

(2007) 06 BOM CK 0055
In the Bombay High Court
Case No : First Appeal No. 111 of 2006

Mrs. Asha Anilkumar Kataria Sole proprietor of KAT STOCKS	APPELLANT
Vs	
Ashokkumar Bafna, Proprietor of K. Ashokkumar Bafna and Ashok and Co., Rajkumar Bafna and Kevalchand Bafna	RESPONDENT

Date of Decision : 13-06-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(4), 8
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 11, 151, 2(2), 20
Electricity (Supply) Act, 1948 — Section 49, 79
Electricity Act, 1910 — Section 24, 26(6), 39
Partnership Act, 1932 — Section 69
Penal Code, 1860 (IPC) — Section 379
Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Rules, 1992 — Rule 3
Securities and Exchange Board of India Act, 1992 — Section 11, 11B, 11C, 15I, 15K(2)
Securities Contracts (Regulation) Act, 1956 — Section 2, 22(A), 22(B), 22(E), 9

Citation : (2007) 4 ALLMR 355 : (2008) 3 BC 149 : (2007) 5 BomCR 125 :
(2007) 109 BOMLR 1273 : (2007) 4 MhLj 149 : (2008) 81 SCL 477

Hon'ble Judges : N.V. Dabholkar, J;M.G. Gaikwad, J

Bench : Division Bench

Advocate : P.V. Mandlik, instructed by K.C. Sant, for the Appellant; P.M. Shah, instructed by P.S. Shendurnikar, for the Respondent

Judgement

N.V. Dabholkar, J.—Appellant-original Plaintiff, by present appeal, challenges the judgment and order dated 23.12.2005 delivered by 4th Adhoc Additional District Judge, Jalgaon, in Special Civil Suit No. 212 of 1999. By the impugned judgment and order, learned Additional District Judge was pleased to reject the plaint and dispose of suit, by arriving at a conclusion that Civil Court had no jurisdiction to entertain the suit. Although suit is disposed of by rejection of plaint, since the decree as defined by Section 2(2) of the Code of Civil Procedure, 1908, includes "rejection of plaint", appeal u/s 96 is preferred, challenging the said judgment and order.

2. Special Civil Suit No. 212 of 1999 was filed in the court of Civil Judge, Senior

Division, Jalgaon, by present appellant for the purpose of recovery of amount of Rs. 1,80,19,089.55 along with future interest at the rate of 22% per annum on the basis of averment to following effect;

Plaintiff is the sole proprietor of the proprietary concern KAT STOCKS and her husband Anilkumar Kataria works as General Manager of the said proprietary concern. In fact, the suit is filed through Shri Anilkumar, because he had dealings with defendants and he is fully conversant with the facts of the suit claim. This is because, he looks after day-to-day transactions of the firm, he takes majority decisions regarding business and executes those. The plaintiff firm is engaged in the business of sub-brokership in the trade of shares, stocks and securities.

Defendant Nos. 1 and 2 are real brothers and sons of Defendant No. 3. One Abhaykumar of Madras (Chennai) is common relative of plaintiff and defendants. Defendants were introduced to plaintiff by said Abhaykumar and the defendants claimed to be wizards in stock trading. The plaintiff was impressed by the tall claims then made by defendant Nos. 1 and 2 and accepted them as clients of KAT STOCKS. Defendants started trading in stock business through plaintiff concern.

KAT STOCKS has an office at Jalgaon and also at Bombay and so many times, business talks, personal meetings regarding shares and stocks business between plaintiff and defendants were held at Jalgaon office. As per the normal practice, all share business, and as requested by defendants Nos. 1 and 2, majority of transactions, were of square-up nature i.e. they were bought and sold in the same settlement period and margin/difference, as the case may be; would be credited or debited to the account of defendants. Defendant Nos.1 and 2 always represented that they were well informed persons and that they were the best persons to take decisions as to which securities and shares they should deal and which of the positions of various companies to be kept or sold. The orders were placed by defendant Nos.1 and 2 and received by Anilkumar on telephone. The plaintiff firm has maintained regular, current, mutual and running accounts in the name of defendant No. 1, wherein the transactions executed on behalf of defendants were regularly entered on day-to-day basis. The accounts thus reflect the amount due to and from the defendants.

