भारतीय गैर न्यायिक

एक सौ रुपये

Rs. 100

रु. 100

ONE HUNDRED RUPEES

सत्यमेव जयते

भारत INDIA

INDIA NON JUDICIAL

पश्चिमबङ्ग पश्चिम बंगाल WEST BENGAL

S 584931

Arbitration Award

In the matter of

A.M. No. Kol-06/2013

Between

Mr. Prasanta Kumar Aditya **...Applicant**

Samadrita Cooperative Housing

ECTP, PHASE-III, B-7/7

Kolkata – 700107

And

M/s Nirmal Bang Securities Pvt. Ltd. **...Respondent**

38-B, KHATAUI BLDG , 2nd floor

Alkesh Dinesh Mody Marg

Fort Mumbai-100001

Preface

1. The Applicant , a constituent of the above Respondent , a Trading Member (TM) of the MCX Stock Exchange Ltd. (MCXC-SX) submitted an application for adjudication by arbitration of a claim of Rs.1,49,015/- which arose during the course of trading in the Currency Derivative Segment (CDS) of the Exchange on the 9th ,10th ,11th &12th July 2013.

2.1.Statement of facts as stated by the Applicant.

A trading account was opened by the Applicant with the TM on the 16th May, 2013 against execution of necessary documents relating to KYC , Rights and obligation of Stock Brokers & client , policies & procedures, the authority given to the TM for sending digital contract notes and various statements by e-mail to the Applicant etc. Copies of the aforesaid executed documents were not sent to him by the Respondent despite the Applicant's e-mail reminder dated 18th July, 2013 as a result of which he was deprived of the opportunity of verifying the correctness of the details filled up subsequently at the Respondent's office which were left blank by him at the time of signing the same.

2.2. The Applicant expressed his desire by putting his signature in the appropriate column of the KYC that he would like to trade only in the Currency Derivative Segment of the MCX. Arising out of that and the fact that he had deposited Rs.10,000 for providing margin too while opening the trading account with the Respondent, he was being pursued by the latter to start trading transactions through them soon. The Applicant conceded by indicating that only one trade could be booked by him on the 9th July 2013 to test waters. Perhaps taking cues from that the Respondent executed a large number of 'buy/sell' orders on the 9th July , 10th July, 11th July and 12th July 2013 without his knowledge. None of the relative orders except the one mentioned earlier were reportedly placed by the Applicant and according to him, all others were unauthorised transactions. In fact, after his talk on the 9th July 2013 with the Respondent , the Applicant did not get any response from them and the contract notes for the orders were also not received by him up to 11th July, 2013, when he gave specific instructions to the Respondent's official at the back office to refrain from entering any transactions in the Currency Segment "any more".

2.3. Notwithstanding the above position, the Applicant stated that from a telephone call received from the Respondent on 13.07.2013 seeking confirmation of all trades done on the 12th July, 2013 on his behalf he came to know of the unauthorised nature of these transactions. The Respondent's reply was "when there was no talk, no instruction, how can I give confirmation of the trades?" The Applicant was also advised that as a result of his non-confirmation of the alleged trades done on the 12th July,2013 his trading account would be suspended and he agreed to this as orders for none of these trades were actually placed by him.

2.4. The Applicant's ledger account with the Respondent showed a debit balance of Rs. 1,49,015.99 as at the close of business on the 15th July 2013 on account of trades done on those four days and these were the only transactions involved in the process. Hence the Applicant had justified his claim based on the aforesaid balance which was finally squared off from remittances from other sources. The Applicant does not seem to have applied any other criteria for working out the alleged loss amount except that it represented the net result of all MTM profits & losses and closing out of the deals finally.

2.5.The Applicant was totally in denial mode on the question of receiving contract notes, bills, margin statements from the Respondent at his registered e-mail address or by way of SMSes on his mobile. The Applicant had further informed that he had not received e-mails from the Exchange too about the reported execution of trades on the dates in question.

