondent in ARBP 228/2018.

Mr. Bimal Rajasekhar for Respondent in ARBP 742/2017 and for Petitioner in ARBP 228/2018.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 16TH JANUARY, 2024.

PRONOUNCED ON : 30TH APRIL, 2024.

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JUDGMENT :

1. By Arbitration Petition No.742 of 2017, the Petitioner has

sought setting aside of the impugned Award dated 8th August, 2017 passed by the Majority Arbitral Tribunal in arbitration matter in Appeal (III) No.F&O/M-0003/2017 and for upholding the dissenting Award dated 14th August, 2017 passed in Appeal (III) Arbitration matter No.F&O/M-0003/2017.

2. By the Arbitration Petition No.228 of 2018 (cross Petition filed by the Respondent in Arbitration Petition No.742 of 2017), the Petitioner therein has challenged the partial setting aside of the impugned Award dated 8th August, 2017 to the extent that the impugned Award refused to grant balance INR 46,60,000/-, thereby granting only 50% of the Petitioner's claim.

3. The facts in Arbitration Petition No.742 of 2017, wherein the Petitioner is Nirmal Bang Securities Private Limited and the Respondent is Erach Khavar are adverted to for convenience. These are as follows:

(i) The Petitioner is a Company incorporated under the Companies Act, 1956. The Petitioner is a SEBI registered broker with Bombay Stock Exchange ("**BSE**") and National Stock Exchange ("**NSE**") carrying on

business of trading in shares and securities since the year 1994. It is the case of Petitioner that the Respondent is a constituent of the Petitioner.

(ii) The Respondent entered into KYC documents and Account Opening Forms in June 2015 and executed documents to open Depository Account. The Client Code of the Respondent was H9390001. The Respondent had opted for e-statement, service of SMS alert on his mobile phone, running account authorization, Internet trading as well as receiving Contract Notes, Bills, Ledger Accounts, Margin Statements and other communications from the Petitioner in the E-form to his registered E-mail address erach70@hotmail.com.

(iii) The Respondent opened Demat and Trading Account with the Petitioner which according to the Petitioner was at the behest of Farukh Meshman and started trading from 30th June, 2015 upto 27th September, 2015. During this period, the Respondent was giving confirmation calls in the evening of the day of

transaction on his personal mobile phone and the Respondent confirmed the transaction from time to time. The Respondent had also sent electronic contract note on his E-mail id for all the transactions and the Respondent had not objected or rejected a single transaction. The Respondent was paid back the balance credit amount of Rs.37,829.69 in his Ledger Account on 27th January, 2016. The Respondent accepted the said amount without any demur.

(iv) Prior to starting of the trading, the Respondent had transferred 1500 shares of Hero Moto Corporation Limited, 5000 shares of Petronet LNG Limited and 7000 shares of ITC Limited, in off market mode from his Demat Account with Bank of India to his Demat Account of the Petitioner. The Respondent suffered losses in his trading and the shares were sold by the Respondent from time to time.

(v) On 29th June, 2016 i.e. after 10 months from sale of the shares, the Respondent objected to the

transactions which had been carried out by the Petitioner on behalf of the Respondent.

(vi) The Respondent filed complaint to Investors' Grievance Redressal Panel ("IGRP") at NSE and claimed the value of the shares from the Petitioner.

(vii) On 9th January, 2017, IGRP passed an order and granted the claim of Rs.46,60,000/- to the Respondent.

(viii) The Petitioner challenged the said order of IGRP by filing Arbitration case at National Stock Exchange India Limited.

(ix) The Arbitral Panel passed an Award dated 10th April, 2017 and modified the IGRP amount to Rs.35,77,412/-.

(x) The Award was challenged both by the Petitioner as well by the Respondent.

(xi) The Arbitral Panel passed the Award by majority on 8th August, 2017 in both the Appeals allowing the

claim of Rs.46,60,000/- against the Petitioner and in favour of the Respondent.

(xii) The Presiding Arbitrator dissented from the Majority Award and passed Award dated 14th August, 2017 dismissing the Appeal of the Respondent and allowing the Appeal of the Petitioner, thereby dismissing the claim of the Respondent.

(xiii) The Respondent filed an Application under Section 33 of the Arbitration and Conciliation Act, 1996 (“the Arbitration Act”) on 5th September, 2017 for correction of the Award.

(xiv) The Majority Arbitrators passed an Order dated 9th October, 2017 dismissing the Application of the Respondent under Section 33 of the Arbitration Act.

(xv) Being aggrieved by the Award dated 8th August, 2017, the Petitioner filed the present Petition challenging the Award.

(xvi) A cross Petition was filed by the Respondent being

Arbitration Petition No.228 of 2018 challenging the impugned Award dated 8th August, 2017 to the limited extent that it had not granted 100% of the Respondent's claim.

4. Mr. Naushad Engineer, learned Counsel appearing for the Petitioner in Arbitration Petition No.742 of 2017 has challenged the impugned Award of the Majority Arbitral Tribunal (referred to as "the Majority Award") on the ground that the Majority Award has ignored vital evidence and is therefore perverse and liable to be set aside on the ground of patent illegality under Section 34(2A) of the Arbitration Act. He has submitted that the Majority Award dismissing the Petitioner's Appeal on the ground that the F&O transactions were all unauthorized and so being the Majority Award is unsustainable as it completely overlooks the importance of confirmations of the transactions given by the Respondent and the other evidence which shows that the trades were authorized and which includes:

(a) Emails (*F/137, 139, 142, 144, 146, 149, 151, 153, 155, 158, 161, 167, Paperbook*).

