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**Award**

In the matter of arbitration under the Chapter 14 & 14A of Bye-laws, Rules and Regulations of Metropolitan Stock Exchange of India Ltd.

Before the Arbitral Tribunal Panel comprising of

Shri Dilip Kumar Das, Smt. Priti Todi & Shri Mahesh Mathur

**Matter No. APP/ARB/KOL-01/2016**

BETWEEN

Purti Vanaspati Pvt. Ltd.

14 N.S Road, 4<sup>th</sup> Floor, Kolkata ---700001

Constituent

And

Karvy Stock Broking Limited

46 Avenue 4, Banjara Hills, Hyderabad --- 500034




Trading Member

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1. There is an Appeal and cross Appeal filed by both the Trading Member [herein after referred to as TM] and the Constituent Investor [herein after referred to as CI] contesting the Arbitral Award dated 30.05.2016 wherein CI's claim for Rs.1,05,69,314/- was admitted to the extent of 50%.
  
2. Karvy Stock Broking Limited [herein after referred to as TM] submitted an appeal on 24.06.2016 against Award dated 30.05.2016 by Tribunal comprising of Shri S. M. Gupta, Shri Vasudeo Agarwal & Shri Chandan Kumar Basu. holding both the parties equally responsible & accountable for the loss in the account of Constituent Investor [herein after referred to as CI] Purti Vanaspati Private Limited. Award required the TM & CI to share the loss of Rs.1,05,69,314/- equally between themselves. Purti Vanaspati Private Limited filed an Appeal on 08.06.2016. Award is contested in both the appeals on the ground that arguments & documents placed on record were omitted to be considered in proper perspective. CI's claim in Appeal is that it should be awarded compensation of ————— Rs.1,24,23,171/- on account of Rs.1,05,69,314/- being the amount of loss it suffered from unauthorised trade by the TM during August, 2013 to October, 2015, Penalty of Rs.56,215/- and Interest amounting to Rs.17,97,642/-. The two Appeals are discussed and disposed by a consolidated order for the sake of convenience.
  
3. Case of the CI is that it should be fully compensated for the loss it suffered due to unfair practices of the TM like execution of (1)

Unauthorised & unstructured trade, (2) Trade during negative ledger balance, (3) Trade without necessary margin. TM's handling of the account further suffered from (4) deficiencies in ECN issued from time to time, (5) Non issuance of SMS alert, (6) Discrepancies in daily margin statements forwarded. Services of the TM were grossly unsatisfactory in the matter of (7) Settlement of account. (8) Encashment of Bank Guarantee [BG] despite protest from the Client was thoroughly irregular & improper.

3.1 Grounds in CI's Appeal, briefly, are:

(a) Award is bad in law, (b) Award is against public policy, (c) Proper adjudication of evidence was lacking, (d) documentary evidence were not appreciated in proper perspective, (e) claims & allegations were omitted to be appreciated in proper perspective, (f) analytical objections & replies were not considered, (g) misconduct & fraud by TM were apparent & they could not avoid vicarious liability, (h) entire claim should have been admitted as transactions in the account were unauthorized & against will of the investor, (i) there cannot be any partial wrong or partial right & so sharing of losses amounts to compromise with justice, (j) Panel should have appreciated that TM had the intention of duping right from the beginning, (k) Panel acted on surmises & conjectures rather than on definite documentary proof, (l) penalty & interest should have been allowed, (m) Panel failed to apply judicial mind, (n) merit of CI's case was ignored sub-serving interest of justice, (o) Award is perverse suffering from material irregularity, (p) Award being bad in

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law is liable to be set aside granting full compensation along with penalty, interest & cost of litigation.

