IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 126 OF 2006
IN
ARBITRATION PETITION NO. 309 OF 2004

Jatin Pratap Desai
of Mumbai Indian Inhabitant
residing at 36/834 Ardesh Nagar,
Worli, Mumbai 400 025. … Appellant

Versus

1. **A.C. Chokshi Share Broker Private Limited,**
   a Company registered under
   the companies Act, I of 1956,
   having its office at 2nd floor,
   ITTS House, Kalaghoda, 28 K,
   Dubash Marg, Mumbai 400 023.

2. **Mrs. Heena Jatin Desai**
   of Mumbai Indian Inhabitant
   residing at 36/834 Ardesh Nagar,
   Worli, Mumbai 400 025. … Respondents

…

Mr. Simil Purohit along with Mr. Vishal Pattabiraman i/b M/s. Purohit and Co., for the Appellant.

Mr. Sharan Jagtiani, Senior Advocate along with Mr. Raghav Gupta along with Ms. Jyoti Pardeshi i/b M/s. Wadia Ghandy and Co., for the Respondent No.1.

…

CORAM : R. D. DHANUKA &
V. G. BISHT, JJ.

Reserved on : 8th April, 2021.

Pronounced on : 29th April, 2021

JUDGMENT (PER : R.D. DHANUKA, J.)

By this Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, " Arbitration Act"), the appellant (original Petitioner) has impugned the order dated 23rd August, 2005 passed by the learned single Judge dismissing the Arbitration Petition No. 309 of 2004 filed by the appellant.

2 Some of the relevant facts for the purpose of deciding this Appeal are as under:-

The appellant as well as the respondent no.2 were the constituents of the respondent no.1. Respondent no.1 is carrying on business of share and stock broker and is a registered Member of the Bombay Stock Exchange under the Bye-laws, Rules and Regulations of the Bombay Stock Exchange. Respondent no.2 is wife of the appellant and was a separate constituent of respondent no.1.

3 Sometime in the year 1999, the appellant had executed an individual Client Registration Application form as per the format given by the respondent no.1 to carry on transactions on the Bombay Stock Exchange for the purchase and sale of various shares. Respondent no.1 did not execute a client broker agreement with the appellant but had executed an individual client registration application form dated 1st August, 1999.

4 It was the case of the appellant that at the end of the settlement period A-42 on 31st January, 2001 there was an admitted credit balance of Rs.7,40,020/- due and payable by the respondent no.1 to the appellant. On 16th February, 2001, the appellant paid a further sum of Rs.2 lakhs to the respondent no.1 thus taking the credit balance is the sum of Rs.9,40,020/-. It is the case of the appellant that no further transactions were carried out by the appellant in respect of the said account with respondent no.1. At the end of the period February, 2001 when the appellant decided not to carry out any further transactions with respondent no.1, there was a credit balance of Rs.9,40,020/- in the account of the appellant with respondent no.1.

5 It is the case of the appellant that the respondent no.2 also had executed a separate individual Client Registration Application form as per the format given by respondent no.1. The respondent no.1 had opened a separate account of respondent no.2. Respondent no.2 was carrying out separate transactions with respondent no.1 under the said account opened by the respondent no.2. It was the case of the respondent no.1 that there was a huge debit balance in the account of respondent no.2 which debit balance was disputed by the respondent no.2. Sometime in the month of September, 2001 the respondent no.1 filed "Arbitration Application Form" under Regulation 15.2 of the Rules, Bye-laws and Regulations of the Stock Exchange, Mumbai. In the said "Arbitration Application Form" submitted with the Application Committee, Stock Exchange, Mumbai, the appellant and the respondent no.2 were impleaded as a respondents.

6 Reference to arbitration was made under the Bye-Laws 248 (a) of the Stock Exchange. The respondent no.1 had annexed a copy of the ledger balance of the respondent no.2 showing an amount of Rs.1,28,36,070/- payable by the respondent no.2. It is

the case of the appellant that since there was a credit balance in the account of the appellant in the books of the respondent no.1, there was no dispute in respect of the said account between the appellant and the respondent no.1. Some time in the month of September, 2001, the respondent no.1 filed a Statement of Claim before the Arbitral Tribunal of the Stock Exchange, Mumbai against the appellant and respondent no.2 *inter-alia* praying for an Award jointly and /or severally for an amount of Rs.12736670/- together with interest on Rs.11848070/- at the rate of 18% per annum from the date of filing of the arbitration reference till the date of Award and also claimed further interest at the rate of 18% per annum from the date of Award till payment and/or realization.

7 The respondent no.2 filed a Written Statement in the said arbitral proceedings on 25th October, 2002 denying the said claim. The appellant also filed a separate Written Statement and Counter Claim on 25th October, 2002 in the said arbitration reference. The respondent no.1 filed a rejoinder to the Written Statement of respondent no.2. Appellant and respondent no.2 also filed a separate sur-rejoinder. On 6th November, 2002 the respondent no.1

filed an Affidavit in lieu of examination-in-chief of Deepika Chokshi, one of the Director of the respondent no.1 and of another witness. The respondent no.1 also filed written submission before the Arbitral Tribunal. The said witness examined by the respondent no.1 was cross-examined by the appellant's counsel. The Arbitral Tribunal made an Award on 26th February, 2004 directing the appellant and the respondent no.2 to pay jointly and severally to the respondent no.1 a sum of Rs. 11848069/- with interest at the rate of 9% per annum from 1st May, 2001 till the date of payment. The Arbitral Tribunal rejected the counter-claim filed by the appellant.

8 Being aggrieved by the said Arbitral Award, the appellant as well as respondent no.2 filed two separate Arbitration Petitions bearing No. 309 of 2004 and 308 of 2004 under Section 34 of the Arbitration Act before this Court. By an order dated 23rd August, 2005, a learned single Judge of this Court dismissed both the Arbitration Petitions with costs as incurred by the respondent no.1. Being aggrieved by the said order dated 23rd August, 2005 the appellant has preferred this Appeal. Respondent no.2 did not file

any Appeal impugning the said order dated 23rd August, 2005 passed by the learned single Judge.

9 Mr. Simil Purohit, learned counsel for the appellant, invited our attention to the pleadings and documents forming part of the record before the Arbitral Tribunal, various By-Laws, Rules and Regulations of the Stock Exchange, Mumbai, written submissions filed by the parties and the findings rendered by the Arbitral Tribunal and the learned single Judge. He invited our attention to the Regulations 247A of the Stock Exchange, Mumbai and would submit that under the said Regulations, the respondent no.1-Broker was under an obligation to keep account of each of its clients showing the accounting, the moneys received from or on account of and moneys paid to or on account of each of his clients and the moneys received and the moneys paid on Member's own account. Such account has to be kept in the name of member in the title of which the word "clients" shall appear.

10 Learned counsel strongly placed reliance on Regulations 247 (A) and (C) and would submit that no money should be paid into clients account other than (i) money held or received on account

of clients, (ii) such money belonging to the member as may be necessary for the purpose of opening or maintaining the account, (iii)money for replacement of any sum which may by mistake or accident have been drawn from the account in contravention of para (D) of the said Regulations, (iv) a cheque or draft received by the Member representing in part money belonging to the client and in part money due to the Member. Clause (D) provided that no money should be drawn from clients account other than (i) money properly required for payment to or on behalf of clients or for or towards payment of the debt due to the member from clients or money drawn from client's authority, or money in respect of which there is liability of clients to the member, provided that money so drawn shall not in any case exceed the total of the money so held for the time being for such each client.

11 Clause (E) of the said Regulations provides that nothing in the para 1 thereof shall deprive a Member broker of any recourse of right whether by way of lien, set-off, counter-claim charge or otherwise against moneys standing to the credit of clients account. It is further provided that it shall also be compulsory for all

Members brokers/sub-brokers to receive or to make all payment from or to the client strictly by way of account payee crossed cheques or demand drafts or direct credit into the bank account through NEFT or any other modes as so permitted by the Reserve Bank of India. Member brokers shall accept cheques drawn only by clients and issue cheques only in favour of the clients. However, in exceptional circumstances Member broker may receive payment in cash, to the extent that there is no violation of the Income Tax requirement for the time being in force.

12 It is submitted by the learned counsel that the respondent no.1 had accordingly opened two separate accounts of the appellant and the respondent no.2 respectively. All the transactions were carried out by the appellant-respondent no.2 separately and were entered in those two separate accounts of the appellant and the respondent no.2 respectively. It is submitted that the respondent no.1-broker could not have held the appellant liable for the transactions, if any, carried out by the respondent no.2 with the respondent no.1 individually. A separate arbitration agreement was recorded between the appellant and the respondent no.1 and

between the respondent no.1 and the respondent no.2 in respect of their separate transactions. There was no Tripartite agreement entered into between the appellant, respondent no.1 and respondent no.2 in respect of the dealings in the stock exchange.

