

(2013) 07 BOM CK 0100
In the Bombay High Court
Case No : Arbitration Petition No. 643 of 2012

Kotak Securities Limited

APPELLANT

Vs

Prakash S. Khanolkar and Vishal B. Malkan

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(b), 30, 30(a), 34

Citation : (2013) 07 BOM CK 0100

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : V.K. Rambhadran, for the Appellant; Shailesh Shah and Mr. Vijay Vaiday, for the Respondent

Final Decision : Disposed Off

Judgement

R.D. Dhanuka J.

1. By this petition filed u/s 34 of the Arbitration & Conciliation Act, 1996 (for short referred to as Arbitration Act, 1996), the petitioners seek to challenge the award dated 13th January, 2012 passed by the Appellate Bench of the Bombay Stock Exchange Limited dismissing the appeal filed by the petitioners by which the petitioners had impugned the arbitral award allowing some of the claims made by the respondent. Some the relevant facts for the purposes of deciding this petition are as under:

Brief facts relevant for the purpose of deciding this petition are as under:

(a) The petitioners are registered brokers with the several stock exchanges including Bombay Stock Exchange Ltd. Respondent No. 2 was sub broker of the petitioners at the material time. Respondent no. 1 was constituent/client of the petitioners at the material time. In the month of December, 2004, the first respondent opened demat account with the petitioners and executed member client agreement including registration and account opening form dated 24th November, 2004 and transferred shares of about six companies into the said

demat account. It is the case of the first respondent that in the month of April, 2005, he came to know that there were various transactions in shares traded without his authority and instructions by the respondent no. 2.

(b) It is the case of the respondent no. 1 that vide his letter dated 24th April, 2005 to the petitioners, it was brought to the notice of the petitioners that the first respondent had instructed second respondent not to enter into any transaction without any discussion with him and not to borrow margin amount from the petitioners to which the second respondent agreed and informed the first respondent that he would inform the first respondent in advance before any transaction. The first respondent also informed that the shares of the Cummins India were held by the first respondent in respect of which the first respondent had raised protest. Vide letter dated 27th April, 2005 from the second respondent to the petitioners, petitioners were informed that the second respondent had incurred loss of about 3.5 Lacs in the month of December, 2004. The second respondent had taken risk of his own to enter in future transaction without intimation to the petitioners. Respondent no. 2 admitted his mistake. Respondent no. 2 assured that he would deposit Rs. 2,00,000/- on 29th April, 2005 and thereafter every month about Rs. 50,000/- to make the portfolio upto date within the period of six months. Respondent no. 2 also agreed to pay interest at the rate of 18% p.a. It is the case of the petitioners that the said letter was in the handwriting of the first respondent.

(c) Respondent no. 1 also placed reliance on undated letter from respondent no. 2 to respondent no. 1 promising to get back original holdings in the shares of ABB Ltd. Aston and Cummins India Ltd. and also Rs. 2 lacs by 30th April, 2005 cumulatively. It is stated in the said letter that these transactions were done by the second respondent in good faith and there was no mala fide intention to betray the first respondent. A copy of the said letter was not forwarded to the petitioners. Respondent no. 1 has also placed reliance on letter dated 19th November, 2005 from respondent no. 2 to respondent no. 1 in which respondent no. 2 recorded that he was grateful to the first respondent for giving second life to perform by temporarily withdrawing the complaint for six months. Respondent no. 2 agreed to deposit shares of eight companies in the demat account of the first respondent as per schedule mentioned herein. Respondent no. 2 also agreed to deposit Rs. 1.5 lacs in two installments. Even said letter alleged to have been addressed by the 1st respondent to 2nd respondent was not forwarded to the petitioners.

(d) By letter dated 28th August, 2008, the first respondent alleged that the petitioners had deputed their Manager from Borivali Branch to discuss the issue with the first respondent on 25th April, 2005 who admitted that the transaction had taken place without any prior intimation to the first respondent and they have failed to monitor the portfolio internally. It is the case of the first respondent that the Manager of the petitioners requested the first respondent to give six months time and during that period the shares would be repurchased by

the petitioners and would be deposited in the demat account of the first respondent. It is also alleged in the said letter that till July, 2008, petitioner had transferred 1150 shares of ABB Ltd. and 75 shares of Cummins India Ltd. By the said letter, respondent no. 1 alleged that the petitioners were still required to purchase and transfer shares of seven companies mentioned therein to his demat account and also liable to pay dividend of more than Rs. 80,000/- and bonus etc. By the said letter the first respondent called upon the petitioners to purchase and transfer the balance shares and to provide corporate benefits. By letter dated 5th October, 2008, the first respondent once again called upon the petitioners to comply with notice/complaint dated 28th August, 2008 within seven days from the receipt of said letter. By letter dated 4th February, 2009, petitioners informed the second respondent about the complaint received from the first respondent and called upon him to resolve the grievance of the first respondent immediately.

(e) By letter dated 29th February, 2009, the second respondent informed the petitioners that though the second respondent had agreed to buy back the shares and deposit the said shares into demat account of the first respondent within the period of six months and though he started purchasing the shares, in view of market price having risen rapidly, it was not possible for him to complete the purchase within six months. It is stated in the said letter that he kept on extending the timeline for his obligation and because of the support and patience of respondent no. 1, respondent no. 2 continued to purchase at his pace as per his financial situation. It was also stated that respondent no. 2 shall complete his obligation taking into account the actual amount of sale proceeds (approximately 13.5 lacs) versus the current market valuation of the remaining shares (approximately 24 lacs). It is also mentioned in the said letter that the said sub broker had already paid Rs. 12 lacs towards the said obligation in the last four years and it had become difficult for him to complete the said obligation by himself and requested the petitioners to take responsibility of purchasing the balance shares for the first respondent. On 5th August, 2009 the first respondent filed statement of case before Bombay Stock Exchange Limited against the petitioners herein and respondent no. 2 inter alia praying for sum of Rs. 55,87,573.00 inclusive of interest.

