

(2012) 02 BOM CK 0196

Bombay High Court

Case No: Arbitration Petition No. 1035 of 2010

Manjula Arvind Thakkar

APPELLANT

Vs

Sharekhan Limited

RESPONDENT

Date of Decision: Feb. 27, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 31, 34
- Evidence Act, 1872 - Section 19
- Securities and Exchange Board of India Act, 1992 - Section 11(1)
- Securities Contracts (Regulation) Act, 1956 - Section 10

Hon'ble Judges: Anoop V. Mohta, J

Bench: Single Bench

Advocate: Rajesh Khandelwal, for the Appellant; Pesi Modi with Mr. R.R. Bhosale along with Ms. Sabah Naik instructed by y Rajesh Desai, for the Respondent

Final Decision: Dismissed

Judgement

Anoop V. Mohta, J.

The Petitioner has challenged Award dated 10 February 2010 passed by the Arbitral Tribunal constituted in the matter of arbitration under the Byelaws, Rules and Regulations of National Stock Exchange of India Limited (NSE).

2. The Petitioner is the client of the Respondent who is a member of NSE and also a member of Bombay Stock Exchange (BSE). The Petitioner has entered into a broker client agreement along with other necessary documents and accordingly a client code was allotted. The Petitioner permitted the Respondent to send contract notes in digital format and for that provided the email ID. As per this agreement, the Respondent undertakes to do trading on behalf of the Petitioner and need to inform about the transactions through the contract notes. The Petitioner agreed to collect the contract notes and in case of non collection, the Respondent was permitted to dispatch the same, apart from sending in digital form. There is no dispute with

regard to the agreement terms. Additionally, the Petitioner along with husband, son and daughter-in-law also signed a "group adjustment letter".

3. The Petitioner was holding certain shares in her DP account and had provided the shares as margin for trades to be carried out under her instructions. The case was that the unauthorised trades resulted in a loss of Rs. 9,37,568/-. The Respondent also wrongfully disposed of her holding of Rs.23,51,844/-. Therefore made a claim of Rs. 32,89,412/with 18% interest per annum.

4. The objection was also raised about wrongful debts and inaction on the part of Respondent not to sell the holdings, apart from the wrongful selling of her holdings. The Petitioner even denied signature on the group adjustment letter with the Respondent and also stated it to be null and void as the same letter was initially issued to one Investor Services Private Limited and SS Kantilal I Ltd. The learned Arbitrator has recorded rightly that those were former names of Respondent/Sharekhan Limited. Therefore the written contract is binding, including the group adjustment letter. It cannot be stated to be null and void.

5. It is necessary to note the contents of the group adjustment letter as it goes to the root of the matter. It is undisputed that the Petitioner along with others registered with the Respondent for dealing in cash and derivative segments of BSE and NSE and opened the separate accounts in each segments. However, for operational purposes, by this letter, they agreed to treat all the other's trade accounts as one and all of them have authorised the Respondent to adjust the balances in any or all of their accounts with the Respondent or vice versa. The Petitioner along with others, by the signed documents has also agreed as under :

In consideration of your agreeing to the aforesaid, we hereby irrevocably and unconditionally authorize you to treat our accounts as one and authorize you to pass such entries as may be required to give effect to this purpose and intent.

Without affecting the generality of the aforesaid we hereby irrevocably and unconditionally authorize you do the following in our accounts maintained with you.

1 Pass journal entries adjusting the debit balance of any one or all of us against credit balance of any one or all of us in any account maintained by you.

2 Consolidate our accounts for the purpose of ascertaining limits available to us.

3 Withhold payment to any or all of us against payments due from any or all of us in any account.

4 Withhold securities due to any or all of us against dues of any or all of us in any account.

Such entries passed by you to give effect to the authorization given herein shall be binding on all of us and we shall not dispute the same. We also undertake to pass necessary accounting entries in our respective books of accounts to give effect to

entries passed by you on the basis of authority given to you vide this letter.

This authority is given to you singularly and jointly.