- 3.2 A number of documents & statements are submitted by the CI in support of the above grounds. Annexure A to CI's Rejoinder dated 05.08.2016 is an analysis of Voice Recorder. In Annexure B, CI refers to the law of evidence that amply justifies its stand. In view of judicial position narrated in Annexure C Panel should have adjudged the errors pleaded by the TM were intentional & not accidental. CI furnished computations vide Annexure D to argue that loss of Rs.76,40,769/- related to transactions for which there is no record of telephonic conversation. Similarly Annexure E displays loss of Rs.69,72,991/- as relating to transactions for which there is no record of telephonic conversation. It has further been pointed out that loss of Rs.23,69,786/- pertained to trades executed during 8<sup>th</sup> to 15<sup>th</sup> October, 2013 when CI's official was out of India.
- 3.3 In its rejoinder dated 05.08.2016 arguments advanced by the CI are : Intention of TM is clear from not indicating amount of undue brokerage earned while disputing figure of Rs.1.7crores. TM is silent on pre trade order instructions repeatedly mentioning post trade actions which admittedly suffered from errors/mistakes/technical glitches etc. TM failed to explain why BG was not revoked on 9<sup>th</sup> October, 2014 or 15<sup>th</sup> January, 2015 if debit balance or legal trades existed. About Ledgers stands have been contradictory & manipulation unexplained. Call timings have been erased from Voice Recording of 21 conversations now submitted. Consolidated Excel sheet submitted by CI clarifies the entire synopsis of the nature & the deliberate way of capturing the Constituent's voice



from any source to be produced as post trade confirmation. Non-production of records for remaining calls proves that either no such trade existed or trades were executed by TM at their sweet will. Tape recorded conversation cannot be admitted as evidence. Numerous errors in vital documents like ECN, Daily Margin Statements, Ledger, Log, SMS Logs etc. are to be treated as intentional & not accidental. BG was for NSE & not MSEI. TM failed to explain why BG was not revoked on 9<sup>th</sup> October, 2014 or 15<sup>th</sup> January, 2015 if debit balance or legal trades existed. It is contended that vital question is whether TM is empowered to trade without Client's orders/instructions. Loss of Rs.76,40,769/- is attributable trades with no telephonic call & loss of Rs.69,72,991/- is referable to trades executed before the relevant telephonic call. Under which law under mentioned incomplete/ erroneous/ modified/ altered/ fabricated/ tempered documents etc can be admitted as evidence.

- 3.4 CI vehemently contended that non-compliance with Regulation 3.4 relating to F & O Segment [Confirmed Order I Instructions], Regulation 3.6.3[CN to indicate time of receipt & execution of order], Regulation 3.10 [Margin] & Regulations 4.3, 4.5.7, 4.5.11, 4.5.15, 4.6.2(d), 4.6.2 (e), 7.1.4(e), 7.1.4(e)(xiv), 7.1.4(g)(i), 7.1.4(h), 7.1.4(k) & 7.1.6.1(e) rendered the entire trade as unauthorized.
- 3.5 In rejoinder received on 23.08.2016 CI took the stand that TM flawed all Rules & Regulations of SEBI & even their own circulated Code of Conduct. TM failed to produce (a) Pre-trade Order Instruction, (b) mandatory Order Register, (c) all the ECN [those produced were erroneous], (d) complete voice recordings, (e) even a

single SMS from Exchange. CNs are erroneous. TM has not a single complete document in their favour.

4. TM contested the Award contending that documentary & oral testimony filed were not exhaustively considered in Award. It disputed the claim of the CI asserting that none of the trades was unauthorized or uninstructed. It maintains that trades were on CI's telephonic instructions to concerned dealers at Kolkata Branch office of TM. ECN was consented in writing. Trade confirmations were sent through ECN to email id: sajjan@purti.net. CI was specifically requested on 12.10.2015 to clear debit balance by 13.10.2015 to avoid invocation of BG provided as margin. Denial was sent on 28.10.2015 in regard to CI's complaint to MSEI delivered on 19.10.2015 .

4.1 Grounds of TM's Appeal, briefly are:

Award violated Act, Section 12(5) to be specific, as Shri C. K. Basu was in panel giving the award despite being member of IGRP against whose order the Arbitration Application had been filed. Rejection of request for reconstitution of Arbitration panel & for appointment of a retired High Court Judge as presiding Member violated principles of natural justice

- 4.2 Panel of Arbitrators have been generally prejudiced against Stock Brokers & their Dealings in Stock Market. Their preconceived

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notions are apparent from comments at page 78 of Award reading: "Having said that, we also know and it is common knowledge that every broker works on targets. They earn brokerage in both buying and selling of securities in all transactions. It is not new that brokers do counter trades of the same scrip/ commodity/ currency every day in the account of the client and while doing so they earn huge brokerage, they also meet the targets by doing this. In this situation, they have an understanding with the client that they will not put him into any loss in this process and he will not be asked to pay anything at the end of the day/week/month/quarter."