(f) On 10th September, 2009, respondent no. 1 amended the statement of claim and segregated the ledger account of transactions of NSE and BSE and restricted his claim to the extent of shares alleged to have been traded on the B.S.E. Ltd. By the said amendment, the first respondent substituted original claim by Rs. 13,31,569/- towards the alleged unauthorized sale of shares, Rs. 1,01,042/- towards the loss of dividends and towards offers of right shares and Rs. 9,58,730/- as an interest totaling to Rs. 23,91,341/-. The respondent No. 2 and petitioners filed separate written statements. The petitioners opposed the claim on various ground including the ground of limitation. It was the case of the petitioners that the respondent no. 1 had carried out trades on the exchanges both in cash and derivative segments since inception of his trading account.

Immediately after carrying out such trades by the petitioners, they used to send contract notes and all ledger statements, communication, at the registered address of the first respondent. Petitioners also used to send digital documents. Petitioners enclosed list of trade executed by the petitioners in different exchanges along with the said written statement. It is the case of the petitioners that the respondent no. 1 never disputed or raised any grievance against the trades any time during which the trades have been carried out. All the debits and credits were made from time to time arising out of the purchase and sale of shares in the account of the first respondent including the sale proceeds of the shares alleged to be sold without authority in respect of which no objection was ever raised. The petitioners also disputed the receipt of any alleged fax dated 22nd April, 2005. The Petitioners denied that the petitioners had sent its managers to the first respondent or that any of the staff had made any assurances that the shares would be bought and that all the issues would be resolved to the mutual satisfaction of the first respondent as alleged in the statement of c36-nmt-151aim. The Petitioners also denied that any transactions were done in the account of the first respondent without authority. The petitioners denied that the first respondent had suffered any loss as claimed or otherwise and contended that the claims made by the respondent was bogus, frivolous and time barred.

(g) On 27th January, 2010 the learned arbitrator made an award directing the petitioners and respondent no. 2 to pay jointly and severally sum of Rs. 14,32,611/- to the first respondent in satisfaction of his claim in respect of B.S.E. Transaction and also interest on the said amount at the rate of 10% p.a. from August, 2009 to the date of payment and also cost of reference quantified at Rs. 20,000/-.

(h) On 10th February, 2010, petitioners filed appeal before the Appellate Bench of the Stock Exchange. By an order dated 24th September, 2010, the Appellate Bench of Stock Exchange allowed the said appeal on the ground of limitation. The 1st respondent filed an arbitration petition in this court challenging the said order passed by the Appellate Bench. This court remanded the matter back to the learned arbitrator in view of the revised circular issued by SEBI extending the period of limitation to three years. By an order dated 13th January, 2012, the Appellate Bench of the Stock Exchange dismissed the appeal filed by the petitioners and confirmed the award made by the Lower Bench.

2. Mr. Rambhadran, learned counsel appearing on behalf of the petitioners made following submissions:-

(a) According to the 1st respondent, he did not carry out any transaction after 2004-05 and all subsequent transactions were carried out by the 2nd respondent as sub-broker on behalf of the petitioners unauthorizedly and without authority and consent of the 1st respondent. It is submitted that statement of claim was filed before the Lower Bench by the 1st respondent on 5th August, 2009. It is submitted that Arbitral Tribunal considered the last transaction alleged to have

been carried out on 26th August, 2008 for the purpose of deciding issue of limitation which was in respect of the ABB Ltd. Mr. Rambhadran pointed out that there was no claim arising out of shares of ABB Ltd. in Bombay Stock Exchange and was not the subject matter of this arbitration and therefore the said transaction could not have been considered as last transaction for the purpose of considering limitation in this arbitration before Bombay Stock Exchange. Petitioners had purchased those shares on behalf of the 1st respondent in ordinary course of business and not for replacement of the original shares as alleged. It is pointed out that even in the amended statement of claim filed by the 1st respondent, shares in respect of ABB Ltd. was not claimed. It is submitted that various correspondences was placed on record by both parties which would demonstrate that claim was ex-facie barred by limitation. Neither the Arbitral Tribunal nor the Appellate Bench considered any of those correspondence while rejecting the plea of limitation raised by the petitioners. It is submitted that neither the Arbitral Tribunal nor the Appellate Bench dealt with the submissions made by the petitioners as to how the claim was not within the period of limitation. Even if the alleged assurance given by the 2nd respondent to pay certain amount and/or replace the shares by November 2005 was given by the sub-broker, claim was ex-facie barred by law of limitation.

(b) Mr. Rambhadran submits that as far as order passed by Appellate Bench is concerned, the only reason rendered by the Appellate Bench on the issue of limitation is that on 19th June, 2008 an amount of Rs. 1,94,556.18 was debited from the brokerage payable to the sub-broker by the petitioners and credited to the account of the 1st respondent and that the last transaction on the floor of the exchange took place on 26th August, 2008 and therefore reference filed by the 1st respondent on 6th August, 2009 was not barred by law of limitation. Mr. Rambhadran submits that both the reasons rendered by the Appellate Bench was factually incorrect. Debit of Rs. 1,94,556.18 to the account of the 1st respondent was only a book entry and no such amount was actually debited. In any event, the said book entry was not on 19th June, 2008 but was on 19th June, 2005. Statement of claim thus filed on 6th August, 2009 was ex-facie barred by law of limitation. It is submitted that even the last transaction considered by Appellate Bench as on 26th August, 2008 is in respect of ABB Ltd. in respect of which there was no claim in the present arbitration proceedings. It is submitted that the award of the Arbitral Tribunal as well as Appellate Bench discloses total non-application of mind. It is submitted that limitation is a mixed question of fact and law and Arbitral Tribunal as well as Appellate Bench thus ought to have considered the material produced by the parties. None of these submissions made and the documents submitted by the petitioners have been considered by the Arbitral Forum as well as by Appellate Bench. It is submitted that the Arbitral Tribunal has allowed the time barred claim and the award is therefore in conflict with the public policy.

