
(2019) 11 DEL CK 0437

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 169 Of 2016

Motilal Oswal Securities Ltd.

APPELLANT

Vs

Rakshak Kapoor & Anr

RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Limitation Act, 1963 — Article 1
Limitation Act, 1908 — Article 85
Arbitration & Conciliation Act, 1996 — Section 34
Jammu and Kashmir Limitation Act, 1938 — Article 115

Citation : (2020) 1 ArbLR 123

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Pradeep Dewan, Sunil Goyal, Anupama Dhingra, Deepak, Sanjeev Anand, Suresh Khadav, Varun K.Bala, Anuj Aggarwal

Judgement

Navin Chawla, J

1. This petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") has been filed by the petitioner challenging the Appellate Arbitral Award dated 03.02.2015 passed by the Panel of Appellate Arbitral Tribunal at the National Stock Exchange of India Ltd. (hereinafter referred to as the "NSE") under the Byelaws, Rules and Regulations of the NSE.
2. The brief facts of the case are that the petitioner is a stock-broker and a member of the NSE and had engaged respondent no.2 as its Sub-Broker, executing Broker-Sub Broker Agreement dated 06.10.2005.
3. On the other hand, respondent no. 1 is an individual investor registered as a client with the petitioner.
4. Upon completion of various formalities, a Member- Client Agreement (MCA) was executed between the petitioner and the respondent no.1 on 14.10.2005 whereby a Dematerialization (Demat) account was opened to give effect to the

transactions for sale and purchase of the shares. Consequently, respondent no.1 started placing orders for sale and purchase of shares at NSE Cash and Future and Options (F&O) segments with the petitioner. The said transactions were executed by the respondent no.2 in the name of the respondent no.1. The petitioner charged brokerage from the respondent no.1 and the share of respondent no.2's sub- brokerage was credited to its account. Regular trading took place between the parties from June, 2006 onwards.

5. The alleged existence of Rs.78,95,958.42 as a debit balance of the respondent no.1 in the ledger account of the petitioner has been the genesis of dispute between the parties.

6. On account of non-payment of the said outstanding amount, the petitioner issued a demand notice to the respondent no.1 and upon failure of the respondent no.1 to pay the same, the petitioner made its first arbitration reference on 16.08.2012 only against the respondent no. 1. The same was withdrawn on 23.11.2012, with liberty to the petitioner to file a fresh claim also impleading respondent no.2 as a party.

7. The petitioner filed its claim afresh on 30.11.2012, which has resulted in the Impugned Appellate Award.

8. An Award dated 30.12.2013 was passed by the panel of arbitrators constituted under the Regulations -Part A (Capital Market Segment) of the NSE in favor of the petitioner and against the respondents no. 1. In the said Award, the Arbitral Tribunal, on the basis of various receipts of the transactions sent by the petitioner to the respondent no.1, came to the conclusion that the last transaction in the account of the respondent no.1 maintained by the petitioner was dated 21.08.2009, and by declaring that the account between the parties was a running (current) trading account, it applied Article 1 of the Schedule of the Limitation Act, 1963 (hereinafter referred to as the "Act") and awarded a sum of Rs.78,95,958.42 along with the interest at the rate of 10% per annum payable by the respondent no.1 to the petitioner from the date of the receipt of reference, that is, 28.12.2012.

9. The Arbitral Tribunal held that the account maintained by the petitioner was a running, mutual and open account wherein reciprocal demands were arising between the parties. It examined the Statement of Accounts and observed that whenever money was paid by respondent no.1, it went to the credit of the account and whatever pay-out was taken by him was entered in the debit. Therefore, the debit and credit balances went on increasing and decreasing with pay-in and pay-out which led to shifting of balances. It held :

"31. There is no dispute between the parties that a running (current) trading account of the respondent No. 1 was being maintained in the account of the applicant. Running / current account would mean 'mutual account' where reciprocal demands between the parties have been made and the demand remained open and unsettled. It has not been disputed on behalf of the

respondent No. 1 that Article 1 of Schedule of Limitation Act would apply to the present proceedings. The question arises as to what is the date of the last transaction entered into the account. The respondent No. 1 has referred to an allegation made in the statement of case submitted in the first arbitration application filed on 21.8.2012 wherein the applicant has alleged that the last date of transaction in F&O Segment was 6.11.2008. The respondent No. 1 has not denied that the shares were sold and entry of sale proceeds in his account was made by the applicant on 21.8.2009. The last transaction was carried out in cash segment. Therefore, the allegations of the applicant in the statement of case dated 21.8.2012, in no way, determine the date of the last transaction in the account of the respondent No. 1 maintained by the applicant. The transaction pertaining to the F&O segment and cash segment, both were entered into the ledger accounts of the respondent No. 1. Even if two separate accounts were maintained, one for transaction in F&O segment and the other for transaction in cash / capital segment, the accounts shall always be treated as one and the suit for recovery could be filed only in respect of the outstanding consolidated net balance after both accounts were settled. Here, it has been alleged by the applicant that after the transaction in the cash segment on 21.8.2009 the outstanding balance in the account was reduced from Rs. 1,04,30,889.96 to Rs. 78,95,958.42 for which the claim was preferred in the arbitration application. Therefore, the starting point of limitation could not be calculated from the date on which the entry relating to transaction in F&O segment was made on 6.11.2008. The last entry in the account pertains to the transaction done in cash segment in the account of the respondent No. 1 on 21.8.2009.

