***IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **OMP 205/1997 & RSA 131/2002**

%11.02.2009 **Date of decision: 11.02.2009**

SHRI ROSHAN LAL GUPTA ..... Petitioner

Through: Mr Girish Aggarwal with
Ms Mugdha Pandey, Advocates

Versus

SHRI PARASRAM HOLDINGS PVT LTD & ANR ..... Respondents

Through: Mr Gagan Gupta with Mr Raman Kapoor, Advocates for Respondents 1& 2 in RSA 131/2002 and for Respondent No.1 in OMP 205/1997.

Mr Sanjay Bhatt with Mr Abhishek Kumar, Advocates for the respondent No.3 in RSA 131/2002.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes

2. To be referred to the reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. The appellant/petitioner on 9th January, 1997 instituted in the court of the Senior Civil Judge, Delhi a suit for declaration and permanent injunction from which the Regular Second Appeal (RSA) has arisen. It was the case of the petitioner/appellant in the plaint that he is a retired officer from the IDBI; that the respondent No.1 Shri Parasram Holdings Pvt Ltd (hereinafter called the "Stock Broker") is carrying on business as a stock broker and is a member of the (respondent No.3 in the RSA) M/s National Stock Exchange of India Ltd (hereinafter called the "stock exchange"); that the

petitioner/appellant had purchased and sold some shares through the stock broker during the period from 3rd July, 1996 to 9th July, 1996 and in which transaction he had suffered losses and had squared up his account vide his cheque dated 10th July, 1996 and had thereafter stopped purchase/sale of shares through the stock broker or anyone else; that the petitioner/appellant on 22nd December, 1996 received notice from the stock exchange of the statement of claim received by the stock exchange from the stock broker and requiring the petitioner/appellant to submit his defence thereto together with fee of arbitration as well as his nominees from the panel of arbitrators of the stock exchange; that the stock broker had filed a totally false claim against the petitioner/appellant with the stock exchange and on the basis of fabricated and forged documents; that photocopy of the Member Constituent Agreement received by the petitioner/appellant as part of the claim of the stock broker though purported to be signed by the petitioner/appellant was, in fact, not signed by him and never executed by him and had been forged and fabricated to cause the stock exchange to entertain the claim of the stock broker for arbitration; that the petitioner/appellant had never authorized the transactions on the basis whereof the claim was made and had not made any part payment, after adjusting which the balance was being claimed by the stock broker.

2. The petitioner/appellant further claimed that he had, prior to the institution of the suit, served a legal notice on the stock broker and the stock exchange calling upon them to withdraw the claim and the request for arbitration but no reply had been received thereto. The petitioner / appellant apprehending that the stock broker and the stock exchange will continue with the arbitration proceedings, instituted the suit for the relief of declaration that the Member

Constituent Agreement relied upon by the stock broker and providing for arbitration of the stock exchange was fabricated and forged and thus void and for perpetual injunction restraining the stock exchange from taking any arbitration proceedings in pursuance to the notice aforesaid served on the petitioner/appellant.

3. Summons/notice of the suit/application for interim relief were issued on 9th January, 1997 for 16th January, 1997. On 16th January, 1997 the stock broker (and its director who was impleaded as defendant No.2 and who is respondent No.2 in the RSA) filed their written statement. In the preliminary objections in the written statement it was, inter alia, stated that the suit was not maintainable owing to the Arbitration and Conciliation Act, 1996 having come into force on 25th January, 1996; reference was made to Section 5 thereof and it was pleaded that there was no provision under the Act to challenge the arbitration agreement before the court when the arbitration proceedings had already commenced; the claim in suit for permanent injunction was also pleaded to be barred by Section 41(h) of the Specific Relief Act; it was further pleaded that in view of the byelaws of the stock exchange providing for arbitration of disputes between the stock broker and its clients/constituents, the court had no jurisdiction to try the suit. Other pleas on merits were also taken in the written statement.

4. The stock exchange on 16th January, 1997 took time for filing the written statement and the matter was adjourned to 20th January, 1997. On that date, the petitioner/appellant filed replication to the written statement of the stock broker and the stock exchange filed an application under Section 8 of the Arbitration Act for referring the matter to arbitration. The stock broker in the written statement as well as the stock exchange in the said

application also disputed the territorial jurisdiction of the courts at Delhi and relied upon the clause in the byelaws of the stock exchange with respect to the exclusive jurisdiction of the courts at Mumbai. The application was contested by the petitioner/appellant by filing a reply.