3.1. <u>The Statements of defense made by the Respondent</u>

The Respondent denied the claim of Rs.1,49,015/- made by the Applicant as, according to them, it is "bogus and baseless". All trades were done as per the "implied consent" of the Applicant. The Applicant did not acknowledge receipt of the documents like contract notes, though these were reportedly sent to his registered e-mail address by the Respondent. No dispute was also raised by him earlier on any of the trades executed.

3.2. The Applicant had agreed to open trading and demat accounts out of his own volition without any undue pressure from any quarters. The copies of the executed documents like KYC application form (KYC) , Risk Disclosure Document (RDD) etc were sent to the Applicant with

'welcome letter'. The Applicant should have brought to the notice of the Respondent when he found that no document was attached with the letter. The Applicant was also wrong to say that no order was booked by him as by his own admission he indicated that only one order was intended to be placed by him on 9th July 2013. A reference to the e-logs of contract notes, bills, margin statements and financial ledger statements etc., and the logs of SMSes sent would convey that all the documents were successfully delivered to the Applicant and there would be no reason why these would not have reached him at all. The copies of the report were also submitted by the Respondent as evidences in support of their claim.

3.3. The Respondent further added that as a measure of abundant caution, there is a systemic arrangement in place with them whereunder trade details are conveyed over telephone to the clients too and hence the Applicant was kept advised of the confirmation of all the trades executed by him. The Respondent further advised that while on the 9th July 2013 the trades were done as per the Applicant's own admission (the Applicant however locked horns with the Respondent by alleging that he opted for only one order whereas the concerned contract note depicted that there were other orders too), on the 10th July & 11th July 2013the trades were undertaken in deference to the "desire and direction" of the Applicant. On the 12th July, 2013 there was a margin short fall in the account as the relevant margin statement displayed as under.

Financial – 124632

Margin – 37.4845%

POA Stocks -139305.7

F&O - (-) 297985

Net Available Margin (-) 158416

As the Applicant failed to replenish the deficit within the stipulated time, the Respondent was constrained to close out / square off the open positions in compliance with the "regulation and the bye-laws of the exchange" and in conformity with the relevant clause of the 'policies and procedures' document signed by both.

3.4. To corroborate the Respondent's stand they also produced evidence by way of CD on which the conversations exchanged between their officials of the dealing room and the Applicant were recorded on the aforementioned trading days. The transcripts of these conversations were also submitted by the Respondent which, according to them, narrate the chain of events and the direction of the discussion that led to the trade decisions made by the Applicant himself. First , though the Respondent was actually unable to place any proof supporting the allegation that the Applicant was ab initio instrumental in conveying the orders in the pre-trade stage, his affirmative answer in the form of "yes" or ok to the statement of the Respondent's dealer would vouch that the Applicant was aware of his intended jaunts in the market before and after the execution of the trades in question. Secondly, the conversation on 10.07.2013 was crystal clear that the order was straightforwardly given by the Applicant to the dealer before the actual execution. The Applicant , therefore, had always the 'implied' or expressed consent as he was in the know of the trades and hence he could not have taken a stand that these were unauthorised ones.

3.5. The Respondent, therefore, desired that the Applicant's claim should be dismissed in view of the facts and circumstances narrated by them as above.

4.1. <u>The gist of presentation made during the hearings.</u>

Three hearings were held on 07.01.2014, 20.01.2014 and 26.03.2014 where certain details were discussed threadbare as under:-

(i) The Applicant's main objection that the orders were not placed with the Respondent before their execution was largely put to scrutiny by subsequent events. It was found from the playing of the CD of conversations between the Applicant & the Respondent's dealers that while on the 9th July 2013 the Applicant was alleged to have desired just one order to be booked (though he did not specify the details thereof), the relative contract note of that date displayed a good number of other orders that were transacted the responsibility for which cannot be placed on him. However, on the 10th July 2013 it was proved beyond doubt that the Applicant concurred with the information provided by the Respondent's dealers about the

prospective trades and accordingly it could be concluded that the latter simply carried out the Applicant's instructions.