32. Though, it has not been disputed that Article 1 of Schedule of the Limitation Act would be applicable in the present case. It is also not disputed by the respondent No. 1 that his account maintained by the applicant was a running mutual and open account. Further, it can also be not denied that there had been reciprocal demand between the parties arising in this account. Whatever money was paid by respondent No.1 went to the credit of the account and whatever pay-out was taken by him was entered in the debit. The debit and credit went on increasing and decreasing with pay-in and pay-out and also each and every transaction in the cash market and also in the F&O segment of the market. The MTM were also increasing and decreasing the balance due. If there was credit balance in the account for whatever reason including sale of shares or the rise and fall of the market it put an obligation on the applicant - Trading Member to make payment of the amount lying in credit to the Respondent - Constituent, unless the agreement between the parties required otherwise. Similarly, there was short-fall in the margin or the respondent No.1 had to discharge the financial obligations including purchase of shares etc. it was the liability of the constituent to replenish the margin and the funds in the account to continue trading. Therefore, the account of the respondent No.1 was not only mutual, open and current but it also created reciprocal demands between the parties from time to time. Article 1 of Schedule of the Limitation Act, therefore, squarely applies on

this account. It has not been disputed by respondent No.1 that the last payment made in the account is relating to the sale of his shares and after this entry, the outstanding due which was left after the last transaction in F&O Segment on 6.11.2008, was reduced to the amount of Rs.78,95,958.42, which is the amount of the claim preferred in these proceedings. Therefore, firstly the entries in cash segment and F&O segment cannot be treated separately for the purpose of calculating the period of limitation of three years; and secondly the period of three years prescribed in Article 1 of Schedule of the Limitation Act would be reckoned on the close of the year in which last entry about the transaction has been admitted or proved. If it is so, the last entry relating to the transaction in cash segment was entered in the account on 21.8.2009 and the financial year, during which this entry was made, came to close on 31.3.2010, so the period of limitation would be computed from that date. The limitation period will not start running from 6.11.2008. As per Article I of Schedule of Limitation Act applicable to the accounts in this case, the period will start running from 1.4.2010. The first arbitration application was filed on 16th August, 2012. The present arbitration claim petition has also been filed on 30th November, 2012 after taking leave to withdraw the earlier proceedings. The date of filing of the present arbitration proceedings will be 16th August, 2012. Even if it is considered to be 30th November, 2012 the period of limitation of three years will be computed from 1.4.2010 so the filing of the present case is well within time.

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36. The case law relied upon and cited on behalf of respondent No, 1 cannot be applied to the facts of the present case. As observed above, the applicant was maintaining a running open and mutual account with reciprocal demand of the parties in the present case. The debit and credit balance in the account went up and went down on each trade executed by the respondent on rise and fall of the market and correspondently the obligation of the respondent No. 1- Constituent to replenish the funds and discharge financial obligations in the account to continue trading and the obligation on the trading member - applicant whenever there were credit balance and the Constituent wanted a pay-out. It was a current / running account in which funds were being deposited and taken out by the respondent No.1 as both the parties had the obligation to discharge their obligation of paying or pay-out from time to time with the balance in the debit or the credit. In fact, no serious dispute has been raised on behalf of the respondent No.1 about this fact. Even the respondent No.2 has not denied that it was a current open and mutual account of the respondent No. 1 maintained by the applicant and that there were reciprocal demands between the parties, so Article 1 of the Schedule of the Limitation Act, 1963 is applicable in this case.

37. It has already been observed that the last transaction in the account is dated 21.8.2009 when the shares of the respondent No.1 were sold by the applicant and the amount of the sale proceeds was entered as credit in the account which reduced the debit balance or outstanding against the respondent No. 1. There

was outstanding balance of Rs. 1,04,30,889.96 in the account of the trading in F&O segment of the market. The sale proceeds of the share amounting to Rs.30,24,726.64 was credited into the account of the trading in capital/share market. The two accounts have to be consolidated to ascertain the net obligation of the respondents to pay or its right to receive the credit balance from the trading member. Therefore, this entry of the sale of shares cannot be ignored because it is also in the same trading account which had been opened by the applicant for trading through the applicant at the platform of the Exchange. There may be one trading account for F&O trades and another account for entries of cash trade, yet the balance in the combined ledger will determine the liability of the parties in these arbitration proceedings.