5. The learned Civil Judge vide order dated 1st February, 1997, inter alia, held that under Section 5 of the Act the jurisdiction of the civil court was barred; that there was no provision under the Arbitration Act to challenge the arbitration before the civil court; that the arbitration proceedings of the stock exchange had already commenced prior to the institution of the suit; that the petitioner/appellant has a right under Section 16 of the Arbitration Act to raise objections as raised in the suit before the arbitrator and even thereafter under Section 34 of the Act and thus allowed the application and dismissed the suit.

6. The petitioner / appellant preferred an appeal to the District Judge which was registered as RCA 631/2002 against the order aforesaid of the Civil Judge and which came to be decided vide order dated 18th May, 2002. The learned Additional District Judge deciding the appeal concurred with the Civil Judge and also noticed that during hearing it had transpired that the arbitrator appointed by the stock exchange had passed the arbitral award and with respect whereto the petitioner/appellant had already filed petition under Section 34 of the Act being OMP 205/1997. I may notice that though there does not appear on the record any decree sheet drawn up by the Civil Judge but a decree sheet was drawn up by the Additional District Judge of dismissal of the appeal. The petitioner/appellant preferred the RSA under Section 100 of the CPC to this court against the order of the Additional District Judge and on 1st March, 2003,

after this court had called for the record of OMP205/1997 and presumably perused the same, notice to show cause as to why the RSA be not admitted was issued to the respondent. The OMP and the RSA were pending before separate courts thereafter and the RSA was transferred to be heard by this court where the OMP was pending vide order dated 12th February, 2007 in the OMP file. Though the RSA had been pending for long but no substantial questions of law as required to be framed were framed nor was there any order formally admitting the RSA for hearing.

7. In these circumstances on 30th January, 2009 the following substantial questions of law were framed:

1. Whether a suit for declaration that the agreement containing an arbitration clause is fabricated, forged and thus null and void and legally inoperative and claiming the consequential relief of permanent injunction of restraining the other party to the impugned agreement from invoking arbitration and the arbitrator from proceedings with the arbitration maintainable in law?

2. Whether suit of the nature aforesaid is barred by Section 5 of the Arbitration & Conciliation Act?

3. What is the effect, if any, of a non party to the arbitration agreement, impleaded as party to the suit, applying under Section 8 of the Arbitration Act?

4. Whether a suit of the nature aforesaid for the relief of declaration and injunction is barred by Section 34 r/w 41 of the Specific Relief Act and whether an application under Section 16 of the Arbitration Act is an alternative efficacious remedy to the same.

and the counsels made submissions in RSA as well as OMP.

8. At the outset, query was made from the counsels as to the maintainability of the RSA, the order challenged therein being on an application under Section 8 of the Arbitration Act. No judgment was cited by counsel for either party on this aspect. The court, if allowing the application under Section 8 of the Act is required to refer the

parties to arbitration. In the present case it was the admitted position that the arbitration proceedings had already commenced even prior to the institution of the suit. Since Section 8(3) provides that the arbitration proceedings may be commenced, continued and an arbitral award made notwithstanding the pendency of an application under Section 8. The suit was filed after the commencement of arbitration proceedings had been commenced by the stock exchange. The suit claimed the relief of stay thereof. The order made by the Civil Judge is thus not of referring the parties to arbitration as the court is required to do under Section 8 but of dismissal of the suit.

9. Section 100 of the CPC provides for an appeal to lie before this court from every decree passed in appeal by any court subordinate to this Court. As aforesaid, though I have not found on record any decree sheet having been drawn up by the Civil Judge while dismissing the suit, there is on record a decree drawn up by the Additional District Judge while dismissing the appeal. Technically, therefore, there is a decree passed in appeal by a court subordinate to this court, to satisfy the first requirement of the maintainability of the second appeal before this court.

10. An appeal could lie from the order aforesaid of the Civil Judge before the Additional District Judge either under Section 96 or under Order 43 of the CPC. No appeal from an order on an application under Section 8 of the Act is provided under Order 43. Under Section 96 of the CPC an appeal lies from every decree passed by any court exercising original jurisdiction. So, the question is as to whether the order allowing the application under Section 8 Arbitration Act constitutes a decree or not.

