



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 410 OF 2014

Jagadeesa G. Chary

...Petitioner

Versus

Nirmal Bang Securities Pvt. Ltd.

...Respondent

Ms. Prachi Pandya i/b. Corporate Attorneys, for the Petitioner.

**Mr. Naushad Engineer, Senior Counsel, a/w. Sharad Parbat, i/b
Ajay Khandhar & Co., for Respondent.**

CORAM : SOMASEKHAR SUNDARESAN, J.

RESERVED ON : February 21, 2025

PRONOUNCED ON : June 9, 2025

JUDGEMENT:

Context and Factual Background:

1. This is a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (“***the Act***”) impugning an Arbitral Award dated October 15, 2013 (“***Appellate Award***”), which in turn is an affirmation of another Arbitral Award dated April 15, 2013 (“***Primary Award***”), rejecting the Petitioner’s claims against the Respondent in arbitration proceedings conducted at the National Stock Exchange (“***NSE***”).

2. The Petitioner had demanded refund of a sum of Rs. 14,87,014.43, which the Petitioner claims is not payable by him by

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reason of all trades (except one) carried out by the Respondent being “unauthorised trades”. In this judgement, the Appellate Award and the Primary Award are collectively referred to as the “*Impugned Award*”.

3. It is noteworthy that the Petitioner also initiated proceedings in the Bombay Stock Exchange (“*BSE*”), which too have gone against him in the outcome and the pattern of arguments in those proceedings is similar. This Petition only impugns the outcome in the arbitration conducted at the NSE and reference to the BSE proceedings has been warranted only because of the Petitioner alluding to some elements of those proceedings, and the fact that the trades of the Petitioner were carried out on both exchanges

4. In this Court, these proceedings have had a chequered history. By an order dated December 2, 2015, the Impugned Award came to be upheld by a Learned Single Judge of this Court. In a challenge under Section 37 of the Act, a Learned Division Bench of this Court by an order dated November 16, 2016 found that reasons were absent in the order of the Learned Single Judge, and remanded the matter for reconsideration. The matter has remained on the docket of this Court since then.

5. I have heard at length, Ms. Prachi Pandya, Learned Counsel on behalf of the Petitioner and Mr. Naushad Engineer, Learned Senior Counsel on behalf of the Respondent. With their assistance, I have navigated the voluminous record generated in the matter. I have also closely examined both the Primary Award and the Appellate Award and the underlying material.

Grounds of Challenge:

6. The grounds of the challenge mounted by the Petitioner can be summarised thus:

- a) According to the Petitioner, there is no evidence of prior authorisation of any of the trades, and therefore all the trades are unauthorised trades;
- b) The Petitioner contends that he had repeatedly instructed the Respondent to stop trading on his account and once such written instruction is provided, further trades could have been effected only if he were to revoke the suspension of his trading in writing;
- c) The Respondent closed out the trade positions in derivatives segment without giving the Petitioner any opportunity to make good any margin shortfall, and determining that there is a failure to make good the margin shortfall, and then squaring off the transactions;
- d) The Petitioner insinuates that he is a man of meagre income (annual income of approximately Rs. 1 lakh during the period proximate to the proceedings) indicating that the volume of

- trading (about Rs.37 Crores) would not be commensurate to his financial strength;
- e) The Petitioner indicates that he was promised portfolio management services by the Respondent with a promise of generating profits of over Rs. 30,000 to Rs. 35,000 per month by one Mr. Rajesh Kumar, a relationship manager who had been known to him in his earlier portfolio management relationship with ICICI Securities, another securities firm, which had a portfolio management service arrangement with ING PMS;
 - f) The Petitioner is so ignorant of the capital market that he does not even know the difference between the NSE and the BSE; and
 - g) Finally, after the Primary Award was passed, in the course of the appellate arbitration proceedings, the Petitioner challenged the appointment of the arbitrator as being in conflict with the bye-laws of the NSE.

