In the matter of Arbitration Appeal under the Bye-laws, Rules and Regulations of National Stock Exchange of India Limited (NSEIL)

Appeal Arbitration Matter No. NSE WRO/00412/19-20/ARB/APPL

Reflection Investments
15/1, (35), Beach Home Avenue
1st Cross Street Besant Nagar
Chennai, Tamil Nadu – 600090

...Appellant
(Original Respondent)
(Trading Member)

And

Stock Holding Corporation India Limited
301, Center Point
Dr. Babasaheb Ambedkar Road
Parel, Mumbai- 400012.

...Respondent
(Original Applicant)
(Clearing Corporation)

Before The Arbitral Panel Comprising of

Mr. Subramanian Narayanan Ananthasubramanian Presiding Arbitrator
Mr. H. C. Parekh Co-Arbitrator
Mr. Jashvant Chandulal Raval Co-Arbitrator

Appearances:

For Appellant: Adv. J J Bhatt (Advocate of the Appellant), Mr Vijay Samtani (Managing Partner of Appellant.

For Respondent: Adv. M Raghuvanshi and Adv. Anil Choudhary i/b Finsec Law Advisor (Advocates) Advocate of the Respondent, Mr. Shashikant Nayak (Company Secretary), Mr. Prabhat Dubey (Division Manager), Mr. Ravi Chandranath (Division Manager).

Appeal:

The present Appeal is assigned to us as per Rules, Regulations and Bye Laws of the National Stock Exchange of India Limited (referred for brevity as "NSEIL)

This Panel of Arbitrators was appointed by the Exchange vide its letter dated 6th December, 2019.

This is an appeal filed by Reflection Investments, the Appellant, against Award dated 10th October, 2019. The appeal was filed on *8th November, 2019*

Brief Facts:

The Appellant is a Trading Member and had entered into an agreement called Clearing Member- Trading Member Agreement (CMTM Agreement), on

08.03.2014, with the Respondent. As per this agreement, the Appellant was required to maintain with **Stock Holding Corporation India Limited,** the Respondent, trading margins from time to time as required by the rules of National Stock Exchange. In the account maintained by the Appellant with the Respondent, all monetary transactions like payments, withdrawals, profit or loss of the transactions, etc. are entered. When the collaterals to secure margin to be maintained goes below 85% of the requirement, the account of the Trading Member (Appellant) is deactivated till the Trading Member replenishes the collaterals. In the month of March, 2016 such an event happened and the account was deactivated and remained in that condition till about February, 2019. During this period, due to market conditions, the margin requirements kept on increasing and the Appellant occasionally kept on depositing additional collateral and at the same time requested for more time to clear the shortfall. During this period also, there were renewals of the expiring contract for which the Respondent gave access (by reactivation) to the Appellant. In the process, the collateral maintained, despite replenishment, went far below the requirement and ultimately the Respondent closed the open positions, encashed the fixed deposits of the Appellant, sold off securities kept for margin and invoked the Bank guarantees. The Appellant was still left as a debtor to the Respondent, for which the Respondent filed reference for Arbitration and the Award was given in favour of the Respondent. This is an Appeal against the said Award passed by the Learned Arbitrators directing the Appellant to pay the balance amount due along with the interest thereon, to the Respondent.

Grounds of Appeal:

Though not clearly articulated, the following grounds could be drawn out from the Memorandum of Appeal as well as Amendment of Appeal filed before us, by the Appellant:

1. Respondent ought to have squared off the F&O positions at the very first event of default or after granting a reasonable time.

2. Respondent's continued negligence to square off the F&O positions in time, its acting against the rule of risk management, terms and conditions stated in contract bills, market practices, usages show that the Respondent breached and violated all the above in letter and spirit.

3. The Respondent stepped in the shoes of the Appellant, took unsolicited risk on its shoulder and became partner in the F&O trading of the Client of the Appellant.

4. The Learned Arbitrators in the Original Arbitration matter, entertaining the reference at Western Regional Office (of NSEIL) Mumbai have committed a grave error, as the Appellant came from Chennai.

5. The Appellant was not treated fairly, was not given equal opportunity to present its case.

6. The Learned Arbitrators in the Original Arbitration matter, failed to decide the cut-off date and the rate at which the Appellant F&O position should have been squared off so that minimum liability or loss would have incurred.

7. The Arbitrators in the Original Arbitration matter, have wrongly assumed that the Appellant is liable to the Respondent since the former had given post-dated cheques to the latter.