(ii) The Applicant was not ready to accept that the trades done on the 11th & 12th July 2013 were at all done by him since the blanket instructions were reported to have been given by him to the Respondent's back office to refrain from booking any transactions in his trading account with effect from 11.07.2014. This conversation must have also been recorded with the Respondent who, however, are unable to trace this even after instituting a thorough search of their records.

(iii) The transactions on the 12th July represented simply the activities for recovery of the margin shortfall for which the Respondent felt they were fully authorised by the rules & regulations governing the entire arrangements. The respondent, however, could not produce any evidence to prove that the demand for making good the margin deficit was ever made on the Applicant.

(iv) Though the hearing was intended to be rounded up after the second stage, the submission of an additional CD containing recorded conversations of the both parties required authentication and discussion by all concerned as some divergence in the versions of the two separate transcripts of the recordings was noticed. Hence, in the reopened third hearing some information came to the fore which relates to the following facts as alleged :-

- The new transcripts depicted the conversations between the Applicant and the Respondent's dealing room official at the pre-trade stage as opposed to the earlier one which was with their back office functionary for relating post trade confirmation of trades. None the less, overall it appears in some cases the buy orders were placed on other days too in addition to the one done on 09.07.2013 by the Applicant before the consummation of the trades. There is, however, no indication that the sell orders were executed at the behest of the Applicant who did not raise any objection to accept the orders on the spot.

- The new information also raise doubt about the contention of the Applicant that he instructed the Respondent's official to refrain from entering into any currency trades after 11.07.2013 on his behalf.

All these show that giving orders before trade was done in a perfunctory manner and no systemic uniformity was followed by either of the parties.

5.1. Analysis

The case seems to be a dispute between a dawdling Applicant and a phlegmatical Respondent. Neither is bedeviled by details and their presentations do not bristle too much with highs and lows. The Applicant is contesting only four days' trades in CDS and the Respondent is trying to justify the same with their ruminating facts. The Applicant is bizarrely consistent that no documents relating to the trades worth the name were received by him despite the Respondent's citing of the convincing proofs by way of e-log reports and SMSes which sought to convey that the digital documents were successfully delivered to him. Nevertheless, the Respondent preferred to concentrate on the recorded conversations between the Applicant and the dealers on the days in question which might be considered to be the significant inputs. At the same time the Respondent's negligence to deal with his requests for copies of KYC and other documents in time also put a question mark on the extent to which he was disadvantaged to nip his loss in the bud.

5.2. Be that as it may, a critical look at the transcripts of the conversations referred to in the preceding paragraph would surely substantiate the contention that in case the Applicant had really a negative feeling at that stage towards the trades done on the 9th & 11th July, 2013 nothing could have prevented him from blatantly refusing these then and there. Instead the tenor and willful elongation of the conversations and the meek display of the sustained interest by him with the Respondent's suggestions demonstrated that in the periphery of his inner mind he was favouring the actions of the latter and was approving these on spot – assessment on a post facto basis. There was not even an iota of doubt or any sign of nagging displeasure and wavering decisions or an expression of volte face reaction in the Applicant's behavior which was noticed during the course of conversations. This gives an impression that the Applicant was all the while ready for a speculative happenstance in his favor and this

turned turtle when he faced enormous loss as the ultimate outcome. The Respondent perhaps underscored the Applicant's 'implied consent' to the positions created in the foregoing manner and the Arbitral Tribunal tends to agree with them to some extent.

5.3. Though ideally it was necessary for the Respondent to act upon the Applicant's instructions only upon receipt of the buy/sell instruction from him at the pre-trade stage, yet the dynamics of the derivatives market are such that it might not always be feasible to maintain the procedural sanctity especially when the option to accept or reject the orders booked was decidedly with the Applicant. Besides, the starting point of the discussion during conversation each day was giving a veiled hint that the Applicant was probably familiar with some prior consultations too before the placement of orders and the Respondent's dealer was only seeking his confirmation as fait accompli. The Applicant's studied silence in this regard would certainly reinforce the aforesaid stand & betray tacitly the speculative interest at the back of his mind. Thirdly ,the Respondent did all that the rule-book wanted them to do in keeping the Applicant informed as the copies of e-log report for ECNS & financial statements and logs of SMSs sent by them vouched their compliance of the standard requirements. It is another matter that the Applicant could not confirm the receipt thereof despite the fact that the aforesaid transcripts of conversation threw some light on the execution of the transacted trades at his request. The Applicant should have been more proactive to collect the documents through personal efforts though this might not have helped him much to identify loopholes in the trading activities as such. The Applicant's grievance that the so-called unauthorised trades were largely responsible for his alleged loss cannot thus be substantiated totally.