38. Here, it may be note worthy that another contention of respondent No.1 is that after the last transaction in F&O segment on 5.11.2008 he stopped trading and thereafter there had been settlement between him and the applicant wherein it was decided that the applicant would sell the shares of the respondent No.1 and appropriate the sale proceeds against its dues from the respondent and nothing more will be payable by the respondent No. 1. This settlement had not been reduced into writing. Assuming for the sake of arguments that the sale of the shares of respondent No. 1 on 21.8.2009 was in pursuance to the said settlement, still it remains to a transaction carried out in the trading account of the applicant and has to be counted for computing the limitation in accordance with Article I of the Schedule of Limitation Act. Anyhow, the respondent No. 1 had never raised the question of settlement before he made allegation about it in the statement of defence. The applicant has alleged and has also proved by filing the Log report that quarterly statement of account was being sent to the applicant even after 21.8.2009 and inspite of error reporting clause in them, the respondent No. 1 had never raised any objection to the showing of the debit balance in his account. The respondent No. 1 never wrote to the applicant that his account stood settled with the sale proceeds of the shares on 21.8.2009. Besides, the applicant served notice of demand dated 30.9.2009 but the respondent did not send any reply and also did not allege that the accounts between him and the applicant stood settled with the sale proceeds of the share appropriated to square the debit balance. It may also be pertinent to note that the respondent No.1 never brought it to the notice of respondent No.2, through which it was trading, that its accounts have been settled under an agreement between him and the applicant. The debit, which was occurring in the account of the respondent No.1, was deposited by the applicant in the account of the respondent No.2 on 21.1.2009. The respondent No.2 also never raised any objection to the applicant for any reason that the account of the respondent No.1 had already been settled. In fact, the son and the representative of the respondent No.2, who was dealing with the account of respondent No.2 and its client, had advised the applicant to write strong worded letter to the respondent No. 1 to clear the outstanding debit balance. There was no occasion if the account of the respondent. No. 1 had been settled. The respondent No.2 by

Email dated 4.10.2010 had asked the applicant to send upto date ledger of respondent No.1 along with six months" interest. The applicant also sent letter dated 31.3.2011 to the respondent No.1 demanding payment of Rs. 1,38,15,407.14. The contract notes of the sale of the share on 21.8.2009 were also duly delivered to the respondent No.1. All these facts amply prove that the allegations of the respondent No: 1 that there had been agreement under which the debit in his account were settled by the sale proceeds of the shares in his account is without any merit. Conversely, the contention of the applicant is that those shares were sold on the instructions of the respondent No. 2 to reduce the debit balance in the account. It is plausible and believable explanation. The respondent No, 1 did not raise any objection to the contract note of the sale of the transaction of sale of shares. He also did not raise any objection to the quarterly statement of account which was sent on 30.9.2009 to 30.9.2010. He also did not dare to dispute the demand for payment of outstanding dues in the notice. From all these facts, it may be held that the shares were sold on the instructions of the respondent No.1.

39. Accordingly, it is held that the last transaction in the account of the respondent No.1 maintained by the applicant is dated 21.8.2009. Applying Article 1 of the Schedule of the Limitation Act, 1963 the limitation time shall begin to run from the close of the financial year 2009-10, i.e., from 31.3.2010. The first arbitration proceedings was filed by the applicant on 16.8.2012 which was later on withdrawn with liberty from the arbitral tribunal to file a fresh arbitration case in which the respondent No. 2 was also impleaded and was filed on 30th November, 2012. Accordingly, the arbitration proceedings whether they are taken to have been filed in August, 2012 or November, 2012 they are well within the period of three years from 31.3.2010. The contention of the respondents to the contrary is rejected."

10. Aggrieved by the said decision of the Arbitral Tribunal, the respondents filed an appeal to the Appellate Arbitral Tribunal of the NSE.

11. By the Impugned Appellate Award dated 03.02.2015, the Appellate Arbitral Tribunal has set aside the decision of the Arbitral Tribunal, holding the claims of the petitioner to be barred by time and outside the scope of Article 1 of the Schedule of the Act. The Appellate Tribunal, inter alia, held that the relationship between the petitioner and the respondent no.1 was in the nature of Principal and Agent and the set of transactions executed by the petitioner created an obligation on respondent no.1 and that the petitioner acted as an agent of the respondent no.1 but not vice-versa and therefore, since there were no independent obligations on each other, the account of the petitioner with the respondent no.1 was open and current but not a mutual account.

12. Aggrieved by the above decision of the Appellate Arbitral Tribunal, the petitioner has filed the present petition wherein it claims that the last transaction between the parties took place on 21.08.2009, whereas the respondent no.1 claims that no transaction took place after 06.11.2008. The parties also differ on

the applicability of Article 1 of the Schedule of the Act to the transaction in question. Therefore, the primary controversy that is involved in the present case is with respect to the applicability of Article 1 of the Schedule of the Act and if it is applicable, the date of commencement of the period of limitation.

13. Article 1 of the Schedule of the Act prescribes the period of limitation in respect of balance due on a Mutual, Open and Current Account where there have been reciprocal demands between the parties. The period of limitation prescribed under this Article is three years from the close of the year in which the last item admitted or proved is entered in the account. Such "year" is to be computed as in the account. In other words, if the statement of account between the parties is to be regarded as a Mutual, Open and Current Account, then the period of limitation of three years would begin from the close of the year in which the last item admitted or proved is entered in the account.

14. It is the case of the petitioner that for every transaction an Electronic Contract Note (ECN) was sent to the respondent no.1, including for the transaction-dated 21.08.2009. The learned senior counsel for the petitioner, relying on Clause 13 of the MCA, submits that the respondent no.1 had agreed to receive the ECNs. Clause 13 of the MCA is reproduced herein below:

"The Stock Broker shall send electronic contract notes, bills, ledgers, transaction statement, reports, letters, circulars, notices etc. to the Client for the trades / transactions done on the Exchange to the email ID of the Client'."