In or around January 1996, the accounts maintained by the plaintiff in respect of defendant No. 1 showed huge debit of more than 70,00,000/=. This was informed to Defendant Nos.1 and 2 and a demand was made for payment by defendant nos. 1 and 2. Paragraphs 5 to 9 contain the details as to the efforts made by Shri Anilkumar to recover the amount and as to how defendants No. 1 and 2, although initially admitted the liability; avoided the payment, by making assurances and promises of different nature. In order to show bonafides, defendant No. 1 acknowledged the dues and also promised to pay interest at 22% per annum on the outstanding dues, by his letters dated 10.4.1996 and 28.10.1996.

Initially, the transactions were entered into the account of the plaintiff concern, in the name of firm K.Ashokkumar Bafna. In January 1996, defendant Nos.1 and 2 represented Mr.Anilkumar that transactions by that firm name have proved to be unlucky and hence, insisted to continue the transactions in the firm name M/s Ashok & Co. All the while, defendants represented that irrespective of the firm name, it was the firm business and not the business of either defendant alone.

According to the plaintiff, on the date of filing of the suit, accounts of the plaintiff concern showed an amount of Rs. 1,54,63,856.20 as due from K.Ashokkumar Bafna and further sum of Rs. 25,55,233.29 to be due from M/s Ashok & Co.

It is the contention of the plaintiff that in spite of repeated attempts, demands through telephonic calls, visits, meetings and letters from time to time, the defendants have failed and neglected to pay the amounts overdue and hence the suit. The cause of action for the suit is said to have partly arisen at Jalgaon, Mumbai and Harda and hence, suit can be filed at either of the three places. Cause of action is said to have arisen on 10.4.1996 and 28.10.1996 when the defendant firm acknowledged the amounts due to the plaintiff from it. The suit is, therefore, said to be within limitation.

3. In the lengthy written statement filed by defendant No. 1, paras 1 to 14 (pages 1 to 16), are utilized for denying verbatim all the averments in the plaint. Ultimately, it is contended that the suit and criminal case (referred in paragraph 12 of the plaint) filed by the plaintiff are false and without any cause. Defendants No. 2 and 3 have no concern with suit contract or claim. There is no joint family of three defendants. There was oral partition and family arrangement between them in the year 1988 and the properties sought to be attached under the suit are of defendant No. 3 alone. Defendant Nos.1 and 2 have no legal right, title or interest in respect of those properties. It is pleaded that suit as against Defendant Nos.2 and 3 deserves to be dismissed.

In fact, in paragraph 7 of the Written Statement, defendant No. 1 has denied execution of any acknowledgment of any outstanding dues or promise to pay interest at the rate of 22 per cent per annum on the outstanding dues, vide his letter dated 10.4.1996 and 28.10.1998 (in fact, 28.10.1996 as per the plaint). It is contended that these letters were not written by defendant No. 1 voluntarily and those were obtained by undue force, coercion and deceit. In paragraph 18, it is pleaded that defendant No. 1 and Jain Irrigation System Limited (JISL) forced defendant No. 1 to give writing dated 28.10.1998 (in fact, 28.10.1996). The same not being voluntary and not by free consent, is void and not binding on defendant No. 1 and hence, it is prayed that the suit deserves to be dismissed.

It is claimed that the suit filed on 28.10.1999 is barred by limitation.

It is pleaded that the plaintiff had no office at Jalgaon, Anilkumar never resided at Jalgaon, none of the transactions took place at Jalgaon. There was no meeting at Jalgaon and no single telephonic conversation was to or from Jalgaon by either defendants. It is thus pleaded that no part of the contract has taken place, or

was performed at Jalgaon and, therefore, the court at Jalgaon has no jurisdiction to entertain, try and decide the suit.

It is contended that the ancestral business of the family is agriculture. Defendant Nos. 2 and 3 have no concern with the business of dealings in securities, stock and shares. The same is new and separate business of defendant No. 1 and, therefore, defendant Nos. 2 and 3 are not liable to satisfy any loan pleaded in the suit.

It is pleaded that the plaintiff is not a registered sub-broker and is thus incapacitated from entering into contract for purchase and sale of shares. The suit, therefore, is liable to be dismissed u/s 12 of the Act (probably, the Securities and Exchange Board of India Act, 1992). Square-up transactions are not permissible by law. Those are against public policy and hence, such a contract cannot be enforced in law.