(b) SMSes (*D/101, 103, 104, 118, 122, 124, Paperbook*).

(c) Electronic contract notes (**126-138, Paperbook**).

(d) Telephone calls (**C/94-99, Paperbook**).

(e) Ledger confirmations (**F/171; K/270-272, Paperbook; Para 28 of SOD, p.399, Paperbook**).

5. Mr. Engineer has submitted that the Majority Award has overlooked the material fact that after the trades were completed, on 5th October 2015, the Petitioner forwarded by E-mail the full Ledger Statement showing that an amount of Rs.37,829.69 was the balance amount. The Respondent has expressly stated in the E-mail dated 5th October, 2015 that the Ledger Statement is “*confirmed*”. Thereafter, on 27th January, 2016 the Petitioner paid the Respondent a sum of Rs.37,829.69 lying to the credit of the Respondent’s Account maintained by the Petitioner. The Respondent accepted this sum without any objection whatsoever. There is an admission of the Respondent that the sum of Rs.37,829.69 was received by him.

6. Mr. Engineer has accordingly submitted that the Respondent was always aware of the trades carried out in his account and it does not lie in the mouth of the Respondent to contend that the trades were unauthorized. He has submitted that it is only on

30th June 2016, 10 months after having confirmed the entire Ledger Statement (on 5 October, 2015), and 5 months after having received a sum of Rs.37,829.69 (on 27 January, 2016) as final payment from the Petitioner, the Respondent wrote to the Petitioner alleging, *inter alia*, that he had just discovered that the balance of his account maintained with the Petitioner was nil. Mr. Engineer has submitted that this was clearly an afterthought and a dishonest attempt at blaming the Petitioner for the Respondent's losses.

7. Mr. Engineer has submitted that the Majority Award by ignoring vital evidence arrived at the conclusion that the trades were unauthorized and therefore, the Majority Award is patently illegal. He has placed reliance upon the following judgments in support of this propositions:

(a) *Associate Builders v. Delhi Development Authority*,¹ (Para 31);

(b) *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*,² (Paras 41 & 42);

(c) *Nirmal Bang Commodities Pvt. Ltd. v. Geetha*,³ (Paras 3 and 4).

¹ (2015) 3 SCC 49

² (2019) 15 SCC 131

³ 2014 SCC Online Bom 1875

(d) ***Slum Rehabilitation Authority v. M.M. Project Consultants Pvt. Ltd.,***⁴ (Paras 128 & 129)

8. Mr. Engineer has submitted that the Majority Award proceeds on the erroneous footing that the then prevailing position of law necessarily required pre-trade authorization for transactions in the F&O segment. This is contrary to SEBI Circular dated 26 September 2017, which specifically noted (in paragraph II) that as on that date, the requirement of pre-trade authorization was prevalent only in the commodity derivative markets, and not in equity, equity derivative and currency derivative markets. The Circular specifically stated that the requirement of pre-trade authorization was being introduced by way of that Circular with effect from 1 January 2018. He has submitted that the transactions in the present matter took place in the year 2015, well before 1st January, 2018, therefore, the requirement of pre-trade authorization was never applicable to the impugned transactions.

9. Mr. Engineer has submitted that the Division Bench of the Calcutta High Court in ***Nirmal Bang Securities Limited v. Tilak Bachar,***⁵ at Paragraphs 23, 24, 25, 30, 31, 33 has upon considering

⁴ 2020 SCC Online Bom 715

⁵ 2019 SCC Online Cal 628

the said SEBI Circular held that pre-trade confirmation was made mandatory only pursuant to the said Circular (i.e. with effect from 1st January 2018). He has submitted that in virtually identical facts, the Calcutta High Court set aside the Arbitral Award that had held transactions in the F&O segment to be unauthorized for want of pre-trade authorization.

10. Mr. Engineer has submitted that the Supreme Court vide its Order dated 17th November, 2020 dismissed a **Special Leave Petition (being SLP (C) No. 20531 of 2019)** against the aforementioned decision of the Calcutta High Court.

11. Mr. Engineer has also placed reliance upon the decision of this Court in *Nirmal Bang Commodities Pvt. Ltd. v. Geetha (supra)* at Paragraphs 3 and 4, wherein this Court held that where the client / constituent had received communications and contract notes in relation to the transactions at the relevant time, such transactions could not be said to be unauthorized. He has also placed reliance upon decision of this Court in *Keynote Capitals Limited v. Eco Recycling Limited*,⁶ at Paragraphs 22, 42, 48, 49, 62 and 63, wherein it is held that where the client / constituent was fully aware of the

⁶ 2018 SCC Online Bom 1269

transactions and did not object to the same, the transactions could not be said to be unauthorized.

12. Mr. Engineer has placed reliance upon the decision of the Division Bench of this Court in **Maheshbhai Hiralal Champneira v. Kotak Securities Limited**,⁷ at Paragraph 8, wherein the Division Bench has held that “*under the Rules and Regulations framed by the NSE, if there is any dispute regarding any contract, the same has to be raised within a couple of days. In the present case, the dispute was raised almost after one year...The Arbitral Tribunal accordingly came to the conclusion that the claim filed by the original Applicant, the Appellant therein was an afterthought*”.