(c) In his alternate submission, Mr. Rambhadran learned counsel for the petitioners submits that even if any shares were purchased by the sub-broker

and/or any payment was made directly by sub-broker and/or if any assurance was made by the sub-broker as claimed by the 1st respondent, the same was not binding on the petitioners. The petitioners had not authorised sub-broker to make any such commitment and/or acknowledge the liability on behalf of the petitioners. It is submitted that on the perusal of the letters addressed by the sub-broker to the 1st respondent it would clearly indicate that the same were addressed by the 2nd respondent in his personal capacity and not on behalf of the petitioners. The Arbitral Tribunal did not consider this aspect and proceeded on a erroneous premise that act on the part of the sub-broker would be binding on the petitioners personally as no action was taken by the petitioners against the sub-broker.

(d) The next statement of Mr. Rambhadran is that though petitioners had raised plea of limitation and had denied the claims made by the 1st respondent and had challenged the authority of the sub-broker to make any commitment or assurance on behalf of the petitioners or had disputed the allegations of respondent no. 1 that any of the staff members of the petitioners made any assurance or promise to pay neither the 1st respondent nor sub-broker laid any evidence.

(e) Mr. Rambhadran then submits that there was collusion on the part of the 1st respondent and 2nd respondent. It is submitted that though the Arbitral Tribunal have rendered award against the petitioners as well as sub-broker and though sub-broker did not file any appeal challenging the award made by the Arbitral Tribunal and also did not file any arbitration petition challenging the award as well as order of Appellate Bench, no steps are taken by the 1st respondent against the 2nd respondent for recovery of the alleged dues.

(f) Mr. Rambhadran then submits that in the written statement filed by the petitioners before the Arbitral Tribunal and also in the written submission, it was the case of the petitioners that several transactions were carried out by the petitioners on behalf and with consent of the 1st respondent in respect of which contract notes, ledger accounts and various other documents were furnished from time to time to the respondent no. 1 but he neither disputed the factum of receipt of any such documents nor disputed any such transactions at any point of time. It is submitted that though the Arbitral Tribunal had given opportunity to the 1st respondent to file affidavit in rejoinder, the 1st respondent did not file any rejoinder controverting the averments made by the petitioners in the written statement alleging that all the transactions were carried out by the petitioners on behalf of the 1st respondent with his consent and on his instructions and requisite documents in respect thereof were furnished to him from time to time. It is submitted that respondent no. 1 could not pick and choose few entries from the said statement in support of his plea that petitioners and/or their sub-brokers had replaced some of the pleaded shares which were alleged to have been unauthorisedly sold and disputed the other transactions. It is submitted that respondent no. 1 themselves had produced copies of contract notes before the

Arbitral Tribunal which would indicate that all contract notes were duly received by the 1st respondent in respect of which no dispute was raised by the 1st respondent at any point of time when the transactions were carried out. It is submitted that statement of account reflecting those transaction was annexed to the written statement which remained undisputed and un-controverted by the first or second respondent. The Arbitral Tribunal as well as Appellate Bench did not deal with this crucial aspect in the entire award and did not render any finding on the material documents produced by the petitioners. Petitioners had also highlighted this issue in its written arguments which has also not been dealt with by the Arbitral Tribunal or by the Appellate Bench. It is submitted that if the Arbitral Tribunal would have considered the said statement of account in respect of such transactions which would reflect that nothing was due and payable by the petitioners to the 1st respondent. Arbitral tribunal would not have awarded any amount in favour of the first respondent. It is submitted that findings of the Arbitral Tribunal as well as Appellate Bench is thus totally perverse. Learned counsel placed reliance upon the judgment of the Supreme Court in case of ONGC Ltd. Vs. Garware Shipping Corpn. Ltd., and in particular paragraph 30 which reads thus:-

30. There is no proposition that the courts could be slow to interfere with the arbitrator's Award, even if the conclusions are perverse, and even when the very basis of the Arbitrator's award is wrong. In any case this is a case where interference is warranted and we set aside the norms prescribed by the Arbitrator as upheld by the learned Single Judge and the Division Bench.

(g) Mr. Rambhadran further submits that the statement of account produced by the petitioners would reflect the transactions carried out at the instruction of the 1st respondent including alleged transactions in respect of the shares which were transferred in the Demat account of the 1st respondent between the period 2007-08. It is submitted that if those transactions are considered, statement of claim filed by the 1st respondent would be within time but still would demonstrate that nothing was due and payable by the petitioners to the 1st respondent. It is submitted that thus nothing was due and payable by the petitioners to the first respondent.

(h) In support of his plea that the relevant documents have not been considered by the Arbitral Tribunal and thus the award can be set aside on that ground alone, the learned counsel placed reliance upon the judgment of the Supreme Court in case of K.P. Poullose Vs. State of Kerala and Another, and in particular paragraph 6 which reads thus:-

6. u/s 30(a) of the Arbitration Act an award can be set aside when an Arbitrator has misconducted himself or the proceedings. Misconduct u/s 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. It

is in this sense, that the Arbitrator has misconducted the proceedings in this case. We have, therefore, no hesitation in setting aside such an award. In the result the judgment of the High Court is set aside and that of the Subordinate Judge is restored. The award of the Arbitrator thus stands quashed. The Arbitrator will complete the proceedings after considering all the relevant documents including Ext. P. 11 and Ext. P. 16 after giving opportunity to the parties. The appeal is allowed with costs.