Analysis and Findings:

7. At first blush, the case of the Petitioner appeared compelling inasmuch as the Petitioner claimed to have directed in writing that the Respondent should stop purchasing in his account, and the contract between the parties provided for purchasing to be revived only upon written instructions of the Petitioner. The material on record, however, would show that the Petitioner indeed actively participated in the trades after his emails that purportedly asked the Respondent to stop further purchases. His written suspension of purchases also do not

partake the character of a firm injunction from trading but represent his bargaining and protestation about the scale of earnings from the trades.

8. For the reasons set out below in this judgement, I find that the Petitioner has not made out a case for interference under Section 34 of the Act. I also find that the grounds raised by the Petitioner are not consistent with the material on record. In the Primary Award, the Learned Sole Arbitrator, who is the master of the evidence before him has arrived at plausible and defensible findings on the merits of the Petitioner's contentions. The Appellate Award has not found it fit to overturn the Primary Award. Since the Appellate Award is not a very detailed award, I have given my anxious consideration to the material on record in determining both instruments that constitute the Impugned Award.

9. I find that the Petitioner's contentions are clinically structured to find fault with the Respondent in relation to compliance obligations under securities regulations. However, taking each of them at its worst, they do not translate into making out a credible and compelling case to hold that the Impugned Award, which interprets the commercial

relationship and transactions between the parties, deserves interference.

10. The primary contention of the Petitioner is that the trades carried out in his name were unauthorised – most of the other grounds flow from this ground. The grounds are dealt with , keeping the absence of authorisation and the purported prohibition on purchases as the foundational ground. Towards this end, his fundamental premise is that there is no authorisation in writing before any trade. In fact, the allegation is that the Petitioner consciously wrote to the Respondent not to carry out any further purchases, and yet there were purchases. This being a serious charge, the finding in the Impugned Award that the Petitioner has indeed traded needs to be scrutinised.

11. It is a matter of record that there are telephonic recordings of conversations between the Petitioner and representatives of the Respondent. The recordings were presented in a compact disc to the Learned Arbitral Tribunal and transcripts of the same were also presented. While there are vague allegations of the transcripts being “doctored” the Petitioner has also argued that the transcripts show conversations after the trades were effected and not confirmations before the trades were executed.

12. A bare reading of the transcripts would show that the Petitioner did not even protest, much less express astonishment or shock about trades having been effected by the Respondent – and that too after his email purporting to suspend purchases on his behalf. That apart, there is voluminous corroborative evidence that support the finding in the Impugned Award – trade confirmations, bills, margin statements and contract notes were sent on email to the Petitioner; sms messages were sent about every trade to the Petitioner; and the ledger account of transactions analysed by the Petitioner admittedly enabled him to reconcile all but 11 trades. The primary contention of the Petitioner (apart from saying that there is no prior written authorisation from him for all trades but one) is that on October 18, 2010, he specifically wrote to the Respondent that owing to the losses suffered in his account the Respondent must not make further purchases. Admittedly there were trades after this date, and the contract notes, sms messages and all related confirmations were received by him. The Petitioner does not disclaim receipt of these but points to expressions of anguish by him about the losses being suffered in his account.

13. In this context, the transcripts of certain conversations after October 18, 2010 gain significance. First, the email of October 18, 2010 states: “*Since I find lot of losses taking place in the transactions carried*

out on my account PNCo12, I request you to advise all concerned to stop carrying out any buy transaction". On October 21, 2010, the Petitioner wrote another email setting out an analysis "meticulously carried out", of the trades executed between September 13, 2010 and October 20, 2010 with the Petitioner's basic knowledge of accounting principles. He does complain about the effected trades on two more days after the email of October 18, 2010. On November 8, 2010, the Petitioner wrote another email stating that he "*expected that the loss would be recovered / or reduced to a minimum in October end*" but a further loss of Rs. 75,000 had taken place. Strangely, in this email, the Petitioner once again states that he would like no further buy transactions to take place and only sale of existing positions be undertaken but in the very same breath he also writes "*However if Nirmalbang feels my findings and opinions are not correct, I will appreciate your frank and true assessment of my account and provide me the reasons for continuing my account with you.*"

14. The email correspondence continues into March 2011, when the Petitioner asked the Respondent to introspect and write off the amounts being claimed from the Petitioner. The Petitioner alluded to the promise of getting returns of Rs. 30,000 to Rs. 35,000 per month and how he moved the portfolio management service from the earlier

firm to the Respondent along with the shift of the relationship manager from that firm to the Respondent.