- 4.3 Award was based on ratio of SMC Global Securities Ltd. vs Bharti Roy and another (Kol) wherein the facts were completely different. The High Court judgment was in favour of the small investor since neither she issued any trade instruction to the broker nor did she authorize her husband or anyone else to place trading orders. This is a case of corporate well informed constituent who undertook transactions on its own volition, provided sufficient margins, accepted transactions conveyed through ECN & e-mails, was in regular touch with concerned officials of TM, made payments & received pay outs & finally, renewed BG periodically [5/6 times in 24 months of dealing period, last on 09.01.2015 for 1 year].
- 4.4 Additionally TM argued that just the absence of Voice Loggers cannot induce an inference that TM failed to establish that all transactions had been supported by respective orders. Sample Voice Loggers do establish that CI has been confirming orders. Confirmation calls & mobile records do show that CI was regularly interacting with Dealer & RM. It should have been appreciated that


the CI had all along been well aware of trades executed as also of state of its account & consciously renewed BG on its own to meet margin obligations. CI even asked for modification of brokerage charges thereby displaying its awareness. Holding TM responsible for any part of the loss is beyond any logic. Panel of Arbitrators failed to appreciate that under the guidelines & prevailing law CI was obliged to bring anomalies in post trade records to the notice of TM within a stipulated period which it all along failed to do. Despite having qualified & knowledgeable personnel CI, a reputed corporate body, not only failed to notify any discrepancy/deviation in CNs & Statements etc, but came to register a grievance after more than 24 months of dealings.

- 4.5 Panel of Arbitrators should not have ignored the fact that allegations of unfair trade, multiple books of accounts, tampering of records, falsification of accounts & statements to Police & Exchange were designed to pressurize TM for securing multiple reliefs by way of Forum Shopping. How could the Panel ignore their noting of CI's statement before the Police that – "Mr. Amit Rastogi as Regional Manager of Karvy, kept in regular touch with me. As and when I placed orders for trading, Mr. Amit Rastogi would promptly inform me of the result and the balance in the company's account. Mr. Amit Rastogi and other officers of Karvy namely Mr. Debajyoti Biswas as Zonal Head would often visit me at our office. In this manner over this period of over 2 years, Mr. Amit Rastogi and his team of officers at Karvy obtained our trust and confidence. For this reason I never checked any e-mails or correspondence which I received from Karvy, the yearly and half yearly account ledger statements. After



all, CI never disputed ECN, Quarterly Statement of Accounts, Margin Statements, Voice Confirmations, regular e-mails from dealer. Renewed BG 5 times too. CI cannot be allowed to take a stand that trades were without its knowledge.

- 4.6 Varied stances of CI declared weakness of its case. CI's tune hanged when Voice Recordings demolished its initial stand that it had not transacted in Option Segment. Allegation that transactions during the period of its authorized signatory were abroad was dropped when asked to explain rationale behind renewal of BG subsequent to that specified period. It was admitted that official of TM had been contacted over mobile phone for the purpose of executing orders.
- 4.7 In its Statement of defense dated 01.08.2016 with reference to CI's Appeal dated 08.06.2016, TM took the stand that when documentary evidence proved that CI was well aware of all transactions it should have been asked to bear the entire loss. It called for ready acceptance that loss in CI's account resulted on account of investment decisions of CI ratified & confirmed by receipt of CNs, periodical renewal of BG combined with adverse market fluctuation. Inadvertent errors on TM's part in post trade records should not have been considered as negligence. Onus of timely pointing out errors was solely on CI. Brokerage was never Rs.1.7 crores as alleged without any supporting calculation. In view of Order placement instructions non-availability of confirmed order instructions cannot be the sole criteria to test whether a particular trade is authorized or not. TM performed all post trade obligations.
- 4.8 In its Statement dated 24.08.2016 w.r.t. CI's rejoinder received on 08.08.2016, TM's point wise rebuttal read: Rather than making