13. Mr. Engineer has submitted that the **Keynote Capitals Ltd. v. Eco Recycling Ltd. (supra)** at Paragraph 49 this Court has held that the respondent therein was fully aware of the transactions carried out by the petitioner in their account and had not raised any objection at any point of time and / or at least within a reasonable period, when such transaction has been carried out and hence, the Arbitral Tribunal could not have considered such transactions as unauthorized.

⁷ 2016 SCC Online Bom 11100

14. Mr. Engineer has submitted that in the present case, far from raising an objection to the impugned transactions within a couple of days, the Petitioner has confirmed the transactions, as also the entire ledger statement and even received and accepted the sum which was the credit lying in the Respondent's Account maintained by the Petitioner. The objection was raised by the Respondent for the first time 10 months after having confirmed the entire Ledger Statement and 5 months after having received the said amount lying to the credit of the Respondent in the Respondent's Account maintained by the Petitioner and by way of final payment from the Petitioner.

15. Mr. Engineer has submitted that this Court in *Jagannath Parmeshwar Mills Pvt. Ltd. v. Agility Logistics Pvt. Ltd.*,⁸ (Para 19(g)) has held that where an Arbitral Award incorrectly states the law, then it is a ground for setting aside the award. He has submitted that since the Arbitral Tribunal has held that there was no pre-trade authorization, and hence the trades were unauthorized, it is an erroneous statement of law as pre-trade authorization was mandatory only after 2018.

⁸ 2022 SCC Online Bom 1462

16. Mr. Engineer has submitted that the Majority Award is contrary to the terms of the contract entered into between the Petitioner and the Respondent. He has submitted that Paragraph 2 of the Investment Advice Clause of the Individual Account Opening Form (which was duly filled by the Respondent at the time of opening the account of the Petitioner) precludes the Respondent from entering into any arrangement or understanding with any individual in respect of transactions of purchases or sales of the shares and/or derivatives and/or fixed return of profit. He has submitted that from conversation in the CD placed on record by the Respondent it was revealed that the Respondent only knew Farukh Meshman. Further, Rajan Singh and Farukh Meshman had formed a company/partnership or were doing business together by which they had an arrangement to get clients, do trading on behalf of clients, and share the profits with the clients. The Respondent had entered into a profit-sharing arrangement with Mr. Meshman. The Respondent told Farukh Meshman that he did not intend to do the trading but that his shares should be safe. Atul Momaya was the employee of Farukh Meshman and Rajan Singh. The trading was done in the office of Farukh Meshman. The Petitioner had informed the Respondent about the various trades.

17. Mr. Engineer has submitted that from the telephone transcript between the Respondent and Atul Momaya, what is apparent is that the Respondent knew Farukh Meshman, who alongwith Rajan Singh used to trade on behalf of the Respondent. The Respondent had of his own volition allowed his shares to be used as security and had authorized Farukh Meshman to trade in the Respondent's name and to share the profits of the trades that were undertaken. Thus, there was a private profit-sharing arrangement between the Respondent and his conspirators. The Respondent had no part to play in this conspiracy other than being the trading member. The Petitioner had no knowledge of this arrangement at all until the transcript came to light.

18. Mr. Engineer has submitted that the private arrangement is contrary to the Investment Advice Clause. He has submitted that though the Majority Award acknowledges the fact of the said profit-sharing arrangement, it fails to appreciate the legal significance of that arrangement, in that such an arrangement is unlawful in light of Paragraph 2 of the Investment Advice Clause. For this reason, the Majority Award is contrary to the terms of the contract between the Petitioner and the Respondent and therefore, patently illegal.

19. Mr. Engineer has in support of the proposition that the Majority Award is patently illegal, if it is contrary to the terms of the contract, has relied upon the decision of the Supreme Court in **Indian Oil Corporation Limited v. Shree Ganesh Petroleum**,⁹ (Paras 43, 46, 50 & 51) and the decision of this Court in **BCCI v. Deccan Chronicle Holdings Ltd.**,¹⁰ (Paras 230, 233, 241).

20. Mr. Engineer has submitted that it is settled law that no Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. The Majority Award has completely ignored this position of law and therefore, ought to be set aside. In view of the arrangement between the Respondent and Farukh Meshman being illegal, no relief can be granted to the Respondent. The Petitioner has in this context relied upon the decision of the Supreme Court in **Immani Appa Rao v. Gollapalli**,¹¹ (Paras 21 & 22).

21. Mr. Engineer has relied upon the statement of Mr. Manoj Gupta who was the sub-broker of the Petitioner and had stated that the trades were unauthorized to render a finding against the Petitioner. He has submitted that the Majority Award has acted in

⁹ (2022) 4 SCC 463

¹⁰ 2021 SCC Online Bom 834

¹¹ AIR 1962 SC 370

completed disregard of the decisions of this Court which held that an admission by a sub-broker is not binding on the broker. These decisions includes **Kotak Securities Limited v. Prakash Khanolkar**,¹² (Paras 11(4) and 15) which holds that an admission / acknowledgment of liability on the part of a sub-broker is not binding on the broker. Further, in **Keynote Capitals Ltd. v. Eco Recycling Ltd.** (*supra*) this Court holds that in absence of an express authority conferred upon an agent to admit liability on behalf of the principal, any admission of liability by the agent is not binding on the principal.

