IN THE COURT OF SH. ARUN SUKHIJA,

ADDITIONAL DISTRICT JUDGE – 07, (CENTRAL DISTRICT)

TIS HAZARI COURTS, DELHI.

ARBN. NO. :- 03/2017

UNIQUE CASE ID NO. :- 376/2017

IN THE MATTER OF :-

Mr. Tusarakanta Sahoo
A-367, 2nd Floor, A Block,
Vikas Puri, New Delhi-110018. ….Petitioner

VERSUS

M/s. Angel Broking Pvt. Ltd.
Regd. Office-G-1, Akruti Trade Centre,
MIDC, Road No.7, Andheri East,
Mumbai – 400093. ....Respondent

APPLICATION UNDER SECTION 34 OF THE ARBITRATION & CONCILIATION ACT, 1996 FOR SETTING ASIDE THE ORDER DATED 08.04.2015 PASSED BY THE ARBITRAL APPELLATE PANEL IN APPEAL A.M. NO. CM/D-0034/2014.

Date of institution of the Petition : 25/07/2015
Date on which Judgment was reserved : 27/05/2020
Date of Judgment : 10/07/2020

::- J U D G M E N T -::

By way of present judgment, this court shall conscientiously adjudicate upon the objections filed on behalf of the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Order dated 08.04.2015 passed by the Arbitral Appellate Panel in Appeal A.M. No. CM/D-0034/2014.

CASE OF THE OBJECTOR AS PER PETITION

Succinctly, the petitioner has averred the following facts in the objections:-

(a) The applicant in March 2009, while was working as a Software Engineer with M/s. CSC India Pvt. Ltd., out of his earning, started making some investment in equity market and for that purpose, he entered into an Agreement with Respondent-Angel Broking Pvt. Ltd. to trade in NSE (CM & FO) and BSE (CM) upon transferring all the stocks from ICICI Securities and became a beneficiary of Respondent. The applicant's client code with respondent is NOIDA661 and DP Account No.12033200 07985065. Between 2009 and 2011, respondent facilitated the applicant in trading shares.

(b) During August 2012 to September 2012, the respondent's employees Mr. Shekhar Gupta and Mr. Tapash Nayak prevailed upon the applicant to open an NBFC A/C with the sister concern Company of the respondent namely NBFC Angel Fincap Pvt. Ltd. The applicant was completely busy with his start-up business activities. Mr. Tapash Nayak, A Risk Manager with the respondent, was trading in his account without any authorization and placement of bids from the applicant's side. Mr. Nayak was working as a Risk Manager with the respondent and he did not have any written Power of Authorization from the applicant to trade or manage his account. Though, the respondent had levied the Brokerage and other Account Maintenance Charges from the applicant and also assigned the Branch Managers/

Authorized Dealers/Relationship Managers to trade in account of the applicant, but the trading had never been done by the Authorized Dealers/RMs of the respondent and all the 49 unauthorized trades were done by the Risk Manager of the respondent company without getting consent or confirmed order from the applicant.

(c) M/s. Angel Fincap Pvt. Ltd. and Angel Broking Pvt. Ltd., in collusion with each other, mismanaged the applicant's account with the company and the NBFC, as a result the loan liability of the applicant-complainant kept on increasing. As per records on 06.10.2012, the applicant was sanctioned a maximum loan of Rs.21 lakhs in his account and such loan amount was increased to the extent of more than Rs.111.36 lakhs in the month of February, 2013 and onwards without informing the applicant and also without obtaining any written instructions from the applicant.

(d) The applicant was busy with his start of venture and was not keen to regular trading activities and decided to get out of market and close the account. However, Mr. Tapash Nayak, the Risk Manager of the respondent, under the instruction from the Senior Management, misguided and misled the applicant by giving false information about the equity markets and the trend prevailing in the equity market to the applicant.

(e) Though, the Mr. Mayank Grover, Mr. Vikas Deep Gupta and Mr. Amit Kumar are the authorized dealers/RMs, who have been assigned by the respondent to trade on account of the applicant but they never executed any trade on account of the applicant and Mr. Tapash Nayak, who is the Risk Manager of the respondent company did unauthorized trades on account of applicant without taking any consent from the application, which violates the Regulation (Capital Market Segment) 3.2.1 of NSEIL. Though, the

respondent levied the brokerage charges and interest for sister NBFC. During the period between 09.01.2013 and 05.08.2013, the respondent did 49 unauthorized transactions without obtaining any confirmed pre-order instructions from the applicant and as a result, the applicant suffered a loss of Rs.49,05,186/- on account of unauthorized trades as done by the respondent.

(f) The respondent liquidated and squared off the position of the applicant by selling consolidated 5080 shares of PNB on 2nd August, 2013 and 5th August, 2013 whereas, there were no SMS/E-mails, telephonic call made to the applicant by the respondent, even though, the margin was not negative on these two occasions. The respondent did not adhere to any of margin requirement regulation, as mandated by the SEBI/NSEIL within the disputed period to the applicant.

(g) In the meantime, the respondent closed its office at Noida and shifted to Mayur Vihar and again to Karol Bagh, which has not been informed to the applicant at any point of time, which is mandatory as per the NSE Regulations. However, with utmost difficulties, the applicant finally traded-out the office of the respondent at Karol Bagh and made personal visit to the office of respondent at Karol Bagh. The applicant brought to the notice of respondent about the negligence and non-compliance of the regulations and rules, as framed by NSE by doing unauthorized trades on account of applicant and the losses he suffered due to the unauthorized trade on his account. The respondent did not respond to the same and also did not consider the grievance of the applicant.