(i) Next submission of Mr. Rambhadran is that the Appellate Bench of the Stock Exchange has not considered the submission made by the petitioners but have confirmed the reasoning rendered by the Arbitral Tribunal without application of mind. It is submitted that the award rendered by the Arbitral Tribunal is merged with the order passed by the Appellate Bench and on perusal of the order passed by the Appellate Bench, it is clear that no reasons are rendered in the impugned order while rejecting the submissions made by the petitioners. In support of his plea, the learned counsel placed reliance upon the judgment of this court in case of Dedhia Investments (P.) Ltd. Vs. JRD Securities (P.) Ltd., and in particular paragraph 5 which reads thus:-

5. There is no reason why the doctrine of merger should not apply to the award of the Appellate Bench particularly having regard to the scheme of the Bye-laws which provide for an appeal. A Division Bench of the Madras High Court in M.A. and Sons Vs. Madras Oil and Seeds Exchange Ltd. and Another, has observed as follows;

(11) The third point may be quite briefly disposed of. Actually it largely depends upon the interpretation to be placed upon the words in condition No. 7 of the First Schedule to the Arbitration Act, that "the award shall be final and binding on the parties and persons claiming under them respectively". Naturally, these words have to be construed as subject to any right of appeal, which might be provided for either by the contract itself, or by any Bye-law governing the parties; Heeralal Agarwalla and Co. Vs. Joakim Nahapiet and Co. Ltd., is clear authority for this view. No doubt, except upon grounds specified in Section 30 of the Act, an award is not liable to be set aside, and is final between the parties. But, what is the award that is final between the parties when the procedure governing the parties itself makes provision for an initial award on arbitration, and an appeal which may be instituted by either party aggrieved ? An "award" is defined in Section 2(b) of the Act as an "arbitration award".

As observed by the Supreme Court in (S) Garikapatti Veeraya Vs. N. Subbiah Choudhury, the legal pursuit of successive remedies will make them all proceedings connected by an intrinsic unity and "to be regarded as one legal proceeding". In that sense, it is the award by the appellate Tribunal, if an appeal is preferred which becomes the final award that governs the parties. The passage from Russel on Arbitration that we set forth earlier, as well as the decision of the Calcutta High Court in Heeralal Agarwalla and Co. Vs. Joakim Nahapiet and Co. Ltd., make it clear that it is perfectly legal to provide for different stages of

arbitration, such as, from a single arbitrator to a committee of appeal, etc. It is the award which finally emerges from this procedure, which is conclusive as between, the parties and not liable to be set aside, except as provided for in Section 30 of the Arbitration Act 10 of 1940. For these reasons, we must hold that the provision for appeal is not ultra vires the law of Arbitration enacted in Act 10 of 1940..." (p. 395) This should be sufficient to dismiss the petition. In the interest of justice I have considered the merits of the submission and there seems to be none.

(j) Next submission of Mr. Rambhadran is that the respondents could not have made claim for replacement of shares in the statement of claim in view of the respondents' having demanded money. It is also submitted that in any event the valuation of shares could not have been demanded of the year 2009 but ought to have been calculated on the date of breach alleged to have been committed by the petitioners by not replacing the shares alleged to have been illegally sold by the petitioners and/or their sub-broker. In support of this plea, the learned counsel placed reliance upon of judgment of the Privy Council in case of BBMB Finance (Hong Kong) Ltd. vs. EDA Holdings Ltd. and others reported in 23 March 1990 The Weekly Law Reports 409. Relevant paragraph of the said judgment reads thus:-

Mr. Evans-Lombe, who appeared for the defendant, submitted, correctly, that there is a line of authority which establishes the basic principle that, in the assessment of damages, a plaintiff can recover the loss he has suffered, no more and no less. This principle and some of its exceptions are indicated in the judgment of Denning L.J. in Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd. [1952] 2 Q.B. 246, 253.

Mr. Evans-Lombe pointed out that damages for conversion may exceed the value of the property at the date of conversion if, for example, the property increases in value between the date of conversion and the date when the plaintiff discovers the conversion: see *Sachs v. Miklos* [1948] 2 K.B. 23 And where in conversion or in detinue, the plaintiff has only suffered temporary deprivation of his property, the appropriate measure of damages may be assessed by reference to the value at the date when the plaintiff demanded the return of the property (*Williams v. Archer* (1847) 5 C.B. 318) or the date when the plaintiff was prevented from reselling the property (*Barrow v. Arnaud* (1846) 8 Q.B. 595). In *Brandeis Goldschmidt & Co. Ltd. v. Western Transport Ltd.* [1981] Q.B. 864 the plaintiffs' cargo of copper had been wrongfully detained for a period of nine months. The plaintiffs had never intended to resell the copper and failed to prove that they had suffered any damage by reason of the delay in delivery up. Brandon L.J. Rejected, at p. 872,

the proposition that there is some universal rule of law governing the assessment of damages in cases of detention, which can be applied by rule of thumb.....

Brandon L.J. cited, and in the present case Mr. Evans-Lombe relied upon, the

judgment of Bowen L.J. in *Williams v. Peel River Land and Mineral Co. Ltd.* (1886) 55 L.T. 689, 692-693, where it was said, *inter alia*:

If, in an action for wrongful detention by one man of that which belongs to another, there be no substantial loss at all sustained, but the mere denial of the right, which right is vindicated in the course of the action, in such a case, there being no pecuniary damage sustained, no pecuniary compensation is given, and nominal damages will be enough; but, if a substantial loss has been suffered in consequence of the wrongful act, what those who have to redress the wrong ought to do is to give compensation for the loss. You do not give damages in an action for detention in *poenam*; it is not a paternal correction inflicted by the court, but simply compensation for the loss

..... I cannot think that the law would really lay down anything so ridiculous as that a man should be compensated whether he suffered damages or not.