22. Mr. Engineer has submitted that the purported statement of Manoj Gupta (which was not even made on oath) has no relevance insofar as the genuineness of the transactions or the Petitioner's liability for the transactions is concerned. The Majority Award having been passed contrary to these binding precedents is contrary to the fundamental policy of Indian law and accordingly, it be set aside.

23. Mr. Engineer has submitted that the finding of the Majority Award on the ledger balance at the time of sale of shares is patently illegal. He has submitted that the Majority Award has held that on the dates when the shares were sold, there was either a

¹² 2013 SCC Online Bom 912

negligible negative balance or a credit balance and therefore, the shares were sold without instructions of sale and without having any debit balance. He has submitted that this finding is patently illegal as there was in fact a negative balance on the date when these shares were sold. This has been borne out from the material on record. Clause E of the Contract allows the Petitioner to sell the shares that were offered as security in the event of debit balances. Thus, the finding of the Majority Award is patently illegal as it is in ignorance of the vital evidence and is also contrary to the terms of the contract that contained the arbitration clause.

24. Mr. Engineer has then dealt with the Arbitration Petition No.228 of 2018 filed by the Respondent in the Arbitration Petition No.742 of 2017 as cross Arbitration Petition. He has submitted that the challenge to the Majority Award is with regard to it refusing to grant the entire sum claimed by the Respondent in the arbitral proceedings. He has submitted that even it is assumed that the Majority Award has erroneously refused to grant the amount claimed by the Respondent, it is settled law that the Respondent cannot claim such amount in proceedings instituted under Section 34 of the Arbitration Act. The Respondent would, in effect, be seeking a

modification of the Majority Award, which is impermissible in such proceedings under Section 34. He has placed reliance upon the decision of the Supreme Court in **National Highways Authority of India v. M. Hakeem**,¹³ (Paras 2, 25, 31 and 42) in this context.

25. Mr. Bimal Rajasekhar, learned Counsel for Respondent in Arbitration Petition No.742 of 2017 and for Petitioner in the Arbitration Petition No.228 of 2018 has placed reliance upon Regulation 3.4.1 of the NSEL Regulations (F&O Segment) which he submits mandates that pre-trade authorization is to be taken. He has submitted that under Regulation 3.1.17 of the NSEL Regulations it is mandated that the trading member (in present case the Petitioner - Nirmal Bang) will be responsible for all actions of their authorized persons (Manoj Kumar Gupta). Regulation 3.1.18 shows that even if there is fraud by the authorized person, the trading member will be liable. He has relied upon the Regulation 4.5.2(d) of the NSEL Regulations which enjoins the trading member to adhere to the rules, regulations and bye-laws of the exchange. He has submitted that the Petitioner in the present case was bound by the aforementioned regulations.

¹³ (2021) 9 SCC 1

26. Mr. Rajasekhar has submitted that in the three-tier dispute resolution process mandated by the NSE, i.e. an original decision and two appeals, the Investor Grievance Redressal Panel (IGRP) of the NSE, the Arbitral Tribunal of the NSE and the Appellate Arbitral Tribunal of the NSE all found that there was a breach by the Petitioner of its obligations of obtaining and keeping pre-trade authorization. Thus, there was unanimity that there was a breach of Petitioner of its obligations.

27. Mr. Rajasekhar has submitted that the Respondent was awarded only 50% of his claim amount. This deduction of 50% takes into account the fact that the Respondent had issued post award confirmations and that his ignorance cannot be excused.

28. Mr. Rajasekhar has submitted that the Petitioner's challenge to the Majority Award, is completely beyond the scope of Section 34. The Petitioner has urged this Court to re-appreciate evidence. He has submitted that the Petitioner invites this Court to revisit what, at best, can be an erroneous application of law. The Petitioner has relied on clauses which were never urged before the Tribunal and which is impermissible.

29. Mr. Rajasekhar has submitted that the scope of a Section 34 Petition has been examined by this Court in **Zenobia Poonawalla v Rustom Ginwala**,¹⁴. This Court has noted the prior decision of the Supreme Court in the case of **Dyna Technologies Private Limited Vs. Crompton Greaves Limited**¹⁵ and observed that the Supreme Court deprecated the tendency of Courts of setting aside arbitral awards, after re-assessing the factual position of the case and then, dubbing the awards to be vitiated by either perversity or patent illegality.

30. Mr. Rajasekhar has submitted that it is required to be kept in mind that this is a multi-tier arbitration proceeding. The final award rests on the shoulders of the two awards below it. He has submitted that the Petitioner's case proceeds on the basis that the IGRP and the Arbitral Tribunal award cannot be looked at, at all. Only the Appellate Arbitral Tribunal award can be looked at which is incorrect. He has submitted that in a multi tier arbitration proceeding, the Section 34 Court should look at what has been upheld and cannot restrict itself to only the final award. The Appellate Tribunal is not engaging in a determination of the dispute

¹⁴ Order dated 25/01/2023 in Commercial Arbitration Petition No.81/2020

¹⁵ (2019) 20 SCC 1

from scratch. It is testing the validity of the Award of the lower Arbitral Tribunal. This is what the parties have agreed to, by proceeding under the NSE multi-tier arbitration Rules. He has placed reliance upon the decision of the Supreme Court in *Girja Nandini Devi v. Bijendra Narain Choudhury*,¹⁶, wherein the Supreme Court has held that it is not the duty of the Appellate Court, when it agrees with the view of the Trial Court on the evidence, either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court. Expression of general agreement with reasons given by the Court, a decision of which is under appeal, would ordinarily suffice.