It is also pleaded that KAT STOCKS is unregistered partnership firm and, therefore, is not entitled to file a suit, in view of Section 69 of Indian Partnership Act. Suit is said to be bad for non-joinder of necessary party because, broker Jain is not impleaded as party. Defendants not only have prayed for dismissal of suit, but have also prayed for compensatory costs of Rs. 5,000/= in favour of defendant Nos. 2 and 3.

4. All three defendants have filed applications titled as "Application u/s 20 read with Section 151 of the Code of Civil Procedure", praying for dismissal of suit for want of jurisdiction. The applications filed by defendant Nos. 1, 2 and 3 are at Exhibits 35, 34 and 33 respectively, copies of which are available at paperbook pages 31 to 37, 24 to 26 and 17 to 19 respectively. All three defendants have specifically referred to paragraph 14 of the plaint, wherein it is claimed that part of cause of action arose at Jalgaon, Mumbai and Harda and, therefore, the plaintiff has a right to file suit at any of these three places.

Defendant No. 3 has contended that he resides at Harda (Madhya Pradesh) and has no business relations with defendant No. 1. After completing his education, defendant No. 1 has started his own financial activities out of his own earnings and savings, in which defendant No. 3 has no role to play. Plaintiff has, with ulterior motive and malafide intentions, pleaded absolute falsehood that defendant No. 3 was the person taking ultimate decisions. In fact, defendant No. 3 has no knowledge about stocks and security trade of defendant No. 1. Defendant No. 3 is added only with a view to exert pressure on him. In view of continued residence of defendant No. 3 at Harda and his having no connection whatsoever with the affairs of defendant No. 1, the suit filed as against defendant No. 3 at Jalgaon, is without territorial jurisdiction. No cause of action or part thereof, has accrued in favour of the plaintiff against defendants within the territorial limits of court at Jalgaon.

Defendant No. 2 has contended that defendant No. 1 alone is proprietor of Shri Ashok Bafna and M/s Ashok Kumar & Co. which has its own commercial/business

activities carried on from Madras. In spite being younger brother of defendant No. 1, defendant No. 2 has no involvement with financial transactions of defendant No. 1 as alleged by the plaintiff. Defendant No. has no contractual relationship with the plaintiff. Defendant No. 2 has his own independent activities at Harda (Madhya Pradesh). He has nothing to do with any of the alleged financial transactions between plaintiff and Defendant No. 1, and Defendant No. 2 is impleaded with ulterior motive and malafide intentions.

Both defendants No. 2 and 3 have thus prayed for dismissal of suit as against them for want of territorial jurisdiction.

Defendant No. 1 in his application has pleaded that he has no contractual relationship with plaintiff who has styled herself as sole proprietor of KAT STOCKS and she is not the sole proprietor of the firm, nor Shri Anilkumar is her constituted attorney. Defendant No. 1 has never dealt with Anilkumar as authorised signatory of KAT STOCKS.

According to defendant No. 1, Shri Bhavarilalji Jain, Chairman of JISL, has many other companies which are either independently incorporated, or held by JISL. One such company dealing in the trade of stocks and stores was Jain Securities, address of which is the same as that of KAT STOCKS at Mumbai. All the documents pertaining to transactions with Defendant No. 1 filed by the plaintiff are from the office of Jain Securities at Bombay. None of the contract notes, or communications are signed in the name of Anilkumar Kataria. Thus, none of the transactions in stock and trade took place at Jalgaon and, therefore, the suit filed in the Jalgaon court is without jurisdiction.

Shri Anilkumar Kataria is in the employment of JISL since many years and at present, he is the director of JISL. In the year 1995-96 and prior to that, Anilkumar and his wife were residing either at Mumbai or Madras. Because Shri Bhavarilal Jain and his company Jain Securities could not file any money suit against defendant No. 1, the plaintiff has fabricated contents of certain documents annexed to the plaint. Defendant No. 1 had no contractual relationship, much less within territorial limits of Jalgaon court, with the plaintiff. While entering into all the transactions regarding securities and shares with KAT STOCKS, defendant No. 1 was always given to understand by Shri Anilkumar that the company is a subsidiary of JISL and that defendant No. 1 is dealing with the said company. All security and share contracts received by defendant No. 1 from KAT STOCKS are received from Mumbai office and always signed by Anilkumar and not by Anilkumar Kataria. All contractual transactions between defendant No. 1 and KAT STOCKS regarding securities and shares were from Madras to Bombay and Bombay to Madras. There is nothing on record, according to defendants; to indicate that any kind of activities of the plaintiff were carried on from Jalgaon.