Both the Brandeis case [1981] Q.B. 864 and the Peel River case (1886) 55 L.T. 689 were concerned with damages caused by temporary deprivation of possession and use of property. A different consideration will apply when the property is irreversibly converted and the plaintiff loses that property. The plaintiff loses the value of the property at the date of conversion and the general rule is that the measure of damages is the value thus lost. To depart from that rule in the present case would be inconsistent with *Solloway v. McLaughlin* [1938] A.C. 247. Mr. Evans-Lombe submitted that in that case Lord Atkin was only concerned to deprive the defendant of a profit. But Lord Atkin's judgment is inconsistent with this submission. Mr. Evans-Lombe also sought to argue that the effect of *Solloway v. McLaughlin* has in some way been modified by the Torts (Interference with Goods) Act 1977, joined with the decision in the Brandeis case [1981] Q.B. 864. Their Lordships do not consider that the decision in *Solloway v. McLaughlin* can be affected by the Brandeis case or by the Act of 1977 which only came into force after the Brandeis case had been decided.

3. Mr. Shailesh Shah, learned senior counsel appearing on behalf of the first respondent on the other hand submits that the Arbitral Tribunal as well as the Appellate Bench have rendered finding of fact after considering all the documents and pleadings and which finding being not, perverse, this court shall not interfere with such findings recorded by the Arbitral Forum as well as Appellate Bench. It is submitted that the last transaction carried out by the petitioners was on 26th August, 2008. It is submitted that during the period 2007-2008 petitioners had replaced, the shares though not all the shares which were illegally sold by the petitioners. Last of such shares replaced and transferred to the Demat account of the first respondent was 26th August, 2008. Statement of claim was filed by the respondents on 6th August, 2009 and therefore claims made by the respondent was within time. Mr. Shah, learned senior counsel then submits that during the period between 2005 and 2008, there was correspondence entered into between the parties including respondent no. 2 who was authorised sub-broker of the petitioners by which respondent no. 2 on behalf of the petitioners had

acknowledged the liability and had replaced some of the shares which were illegally sold. It is submitted that the said sub-broker had also made part payment. It is submitted that no action was taken by the petitioners against the sub-broker who was their agent for all purposes. It is submitted that the managerial staff of the petitioners had also from time to time assured and promised the first respondent for payment, replacement of shares, limitation was thus extended. It is submitted that the petitioners through their authorised representatives had visited the office of the first respondent and had made various assurances. Mr. Shah, learned senior counsel invited my attention to various letters addressed by respondent no. 2 admitting his fault and had made part payment. It is submitted that such acknowledgment and part payment made by sub-broker was on behalf of the petitioners and would extend period of limitation and would be binding on the petitioners. It is thus submitted that claims made by the first respondent was not barred by law of limitation.

4. Mr. Shah, learned senior counsel placed reliance upon the judgment of the Supreme Court in case of Lakshmirattan Cotton Mills Co.Ltd. and Behari Lal Ram Charan Vs. The Aluminium Corporation of India Ltd., and in particular paragraphs 21, 22 and 24 which reads thus:-

21. But the argument was that since the letter (Ex. 1) called for confirmation of the amount of Rs. 1,07,447 as being the balance due to the appellant-company and as the appellant company failed to confirm it, the admission of liability was conditional, and therefore, cannot operate as an acknowledgement. In this connection the decision in Maniram v. Rupchand was relied on and in particular the famous dictum of Mellish, L.J., in more River Steamer Company v. Mitchell approvingly cited therein. The dictum was that an acknowledgement to take the case out of the statute of limitation must be either one from which an absolute promise to pay can be inferred, or secondly, an unconditional promise to pay the specific debt, or thirdly, that there must be a conditional promise to pay the debt and evidence that the condition has been performed. The statement relied on in Maniram's case as an acknowledgement was by the respondent in a written statement filed by him in an earlier probate proceeding in which it was averred that the applicant Rupchand Nanabhai (the respondent) "had for the last five years open and current accounts with the deceased (the testator) and that the alleged indebtedness did not affect his right to apply for probate", as one of the executors. It was held that the statement was sufficient to constitute an acknowledgement. "An unconditional acknowledgement", said their Lordships, "has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do There can be no reason for giving a different meaning to an acknowledgement that there is a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant. It is a case of the third proportion of Mellish, L.J., a conditional promise to pay and the condition performed."

We do not see how this decision can support the corporation since in the present case also there was an admission of a subsisting account on the finalisation of which the corporation was prepared to pay the balance found due at the foot thereof. The only dispute was what would be such as balance, Rs. 1,07,447, according to the corporation, and a larger sum according to the appellant-company. The confirmation sought for in the letter (Ex. 1) was not a condition to the admission as to the existence of a subsisting account and the liability to pay when accounts were finalised, but to the specific amount which, according to the corporation, would be the amount payable by it according to its calculation. The decision in *Raja Kavali Arunachella Row Bahadur v. Sri Rajah Rangiah App Row Bahadur*. does not apply as the condition subject to which the settlement there was made was not performed, and therefore, the document was held to be one which could not be spelt out as an acknowledgement. In *Rallapragada Ramamnrthy v. Thammana Gopayya*. also, the letter relied on as an acknowledgement stated that if certain arbitrators should decide that the defendant should pay any amount he would immediately pay but if the arbitrators failed to decide the plaintiff might sue and the defendant in that case would not plead limitation. The arbitrators failed to decide. It was held that the letter being conditional and the condition not having been performed did not operate as an acknowledgement. This decision too has no bearing on the facts of the present case. Unlike the cases relied on by Mr. Sen, the present case is one of an admission of a subsisting account and the jural relationship and the liability to pay whatever amount would be found due on finalisation of accounts. There is no condition subject to which the admission was made which remained unperformed.