(h) The applicant lodged a complaint with SEBI vide complaint no. SEBIE/DH13/0001885/1 and a copy of which was also sent to the

respondent via National Stock Exchange and on 04.01.2014, Mr. Tapash Nayak pressurized the applicant to take back any case against the respondent and to send an email to feedback@angelbroking.com and to confirm in writing that all the trades done from Risk Management Systems terminals were authorized. The applicant lodged a complaint before SEBI about the unethical practice by the respondent through its employee. The above numbered complaint was closed by NSE Investor Service Cell with the suggestion to invoke the arbitration before NSE as the respondent was not ready to discuss and settle the matter with the applicant.

(i) The respondent deactivated the account of the applicant "NOIDA661" in the month of January 2014 without giving any prior intimation or assigning any proper reason for deactivating the account. As per the suggestion from NSE Investor Services Cell, the applicant filed an arbitration complaint case bearing NSE/ARBN/CM/D-0034/2014 before the NSE India Ltd. As per the NSE Regulations, the applicant opted the panel of Arbitrators from the list of Arbitrators, as informed to him. The respondent filed a short reply on 27.06.2014 and the same was received by the applicant on 02.07.2014. The respondent again filed a second reply to the complaint on 04.07.2014 before the Ld. Arbitrator Panel by manipulating, adding and producing the forged document to sequel their case. Both the parties argued the matter before the Ld. Arbitrator panel on 20.08.2014. The respondent filed a Sur-Rejoinder to the Rejoinder Statement, as filed by the applicant to cover up the irregularities and violations of regulations, as done by the respondent, by doing unauthorized trade from the account of applicant. Ld. Arbitrator, without giving ample opportunity and time to the applicant to go through

the sur-rejoinder, as filed by the respondent, closed the argument. The applicant filed the Rejoinder Statement on 18.07.2014.

(j) The applicant clearly showed how the respondent violates the Chapter 4 of the NSEIL Regulation (Capital Market Segment) i.e. Code of Conduct of doing business and Trading Operations related to employee supervision, Fairness, Honesty and Professionalism among many others. The panel of Ld. Arbitrators vide order dated 29.09.2014 dismissed the claim petition filed by the applicant. In the Arbitration Award, the panel of Ld. Arbitrator did not consider the Rejoinder and the written argument, as filed by the applicant. The impugned Award does not refer to any of the points, as raised by the applicant in his Rejoinder and written arguments. The Ld. Arbitrators erroneously and wrongly came to a conclusion that the applicant has given the consent/ confirmation for the disputed trades whereas, the material on records clearly shows that there was no trade placement order by the applicant and due to the unauthorized trade, the applicant suffered a loss of Rs.49,05,186/-.

(k) Being aggrieved by the order/ award dated 29.09.2014 passed by the Ld. Arbitral Tribunal in Arbitration Matter No.NSE/ARBN/CM/D-0034/2014, the applicant filed an appeal before the Panel of Appellate Arbitral Tribunal at NSE of India, New Delhi praying that Ld. Arbitrators dismissed the claim of the applicant without considering the questions and points for consideration. The respondent filed its reply to the appeal filed by the applicant in Appeal A.M. No.CM/D-0034/2014, on 20.12.2014. The applicant filed the rejoinder affidavit on 09.01.2015 and written argument on 19.03.2015. The appeal panel vide order dated 08.04.2015 dismissed the appeal without considering that the respondent, while trading on the account

of the applicant did not follow the rules, guidelines and regulations as given in National Stock Exchange of India Ltd. (Capital Market) Trading Regulations, 1994. The observation of the Ld. Appellate Panel is totally erroneous, out of jurisdiction, wrong, illegal and baseless without any evidence as the HDFC Bank vide mail dated 23.04.2015 informed the applicant that no such mail, SMS or any other communications were sent to the applicant.

PRINCIPLES OF SETING-ASIDE OF AWARD UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT

On a panoramic appreciation of the earlier existing judicial thought on the issue, as manifested by decisions ranging from ***Renu Sagar Power Company Ltd. v. General Electric Company 1994 Supp. (1) SCC 644*** to ***Associated Builders v. DDA (2015) 3 SCC 49***, the Hon'ble High Court in its decision in ***NHAI v. Hindustan Construction Company Ltd. MANU/DE/2699/2017*** delineated the following propositions:-

(i) The four reasons motivating the legislation of the Act, in 1996, were

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards,

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if

(a) it is contrary to the fundamental policy of Indian law, or

(b) it is contrary to the interests of India,

(c) it is contrary to justice or morality,

(d) it is patently illegal, or

(e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

(a) it disregards orders passed by superior courts, or the binding effect thereof, or

(b) it is patently violative of statutory provisions, or

(c) it is not in public interest, or

(d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law, Or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness.
(A reasoning or decision is **Wednesbury** unreasonable (or irrational) if it is so unreasonable that no **reasonable** person acting reasonably could have made it (Associated Provincial Picture Houses Ltd v **Wednesbury** Corporation (1948) 1 KB 223).

It would include a case in which

a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a plausible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

(xi) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."

FINDINGS AND CONCLUSIONS OF THE COURT

The Ld. Counsel for the Respondent has addressed the arguments that none of the grounds, as envisaged under Section 34 of the Arbitration and Conciliation Act, are attracted for setting-aside the Awards in question. The Ld. Counsel for the

Respondent had argued that Ld. Arbitrators, after detailed discussions, have given the reasoned award based upon the evidence before them.