Process followed / Hearings

Notices were issued to both parties and the first hearing was held on 29th January 2020 when Appellant requested for adjournment to file amendment to Memorandum of Appeal (MOA) due to last minute appointment of Counsel to represent his case. At the Second hearing held on 3rd March, 2020 the Applicant filed Amendment of Appeal (AOA). Both the parties were fully heard, were given full and equal opportunities and were also granted further opportunity to submit additional written submissions which were duly filed.

Submissions and Arguments

Through Appeal and Defence statements, revision, oral arguments and final written statements the Appellant and the Respondents have said all they wanted, which is briefly recorded as under.

A. The Appellant:

Most of the grounds of appeal narrated above also appear in the written submissions and arguments. Upon going through the MOA, AOA and written submissions as well as oral arguments, we have classified the submissions as under:

1. *Independence and Integrity of Arbitrators*

   i. While the Appellant believes that all Arbitrators are the people of highest integrity and have never and will never do anything in breach of faith, the Respondent seems not so sure about integrity of the Arbitrators.
   ii. It gives rise to suspicion that the Panel is treating Respondent with a bias while ignoring a genuine plea of the Appellant.

2. *Inadequate opportunity and unequal treatment*

   i. Though the case involves several disputed and complex questions of facts and law and high stakes, at the original tribunal hearing, the Respondent (now Appellant) was not represented by an Advocate although the other party was represented by Advocate.

3. *Jurisdiction and case laws.*

   i. The Learned Arbitrators, in the Original Arbitration matter, entertaining the reference at Western Regional Office of NSEIL Arbitration, Mumbai has committed a grave error as the Respondent (now Appellant) came from Chennai.

In the following precedence of Arbitration between TM and PCM the Arbitrations were held at a place closer to where offices of the TMs were located

1. Raga Shares Trading Private Limited, Jabalpur (TM)- Appellant Vs Farsight Securities Limited, New Delhi (CM) Arbitration was held at Indore.

2. Glow Capital Market Limited, New Delhi (CM)- Applicant Vs HRIM Finance & Securities Private Limited (TM)- Mumbai Arbitration was held at Mumbai

3. Glow Capital Market Limited, New Delhi (CM)- Applicant Vs Sunchan Securities Limited (TM)- Mumbai Arbitration was held at Mumbai

   i. In all evidence presented, particularly in all three cases, the Arbitration was conducted closer to the place of the Trading Member. Conversely, there was no instance where the Arbitration was conducted closer to the place of the Clearing Member.

   ii. Some more case laws are cited in support of the Appelant's claim for correct jurisdiction.

4. *Deactivation*

   i. The trading in F&O segment is a leverage product and hence time and risk are the essence of the F&O trades.
   ii. The Respondent being an old organization associated with the capital market for last many years was and is aware, inter alia that F&O trading is a leverage product and risk mitigation is the rule.
   iii. As per the agreement as well as the bills of the Clearing Member, the terminal was deactivated as soon as the Trading Member crossed the exposure beyond 100% of the margin deposit on 11.03.2016 and this was when there was a receivable of Rs. 33.56 lakhs. Since this amount was not paid by the Appellant on the next day i.e. 12.03.2016, as per the TMCM Agreement and bills, the Respondent should have immediately invoked the Bank Guarantees and adjusted the deposits of the Appellant which at that point of time was sufficient to cover the receivable of Rs. 33.56 lakhs and in case the Appellant would have closed out all positions, post the invoking of the Bank Guarantees and appropriation of other collaterals like securities and cash balances by the Respondent, there

iv. would be a credit balance of Rs. 2 crores in the Account of the Appellant.

5. *Fees for Arbitration.*

The Appellant has made a statement having been directed to pay arbitration fees, even as according to the Appellant, the Respondent did not pay any fees, without any evidence for the same being provided.

6. *Counter Claim*

The Learned Arbitrators have neither accepted nor rejected the Counter Claim of Appellant (then Respondent) while passing the Award.

B. The Respondent

1. As per the NSEIL (F&O) Regulations, Trading Member is required to distinguish Constituent's contracts from its own contract. These should be maintained on 'pro' and 'cli' basis where 'pro' means proprietary and 'cli' means clients in order to determine the amount of brokerage and margin to be recovered from the Constituents.

2. The records for the Constituent's contract are required to provide further details such as contracts held in custody, fully paid for Constituent's security, charges collected from Constituents, records of long term and short term positions for 'pro' and 'cli', margin book for 'pro' and 'cli', etc.

3. The Appellant had outstanding dues to be paid and the Respondent has, from time to time, requested the Appellant to clear the said dues.

4. The Appellant assured, personally as well as through mails on many occasions, to pay the margin shortfalls but never cleared the entire shortfall.