13 Learned counsel invited our attention to the relevant para in the impugned Award on page 67 of the paper book and would submit that the Arbitral Tribunal has recorded a perverse finding that there was an oral agreement of understanding between the parties. It is held by the Arbitral Tribunal that the appellant was mostly coming to the office of the respondent no.1 and had also given instructions some times while the respondent no.1 herein was out of town or may be under instructions of respondent no.2 wife. The Arbitral Tribunal also relied upon the affidavit in lieu of examination-in-chief filed by the Director of the respondent no.1.

14 It is submitted that the Arbitral Tribunal has though recorded that there was a credit balance in the account of the appellant with respondent no.1 at least in the sum of Rs. 9 lakhs, the appellant had never demanded any such money at any point of time except by filing a counter-claim on 25th October, 2001 after the respondent

no.1 having filed statement of claim before the Arbitral Tribunal. It is submitted that even if on few occasions, the appellant had made payment on behalf of his wife to the respondent no.1, the appellant could not be held liable for all the transactions, if any, carried out by the respondent no.2-wife with the respondent no.1. He submits that in any event the respondent no.1 had invoked the arbitration agreement between the respondent no.1 and 2 and not between the appellant and respondent no.1 before the Arbitral Forum. The respondent no.1 could not have filed any claim against the appellant on the basis of alleged oral agreement/understanding between the appellant and the respondent no.1.

15 Learned counsel invited our attention to the findings rendered by the Arbitral Tribunal on page 69 of the paper book holding that it was true that as per SEBI requirement, written instructions of the constituents are necessary for transfer of one constituent' account to other, however, the practical side of it suggest that considering past experience and considering joint and several liability and considering their heavenly bestowed relationship, the Arbitral Tribunal upheld that such a transfer as

made by the respondent no.1 Member was in order. He submits that the said findings of Arbitral Tribunal is *ex-facie,* perverse and contrary to the Bye-laws, Rules and Regulations of the Stock Exchange, Mumbai and also the SEBI requirements. The Arbitral Tribunal could not have passed an Award against the petitioner on the basis of bestowed relationship between husband and wife. No finding of joint and several liability could be rendered by the Arbitral Tribunal passed on the alleged oral agreement between the appellant and the respondent no.1.

16 Learned counsel for the appellant invited our attention to the part of the Award at page 54 of the paper book referring to the written submissions made by the appellant contending that the claim filed by the respondent no.1 was bad for misjoinder of parties and causes of action as the respondent no.1 had entered into separate client broker agreement with respect of the respective separate transactions and therefore, the claim as filed by the respondent no.1 against the appellant was not maintainable and was liable to be said aside.

17 The Arbitral Tribunal had also referred to written submissions filed by the appellant inviting the attention of the Arbitral Tribunal to the Bye-laws and the SEBI guidelines which were violated and disregarded by the respondent no.1. The appellant had denied the alleged oral agreement or understanding as pleaded by the respondent no.1. Reliance was placed on clause (ix) of the mandatory precautions to be exercised by the members brokers of the SEBI Guidelines, Rules and Regulations which provided that "No adjustments between one client account to another should be made unless express authority has been obtained from the client. Such authority should be preserved by the broker".

18 It is submitted by the learned counsel that respondent no.1 did not produce any such express authority of the respondent no.2 under the said mandatory requirement as per clause (ix) of the SEBI Guidelines authorizing the respondent no.1 to make any adjustment in the account of the appellant nor the appellant had issued any such authority in favour of the respondent no.1 authorizing the respondent no.1 to adjust the liabilities of the respondent no. 2, if any, towards respondent no.1 from the

separate account of the appellant opened with respondent no.1. The entire award was passed disregarding the SEBI Guidelines and thus deserved to be set aside in the said Petition filed by the appellant. The learned single Judge, however, has erroneously dismissed the said Arbitration Petition.

19 Learned counsel for the appellant invited our attention to the part of the Award at page 35 of the Appeal Paper Book and would submit that the specific case of the respondent no.1 before the Arbitral Tribunal was that the appellant had held out that liability of the appellant and the respondent no.2 would be joint and several. The appellant was impleaded as a constituent, based on this understanding. It is, however, an admitted position that such understanding was never in writing. Even in the oral evidence led by the respondent no.1, no such alleged understanding between the appellant, respondent no.1 and respondent no.2 was proved by the respondent no.1.

20 Learned counsel for the appellant placed reliance on Section 7 of the Arbitration Act in support of the submission that the Arbitration Agreement is required to be executed in writing. The

respondent no.1 and the respondent no. 2 had invoked the Arbitration Agreement between the respondent no.1 and respondent no.2 and not between the respondent no.1 and the appellant. The Arbitral Tribunal had thus no jurisdiction to entertain any claim in so far as appellant is concerned. He submits that even if the appellant was an agent of the disclosed principal, the appellant cannot be held liable. Learned counsel for the appellant invited our attention to few observations made by the learned single judge in the impugned order dated 23rd August, 2005. He submits that the learned single Judge has erroneously held that it was an implied term in the written contract executed between the respondent no.2 and the respondent no.1 and it was agreed to between the parties orally that if there was any debit balance in the account of the wife, both, the husband and wife would be jointly and severally liable.

21 The arbitration clause in the agreement with the wife was admittedly invoked. The learned single Judge erroneously held that there was arbitration clause between the husband and the broker also and thus there was no jurisdictional error in the Award.

It is submitted by the learned counsel for the appellant that the learned single Judge having rendered a finding that respondent no.1 has not invoked the arbitration agreement entered into between the respondent no.1 and the appellant, the learned single Judge ought to have interfered with the arbitral Award rendered by the Arbitral Tribunal against the appellant. The impugned order passed by the learned single Judge is *ex-facie,* contrary to the Section 7 of the Arbitration Act and is *ex-facie* erroneous.

22 It is submitted by the learned counsel for the appellant that the learned single judge did not interfere with the finding of the Arbitral Tribunal that there was oral understanding between the parties on the ground that such finding of the fact was recorded by the Arbitral Tribunal after appreciating the evidence on record which finding cannot be interfered with under limited jurisdiction of this Court under Section 34 of the Arbitration Act.

23 Learned counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Deutsche Post Bank Home Finance Ltd. Vs. Taduri Shridhar and Ors.**[1] and in

1 AIR 2011 SC 1899

particular para 12 in support of the submission that there can be reference to arbitration only if there is an arbitration agreement between the parties. The dispute arising out of two separate agreements between different parties cannot be clubbed together in the same arbitral proceedings.

24 Learned counsel for the appellant submits that the counter claim filed by the appellant has been rejected by the Arbitral Tribunal only on the ground that the said counter claim was filed as a counterblast and was not sustainable after being adjusted with the account of the respondent no.2. He submits that the rejection of the said counter claim filed before the Arbitral Tribunal is also contrary to and is in violation of SEBI Guidelines. There was no dispute between the respondent no.1 and the appellant under the said account opened in the name of the appellant by the respondent no.1. On the basis of the alleged oral guarantee, the claim could not have been filed against the appellant by the respondent no.1.

25 Learned counsel for the appellant invited our attention to the judgment delivered by a division bench of this Court in case of

Syntrex Corporation Vs. Rajmukar Keshardev and Ors.[2] 2007 (6) MLJ 34 and in particular paragraphs 2 to 5 and would submit that the dispute between the parties i.e. a member and the constituent arising out of the transactions having taken place on the floor of the stock exchange only and the transactions permitted under the Bye-laws of the exchange only could be referred to arbitration and not otherwise. There were no such transactions on the floor of exchange between the appellant and respondent no.1 which were the subject matter of the said arbitration proceeding filed by the respondent no.1 against the appellant.

26 Mr. Sharan Jagtiani, learned senior counsel for the respondent no.1, on the other hand, submits that the arbitration proceedings filed by the respondent no.1 were under Bye-laws 248 (a) of the Mumbai Stock Exchange and was a statutory arbitration. No notice under Section 21 of the Arbitration Act was required to be issued prior to the date of the filing statement of claim by respondent no.1 under the Bye-laws of the Stock Exchange Mumbai. The respondent no.1 had filed a requisite Form i.e. Form 'AA' with the Stock Exchange with a request to refer the dispute to

2 2007(6) MhLj 34

Arbitration. It is submitted by the learned senior counsel that the oral understanding between the appellant, respondent no.1 and the respondent no.2 to the effect that if there was any debit balance in the account of the respondent no.2 recoverable by the respondent no.1, the appellant would be jointly and severally liable in respect of such liability of the respondent no. 2 was proved by his client before the Arbitral Tribunal.