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baseless allegation of earning of brokerage of Rs.1.7 crores, CI may work out the exact quantum on the basis of CNs received during 25 months. CI throughout tried to build its case by picking holes in arguments, records, documents at all stages. One should appreciate that trading losses & deficiencies in post trade records etc are all together two different issues. It was only in October, 2015 after CI raised false allegations that its conduct became suspect so much so that TM thought it prudent to encash the bank guarantee. How can CI question TM's prerogative of appropriating guarantee towards NSE & MSEI. There is documentary evidence witnessing due delivery of sample Margin Report to Exchanges. TM's case is also that purported call of 11.10.2013 is fresh issues which should not be admitted & that having ratified all transactions through receipt of CNs, Margin Statements, pay-in & pay outs & renewal of guarantee the entire allegations deserve outright rejection as simply an afterthought. According to the TM merely telephonic exchanges on some dates & no calls on some when trade took place do not prove trades to be unauthorized. Finally, it is contended that when through its conduct CI ratified trades for 25 months how can it raise a dispute now picking holes in post trade records.

- 4.9 In further Statement dated 24.08.2016 in response to CI's rejoinder received on 23.08.2016, TM reiterates its stand and maintains that an internal document now filed does not anyway advance CI's case. Deficient & incomplete post trade record cannot provide basis to hold trades as uninstructed to allow CI to wriggle out of its trading obligations. TM vehemently denies the allegation that e-mail logs were manufactured/ altered. TM also pinpoints that dealings between

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August, 2013 & September, 2015 were all ratified. CI never registered any timely objection as regards any document or statement. TM furnished all necessary documents completely to establish that CI was all along aware of the trades and status of his account.

## Hearing

5. First hearing was held on 09.08.2016. Both the appeals are proposed to be taken up together. It was pointed out that the Panel feels that participation of Shri C. K. Basu in both IGRP & Arbitration has not anyway vitiated the Award that forms the subject matter of both the instant appeals. It was clarified that for deciding as to whether the trades had been unauthorised, call records alone cannot be expected to provide conclusive evidence. The issue shall have to be examined in the light of all other evidence indicating extent of knowledge CI had about the trades in question and also the extent of his participation at various stages of operation of the account. CI may furnish arguments and evidence in support of the contention that errors & omission alleged in documents submitted by the TM were much more than technical & inadvertent. It is generally agreed that on the basis of adopted lines of rival arguments and documents on record analysis of individual trades routed through the account during 06.08.2013 to 20.09.2015 is neither feasible nor insisted upon. Parties were assured that the Panel will have no objection if the dispute & differences are sorted out through an amicable settlement. Next hearing was scheduled on 08.09.2016.

5.1 In course of final hearing on 08.09.2016 diverse aspects of the case were discussed on the basis of documents brought on record till 24.08.2016, hearing too was declared closed. Award, however, could not be finalised promptly as Shri Mathur unfortunately developed some health problems & Smt Todi got preoccupied in some pressing personal matters. Extension accordingly was obtained for pronouncing the Award by 15.11.2016.


6. Undisputed facts of the case are:

Investor Purti Vanaspati Private Limited [CI] opened a Trading account with Karvy Stock Broking Limited [TM] in August, 2013. Being in the business of vanaspati oil, trade in currency exchange instruments were thought of as a measure to hedge losses apprehended on account of foreign exchange rate fluctuations. Initially it tendered payment of Rs.1.10 crores on 06.08.2013 followed by a subsequent payment of Rs.20 lakhs on 08.10.2013. All trades were in Futures & Options in Currency Derivatives. As per the KYC brokerage payable was indicated at Rs.2 per lot or 0.02%. The first trade in the account took place on 06.08.2013 and the last on 29.09.2015. CI offered a Bank Guarantee [BG] of Rs.2 crores towards margin & other obligations. Account shows total amounts in purchases and sales as Rs.22,31,88,09,074/- & Rs.22,31,07,75,789/- respectively. Total volume of transactions in the account thus works out to Rs. 44,62,95,84,863/-. Only once CI received a pay out of Rs.44 lakh, TM received the very first complaint from CI on 09.10.2015. A reply was sent by TM on 12.10.2015. On the basis of CI's complaint on 10.10.2015 alleging fraudulent activities by the

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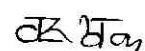
TM Hare Street station of State Police registered Case no. 650 on 29.10.2015 under sections 406/420/467/471/120B of IPC. TM moved a petition under sections 401 & 482 of CrPC, 1973 before the High Court of Kolkata on 27.01.2016 pleading, inter-alia, for quashing the Police FIR Case no 650/2015. The Hon'ble High Court passed an order on 10.02.2016 allowing continuation of police investigation debarring any coercive action against the TM till completion of investigation. CI's grievance forwarded by MSEI on 19.10.2016 was replied by the TM on 28.10.2015. CI's rejoinder received through MSEI on 05.11.2015 was replied by TM on 14.11.2015. IGRC Order dated 16.12.2015 by S/Shri Udayan Basu, N.P Sengupta & Dilip Shah shows that no settlement could be arrived at by the disputing parties. Thereafter an Arbitration Application was filed on 13.01.2016 claiming compensation of Rs.1,24,23,171/- being the net loss reflected in its trading account.