22. Ordinarily, the functions of Subramanym as the secretary of the corporation would be ministerial and administrative. As a secretary only, he would have no authority to bind the corporation by entering into contracts or other commitments on its behalf. As the chief accountant and holder of a power of attorney, his functions in regard to the former would be to supervise over maintenance of proper accounts, and in regard to the latter to look after and represent the corporation in litigation. None of these three positions held by him would by itself or cumulatively make him a person duly authorised to make an acknowledgement binding on the corporation. Also, the fact that he carried on correspondence for the corporation would not make him a person authorised to make an acknowledgement binding on the corporation. [see *Uma Shankar v. Gobind Narain*. Put such a description of the functions and duties performed by him would not be complete. If the correspondence together with the statements of accounts enclosed therewith is closely examined it becomes clear that he was authorised to scrutinise the claim made by the appellant-company, the various items for which the appellant-company claimed credit and to reject some, and what is important, to allow the others. That he had such an authority is clear from the fact that in respect of such of the items which he allowed credit was given to the appellant-company and necessary entries to the credit of the

appellant-company were posted in the account maintained by the corporation in its books of account. Thus, in the reconciliation statement (Ex. 43) sent along with the corporation's letter of September 17, 1945. Rs. 98,101 were shown to be the balance due to the appellant-company. The words used in that statement were "balance as per A.C.I. Ltd. Books". These words clearly indicate that there was a subsisting account in the name of the appellant-company in the books of the corporation and that at the foot of that account the sum of Rs. 98,101 was due to it. Ex. 44, another statement of account sent to the appellant-company, stated Rs. 1,00,304-7-7 as being the "Balance as per ledger" as on December 1, 1945. As explained earlier, the increase in the balance from Rs. 98,101 to Rs. 100,304 was due to certain items aggregating Rs. 2,203-4-6 having been passed by Subramanayam, and entries having thereupon been posted in the ledger. Thereafter, further items were passed by him totalling Rs. 465-10-0 which when added raised the balance to Rs. 1,00,760-1-7, as at the end of December 1945. This was the balance "as per our ledger" stated in the statement sent along with the letter (Ex. 1).

24. In his evidence Subramanayam testified that Lakshmipat Singhania, the director-in-charge of the corporation, knew that he was dealing with Arora, the representative of the appellant-company, in the matter of accounts between the parties. He also said that he was to find out the difference between the two and that as a result many points were resolved and he confirmed by letters to the appellant company those points which were so resolved. He then stated that the directors of the corporation were aware of the settlement of the said points by him but they neither ratified nor repudiated them. This was because, as conceded by him, he never placed those settled points before the directors for their ratification. He did not say that he had no authority to settle the differences or that he settled them subject to the approval of the directors. It is clear that he could not have settled the various points of difference between the parties and suitable entries in the books consequent upon such settlement could not have been posted unless he was authorised by the directors to finalise the accounts and make final adjustment with the appellant-company. He tried, of course, to make out that he had no authority except as a secretary to carry on correspondence for clarifying the position of the corporation. He even denied that entries were made in the books of the corporation after he had settled the said items. The denial is futile because the statements of account sent by him to the appellant company from time to time clearly show that such entries were made. The effect of all this evidence is that besides his functions as the secretary-cum-chief accountant, he was authorised to finalise the accounts between the parties, "to settle differences between them and to arrive at the final figure payable by the corporation. It was in pursuance of such authority that he dealt with Arora, passed some of the items for which the (Shelat, J.) appellant-company claimed credit, had those entries posted in the books of the corporation, sent statements of accounts from time to time and finally addressed the letter, (Ex. 1), stating therein that according to the books of the corporation the sum of Rs. 1,07,447

was the balance payable to the appellant-company. He could not possibly have asked the appellant-company to confirm that balance unless he had the authority on behalf of the corporation to acknowledge on its behalf that that was the balance payable by it. Therefore, the conclusion is inescapable that he had the implied authority to make the acknowledgement and wrote the letter (Ex. 1) with the intention of doing so.

5. On the issue raised by the petitioners that all transactions which were reflected in the statement of accounts submitted by the petitioners alongwith the written statement and that the contract notes, ledger accounts and others were furnished to the respondents from time to time, it is submitted by the learned senior counsel that the petitioners did not produce any such contract notes on record. It is submitted that if according to the petitioners, nothing was due and payable, petitioners ought to have raised such specific plea in the written statement or ought to have made a counter claim for such declaration. It is submitted that neither any such plea was raised by the petitioners in the written statement nor was it argued before the Arbitral Forum. It is submitted that thus there was no issue raised before the Arbitral Tribunal that the petitioners were not liable to make any payment and the first respondent was thus not required to file any rejoinder to such vague plea raised by the petitioners. It is submitted that without admitting the transactions reflected in the statement of accounts submitted alongwith written statement, the said statement would indicate that the claim was not barred by law of limitation in view of the fact that the statement of claim was filed within three years from the date of last transaction as per said statement. Learned senior counsel however fairly conceded that Appellate Bench of the Arbitral Tribunal has erroneously considered debit of Rs. 1,94,556.18 to the accounts of the respondent no. 2 and credit of the said sum in the accounts of the 1st respondent as on 19th June, 2008 instead of 19th June, 2005.

6. Mr. Shah, learned senior counsel then submits that the petitioners were to prove that transaction carried out by respondent no. 2 was without authority of the petitioners which the petitioners failed to prove.

7. Mr. Shah, learned senior counsel submits that the date of valuation considered by the first respondent in the statement of claim of 2009 is in order. The petitioners did not replace the shares. The petitioners continued to be in breach of their obligations to replace the shares. Cause of action for replacement of shares continued till date of filing statement of claim. It is submitted that judgment of Privy Council relied upon by the petitioners is not applicable to the facts of this case. The first respondent was therefore entitled to claim the value of shares of 2009. It is submitted that there was no infirmity of any nature whatsoever in considering the value of the shares of the year 2009 by the first respondent and in the award allowing claims on such basis.