15. The learned senior counsel for the petitioner submits that Quarterly ledger statement under Cash and F&O segment were also sent to the respondent no. 1 throughout the period of the transaction and also between 23.09.2008 to 12.01.2011 along with the Demat Transaction Statement and other reports, to which no objection was raised nor any discrepancy pointed out by the respondent no.1. For this purpose, the learned senior counsel for the petitioner places reliance on the documents pertaining to the proof of delivery of quarterly reports and ledgers sent by emails to the respondent no.1 between the said period. He contends that the data contained therein could not have been fabricated by the broker as the same was prepared from the Trade File provided by the NSE. It further states that the amount outstanding against respondent no.1 as on 21.08.2009 was reduced by a sum of Rs.30,24,726.64 on account of sale of shares of three companies executed by the respondent no.1 through the petitioner, to which also respondent no.1 did not raise any objection. After selling the securities, a consolidated debit in the cash and F&O segment of Rs. 78,95,958.42 became due and payable by the respondent no.1 as a principal amount. He submits that, therefore, the said claim of the petitioner is valid, as the respondent no.1 never denied the receipt of the ECN and the quarterly ledgers that were sent on his email ID.

16. The learned senior counsel for the petitioner further submits that the Respondent no.2, being a sub-broker and having undertaken to indemnify the

petitioner for any outstanding amount against the respondent no.1, is jointly and severally liable to pay for the liability of the respondent no.1 under the Broker Sub-Broker Agreement.

17. On the issue of limitation, the learned senior counsel for the petitioner submits that as each of the transactions, which took place between the parties, were independent in nature, the account of the respondent no.1 was a mutual, open and current account that created reciprocal demands between the parties. He submits that the last entry dated 21.08.2009 would be relevant for determining the end of the financial year for the purpose of start of limitation. The financial year ended on 01.04.2010 and the fresh arbitration petition was filed on 30.11.2012, hence the present claim of the petitioner is within the period of limitation. He places reliance on the judgment of Supreme Court in *Kesharichand Jaisukhal vs. Shillong Banking Corpn.*, AIR 1965 SC 1711.

18. Lastly, the learned senior counsel for the petitioner contends that merely because it is alleged that no transaction took place after 06.11.2008, it would not change the nature of a current, open and mutual account. Reliance is placed on *Tripura State Bank Lt. Vs. Jagneswar Laskar* (AIR 1960 Tripura 16) and *Official Liquidator Bank of Rajasthan Ltd. vs. Indraj Mistri* (AIR 1960 Tripura 12).

19. The learned counsel for the respondent no. 1, on the other hand, submits that Article 1 of the Schedule of the Act cannot apply to present case, as the account maintained by the petitioner of respondent no.1 was not mutual. He submits that for the account to be mutual, it is necessary that there must be independent transactions on each side creating independent obligations, which is not the case here, and mere transactions which create obligations on the one side and those on the other being merely incomplete or partial discharge of such obligations, will not be mutual. Reliance is placed on :

(i) 1960(1) SCR 563 *The Hindustan Forest Company V s. Lal Chand & Ors.*

(ii) AIR 1965 SC 1711 *Kesharichand Jaisukhal Vs. Shillong Banking Corpn.*

(iii) 2012 III AD (Delhi) 796 *Bharath Skins Corporation Vs. Taneja Skins Co. Pvt. Ltd.*

(iv) 2001 III AD (Delhi) 493 *Manish Garg Vs. M/s. East India Udyog Ltd.*

(v) 2008 (I) Arb LR 205 (Delhi) *Era Constructions (India) Ltd. Vs. D.K. Sharma, Prop, Keshav Security Services (Regd.)*

(vi) AIR 2004 Punjab & Haryana 56, *M/s. Today Stationers and Gift Centres & Ors. Vs. Allahabad Bank.*

20. The learned counsel for the respondent no.1 submits that the respondent no.1 had denied execution of any transaction through the petitioner on 21.08.2009 or having placed an order for sale of shares on 21.08.2009 as claimed by the petitioner or that having received an ECN for the said purported transaction dated 21.08.2009 and/or accepting the same. According to him, the

last transaction by the petitioner took place on 06.11.2008 under F&O Segment and when the respondent no.1 disputed the various transactions executed and various debits made in the respondent no.1's account, a settlement was arrived between the parties and the account of respondent no.1 stood closed.

21. The learned counsel for the respondent no. 1 has raised an objection on the authenticity of the ECNs because the ECNs sent by the petitioner were not digitally signed. He submits that in terms of the SEBI Regulations, only digitally signed ECNs can be sent to the client. He relies on the Circular No.MRD/SC/Cir-11/2004 dated 25.02.2004 MRD/DoP/SE/Cir-20/2005 issued by the SEBI and submits that it mandatorily required that ECN could be sent only to those clients who had opted to receive the same in an electronic form and if ECN is sent through the e-mail, the same shall be digitally signed. He submits that the petitioner has, therefore, failed to prove the validity of the transaction.

22. The learned counsel for the respondents submits that as the last transaction that took place between the parties was on 06.11.2008, the claim filed by the petitioner was beyond the period of limitation, even assuming Article 1 of the Schedule of the Act to be applicable to the present case.

23. It was lastly argued by the learned counsel for the respondent no.1 that in any case, as the alleged transaction of 21.08.2009 was neither admitted nor it has been proved by the petitioner, it cannot be considered as the last entry in the account for the purposes of computing limitation.

