(2011) 09 BOM CK 0064

In the Bombay High Court

Case No : Arbitration Petition No. 320 of 2009

Networth Stock Broking Ltd. APPELLANT

Vs

Devanand Shah RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2011) 09 BOM CK 0064

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Jaymala Raut, i./b., J.J. Associates, for the Appellant;

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—None appears for the Respondent. The matter was admitted on 25 June 2009. The matter was listed for final hearing from time to time since 2009 for more than eight to ten occasions.

2. The Petitioners who are a corporate share and stock broker have challenged the Award dated 25 November 2008 passed by the Arbitrator appointed under the byelaws, rules and Regulations of the National Stock Exchange of India Limited, based upon the Client Member Agreement between the parties. The Respondent also executed individual Client Registration Form and other related documents to become constituent of the Petitioners and established privities for buying and/or selling and dealing in securities and trading in F & O segment (carry forward of positions in Future stocks, Index, Intraday trading etc.) through the Petitioners on NSE. The Respondent has also signed mandatory Risk Disclosure Document for dealing in capital market and F & O (Futures & Options) Segments and also signed a mandatory Investors Rights and Obligations document at the relevant time. The client code was accordingly allotted to the Respondent who also maintained his demat account with the Petitioners. The Respondent is fully aware of the stock market operations, Futures and Options trading mechanism, clearing, settlement and risk management systems and the

need to meet settlement obligations in time. The dispute arose after falling of stock market prices from 18 January 2008 onwards. On account of market crash further on 21 January 2008, and due to nonpayment of margin obligations and debit balances, the Respondent''s open positions were squared off on 22 January 2008. The Arbitrator, in view of above, ought to have discussed, what would have been the position had the position been squared off on 17 January 2008 or 21 January 2008.

3. It is relevant to note that the Respondent from time to time issued cheques ranging from 12 December 2007 up to 22 January 2008 of various amounts. Except first cheque, all other cheques were bounced for want of sufficient funds and the last one was of 24 January 2008. Notice u/s 138 of Negotiable Instrument Act was also issued on 16 February 2008. The Respondent failed to make the payment inspite of legal notice dated 19 March 2008. Therefore, in view of the arbitration clause, an Arbitrator was appointed. The registered office of the Petitioners is situated in Mumbai. The Client Member Agreement provides that transactions will be subject to jurisdiction of Court in Mumbai. The arbitration proceedings however initiated at Chennai in view of the available provision under the Agreement.

4. I have already in Networth Stock Broking Ltd. v. Arun Kumar Ganpati Nayak in Arbitration Petition No. 307/2007 decided on 25 June 2009, considering the similar clause between similarly situated member client agreement observed that the Court in Mumbai has jurisdiction to decide the dispute or conflict arising out of the agreement.

5. The Arbitrator, however, rejected the claim of the Petitioners in to and awarded the cost also.

6. The Petitioners, therefore, preferred this arbitration petition. The Award is dated 25 November 2008 and copy of the same was received by the Petitioners on 10 December 2008. Since 10 and 11 March 2009 were court holidays, the Petition as filed on 12 March 2009. There is no opposition, it is within limitation. The delay even if any, is condoned.

7. After going through the material on record, I am of the view that the learned Arbitrator has admittedly not discussed the basic position which in my view is very relevant for considering the effect of collapse of market and the respective liabilities of the parties specifically when though cheques were issued it is always difficult for the parties to verify unless deposited and/or reported by the Bank that the same were dishonored. In the present case, admittedly, cheques were issued by the Respondent which were dishonored and lastly recorded the same on 24 January 2008. Earlier the cheques were also dishonored on 21 January 2008 and 22 January 2008. To say that the Petitioners ought not to have continued with the business in view of the dishonor of earlier cheques is not correct. Contradictory statements with regard to the issuance of cheques by the Respondent it shows that the cheques were issued pursuance to the contract as

well as the business conducted during the relevant time. The blame cannot be put on the Petitioners to say that they ought not to have conducted the business knowing fully that the Respondent''s cheques were dishonored. The Respondent cannot get premium of his own wrong. There was no question of issuing cheques by the Respondent. It is not the obligation of the Petitioners to wait for instructions of Respondent not to encash the cheques. The business was volatile. But if there was no communication, the Petitioners continuing the business at the instance of the Respondent cannot be stated to be without permission or authority. The requirement is clear communication from the constituent/ Respondent. The fact that the cheques were bounced lastly on 24 January 2008 and admittedly no amount was paid at appropriate time. There is no reason to hold that the Petitioners have failed and breached the condition of the contract. The burden lies upon the Respondent to prove his case of no liability. The material placed on record and as record shows that the Petitioners have placed on record sufficient material and discharged their basic burden in support of their claim so filed. The Respondents however failed to discharge its rebuttal evidence and/or the material to discontinue their liability as claimed.

8. The notable conduct of issuance of cheques by the Respondent for payment without having substantial balance in his account to keep the F & O positions open until the applicants came to know about the sequence of dishonor of cheques with malafide intention, but continue with the business, and not made the payment when occasion came, specifically when there were no contra instructions on record. Inspite of notice, as Respondent failed to make the payment, the claim so raised ought not to have dismissed in such fashion by giving premium to the wrong committed by the Respondent himself. There is no reasoning with regard to the conduct and the reasons with regard to the issuance of cheques by the Respondent including the nonpayment though business was conducted as per instructions. The default cannot be put on the Petitioners to say that they ought not to have given credit based on the cheques received knowing Respondent''s previous history of dishonor of cheques. The Petitioners are under contractual obligation to do the business as per the instructions. The Respondent is under obligation either to communicate forthwith not to continue with the business and if the business is conducted or done for want of contra instructions, the obligation to make payment need to be considered by the Arbitrator.

9. As Respondent is absent and even otherwise, it is difficult to pass or grant Award in favor of the Petitioners as claimed. Therefore, I am inclined to quash and set aside the order with liberty to Petitioners to take steps to approach the same Arbitrator and/or appoint new Arbitrator in accordance with law.

10. In the result, the following order:

(i) The Arbitration Petition is allowed and the impugned Award is set aside.

(ii) The liberty is granted to the Petitioners to appoint and/or approach the same Arbitral Tribunal for fresh hearing.

(iii) All points are kept open.

(iv) No order as to costs.