This Court will deal with the question of Lifting of Corporate veil at the first instance. As far as the plea of Lifting of Corporate veil is concerned, the Ld. Arbitrators have failed to held that our own Hon'ble High Court in ***Sudhir Gopi Versus Indira Gandhi Open University 2017 SCC Online Delhi 8345*** has held that the Arbitrator has no power and jurisdiction to lift the corporate veil of the company and this power vests only in the Court and that too on the strong grounds. The said view was also endorsed by Hon'ble Mumbai High Court in ***NOD Bearings Pvt. Ltd. VS. Bhairav Bearing Corporation, 2019 SCC Online Bombay 366***. The remedy for lifting of the corporate veil is totally different remedy and the petitioner/claimant can agitate in the appropriate court in accordance with law, but the petitioner/claimant cannot be allowed to seek the remedy before the Ld. Arbitrators and the Ld. Arbitrators were not even competent to decide the same in view of settled propositions.

The Ld. Counsel for the petitioner, while assailing the awards in question, has fervently and assiduously argued to the following effect and same covers the question of margin money, non-communication of transaction and confirmation through contract notes:-

> *a. The Arbitrators validate trading worth multiple crores of rupees without any margin although admittedly they have not found any tangible evidence of mandatory instructions of placing an order. There is no margin call made to the petitioner-client when there was margin shortfall in the account. The account has been arbitrarily squared off which is a direct violation of SEBI CIR/MRD/ICC/30/2013& PR No. 94/2013 along with SEBI Adjudication Order No. BM/AO-76/2012 dated 28.12.2012. It is also pertinent to note that margin shortfalls (i.e. <50% margin availability) for close to 90% of the days in disputed period as*

per SEBI/MRD/SE/SU/Cir-15/04 and 3.3A.1 (Margin Requirements) make the trades void ex-facie. Further, NSEIL Capital Market Regulations 3.9 along with 9.1, 9.7 and 11.16 of the circular issued by NSE/SEBI in pursuance of the bye-laws pertaining to margins, SEBI/NSE Circulars on "Margin Shortfall" penalties to be imposed on trading members on short collection/non-collection of client margins etc. have been violated which makes the award unreasoned and illegal. The petitioner relies upon paras no.9 to 12 of judgment dated 10.01.2012 passed in OMP 46/2005 titled as Trexim Corporation vs Fortis Securities Ltd.

b. The Hon'ble High Court of Bombay in the matter of Kritika Nagpal Vs. Geojit Financial Services Ltd. in Arbitration No.47 of 2009 vide order dated 17.09.2012 has held that as follows:-

> *"12. The member was fully aware of the market collapsing situation, which was admittedly commenced at least from 18 January 2008, still waited upto 21 January, 2008 and to such action on 22 morning, is also without any justification. The member, one who believes and/or follows and/or rely upon those agreed terms and conditions ought to have taken such steps after due notice immediately on the earlier occasion itself. There is nothing on record to show that why such decision was not taken early."*
>
> *"14. It is relevant to note that, even under the Arbitration Act, the principles of fair and equal treatment, apart from proper and fair opportunity, are the basic foundations."*
>
> *If the case is made out that there was breach of principle of natural justice, in the present case, is of the same nature, and as admittedly or at least there is no finding on record to show that the notice was given before taking such action, in my view, falls within these principles. This cannot be overlooked by the Court."*

c. The Hon'ble High Court of Bombay in the matter of Sharekhan Ltd. Versus Nita Thakkar reported as Arbitration

Petition No. 789 OF 2010 vide order dated 07.03.2012 held as follows:-

> *"11.....The Doctrines to be followed*
> *The Arbitrator cannot disregard the substantive and procedural law. The Arbitrator is therefore bound to take note of law; of interpretation, precedent, obiter dicta, ratio decidendi, Estoppel, acquiescence, waiver and res judicata, public policy, natural justice, fair-play and equity."*

d. The Respondent-Trading Member did not square-off the position of Applicant-Constituent when the Trading Account of the Applicant-NOIDA661 was in negative margin on 26/06/2013, 27/06/2013, 28/06/2013, 31/07/2013, but unauthorizedly squared off the account by selling consolidated 5080 shares of PNB on 02/08/2013 and 05/08/2013 without any notice/SMS/Telephonic Call/E-mail etc. when the Applicant's Account was having positive margin and there was no legal reason to do so. The Ld. Arbitrators failed to appreciate that in the interest of all fairness and natural justice, the Respondent-Trading Member should have applied its discretion to square-off on 26/06/2013 (first day of negative margin) after giving a prior notice, not on 02/08/2013 and 05/08/2013 (when the account was having positive margin).

e. The Respondent in spite of knowing the highly volatile nature of market situation allowed the Applicant's loss to be higher because the Respondent was getting interest accumulated for its 100% subsidiary NBFC-Angel FincapPvt Ltd. It is further submitted that the Ld. Arbitrators failed to adjudicate under NSEIL (Capital Market) Regulation 3.3A.1, 3.9 and the basic principle of law that under no circumstances the Applicant's positions can be squared off when the Account has more than enough funds to maintain margin positions and the loss caused due to such illegal act is the sole responsibility of the Respondent. The margin positions for the aforementioned dates are mentioned below in a tabular format as already submitted to the Tribunal.