27 It is submitted that such findings or facts rendered by the Arbitral Tribunal were rightly not interfered with by the learned single Judge. The appellant also had client account with the respondent no.1–broker admittedly. Under the Bye-laws framed by the Stock Exchange Mumbai, the respondent no.1 could have filed one single arbitration proceeding also in respect of two separate accounts. In support of this submission, the learned senior counsel placed reliance on the judgments of the Hon'ble Supreme Court. It is submitted by the learned senior counsel that the appellant did not raise any issue of jurisdiction of the Arbitral Tribunal to adjudicate upon the claims made by the respondent no.1 against the appellant on the ground that no arbitration agreement between

them having been invoked by respondent no.1 under Section 16 of the Arbitration Act. The appellant had only pleaded that there was a mis-joinder of the parties.

28 It is submitted that the appellant himself had filed a counter claim against the respondent no.1 before the Arbitral Tribunal. The appellant not having raised any issue of jurisdiction under Section 16 of the Arbitration Act within the time prescribed under the said provision or otherwise, the appellant is precluded from raising such plea in the Petition filed under section 34 of the Arbitration Act. The learned senior counsel placed reliance on Bye-laws 248(a) of the Bye-laws framed by the Stock Exchange, Mumbai. He submits that the said clause providing for dispute to be referred to the arbitration between members and non-members is very wide. The term “dealings” is wider than transaction. The appellant becomes a non-member in respect of dealings of wife with the broker and thus was jointly and severally liable arising out of the transactions between the broker and respondent no.2-wife. The appellant admittedly had a separate client account with respondent no.1.

29 The learned senior counsel placed reliance on the following judgments in support of his aforesaid submissions.

1) **Union of India Vs. Pam Development Pvt. Ltd.**[3]
2) **Gas Authority of India Pvt. Ltd. And Anr. Vs. Keti Construction (I) Ltd. And Ors.**[4]
3) **Aditasai Cotspin Pvt. Ltd. Vs. M/s Louis Drayfus Commodities Pvt. Ltd.**[5]
4) **Oil and Natural Gas Corporation Ltd. Vs. Comes Services SA.**[6]
5) **P.R. Shah Shares and Stock Brokers Pvt. Ltd. Vs. B.H.H. Securities Pvt. Ltd. And Ors.**[7]
6) **Banwari Lal Kotiya Vs. P. C. Aggarwal**[8]
7) **Bombay Stock Exchange Vs. Jaya L. Shah & Anr.**[9]

30 It is submitted by the learned senior counsel for the respondent no.1 that the Bye-laws of the Stock Exchange Mumbai have statutory force and have been rightly applied by the Arbitral Tribunal also against the appellant. He submits that even in the said application form filed by the respondent no.1 before the Stock Exchange Mumbai, a reference to Bye-laws under 248 (a) was

3 (2014) 11 SCC 366
4 (2007) 5 SCC 38
5 2015 SCC Online Bom 3410
6 2003 SCC Online Bom 287
7 (2012) 1 SCC 594
8 (1985) 3 SCC 255
9 (2004) 1 SCC 160

made. The said Form AA was filed by the respondent no.1 against the respondent no.2 as well as appellant. He relied upon paragraph 11 of the Statement of Claim filed by his client and would submit that it was the specific case of his client that the appellant and the respondent no.2 were constituents of the respondent no.1. The Arbitral Forum had thus jurisdiction to entertain the said claim filed by the respondent no.1 not only against the respondent no.2 but also against the appellant.

31 It is submitted by the learned senior counsel that in the written statement and the counter-claim filed by the appellant in the said Arbitral proceedings, the appellant had defended the claims made by the respondent no.1 on merits and not on the ground of jurisdiction. The existence of jurisdiction pleaded by the respondent no.1 in the Statement of the Case was not denied by the appellant in the written statement. The appellant having participated in the arbitral proceedings by filing a counter claim cannot be allowed to urge that the Arbitral Tribunal had no jurisdiction to entertain the claims made by respondent no.1 against the appellant.

32 It is submitted by the learned senior counsel that the Arbitral Tribunal has rendered a finding of fact that the respondent no.1 had examined the witness by filing affidavit in lieu of examination-in-chief of the one of the Director of respondent no.1. The appellant as well as respondent no.2, however, did not lead any oral evidence. The finding of facts rendered by the Arbitral Tribunal that the appellant and respondent no.2 are jointly and severally liable and thereby allowing the claim made by the respondent no.1 and dismissing the counter-claim filed by the appellant was rightly not interfered with by the learned single Judge. The transactions between the parties were peculiar to the stock exchange trade.

33 It is submitted by the learned senior counsel that though the observations made and findings recorded by the learned single Judge are at variance with the submissions made by him across the bar, the Court while hearing an Appeal under Section 37 of the Arbitration Act has to ascertain whether the arbitral Award rendered by the Arbitral Tribunal is right or not. Since there is no perversity found in the arbitral Award, the powers of Court under

Section 37 of the Arbitration Act being very limited, no interference is warranted with the order passed by the learned single Judge and also the arbitral Award rendered by the Arbitral Tribunal.

34 Mr. Simil Purohit, learned counsel for the appellant, in his rejoinder argument submits that there was no contract of surety pleaded by the respondent no.1 before the Arbitral Tribunal. There was no contractual agreement binding between the appellant and respondent no.1 in respect of the claims made by the respondent no.1 against the appellant. The respondent no.1 did not point out any provisions of law holding husband as surety of his wife automatically and becomes axiomatically, jointly and severally liable for the debts, if any, of the wife to any third party.

35 Learned counsel for the appellant strongly placed reliance on Bye-law 248(a) of the Bye-laws framed by the Stock Exchange Mumbai and would submit that the dispute under the said Bye-laws can be referred to arbitration only if all the dealings, transactions and contracts which are made subject to the Rules, Bye-laws and Regulations having taken place on the floor of exchange and not otherwise. It is submitted that no claim arising out of the alleged

guarantee or surety of the appellant on behalf of his wife to the respondent no.1 can be made subject to Bye-laws and Rules and Regulations of Stock Exchange Mumbai. He strongly placed reliance on Bye-law No. 44 which provides that for the purposes of these Bye-laws and Regulations the term “bargains”, “transaction”, “dealings” and “contract” shall have one and the same meaning unless context indicates otherwise. He submits that the words “bargains” “dealings”, “transactions” and “contract” has to be on the floor of the stock exchange for referring the dispute, if any, arising out of such “bargains”, “contract”, “dealings” or “transactions” and not otherwise.

36 It is submitted by the learned counsel that if the arguments of the respondent no .1 are accepted, any private transaction between the member of the stock exchange and his client also will have to be referred to arbitration though such transaction would not be a transaction on the floor of the exchange. The private transactions between the broker and the constituent not having taken place on the floor of the exchange can not be referred to arbitration under Bye-laws 248(a). The appellant was not sued on the basis of

transactions on the floor of exchange between the appellant and the respondent no.1 but on the basis of an oral guarantee. It was not the case of respondent no.1 that there was a document evidencing guarantee issued by the appellant.

37 It is submitted that even if there was any oral guarantee alleged to have been given by the appellant to the respondent no.1-broker, that would at the most be a private arrangement between the guarantor and broker which cannot be subject matter of Bye-laws, Rules and Regulations of the Stock Exchange Mumbai. The entire case of the respondent no.1 against the appellant that there was an oral understanding between the appellant and the respondent no.1 and that he would be jointly and severally liable to the respondent no.1 on the basis of such alleged oral assurance or guarantee which was outside the purview of the Bye-laws 248(a) and was without jurisdiction. The respondent no.1 had approached Arbitral Forum with a specific case that there was oral understanding between the appellant and respondent no.1.

38 The learned counsel for the appellant distinguished the judgments cited by the learned senior counsel for the respondent

no.1 on the ground that the appellant had specifically raised a plea in the written statement that there was a mis-joinder of the appellant in the said statement of claim filed by the respondent no.1 and a claim could not have been maintained against the appellant. He submitted that it was a statutory arbitration wherein only specified disputes permissible under Regulation 248(a) between the specified parties mentioned therein only and that also arising out of the "bargains", "dealings", "contract" and "transactions" having taken place on the floor of the exchange could be referred to arbitration and nothing beyond that. Even by consent of the parties, the dispute with a third party in respect of the private transaction could not be referred as disputes to arbitration nor such disputes could be adjudicated upon by the Arbitral Tribunal against such third party even on a consent or such third party not having raised any issue of jurisdiction.