24. I have considered the submissions made by the learned counsels for the parties.

25. The Appellate Arbitral Tribunal has held that there was no documentary evidence on record to show that the respondent no.1 had placed the transactions through respondent no.2. As far as the execution of transaction dated 21.08.2009 is concerned, it has held that there was no documentary evidence showing that the respondent no. 1 opted for the ECN as per the bye-laws and SEBI Guidelines. It has held that as the Contract Notes/bills/statement of accounts pertaining to the transactions were not signed or admitted by the respondent no.1 and in fact were refuted, there was no evidence led by the petitioner herein in support of its claim.

26. Learned senior counsel for the petitioner has drawn my reference to the Statement of Defence filed by the respondent no.1 before the Arbitral Tribunal. He submits that in the Statement of Defence there was only a vague denial of the claim of the petitioner with regard to the transactions. I would reproduce the averments made by the respondent no.1 in its Statement of Defence as the same are relevant to adjudicate on the above referred finding of the Appellate Arbitral Tribunal:

"2. At the time of the last transaction in November, 2008, the respondent no.1 disputed the various transactions the applicant and respondent no.2 had entered

into in his name without his knowledge and consent and also disputed the various debits made of penalty etc. at which stage respondent no.1 decided not to henceforth do any further trading and informed the applicant of the same and it was agreed between the applicant and the respondent no.1 that the respondent no.1's account stands closed and the applicant shall immediately encash the shares it was holding by way of security and appropriate the sale proceeds thereof against its dues in full and final settlement of all the claims the applicant may have against the answering respondent and no further amount will be payable by the respondent no.1 to the applicant. xxx

7. In reply to para 7 of the statement of case, it is submitted that the answering respondent had/has no knowledge of the trade and it is only the respondent no.2 who was executing the transaction in the name of the respondent no.1, however without the involvement and knowledge and consent of the respondent no.1. It is denied that the respondent no.2 or the applicant confirmed the transactions to the respondent no.1:

8. In reply to para 8 of the statement of case, it is denied that the respondent no.1 had admitted the transactions mentioned in the contract notes sent to him by the applicant. The answering respondent disputes the statement of account and the various entries made therein by the applicant of the transactions allegedly executed in the name of the answering respondent and sent to him as claimed by the applicant.

9. The contents of para 9 of the statement of case are denied. It is denied that the applicant sent quarterly statements of account to the respondent no. 1 from time to time or that the respondent no.1 has never raised any objection about the entries shown in the purported ledger accounts claimed to have been maintained by the applicant. Most of the entries in the said ledger accounts are unauthorized and disputed by the answering respondent."

27. A reading of the above averment would clearly show that the denial of the respondent no.1 to the various transactions as claimed by the petitioner, was completely vague.

28. Over and above this, the learned senior counsel for the petitioner has drawn my attention to the Ledger Account that had been sent by the petitioner to the respondent no.1 during the relevant period. He claims it was not proved by the respondent no. 1, through any document, that there was any dispute raised with respect to the transactions recorded in the said Ledger Account.

29. In this regard, reference also has to be made to the following Clause in the MCA dated 14.10.2005 executed between the petitioner and the respondent no.1:

? "The Stock broker and the Client hereby agree that this procedure for sending the contract notes, bills, ledgers, transaction statements, reports, letters, circulars, notices, statement of account for funds/securities etc. by post (ordinary or registered or speed or UCP), courier, hand delivery to the Client is applicable

only if so demanded by the Client in writing to the Stock broker. Otherwise, the Client hereby agrees to receive the contract notes, bills, ledgers, transaction statements, reports, letters, circulars, notices / statement of account for funds/securities. etc. in electronic form through email ID provided by the Client to the Stock broker.

? Clause 17 - The stock broker and the client agree to reconcile their accounts at the end of each quarter with reference to all the settlements where payouts have been declared during the quarter.

? It is hereby agreed between the client and the stock broker that the ledger statements in respect of transactions entered into on the cash segments of the Exchange will combined for the purpose of convenience of the stock broker and the client and the payments received and paid by the stock broker will be appropriated on a First-in-first-out basis. The client agrees to upload his accounts statements, cash and derivatives both from stock broker"s website www.motilaloswal.com. on a weekly as well as monthly basis. Any discrepancy in the Account Statement shall be brought to the notice of Stock broker by the client in writing within seven (7) days from the end of the month, failing which the Account Statement appearing in the books of the Stock broker shall be deemed to be correct and accepted by the client."

(Emphasis Supplied)

30. A reading of the above clause leaves no doubt that the respondent no. 1 had agreed to receive the Contract Notes, ledger etc. in electronic form through e-mail. The Appellate Arbitral Tribunal has lost sight of the said Clause. It was for the respondent no. 1 to have contemporaneously challenged the transactions mentioned in such Contract Notes and Ledgers.

31. Faced with the above position, the learned counsel for the respondent no.1 contended that even though the ECNs were received by the respondent no.1, they had not been digitally signed by the petitioner. He submits that as per guidelines, the ECN has to be digitally signed and in absence thereof, it could not have been relied upon.

32. It is noticed that this plea was not taken by the respondent no.1 before the Arbitral Tribunal. This has been taken only before this Court. Even otherwise, once the Ledger Accounts had not been challenged by the respondent no.1 at the relevant time, in my view, the question of the ECN not being digitally signed loses all its significance.

33. In view of the above state of evidence, the findings of the Appellate Arbitral Tribunal cannot be sustained. The Appellate Arbitral Tribunal has clearly overlooked the relevant evidence in this regard.

