



पश्चिमबङ्ग पश्चिम बंगाल WEST BENGAL

R 699567

Before the Appellate Arbitral Tribunal constituted by Mr. Saubir Bhattacharyya,
Mr. Arup Ratan Chattopadhyay and Mr. Alok Bhattacharyya

In the matter of appellate arbitration under the Bye-laws, Rules and Regulations of MCX
Stock Exchange Ltd.

Appellate Arbitration Matter No.KOL-01/2014

Between

M/S Nirmal Bang Securities Pvt. Ltd. (TM)
B-38 Khatau Building, 2nd Floor,
Alkesh Dinesh Modi Marg Fort, Fort
Mumbai 400001 ----- Appellant

And

Mr. Shyamal Majumder (C)
P-140/1, Jhautala Road, Near Kalantar Press
Kolkata-700 017 --- Respondent

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भारतीय गैर न्यायिक



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(Signature)

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29 JAN 2015

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value of Rs. 50/- is to be
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Award

The Appellant has filed this appeal against the award dated the 8th October 2014 passed by the Hon'ble Panel of Arbitrators comprising Justice Arunabha Barua, Mrs. Neeloo Biswas and Mrs. Priti Todi whereby the claim of the Respondent (original Applicant) for Rs 25,74,600/- was partially decided in his favour and a sum of Rs. 6,51,530/- was awarded.

2. The Appellant is the Trading Member and the Respondent is the constituent. He was allotted a client code no. DUL00341.

3. The case of the Respondent (original Applicant) in the original arbitration case was that he had opened a trading account with the Appellant (original Respondent) and the Appellant had indulged in trading without his permission. He, therefore, claimed a sum of Rs 25,74,600/- which included a claim of Rs. 521540/- for loss of corporate benefits and compensation of Rs 750000/- from the Appellant (original Respondent)

4. The Appellant (original Respondent) denied all claims.

5. Having considered the rival contentions of the parties, the Hon'ble Panel ordered that the Appellant (original Respondent) should pay a sum of Rs 6,51,530/- to the Respondent (original Applicant) within 30 days of the receipt of the award.

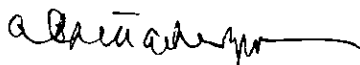
Grounds of Appeal

6. The Appellant Company, M/s Nirmal Bang Securities Pvt Ltd. (hereinafter to be referred to as Nirmal Bang), being aggrieved by the Award dated the 8th October 2014 passed by the Hon'ble Panel filed the appeal for setting aside the award on the 7th November 2014 on the following grounds:

(i) That the Award is erroneous on facts and in law and is thus liable to be set aside.

(ii) The Hon'ble panel was wrongly influenced by the purported video recording made by the Respondent although several reasons were cited by Nirmal Bang as to why the same should not be considered as admissible evidence. Several judgements of the Apex Court were quoted by Nirmal Bang in this regard.

(iii) The proceeding of the arbitration was based on wrong observations. The reason for not being able to furnish the recordings of order placements were explained by Nirmal Bang. However, it was not said that such order placement calls could not be recorded. In fact, from the transcript, it is evident that there were few calls recorded during market hours where orders were placed after having conversation with the Respondent and taking consent from him.



(iv) The amount of the award in favour of the Respondent was based on the wrong presumption that all the trades/deals in the currency derivative segment were being done by the dealers of Nirmal Bang and only post trade confirmations were conveyed. Had it been so, the reason for ratifying the trades on receipt of post trade confirmation was beyond the understanding of Nirmal Bang. By instructing to liquidate the stocks in order to reduce the outstanding debit balance in his account, the Respondent was honouring the trades/deals executed in the currency derivative segment. By his own admission, the Respondent was well in the know of the trades executed in his account allegedly without his consent as early as on the 30th June 2011. However, the reason for continuing with the trades in the currency derivative segment even after the 30th June 2011 was best known to the Respondent.

(v) The Hon'ble panel had erred by concluding that there was no express denial by Nirmal Bang regarding the lines of conversations recorded. But in the notarized affidavits the employee of Nirmal had clearly affirmed that due to passage of time, he did not have a clear recollection of the conversations recorded. Nirmal Bang's appeal not to take the purported video recordings on record was not considered by the Panel. It was the view of Nirmal Bang that electronic evidence produced should be sent for forensic examination to find out if it was edited or doctored in any way. If editing is done, it is likely that it will lose its importance. The same view was expressed by the Respondent. However, the Respondent had furnished an excerpt of that recording at the Investor Services Cell. That edited version is also enclosed in the compact disc which was submitted by Nirmal Bang. The fact that there was justifiable doubt about the authenticity of the recording furnished by the Respondent was not appreciated by the Hon'ble Panel.

