

(2013) 06 BOM CK 0066
In the Bombay High Court
Case No : Arbitration Petition No. 930 of 2010

Bombay Construction and Engineering Pvt. Ltd.	APPELLANT
Vs	
Mehta Finstock Pvt. Ltd. and HKB Stock Broking Pvt. Ltd.	RESPONDENT

Date of Decision : 10-06-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28, 34, 34(2)(a)(v)

Citation : (2013) 5 ALLMR 600 : (2013) 4 BomCR 429

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Simil Purohit instructed by M/s. Purohit and Co, for the Appellant;
Zal Andhyarujina with Mr. Ajay Khandhar and Jayant Gaikwad, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioner-original Respondent has invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) and thereby challenged Award dated 24 February 2010 passed by the Arbitral Tribunal consisting of three learned Arbitrators of National Stock Exchange of India Limited (NSEIL). The operative part of the Award is as under:

- 1 The Respondent is directed to pay to the Applicant a sum of Rs. 53,76,751.46p together within interest @ 12% p.a. from 20.2.2008 till realization.
- 2 The counter claim stands rejected.
- 3 The Respondent to bear its own cost and also the cost of the Applicant No. 1 after the remand of the matter.
- 4 We authorize the National Stock Exchange of India Limited, to file the Original Award and forward a copy of the Award each to the parties.

The Petitioner appointed the Respondent to effect transactions on the Futures & Options Segment of NSEIL. The Respondent squared off the outstanding positions of the Petitioner on 22nd January 2008. The differences arose; the

Petitioner filed a complaint against the Respondent with NSEIL; the Respondent filed a claim against the Petitioner. The Petitioner filed its written statement and counter claim against the Respondent for a sum of Rs. 52,59,030.79 together with interest. The learned Arbitrator earlier had passed award dated 8 October, 2008, thereby rejecting the counter claim filed by the Petitioner and awarded similar amount in favour of the Petitioner. Being aggrieved, the Petitioner had preferred a petition which was finally disposed and the matter was remanded back. The learned Arbitral Tribunal re-heard the matter and passed the Award.

2 By earlier Order dated 25 September, 2009, this Court had remanded the matter, by observing as under:

Because, it amounts no full opportunity, as contemplated under the principle of natural justice. There is nothing on record to show that the parties have accepted and or consented for such procedural mode and mechanism. Without expressing anything on merits of the matter, on this ground itself, I am quashing this award. However, it is made clear that the Hon''ble Tribunal may fix the matter and pass appropriate order after hearing both the parties within a period of 6 weeks, on the basis of material available on record.

3 The leaned Arbitral Tribunal, after re-considering the whole matter including the material and averments made in the sur rejoinder and sur-sur rejoinder, by giving additional reasons, and by maintaining the reasons/findings and conclusion already given in Award dated 8 October 2008, has passed the present Award, by treating the earlier Award as an integral part of the present Award.

4 The contention of the learned counsel appearing for the Petitioner that the learned Arbitrators erred in relying on and incorporating the earlier Award and liable to be quashed and set aside, is unacceptable. After going through the reasoning so given by the learned Arbitral Tribunal in both these Award, I am inclined to observe that the matter was remanded with intention to give opportunity to the Petitioner to make out a case and/or additional submission, based upon the rejoinder and/or sur rejoinder. The learned Arbitral Tribunal, therefore, re-considered the same and passed the Award by retaining the reasoning so given apart from dealing with the aspect of sur rejoinder and sur-sur rejoinder again. In view of the above, I am inclined to observe that the Award so passed is based upon the material available on record and after giving hearing and opportunity to all the parties.

5 The learned Arbitral Tribunal in paragraphs 10, 11 and 12 of the Award had referred the pleadings and sur-rejoinder and sur-sur rejoinder, including the "alleged financial capability" to meet the demand. The supporting bank statement before the Tribunal, including the financial capacity of the Petitioner as recorded in paragraph 4, in no way, justify the case of Petitioner not to fulfill the obligation of paying the sum of Rs. 96 lacs. There is no contra material placed on record by the Petitioner to show that the Respondent had demanded a sum of Rs. 10 lacs only. The fact that the Petitioner failed to deposit and/or make the

payment of balance amount itself proved the default.

6 The submission that there was no proof on record placed to establish the case of the trading member's demand upon the constituent (client) and, therefore, the action of squaring off the position was illegal and unjustifiable, is unacceptable. The Petitioner, from time to time, had received the contract notes and statements and there were transactions made orally also. I am inclined to observe that the huge amount lying with the client is no reason to accept the case that he was not under obligation to make the balance payment, inspite of knowledge of margin defaults. The submission that there was no demand made is unacceptable basically when there is no denial to the fact of requirement of fulfilling the obligation of margin as contemplated under the Regulations.