Date	*Client Code*	*Margin Available*	*Net Available Margin*	*Square-off Done*
26/6/2013	*NOIDA661*	*-1936.77*	*-1936.77*	*NO*
27/6/2013	*NOIDA661*	*-35655.92*	*-35655.92*	*NO*
28/6/2013	*NOIDA661*	*-51272.85*	*-51272.85*	*NO*
31/7/2013	*NOIDA661*	*-20313.04*	*-20313.04*	*NO*
2/8/2013	*NOIDA661*	*131480.36*	*131480.36*	*YES*
5/8/2013	*NOIDA661*	*526828.62*	*526828.62*	*YES*

f. The Learned Arbitrators failed to consider that the Respondent-Trading Member while dealing with the Securities Market failed to comply Margin Requirements as per Clause 3.3A.1 of NSEIL (Capital Market Segment) Regulations which is as follow:

3.3 MARGIN REQUIREMENTS

3.3A.1

The relevant authority may specify the requirements of additional capital and margins for the Trading Members. The minimum cash component of such additional capital and margins shall be 50% and the cash component may be in the form of cash or cash equivalents. Cash equivalents are as follows:-……..

g. The illegality and perversity go so much into the root that in Para 31 of the order dated 08.04.2015 the Arbitrators, without any respect to justice and morality, have quoted a part of Para 9 of the Hon'ble Bombay High Court Judgment which deals with transactions from multiple stock exchanges, trading with order instructions placed by the client and square-off after asking for the balance amount (margin call).

h. All the 49 said transactions have not been done with the prior approval of the Applicant and the same is gross violation of the NSEIL (Capital Market) Regulations (Clause 3.2.1) by the Respondent. In between 09.01.2013 and 05.08.2013 there were 49 unauthorized trades by the Respondent without receiving confirmed pre-order instructions/ calls of the Applicant and as a

result the Applicant suffered a huge loss of Rs.49,05,186/- on account of unauthorised trades as done by the Respondent.

3.2.1 TRADE OPERATIONS

3.2.1 Trading Members shall ensure that appropriate confirmed order instructions are obtained from the constituents before placement of an order on the system and shall keep relevant records or documents of the same and of the completion or otherwise of these orders thereof.

i. The Applicant has changed the addresses of communication twice. Despite several requests by the Applicant to change the address, the respondent has conveniently suppressed the modification request form without answering whether they have ever communicated to the Bangalore Address of the Applicant. The Applicant has submitted a copy of communication made to Applicant's Bangalore Address before the Tribunal.

j. The communication sent through inland letter does not require any permission from India Post and it is very surprising to accept the contention of the Respondent that they sent multiple pages/papers of utmost important Bills through Inland letter. The Documents as submitted by the Respondent are not authentic and valid documents. None of the stamped pages are presented on the official letter pad of the licensed vendor. If at all they have been dispatched, it has not been clarified as who received the documents sent to a wrong address. It is further submitted that Applicant did not receive even a single email related to Contract Notes, Sauda-Summary and Bills as alleged by the Respondent. Nor quarterly ledgers were received by the applicant from the respondent. It is submitted that the ledger was sent by the Respondent only after the Applicant registered a Complaint with SEBI. It is also submitted that the respondent has annexed "Copy of SMS log sent by CDSL" is not a genuine and authentic document as it has not mentioned the type of log that has been attached along with the e-mail forwarded. The log attached has no Column Headers with it. The SMS log even does not even show 25% of the actual trades. The same does not bear stamp and has not been taken on the official letter pad of CDSL.

The respondent has submitted an Online Access Log with IP Details. The respondent calls it a "System Generated Log". A small glimpse of Column 3(sdetails) and Column 4(product) tells that for the first 28 rows "sdetails | product" reads as "BO | Login" and for subsequent rows "sdetails | product" reads as "Login | BO". Either of the above two representations can be correct. A copy-paste manipulative job can only create such system-generated representations.

k. The Applicant transferred INR 8 lakhs to the Respondent using the Back-office Pay-in facility as part of Margin and Interest as communicated by the Respondent. It is pertinent to mention that all the 7 authorized trades were done before this Pay-in. The Applicant has never ever transferred a single penny after this pay-in because he was not doing any trades. The Respondent-Broker has admitted in its own call log dated 15.05.2013 that 3.5 lakhs is wiped out as interest. The employees of the respondent-trading member were misusing the funds of the Applicant-constituent as per its own submission that the broker has bought 2 lakhs worth own stock in Applicant's account and that it is perfectly fine as per Regulations. The Respondent Broker's employees were misusing the Trading A/C of the Applicant for own trade purposes. The Applicant, being unaware of the Trading Member's employees own trades, sent an e-mail dated 06.05.2013 to an employee, Mr. Tapash Nayak seeking clarifications on the trades done in Applicant's A/C by numerous employees of the Respondent-Trading Member as per 05.04.2013 The e-mail attachments were communicated by the employees to the Applicant upon visiting his office.

l. The Arbitral Tribunal as well as appellate tribunal erred in not taking into consideration the CD on which there are conversations between the Applicant and the Dealer and the Branch Manager of the Respondent which clearly enumerate the orchestrated trap by the respondent using its employees. The ex-employees of the respondent have admitted the trap of the respondent.

m. The Respondent produced newly manufactured audio file as per CD Annexure B1 which is completely edited, manipulated, morphed and created by joining various audio files. This must have been the reason that respondent was not able to produce the file before Arbitral Tribunal.

n. No affidavit under section 65B: It is submitted that all the documents produced by the respondents before the Arbitrator was electronic record, however no affidavit filed by the respondent before the arbitral tribunal or the appellate arbitral tribunal stating authenticity of the documents produced. The Applicant relies upon Anvar P.V. vs P.K.Basheer&Ors. 2015(1) JCC 214. As per CD produced by the respondent There is silence of more than 3 minutes starting from ~12:34 (MM:SS) which clearly shows broken links, cut-copy paste job, even audio clippings of different people are joined just to make the file look like length of 16:13 (MM:SS). The Respondent offers no explanation on the selective cut-copy tampering done on an audio file which can be clearly audible and visible. It is also submitted that selective recordings have been filed the Respondent before the arbitral Tribunal. The Applicant has re-written the true and correct transcripts for 29.01.2013 and 15.05.2013 and produced before the Tribunal to showcase the misrepresentations by the Respondent wherein the Applicant's statements have been intentionally misrepresented and the Respondent's statements have been edited from the transcripts.