- 6.1 CI first complained to the TM on 09.10.2015 which was replied on 12.10.2015. On allegation of fraud CI made a Police Complaint on 10.10.2015 which was registered as Case no. 650 by Hare Street P.S on 29.10.2015 under sections 406/420/467/471/120B of IPC. Arbitration Application was filed on 13.01.2016 subsequent to IGRC Order dated 16.12.2015 by S/Shri Udayan Basu, N.P Sengupta, and Dilip Shah.
- 6.2 Before pronouncing the Award the Panel satisfied itself about maintainability of Arbitration proceedings alongside criminal investigation by the Police in the strength of one Supreme Court and another Bombay High Court decisions [discussed at length] & in view of the observation of the jurisdictional High Court in regard to


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TM's petition. Taking note of goals & objectives behind the ADR [Alternative Dispute Resolution] System postulated by the Arbitration and Conciliation Act, 1996 [that amended Indian Arbitration Act, 1940], the Arbitration Panel proposed to base their findings on appraisal of underlying facts & circumstances without insisting on strict legal scrutiny. They observed that the practice of brokers/ sub-brokers/ agents acting on targets undertaking counter trades in same scrip/commodity/ currency in client's account with its tacit approval for the sake of enhancing brokerage earnings is not something unheard of. Accordingly the Panel inferred that in the case under consideration, it must be both the parties who were responsible for the eventual loss from trading through the account. The panel felt the arguments & counter arguments of both the parties were equally self defeating. CI admitted knowledge of transaction posted in its account. It did not act in the manner expected of a well informed corporate investor. Activities in the Derivative Segment were withheld from the audited accounts for 2013-14 & 2014-15 which violated the prescribed Accounting Standards. Lack of knowledge of losses over a period of two years was sought to be explained by stating that e-mail account had not been pursued. The Panel, therefore, held the CI equally contributed to the resultant loss in its account. The Panel was of the opinion that the TM failed to establish the bona fides of the transactions which ultimately caused loss to the tune of Rs. 1,05,69,314/- in CI's account. They refused to buy the argument that the diverse errors & deficiencies in its records, documents & arguments, mostly being in technical/clerical nature could not invalidate the transactions. Holding both the parties at


equal fault the Award asked each to bear the loss to the extent of Rs.52,84,657/-.


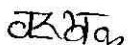

### **Our Analysis & finding**

7. We are aware that Indian Arbitration Act, 1940 was replaced by Arbitration & Conciliation Act, 1996 to make it an Alternative Dispute Resolution [ADR] system. Rival contentions along with all the arguments advanced as also documents and statements brought on record have been carefully considered. Objection on ground that participation of Shri C.K. Basu as a member of the Panel despite sitting in the IGRP violated principles of natural justice is rejected as not based on correct and proper interpretation of applicable law. IGRP had only a limited mandate to facilitate conciliation between the parties. IGRP was not required to record a finding of fact and had not, in fact, gone into merits of rival arguments & stands. Presence of Shri C.K.Basu in both the Panels cannot be said to have anyway vitiated either proceedings.
- 7.1 One can't help observing right at the outset that the case would have certainly called for more incisive scrutiny had the CI pinpointed specific trades or identified trades executed over a particular period which it claimed as unauthorised or unstructured. CI's grievance could have been countenanced had its relation with the TM been short or tumultuous. It is a bit difficult to fathom as to what rationale is sought to be suggested by questioning the transactions right from the beginning when the account had been actively operated for a number of quarters, over a couple of years to be more specific. One

can ill afford not to take note of the unusual approach of the CI to allege transactions A to Z as unauthorised thereby passing the buck to and inviting TM to prove the contrary. We must frankly admit our inability to approve the strategy adopted by the CI of establishing its case simply by picking up loopholes in the arguments & testimonies of the TM.