11. A decree is defined in Section 2(2) of the CPC as a formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It is deemed to include the rejection of the plaint. Since an order allowing an application under Section 8 of the Act conclusively determines the right of the plaintiff to maintain a suit, it should fall within the definition of a decree.

12. I however find that the Division Bench of this court in **Canbank Financial Services Ltd. v. Haryana Petrochemicals Ltd.** 2008 (2) Arbitration Law Reporter 365 held that, an order allowing the application under Section 8 of the Arbitration Act is not appealable under the Arbitration Act and otherwise under the CPC. The plea that such an order is akin to rejection of plaint and thus a decree and hence appealable also did not find favour. Once the Division Bench has held that the first appeal does not lie against such an order, the question of the maintainability of the second appeal does not arise. Thus I find that the second appeal is not maintainable for this reason alone.

13. There is, however, yet another aspect in the present proceedings of relevance to the nature of the order of the Civil Judge. The counsel for the petitioner/appellant has argued that the application on which the suit was dismissed, in the present case, was filed by the stock exchange and not by the stock broker. It is contended that the agreement alleged of arbitration was between the petitioner/appellant and the stock broker and not between the petitioner/appellant and the stock exchange. It is thus contended that the right, if any, to apply under Section 8 of the Arbitration Act was of the stock broker only and not of the stock exchange. It is

averred that in Section 8(1) "….. if a party so applies ...." refers to a party as defined in Section 2(h) and means a party to an arbitration agreement.

14. Per contra, the counsel for the stock broker has argued that the stock broker also in written statement filed by them had in the preliminary submissions itself taken the plea of the suit being barred owing to the existence of the arbitration agreement and thus it cannot be said that it is only the stock exchange which applied under Section 8 of the Act. It is also urged that even if it is considered that the stock broker alone could have applied under Section 8 of the Act and had not so applied, the suit has been dismissed under Order 7 Rule 11 of the CPC as being barred by law i.e., the law contained in Section 5 of the Arbitration Act.

15. At the outset, I may state that the contention of the stock broker that even if the stock broker had not applied under Section 8 of the Act, the stock broker could still apply for rejection of the plaint under Section 5 of the Act is not sound. It is not as if the civil court *per se* does not have jurisdiction to entertain a suit emanating from a transaction subject matter of arbitration agreement. A civil court cannot dismiss a suit instituted before it, even though found to be subject matter of an arbitration agreement, at the threshold. It is always open to the defendant to the suit to waive, give up and abandon the plea of arbitration and if that were to happen then the suit will continue before the civil court. The manner in which the defendant in a suit which is the subject matter of an arbitration agreement is to setup the plea of arbitration has been prescribed in Section 8 of the Act. Such a plea has to be raised not later than when submitting the first statement on the substance of the dispute. If such a plea is not raised while submitting the first statement on

the substance of the dispute, the defendant is thereafter barred from raising such a plea and if that be the position then it cannot be argued that even though the plea is not raised in the manner prescribed in Section 8 of the Act, it is open to the defendant thereafter also to contend that the suit is barred by virtue of section 5 of the Act.

16. I also do not agree with the contention of the petitioner/appellant that the word "party" in Section 8 refers to a party to the agreement. In my view, the word "party" in Section 8 refers to a party to the suit. In the present case the stock exchange had been impleaded as a party to the suit, not merely as a proforma party but as a substantive party against whom reliefs of injunction was also claimed of proceeding with the arbitration initiated at the instance of the stock broker. In the circumstances, it cannot be said that the stock exchange was merely a proforma party to the suit and not competent to raise the plea. The stock exchange being the institution to whose arbitration the petitioner/appellant were alleged to have agreed and as per whose byelaws such matters are to be referred to arbitration thus had a vital interest in the arbitration and was competent to apply to the court under Section 8 of the Act. It cannot be called a stranger to the arbitration.

17. Section 2, upon clause (h) whereas reliance is placed by the plaintiff/petitioner is subject to the context otherwise requiring. Context in which the word "party" is used in Section 8 is in relation to a party to an action brought before the judicial authority and not in the context of a party to the arbitration.