5. The Appellant has called into question the integrity of the Arbitrator. However, in the original Arbitration, the place of Arbitration was mentioned as Mumbai which was objected to by the Appellant (then Respondent). The matter was referred to NSEIL and NSEIL vide its email dated 28.05.2019 clarified that the Arbitration Panel consists of eminent persons whose independence and impartiality is beyond doubt. Further, the Arbitral Tribunal has in the impugned order, unequivocally rejected an allegation of bias and has expressed displeasure at the conduct of the Appellant (then Respondent)

6. The Arbitral Tribunal, in the Original Arbitration matter, heard the arguments extensively and concluded that the Appellant cannot be considered to be a 'Constituent' under the rules, regulations and

byelaws of NSEIL and NSECL and held that the place of Arbitration should be Mumbai.

7. The Arbitral Tribunal also relied upon TMCM Agreement wherein it is clearly stated that the Courts in Mumbai shall have exclusive jurisdiction.

8. As regards parties being represented by a Counsel at the hearing at Tribunals, it is submitted that in Tribunal proceedings where both the parties to the dispute are Clearing Members or Trading Members, the party shall not be permitted to appear by Counsel.

9. As regards Arbitration fees, FAQ 25 of the NSEIL Arbitration 'Frequently Asked Questions' clearly states that the party against whom an Arbitral Award has been passed will bear the cost of Arbitration.

10. The Appellant has erred in interpretation of limitation period. Under TMCM Agreement the Appellant is required to continuously fulfil the margin requirements and any failure means there is a continuous breach. In light of the above, Arbitration proceedings have been initiated by the Respondent (then Applicant) within the limitation period.

11. The Respondent is a professional clearing member (PCM) and its functioning is governed by SEBI Regulations, NSE Clearing Corporation Limited (NCL) byelaws, rules and regulations and agreement executed with the Trading Member.

12. In cases where the margin utilization of a Trading Member goes beyond 85%, the terminal of such Trading Member goes into Risk Reduction Mode automatically. When a Trading Member moves to a Risk Reduction Mode, the Respondent (SHCIL) is required to send reminders for receipt of additional collateral.

13. As it is evident from the table provided in paragraph 24 of the Reply to the Respondent's Statement of Defence and Counter Claim, dated 10.07.2019 filed as part of the Original Arbitration, the Appellant had increased his collateral with the Respondent from around INR 8 crores in March, 2014 to around INR 24 crores in February, 2019. The Appellant had always responded to the bills issued by the Respondent, and assured the Respondent that it will bring in additional collateral as margin to cover the shortfall. This was also reiterated in the letter, dated 01.02.2019, sent by the Appellant to the Respondent, annexed as Annexure 10 to the Respondent's Statement of Defence and Counter Claim in the Original Arbitration.

14. Further, as had been stated in paragraph 21 of the reply to the Respondent's Statement of Defence and Counter Claim, dated 10.07.2019, a similar situation arose in March, 2014 when the margin

utilization of the Appellant crossed 134%. During that time, the Appellant had paid additional margin.

15. Therefore, since the Appellant had assured of payment of additional margin and had routinely increased it, albeit not reducing the margin shortfall to a level below 100% and in the light of a similar occurrence in March, 2014 which was adequately resolved, the Respondent did not take the adverse action of closing the open positions of the Appellant, with a view to ensure that the loss (if any) sustained by the Respondent is minimal. However, the assurances received from the Appellant turned out to be false, and the Respondent suffered a huge loss on finally closing out the open positions.

16. It is also pertinent to note that the Appellant had never asked the Respondent to close the open positions. On the contrary, the Appellant had always requested for additional time to bring in the requisite collateral. The argument that the Respondent should have closed the open position in March, 2016 itself and the argument on the cut-off date & rate to square off have only been advanced at the Appellate Arbitration stage as an afterthought.

17. In light of the above, it is indisputable that the Respondent has appropriately complied with the applicable laws. The Respondent had regularly sent billing statements and followed up with the Appellant to clear the margin shortfall. It had not acted negligently, but on the contrary, it has prudently relied on past practices, assurances, and seemingly genuine attempts by the Appellant to clear the margin shortfall, to not close the open positions and suffer a definite loss.

Reasoning and Conclusions:

Having heard the parties and gone through the Arbitration Award dated 10th October, 2019 passed by the Learned Arbitrators, we now proceed with recording reasons for our conclusions, as under:

1. *Independence and Integrity of Arbitrators*

The issue of independence and integrity of the Arbitrator has been appropriately and adequately dealt with by the Learned Panel of Arbitrators in the Original Arbitration matter and we do not want to entertain the issue again.