Defendant No. 1 is residing at Madras and carrying on his financial activities from Madras and so far as transactions with KAT STOCKS are concerned, those are with its office at Bombay.

According to defendant No. 1, plaintiff KAT STOCKS posed itself as sub-broker. It is neither sub-broker nor an entity recognized under SEBI to carry on any trades, securities and shares. If a person is not given status of sub-broker, he cannot deal in any transactions of securities or shares and, therefore, all transactions, allegedly entered into by KAT STOCKS with defendant No. 1, have no legal standing or clothing and, therefore, the suit is barred by law.

It is, therefore, prayed that the suit is bad for want of jurisdiction to the court at Jalgaon.

5. Appellant-plaintiff has filed three separate replies to all these three applications of Defendants. Generally, each and every averment in the applications is specifically denied, by contending that those are untrue and frivolous averments.

So far as reply to application by defendant No. 3 is concerned, it is reiterated that defendants No. 1 to 3 are carrying on their business in partnership even at Harda in the name and style "M/s Pratapchand Kevalchand Bafna" and in the Income Tax returns submitted to the Income Tax Department, the firm is shown as HUF firm. The plaintiff claims that she has sufficient documentary evidence to establish that defendant No. 3 is actively involved in the business and was taking ultimate decisions.

In reply to the application filed by defendant No. 2, it is contended that it was represented by defendant nos. 1 and 2 that every transaction of the business of stock trading was required to be reported to defendant No. 3 for his approval and advice, as also final consent. It is thus denied that defendant No. 1 is the sole proprietor of "Shri Ashok Bafna" or "M/s Ashok & Co.". Contention of Defendant No. 2 that he has no involvement in the financial transactions of defendant No. 1, is denied as false to the knowledge of defendant No. 2. It is said that defendant Nos. 1 and 2 were staying together at Madras and defendant No. 2 shifted to Harda only in the year 1996. It is the claim of the plaintiff that she has sufficient documentary evidence to establish active involvement of defendant No. 2 in the business of securities and shares.

So far as reply to application (Exh.35) of defendant No. 1 is concerned, it is pleaded that the documents signed by defendant nos. 1 and 2, as also correspondence exchanged between the plaintiff and defendants, clinchingly establishes contractual relationship between the plaintiff and defendants. It is admitted that Jain Securities Limited and KAT STOCKS shared office at Mumbai, but it is added that there is no relation of whatsoever nature between the two companies. It is also denied that the documents filed by plaintiff are regarding transactions of Defendant No. 1 with Jain Securities, Bombay. According to the plaintiff, the Defendants have full knowledge of following facts;

(i). Defendants are distant relatives of Anilkumar. (Defendant No. 1 is son-in-law of Anilkumar's aunt).

(ii). Mr. Anilkumar and Anilkumar Kataria are one and the same person.

(iii) All defendants have visited Jalgaon in connection with the dealings with KAT STOCKS.

(iv). All defendants always dealt with Mr. Anilkumar.

(v). All the orders for buying and selling of stocks and Securities used to be on telephone only, communicated either from Madras or Harda and at Mumbai, or Jalgaon, wherever Anilkumar used to be at a particular point of time.

It is denied that Anilkumar was in the employment of JISL or that presently he is a director. It is denied that plaintiff had filed suit on the basis of fabrication of contents of certain documents, because Jain Securities could not legally file any money suit. It is submitted that there is no question of plaintiff posing herself as sub-broker because KAT STOCKS is a sub-broker.

It is denied that in case a person is not given status of sub-broker, such person cannot deal in the transactions of securities or share trading or that because the KAT STOCKS is not a sub-broker recognized under SEBI Act, all the transactions entered by KAT STOCKS with defendants have no legal sanctity and hence, court has no jurisdiction to entertain the suit. Defendants were aware that the plaintiff is not registered as sub-broker and yet they have consciously dealt with the plaintiff. Prior to 1977, such registration was not mandatory and thousands of unregistered brokers were freely doing the business without any hindrance from SEBI which made the registration compulsory from 1997. The clients or the brokers dealing with unregistered sub-brokers do so at their risk and the SEBI can, at the most, penalise the broker for dealing with unregistered sub-brokers. Hence, it is not open for the defendants to say that the transactions between them and the KAT STOCKS were without legal sanctity. According to the plaintiff, provisions cited by the defendants, viz. S.O.627, Section 28 of SEBI Act, Chapter III of the Ordinance, Clause 14 of Regulation, are of no consequence.