18. I also do not find any merit in the plea of the petitioner/appellant that the stock broker had consented to the jurisdiction of the civil court and / or had waived/abandoned the

right under Section 8. The preliminary objections in the written statement of the stock broker have already been referred to above. In the same the stock broker has unequivocally contested the jurisdiction of the civil court to proceed with the suit for the reason of the arbitration. Of course, the preliminary objections repeatedly refer to Section 5 and not to Section 8 but mere failure to cite the correct provision of law and/or referring to the wrong provision, cannot defeat the rights of the parties. It is of significance that the written statement was filed soon after the coming into force of the 1996 Act and till when there was not much clarity about the statute and the recent past has shown as to how the courts themselves have from time to time changed their interpretation of the various provisions of the statute. Thus, once the stock broker has, while submitting his first statement on the substance of the dispute, taken the plea of the jurisdiction of the civil court being barred for the reason of the existence of the arbitration agreement, it cannot be said that merely because reliance is made while taking the said plea to section 5 instead to Section 8 would tantamount to the stock broker giving up the right to apply for arbitration. It is also significant that the stock broker had prior thereto already commenced the arbitration proceedings. Recently another Single Judge of this court in **Ministry of Sound International Ltd v. Indus Renaissance Partners Entertainment Pvt Ltd** 156 (2009) DLT 406 held that where a suit was instituted after the plea under Section 8 of the Arbitration Act had been taken in a suit filed by other party would not tantamount to waiver / abandonment of the right under the arbitration agreement. It was further held that the case would be different where before taking a plea of arbitration, a suit is instituted. Following the same reasoning I am not only of the view that on a meaningful reading of the written statement, the stock

broker had also applied for reference of the parties to arbitration within the meaning of Section 8 of the Act but also, even if he had not so applied, having instituted the arbitration proceedings before filing the written statement cannot be said to have, by filing the written statement waived or abandoned arbitration.

19. Though the second appeal is found to not lie, however, since substantial questions of law were framed, it is deemed expedient to, for the sake of complete adjudication, deal with the same also. The questions 1, 2 and 4 aforesaid, relate to the very maintainability of a suit as filed by the petitioner/appellant, i.e., for declaration that the arbitration agreement on the basis whereof the defendants to the suit have initiated arbitration proceedings, is forged and fabricated and thus void and of permanent injunction restraining arbitration.

20. Section 32 of the 1940 Act, barred a suit for decision upon the existence, effect and validity of an arbitration agreement; however Section 33 thereof permitted the court to determine the existence or validity of the agreement. The 1996 Act, however, marks a change in this regard. There is no equivalent to the Sections 32 and 33 of the old Act. On the contrary, Section 16 has been introduced and Section 34 providing for recourse against an arbitral award expressly makes the invalidity of the arbitration agreement a ground for setting aside the arbitral award. A peremptory Section 5 prohibiting the jurisdiction of courts save as expressly provided under the Act has also been introduced. If in spite of the said changes, this court is to hold that a suit is maintainable where the contract containing the arbitration clause is challenged on ground of forgery and the court in such suit is empowered to injunct arbitration proceedings (as otherwise no purpose would be served by such suit), in my view, it would tantamount to negating the effect of

the change in the statute. It may also be noticed that arbitration is normally provided for in commercial agreements and whereunder after the disputes have arisen, one of the parties is always interested in delaying the disposal of the claims of the other. In fact, the parties while providing for arbitration in commercial contracts do so for the reasons of expediency. If notwithstanding the aforesaid material changes between the old and the new Act, it is to be held that a suit as a present one is maintainable, it would give a tool in the hands of the party wanting to delay the disposal of the claims of the other; in each case suits would be instituted and stay of arbitration proceedings would be sought.

21. There is yet another reason for me to hold so and it is reflected in the substantial questions of law framed on 29th January, 2009. The relief of declaration is guided by Section 34 and the relief of permanent injunction by Section 41 of the Specific Relief Act. Grant or non-grant of declaration is in the discretion of the court. A permanent injunction cannot be granted under clause (h) of Section 41 when equally efficacious relief can be obtained by any other usual mode of proceeding except in case of breach of trust. The discretion of the court ought not to be exercised in a manner so as to adversely affect the arbitral proceedings or to negate the purport of the 1996 Act. Similarly, it is not as if, if injunction restraining the arbitration is not given, the party challenging the validity of the arbitration agreement would be rendered remediless. The said party has the equally efficacious remedy of Sections 16 & 34 of the Arbitration Act. The suit for declaration and permanent injunction is found to be barred by provisions of Specific Relief Act also.