6. The Petitioner, along with others, has additionally given a Power of Attorney in favour of the Respondent, empowering them to do all transactions as per the NSE rules. It is therefore clear that in case of failure on the part of the client to discharge his or her liability as per the ledger, the stock broker has authorised to recover the debit balance by selling the stock and/or squaring off the position. Therefore, transactions executed by the Respondent cannot be stated to be unauthorised. The purpose and intent of group adjustment letter will be achieved only if the Respondent/broker is permitted to do the needful if necessary, by adjusting the accounts of all. No group adjustment would be effective and purposeful unless, if needed, the share broker is permitted to sell and/or dispose of the shares to adjust the account/debit balance. For all the purposes, for such transaction, it is one account. The adjustment of balance, from all the accounts read with the power of share broker, to square off the accounts, if necessary, cannot be dissected. It is interlinked, considering the derivative transactions in segment of BSE and NSE duly jointly authorised transactions on the disputed dates cannot be stated to be unauthorised. The Petitioner along with other members were fully aware of the transactions. They were receiving the details accordingly in digital format also. There was no complaint for more than 6 to 7 months for not getting the contract notes for the disputed period. The submission that she never agreed or consented to accept the contract notes in digital form itself shows the approach only to deny even the signed agreements. The first complaint was made on 8 December 2008 to the Respondent and not to any other regulatory authority like the NSE or the SEBI.

7. The learned counsel appearing for the Respondent has pointed out a Judgment of this Court in Sabina Sanghvi vs. Sharekhan Ltd in Arbitration Petition No. 499/2010 along with other companion matters dated 16 June 2010 (D. K. Deshmukh, J.) and whereby a similar group adjustment letter has been considered and observed as under :

After having heard learned counsel appearing for Petitioner, I do not see any reason to disturb the conclusion recorded by the Appellate Arbitral Tribunal in that regard. It was also contended on behalf of the two companies relying on the wording of the letter dated 24th January 2008 that that letter does not authorise the respondents to sell the shares belonging to the companies to meet the liability of Sabina. According to the companies, that letter authorises only withholding of the securities belonging to the companies. The Appellate Arbitral Tribunal has considered that argument in detail and interpreted that letter and has held that the said letter authorises even sale of shares belonging to the companies to meet the liability of Sabina. The interpretation of the document is within the jurisdiction of the Appellate Arbitral Tribunal. Court hearing petition u/s 34 of the Act can interfere with the finding recorded by the Appellate Arbitral Tribunal on the basis of interpretation of the

document only if the Court finds that the construction of the document accepted by the Tribunal is impossible or is unjust. After having gone through the letter, I find that the construction of the letter by the Tribunal is a possible construction and therefore, in my opinion, that part of the award cannot be interfered with.

8. Considering overall view of the matter, including the contents and the purpose of such group adjustment letter and the observation given by the learned Judge of this Court, I am also of the view that the interpretation/view so expressed by the Arbitral Tribunal is a possible view. It cannot be stated to be perverse or illegal. It falls within the ambit of the Rules and Regulations and authorisation and therefore need no interference. The rejection of Petitioner's claims by the Arbitral Tribunal by interpreting the above adjustment letter and on facts are well within the frame work of law and the record. Such letter in fact allow any one member or joint holder to fill the gap and deposit the amount to continue with the transaction to avoid squaring off stage. The commercial man know all this.

9. The submission was also made that a decision given by arbitration forum of BSE in arbitration proceedings between the same parties, on similar issue should have been followed. The decision given by the BSE tribunal may have persuasive value but cannot be stated to be binding on NSE tribunal. Both tribunals are governed by their own rules and the procedure apart from common laws. The Tribunal in the present case specifically disagreeing with the view so expressed by the BSE forum and by giving their own reasons also cannot be stated to be incorrect. Now, in view of the judgment of this Court accepting the view, as expressed by the present NSE Tribunal in the case and as I am also agreeing with the view expressed by this Court, the submission of the learned counsel appearing for the Petitioner, based upon the decision of BSE forum is unacceptable.

10. It is the Arbitration mechanism in stock exchanges, basically governed by the provisions of the Securities Contracts (Regulation) Act, 1956 (for short, the Securities Act) and the Rules and Regulations and Byelaws framed thereunder, including the circular issued by the Government and the Securities and Exchange Board of India (for short, "SEBI") from time to time. The circulars are issued principally u/s 11(1) of the Securities and Exchange Board of India, Act 1992 (for short, "the SEBI Act") read with Section 10 of the Securities Act. The Arbitration proceedings are governed by the Arbitration Act, 1996 read with above Acts, Byelaws and circulars apart from the provisions of general laws. I have already elaborated the issue in the following words [Sahyadri Earthmovers Vs. L and T Finance Limited and Another](#), :

Equal and fair treatment

(xvii) The Arbitrator must give equal opportunity to both the parties and, therefore, bound to follow the principles of natural justice, fair play and equity. CPC & Evidence Act

(xviii) Though CPC and the Evidence Act are not applicable strictly, (Section 19), but the settled principles do apply. The power of Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of any evidence just cannot be overlooked.