34. The next question to be determined is whether the claim of the petitioner before the Arbitral Tribunal was within the period of limitation. The answer to this lies in Article 1 of the Schedule to the Limitation Act, 1963. The same is

reproduced hereinbelow:

S.No.

Description Of Suit

Period Of Limitation

Time From Which Period Begins To Run

1.

For the balance due on a mutual, open, and current account where there have been reciprocal demands between the parties.

Three years

The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

35. A reading of the above Article would show that where the claim is for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the period of limitation for making such claim would be three years from the close of the year in which such item admitted or proved is entered in the account. The year is to be computed as in the account. The question, therefore, would be whether the account maintained by the petitioner was "mutual" and as to what is the last item "admitted or proved" in such an account.

36. The Appellate Arbitral Tribunal has held that the account maintained by the petitioner was not "mutual". It has held that the relationship between the petitioner and the respondent no.1 was of a broker and a client and as such of a principal and an agent. It was only the act of the broker, who executes the transaction that results into the obligation on the client; no obligation of the petitioner is created from any transaction executed by the petitioner on instructions of the respondent no.1.

37. I am unable to subscribe the above view taken by the Appellate Arbitral Tribunal. The Appellate Arbitral Tribunal has not referred to the various Clauses in the MCA executed between the petitioner and the respondent no.1. Some of these Clauses relevant to the present controversy are reproduced hereinbelow:

? The client hereby authorizes the Stock broker to maintain his account on running basis. The client also authorizes the Stock broker to hold his credit in anticipation of future debits.

? All payment for securities bought shall be made out by way of Cheques/DD/ fund transfer in favour of "Motilal Oswal Security Ltd." At the time of settlement of dues of the Client, the Stock broker shall draw an account payee Cheques fund transfer in favour of the Client which may be payable to a specified bank account of the Client."

(Emphasis Supplied)

38. The above Clauses of the MCA would clearly show that the account maintained by the petitioner was agreed to be a "running account". It was to be balanced at the end of each quarter.

39. In the present case, there were independent transactions of sale and purchase in the F&O as also the cash segment, placed by the respondent no.1 with the petitioner.

40. In *Hindustan Forest Company v. Lal Chand & Ors.*, AIR 1959 SC 1349, the Supreme Court has approved the following test laid down by Rankin, C.J. in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah*, (1930) ILR 58 Cal. 649:

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following *Halloway*, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

41. Applying the above test, the Supreme Court in the facts of that case held that the payment made therein did not create any independent obligation on the seller in favour of the buyer and therefore, Article 1 of the Schedule of the Act (in that case Article 115 of the Jammu & Kashmir Limitation Act) was not applicable. The same is not true in the present case. Every transaction of purchase created an obligation on respondent no. 1 to pay for the same, while every transaction of sale created an obligation on the petitioner to pay the respondent no. 1 for the same. These transactions were entered in a running account for a balance to be struck at the end of each quarter.

42. In *Kesharichand Jaisukhal V.Shillong Banking Corporation*, AIR 1965 SC 1711, the Supreme Court was considering a transaction wherein the client had a combined overdraft and deposit account with the bank. The Supreme Court reiterated that where there have been reciprocal demands between the parties, Article 1 of the Schedule of the Act (in that case Article 85 of the Indian Limitation Act, 1908) would be applicable. It was held that the loans by the bank created obligation on the client for repayment, which was independent of the bank's obligation to repay the amount of the cash deposits and to account for the cheques/hundies and drafts deposited for collection.

43. This Court in *Bharath Skins Corporation v. Taneja Skins Co. Pvt.Ltd.*, 2011 SCC OnLine Del 5523, explained the test of determining the mutuality of the

account in the following words:

"13. From the aforesaid observations, it can be deduced that for the creation of an open, current and mutual account, there must be an intention between the parties, either express or implied, which may be deducible from the course of dealings to have mutual dealings, creating reciprocal obligations, independent of each other. A "demand" in relation to a matter of account means a "claim for money" arising out of a "contractual business relationship" between the parties. Where the dealings between the parties disclose a "single" contractual relationship, there will be demands only in favor of one party. For instance, where the relationship between "A" and "B" is that of lender and borrower respectively, "A" will have a "demand" against "B" in respect of every item of loan advanced. But "B" can have no demand against "A". Where the dealings between the parties disclose "two" contractual relationships, there will arise demands in favor of each side against the other. For instance, where "A" advances money to "B" from time to time as loan, and "B" engages "A" as his agent for the sale of goods sent by "B", there are two contractual relationships between the parties: one, that of lender and borrower and the other, that of principal and agent. "A" as creditor may have several demands against "B" who as principal may have, independently, several demands against "A". The real test, therefore, to see whether there have been reciprocal demands in any particular case is to see: Whether there is a "dual contractual relationship" between the parties.

44. The same test was followed by this Court in *Era Constructions (India) Ltd. v. D.K.Sharma, Prop. Keshav Security Services* 2008 (100) DRJ 712.

45. Applying the above test to the facts of the present case, the finding of the Appellate Arbitral Tribunal cannot be sustained. In the present case, the transactions were of independent orders placed by the respondent no.1 on the petitioner for sale/purchase in the F & O and cash segment. They created independent liability on the two parties, that is, the petitioner and the respondent no.1. These independent transactions were maintained in the form of a running account, which was to be reconciled every quarter and based thereon the payment was to be made/taken by the respondent no.1. The transaction in hand therefore, clearly satisfied the test laid down by the Supreme Court and by this Court in holding the account to be "mutual".