- 7.2 There is no gainsaying the fact that Regulations prescribed by SEBI do require a Broker to maintain records to establish on record that all the trades posted in the account of its constituent are supported by confirmed orders/ instructions from the constituent. Yet there is neither any authority under the Rules nor a dictate as per market convention & practice to permit one to jump to the unassailable conclusion that in the absence of such records the transactions are destined to be treated as unauthorised. Responsibility & accountability in respect of a trade, especially that which cause depletion in investment can be justifiably attributed to the Trading Member only and only if it is seen that the trade had been executed behind the back & beyond the knowledge of the Investor at the sole initiative of the Trading Member with exclusive intention of earning brokerage. A Trading Member certainly owes an explanation if its dealings are found to be far from fair & transparent. Yet the transaction itself cannot be treated as lacking in necessary authority if record does show that all efforts were taken to take the Client into confidence soon after the execution. Presumption prompted would be that the trade was undertaken on basis of a mutual understanding. In such contingencies one would look into client's responses on

receipt of post trade communication from the Trading Member designed to bring the transaction to client's knowledge.

- 7.3 Another fact that cries for attention happens to be that CI tendered BG of Rs.2 crores, purchases & sales of values Rs.2231 crores approximately are posted in his trading account when company's annual import of raw material was in the region of 100 crores in the 2 years involved. Question thus arises as to whether such large scale hedging in currency could be prompted by sole consideration of safeguarding likely commitments in the event of fluctuations in foreign exchange rates material for the import-export business. It is also to be carefully noted that in the instant case Ledger Balance turned negative as early as on 11.09.2013.
- 7.4 A host of documents and statements have been submitted by both the parties to assail each other's arguments. Anxious considerations have been given to each such document and statement relied upon by TM & CI, on an objective appraisal. We have following comments to offer as regards the relevance, bearing, admissibility and evaluation of all such Annexures & Exhibits brought on record at different stages since inception of Arbitration proceedings.
- 7.5 It will be apparent from the discussion in the following paragraphs with reference to specifics that general contentions like Award is bad in law, Award is against public policy, Award lacked in proper adjudication of evidence and in objective appraisal of claims, allegations and objections are to be ignored as devoid of appropriate substantiation. CI alleged that misconduct and fraud by TM were apparent and vicarious liability must be affixed on it. The deficiencies and lapses pinpointed in the records and statements

brought on record by the TM certainly calls for notice. The nature and magnitude of errors and omissions, however, does not induce an inference that these were deliberate distortions or manipulations to cover up unauthorised trades. When during the entire tenure of trade the CI had no occasion to register any grievance, it sounds quizzical as to what rationale is sought to be suggested by taking a stand that entire claim should have been admitted holding all the transactions as unauthorised & dubious. We are at a loss to comprehend as to how could CI, argue that asking for sharing of loss amounted to compromise with justice since there could not be something partly right and partly wrong. On one hand CI argues that the Panel should have appreciated that the TM had the intention right from the beginning of duping the investor and, on the other hand he prefers silence as to what compelled him to carry on the trading relationship for over 2 years. CI alleges Award to be based on surmises and conjectures ignoring documentary proof. And what he refers to as documentary proof happens to be hints aimed at finding loopholes in TM's documentary and verbal submissions. There is no gainsaying the fact that TM failed to demonstrate exercise of due care & diligence in its dealing with the CI. There is no material, however, apt to impute motive for recourse to unauthorized trades. When the conduct of the CI shows that he had all along been vigilant, the charge of manipulation of records without corroborating evidence cannot be taken up for serious deliberation just because the records produced at the stage of arbitration contained some errors & omissions.