39 It is submitted by the learned counsel that even if the appellant had not even specifically raised the issue of jurisdiction under Section 16 of the Arbitration Act as sought to be canvassed by the learned senior counsel for the respondent no.1, this being a

case of inherent lack of jurisdiction, the appellant is not precluded from raising such issue of jurisdiction for the first time in the petition filed under Section 34 of the Arbitration Act or across the bar. In support of this submission, learned counsel for the appellant placed reliance on the judgment of Hon'ble Supreme Court in the case of **M.D.,Army Welfare Housing Organization V/s Sumangal Services Pvt. Ltd.**[10], **Union of India Vs. Popular Builders, Calcuta**[11], judgment of this Court in the case of **Atul R. Shah Vs. V. Vrijlal Lalloobhai and Co. and Ors.**[12], and the judgment of Delhi High Court in the case of **Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.**[13].

40. Mr. Jagtiani, learned senior counsel for the respondents submitted brief note dated 16th April, 2021 distinguishing the judgments cited by the learned counsel for the appellant on the issue of jurisdiction. In so far as judgment of this Court in case of **Syntrex Corporation** (supra) relied upon by the learned counsel for the appellant is concerned, the said judgment is distinguished

10 AIR 2004 SC 1344
11 AIR 2000 SC 3185
12 AIR 1999 Bom 67
13 2017 SCC OnLine Del 7228

on the ground that the facts before this Court in the said judgment are different from the facts in this case. The respondent no.1 had not made its claim arising out of any private transactions/dealings with the appellant. These transactions were made only on the floor of the Exchange and were settled finally by the Exchange. The appellant and respondent no.2 both were the constituents of respondent no.1. All the transactions carried out by the appellant and respondent no.2 were subjects to Rules, Bye-laws and Regulations of the Exchange.

41. It is submitted that the instant matter pertains to dealings carried out/made by the appellant in the trading account of his wife i.e. respondent no.2. The arbitral tribunal had rightly held that there existed an oral agreement between the parties that appellant was jointly and severally liable for the transactions/dealings performed in the trading account of the respondent no. 2. In this case the contract notes were issued by the respondent no.1. The Arbitral Tribunal has observed that since 1999 the appellant was actively dealing in the trading account of respondent no.2. These trades had been accepted by

the appellant as well as respondent no.2. The appellant thus could not raise any objection on the ground that there was no written contract notes between the appellant and the respondents.

42. The learned senior counsel for the respondents distinguished the judgment of the Hon'ble Supreme Court in case of **Union of India Vs. Popular Builders** (supra) on the ground that the case before the Hon'ble Supreme Court in the said judgment was not a case of statutory / institutional arbitration. The arbitration clause in this case has been set out on the bye-laws of the Stock Exchange. There were no arbitrable dispute to be referred to be arbitration in respect of the final bill in the case before the Hon'ble Supreme Court. The appellant was carrying on the dealings/transactions from the trading account of the respondent no.2.

43. The learned senior counsel distinguished the judgment of this Court in case of **Atul R. Shah** (supra) on the ground that in that matter the Arbitral Tribunal was not constituted in conformity with Section 10 of the Arbitration Act. The Arbitral Tribunal did not afford reasonable opportunities to the

appellant to defend the claims made by the respondents. However, in this case the Arbitral Tribunal was constituted in conformity with not only Bye-laws of the Exchange, but also in accordance with Section 10 of the Arbitration Act. The appellant has not raised this ground before the Arbitral Tribunal. The Arbitral Tribunal had given ample opportunities to the appellant as well as respondent no.2 to present their respective defences in the matter. The appellant as well as respondent no.2 however chose not to lead any oral evidence before the Arbitral Tribunal and thus cannot be allowed to contend that the impugned award was in violation of the principles of natural justice.

44. Learned senior counsel for the respondents distinguished the judgment of the Supreme court in case of **Deutsche Post Bank Home Finance Limited** (Supra) on the ground that the arbitral proceedings considered by the Hon'ble Supreme Court in the said judgment were not a statutory arbitration. The proceedings before the Hon'ble Supreme Court were arising out of an order passed by the designate of the Hon'ble Chief Justice of the State in an application under Section 11 of the Arbitration Act. The

Designate of the Hon'ble Chief Justice in the said judgment had held that the arbitration application was not maintainable against the appellant since he was not a party to the arbitration agreement between the respondents. In the instant matter, the appellant has not only actively participated in the arbitral proceedings before the Arbitral Tribunal, but had also filed the counter claim against the respondent no.1 and thus cannot be allowed to contend that there was no arbitration clause between the appellant and respondent no.1.

45. Learned senior counsel for the respondents distinguished judgment of the Delhi High Court in case of **Alupro Building Systems Private Limited** (supra) on the ground that the grounds of challenge in that petition before Delhi High Court under Section 34 of the Arbitration Act were totally different and were not relevant whatsoever in the facts and circumstances of this case. In this case the respondent no.1 had invoked the provisions of a statutory arbitration after following the due process of law in respect of its claim against the respondent and appellant no.2. The Arbitral Tribunal was duly constituted in accordance with

the Bye-laws of the Exchange and the Arbitration Act. There was no role which the parties were required to play for appointment of arbitrators. The appellant and the respondent no.2 were put to sufficient notice as regards the commencement of arbitral proceedings against them.

REASONS AND CONCLUSION :-

46. The questions fell for consideration in this appeal are :-

"(a) Whether arbitral tribunal had jurisdiction to entertain claims made by the respondent No.1 against the appellant?

(b) Whether the appellant could be impleaded as a party respondent in the arbitral proceedings in respect of the dispute between the respondent no.1 and respondent no.2 filed under the statutory Bye-laws on the ground that the liability of the appellant and the respondent no.2 were joint and several though Arbitration Agreement between the respondent nos.1 and 2 only was invoked by the respondent no.1?

(c) Whether Arbitral Tribunal can be conferred with jurisdiction by consent of parties in respect of the private transaction between them and not having taken place on the floor of the Bombay Stock Exchange under bye-law 248(a) of the Stock Exchange, Mumbai?

(d) Whether under Bye-law 248(a) of the Stock Exchange, Mumbai providing for adjudication of the disputes arising only between the parties prescribed therein in relation to such dealings, transactions, contracts only could be invoked against a third party allegedly based on alleged guarantee or otherwise?

(e) Whether the award against a third party in respect of a private transaction not falling under bye-law 248 (a) would amount to lack of inherent jurisdiction?

(f) What is the effect of the respondent not raising an issue of jurisdiction specifically under Section 16 of the Arbitration Act before the Arbitral Tribunal in case of the Arbitral Tribunal having inherent lack of jurisdiction?

47. A perusal of the Arbitration Application Form under Regulation 15.2 of the Regulation of Stock Exchange, Mumbai indicates that the respondent no.1 had made a claim against the respondent no.2 and the appellant by invoking Bye-law 248(a), framed by the Stock Exchange, Mumbai. In the statement of claim filed by the respondent no.1 before the Arbitral Tribunal it was the case of the respondent no.1 that the appellant and the respondent no.2 herein were wedded to each other. For all practical purposes the appellant was carrying on a business in the name of his wife and his own name. However, it was understood that it would be ultimately joint and several liability of the appellant and the respondent no.2 arising out the transactions which may be conducted by the appellant in his own name or in the name of his wife.

48. It was the case of the respondent no.1 that the debits and the credits of the account of the appellant and the respondent no.2 was by and large netted off and the net amount was received or paid after adjustment. The respondent no.2-wife regularly received legal account of HD10 and confirmed the

balance shown therein from time to time. The appellant and respondent no.2 were issued contract notes and bills from time to time. There was a running account maintained by the respondent no.1 for the appellant and the respondent no.2. After Settlement no.A42, as per the instructions of the appellant, the credit standing to the account of the appellant was transferred to the account of the respondent no.2 and the ledger account of the appellant was made 'Nil'.

49. According to the respondent no.1, even after transferring the credit balance from the account of the appellant to the account of respondent no.2 as per the instructions of the appellant and the respondent no.2, the debit balance came down to Rs.84,85,76,418/-. It was alleged that the appellant and the respondent no. 2 misrepresented to the respondent no.1 that they were one and the same and both were jointly and severally liable to pay the debit balance plus any other liabilities. In paragraph no.11 of the statement of claim it was alleged that the appellant and the respondent no.2 were the constituents of the respondent no.1. The differences and the dispute had arisen between them

which were resolved through the arbitration of the Bombay Stock Exchange. The appellant and the respondent no.2 resisted the said statement of case filed by respondent no.1 on various grounds.

