(2012) 03 BOM CK 0289

In the Bombay High Court

Case No : Arbitration Petition No. 157 of 2010

HSBC Invest Direct Securities (India) Ltd. APPELLANT

Vs

Ms. Manishaben Ghanshyabai Patel RESPONDENT

Date of Decision : 05-03-2012

Acts Referred:

Citation : (2013) 1 BomCR 171

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : V.K. Ramabhadran, for the Appellant;

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—The Petitioners (Original Respondent) (subbroker) has challenged the Arbitration Award dated 14 October 2009 passed by the Arbitral Tribunal constituted under the Byelaws, Rules and Regulations of the National Stock Exchange of India Limited (NSE). The operative part of the Award is as under:

1 The claim of the Applicant, Ms. Manishaben Ghanshyambhai Patel is accepted for the reduced amount of Rs.25,68,566.80/, being the losses incurred by her on account of squaring off the position by the Respondent. The net claim amount is worked out after reducing the amount of Rs.11,487.82/, which the Applicant has already received from the Respondent.

2 The additional claim of Rs. 56,31,405.38/for the notional profit lodged by the Applicant stands rejected.

3 The Respondent, M/s IL & FS Invest smart Securities Ltd. is directed to pay an amount of Rs. 25,68,566.80/(Rupees twenty five lakh sixty eight thousand five hundred sixty six and paise eighty only) to the Applicant, Ms. Manishaben Ghanshyambhai Patel.

4 The Respondent is further directed to pay interest @ 12% p.a on the Award

amount of Rs. 25,68,566.80/to the Respondent w.e.f. 29th October, 2008 till the date of payment

2. The Petitioners are a body corporate formerly known as IL & FS Investsmart Securities Ltd., doing business as Stock brokers and for that registered with NSE and Bombay Stock Exchange Limited (BSE).

3. On 11 July 2008, the parties entered into an agreement to trade or transact business in securities or other instruments on the Exchanges on certain terms and conditions. The Respondent, on 24 December 2008 lodged a complaint against the Petitioners with NSE thereby alleging that she had paid nifty Future and Options in the sum of Rs.92 lacs at 10.15 am and she admitted to place an order at 11 am to close out the position, but she was informed that the position was closed out at 10.20 am itself and, therefore, she suffered loss in the sum of Rs.25,80,054/. It is also alleged that the Petitioners had carried out certain trades in the account of Respondent without her permission on 31 October 2008 and therefore also claimed a sum of Rs. 83,68,567/against the Petitioners. The petitioners replied on 5 March 2009 to letter dated 19 February 2009 issued by the NSE. The Petitioners informed the reason for his authorised action.

4. The Respondent thereafter filed her claim before the Arbitral Tribunal on 10 April 2009. The Petitioners resisted the claim by its written statement dated 13 July 2009. A cheque of Rs.15 lacs was returned due to insufficient funds on 15 October 2008. At that time, the market loss in her account was about Rs.29 lacs at 9.59 am. As there was no response, the Petitioners informed her about loss in her account of Rs.25 lacs and also informed that they would have no option but to square off the position as there was no credit balance in her account. Another attempt was made immediately to inform that the position would be squared off. The transcript of audio voice recorded between 22 October 2008 and 29 October 2008 was placed on record accordingly.

5. By referring to various clauses of the agreement as well as the Byelaws basically Clause 3.10(a) and 3.10(b), the matter was heard and ultimately the Award was passed on 14 October 2009 against the Petitioners whose name has been changed to HSBC Invest Direct Securities (India) Limited with effect from 15 July 2009.

6. None appeared for the Respondent though served. Therefore on 8 February 2010, this Court admitted the matter and made returnable on 3 May 2010. Affidavit of service though filed there is no reply to this Petition till this date. Therefore, the matter is listed for final hearing and ultimately heard finally on 8 February 2012. The Respondent was not present on that day of hearing also.

7. The relevant Regulation 3.10 (a) and 3.10(b) of NSE Regulations pertaining to Future and option segment are as under:

3.10(a) The Trading member must demand from its constituents the margin deposit which the member has to provide under the Trading regulations in respect of business done by members for such constituents.

3.10(b) In case of nonpayment of daily settlement by the constituent within the next trading day, the Trading member shall be at liberty to close out transactions by selling or buying the derivatives contracts as the case may be, unless the constituent already has an equivalent credit with the trading member. The loss in this regard, if any, shall be met from the margin money of the constituent.

8. The other relevant clauses of the agreement are as under:

2(d)He is liable to pay applicable initial margins withholding margins, special margins or such other margins as are considered necessary to the Member or the Exchange or as may be directed by SEBI from time to time as applicable to the segment(s) in which the Client trades. The Member is permitted in its sole and absolute discretion to collect additional margins even though not required by the Exchange. Clearing House/Clearing Corporation or SEBI and the Client shall be obliged to pay such margins within the stipulated time.

5 Without prejudice to the Member''s other rights (including the right to refer a matter to arbitration), the Member shall be entitled to liquidate/close out all or any of the Client''s positions for nonpayment of margins or other amounts, outstanding debts, etc and adjust the proceeds of such liquidation/ close out, if any, against the Client''s liabilities/obligations. Any and all losses and financial charges on account of such liquidation/closingout shall be charged to and borne by the Client.

9. Regulation 3.10(b) deals with the nonpayment of daily settlement by the constituent within the next trading day. That has nothing to do with the nonpayment of margin money. The contentions of the contract and basically clause 2, as referred above, the Arbitrator has failed to consider whereby the Respondent agrees to pay initial margins, withholding margins, special margin or such other margins as are necessary by the Member of the Exchange. The Member is also permitted to collect additional margin as per his sole and absolute discretion. The client is under obligation to pay such margins within the stipulated time. The Arbitrators further failed to consider clause 5 of the Member constituent agreement, whereby the Member is permitted to liquidate and close out all or any of the clients position for nonpayment of margin or other amounts outstanding debts and adjust the profit of such liquidation or close out, if any against the client''s liability and obligation. It is also agreed that any and all loss and financial charges on account of such liquidation/closing out shall be charged to and borne by the client. Therefore, the Petitioner being member is entitled to close out the transaction if the Respondent/client failed to make the margin amount or any other amount.

10. The learned Arbitrators therefore having held that there was a shortfall of margin for the Open position, but wrong in holding that the Respondent was not required to pay the margin and the Petitioners illegally squared off the position at 10.26 am on 29 October 2008. Regulation 3.10(b) cannot be referred and read

to adjudicate the issue with regard to the margin money. It is applicable for nonpayment of daily settlement by the constituent and not non7 payment of margin money as observed.

11. Importantly the transcript of AVR which was placed on record shows that even on 25 October 2009 a cheque in the sum of Rs. 15 lacs issued by the Respondent was returned due to insufficient funds. Therefore also the Petitioner''s action to close out the transaction in view of the fact that the market loss increased was above Rs. 37 lacs. Therefore, taking overall view of the matter, in my view, the discretion so exercised by the Petitioner was well within the frame work of law and the record specially when the agreement itself provides and empower the Stock broker to use his discretion diligently considering the market position on that moment and/or the day.

12. The grant of rate of interest at 12% per annum on the ground is therefore also incorrect.

13. Resultantly, the following order :

(i) The Petition is allowed;

(ii) The Award dated 14 October 2009 is quashed and set aside.

(iii) There shall be no order as to costs.