o. In para 23 of the impugned order the AAT wrongly held that communication, SMS email was sent by the HDFC bank to the applicant. HDFC bank has confirmed that all communications were sent to the respondents' address i.e. Angel Fincap Pvt. Ltd. G-1, Arkuti Trade Centre, Road No. 7, MIDC, Gautam Nagar, Andheri(E) Maharashtra, India and, not to the applicant's address.

p. The Ld. Appellate Panel of Arbitrators failed to quote that there were two (not one) attachments. Instead of looking into both the attachments, the Ld. Appellate Panel of Arbitrators

selectively picked one which is completely unjust and illegal in the eyes of law. More-so the reasons and the basis, therefore, so given by the learned Ld. Appellate Panel of Arbitrators by overlooking NSEIL (Capital Market) Regulation 4.5.3(e) (Trading Principles) makes it patently illegal and against public policy. The basic assumption of personal trades done in the Account of the Applicant by the employees of the Respondent as lawful and authorised itself creates doubt on the application of judicial mind and know-how of the mandatory NSEIL rules and regulations as per SEBI directives by the Ld. Tribunals. The content of e-mail to highlight the illegality committed by the Ld. Arbitrators in not taking complete evidence into account.

*"**Sub**: Trading Details in My Account*

Dear Tapash,

PFA the Trading Detail Report along with calculation statement (emphasis required) in my account.

Please correct me if I am wrong in showing all transactions.
Acknowledgement - Amount of INR 10,000/- (Ten Thousand Rupees Only) credited to my account on 06-05-2013"

q. The Ld. Appellate Panel of Arbitrators did not refer to the attachment (calculation statement) the contents of which clearly proved the violation of NSEIL (Capital Market) Regulation 4.5.3(e) (Trading Principles) which states "No Trading Member or person associated with a Trading Member shall make improper use of constituent's securities or funds." The attachment clearly shows that the employees of the Respondent-Trading Member were trading and misusing the Applicant's Account/Funds and the Applicant asked about the same writing an email to TapashNayak who was unauthorisedly executing them for himself and the Respondent's employees. It is also admitted that the employee Mr. Nayak has transferred money to the Applicant's YES Bank A/C which has been selectively not discussed by the Ld. Panel.

"……Acknowledgement – Amount of INR 10,000/- (Ten Thousand Rupees only) credited to my account on 06-05-2013".

It is further submitted and clarified by the Applicant is that there was no need to ask about the authenticity of trades to Mr. Nayak, an employee with the Respondent-Trading Member if they were authorised and ordered by the Applicant.

r. The learned arbitrator and AAT failed to understand that Respondent-Broker has admitted in its own call log dated 15.05.2013 that 3.5 lakhs is wiped out as interest. The employees of the respondent-trading member were misusing the funds of the Applicant-constituent as per its own submission call log dated 29.01.2013. It is further submitted that as per own submissions of employee Mr. Tapash Nayak, the Respondent had already misused the trading A/C of the Applicant to an extent of Rs. 2 lakhs as on 29.01.2013 which is an open violation of NSEIL (Capital Market) Regulation 4.5.3(e) (Trading Principles).

s. In para 25-26 the AAT failed to appreciate that earlier the applicant had no records, contract Notes it is clear from the arbitration form filled by the applicant for arbitration proceedings. After getting the contract Notes submitted by the respondent during arbitration, the applicant found 49 unauthorised trades. The applicant had shown his loss, and the loss continues the same. Suppose even if there is some discrepancy in computation that will not make the loss zero. In para 27-the learned AAT has made observation without application of mind. The learned AAT failed to appreciate that the applicant is not claiming dividend in table B, rather he showed the status of his account as on that date. The AAT further failed to appreciate that the account of the applicant was squared off when there was sufficient margin. In para 28 of the impugned award, the AAT has shown completely non application of mind and ignorance of fact and thus has shown misconduct. The AAT failed to appreciate that there were two attachments in email dated 06.05.2013 sent by applicant to Tapas Nayak. The

AAT deliberately pick up one attachment and ignored the other. In para 30 the AAT failed to take into account that post facto intimation is no confirmation. Trade has to be executed on prior instruction of the applicant.

t. *In para 31 the AAT has shown non application of mind. While quoting the judgment of AnandRathi Share vs Devender Singh Bagga, the AAT failed to appreciate that in this case margin calls had been made but in the case of the applicant no such margin calls were made as per own submissions from the contract notes submitted by the Respondent. In para 32 on the one hand the AAT quote the regulation 3.2.1 which makes mandatory for the respondent/trading member to ensure that appropriate confirmed order/instructions are obtained from the constituent before placing of an order on the system and to keep relevant records or documents of the same and of the completion or otherwise of these orders thereof. On the other hand the AAT observed that in the absence of any tangible evidence as to placing of the order, the same can be inferred from the conduct of the parties etc.*

The first question arises whether the margin money requirement is directory or mandatory requirement. This question has been answered by our own Hon'ble High Court in paras No.9 to 15 of the judgment dated 10.01.2012 passed in ***OMP 46/2005 titled as Trexim Corporation Vs. Fortis Securities Ltd***. The said Judgment has been relied upon by the Petitioner and the relevant paras are reproduced herein-below:-

"Margin money requirement was mandatory

9. Trexim had raised several objections to the claims of Fortis before the Arbitral Tribunal. One of them was that Fortis had not taken margin money from Trexim for the transactions it claimed to have entered into on the NSE on behalf of Trexim and that this was contrary to the mandatory requirement of the NSE Regulations.