8. On the issue of collusion raised by the petitioners between 1st and 2nd respondent, Mr. Shah submits that though the award was rendered against the

petitioners as well respondent no. 2, merely because respondent no. 1 did not apply for execution of decree against respondent no. 2 would not indicate any collusion between the parties. It is submitted that respondent no. 2 continued to be sub-broker of the petitioners all throughout and thus for his action, the petitioners were personally liable. It is submitted that there is no evidence of collusion produced and/or proved by the petitioners before the Arbitral Tribunal.

9. In rejoinder Mr. Rambhadran, learned counsel submits that in the written statement as well as in the written arguments, petitioners had disputed its liability and had specifically denied the claims. The Arbitral Tribunal however did not render any findings on these averments of the petitioners in the entire award. Even Appellate Bench of the Stock Exchange did not consider submissions advanced by the petitioners on this issue. It is submitted that inspite of opportunity given to the first respondent to file rejoinder, these averments made in the written statement by the petitioners remained to be un-controverted. It is submitted that first respondent himself had filed copies of contract notes before the Arbitral Tribunal which would indicate that all contract notes in respect of various transactions carried out and which were reflected in the statement of account submitted by the petitioners were carried out and documents were received by the respondents but not disputed by him. Learned counsel also invited my attention to the grounds raised by the petitioners in this petition in support of his plea that the Arbitral Tribunal as well as Appellate Bench did not consider this crucial aspect in the award and the order respectively and has allowed the claim of the respondents without considering the material and crucial documents and pleadings which shows perversity in the impugned award.

10. I have considered the rival submissions made by the learned counsel appearing for both parties and have given my anxious consideration to the submissions made by the learned counsel and also have perused the record. Questions that arise for consideration of this court in this proceedings are:-

- (1) Whether claims made by the 1st respondent were barred by law of limitation
- (2) Whether Arbitral Tribunal as well as Appellate Bench have rejected the plea of limitation raised by the petitioners without considering the correspondence exchanged between the parties and without assigning any reasons, without dealing with all the submissions made by the petitioners.
- (3) Whether award made by the Arbitral Tribunal and the order passed by the Appellate Bench is vitiated on the ground that the statement of accounts submitted by the petitioners alongwith the written statement and the submissions made thereon were not considered in the impugned award of the Arbitral Tribunal and the order passed by the Appellate Bench.
- (4) Whether alleged acknowledgment of liability and/or part payment if any made by the sub-broker would be binding on the broker and would extend period of limitation.

(5) Whether 1st respondent could have claimed the valuation of the shares of the year 2009 or could have made claims only on the basis of valuation on the date when the alleged breach committed by the petitioners and/or their sub-brokers.

11. As far as issue of limitation raised by the petitioners is concerned, on perusal of the record, it is clear that the Arbitral Tribunal has rejected the plea of limitation on the ground that the last transaction on the floor of exchange was 26th August, 2008. Arbitral Tribunal has also held that the sub-broker as well as petitioners had alleged to be have admitted to having sold the shares when they should not have sold the shares. It is held that on 27th April, 2005 itself and thereafter from time to time, sub-broker had admitted his liability as per record and tried to make good the loss to continue to be SEBI registered, sub-broker of the petitioners herein and the petitioners were still holding interest deposit of the sub-broker which had not been denied by the petitioners at any stage. Arbitral Tribunal held that the petitioners were equally, jointly and severally responsible to make good the loss suffered by the 1st respondent. Appellant Bench of the Stock Exchange in the impugned order has rejected the plea of limitation on the ground that lower Arbitral Tribunal had appropriately considered the relevant facts and the documents. It is held that on 19th June, 2008 an amount of Rs. 1,94,556.18 was debited from the brokerage payable to the sub-broker and credited to the account of the 1st respondent and also considered the last transaction on the floor of the exchange on 26th August, 2008.

12. In my view, Arbitral Tribunal as well as Appellate Bench proceeded on erroneous premise that the last transaction was carried out was on 26th August, 2008 which was in respect of shares of the ABB Ltd. On perusal of the record, it is clear that there was no claim in respect of shares of ABB Ltd. in the present proceedings by the 1st respondent at all. The Arbitral Tribunal has mixed up the facts of this arbitration with the facts in arbitration between same parties between National Stock Exchange Limited. Similarly an amount of 1,94,556.18 which was alleged to have been debited to the accounts of the sub-broker and credited to the accounts of the 1st respondent considered by the Appellate Bench is concerned, it is clear that the date of such credit considered by the Appellate Bench was factually incorrect. The Appellate Bench proceeded on the premise that the amount was credited to the account of the 1st respondent on 19th June, 2008 and thus reference filed by the 1st respondent on 6th August, 2009 was not barred by law of limitation. Mr. Shah, learned senior counsel appearing on behalf of the 1st respondent fairly conceded that the said amount was credited to the account of the 1st respondent was on 19th June, 2005 and not 19th June, 2008 as erroneously considered by the Appellate Bench. Perusal of the record also indicates that Arbitral Tribunal did not consider the correspondence addressed by the sub-broker to the 1st respondent which would clearly indicate that the sub-broker had admitted his personal liability and fault in carrying out transactions on his own and had agreed to make payment in installments personally to the 1st respondent and to replace the shares sold by him without instructions of the 1st respondent. None of those correspondence were forwarded

to the petitioner. In my view, question of limitation being a mixed question of fact and law, correspondence relied upon by both parties in support of their rival contentions ought to have considered by the Arbitral Tribunal. Award is thus vitiated by not considering these material and crucial documents. The Arbitral Tribunal has not decided in accordance with the submissions made and documents produced by the parties and the award on this ground itself is vitiated.

13. In my view, this is not a case for re-appreciation of evidence produced before the Arbitral Tribunal. Record produced by parties would indicate that the Arbitral Tribunal has not considered any of these submissions and documents produced by the parties while rejecting the plea of limitation raised by the petitioners.