22. The petitioner/appellant has in the synopsis of submissions with judgments on record relied upon various judgments laying down

that the courts while exercising powers under Section 8 and Section 11 of the Arbitration Act are to satisfy themselves of the validity of arbitration agreement. On the basis thereof, it is urged that the courts including the Seven Judges Bench of the Apex Court in **SBP and Company vs. Patel Engineering Ltd** 2005 (8) SCC 618 have held that party should not be permitted to be vexed by costly arbitration if at the initial stage itself it can be determined whether there is any arbitration agreement and/or arbitral dispute or not. It is further urged that on the same parity of reasoning the suit as the present one ought to be held to be maintainable.

23. In my view, the law with respect to the adjudication by the courts while dealing with an application under Section 8 or Section 11 of the Act would not apply to the suit. Firstly, the proceedings under Sections 8 and 11 are provided for by the Act itself while the suit challenging the validity of the arbitration agreement has not been provided for in the Act and is barred under Section 5 of the Act. Thus merely because while interpreting Section 8 and Section 11 it has been held that the court before referring the parties to arbitration should satisfy itself of the existence of the arbitration agreement would not justify the institution of a suit for the same relief. Section 8 application is filed when a substantive suit is already before court and the question to be determined is whether that suit is to proceed or the parties are to be referred to arbitration. Similarly, Section 11 is an application for appointment of the arbitrator. Merely, because the court when faced with such provisions as provided for under the Act is to satisfy itself of the existence of the agreement cannot be understood to lay down that it is open to a party to even where no suit for substantial relief and application under Section 11 has been filed, an independent suit only

for the relief of challenging the validity of the arbitration agreement can be instituted. I, therefore, do not feel the need to refer to the judgments filed by the counsel for the petitioner/appellant alongwith the synopsis on Section 8 and Section 11 of the Act.

24. Synopsis of the petitioner/appellant also refers to a Division Bench judgment of the Calcutta High Court in **Hindustan Cables Ltd vs. Bombay Metal Company** AIR 1991 Calcutta 350 where a suit as the present one was held to be maintainable and the judgment of a Single Judge of this court in **Chemical Sales Agencies vs. Naraini Newar** 2005 (1) Arbitration Law Reporter 193 Delhi also dealing with Section 8 of the Act. While the former was under the 1940 Act, in the latter it was held by this court that since there was no definite finding as to the existence of the arbitration agreement, the parties could not be referred to arbitration.

25. I, however, have found the question to be no longer res integra. A Bench of three Judge of the Apex Court in **K V Aerner Cementation India Ltd vs. Bajranglal Agarwal** 2001(6) Supreme 265 (and which is unfortunately not reported in the law journals having large circulation and frequently used in the courts) has held as under:

> "1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.

2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an arbitral Tribunal, the Court committeed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. **But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question.** A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to' rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-section (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. **The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.**"

Thus the question of maintainability of suit need not detain me any further.

26. The questions No. 1, 2 and 4 of law are thus answered to the effect that a suit for declaration that an agreement containing an arbitration clause is forged, fabricated and unenforceable and thus null and void and for injunction restraining arbitration does not lie and is barred by Section 5 of Arbitration Act and Sections 34 and 41(h) of the Specific Relief Act read with Section 16 of the Arbitration Act.

27. As far as the Question No.3 is concerned, as aforesaid, in the present case the stock exchange being the institution to whose arbitration the petitioner/appellant and stock broker had agreed, is held entitled to maintain an application under Section 8 of the Arbitration Act. The question whether a total stranger to arbitration but a party to suit can apply or not, is not found relevant for adjudication of present and is as such left open.

28. Having held the RSA and in any event the suit to be not maintainable, there is no impediment to now consider the OMP. The counsel for the petitioner / appellant has confined his arguments to challenge to the signatures on the Member Constituent Agreement relied upon by the respondent. It may be stated that in the OMP the stock broker is the respondent No.1 and the arbitrator who has rendered the award is the respondent No.2; the stock exchange is not a party thereto.