15. It is against this backdrop that the transcripts of the conversation become relevant. On November 18, 2010, the Respondent's representative reported to the Petitioner on a phone call that a certain security was sold on the NSE and bought on the BSE and the Petitioner said "*OK, fine*". Likewise, on December 9, 2010, the official Respondent to the Petitioner that there was a sale of 90 L&T shares on the NSE and a purchase of the identical number of the same shares on the BSE. Curiously, the sale price was lower than the purchase price and the Petitioner asks him if anything else was purchased and says "*Accha, thik hai*". There are various other such conversations. The pattern of trading appears to that of arbitrage – purchase on one exchange and sale on the other with a view to exploit the differences in prices. These conversations are during the period between November 2010 and December 2010 i.e. all after the first email from the Petitioner asking the Respondent not to make more purchases (on October 18, 2010).

16. A conjoint reading of the emails purporting to proscribe further purchases and the contemporaneous conversations would show that the Petitioner potentially was threatening to close down the relationship if they did not improve performance. It appears that he

did not actually instruct the Respondent to completely stop transacting. As seen from the email of November 8, 2010, the Petitioner indicated that if the Respondent believed the Petitioner's assessment was wrong, he was happy to hear their point of view. Thereafter there have been trades including purchases. They are reported to him and he is happy to get them reported. There is no expression of astonishment at trades being effected despite his purported prohibition. Moreover, in a conversation held on December 30, 2010, the Petitioner confirms that until then he was receiving all contract notes and now he was facing some issue in access to contract notes. This would indicate that he was indeed in receipt of contract notes and was reviewing, and analysing them. This makes it clear that his emails were treats to stop and not firm instruction to bring the trading to an end.

17. Such evidence supports the findings in the Primary Award to the effect that the Petitioner has confirmed receipt of all contract notes and documentation about the trades after October 18, 2010, but he has no explanation as to why he did not disclaim the trades contemporaneous with their receipt, which he was entitled to do immediately. The Primary Award returns a finding that the Petitioner appeared to be a person well versed with the stock market and had been able to piece all transactions together and he really quarreled only about 11 trades,

which too were explained at a hearing of the Learned Arbitral Tribunal and at that stage, the Petitioner appeared to have understood the explanation. The Learned Arbitral Tribunal returned a plausible conclusion that the Petitioner well understood the transactions and participated in them. Put differently, the dispute raised over the trades being unauthorised appears to be an afterthought.

18. The Learned Arbitral Tribunal rejected the projected naïveté of the Petitioner – with his insinuation of his low income level and his contention that he did not know the difference between the NSE and the BSE. On a review of the material on record, in my opinion, the Learned Arbitral Tribunal is right. The Respondent was reporting to the Petitioner about a pattern of trading – buying on one of NSE and BSE, and selling on the other. If the Petitioner had no clue about the difference between the two exchanges, he would have wondered what was being reported to him and would have challenged the Respondent. None of that is apparent. Instead he seems to have understood the trades.

19. Evidently, the Respondent's services as broker was on both exchanges and contract notes for trades on each exchange were being sent to him, as indeed were sms confirmations and ledger statements.

The Petitioner did threaten to end the relationship overall and also welcomed thoughts from the Respondent to explain why it should continue. The relationship indeed continued and the trades took place. At one stage, the corporate office of the Respondent froze the trading and the Petitioner protested it saying it was arbitrary. On March 23, 2011, the Respondent assured the Petitioner that the losses were solely due to market fall and they were using their research strategies to help improve performance. On the next date, the Petitioner did not express shock or surprise about trades being effected after October 18, 2010 but appreciated the efforts to explain matters to him. At this stage, he complained about the quality of the research and the service and expressed the need for the Respondent to introspect and write off the losses as a goodwill gesture. He indeed reminded the Respondent about the original reason for moving his portfolio to the Respondent – essentially to be given profits and returns of Rs. 30,000 to Rs. 35,000 per month.