31. Mr. Rajasekhar has submitted that it is required to be kept in mind while assessing the challenge to the Award that the Appellate Tribunal Award was passed by two technical Arbitrators. He has placed reliance upon decision of the Supreme Court in *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*,¹⁷, wherein the Supreme Court has held that in the event the members of the Arbitral Tribunal, nominated in accordance with the agreed procedure between the parties are engineers, their Award is not meant to be scrutinized in the same manner as one prepared by

¹⁶ AIR 1967 SC 1124

¹⁷ (2022) 1 SCC 131

legally trained minds.

32. Mr. Rajasekhar has submitted that it has been held in the decision of the Supreme Court in **PR Shah v BHH Securities**,¹⁸, that though the Rules, Bye-laws and Regulations of the Exchange were not made under any statutory provision, they have a statutory flavour. Thus, in the present case, the Petitioner ought to have taken prior permission to do the trades as mandated under Regulation 3.4.1. and and also would be held responsible for the acts of its registered authorized person, as per Regulation 3.1.17 of NSEL Regulation.

33. Mr. Rajasekhar has also relied upon the decision of this Court in **Bonanza Commodities Brokers Pvt. Ltd. v. Roshanara Bhinder**,¹⁹, wherein it is held that the bye-laws of the Multi Commodity Exchange of India Ltd. are mandatory and the transactions carried out in violation of such mandatory bye-laws would not make the broker entitled to make any claim against the constituent based on such unauthorized trade effected by the broker.

34. Mr. Rajasekhar has also relied upon the decision of this

¹⁸ AIR 2012 SC 1866

¹⁹ 2015 SCC OnLine Bom 1411

Court in **Amit Bhardwaj v Marwadi Shares and Finance Ltd.**,²⁰, wherein this court has held that the regulations are to be followed by the constituents and the stock brokers. As the regulations have been framed for the protection of the system, those regulations will have to be followed. If the brokers are permitted to carry on transactions contrary to the regulations framed by which they are bound, it will endanger the system itself.

35. Mr. Rajasekhar has submitted that the Majority Award should be upheld in so far as it awards INR 46,60,000/- to the Respondents.

36. Mr. Rajasekhar has dealt with contention of the Petitioner that the clauses in the contract barring profit share has been breached since the Respondent Erach Khavar and Farukh Meshman were sharing profits. The reliance has been placed by the Petitioner on principles of *pari delicto* to contend that the Respondent is not entitled to anything. He has submitted that in **Shanta Agarwal v M/s Baldota Bros.**²¹ and **Sita Ram v Radhabai & Ors.**²², it has been held that in *pari delicto* is an equitable doctrine which means parties

²⁰ Arbitration Petition No.563/2009 – Order dated 25/03/2011

²¹ 1971 SCC OnLine Bom

²² 1967 SCC OnLine 27

are equally guilty and applies when the contract is illegal. In *pari delicto* does not prevent a claimant from claiming his due if the cause of action is not founded on the illegal contract. He has submitted that the Clause relied upon by the Petitioner is inapplicable. The bar on profit sharing does not extend to any friend or acquaintance of the investor. He has accordingly submitted that the reliance placed by Nirmal Bang on *in pari delicto* is completely misplaced.

37. Mr. Rajasekhar has submitted that the Petitioner has raised new arguments such that Nirmal Bang has unconditional authority to sell the margin security and no separate instruction for sale was required. He has submitted that in the present case it has been held by the Majority Award that the trades were not executed by the Respondent and hence, there was no unconditional authority of the Petitioner to sell the margin security. He has submitted that this attempt made by the Petitioner to have this Court re-appreciate the evidence is impermissible. He has placed reliance upon the decision of this Court in ***Zenobia Poonawalla v. Rustom Ginwala (supra)*** in this context.

38. Mr. Rajasekhar has submitted that the SEBI Circular

dated 26th September, 2017 which has been relied upon by the Petitioner to contend that before the Circular, no pre-trade authorization was necessary in the futures and options market is a misreading of the Circular. He has submitted that the SEBI Circular states, “*Prevention of Unauthorized Trading by Stock Brokers*”. Thus, it itself contemplates that without pre-trade instructions, the trades are to be considered as unauthorized. He has submitted that Regulation 3.4.1 of the NSEL Regulation clearly state that such instructions are required to be recorded and kept. Parties traded on the NSE and are bound by these Regulations. The Petitioner cannot seek to escape the rigor thereof.