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- 7.6 Exhaustive record of due receipt of pre trade instruction could not be produced by the TM. But the CI too could not suggest any criterion to identify a trade that was without his knowledge out of the whole lot about which he had no grievance for long 25 months. It does not call for an extensive argument to convince one that the TM took ample measures to acquaint the CI of the trades executed in his account as also the state of his account. ECN declares TM's bonafides. Not much can be read in CI's imputation that TM never checked whether these were read by him. Fact remains that CI never raised any timely objection of any sort. Record reveals that trades were executed even on dates which find no mention in call records & these trades too were ratified subsequently. CI was taking stock of his account in which trades took place almost on daily basis.
- 7.7 A statement was submitted by CI [Annexure D] to show that Loss of Rs.76,40,769/- resulted from transactions for which there is no record of telephonic conversation. Alongside another statement shows [Annexure E] Loss of Rs.69,72,991/- relating to transactions for which orders were placed on Exchange platform before any communication reached the TM. Loss of Rs.23,69,786/- is shown to relate to trades executed during 8<sup>th</sup> to 15<sup>th</sup> October, 2013 when CI's official was out of India. These statements were submitted in support of the contention that trades for which record of call as evidence of pre trade placement of orders are not available should be straightway treated as unauthorized and uninstructed. None of these can advance the cause of the CI in view of our considered opinion that question is to be decided on availability of CI's knowledge of the trade and not on single criterion of availability of call records.





- 7.8 Annexure A to CI's reply dated 03.08.2016 attempts an analysis of Voice Recorder to take a plea that erasing call timing from transcription [shown in the transcript submitted earlier] and capturing CI's voice from any source spoke of furnishing of manipulated records of trade confirmations. \*\*Annexure B refers to provisions of Law of evidence, 1872 to assert that tape recorded conversation cannot be admitted as valid evidence. We feel that our approach to analyze the trades on overall consideration of call records, ECN, Margin Notes, Statement of Accounts etc answers the plea. Referral law vide Annexure C to allege that TM's errors are intentional & not accidental is hardly relevant. To impute motive burden of proof would be on the party who levels the allegation. Basic law of Evidence is that the onus lies on the party who stands to lose if no evidence is adduced by either side.
- 7.9 CI took pains to point out certain irregularities in handling by the TM of the Bank Guarantee [BG] provided by it. Appropriation of BG being exclusive prerogative of the TM who is accountable, not to the CI, but to the Exchange, nothing worthwhile to base our inferences as regards the principal issue of scrutiny of the Award can be expected by pursuing the issue.
- 7.10 In the rejoinder dated 03.08.2016 objections galore have been raised by the CI in regard to almost all the statements & documents furnished by the TM. According, to the CI name appearing in the KYC is incorrect, KYC is not proved as delivered, non-production of Order Placement Register raises doubt about its existence. Daily Margin Statements had admitted mismatch, trades were executed without adequate margin, availability of only a few ECN,

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discrepancy in ECN vis-à-vis hard copies are some other issues raised by the CI. We are obliged to take note of these deficiencies in the discharge of its mandatory obligations but we are unwilling to treat any of these as having the effect of proving the charge of execution of unauthorized trades by the TM. Coming to e-mails CI speaks of admitted back office errors and absence of such mails for quite a number of transactions. The issues lose their relevance when seen in the light of the fact that none of these had been the subject matter of CI's grievance during the earlier part of the currency of the account.

- 7.11 In desperation CI quoted a long list of Regulations of SEBI to assert that non compliance with these by TM rendered all the trades in his account as unauthorized to entitle him to the compensation demanded. According to him since trades could not be shown to be based on confirmed orders Regulation 3.4 pertaining to trade in F & O Segment stands violated. Extensive discussion on the issue in foregoing paragraphs directly controverts the plea. Regulation 3.6.3 may require the broker to indicate time of receipt and execution of each order. But where is the authority to dictate that absence of such information in some Contract Notes by itself renders the whole lot of trades as unauthorized. Aberrations cited may, at the best, induce an inference that the TM did not have a foolproof procedure & system to ensure best client servicing. It is for the Exchange to oversee as to whether there had been any contravention of Regulation 3.10 dealing with 'margin'. Without going into the gamut of host of Regulations like 4.3, 4.5.7, 4.5.11, 4.5.15, 4.6.2(d), 4.6.2 (e), 7.1.4 (e),

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7.1.4(e)(xiv), 7.1.4(g)(i), 7.1.4(h), 7.1.4(k) & 7.1.6.1(e) referred to by the CI we are of the firm opinion that there is not an iota of evidence to justify his stand that the trades in his account were all unauthorized.