10. The Arbitral Tribunal in the impugned Award has itself noticed that the Bye Laws 19 to 22 of Chapter IX of the Bye Laws of NSEIL requires margins to be placed by the Member with the NSE and Bye Law 26 sets out the effect of the failure by a Member to deposit the margin with the NSE. Bye Law 26 states that a trading Member failing to deposit the margins as provided in the Bye Laws and Regulations shall be required by the relevant authority "to suspend its business forthwith." Further its states that "a notice of such suspension shall be immediately placed on the trading system and the suspension shall continue until the margin required is duly deposited."

11. Regulation 3.9 (a) CMR deals with the obligation of the constituent to deposit margin with the Member. It mandates that "The Trading Members shall buy securities on behalf of the constituent only on the receipt of margin of minimum such percentage as the relevant authority may decide from time to time, on the price of the securities proposed to be purchased, unless the constituent has already ***an equivalent credit*** *with the broker".*

Regulation 3.9 (b) spells out the consequences of the constituent failing to make the full payment to the Trading Member for the execution of the full contract within two days of the contract note having been delivered for the cash shares or before the pay-in-day (as fixed by NSE for the concerned settlement period), whichever is earlier unless "the constituent has already an equivalent credit with the Trading Member." The loss, if any, would be met from the margin money of the constituent. Further, where a Member purchases or sells for the constituent without margins as prescribed, the Member could entail penalties that can be levied at that time by the NSE.

12. A plain reading of Regulation 3.9 CMR makes it clear that unless the constituent has credit with the Member which is "equivalent" to the value of the shares purchased, the deposit of margin money by the constituent is a must before the Member can buy shares on behalf of the constituent. Also, the delivery of contract notes concerning the purchase of shares by the Member to the constituent is mandatory for

determining the two day period within which the constituent has to make full payment. The only exception again is if the constituent already has an equivalent credit with the Member. A breach of the requirement by the Member, i.e. a Member proceeding to buy shares without the constituent depositing with the Member the margin money entails penalties for the Member. There can, therefore, be no mistaking of the mandatory nature of the requirement of both the margin money being deposited by the constituent and the making of full payment by the constituent within two days of delivery to it of the concerned contract notes. This Court fails to appreciate how and on what basis the Arbitral Tribunal concluded that "The wording of Regulation 3.9 is at best directory against the Broker/Member but not totally prohibitory in the sense that a violation would make an Order of purchase/sale as non-est. Even the extent of requirement of margins is a fluid situation." In the view of the Court, the above conclusion is patently erroneous and based on an incorrect reading of the relevant CMR provisions. The very edifice of the transactions in a stock exchange would be rendered weak if the requirement of margin money deposit and settlement of accounts within a short period after the transaction is entered into are not strictly enforced.

13. The error in the impugned Award in this regard is apparent when the transactions claimed by Fortis to have been entered into by it on behalf of Trexim in February and March 2000 are considered. Fortis claimed that it had purchased 21,400 shares of HFCL on 5th January 2000 at a price of Rs.1,65,93,771.50. There was a requirement of payment of 20% margin money. Since the transactions in the said shares were considered volatile an additional margin of 105.28% was required. This worked out to nearly Rs.68 lakhs. Admittedly Trexim made no payment of margin money for this transaction to Fortis. Also, clearly Fortis had no 'equivalent credit' in the account of Trexim to permit the purchase by Fortis of such a large tranche of shares of HFCL on behalf of Trexim. Also, surprisingly despite the requirement of settling the payment within two days of delivery of the contract, Fortis appears not to have made any written demand against Trexim in relation to the above transactions at any time between January and March 2000 and till such time it filed a claim before the NSEIL. According to the

Respondent the said shares were sold on 11th January 2000 at a value of Rs. 1,53,11,048.50 at a loss of Rs. 12,82,723/-. The original contract notes in respect of the said transactions were not produced by Fortis before the Arbitral Tribunal. There is considerable force in the submission of Trexim that it was not possible that a broker earning a brokerage of Rs. 19,260/- in respect of a transaction of 21,400 shares should have invested amounts aggregating to Rs. 68,00,000 in providing margin to the NSEIL and run the risk of such a considerable loss.

14. Another transaction is the purchase of 65,000 shares of MTNL on 25th February 2000 in the value of Rs. 1,88,32,103.15. These were allegedly sold on 29th February 2000 for Rs. 26,68,402.47. Even in relation to the aforesaid purchase no margin was provided by Trexim. Further, another 1,00,000 shares of MTNL were claimed to have been purchased by Fortis on 2nd March 2000 for a sum of Rs. 3,20,12,307.57. During the period from 8th to 10th March 2000, 3,80,000 shares of MTNL for a value of Rs.9,53,32,884.20 were purchased. Again, for these transactions no margin amount was paid by Trexim. Fortis also did not produce contract notes, signed in duplicate by Trexim, evidencing the placing of an order by Trexim on Forits for these purchases. It is unbelievable that transactions worth crores of rupees could have entered into by Fortis without any margin money being deposited by Trexim.

15. Fortis claimed before the Arbitral Tribunal that there was 'sufficient credit' in Trexim's account in relation to the settlement period 8th to 14th March 2000 and even earlier. Fortis claimed that there was credit for a settlement between 5th January and 11th January 2000 and up to December 1999 of Rs. 8.59 lakhs approximately. The Arbitral Tribunal failed to note that these credits were too meager when compared to the actual value of the transactions concerning the HFCL and MTNL shares. In any event this did not constitute 'equivalent credit' as mandated by the Regulations. This was too obvious for the Arbitral Tribunal not to have noticed. It seems to have gone by the fact that in the past for certain transactions in September 1999 involving sale and purchase of MTNL shares Fortis had remained exposed for a liability of Rs. 1

crore approximately. That still did not explain how Fortis could possibly have purchased shares for several crores of rupees on behalf of Trexim, and that too for two months in succession, without Trexim paying it any margin money. The Arbitral Tribunal also overlooked the fact that apart from not paying any margin money, Trexim also did not settle the 'full payment' in respect of the above purchases within 'two days' as required by the CMR. Yet Fortis had not raised any written demand for the said payment against Trexim at any time soon thereafter Fortis itself had not deposited with NSE the margins for these transactions. These factors lend credence to the submission of Trexim that the transactions were indulged in speculatively by Fortis and it was trying to somehow recover the shortfall. The Arbitral Tribunal's conclusion that the margin money requirement was not mandatory is contrary to the Regulations and the conclusion that there was sufficient credit available in Trexim's account with Fortis is contrary to the evidence on record."