39. Mr. Rajasekhar has submitted that the Petitioner has relied upon *Nirmal Bang Securities Pvt. Ltd. V Tilak Bachar (supra)* in support of the proposition that the SEBI Circular of 2017 is what mandates pre-trade authorization and before that, there was no such prior requirement. He has submitted that this decision is not binding. In that case, Nirmal Bang had never questioned the applicability of Regulation 3.4.1. There was no argument before the three tiers of the NSE that such Regulation was not mandatory. There was no reliance on Clause 13 of the contract

before the Tribunals. This cannot be now introduced for the first time. He has submitted that Clause 13 of the contract is subject to Clause 17 of the contract which provides that the transactions executed on the Exchange are subject to Rules, Byelaws, and Regulations and circulars/ notices issued thereunder of the Exchanges where the trade is executed and all parties to such trade shall have submitted to the jurisdiction of such Court.... for the purpose of giving effect to the provisions of the Rules, Byelaws and Regulations of the Exchange. This is also subject to Clause 44 which has provided that the provisions of this document shall always be subject to Government notifications, any rules, regulations, guidelines and circular/ notices issued by SEBI and Rules, Regulations and Bye laws of the relevant stock exchanges where the trade is executed that may be in force from time to time.

40. Mr. Rajasehar has submitted that the decision in ***Kotak Securities Ltd. v. Prakash S. Khanolkar (supra)*** relied upon by the Petitioner is in support of its contention that an employee's admission made without authorization cannot bind the broker is inapplicable. In the present case Manoj Kumar Gupta's admission is uncontroverted, uncontested and undenied. In that decision relied upon by the

Petitioner the broker had specifically challenged the authority of the sub-broker to make any commitment on its behalf. Thus, the facts therein are wholly distinguishable.

41. Mr. Rajasekhar has distinguished the Judgment relied upon by the Petitioner viz. ***Keynote Capitals Ltd. v. Eco Recycling Ltd. (supra)***. He has submitted that there is no finding in the Judgment that pre-trade authorization is not required if the Regulations mandate the same. In that case, admittedly, pre-trade authorization was there. The finding of lack of authorization of the trade was not because there was lack of pre-trade authorization. In that case, the employees who had given admissions of liability later rescinded the same and filed an affidavit to the effect that he had been coerced and threatened to give such admissions. In the present case, the admissions are uncontroverted and undenied, far from it being given under coercion or threat.

42. Mr. Rajasekhar has also distinguished the decision relied upon by the Petitioner viz. ***Maheshbhai Hirabhai Champneira v. M/s Kotak Securities Ltd.(supra)*** which is in support of the contention of the Petitioner that if the constituent had any objection, he should

have raised it within a few days.

43. Mr. Rajasekhar has submitted that the Petitioner has not referred to any Rule of the National Stock Exchange that the dispute has to be raised within a couple of days. This was not its case before the Tribunals as well. Its case was simply that the trades were authorized by virtue of post trade confirmations. He has submitted that in that case, the grievance raised by the constituent that the CDs said to contain his instructions had been produced but not relied on by the Tribunal in dismissing his claim. It was held in Paragraph 8 of the said decision that it would have been a different matter if despite the non-production of the original documents/ CDs, Tribunal had given a finding against the Appellant. In other words, had the broker not produced the CDs containing the instructions, the constituent would have succeeded. In the present case, Nirmal Bang has not produced any pre-trade instructions. This have been recorded by all three tiers in view of the non-production, and going by the Division Bench's observation, the finding has to be in favour of the Respondent i.e. that there were no instructions.

44. Mr. Rajasekhar has also submitted that the decision

relied upon by the Petitioner viz. *Jagannath Parmeshwar Mills Pvt. Ltd. v. Agility Logistics Pvt. Ltd. (supra)* is inapplicable. In that decision it was held that erroneous invocation of law is patently illegal. He has submitted that none of the Judgments relied upon by the Petitioner are binding precedents. All are distinguishable on facts.

45. Mr. Rajasekhar has submitted that the Majority Award should be set aside in so far as it rejects the Respondent's claim to the extent of 50%. He has submitted that the Majority Award on the face of it to the extent that it records that Respondent i.e. Erach Khavar did not file an appeal from the decision of the IGRP is incorrect. This is the only basis for not awarding INR 46,60,000 is incorrect. The Respondent has in fact challenged the IGRP order.

46. Mr. Rajasekhar has submitted that the loss suffered by the Respondent should be calculated (at the least) as of the date of filing of the claim, i.e. INR 93,21,500, being the value of the shares as on the date of filing of the complaint before the IGRP. He has submitted that the IGRP correctly considered the value of the loss. However, it has arbitrarily decided that the Respondent was only entitled to 50% of the same. He has submitted that if the Petitioner

Nirmal Bang had not conducted the unauthorized trades, the Respondent would have been in possession of the shares even as of the date of the claim. Thus, the loss, as of the date of the claim, should be calculated. Pertinently, the shares would have been worth close to INR 2 crores today.

47. Mr. Rajasekhar has submitted that the ruling of 50%, 75% etc. is random and unreasoned. When there is admittedly wrongdoing by the Petitioner, there is no warrant to decide that the Respondent is only entitled to a percentage of the loss suffered by him as a result of the wrong doing. He is entitled to the entire loss. He has submitted that it is well settled that part of the award can be upheld and part can be set aside. He has accordingly prayed that the awarded amounts be upheld and the rejection of part of the claim be set aside.