46. In *Hasanali Kurjibhai vs. Ratilal Nyalchand Chitalia and Another*, 1952 SCC OnLine Guj 67, on a similar relationship, it was held that the account maintained would be a mutual account.

47. Next question which would become important in this case would be to determine the last transaction entry into the account which had been admitted/proved. While the petitioner contends that the last transaction between the parties was on 21.08.2009, the respondent no. 1 contends that it was on 06.11.2008.

48. Admittedly, the arbitration claim that resulted in the Impugned Award passed by the Appellate Arbitral Tribunal was initiated by the petitioner on 30.11.2012. If the last transaction is taken as 21.08.2009, the same would be within the period of limitation. The petitioner had not made any comment with respect to the transaction of 21.08.2009 in the Statement of Claim. However, the assertion made was that as on 30.08.2009 the ledger account of respondent no. 1 was showing a consolidated debit of Rs. 78,95,958.42 as due and payable by respondent no. 1.

49. In the Statement of Defence filed by the respondent no. 1, he relied upon the earlier statement of claim that was filed by the petitioner on basis of the same transaction against respondent no. 2 and raised a plea of limitation as under:-

"The claim made by the applicant against the answering respondent is hopelessly time barred. The last transaction which the applicant entered into for and on behalf of and on account of the answering respondent, even as per the applicant and according to the averments made by the applicant itself in the statement of case and the documents annexed thereto was on 6th November, 2008. The answering respondent is reproducing below para 3 of the statement of case dated 21st August, 2012 of A.M. No. F&O/D-0074/2012 filed by the applicant prior to the filing of the present arbitration case with respect to the same frivolous claim that has been made in the present arbitration case, which will clearly show that the present arbitration case is hopelessly time barred.

3. As per our books of accounts, the Respondent has been trading since December 13, 2005 in NSE F & O Segment. The Respondent made the last transaction on November 6, 2008 in the F & O Segment. The Respondent's account was reflecting debit of Rs.1,04,29,358.44 as on November 6, 2008. After 6th November, 2008 admittedly there has been no dealing between the applicant and the answering respondent. That being so, any legal proceedings including the present one for the recovery of any amount allegedly due to the applicant from the answering respondent ought to have been initiated within 3 years of the said date i.e. on or before 5th November, 2011 and as such the present statement of case filed on 30th November, 2012 is hopelessly time barred."

50. It is only in the rejoinder that the petitioner specifically based its claim on the transaction of 21.08.2009, stating as under:-

"The Applicant further states that Respondent No. 1 had executed the last transaction through the Applicant on 21st August 2009 under NSE Cash segment which has resulted into reduction of his debit balance from Rs. 1,04,30,889.96 to Rs.78,95,958.42. The Applicant had sent ECN for transaction dated 21st August, 2009 to Respondent No. 1 and same was received and accepted by Respondent No. 1. Therefore for all practical purpose of calculating the period of limitation the date of last transaction is 21st August, 2009. Hereto annexed and marked Exhibit A is the copy of the ECN for trade dated 21st August 2009 alongwith it's sent log report.

The Applicant states that the Applicant has filed the present claim in respect of an amount due and payable by Respondent No. 1 as per his open and running account in the books of the Applicant wherein last credit entry is passed for credit of Rs. 30,24,726.64 in respect of contract note no. 0910/156N/1843896 dated 21st August, 2009. The Article 1 Schedule 1 of the Limitation Act, 1963 provides that the period of limitation starts on the last day of close of the year in which last item admitted or proved is entered in the account. Therefore the period of limitation started on 1st April 2010. The present claim is therefore within limitation. The Applicant further states that the Hon"ble Bombay High Court has reaffirmed the above proposition of law for transactions by and between a NSE broker and client in a reported judgment 2004 (1) Bom. CR. 307 Jagmohan Singh Gujral v. Satish Ashok Sabnis wherein under para 7 of the judgment the Hon"ble Bombay High Court has held as under:

"If accounts are maintained between the clients and the brokers and they would be payable at the end of the financial year."

4. With reference to para 2 of the reply under the head "Preliminary Objections", the Applicant denies that there was any dispute by and between the Applicant and Respondent no. 1 in respect transactions executed by Respondent no. 1 during the period from 7th November 2008 till 21st August 2009 and/or during the earlier period. The Applicant further denies that Respondent No. 1 decided not to henceforth do any further trading and informed the Applicant of the same and denies that it was agreed between the Applicant and Respondent no. 1 that Respondent No. 1's account stands closed and the Applicant immediately encashed the shares it was holding by way of securities and appropriated the sale proceeds thereof against its dues in full and final settlement of all the claim of the Applicant against Respondent no. 1. The Applicant further denies that it was agreed that no further amount will be payable by Respondent No. 1 to the Applicant. The Applicant states that on 21st August, 2009 Respondent No. 1 had placed an order for sale of shares and accordingly transaction was executed and ECN was sent to Respondent no. 1. Respondent No. 1 has received said ECN and accepted the transaction which has resulted into crediting his ledger account by a sum of Rs. 30,24,726.64."

51. The Appellate Tribunal in its Impugned Award has held the transaction of 21.08.2009 to be not proved. It has held that there was no evidence to prove that the order dated 21.08.2009 had been placed by the respondent no. 1. As already discussed hereinabove, it has further held that the respondent no. 1 had not opted to receive the ECNs and therefore, the period of limitation would not commence from 21.08.2009.