The bare perusal of the aforesaid Judgment reveals that the requirement of margin money is mandatory requirement. The petitioner has clearly shown that on many occasions, there was negative balance in his account. The Ld. Arbitrators have not taken into consideration the aforesaid Judgment, whereby, the Hon'ble High Court has clearly held that requirement of margin money is primary and mandatory requirement.

The Ld. Arbitrators have discussed about post confirmation of the trading of shares, but the Ld. Arbitrators have, nowhere, discussed about the Contract notes. The Contract notes are important and vital documents but the Ld. Arbitrators have not discussed about the Contract notes. The Ld. Arbitrators have, nowhere, concluded that the Contract notes were signed and executed by petitioner at any point of time. The importance of Contract Notes has been discussed in detail in Paras No.16 to 20 by our own Hon'ble High Court in ***Trexim Corporation V. Fortis Securities Ltd (Supra)*** and the same are reproduced as under:-

"16. On the question of non-production of contract notes, the factors that weighed with the Arbitral Tribunal were that the order number and unique number were generated by the NSE system and these could not be manipulated by the broker. The Arbitral Tribunal compared the contract notes filed by Fortis on 8th, 9th, 10th and 14th March 2000 with the Trade Done Reports (TDRs) filed by Fortis under hard and softy copy for the period from January to March 2000 covering all the transactions executed through the NSE. According to the Arbitral Tribunal this showed that the trades done followed one another within seconds/sub seconds in logical sequence. The Arbitral Tribunal noted that the contract notes gave all the matching details relating to order number, trade number, trade time, quantity for the relevant dates. Although Fortis had not produced the acknowledged copy of the contract note (duly signed by Trexim) it was explained by the fact that the contract note was not prepared at the moment of the trade transaction but after completion of the days' trading. Further, the offices of Fortis and Trexim were physically in the same area and, therefore, Fortis' assertion of delivery of contract notes through messenger was acceptable. Even Trexim's witness Shri Arvind Kapur admitted that contract notes used to be delivered by messenger and by courier. It was, however, noted by the Arbitral Tribunal that Trexim "has no proof of returning the signed copies of contract notes to the Claimant (Fortis) for the admitted transactions." The Arbitral Tribunal accepted Fortis' submission that there was a general practice between the parties of delivery/receipt of contract notes through messenger with neither maintaining a peon book/dispatch register. Shri Arvind Kapur's denial of being present at Fortis' office on 25th February and 14th March 2000 was held to be false. As regards the non-production of the order books the Arbitral Tribunal held that "substantially all the factors required to be detailed in an Order book were available" in the TDRs in which the code TC representing Trexim was used by Fortis. Therefore it was held by the Arbitral Tribunal that the placement of order by Trexim on Fortis was proved.

17. There are several problems with the above conclusions of the Arbitral Tribunal. The impugned Award itself notes that under

Regulation 3.5.1 for trades executed in the format prescribed by the NSE, every Trading Member "shall issue a contract note to his constituents." In terms of Regulation 3.5.2 such contract note "shall be signed by a Trading Member or his Authorised Signatory or constituted Attorney." Under Regulation 7.1.17 every Trading Member is required to keep copies/duplicates of the contract notes and details of the statements which are required to appear on the contract notes. These cannot but be considered to be mandatory requirements of the Regulations.

18. The Arbitral Tribunal itself noted in the impugned Award: "True, the Claimant (i.e. Fortis) has not produced the acknowledged copy of the contract notes (duly signed by the Respondent)" i.e Trexim. It also noted the SEBI Circular dated 18th November 1993 that required Member brokers to insist on the clients returning the "duplicate copy of the contract notes duly signed by them in token of their having received the contract notes." Also, the Arbitral Tribunal noted that the contract notes produced by Fortis were "photocopies of copies kept at the Claimant's (Fortis) office" and that "the copies kept at the office were not produced in spite of notice to produce during evidence (on) the plea that these were not traceable then." Yet, the Arbitral Tribunal seems to have excused this abject failure on the part of Fortis to produce credible proof of the transactions having been entered into upon orders placed on it by Trexim on the specious reasoning of there being a 'general practice between the parties'.

19. The mere presence of Shri Arvind Kapur in Fortis' office, or the proximity of the offices of Trexim and Fortis, could not make up for the lack of proof of the transactions running into crores of rupees having been entered into on behalf of Trexim by Fortis without the mandatory requirements of the NSE Regulations being complied with. The TDRs were documents prepared by Fortis and they required to be corroborated by contemporaneous documents evidencing the authorization of those transactions by Trexim. There was no such credible documentary corroboration in the evidence produced by Fortis before the Arbitral Tribunal.