29. Having held that the suit to challenge the arbitration agreement as forged was not maintainable, the jurisdiction to decide the said plea vested with the arbitrator. The fact that the arbitrator has such jurisdiction also need not detain any further. Recently this court in **M/s Hero Exports v M/s Tiffins Barytes** Arbitration Application 121/2008 decided on 2nd September, 2008 was faced with a similar question. The contention of the respondent therein

also was to the effect that the MoU containing the arbitration agreement had been procured under coercion and extortion and therefore unenforceable. An FIR on the basis of the said averments had also been lodged and cognizance thereof been taken. A suit had also been filed seeking declaration that the MoU was not binding. The respondent in that case thus set up a plea of nullity of the document containing the arbitration clause. This court held that the jurisdiction of the arbitrator to decide upon the arbitrability of the disputes after considering evidence, in terms of Section 16 of the Act, is no longer undeniable; that the court cannot refuse to exercise the power under Section 11(6) of the Act on such pleas. The court thus allowed the application and referred the parties to arbitration. An SLP was preferred against the said order and which was dismissed *in limine*.

30. The arbitrator in the present case has, in the award, gone into the plea of the petitioner/appellant and after comparing the signatures of the petitioner/appellant on certain admitted documents including the letters written by the petitioner/appellant to the stock exchange/arbitrator, with the signatures on the Member Constituent Agreement, the arbitrator reached a conclusion that the agreement was, in fact, signed by the petitioner/appellant.

31. The counsel for the stock broker in this regard relied upon **Gulzar Ali v State of H.P.** (1998) 2 SCC 192 holding that the requirement in Section 67 of the evidence Act that handwriting must be proved to be that of the person concerned can be met either by expert opinion or by opinion of person acquainted with the handwriting or even by the circumstantial evidence or by comparison of the handwriting by the court itself.

32. Once having found that the arbitrator was empowered to determine the question of the genuineness or validity of the agreement which was challenged by the petitioner/appellant, no ground is made out for challenging the said finding of the arbitrator under Section 34 of the Act.

33. I even otherwise do not find the findings of the arbitrator to be unjustified. It is the admitted position that the petitioner/appellant purchased/sold shares through the stock broker between 3rd July, 1996 to 9th July, 1996. The claim of the stock broker is with respect to the transactions of sale/purchase by the petitioner/appellant between 10th July, 1996 to 16th July, 1996. The counsel for the petitioner/appellant, on inquiry, as to what was the relevance or necessity of the Member Constituent Agreement on which the signatures are denied by the petitioner/appellant, though could not find anything to that effect in the byelaws of the stock exchange, in post lunch session referred to the regulations of the stock exchange. There is no dispute that in terms of the regulations and byelaws of the stock exchange anybody selling/purchasing shares through the stock broker is a constituent. Regulation 4.3.1 (only regulations as on September, 1999 have been made available) provides that every trading member i.e., stock broker shall enter into an agreement with each of his constituents before accepting or placing orders on the constituent's behalf. Such agreement is to be as per annexure 3. The Member Constituent Agreement relied upon by the stock broker is in terms of the said regulation. Regulation 5 provides for arbitration and in 5.9 dealing with procedure for arbitration it is provided that every application for arbitration shall be accompanied by, inter alia, copy of a Member Constituent Agreement. In compliance with the said regulation, the stock broker

while applying for the arbitration to the stock exchange appears to have annexed the Member Constituent Agreement.

34. Byelaws of the stock exchange of January 1996 in Chapter XI, Byelaw 1-a provides that all differences and disputes between a trading member and constituent arising out of or in relation to dealings on the exchange shall be referred to and decided by arbitration in terms of the byelaws, rules and regulations of the exchange. Byelaw 2 provides that all dealings, transactions and contracts which are subject to the byelaws shall be deemed in all respects subject to the byelaws, rules and regulations. Chapter X, Byelaw 1 further provides that all contracts relating to dealings permitted on the exchange made by a trading member shall in all cases be deemed to be made subject to the byelaws, rules and regulations of the exchange and shall be a part of the terms and conditions of all such contracts. Chapter IX, Byelaw 8 provides for issuance of contract notes for deals effected with clients or on behalf of the clients.