50. In the written statement and the counter claim of the appellant it was contended that the claim filed by the respondent no.1 against the appellant was bad for misjoinder of parties and causes of action. Each individual is a separate legal entity in the eyes of law. The respondent no.1 had entered into separate Client Broker Agreement with respect of their separate transactions and therefore, the claim as filed by the respondent no.1 was not maintainable and liable to be dismissed. It was also contended by the appellant that the respondent no.1 had acted in utter disregard and in violation of the Rules, Regulations and Bye-laws of the Stock Exchange, Mumbai and also those of SEBI which specifically inter-alia deal with the rights and liabilities of the members and the constituents. The respondent no.1 acted without the knowledge and instructions of the appellant for their own benefit and have sought to fasten the alleged liability of the respondent no.2 on the appellant.

51. The appellant also denied any oral understanding between the appellant and the respondents as alleged by the respondent no.1 in the statement of case. The appellant relied upon the SEBI guidelines, Rules and Regulations in support of the contention that there can be adjustments between one client account and another only after obtaining the express authority of the clients. In the instant case there was no such express authority written or otherwise given by the appellant to the respondent no.1 to adjust the credit balance in his account as has been done by the respondent no.1. The appellant denied that on 5th March, 2000 after Settlement No.A42, as per instructions of the appellant, credit standing in the account of the appellant was transferred to the account of the respondent no.2 and the ledger account of the appellant was accordingly made 'Nil'. The appellant denied that he had represented to the respondent no.1 that he would make the payment towards the alleged debit in the account of the respondent no.2. The respondent no.1 thereafter filed rejoinder. The appellant filed the sur-rejoinder to the said affidavit in rejoinder.

52. The respondent no.1 examined Mrs.Deepika Ashwin Choksi, one of the Director of the respondent no.1 and Mr.Parag Vinod Zaveri as witnesses. Both the witnesses of the respondent no.1 were cross-examined by the appellant and the respondent no. 2. The appellant and the respondent no.1 did not lead any oral evidence.

53. In so far respondent no.2 is concerned, the Arbitral Tribunal held that all the transactions had been done in the client code of respondent no. 2 and the transactions in the month of March alleged from Settlement No.A48 was carried out as per instructions of appellant and respondent no.2. The appellant and respondent no.2 had not brought on record any evidence either documentary or oral evidence to disprove affidavit in lieu of examination–in–chief filed by a few witnesses examined by respondent no.1. Arbitral Tribunal held that the appellant and respondent no.2 are jointly and severally liable to pay the amount as per the said award. The Arbitral Tribunal held that normally and historically the share transactions are done in a family by one person on behalf of the family members and more particularly, husband

and wife is a formal unit. Interaction with the brokers' office was done by only one person. This was the position despite the fact that there would be separate client code, separate contract notes, bills and separate bank accounts. It was necessary to have these things separately, considering the documentation necessary for the purpose of tax laws. Broker member may not have seen other family members except their photographs, now on compulsory Broker Client Claim Form.

54. The Arbitral Tribunal accordingly held that the Tribunal upholds the existence of such oral agreement or understanding. It is held that the appellant was mostly coming to the office of the respondent no.1-broker and had also given instructions sometimes when the respondent no.2 was out of town and merely under the instructions of respondent no.2. The Arbitral Tribunal held that the counter claim filed by the appellant was a counter blast and is not sustainable after being adjusted to the account that of respondent no.2 and accordingly, dismissed the said counter claim. In the last paragraph the Arbitral Tribunal held that it is true that as per SEBI requirement the written instructions are

necessary for transfer of one constituent's account to the other. However, from the practical side of it suggests that considering past experience and considering joint and several liabilities and considering their heavenly bestowed relationship, the Tribunal uphold that such a transfer as made by the respondent no.1 was in order.

55. The Arbitral Tribunal did not decide the issue of misjoinder of the appellant raised in the said arbitral proceedings filed by the respondent no.1 and many other issues raised in the written statement filed by the appellant. Though the Arbitral Tribunal held that as per SEBI requirements written instructions of the constituents are necessary for transfer of one constituent's account to the other, the Arbitral Tribunal considered the so called practical side, the alleged past experience, the relationship of appellant and respondent no.2 as husband and wife and their bestowed relationship while upholding such transfer as made by the respondent no.1.

56. Under Bye-law 247A(1) it was mandatory for every member broker to keep such books of accounts as will be necessary to show and distinguish in connection with his business as a member :-

(i) Money received from or on account of and money paid to on or account of each of the clients.

(ii) The money received and the money paid on members own account.

57. Under the said Bye-law 247A it is also provided that no money shall be paid into clients account other than the money held or received on account of the clients. It further provides that the member broker however is not deprived of any recourse of right, whether by way of lien, set off, counter claim, charge or otherwise against money standing to the credit of the clients account. It shall be compulsory for all the member/sub-broker to receive or make payment or to the client strictly by way of account payee cross-cheques or direct credit into the bank account through NEFT or any other modes as permitted by the Reserve Bank of India. The member broker shall accept cheques drawn

by clients and issue cheques only in favour of the clients. However, in exceptional circumstances, the member broker may receive payment in cash to the extent that there is no violation of the Income Tax requirements for the time being in force.

58. There was no express or oral understanding given by the appellant that any amount lying to the credit of his account shall be adjusted against the account of the respondent no.2. The question of adjustment of the credit balance lying in the account of the appellant by the respondent no.1 with the debit balance of respondent no.2 did not arise. Though the Arbitral Tribunal took cognizance of this Byelaws requiring express authority of a client for adjustment of the credit and debit balance as the case may be, the Arbitral Tribunal approved the illegal transfer of the credit balance of the appellant in the account of the respondent no.2 without any express authority or otherwise in violation of Bye-law 247A and also the SEBI guidelines. The adjustment of the credit balance with the debit balance could be permitted only by and under the express authority in respect of the same client and not two separate clients. The Arbitral Award ought to have

been set aside by the learned Single Judge on the ground of such perversity or patent illegality.

59. Under the said Byelaws the respondent no.1-broker had maintained separate account of the appellant as well as respondent no.2 and had accepted two separate forms as required under Bye-laws, Rules and Regulations. In the eyes of law appellant and the respondent no.2 are two separate legal entities and had two separate and distinct accounts opened with the respondent no.1. The Arbitral Tribunal however has relied upon the alleged past experience and considering heavenly bestowed relationship between husband and wife and totally ignored the mandatory Bye-laws, Rules and Regulations framed by the Stock Exchange, Mumbai and those SEBI guidelines while allowing the claim made by the respondent no.1.

60. The Arbitral Tribunal thus committed perversity and patent illegality by holding the appellant and respondent no.2 as a family unit for the purpose of joint and several liabilities. Despite the fact that there were separate client code, separate contract notes and bills and separate bank accounts, the Arbitral

Tribunal has also rendered a perverse finding that the broker member may not have seen other family members except their photographs on compulsory Broker Client Agreement Form. The finding of the Arbitral Tribunal that there is an extended oral agreement and understanding between the appellant and the respondent no.1 that the liability of the respondent no.2, if any, towards respondent no.1 would be joint and several and that the appellant would be liable for the same is totally perverse and contrary to the Bye-laws, Rules and Regulations of Stock Exchange, Mumbai and the SEBI guidelines.

61. Bye-law 248(a) of the Stock Exchange, Mumbai reads thus :-

> "248(a)- All claims (Whether admitted or not) difference and disputes between a member and a non-member or non-members (the terms 'non-member' and 'non-members' shall include a remisier, authorised clerk, a sub-broker who is registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights, obligations and liabilities of remisiers, authorised clerks, sub-brokers, constituents,

> employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange."

62. A perusal of said Bye-law 248(a) clearly indicates that the claims, difference and dispute only between the parties referred in the said Bye-laws arising out of a relation to a dealings, transactions and contracts which are made subject to Rules, Bye-laws, Regulations of the Exchange or with anything reference to anything incidental thereto or in pursuance thereof relating to their construction, fulfillment or validity or in relation thereto shall be referred to or decided by arbitration as provided in the Rules, Bye-laws and the Regulation of the Exchange. Though there was a similar arbitration clause applicable in respect of such dispute between the appellant and the respondent no.1 in respect of all claims, differences, disputes between them as member and non-member was not invoked by respondent no.1 when the statement of claim was filed by the respondent no.1 jointly against the appellant and the respondent no.2.

63. The Arbitration clause under the said Bye-law 248(a) could be invoked only in respect of dealings/transactions and contracts which were made subject to Rules, Bye-laws and regulations of the Exchange or with reference to anything incidental thereto. In this case the respondent no.1 had alleged that the appellant had orally agreed and there being an oral understanding between appellant and respondent no.1 that the dues, if any, of respondent no.2 towards the respondent no.1 would be cleared by the appellant. In our view, there were those two separate causes of action i.e.