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 It has already been pointed out that installation of a voice recording system for capturing evidence of placement of trading orders by the Constituent is not prescribed as a mandatory requirement. Documents brought on record do establish the fact that the Trading Member followed the system of seeking confirmation from the Constituent about the orders executed. CI authorised ECN. Evidence furnished by the TM show that ECNs were mailed to CI from time to time. Only thing that can be held against the TM happens to be that there were errors & omissions highlighted by the CI in the procedure followed & /or in the statements filed. Statements of Accounts too were made available to the CI. Most importantly, CI was constantly in touch & deliberation with the designated official of the TM. TM took no care in keeping the CI informed as regards state of account & appropriation of the Bank Guarantee furnished. The errors & omissions explained to be inadvertent & failure to implement a foolproof procedure as regards client servicing certainly emboldens one to question TM's fairness & transparency. Measures taken by the TM in different stages of operation of the CI's account amply justify TM's stand that CI was in the knowledge of trades executed in his account. Imputation of fraud and tempering of records against the TM failed to elicit any support despite a police

complaint. It sounds a bit quizzical as why could not the Tm come lean by disclosing the quantum of brokerage it earned from transactions reflected in CI's account. To sum up, inference is inescapable that the imputation of unauthorised trade cannot but be rejected as devoid of any merit.

### Order

9. From the analysis as attempted above it will be clear that in the case under consideration neither party can legitimately claim that it sincerely & honestly discharged its respective duties & obligations. To make a long story short, material on record does not, even remotely, support a stand that trades in the account of CI were unauthorised, uninstructed or beyond the knowledge of the CI. Conclusion is also irresistible that the TM failed to demonstrate that it had a fair, transparent and efficient system in place to ensure best service to its clients. There may not be material enough apt to suggest that errors & omissions in its procedure & records were clerical. Yet there is no gainsaying the fact that such inaccuracies & deficiencies cannot be brushed aside as non consequential. Arbitration essentially being an investor protection mechanism, arbitrators cannot afford to be unmindful of the deficiencies, defects, aberrations & negligence on the part of the TM manifested in course of the proceedings. CI certainly deserves credit for bringing these to light. Interest of fair play and natural justice demands that the TM should be made to pay a price for the deviations. There is no denying the fact that in a relationship of Treading Member – Constituent, the




former stands to gain by way of earning of brokerage irrespective of result of the trade. The Constituent, on the other hand, is to face the risk inherent & obliged to seek TM's assistance in execution of the trade. A Trading Member thus stands to gain at the cost of the Constituent. It would not, therefore, be altogether out of place if in the instant case the TM is called upon to surrender a part of the brokerage it earned to compensate the CI at whose cost the brokerage had been earned. We are accordingly at one with the Panel pronouncing the Award forming the subject matter of Appeals when they opined that the eventual loss in the account must be attributed to deviations & aberrations in the discharge of respective duties & obligations by both the parties. However, in view of the facts & circumstances detailed above we cannot persuade ourselves to agree to the inference that the parties should be asked to bear the loss equally. In terms of deficiencies in discharge of assigned duties & obligations, deviations from right course, aberrations in conduct, defects in record keeping and short comings in ensuring proper service to the clients, gravity & impact on consequential effect of omissions & commissions is seen to be much more serious in case of the CI as compared to that of the TM. In the light of the discussion in the foregoing paragraphs we are impelled to the view that ends of justice would be met if the CI, Purti Vanaspati Private Limited is asked to meet 90% of the loss attributable to its error of judgment & adverse market movements while the TM, Karvy Stock Broking Limited is directed to compensate Purti Vanaspati Private Limited for the remaining 10% of the loss of Rs.1,05,69,314/- as the price for failure to ensure fair, transparent & effective client service. For


statistical purposes Appeal by Karvy Stock Broking Limited shall be treated as allowed partly & Appeal by Puri Vanaspati Private Limited as dismissed as lacking in merits.


10. The Award is made in three originals duly dated and signed and the same is filed with the Exchange in compliance with Chapter 14 & 14A of Bye-laws, Rules and Regulations of Metropolitan Stock Exchange of India Ltd. The Exchange shall kindly arrange to send one original each to the parties to the dispute retaining the stamped original Award in the Exchange for record.

**Kolkata dated this 07 of November, 2016.**

**Appellate Bench:**

  
Shri Dilip Kumar Das  
(Presiding Arbitrator)

  
Smt. Priti Todi  
(Co- Arbitrator)

  
Shri Mahesh Mathur  
(Co-Arbitrator)