20. The picture that emerges is that the Petitioner indeed was a client of the portfolio management services with ICICI Securities and ING. He moved that to the Respondent. The commercial expectation was that the Respondent would conduct portfolio management services and generate returns. It must be remembered that these trades took

place way back in 2010. Since then, there has been significant improvement in regulatory stringency in brokers being permitted to undertake decisions on behalf of their clients as opposed to executing trades instructed by clients. Be that as it may, the commercial relationship between the parties appears to have been that the Respondent would be given a free run to trade, with the expectation that returns would be generated in the region of Rs. 30,000 to Rs. 35,000 per month. The parties executed a member-client agreement on September 3, 2010. In the very first month, there was a loss of Rs. 1 lakh, which then increased to Rs. 1.75 lakh by end of October 2010. The Petitioner's protestations appear to be about the losses and not about authorising the trades. The Petitioner evidently authorised the Respondent to trade freely to generate its returns he expected. The Petitioner was happy to receive post-transaction reports after the trades were effected.

21. The Respondent carrying out *de facto* discretionary portfolio management services instead of being a purely executing broker may have regulatory repercussions at the hands of the securities market regulator but it cannot negate the fact that the parties were willing participants in the same trades and the Petitioner had the expectation that the Respondent would trade on his behalf in a manner that would

generate profits and not losses. Risk and reward follow the trade and the participation in the trades by the Petitioner would as a matter of contract pre-empt the Petitioner's ability to claim that the trades were unauthorised.

22. The Petitioner appears to have been advised to structure his assault on the Respondent in reliance upon specific regulatory requirements – authorisation of trades; conduct of discretionary portfolio management services; potential examination of suitability of a client for trading in derivatives etc. Even assuming each of the allegations in this regard is correct, it would not follow that the Petitioner can wash his hands off the losses after conscious and knowing participation in the scheme of trading. The Petitioner's claim of being so naïve as to not know the difference between the NSE and the BSE totally undermines his credibility inasmuch as he was receiving separate contract notes and confirmations across both exchanges; arbitrage transactions of diametrically opposite trades being concurrently entered on the two exchanges being reported to him; his admitted receipt and analysis of contract notes; and his capacity to understand and appreciate the trades, and being explained the balance 11 trades that he did not understand, in the presence of the arbitrator.

23. All of these point to the Petitioner having been a conscious and aware customer – indeed, he had a portfolio management relationship and trading account with ICICI Securities and ING for over a decade before migrating his relationship with the same relationship manager to the Respondent. The volume of trading – running into a few tens of crores of rupees – was well within the live and active knowledge and analysis by the Petitioner. Therefore, it would not lie in the mouth of the Petitioner to challenge the same later to get out of the conscious commercial bargain.

24. In the grounds of challenge, the Petitioner has contended that the Respondent could not have closed out any position without giving him notice about margin shortfall and giving him a chance to provide margin. If the Petitioner's contentions about the trades being totally unauthorised were true, the Petitioner would never have raised such a ground complaining about being given a chance to provide additional margin. If no trade, at least after October 18, 2010 was to be taken as valid, there was no question of the Petitioner seeking a chance to provide margin. These two contentions are mutually destructive. What appears from the record is that the Petitioner was provided with margin statements along with post-transaction reports, and he was fully conscious of the trades and the margin positions. Therefore, while

the contention about notice of margin shortfall does not hold water, but it does undermine the contention about the trades being unauthorised and having been allegedly conducted behind the back of the Petitioner.

25. Therefore, the Primary Award being an eminently plausible and defensible award, the Appellate Award, which incorporates reference to it, and refrains from interfering with its findings, in my opinion, calls for no interference in exercise of the jurisdiction under Section 34 of the Act.