5.4. Coming now to the reasons adduced by the Respondent that trades transacted on the 12th July, 2013 were due to the close –out operations done for recovery of the margin-deficit, it cannot be said that their action was fool-proof. For one thing, it was unclear whether the demand for margin shortfall was made by the Respondent on the Applicant and whether he was allowed the time for payment. The Applicant was found to be unaware of the cause for the sudden liquidation of his position. He was also not given the opportunity by the

Respondent to correct the situation in the desired manner. The Respondent's unilateral action of squaring off is not at all supportable for the following reasons:-

a) Clause 3.10 (a) of MCX Stock Exchange (Currency derivatives Segment) Trading and Clearing Regulations lays down inter alia that "The Trading Member must demand from its constituents the Margin Deficit which the member has to provide…." It appears as per the margin statement of the Respondent for 12.07.13 that the net available margin was (-) 158416. However, there is no evidence to prove incontrovertibly that the Applicant was asked to deposit the necessary amount to make up the shortfall and accordingly the Respondent seemed to have violated the directive.

b) Clause 3.10(b) ibid also provides that " In case of non-payment of daily settlement by the constituents within the next trading day, the trading Member shall be at liberty to close out transactions by selling or buying the [Derivative Contracts]". Here the Respondent could not prove that the Applicant was actually a "Constituent-in-default".

Accordingly, the Respondent's action of closing out the positions without informing the Applicant and waiting till the next trading day was wrong and contrary to the regulations of the exchange. True, the clause (e) of the document captioned as 'policies and procedures' grants the Respondent the absolute authority to recover dues even without any reference to the Applicant, but since this provision is against the definitive instruction of the Regulation in question as mentioned above , the instructions contained in the latter would prevail. The Respondent thus seemed to have failed to follow the laid-down norms.

6.1. <u>The Decision and the Award</u>.

The Applicant has based his claim amount of Rs.1,49,015/- on the balance due to the Respondent from him as reflected in the ledger a/c with the latter as on 15.07.2013 as he has not delineated its components. However, without entering into further polemics, it cannot be denied that the margin deficit payment was the genuine duty of any client like the Applicant and it would be remiss if the entire blame is put on the Respondent only for their failure to act in

conformity with the letters and spirit of the regulation. The Applicant was duty-bound too to keep track of what was happening to his account instead of simply leaving it to the Respondent. Hence, it is the considered opinion of the Tribunal to hold the Applicant partly responsible for his inaction. To this end, it is felt that the delivery of Justice would not be iniquitous if the Applicant and the Respondent are made jointly accountable for the loss which was contributed by the negligence of both though in unequal proportions. In other words, it will perhaps suffice if the Respondent is called upon to pay a sum of Rs.1,20,000/- (Rupees One lakh twenty thousand only) to the Applicant in full & final settlement of the case.

6.2. Thus having considered all the aspects of the case which came to the fore and which were unforthcoming though leaving trails through various actions of the Applicant and the Respondent, the free and frank discussions which took place during the hearings and the procedural requirements which remained unfulfilled by both, the Tribunal came to the foregoing conclusion with the added condition that the payment of Rs.1,20,000/- would be made by the Respondent to the Applicant within a period of one month from the date of pronouncement of the judgment. The Award is given accordingly.

6.3. The Award is printed in three originals only.

Date:03.04.2014
Place: Kolkata

(P.K.Bhattacharjee)
Sole Arbitrator