14. While rejecting the plea of limitation, without assigning any reason, Arbitral Tribunal has held that the liability was admitted by the sub-broker. Onus was on the 1st respondent to prove that the alleged acknowledgment of liability by the sub-broker was authorized by the petitioners, which the respondent no. 1 failed to prove. Acknowledgment of liability cannot be made under an alleged implied authority given to the agent on behalf of the principal. The award in my view discloses total non-application of the mind on the part of the Arbitral Tribunal. The arbitral award having been merged with the order passed by the Appellate Bench, even Appellate Bench did not consider the said aspect independently and did not render any reason as to how the sub-broker could acknowledge any liability on behalf of the broker in absence of any authority given by the broker in favour of the sub-broker. In my view order thus passed by the Appellate Bench is also totally vitiated on this ground also.

15. On perusal of the written statement and the statement of account produced by the petitioners for consideration of the Arbitral Tribunal, it is clear that it was case of the petitioners that all such transactions including some of the transactions admitted by the 1st respondent were carried out on behalf of the 1st respondent with consent and authority of the 1st respondent. It was case of the petitioners that all such contract notes, copy of ledger accounts and other documents were sent to the 1st respondent from time to time which would reflect the transaction carried out from time to time in respect of which no objection of any nature whatsoever was raised by the 1st respondent at any point of time. 1st respondent himself has relied upon all such contract notes on record of the Arbitral Tribunal. It was case of the petitioners that if all such transactions which were reflected in the statement of accounts would have been considered by the Arbitral Tribunal, no amount was due and payable by the petitioners to the 1st respondent. On perusal of record, it is clear that though the Arbitral Tribunal had given an opportunity to the 1st respondent to file rejoinder to the written statement in which such plea was raised and statement of account was annexed, no rejoinder was filed by the 1st respondent controverting these averments and the statement of accounts. I am not inclined to accept the submissions made by Mr. Shah, learned senior counsel appearing for 1st respondent that since there was no counter claim filed by the petitioners or since

there was no specific plea that nothing was due and payable by the petitioners to the 1st respondent and merely because rejoinder was not filed by the 1st respondent, it would not amount to admission of such plea raised by the petitioners. In my view, Mr. Shah is not correct in his submission that Arbitral Tribunal rightly did not frame any such issues on the basis of statement of accounts submitted by the petitioner whether any amount was due and payable by the petitioner to the 1st respondent. In my view, arbitral tribunal could not have permitted the first respondent to accept few transactions out of several transactions reflected in such statement of account and to reject the remaining transactions. On perusal of the arbitral award, it is clear that no such issues raised by the petitioners has been dealt with at all in the entire award and though the petitioners has raised these grounds in the appeal memo before the Appellate Bench, even Appellate Bench did not consider any of such submission which would go the root of the matter. The entire award is thus vitiated on this ground and the order upholding such award by the Appellate Bench without considering these arguments is also vitiated and deserves to be set aside.

16. As far as valuation of the shares considered by the 1st respondent as of 2009 is concerned, it was the case of the 1st respondent himself that after 2004-05 1st respondent had not carried out any transactions with the petitioners. It was case of the 1st respondent that the petitioner had illegally sold shares which were in the demat account of the 1st respondent without authority and consent of the 1st respondent in the year 2004-05. In my view, such damages claimed by the 1st respondent if any could have been claimed on the basis of damages alleged to have been suffered on the date of alleged breach and not on the date of filing statement of claim in the arbitration proceedings. I am not inclined to accept the submissions made by Mr. Shah, learned senior counsel that the liability of the petitioners to replace the shares continued till the date of filing statement of claim and that the valuation of such shares could be considered on the date of filing statement of claim. Arbitral Tribunal as well as Appellate Bench did not consider this crucial aspect in the impugned award as well as impugned order respectively. This shows total non-application of mind on the part of the Tribunal as well as Appellate Bench.

17. As far as judgment in case of Lakshmirattan Cotton Mills Company Limited (supra) relied upon by Mr. Shah, learned senior counsel appearing on behalf of the 1st respondent is concerned, it has been held by the Supreme Court that unless agent has authority on behalf of the principal to acknowledge on its behalf the liability, it is not binding on the principal. Agent has no implied authority to make acknowledgment of liability on behalf of the principal unless there is specific authority to acknowledge such liability is issued by the principal. Even otherwise on perusal of the correspondence addressed by the sub-broker to the 1st respondent copies whereof had not been forwarded to the petitioners, it makes it absolutely clear that the same were addressed by the sub-broker in his personal capacity and as a matter of fact, such sub-broker had made part payment and had replaced some shares at his own cost and not on behalf of the

petitioners considering his personal liability and fault on his part. No such letters could be considered as acknowledgment of liability on behalf of the petitioners broker.

18. In my view, Mr. Rambhadran, learned counsel appearing on behalf of the petitioners is right in his submission that there is no proposition that court could be slow to interfere with the arbitration award even if the conclusions are perverse and even if the basis of arbitral award is wrong. In my view, the impugned award as well as order passed by the Appellate Bench demonstrates complete perversity. Order passed by the Appellate Bench proceeds on erroneous premise that the account of the 1st respondent was credited in the year 2008 though the said alleged entry was in the year 2005. Both the Tribunal had proceeded on the erroneous premise that the last transaction was in the year 2008 which transaction was not even in respect of the shares in respect of which claims were made by the 1st respondent in the arbitration proceeding. Arbitration petition accordingly succeeds. Impugned award/order dated 13th January, 2012 passed by the Appellate Bench of the Bombay Stock Exchange Limited is set aside.

Appeal filed by the petitioners before the Appellate Bench is allowed.

Award made by the Arbitral Tribunal on 27th January, 2010 is set aside.

Arbitration Petition is disposed of in the aforesaid terms. There shall be no order as to costs.