2. *Inadequate opportunity and unequal treatment*

It was noted that during the course of the Original Arbitration proceedings the-Appellant (then Respondent) had argued the case himself though the Respondent (then Applicant) was represented by an Advocate. It was due to this imbalance that we agreed to the request of the Appellant not only to appoint an Advocate at the last moment but also gave an opportunity to revise its Memorandum of Appeal filed before us. Further, both the parties were heard at length and one more opportunity of giving written submissions was also provided to them. As recorded hereinabove we have

permitted the Appellant to exercise its right to appoint an Advocate to represent it at the proceedings, and they have done so. With this process followed, the issue stands settled and we treat it as closed with no further directions.

3. *Jurisdiction and case laws.*

This issue has been considered by the Learned Panel of Arbitrators in the Original Arbitration matter from Page no. 26 to Page no. 35 (part) of its Award, under the head 'Reasoning and Conclusions' on venue of Arbitration. The issue has been treated adequately and in a balanced manner. We also find that there is no necessity to extend the definition of 'Constituent' which is expected to be only with relation to trading as given in Explanation 2 reproduced below:

Explanation 2: For the purpose of Chapter IX, X & XI, the term 'Constituent' ***in relation to trades*** *shall also include a Trading Member where such trades done on the specified exchange are cleared and settled on his behalf by a* ***Clearing Member*** *(emphasis ours).*

Moreover, if both the parties have agreed in writing that the jurisdiction in case of arbitration shall be in Mumbai, the place of Arbitral Tribunal will naturally be Mumbai.

Hence, we treat the issue of jurisdiction as closed and find no reason to interfere.

4. *Deactivation*

Both the Parties have vehemently put forward their views. While Appellant has argued that the Respondent should have been proactive, the Respondent have expressed that they have complied with the Rules and Regulations. The Appellant have questioned the delay in actions by the Respondent and Respondent argued that the Appellant had all the options to close the open positions whenever access was granted at the time of regular expiry dates on a few occasions. The learned Arbitrators in the Original Arbitration matter have dealt with this point in paragraphs 33 to 35 of their Award, while holding that the actions of the Applicant therein (now Respondent) were with justifications and we have no hesitation in further stating that any proactive steps by the Respondent would certainly be called to question and may also amount to the Respondent assuming the Role of a Trading Member which, in our view, is not envisaged either by the Law or the Authority.

Hence we do not interfere with the findings of the Learned Arbitrators in the Original Arbitration matter and their decision to hold as justified, the actions of the Respondent to liquidate the collateral and invoke the bank guarantees.

5. *Fees for Arbitration.*

We do not consider this to be a matter of Arbitration as the extant rules are very clear in this regard and do not wish to give any directions to the Panel of Arbitrators in the Original Arbitration matter.

6. *Counter Claim*

Before the Learned Arbitrators in the Original Arbitration matter, the Appellant (then Respondent) had placed its Counter claim which is also recorded on page 14 in the Award, in the form of Prayer at paragraph **'f'**. The Respondent (Applicant therein) had given response through Rejoinder which is recorded on Page 17 of the Award under the head Statement of Counterclaim.

In its counter claim, the Appellant had asserted that the Respondent (the Applicant therein) wrongfully ***disabled its terminal*** and invoked bank guarantees etc., which caused a loss of reputation and business. The learned arbitrators took note of this and held as follows in the Impugned Award:

"39. We are of the opinion that the Respondent's contention in respect of ***disabling of terminals is completely irrelevant and inconsequential*** *to the crux of the application and therefore does not call for any comments from us. In view thereof, we proceed to dismiss the contention of the Respondent on the point of disablement of the terminals by the Applicant"*

Besides, we note that in the Original Arbitration Matter, the Appellant had filed a counter claim for the alleged loss suffered on account of closing out the open positions and disabling of the terminals; while at this stage, the Appellant is alleging Respondent's negligence in not closing out the positions earlier.

From the above, it can be deduced that the learned arbitrators have adequately considered the counterclaim of the Appellant and dismissed the same. We do not therefore find any reason to disagree with the contention of the Original Arbitration Award.

Accordingly, this Appellate Tribunal of Arbitrators, pass the following Order;

Award

1. **The Award dated 10th October, 2019, passed by the Learned Panel of Arbitrators in the original matter, is UPHELD.**

2. **No Award as to costs.**

Mumbai
Date: 27/7/2020

H. C.Parekh
(Co-Arbitrator)

Jashvant Chandulal Raval
(Co-Arbitrator)

S. N. Ananthasubramanian

Subramanian Narayanan Ananthasubramanian
(Presiding Arbitrator)