7 The material placed on record, as referred and dealt with by the counsel appearing for the parties, apart from the reasoning given by the Arbitral Tribunal, shows that the Respondent's ledger account reflected a debit balance of Rs. 96,94,455 on 21 January 2008. Upto 18 January 2008 there was no problem. The market fell sharply on 21 January 2008. To say that the Respondent asked to deposit only Rs. 10 lacs, therefore, is unacceptable situation. The Petitioner's deposit of cheque of Rs. 10 lacs on 22nd January 2008 in the account of Respondent was grossly inadequate and was nothing but the failure to recoup/replenish, to pay margin and mark to market losses which resulted into squaring off of his F & O position on 22nd January 2008. The Petitioner has been in the field for long. The good relationship, even if any, in no way, disentitle the broker to ask for and/or demand balance marginal amount, unless there is contra material placed on record which is missing in the present case. The instruction, therefore, to square off the position on 22nd January, 2008, in view of the above undisputed position on record, in no way can be stated to be illegal and contrary to the provisions of law, specifically when there is no denial and/or dispute to the regularly maintained accounts in the ordinary course of the business.

8 The submission and contention that they were not aware of the transaction for want of receipt of ledger account and contract note of 22nd January 2008 itself show that the contradictory and inconsistent stand taken by the Petitioner with regard to the nonpayment of marginal amount. On the contrary, there is ample record to show that there was no dispute with regard to the receipt of the ledger account and the contract note before the date of action.

9 The Petitioner, was aware of its mark to market losses and/or additional margin requirement and failed to keep the track for the losses of margins inspite of a regular receipt of information as well as demand as required in terms of Bye-law No. 3.10(a) of NSEIL of F & O. Therefore, without placing any contra material on record gave false justification for the first time before the learned Arbitral Tribunal. The reasoning so given by the Arbitral Tribunal on this issue, in no way, can be stated to be perverse and/or contrary to the record and the law. Therefore, the action to liquidate the stock futures position which were existing in F & O segment, the debit balance shows at the end of 22nd January 2008 in

no way stated to be incorrect or bad in law. I am inclined to observe that the basic burden lies upon the petitioner to show that he was not under obligation to make the payment inspite of knowledge of collapse of market and obligation to replenish to maintain the margin as required under the Byelaws; the Petitioner failed to discharge the said burden. Mere allegations that there was no demand, in the background, in my view is not sufficient.

10 There is ample material on record to show that inspite of repeated reminders and communications, the Petitioner unable to arrange for the payment and, therefore, suggested to go ahead with the liquidating the outstanding position at prevailing market price. The same was also communicated immediately. The default was persisting inspite of further reminders and, therefore, ultimately the Respondent constrained to sell 10,000 shares of RPL on 10 February 2008 at the prevailing market price. The learned Arbitral Tribunal therefore right in coming to the conclusion that the Petitioner (original Respondent) is liable to give whole claim of Rs. 53,76,751/- with interest at 12% p.a. from 20 February 2008 till payment. The amount so quantified by the Arbitral Tribunal is based upon the material placed on record. There was no specific challenge raised with regard to the ledger account/statement placed on record. The calculations therefore so arrived at, though not specifically dealt with, which, in the present facts and circumstances and in view of the reasons already given in earlier Award as well as in the present Award, need no interference, even with regard to the conclusions.

11 The Respondent's counter claim was rejected as it was not supported by any material, as well as, the evidence. The whole submission was revolving around the Award of amount against the Petitioner basically on the ground of unproved allegations of no demand at appropriate time. The Arbitral Tribunal, based upon the letter so referred in paragraph 8, rightly rejected the contention of the Petitioner that there was no demand made. For the above reason itself, the rejection of counter claim need no interference apart from the fact that there is no specific submission made to that effect.

12 Therefore, taking overall view of the matter, as the Award is well within the frame work of law and the record including the rate of interest as granted on 20 February 2008 need no interference. The Petitioner failed to make out a case to set aside the Award as contemplated under Sections 28 and 34(2)(a)(v) of the Arbitration Act. The action of squaring off as contemplated in Regulation 3.10 of NSEIL, F & O Segment, in the present facts and circumstance, in no way, can be stated to be illegal and/or contrary to the provisions of law. In the result, the Petition is dismissed. There shall be no order as to costs.