(i) Between the respondent no.1 and the respondent no.2 in respect of the transactions having taken place on the floor of the Stock Exchange, Mumbai i.e. the debit balance in the account of the respondent no.2 opened with the respondent no.1.

(ii) The cause of action based on the alleged oral understanding between the appellant and the respondent no.1 to pay the alleged dues of the respondent no.2 towards respondent no.1 in case of any default of respondent no.2.

64. In so far as the alleged oral understanding given by the appellant to clear the alleged dues of respondent No.2 to respondent No.1 is concerned, the same would not fall under Bye-law 248(a) being a private and separate transaction not subject to the Rules, Bye-laws and Regulations of the Exchange. Under Bye-law 44 of the Stock Exchange, Mumbai, it is clarified that for the purpose of these "Bye-laws", "Regulation", "Bargain", "Transactions", "dealings" and "Contract" shall have one and the same meaning unless the context indicates otherwise. We are thus not inclined to accept the submission of the learned senior counsel for the respondents that the dealings between the appellant and respondent no.1 i.e. an oral understanding by which the appellant had agreed to pay the dues of the respondent no.2 in cash or in default would also be covered by the Bye-laws and Regulations of the Stock Exchange, Mumbai and was not a separate transaction.

65. In our view, the entire adjustment made by the respondent no.1 by transferring the credit balance lying in the account of the

appellant with the debit balance lying in the account of the respondent no.2 with the respondent no.1 was without any express authority which was mandatory before carrying out any such adjustment under Clause IX of the SEBI Guidelines. The Hon'ble Supreme Court in case of ***Deutsche Post Bank Home Finance Limited*** (Supra) has dealt with the Special Leave Petition converted into Civil Appeal filed by a third party (not a party to the Arbitration Agreement) impugning the order passed by the High Court under Section 11 of the Arbitration Act. Insofar as such third party who was impleaded in an application under Section 11 of the Arbitration Act by the respondent No.1 was concerned, there was a transaction between respondent Nos.1 and 2 under an agreement entered into between those two parties. There was a separate loan agreement between the appellant and the respondent No.1.

66. The Andhra Pradesh High Court accepted the contention raised by the respondent Nos.1 that the appellant was rightly impleaded as a party respondent in the said application filed by the respondent No.1 under Section 11 of the Arbitration Act. The Hon'ble Supreme Court in the said judgment adverted to earlier judgment in

case of ***S. N. Prasad v/s. Monnet Finance Limited and Ors.***[14], . The Hon'ble Supreme Court in the said judgment in case of ***S. N. Prasad*** (supra) had held that there could be reference to arbitration only if there is an arbitration agreement between the parties. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can only be with respect to the parties to the arbitration agreement and not the non-parties. As there was no arbitration agreement between the parties, the impleadment of appellant as a respondent in the proceedings and the award against the appellant in such arbitration cannot be sustained.

67. The Hon'ble Supreme Court gave an illustration that if 'X' enters into two contracts, one with 'M' and another with 'D', each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for arbitration by 'X' against 'M' in regard to the contract with 'M', 'X' cannot implead 'D' as a party on the ground that there is an arbitration clause in the agreement between 'X' and 'D'. It is held

14 (2011) 1 SCC 320

by the Hon'ble Supreme Court that if a party to an arbitration agreement files a petition under Section 11 of the Act impleading though the party to the arbitration agreement but also a non-party to the arbitration agreement as respondent, and the Court merely appoints an arbitrator without deleting or excluding the non-party, the effect would be that all the parties to the petition under section 11 of the Act (including the non-party to arbitration agreement) will be parties to the arbitration. That will be contrary to the contract and the law. If a person who is not a party to the arbitration agreement is impleaded as a party to the petition under section 11 of the Act, the Court should either delete such party from the array of parties, or when appointing an Arbitrator make it clear that the arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement.

68. The Hon'ble Supreme Court in the said judgment held that the appellant was not a party to the construction agreement containing an arbitration agreement. There was no doubt that loan agreement dated 21st December, 2006 between the first respondent as borrower and the appellant as a creditor also contained an

arbitration clause providing for resolution of disputes in regard to the said loan agreement by arbitration. But the developer was not a party to the loan agreement. There was no arbitration agreement between the developer and the appellant. The first respondent had invoked the arbitration agreement contained in the construction agreement between the first respondent and the developer and not the arbitration agreement contained in the loan agreement between the appellant and the first respondent.

69. It is held that the existence of an arbitration agreement in a contract between the appellant and the respondent will not enable the first respondent to implead the appellant as a party to an arbitration in regard to his disputes with the developer. It is held that if there had been an arbitration clause in the tripartite agreement amongst the first respondent, developer and the appellant and if the first respondent had made claims or raised dispute against petitioner, developer and the appellant with reference to such tripartite agreement, the position would have been different. But that is not so. The petition under Section 11 of the Act against the appellant was therefore misconceived as the

appellant was not a party to the construction agreement entered into between the respondent no.1 and the developer. The Hon'ble Supreme Court accordingly allowed the said appeal and set aside the order passed by the Andhra Pradesh High Court insofar as appellant is concerned. The principles laid down by the Supreme Court in the said judgment apply to the facts of this case.

70. In view of Bye-law 248(a), neither there could be any tripartite agreement between the parties nor the respondent No.1 produced any such Tripartite Agreement. Admittedly, the respondent no.1 had not invoked the arbitration agreement between the appellant and the respondent no.1 and had illegally clubbed the two separate causes of action in the same arbitration by invoking arbitration agreement only between the respondent no.1 and the respondent no.2.

71. This Court in a judgment in case of ***The Indian Performing Right Society Ltd. v/s. Entertainment Network (India) Ltd.***[15]***,*** had considered a petition filed under Section 34 of the Arbitration Act impugning an arbitral award dealing with the copyright dispute

15 2016 SCC OnLine Bom 5893

and granting various declaratory reliefs in respect of such copy right in favour of the claimant. The respondent before the arbitral tribunal did not raise any objection in respect of the jurisdiction of the arbitral tribunal to adjudicate upon the issue as to whether the broadcast of the sound recording without the permission of the owner of the copyright in the literary work and/or musical work infringes the copyright literary work and/or musical work, since a declaration of that nature would necessarily entail a determination of the rights of his client in rem. The said objection in respect of the jurisdiction of the arbitral tribunal to deal with such an action in rem was raised for the first time in the proceedings filed under Section 34 of the Arbitration Act.

72. This Court in the said judgment after adverting to the judgment of Hon'ble Supreme Court in case of ***Booz Allen and Hamilton Inc. v/s. SBI Home Finance Ltd.***[16]**,** held that merely because the petitioner did not raise any specific plea of jurisdiction before the learned arbitrator with respect of various prayers in the statement of claim in respect of the copyright of one of the parties which was an action in rem and was not arbitrable, since the learned

16 (2011) 5 SCC 532

arbitrator inherently lacked the jurisdiction to adjudicate upon such action in rem it would not amount to a waiver under Section 4 of the Arbitration Act. A party even by consent cannot confer jurisdiction on the learned arbitrator in case of action in rem which jurisdiction the learned arbitrator did not have. This Court also adverted to the judgment of Supreme Court in case of ***Chiranjilal Shrilal Goenka v/s. Jasjit Singh***[17]***,*** and followed the principles laid down therein. This Court accordingly permitted the petitioner to raise such issue of jurisdiction for the first time in the petition filed under Section 34 on such ground. We are in agreement with the principles laid down by a learned Single Judge of this Court delivered by one of us (R. D. Dhanuka, J.). In this case also, the arbitral tribunal lacked inherent jurisdiction to deal with the claim against the appellant arising out of private transaction not governed by bye-law 248(a).

73. This Court in case of ***Smt. Prema Amarlal Gera v/s. The Memon Co-operative Bank Ltd. and Anr.***[18]***,*** had considered the arbitration petition filed by a third party (not a party to the arbitration agreement) but was allowed to intervene on his

17 (1993) 2 SCC 507
18 (2017) 2 Bom CR 800

application in the arbitral proceedings by the learned arbitrator. The learned arbitrator made an award also against the said third party. This Court in the said judgment delivered by one of us (R. D. Dhanuka, J.) held that under Section 84(1) of the Multi State Co-operative Societies Act, 2002 (for short 'the said Act 2002'), the dispute between the persons who are described in the said provision only could be referred to arbitration and though the intervener did not fall under any of those provisions described in Section 84(1) of the said Act 2002, the learned arbitrator without application of mind and contrary to Section 84(1) allowed the intervention application to intervene in the arbitral proceedings. The intervener could not have been allowed to intervene in the arbitral proceedings who was a third party by the learned arbitrator. The learned arbitrator not only allowed intervention of the third party but also granted various reliefs against him.