52. The learned counsel for respondent no. 1 in support of the above findings has further contended that if the transaction of 21.08.2009 is taken as a sale of Security that was in the hand of the petitioner for liquidating the debt of the respondent no. 1, the same being not a part of the transaction, it would in any case not extend the period of limitation. To the plea raised by the learned senior

counsel for the petitioner that the respondent no. 1 in its written statement had asserted that there was a settlement reached between the parties in November 2008 regarding the sale of shares, the learned counsel for the respondent no. 1 submits that these shares could not have been sold after an unreasonable period of delay of almost nine months so as to extend the period of limitation.

53. To answer the above pleas, few Clauses of the Agreement would need to be considered, they are reproduced hereinbelow:-

? "The client hereby authorizes the stock broker to transfer shares, lying in the Stock brokers pool account for pay-in purposes for shares purchased by the client in previous settlements. In case the client does not want the stock broker to transfer these shares towards inter settlement from the stock brokers pool account for payin purposes, he shall inform the stock broker in writing 48 hours before payin date. In case the stock broker does not receive the same in writing or for a wrong settlement, the stock broker shall not be responsible fat loss, if any.

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? Further it is explicitly agreed that the stock broker will adjust and set off the amounts and securities payable to the client / family / group in respect of transactions done by the client / family / group on the cash segment of the Exchange, against the amounts receivable from the client / family / group in respect of the transactions entered into, by the client / family / group, on the cash segment of the Exchange. The client authorizes the Stockbroker to pass appropriate journal entries for the same.

? The client hereby authorizes the stock broker to appropriate credits lying in his / group / family accounts on the Cash segments of the Exchange against debits in his / group / family accounts on the Derivatives segment of the Exchange through issue of cheques or by passing appropriate journal entries for the same."

54. A reading of the above Clauses would show that the petitioner had been authorized by the respondent no. 1 to deal in Security for purposes of making recovery of debt owed to it. In the first Statement of Claim filed by the petitioner, it had asserted as under:-

"3. As per our books of accounts, the Respondent has been trading since December 13, 2005 in NSE F &O Segment. The Respondent made the last transaction on November 6, 2008 in the F & O Segment. The Respondent"s accounts is reflecting debit of Rs. 1,04,29,358.44 as on November 6, 2008.

4. As agreed under the Member-Client Agreement the Respondent is liable to pay delay payment charges as against the outstanding debit balance till full payment of such debit. Further, the Respondent has also agreed to penalty charges and such other charges as may be levied in his account from time to time. The Respondent was thus levied with the delay payment charges and penalties for

margin shortage whereby the Respondent's accounts reveals debit balance of Rs. - 1,09,18,381.44 in F & O segment as on January 5, 2009.

5. The Respondent was repeatedly requested to clear the outstanding debit reflecting in his account. The Respondent gave assurances of payment and delayed the same on one pretext or other. Accordingly, the Applicant with the consent of the Respondent sold the securities on August 21, 2009, lying in the collateral account of the Respondent held with the Applicant. The safe proceed of Rs. 30,24,726.64 (Rupees Thirty Lakh Twenty Four Thousand Seven Hundred Twenty Six and Sixty Four Paise Only) was duly credited to the account of the Respondent."

55. The plea of the respondent no. 1 that the transaction of 21.08.2009 was not in terms of the Agreement, therefore, cannot be accepted. It is own case of the respondent no. 1 before the Arbitral Tribunal that it authorized the petitioner to sell the Security in order to settle it's outstanding dues. The only difference was whether the sale of such Security was in full and final settlement of all the claims of the petitioner against respondent no. 1 or not. The onus of proof of the same was on the respondent no. 1. In the Impugned Award passed by the Appellate Arbitral Tribunal there is no finding in favour of the respondent no. 1 on this issue.

56. As far as the belated sale of shares is concerned, it was again for the respondent no. 1 to have proved on record that it sought a closure of its account with the appellant on 06.11.2008.

57. In *Jandas vs. Indermal*, AIR 1964 Raj 58, it was held that once it is accepted that there was a mutual, open and current account between the parties, the presumption is that the account continued to remain mutual, open and current. The mere fact that there were no dealings between the parties for a period does not entitle the Court to hold in retrospective that the accounts had ceased to be mutual, open and current.

58. While it may be true, as held in *Today Stationers and Gift Centres vs. Allahabad Bank*, 2003 SCC OnLine P&H 657 and *Chandradhar Goswami & Ors. vs. Gauhati Bank Ltd.*, AIR 1967 SC 1058, that a unilateral entry made in the account would not be sufficient to extend the period of limitation, however, at the same time, in the present case, the respondent no. 1 having admitted that the sale of shares was permitted by him, it was for the respondent no. 1 to prove the date of such permission and any condition imposed on such sale.

59. It is of some relevance to note that the petitioner had supplied the Ledger Accounts to the respondent no. 1 after the transaction of 21.08.2009 till the filing of its Statement of Claim on a regular basis. The respondent no. 1 has not shown that it ever disputed such Ledger Statements.

60. In view of the above, the Impugned Award passed by the Appellate Arbitral Tribunal cannot be sustained. The same is hereby set aside, leaving the parties to bear their own cost.