(vi) The Hon'ble Panel had made a wrong observation in the Award by stating that Nirmal Bang failed to explain as to why and how trades in the account stopped after October 2011. It was, however, explained by Nirmal Bang vide its submission dated the 20-5-2014 that after October 2011 the Respondent had stopped placing orders and, therefore, trades in the account had stopped. Moreover, a complaint was lodged by the Respondent against Nirmal Bang in September 2011.

(vii) The Hon'ble Panel had erred in calculating the amount of award as they had not taken into account the value of the shares lying undisturbed, which were lying with Nirmal Bang.. the value of such securities was Rs 2,53,775.50 (at the closing rate of the 7th November, 2014). Thus the value of stocks still lying with Nirmal Bang should have been deducted from the total value of securities before working out the actual amount of claim.

(viii) The appeal has been filed by Nirmal Bang within the prescribed period of limitation set by the Exchange.

(ix) Nirmal Bang has not filed any other petition challenging the award before this Panel or any other court.

(x) Finally, Nirmal Bang has prayed for setting aside the award dated the 8th October 2014 and passing such further orders as may be deemed fit and proper.

Respondent's Reply:

7. The Respondent has denied the claim of Nirmal Bang and has made the following submissions:

i)The Respondent never scaled down his demand as claimed by Nirmal Bang and he is pleading for his claim of Rs25,74,600/-.

ii) Desire and directions were not given by him regarding the trade related decisions taken by the employees of Nirmal Bang and he had actually given an idea as to how the trade should be done.

iii) On the 3rd August 2011, some trades were done in consultation with him but it was a deliberate plan of Mr.Pradip Halder, the then BM of Nirmal Bang who came with a prior plan of misleading him. On the 2nd August 2011, Mr. Halder approached him and for reducing the debit balance in the account, Nirmal Bang had to switch/swap the existing portfolio.

iv) He never got the actual contract notes. The physical contract notes were printed on the stationery of NSE and the digital contract notes were altered/manufactured by Nirmal Bang to mislead him.

v) He had questioned the audio recording and the transcripts submitted by Nirmal Bang.He felt that this should be total (from starting to end date) and should be authenticated by a government laboratory.

vi) The Hon'ble Panel did not consider the video recording as evidence due to the objection raised by Nirmal Bang, who sought the authentication certificate. The Respondent submitted that he was trying to get the authentication certificate from a government approved laboratory.

vii) He (the Respondent) submitted that the case reference cited by Nirmal Bang for not considering the recording as evidence was irrelevant and that Mr. Pradip Halder, who had sworn an affidavit was pretending of suffering from selective dementia. Mr. Halder had admitted coming to the place of the Respondent but did not disclose the date and purpose of visit.

Hearing and Further Submissions

8. Two hearings were held on the 23rd December 2014 and the 16th January 2015 at the office of MCX-SX in presence of both the parties when their submissions were heard. Both the parties were asked to file/ produce certain more documents in support of their respective contentions.

9. The parties furnished replies and documents as asked for in the first hearing. After the first hearing held on the 23rd December 2014, the Respondent submitted, inter alia, the certificate of Truth Labs, a reputed forensic laboratory of the country vouchsafing the video and audio recording submitted by him under cover of his letter dated the 5th January 2015. Nirmal Bang also submitted the replies to the queries by the panel in the hearing held on the 23rd December 2014 under cover of their letter dated the 12th January 2015.

Analysis and Findings :

10. We have carefully heard the rival parties and have gone through the documents and submissions made by both the parties in this matter.

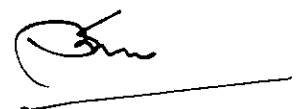
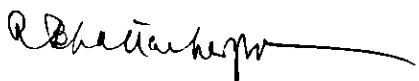
11. The appeal of Nirmal Bang has been filed within proper time as directed by SEBI.

12. The Hon'ble Panel in the original arbitration had observed that no outside expert evidence was produced in respect of the video recording of the Respondent. After the original arbitration, however, the Respondent has obtained and submitted a certificate dated the 12th December 2014 from Truth Labs, which is a reputed forensic laboratory of the country. In page 9 of the report, Truth Labs has expressed the opinion that "hence it is concluded that the recording Q contained in the handycam is authentic and represent the true incidents...". Truth Labs also expressed the opinion that 'the audio and video did not contain any signs of editing or morphing.' The members of the Arbitral Panel have heard and seen both the video and audio recording and have read the transcript submitted by the Respondent, which is broadly in unison with the audio recording. Both the video and audio recordings were quite clear and the entire conversations could be heard clearly. Thus the recording submitted by the Respondent could be treated as evidence and the stipulations in the Supreme Court matter (Ram Singh & Ors Vs Col. Ram Singh) which were relied upon by Nirmal Bang (in the original arbitration stage) are complied with. In the said judgement the Supreme Court held that a tape recorded statement could be treated as an evidence if i) the voice of the speaker could be duly identified by the maker ii) Accuracy of the