74. This Court accordingly held that the learned arbitrator had no jurisdiction to allow the intervention application of an outsider who did not fall under any of the categories of persons described in Section 84(1) of the said Act 2002. The learned arbitrator could

not have determined the rights and liabilities of the third party, including the issue of his alleged title in respect of the flat which was mortgaged by the principal borrower in favour of the bank. The learned arbitrator could not have granted any reliefs in favour of or against such third party under Section 84(1) of the said Act 2002 or under any provisions of the Arbitration and Conciliation Act, 1996.

75. This Court held that the said arbitration under Section 84(1) of the said Act was a statutory arbitration and thus neither any intervention application of a third party not falling under the categories of persons described in Section 84(1) of the said Act 2002 was at all permissible nor any award could be made against such third party even by consent of such third party. This Court accordingly has set aside the arbitral award insofar as the petitioner therein was concerned. We are in agreement with the views expressed by the learned Single Judge of this Court. The said principles laid down by this Court applies to the facts of this case with greater force.

76. In this case, the appellant who was impleaded as a party respondent had raised an objection that there was misjoinder of parties and no reliefs could be granted against the appellant by the arbitral tribunal in those proceedings. In our view, in view of there being a statutory arbitration even in this case as prescribed under Bye-laws 248(a) of the Bye-laws framed by the Stock Exchange, Mumbai and in view of the fact that the appellant did not fall under any of the persons described under the said clause in the capacity of a guarantor or as third party, the entire arbitration in so far as Appellant is concerned was totally without jurisdiction. Even if the appellant had not raised any objection in so many clear terms prescribed under Section 16 of the Arbitration Act in such statutory arbitration prescribing the parties whose disputes can be referred to arbitration in relation to dealings, transactions and contract made subject to Bye-laws and Regulations of the Exchange, the arbitral tribunal having lack of inherent jurisdiction, the appellants are not precluded from raising such objection even after declaration of award. In our view, even if the appellant had entered into any such oral understanding with the respondent no.1 to clear the dues of the respondent no.2, respondent no.1, such alleged

understanding given by the appellant would not fall within the purview of Bye-law 248(a). No third party even by consent of the party could be impleaded as a party respondent to the arbitral proceedings under the said Bye-law 248(a) which was admittedly a statutory arbitration.

77. In our view, if the arguments of the learned senior counsel for the respondent no.1 are accepted, any dispute between the broker and a constituent even arising out of any private transactions not falling under Bye-law 248(a) for example:- money lending transaction, property dispute, partnership dispute, claim for damages etc. occurred which obviously would not take place on the floor of the Stock Exchange also can be referred to the arbitration under Bye-laws 248(a). The said Bye-law 248(a) does not permit adjudication of any other dispute not falling under bye-law 248(a) and between the parties not described in the said bye-law. Both these conditions are mandatory.

78. The Hon'ble Supreme Court in case of ***MD, Army Welfare Housing Society*** (supra) has held that if the learned arbitrator has no jurisdiction to pass an interim order under the provisions of Arbitration Act, 1940 in absence of any specific agreement in relation thereto, by consent of parties no jurisdiction could be conferred on the arbitral tribunal for passing interim order. It is held that the arbitral tribunal is not a Court of law. The arbitrator is bound by the terms of reference. The jurisdiction of the arbitrator being confined to four corners of the agreement, he could not pass such order which was not the subject matter of reference. In our view, the dispute arising out of the private transaction i.e. an alleged oral understanding between the appellant and the respondent no.1 thus could not have been referred to arbitration under the said Bye-law 248(a). The arbitral tribunal derives authority from the agreement between the parties i.e. in this case under bye-law 248(a). The principles laid down by the Supreme Court in the said judgment in case of ***MD, Army Welfare Housing Society*** (supra) applies to the facts of this case. We are respectfully bound by the said principles laid down in the said judgment.

79. A learned Single Judge of this Court in case of ***Atul R. Shah*** (supra) has held that if the tribunal is not properly constituted, even if the objection was not raised before the arbitral tribunal, that cannot result in the arbitral tribunal exercising jurisdiction if constitution of the arbitral tribunal was in contravention of Section 10 of the Arbitration Act. Courts cannot confer jurisdiction on themselves, by consent of the parties and clothe themselves with jurisdiction though in a given case, no such jurisdiction vest in such Court. The principles laid down by this Court in the said judgment applies to the facts of this case.

80. In our view, Mr. Jagtiani, learned senior counsel for the respondent no.1 however is right in his submission that under the Bye-laws, Rules and Regulations framed by the Stock Exchange, Mumbai, the party who wants to make a claim against any party falling under Bye-law 248(a) was not required to give any notice invoking arbitration agreement under Section 21 of the Arbitration Act and is required to file requisite form alongwith statement of claim before the Stock Exchange, Mumbai.

81. In case of ***Union of India v/s. Popular Builders*** (supra) relied upon by Mr. Jagtiani, learned senior counsel for the respondent no.1, the Hon'ble Supreme Court considered the fact that the appellant had not only filed a statement of defence but also raised a counter claim against the respondent. The appellant had also not raised the objection with regard to the competent jurisdiction of the arbitral tribunal before the learned arbitrator which amounted the waiver under Section 4 read with Section 16 of the Arbitration Act. In our view, the said judgment of the Hon'ble Supreme court would not assist the case of the respondent no.1. The Hon'ble Supreme Court in the said judgment was not dealing with any statutory arbitration prescribed under Bye-law 248(a) that also describing the parties between whom only differences and dispute, if any, could be referred to the mechanism of arbitration prescribed under the said Bye-laws. Similarly, the judgment of Hon'ble Supreme Court in case of ***Gas Authority of India Ltd. and Anr. v/s. Keti Construction (I) Ltd. and Ors.***[19]***,*** relied upon by the learned senior counsel for the respondent no.1 also would not assist the case of the respondent no.1 on the same ground.

19 (2007) 5 SCC 38

82. A learned Single Judge of this Court in case of ***M/s. Adityasai Cot Spin Pvt. Ltd.*** (supra) held that even if there did not exist any arbitration agreement according to the petitioner, it was for the petitioner to raise such issue before the learned arbitrator under Section 16 of the Arbitration Act and the petitioner not having raised such such issue before the learned arbitrator though notices were served upon the petitioner from time to time, this issue cannot be allowed to be raised for the first time in the petition under Section 34 of the Arbitration Act. There is no dispute about this proposition of law. However, since this case is a clear case of inherent lack of jurisdiction, even if an objection is not raised by a third party who is impleaded as a party respondent at the threshold, the same would not confer the jurisdiction upon arbitral tribunal and would not amount to waiver under Section 4. Even in the said judgment in case of ***M/s. Adityasai Cot Spin Pvt. Ltd.*** (supra), this Court has not considered the case of any statutory arbitration and that also having similar clause. The said judgment would not assist the case of the respondent no.1.

83. The Supreme Court in case of ***P. R. Shah, Shares and Stock***

Brokers Pvt. Ltd. (supra) has considered the facts where the appellant and the first respondent therein were members of the Bombay Stock Exchange. The first respondent had raised and referred a dispute against second respondent and the appellant under the Rules, Bye-laws and Regulations framed by the Bombay Stock Exchange. It was alleged by the respondent no.1 that the appellant and the second respondent were sister concern with a common director who had approached the first respondent to get the carry forward sauda in respect of certain shares. Those shares were transferred with the first respondent on behalf of the second respondent which were outstanding with the appellant. In that case, all the bills were drawn on the second respondent according to the first respondent as required by the appellant.

84. The arbitral tribunal had held that the transactions had taken place as alleged by the first respondent and therefore the appellant and the second respondent were liable for the amounts claimed. The arbitral tribunal made an award allowing the claim against the appellant and the second respondent. The second respondent did not contest the award. The appellant filed a petition under Section

34 of the Arbitration Act which came to be dismissed by a learned Single Judge of this Court. The dispute between the parties was that Bye-law 248(a) did not apply to a dispute between two members. The Hon'ble Supreme Court held that the arbitration in that case was not an ad-hoc arbitration under the arbitration agreement executed between the parties but was an institutional arbitration under the Bye-laws of the Exchange.