48. Having considered the rival submissions in my view, the Majority Award has overlooked vital evidence which establishes that when the trades took place from 1st July, 2015 to 24th September, 2015, there were post transaction confirmation of the transactions given by the Respondent. The evidence on record shows that the

trades were authorized. These include E-mails, SMSes, Electronic Contracts notes, Telephone Calls and Ledger confirmations. Further, the material relevant fact which has been overlooked by the Arbitral Tribunal Majority Award is that the Respondent had confirmed the Ledger Statement forwarded by the Petitioner which showed the amount of Rs.37,829.69 being the balance amount after the transactions had taken place. The Majority Award in holding that the transactions were unauthorized by overlooking this vital evidence has arrived at a perverse and patently illegal finding.

49. The Petitioner had paid the Respondent the said amount of Rs.37829.69 and it was accepted by the Respondent without any objection. Further, the Respondent only for the first time objected to the transactions and to the fact of the balance of his account maintained with the Petitioner being nil, 10 months after having confirmed the entire Ledger Statement (on 5th October, 2015) and 5 months after having received the sum of Rs.37,829.69 (on 27th January, 2016).

50. The decisions of the Supreme court relied upon by the Petitioner in support of its contention that the Majority Award

ignoring vital evidence in arriving at the conclusion that the trades were authorized, would render the Award patently illegal viz. *Associate Builders (supra)* and *Ssangyong Engineering & Construction Co.Ltd.(supra)* are apposite. The relevant factor to be considered and which in my view the Majority Award has lost sight of, is that the SEBI Circular dated 26th September, 2017 had noted that as on the date of the Circular, the requirement of pre-trade authorization was prevalent only in the commodity derivative markets, and not in equity, equity derivative and currency derivative markets. Reading of the Circular makes it clear that requirement of pre-trade authorization was being introduced by way of that Circular with effect from 1st January 2018. The transactions in the present case having taken place prior to issuance of the Circular and / or well before 1st January 2018 the pre-trade authorization was never applicable to these transactions.

51. Further, the Majority Award was required to consider the Judgment of the Division Bench of the Calcutta High Court in *Nirmal Bang Securities Pvt. Ltd. v Tilak Bachar (supra)* in its proper perspective. In that case which was on similar facts as in the present case, the Arbitral Award held the transactions in the F&O segment to

be unauthorized for want of pre-trade authorization. The said Circular was considered and it was held that pre-trade confirmation was made mandatory only pursuant to the said Circular i.e. with effect from 1st January, 2018. I do not find any merit in the attempt made by Mr. Rajasekhar to distinguish this decision on the ground that it did not consider the effect of Regulation 3.4.1 of the National Exchange (Futures & Option Segment trading Regulation). On the contrary, the decision has made express note of this provision in Paragraphs 11 and 23 of the decision. Further, the Supreme Court vide Order dated 17th November, 2020 has dismissed Special Leave Petition against said decision of Calcutta High Court.

52. Further, I find that the decisions of this Court in ***Nirmal Bang Commodities Pvt. Ltd. v. Geetha (supra)*** and ***Keynote Capitals Limited v. Eco Recycling Limited (supra)*** relied upon by Mr. Engineer have held that when the constituent is aware of the transactions and has not objected to the same, the transactions cannot be said to be unauthorized. Further, if any objection is raised by the constituent, it is to be raised within a reasonable time. The Division Bench of this Court in ***Maheshbhai Hirabhai Champneira v. M/s Kotak Securities Ltd.(supra)*** has held that such objection was to be raised within a

couple of days. Further, in *Keynote Capitals Limited v. Eco Recycling Limited (supra)*, this Court has held that such objection should be raised within a reasonable period. The Respondent has in the present case failed to raise any objection within a reasonable time as he raised his objection only after receiving and accepting the said sum of Rs.37829.69 lying to the credit of the Respondent's Account maintained by the Petitioner and after having confirmed the Ledger Statement.

53. An attempt has been made by Mr. Rajasekhar to distinguish these decisions on the ground that in the present case there is no pre-trade authorization and only post-trade authorization. Further, that the Regulations, in particular Regulation 3.4.1, which mandates pre-trade authorization has not been satisfied, was not raised in those decisions. This distinction drawn by Mr. Rajasekhar, is of no substance, considering the aforementioned finding that pre-trade authorization was mandated only from 1st January, 2018 as per the said Circular dated 26th September, 2017 and hence, Regulation 3.4.1 cannot be read de hors the SEBI Circular dated 26th September, 2017.

54. The submissions of Mr. Engineer relating to the arrangement entered into between the Respondent and Farukh Meshman, being a private profit sharing arrangement, in breach of the Investment Advice Clause (Paragraph 2) has not been appreciated in the Majority Award, although the illegality of this profit sharing arrangement, has been noted in the Minority Award. I do not accept the interpretation of the Respondent placed on Paragraph 2 of the Investment Advice Clause that it does not extend to a friend or acquaintance of the investor. In my view, there is much substance in the submission of Mr. Engineer that the bar under the Investment Advice Clause against entering into arrangement with Agent / Employee / Representative of the Petitioner and not with a third party, extended to the arrangement with Farukh Meshman as otherwise it would be contrary to the cardinal principle of law that what cannot be done directly, cannot be permitted to be done indirectly. Further, this arrangement also included Manoj Gupta who is admittedly a Sub-Broker of the Petitioner and therefore, the Petitioner's arrangement involved an Agent / Representative of the Petitioner. Accordingly, I find much substance in the submission of Mr. Engineer that since the Respondent's profit-sharing arrangement being an illegal profit sharing arrangement i.e. in breach of the

Investment Advice Clause, the Majority Award ought not to have granted relief to the Respondent.