35. The position which emerges is that all transactions between the stock broker and client/constituent are subject to byelaws and subject to arbitration. In my view the signing of the Member Constituent Agreement also containing the arbitration clause in this regard does not affect the existence of the arbitration agreement. Even in the absence of such a Member Constituent Agreement it cannot be said that there was no arbitration agreement between the parties. The contract notes issued by the stock broker of sale/purchase also provide for arbitration on them. The Apex Court in **Madan Mohan Rajgarhia v. Mahendra R. Shah & Bros. (**2003) 7 SCC 138 has held that the *para materia* clause of Bombay Exchange is comprehensive and covers disputes and claims between

the sellers and purchasers of shares and the stock broker. In this regard, it may also be stated that an arbitration agreement neither under the 1940 Act nor under the 1996 Act was required to be signed. The only requirement was of it being signed. I have recently in **Lt. Col. (Retd.) P.R. Choudhary & Ors v Narendra Dev Relan & Ors (**IA.no.6941/2005 in CS(OS)574/2005 decided on 13th January, 2009) dealt in detail with this aspect and do not feel the need to burden with the case law in that regard. Suffice it is to state that irrespective of the genuineness or validity of the Member Constituent Agreement, the claims of a stock broker against its client/constituent would be arbitrable in accordance with byelaws of the stock exchange.

36. In view of the admission of the petitioner/appellant of having been a constituent /client of the stock broker and of at least some of the transactions with the stock broker, in the normal course it would be expected that a Member Constituent Agreement as required by the regulations would be signed. I, during the hearing, inquired from the counsel for the petitioner/appellant as to whether the petitioner/appellant for the transactions admitted had signed a Member Constituent Agreement or not and if so which was that agreement, if not the agreement relied upon by the respondent. The only answer of the counsel for the petitioner/appellant was that it was for the respondent to explain. The agreement relied upon by the respondent and challenged by the petitioner/appellant is dated 3rd July, 1996 i.e., the date on which, according to the petitioner/appellant also, the transactions commenced between the parties and in the absence of the petitioner/appellant averring or proving that any other Member Constituent Agreement was signed or that the same was terminated when according to the

petitioner/appellant the petitioner decided to cease the relationship with the respondent, I find it in the normal course of human behavior and business, within the meaning of section 114 of the Indian Evidence Act to presume and believe that the Member Constituent Agreement as relied by the respondent was signed by the petitioner/appellant and do not find any illegality in the finding of the arbitrator of the validity of the same.

37. Though the counsel for the petitioner/appellant has, during the hearing, not urged any other ground challenging the validity of the award but I find that a number of other grounds have been taken in the petition.

38. It is pleaded that the appointment of the arbitrator was not in accordance with the procedure prescribed in the regulations of the stock exchange. Reliance in this regard is placed on Regulation 5.2 Exhibit P-13 to the affidavit by way of evidence of the petitioner/appellant. The same provides for each party to the reference submitting to the exchange the names of the proposed arbitrators from the panel of arbitrators of the exchange and for the respondent to submit within 7 days his selection of arbitrator. Regulation 5.3 provides that if parties fail to select a common arbitrator the relevant authority shall select an arbitrator. The challenge is that the stock exchange appointed the arbitrator within ten days. The record of the arbitrator received in this court discloses that the broker made an application dated 13th December, 1996 to the exchange for arbitration, also proposing his arbitrators and enclosing other requisite documents. Vide letter dated 18th December, 1996 the stock broker proposed certain other names as arbitrators in substitution of the names earlier proposed. The stock exchange issued notice dated 20th December, 1996 to the

petitioner/appellant of the application of the petitioner/appellant requiring the petitioner/appellant to, inter alia, also submit the list of 7 persons from the panel of arbitrator within 7 days. The petitioner/appellant in response thereto sent a legal notice dated 2nd January, 1996 challenging the arbitration proceedings and naturally in the same did not propose any arbitrator. The stock exchange only vide letter dated 5th March, 1997 informed the respondent of the appointment of Shri S.A. Kirtikar as the arbitrator. The counsel for the stock broker and the stock exchange have, during the hearing, informed that Mr S.A. Kirtikar is a retired District Judge. Thus, it will be seen that the plea of the arbitrator having not been appointed in terms of the regulations and byelaws is not made out.

39. The next plea is that the arbitrator failed to decide first the challenge to the arbitration proceedings. This contention is also not tenable in law. Under Section 16 of the Act upon a challenge being made to the jurisdiction of the arbitrator, the arbitral tribunal though is required to adjudicate the same but there is nothing to show that the arbitrator is to first adjudicate the same and can thereafter only proceed to adjudicate on the merits of the claim. The arbitral tribunal in its jurisdiction is entitled to decide the said challenge either as a preliminary issue or together with the entire matter. It is significant that even in the event of the arbitrator deciding against the challenge, no remedy therefor is provided and the challenge to such finding can be made only after the arbitral award in accordance with Section 34 of the Act. Thus, it cannot be said that any illegality has been committed by the arbitrator in not deciding the challenge as a preliminary issue as sought for by the petitioner/appellant.