To decide jurisdiction :

(xix) The Arbitrator is empowered to decide his own jurisdiction if objected and even the issue of existence of arbitration agreement (S/ 16). It should be decided as early as possible by passing reasoned order, as this could be additional ground of challenge u/Section 34 of the Arbitration Act.

Substantial laws-customs-commercial usages and practice

(xx) The Arbitrator is bound by the substantive laws of the land as well as procedural laws and practice and principle apart from the custom and usage of the trade referring the business and commerce between the parties, in all respects.

To Analyse the evidence and the record

(xxi) The Arbitrator is required to consider all the material and evidence/documents placed by the parties on record read with the evidence led by the parties. The Arbitrator is, therefore, bound to analyse and appreciate the same by giving proper and correct interpretation of terms of the contract subject to provisions of law, before passing reasoned interim or final award. The Arbitrator to pass reasoned interim and/or final award, unless agreed otherwise.

To award interest-pre-post-future interests agreed if not as per the law

(xxii) The Arbitrator is required to consider/grant pre/post, pending and future interest as contemplated u/s 31 of the Arbitration Act.

The Doctrines to be followed

The Arbitrator cannot disregard the substantive and procedural law. The Arbitrator is therefore bound to take note of law; of interpretation, precedent, obiter dicta, ratio decidendi, Estoppel, acquiescence, waiver and res judicata, public policy, natural justice, fairplay and equity.

11. The constituent/ investor appoint the broker for doing business/transaction on all exchanges. Every exchanges is governed and administered by its Byelaws and Regulations and various circulars. In case of dispute pertaining to the transactions, the respective exchanges will be governed by its Byelaws as declared separately. The Arbitral Tribunal so appointed being institutional Tribunal, will take its own decision as per their laws and trade and practice. There is nothing to show that the decision of Tribunal of one exchange is binding to other institutional Tribunal, though the basic subject and object of such transactions are same and similarly placed.

12. The Appellate Tribunal's decision is binding on the lower Tribunal, but the Appellate Tribunal of one exchange whether binds the lower Tribunal of other exchanges, is again a matter which one has to consider from the point of view of avoiding conflicting views and decisions apart from the judicial discipline. I am of the view that all these are situations where SEBI and/or Competent Authority must take note of and issue necessary circulars or guidelines to avoid further complications and delay in taking early decisions in the Arbitration proceedings. The investors, shareholders and financial institutions and public at large are involved in all these financial transactions.

13. The conflicting views, difference of opinion, is permissible but while taking final decisions, the Tribunal also needs to consider the settled principle of law, as well as, the binding decisions of the Supreme Court or High Court etc. These Arbitral Tribunals, as everyone knows, decide the right of the parties by such Arbitration mechanism. Therefore, basic laws and principles just cannot be overlooked even by the Arbitral Tribunal so that the Arbitration mechanism is not termed as costly, tardy adjudication procedure in contesting matters. We have to make it more effective and less expensive. The Arbitrator can use his expertized in the field read with the commercial trade usage and practices if any, but at the same stroke, he must take into consideration the basic laws of the land, apart from the principle of fairplay, equity and natural justice.

14. In view of above, the submission that the Respondent ought not to have delayed the actions is nothing but new stand contrary to the adjustment letter. The Petitioner, in the facts, cannot be stated to be wrong or without authority to charge the (DPC) as provided in the agreement and the adjustment letter. The fact of not depositing the required money, in time, itself entitled the Respondent to charge extra amount, as per the regulation itself. The D.P.C. Charges were charged not at the rate of 2% but only 12% p.a. This cannot be the reason to interfere with the D.P.C so charged. The stock member may charge for delayed payment or if situation demands, sell the shares, square off all the single or joint accounts and if amount deposited deduct the D.T.C. as per the adjustment letter and the agreement in question.

15. Resultantly, the Petition is dismissed. There shall be no order as to costs.