55. The reliance placed in the Majority Award on the submission of Manoj Gupta, Sub-Broker of the Petitioner, to render a finding against the Petitioner that the transactions were unauthorized runs counter to the decisions relied upon by Mr. Engineer viz. ***Kotak Securities Limited v. Prakash Khanolkar (supra)*** and ***Keynote Capitals Ltd. v. Eco Recycling Ltd. (supra)*** which have held that admission of Sub-Broker is not binding on the Broker. In the present case, the Majority Award has in finding that the statement of Sub-Broker bound the Petitioner, failed to consider that the statement of the Sub-Broker Manoj Gupta in the present case was not a statement on oath and no evidence of the Sub-Broker was led. Hence, there was no occasion for the Petitioner to either cross examine or controvert the Sub-Broker. However, the Majority Award has found that the Petitioner had not controverted the Sub-Broker. I do not find any substance in the submission of Mr. Rajasekhar that the statement of Manoj Gupta, Sub-Broker of the Petitioner was un-controverted and undenied. He has also attempted to distinguish the aforementioned decisions on the ground that in those cases the Sub-Broker's statement

was controverted as the Sub-Broker had been coerced and threatened to give such admissions. In my view, such distinction is misplaced, particularly considering that it cannot be held that the statement of Manoj Gupta, Sub-Broker of the Petitioner was binding on the Petitioner.

56. The Majority Award has also arrived at a finding that the Petitioner had sold the shares given as security by the Respondent when there was either a negligible negative balance or a credit balance. This finding is patently illegal as there was in fact a negative balance on the date when these shares were sold. Further, the Petitioner was allowed to sell the shares by virtue of Clause E of the Contract in the event of negative balance. Thus, the Majority Award has ignored vital evidence which would render it patently illegal. I do not find any substance in the contention of the Respondent that the Petitioner could not sell the margin shares as the margin obligations were arising out of trades which had not been executed by the Respondent constituent. In view of my above finding, that the trades are authorized trades by the Respondent Erach Khavar, the Petitioner was justified to sell the margin shares from the Respondent's margin obligation.

57. In so far as the Arbitration Petition filed by the Respondent Erach Khavar who is the Petitioner therein and which challenges a part of the Majority Award to the extent that it has not granted the balance 50% of the claim of the Respondent Erach Khavar, being INR 46,60,000/-, in my view, such challenge to that part of the Majority Award is nothing but a pretext to seek a modification of the Majority Award by enhancing it to 100% of the Respondent's claim. This cannot be done by a Court exercising jurisdiction under Section 34 of the Arbitration Act. In such exercise of jurisdiction, the Section 34 Court can only set aside the Award or uphold it.

58. In that view of the matter it is not necessary to examine the reason given in the Majority Award for grant of only 50% of the Respondent's claim.

59. In view of it being held that the Majority Award suffers from perversity and patent illegality, the Majority Award is liable to be set aside under Section 34(2A) of the Arbitration Act. Accordingly, the following order is passed:

- (i) The Majority Award dated 8th August, 2017 passed in Appeal (III), Arbitration matter No.F&O/M-0003/2017 is set aside and the dissenting Award dated 14th August, 2017 passed in Appeal (III) Arbitration matter No.F&O/M-0003/2017 is upheld.
- (ii) The Arbitration Petition No.742 of 2017 is accordingly disposed of.
- (iii) In view of this order, the Arbitration Petition No.228 of 2018 is dismissed.
- (iv) There shall be no orders as to costs.

[R.I. CHAGLA, J.]

60. Mr. Rajasekhar, the learned Counsel appearing for the Respondent, has sought stay on this Judgment and Order dated 30th April, 2024. He has further stated that by an Order dated 29th October, 2018, this Court had passed conditional stay on the Award and permitted the Respondent to withdraw the amount which had been withheld by NSE Rs.46,60,000/- from the trading account of the

Petitioner against furnishing of a suitable bank guarantee with a view to secure the amount in case the final orders in the arbitration petition go against the Respondent and he is required to bring back the amount. Pursuant thereto, the Respondent has furnished bank guarantee to the satisfaction of the Prothonotary and Senior Master and which is valid as of today. He has sought continuation of the arrangement for a period of six weeks and / or the Respondent not to be directed to bring back the said amount with interest for a period of six weeks from today.

61. Mr. Naushad Engineer, the learned Counsel appearing for the Petitioner has vehemently opposed the stay of the impugned Judgment and Order and / or continuation of the arrangement as recorded in the Order dated 29th October, 2018.

62. Having considered the submissions of Mr. Rajasekhar and noting that this arrangement was recorded way back on 29th October, 2018 and has been continued till today, for a period of six weeks from today, the Respondent is not required to bring back the said amount with interest. Upon the expiry of the said period of six weeks, the Respondent shall comply with the Order dated 29th

October, 2018 and bring back the amount of Rs.46,60,000/- with interest which shall be deposited in this Court and the Petitioner is at liberty to withdraw the said amount upon it being deposited.

[R.I. CHAGLA, J.]