> *20. Given the nature of the transactions and their value, the Arbitral Tribunal ought to have insisted upon submission of proper documentary proof by the claimant Fortis including proof of deposit of margin money by Trexim, originals of contract notes signed by way of acknowledgment by Trexim as available in the records of Fortis, and order books maintained in the regular course of business by Fortis strictly in accordance with the requirements of the Rules, Bye Laws and Regulations of the NSE. Absent these essential pieces of evidence, Fortis' claim was liable to be rejected by the Arbitral Tribunal. The conclusion reached by the Arbitral Tribunal in the impugned Award that Fortis had proved the placing of orders on it by Trexim for the transactions in question is based on no credible evidence. It is therefore not possible to legally sustain the impugned Award."*

The Ld. Counsel for the Petitioner/Claimant has also relied upon the following Judgments:-

(a) Angel Broking Pvt. Ltd. Vs. Sharda Kapur and Ors., O.M.P. 613/2014 order dated 27.05.2014 (Para 11 & 12)

(b) Angel Broking Pvt. Ltd. Vs. Arti Jain and Anr. FAO 65/2014 order dated 05.03.2014 (para 8)

The said cases also reveal that how the constituent/customer of Angel Broking Pvt. Ltd. has suffered on account of misdeeds at the hands of Angel Broking Pvt. Ltd. and its employee(s).

In view of the judgments, as relied upon by the petitioner, specifically, ***Trexim Corporation V. Fortis Securities Ltd. (Supra)***, this Court is fully in agreement, with the arguments, as advanced by the Ld. Counsel for the petitioner. The Impugned Award is patently legal failing to ignore the mandatory requirements as held in the ***Trexim Corporation V. Fortis Securities Ltd. (Supra)***.

The Full Bench of Hon'ble Supreme Court of India in ***CIVIL APPEAL NO. 5172 OF 2017 titled as Kinnari Mullick and Another Versus Ghanshyam Das***

Damani decided on April 20, 2017 has held that the Court has no power to remand the case to the Arbitrator after decision of Section 34 of the Arbitration and Conciliation Act Case and it is party who has to apply under Section 34(4) of the Arbitration and Conciliation Act to adjourn the proceedings so that the party would apply before the Ld. Arbitrator. The said view was also endorsed by the Hon'ble Supreme Court in the Judgment passed in ***CIVIL APPEAL NO. 10386 OF 2018 titled as RADHA CHEMICALS VERSUS UNION OF INDIA decided on October 10, 2018*****. In the case of *Kinnari Mullick and Anr. (Supra)***, the Ld. Single Bench of Hon'ble Kolkata High Court has passed the following order:-

> *"6……..The learned Single Judge was pleased to allow the said application on the finding that the impugned award did not disclose any reason in support thereof. The impugned award was accordingly set aside and the parties were left to pursue their remedies in accordance with law. The relevant portion of the decision of the learned Single Judge reads thus:-*
>
> *"Since the present award is completely lacking in reasons and is littered with the unacceptable expressions like "I feel that the claim is justified", "I find no basis" and the like which cannot be supplement for reasons that the statute demands, A.P. No.1074 of 2013 is allowed by setting aside the award dated June 18, 2013. The parties are left free to pursue their remedies in accordance with law."*

The Hon'ble Division Bench of Hon'ble Kolkata High Court has passed the judgment, whereby, the Hon'ble Division Bench has changed the operative order and the matter was remanded back to Ld. Arbitrator. However, the Hon'ble Supreme Court has allowed the Appeal and set-aside the order of Hon'ble Division Bench, whereby, the matter was remanded back to the Ld. Arbitrator and endorsed aforesaid view of the Hon'ble Single Bench. Para No.18 of the said Judgment is reproduced hereunder:-

> *"18. As the Respondent has not challenged the decision of the Division Bench, we are left with the situation where the award has been set aside, and as observed by the learned Single Judge, with liberty to the parties to pursue their remedies in accordance with law."*

This Court came to the conclusion that Award of Ld. Arbitrators has failed to recognize the well settled principles of law, as enunciated by various dictums and therefore, the Awards in question passed by the Ld. Arbitrators are patently illegal and the same are liable to be set-aside.

RELIEF:

Accordingly, in view of the discussions, as adumbrated above, I hereby pass the following

::- FINAL ORDER -::

1. The Petition /Application/Objection under Section 34 of the Arbitration and Conciliation Act is hereby allowed.
2. The impugned Award dated 08.04.2015, which has confirmed the Award dated 29.09.2014, is hereby set-aside and accordingly, the Award dated 29.09.2014 is also set-aside.
3. The parties are left free to pursue their remedies in accordance with law.
4. No order as to costs in the present petition. The parties shall bear their own respective costs.

File be consigned to Record Room after due compliance.

Announced through video conference on this 10th day of July, 2020.

ARUN SUKHIJA
Digitally signed by ARUN SUKHIJA
Date: 2020.07.10 12:27:15 +05'30'

(ARUN SUKHIJA)
ADJ-07 (Central)
Tis Hazari Courts, Delhi

Arbt no. 03/17 (ID no. 376/17)

Tusarakanta Sahoo Vs. Angel Broking Pvt. Ltd.

10.07.2020

The Judgment has been pronounced through cisco webex video conferencing.

Present: Sh. Sunil Kumar Jha, Ld. Counsel for the petitioner.
Sh. Dev Mani Bansal, Ld. Counsel for the respondent.

Vide Separate Judgment announced through video conference the Petition /Application/Objection under Section 34 of the Arbitration and Conciliation Act is allowed. The impugned Award dated 08.04.2015, which has confirmed the Award dated 29.09.2014, is set-aside and accordingly, the Award dated 29.09.2014 is also set-aside. The parties are left free to pursue their remedies in accordance with law. No order as to costs in the present petition. The parties shall bear their own respective costs.

File be consigned to record room after due-compliance.

ARUN SUKHIJA
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Date: 2020.07.10 12:28:06 +05'30'

(Arun Sukhija)
ADJ-07/Central/Tis Hazari Courts,
Delhi/10.07.2020