Challenge to Arbitrator Appointment:

26. After it appeared that the Petitioner was losing before the Learned Arbitral Tribunal, the Petitioner appears to have been advised to take up a novel contention – that the very composition of the Learned Arbitral Tribunal was flawed.

27. The Petitioner had suggested three names in descending order of preference. The first name was one Mr. G.A. Nayak and the second name was one Mr. R.V. Iyer. The Respondent had provided three other names. The NSE first appointed Mr. G.A. Nayak. The Respondent objected on the premise that the NSE ought to pick a name that was not on the list of either party. The NSE then picked the next name

suggested by the Petitioner – Mr. R.V. Iyer-and built consensus on the name and both parties proceeded to the arbitration. Throughout the Primary Arbitration proceedings the Petitioner did not raise any objection – he had no reason to do so since the Learned Sole Arbitrator was his very own second choice. Therefore, the proceedings before Mr. Iyer were conducted by consent of the parties. On March 7, 2013, judgement was reserved by the Learned Arbitral Tribunal. On April 12, 2013, the Petitioner raised objections about Mr. Iyer’s appointment on the premise of procedural lapses on the part of NSE. The Petitioner contended that Mr. Nayak had been wrongly replaced and the arbitration should start afresh with Mr. Nayak.

28. The Appellate Award rejects this contention on the premise that any objection to the independence or impartiality of the arbitrator ought to have been taken up during the Primary Arbitration proceedings, and that at such a late stage, this objection could not be taken up.

29. It is noteworthy that the Petitioner’s objection is not to independence and impartiality but is now premised on the NSE bye-laws not permitting the Respondent a second chance to suggest arbitrators. Accepting that argument, it would follow that the NSE had the prerogative to appoint any arbitrator ignoring the list given by the

Respondent. In any case, Mr. Iyer was the second choice of the Petitioner , and therefore, the Petitioner could not have had any objection to his appointment.

30. In any case, both parties consented and proceeded before the Learned Arbitral Tribunal. The Learned Arbitral Tribunal put to the Respondent whether he would persist with any objection to the composition of the Learned Arbitral Tribunal. The Petitioner was happy that it was an arbitrator suggested by the Petitioner. The parties consented and proceeded before the arbitrator. Arbitration is a creature of contract and indeed the parties consented to proceed. The Respondent may have had a cause of action by objecting to the arbitrator being one suggested by the Petitioner, and indeed the Learned Arbitral Tribunal put it to the Respondent, who waived it.

31. I am afraid the Petitioner was never in a position to object to the arbitrator. For the Petitioner to raise this issue would not be tenable. I have carefully examined the grounds raised in the Petition in this regard. I am unable to agree with this objection on two counts – after according consent to proceed, it would not be open for a party to object to an arbitrator and that too after an adverse order. If such an objection were to be permitted, it would lead to a pernicious trend of participating in arbitration and raising objections after the award is

adverse to the very party that suggested the arbitrator. That apart, the arbitration under the NSE bye-laws is an institutional arbitration. The NSE has powers to appoint an arbitrator. The NSE has made its choice of an arbitrator and put it to the parties. The NSE may have been wrong in permitting replacement of Mr. Nayak who was originally appointed, by building consensus and that too for the second choice proposed by the Petitioner. In my opinion, even if the change were improper, the parties agreed to the replaced arbitrator and participated in the conduct of the arbitration. It must be remembered that there is not a whisper about any real or perceived lack of independence or impartiality on the part of Mr. Iyer. The grievance is rooted in the arbitration outcome not having gone the Petitioner's way. In these circumstances, this objection too does not deserve acceptance.

32. The grounds in the Petition invoke Section 34(2)(iii) and Section 34(2)(iv) of the Act, neither of which is relevant for this case. It can never be said that the Petitioner did not have notice about appointment of the arbitrator or that the Petitioner was unable to present his case. Copious and elaborate pleadings with submissions even on sur-rejoinder are found on the record. Therefore, Section 34(2)(iii) of the Act has no application to this case. Likewise, there is nothing in the Impugned Award that can be regarded as a decision not falling within

the scope of the arbitration agreement. Neither has the Petitioner pointed out any such specific facet to invoke Section 34(2)(iv) nor is one able to discern any facet of such an element from the record.