40. In this case the petitioner/appellant choose to pursue the civil suit, first appeal and then second appeal instead of defending the

claim before the arbitrator. Though the petitioner/appellant sent notices/applications etc to the arbitrator but the petitioner/appellant failed to appear on any of the dates of hearing fixed by the arbitrator. The petitioner/appellant was fully aware that under the law (Section 8(3) of the Arbitration Act) notwithstanding the suit and the application under Section 8 therein having been filed the arbitrator could proceed with the arbitration and, in fact, was so proceeding. Though the petitioner/appellant had also applied for stay of arbitration proceedings but no stay has been granted at any stage. The petitioner/appellant thus took a chance of proceeding with the suit and not appearing before the arbitrator and after the award has been made cannot be heard to make grievance of the same. There has been no denial of hearing or breach of principles of natural justice and the petitioner has been given sufficient opportunity. Moreover, the arbitrator has in the award dealt with all the pleas raised by the petitioner in the communications sent by the petitioner to the stock exchange/arbitrator.

41. The petitioner has also pleaded that the arbitrator ought to have given an opportunity to the petitioner to lead evidence. However, the petitioner after sending the communication before the hearing on 3rd May, 1997 did not even bother to find out as to what happened on 3rd May, 1997 and thereafter inquired about the arbitration proceedings in July, 1997 only i.e., shortly before the arbitrator made the award.

42. The counsel for the petitioner, during the hearing, also generally argued that the arbitrator has erred in accepting the plea of the stock broker of the petitioner having made cash payments and which is not permissible under the regulations/byelaws of the stock exchange. Reliance in this regard is placed on Chapter VI of the

Capital Market Regulations of the stock exchange of September, 1999. However, the same relates to settlement of accounts between stock brokers themselves. My attention has not been drawn to any regulation or byelaw requiring payment by constituents to stock brokers in cheque only and prohibiting such payments in cash. In this regard, it may be recorded that the claim of the stock broker is that for the transactions by the petitioner between 10th July, 1996 to 16th July, 1996 a total sum of Rs 10,57,857/- was due from the petitioner to the stock broker, out of which the petitioner paid Rs 1,67,855/- on 30th July, 1996 and Rs 1,50,000/- on 27th September, 1996 both in cash and which after adjusting the margin money of Rs 90,000/- also paid by the petitioner in cash on 15th July, 1996 left an outstanding of Rs 6,50,000/- from the petitioner to the respondent. Even if there is to be a provision prohibiting payment by the constituents to the stock broker in cash, in my view, same would not invalidate the award, whatsoever consequences thereof, for breach of byelaw/regulation, if any, may follow.

43. Though the parties were given opportunity to lead evidence in the OMP on the following issue framed on 13th November, 2000 in the OMP:

> "1.Whether the award dated 29.7.97 is liable to be set aside on the grounds noted in para 60 of the petition?
>
> 2.Relief."

the petitioner on whom the onus of challenge to the award rested has failed to bring anything on record entitling him to the relief in the petition.

44. The arbitrator has, while allowing the claim of the stock broker of the principal sum of Rs 6,50,000/- also awarded interest thereon

@ 18% per annum from 15th July 1996 till payment. I do not find any reason to set aside the award insofar as for the sum of Rs 6,50,000/-, but following the dicta in **Krishna Bhagya Jala Nigam Ltd v. G Harischandra Reddy** AIR 2007 SC 817 and **Flex Engineering Ltd v. Antartica Construction Co**. 2007 (2) ARB LR 387 (Delhi) the rate of interest during the pendency of the petition in this court is reduced from 18% per annum to 12% per annum, considering that the transaction between the parties was a commercial transaction. However, if the petitioner fails to pay the amount within 30 days of this order, the stock broker shall thereafter again be entitled to interest at 18% per annum.

45. The RSA as well as the OMP challenging the award, therefore fail and are dismissed with costs of Rs 50,000/- to the counsel for the stock broker and the stock exchange to be shared equally.

RAJIV SAHAI ENDLAW
(JUDGE)

February 11, 2009
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