statement has to be proved by the maker. There are a few more conditions but these are the most important ones. If we apply these two conditions to the video/audio recording submitted by the Respondent, we find that these recordings could be treated as evidence. Nirmal Bang has only one objection now against the video/audio recording. They are relying on the Information Technology Act, 2000 and the Rules made thereunder, arguing that the recordings tantamount to a sting operation and are against the laws of the land. Without going into the issue of whether such recording is illegal and punishable under the law, it is the view of the panel that the discussions emanating from the recording could be relied upon and unambiguously indicative of the fact of conversations that took place between the parties concerned on 2nd August, 2011. Incidentally, neither in the written submission dated the 12th January 2015 nor in the hearing held on the 16th January 2015, Nirmal Bang did make any comment on the vetting of the recordings by Truth Labs although they had received the same.

13. If we go by the recording of the meeting, which took place on the 2nd August 2011, the gist of the proceedings can be summed up as: i) the Respondent was complaining of the brokerage charged and the representatives of Nirmal Bang assured that steps will be taken to reduce it ii) the Respondent did not take any responsibility of any currency derivative transaction and blamed the employees of Nirmal Bang for the debit balance created in the account. iii) the representatives of Nirmal Bang pleaded for time to make good the loss by making further trade, which could take time. iv) the Respondent while agreeing to the method of gradual recovery of the loss did never agree to accept any loss either present or future.

14. As against the above, the Respondent had received ECNS (leaving aside the physical contract notes), SMSes and telephonic conversations in which he repeatedly confirmed the trades. He also was aware of the disposal of the securities and had detailed discussions regarding the sale of his securities. The objection of the Respondent that the telephonic conversations were truncated and doctored does not impress the Panel as he could not come out with what was truncated and what was doctored. The Respondent, if he was averse to currency derivative transactions, could refuse to confirm the trades and send a simple letter to Nirmal Bang disowning all trades and asking them to stop all future trades. Neither in the hearings nor in the written submissions, the Respondent came clear on this subject. The Respondent submitted that repeated calls came from Nirmal Bang and he was almost forced to confirm the trades. This is not acceptable given the age, educational background and his earlier experience in capital market trading. He could simply switch off the mobile or express his objection to the trades if he did not want to confirm any trade.



15. Taking a holistic view, we broadly agree with the Hon'ble Panel of Arbitrators that "both parties have acted unconscionably and should share the losses which were the result of such unauthorized action of the original Respondent (Nirmal Bang) and its employees and the tacit consent and not protesting suitably by the Applicant (the present Respondent) at the material time." We also agree on the sharing formula of the losses at 50: 50 as decided by the Panel but would work out the quantum of loss a bit differently. Nirmal Bang had sold out securities of the Respondent on three different dates and got a sum of Rs13.41lacs. Dividend of Rs 0.07 lacs and initial deposit of Rs 0.05 lacs were also due to the Respondent. Thus the Respondent should get $\frac{1}{2} * Rs 13.41lacs + Rs 0.07lacs + Rs 0.05lacs = Rs. 6.82$ lacs. Securities(shares) of the Respondent not sold should, of course, be refunded to him. The claim of the Respondent for corporate benefits and compensation stands rejected. The Respondent has not explained how corporate benefits were worked out .

Order

16. In view of the above findings, we issue the following award:

i) The Appeal of Nirmal Bang Securities Pvt. Ltd. is rejected. The Appellant is to pay Rs 6.82 lacs with interest @12% from 13.03.2012 (date immediately after the end of the transactions) to the Respondent. Dividends accrued after 12.3.2012 on shares of the Respondent lying with the Appellant should also be paid.

17. The award should be implemented within 30 days from the receipt of this order.

18. The cost of litigation is to be governed by the rules of the Exchange made in this regard.

19. We order accordingly.


20. Three copies of the award are signed in original. One copy each may be given to the Appellant and the Respondent and the remaining one should be retained with the office of MCX-SX.

Place :Kolkata

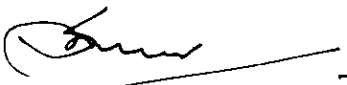
Date: 13.02.2015


Alok Bhattacharyya

Presiding Arbitrator


Arup Ratan Chattopadhyay

Arbitrator


Saubir Bhattacharyya

Arbitrator

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