Case Law Cited:

33. Finally, a word on two judgments relied upon by Ms. Pandya on behalf of the Petitioner, would be in order. Both the judgements are in relation to trading in commodities derivatives. The case of Bonanza Commodities Brokers Pvt. Ltd. Vs. Mrs. Roshanara Bhinder (Arbitration Petition No. 195 of 2015) is totally distinguishable on facts. A Learned Single Judge of this Court was dealing with a case where a member of the commodities derivatives exchange was challenging the rejection of a claim by the arbitral tribunal, which had taken note of the fact that there was never any default on the part of the client whenever the broker demanded payment of more margin money. On facts, the arbitral tribunal had found that appropriate compliance for default in payment of margin had not been effected by the broker before closing out the open positions. This is of no relevance to this case because in the case at hand, the allegation is that none of the transactions were authorised since they were not backed by prior written authorisation. In fact, as stated earlier, reliance on margin as an issue undermines the

foundation of the Petitioner's case, namely, that no trade was authorised.

34. Likewise, the case of *BMA Commodities Pvt. Ltd. and Anr. Vs. Kaberi Mondal and Anr. (2015 (2) Bom. C.R. 457)* is also completely distinguishable on identical grounds. In that case too, the facts are completely different – it was found on evidence that the client of the broker had a positive balance and there was no cause for the broker to close out of the positions of the client. The arbitral tribunal ruled in favour of the client of the broker and the broker's challenge under Section 34 was repelled. On facts, it had been found that the client had never signed up for receipt of electronic contract notes and therefore the claim of having delivered all contract notes was not accepted. This is completely different from the matter at hand where the Petitioner had always received all contract notes and had examined them to engage with the Respondent, participated in attempting to make money, and then disclaimed losses.

Conclusions:

35. Therefore, for the reasons set out above, I return the following conclusions:

(a) The Petitioner expected the Respondent to provide portfolio management services with a migration of his relationship

- with the same relationship manager who was servicing him at ICICI Securities and ING portfolio management services;
- (b) The Petitioner expected the Respondent to trade freely and provide him returns and was happy to receive post-transaction reports;
- (c) The Petitioner indeed received post-transaction confirmations and reports including contract notes, margin statement, ledger etc., on email and also by way of sms confirmations;
- (d) The Petitioner complained bitterly about the losses being incurred but refrained from firmly suspending or terminating the relationship – he was happy to engage further and indeed took note of, and approved arbitrage (with contemporaneous contrary trades on two different exchanges) even after the emails by which he indicated a desire to stop further buy transactions;
- (e) The Petitioner is not at all a naïve investor without knowledge of the stock market – he was conscious about the trades and comprehended the trades;
- (f) The Respondent may have violated securities regulations on executing discretionary transactions on behalf of the Petitioner but that would not have a consequence for the commercial claims and counter-claims between the parties;
- (g) The Respondent's contentions about being completely naïve stands undermined – he was fully aware of the volume of trading (about Rs. 37 crores) contemporaneous with the trades. The volume may have been large but the losses were of a mere approximate Rs. 14 lakh;
- (h) The contention about the composition of Learned Arbitral Tribunal being flawed necessitating starting afresh with Mr. G.A. Nayak as the arbitrator is not tenable; and

(i) Neither Section 34(2)(iii) nor Section 34(2)(iv) of the Act has any relevance or application to the case.

36. In the result, the Petition fails and deserves to be dismissed. Typically, costs would follow the event. However, I find that it was not the fault of either party that the overburdened docket of this Court led to the matter remaining pending for nearly ten years after the matter was remanded by the Learned Division Bench of this Court on the ground that the earlier order by the Learned Single Bench of this Court was devoid of reasoning. In these circumstances, although costs must ordinarily follow the event in a dispute of a commercial nature, considering the scale and size of the dispute involved, I have been persuaded to conclude that costs need not be imposed.

37. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN J.]