85. The Hon'ble Supreme Court gave an illustration that if 'A' had a claim against 'B' and 'C' and there was an arbitration agreement between 'A' and 'B' but there was no arbitration agreement between 'A' and 'C', it might not be possible to have a joint arbitration against 'B' and 'C'. 'A' cannot make a claim against 'C' in an arbitration against 'B', on the ground that the claim was being made jointly against 'B' and 'C', as 'C' was not a party to the arbitration agreement. But if 'A' had a claim against 'B' and 'C' and if 'A' had an arbitration agreement with 'B' and 'A' also had a separate arbitration agreement with 'C', there is no reason why 'A' cannot have a joint arbitration against 'B' and 'C'. In our view, this judgment of the Hon'ble Supreme Court would not apply to the facts of this case.

86. In this case, admittedly the respondent no.1 did not invoke the arbitration agreement between respondent no.1 and the appellant. The cause of action between the respondent nos.1 and 2 was arising out of the transactions allegedly having taken place between the respondent nos. 1 and 2 on the floor of the stock exchange, Mumbai, whereas the cause of action between the appellant and the respondent no.1 was totally different and was a private transaction. The arbitral tribunal could not have allowed the respondent no.1 to mix up the two separate causes of action in the statement of claim filed by the respondent no.1, when one cause of action out of two was outside the purview of arbitration clause. The said judgment would not advance the case of the respondent no.1.

87. Insofar as the judgment of Supreme Court in case of ***Banwari Lal Kotiya*** (supra) relied upon by the learned senior counsel for the respondent no.1 is concerned, the Hon'ble Supreme Court has dealt with an arbitral award under the provisions of the Arbitration Act, 1940. The Hon'ble Supreme Court considered Bye-law 248(a) of the Stock Exchange, Mumbai and held that the assent of the parties

to actual reference is already there in the agreement; in addition there is a statutory reference and thus the reference being consensual the resultant award would be valid and binding on the parties to the transactions. There is no dispute about the proposition of the law laid down by the Supreme Court in the said judgment that the reference under Bye-law 248(a) was a statutory reference and thus assent of all the parties to the actual reference already was in the agreement.

88. In our view, two separate transactions between two different parties could not have been clubbed together in the same reference, though all such parties were party to such statutory arbitration. The respondent no.1 admittedly not having invoked the arbitration agreement against the appellant under bye-law 248(a), the appellant could not have been impleaded as a party respondent to the statement of claim filed by the respondent no.1 and that too in respect of a private transaction. The entire award insofar as the appellant is concerned, was thus without jurisdiction.

89. The Hon'ble Supreme Court in case of ***Bombay Stock Exchange v/s. Jaya I. Shah and Anr.*** (supra) has held that the

Rules, Bye-laws and Regulations framed by the Bombay Stock Exchange had received the approval of the Central Government and are statutory bye-laws. The Bye-laws framed by the Exchange also provide the mode and manner in which the arbitration proceedings can be taken recourse to both by the members and non-members against the defaulters. The Rules in this behalf however are distinct and separate. There is no dispute about the proposition of law laid down by the Hon'ble Supreme Court in the said judgment.

90. In our view, none of the judgments relied upon by the learned counsel for the appellant could be distinguished by the learned senior counsel for the respondents. The judgments relied upon by Mr.Purohit, learned counsel for the appellant are applicable to the facts of this case. In our view, though the respondent no.1 had led oral evidence to prove the case of the respondent no.1 that the appellant had given an oral understanding to the respondent no.1 that the appellant would pay the dues of the respondent no.2 in case of default on the part of the respondent no.2, no such case of the respondent no.1 was proved before the arbitral tribunal. Be

that as it may, the respondent no.1 could not have led any oral evidence contrary to the contents of the documents entered into between the parties and also contrary to the Bye-laws, Rules and Regulations framed by the Stock Exchange, Mumbai. By-laws, Rules and Regulations of the Stock Exchange which are binding not only on the parties but also on the arbitral tribunal.

91. In so far as the submission of the learned senior counsel for the respondent no.1 that the appellant himself having filed a counter-claim before the Arbitral Tribunal thus could not be allowed to urge that the Arbitral Tribunal did not have jurisdiction to entertain the claims against the appellant is concerned, in our view, the appellant could not have filed any such counter-claim in the proceedings filed by the respondent no.1 against the respondent no.2 since the impleadment of the appellant itself was a misjoinder of the party. Since there was a separate arbitration agreement between the appellant and the respondent no.1, if the appellant was aggrieved in view of the respondent no.1 not paying the amount lying to the credit in the account of the appellant or in view of the adjustment of credit balance, the appellant could have

invoked the separate arbitration agreement prescribed under Bye-laws 248 (a) of Bye-laws framed by the Stock Exchange, Mumbai and could not have filed a counter-claim. The Arbitral Tribunal has dismissed the counter-claim filed by the appellant on the ground that the said counter-claim was filed as counter blast and not sustainable after being adjusted to the account of the respondent no.2.

92. There is no merit in the submission of the learned senior counsel for the respondent no.1 that various findings of the facts rendered by the Arbitral Tribunal in this case were rightly not interfered with by the learned Single Judge. In our view, the learned Single Judge ought to have set aside the award on the ground of inherent lack of jurisdiction. Be that as it may, the findings rendered by the Arbitral Tribunal being totally perverse and contrary to bye-laws, rules and regulations of Stock Exchange, Mumbai, award was liable to be set aside on that ground itself.

93. In so far as the reliance placed on the statement of claim, by the learned senior counsel for the respondent no.1 in support of the

submission that the appellant as well as the respondent no.2 were impleaded as Constituents of the respondent no.1 and thus the Arbitral Tribunal had jurisdiction to entertain the claims against the appellant as well as the respondent no.2 is concerned, in our view, there is no merit in this submission. The respondent no.1 had not made any claim against the appellant as the constituent arising out of two separate accounts, but had filed claim against two separate constituents in the same statement of claim based on two separate causes of action. One of such causes of action and more particularly against the respondent no.2 which was arising out of the transaction traded on the floor of the Stock Exchange, Mumbai by the respondent no.1 only could be the subject matter of the arbitration in view of specific arbitration clause recorded under Bye-law 248(a) of the Bye-laws framed by the Stock Exchange, Mumbai.

94. The alleged cause of action between the respondent No.1 and the appellant being a private transaction not covered by the said Bye-law 248(a) could not be adjudicated under the said Bye-law. Merely because the appellant was also impleaded as a constituent in the statement of claim along with the respondent

no.1, such pleadings would not confer the jurisdiction upon the arbitral tribunal.

95. There is no merit in the submission of the learned senior counsel for the respondent no.1 that since the appellant had participated in the arbitration proceedings, the appellant cannot be allowed to raise an issue of jurisdiction at this stage contending that the Arbitral Tribunal had inherent lack of jurisdiction in entertaining and adjudicating upon the claims made by the respondent no.1 against the appellant. In our view, there was no contract of surety pleaded by the respondent no.1 before the Arbitral Tribunal nor there was any binding contractual agreement between the appellant and the respondent no.1 in support of the claims made by the respondent no.1 against the appellant which could be enforced in a statutory arbitration prescribed under Bye-law 248(a).

96. Merely because the appellant and the respondent no.2 were husband and wife, on that ground, the Arbitral Tribunal could not have allowed the claims against the appellant and to adjust the credit balance lying in the account of the appellant husband with

the debit balance lying in the account of the respondent no.1 wife without any express authority of the appellant. Be that as it may, any dispute arising out of such alleged express authority or otherwise, could not be the subject matter of the said statutory arbitration prescribed under Bye-law 248(a). The impugned award clearly shows perversity on this ground also.

97. A perusal of the record clearly indicates that the appellant was not sued on the basis of transactions on the floor of the exchange between the appellant and the respondent no.1 but on the basis of an oral understanding/oral guarantee on behalf of the appellant given to the respondent no.1 for clearing the dues of the respondent no.2, if any, payable to the respondent no.1. Appellant could not be impleaded based on an oral arbitration agreement in alleged oral understanding between the appellant and the respondent no.1. Mr. Jagtiani, learned senior counsel for the respondent no.1 fairly accepted that the arguments advanced by him in this appeal are contrary to the findings recorded and the observations made by the learned Single Judge. In our view, since the entire award was without jurisdiction and shows perversity,

learned Single Judge ought to have interfered with the impugned award rendered by the Arbitral Tribunal.

98. We therefore pass the following order :-

ORDER

(i) The impugned award dated 26th February, 2004 passed by the Arbitral Tribunal is set aside qua the appellant. Counter claim filed by the Appellant is without jurisdiction.

(ii) The impugned order dated 23rd August 2005 passed by the learned Single Judge is set aside.

(iii) The Arbitration Petition No.309 of 2004 and the Appeal No. 126 of 2006 filed by the appellant are allowed in aforesaid terms.

(iv) There shall be no order as to costs.

(V.G. BISHT, J.) *(R.D. DHANUKA, J.)*