It is generally contended that the application for dismissal of the suit on the ground that the court of Civil Judge, Senior Division, Jalgaon had no jurisdiction, is malafide and misconceived. It is also added that no prejudice would be caused to defendants, if the suit is tried by the court of Civil Judge, Senior Division. Defendants have raised several questions of facts, mixed questions of facts and law and pure question of law, which can only be decided at the final hearing of the suit and, therefore, the applications are said to be premature. In order to challenge the applications, the plaintiff has relied upon contentions in the plaint, application for attachment before judgment and solemn affirmation in support of those.

6. From the impugned order, it appears that for considering the issue, "whether this Court has jurisdiction to entertain the suit ?", deposition of Anilkumar is recorded on behalf of the Plaintiff at Exh. 112 and the witness was cross-examined on behalf of the defendants. Of course, defendants have not led any

oral evidence for decision on this preliminary issue. However, in stead of considering the issue of jurisdiction (territorial), learned Judge considered the issue, "whether the suit is maintainable in the court as per the (in view of) the rules and regulations under the Security and Exchange Board of India Act 1992?". After considering the definitions of "Security" and "Board", learned Judge has recorded that mainly objection is on the ground that, in view of Section 20-A of SEBI Act, no Civil Court shall have jurisdiction in respect of any matter, which the Board is empowered by or under the Act, to pass any order and no injunction shall be granted by any court, or any other authority in respect of any action or to be taken in pursuance of any order passed by the Board under the Act. Thereafter, referring to Section 11 of the SEBI Act, learned Judge has observed that the Section confers supervisory powers and control over the transactions by Stock brokers and sub-brokers. Referring to Section 12 of the SEBI Act, it is observed that, the registration of stock broker, sub-broker is mandatory. Referring to evidence of Anilkumar, it is observed that he has been dealing with shares and securities since 1987. The Plaintiff is also dealing in the business as sub-broker since 1992. Thus, Anilkumar and the plaintiff are aware of requirement of SEBI Act and Regulations thereunder, but still they are not having registration certificate. Although Anilkumar had volunteered during his oral evidence that he had applied for registration certification and paid registration fees as required by Regulation, 1992, learned Judge seems to have disbelieved him on that count, because no documentary evidence is placed on record to support such a contention. This was also because Anilkumar could not remember the date when he had so applied and that he had not thereafter approached SEBI for the certificate. By taking into consideration admission that the suit is filed for price of the shares which were purchased and sold to defendants, learned Judge has expressed that the plaintiff is a sub-broker without registration certificate which is mandatory under the Act. The learned Judge thus appears to have arrived at a conclusion that the suit by the plaintiff is not maintainable in absence of registration certificate under SEBI Act. According to the learned Judge, the case law relied upon by the learned Counsel for the plaintiff was relating to territorial jurisdiction, but the case in hand was based upon the issue of jurisdiction on law point ?

Observing that the matter at hands is governed by SEBI Act, a specific enactment; brought into force for dealing with cases relating to securities, stock, shares etc., Civil Court does not have jurisdiction to try the suit and placing reliance on the observations of this High Court in the matter of Trilochana K. Doshi v. Stock Exchange of India and Anr. 2002 (2) BCR 234, learned Judge was pleased to answer the issue in the negative and order rejection of the plaint.

7. During the course of his arguments, senior Counsel Shri P.V. Mandlik pointed out that all the applications (Exhibits 33, 34 and 35) by all the three defendants are titled as one u/s 20 read with Section 151 of the Code of Civil Procedure, thereby indicating that the challenge was regarding territorial jurisdiction of the court of Civil Judge, Senior Division, Jalgaon. Only in para 4(k) of Exhibit 35 by

defendant No. 1, some different ground is made out that, if a person is not conferred status of sub-broker under SEBI Act, the said person cannot deal in any transaction of securities, shares or trade and since the KAT STOCKS is not the sub-broker recognized under SEBI Act, all the transactions entered into by KAT STOCKS with defendant No. 1, had no legal standing or clothing and, therefore, it is a legal bar for entertaining the suit. The paragraph is concluded, by saying that on this count also, the court has no jurisdiction. It was submitted that, the plaintiff has no registration with SEBI and hence, provisions of SEBI Act 1992 or the Securities Contracts (Regulation) Act 1956 ("S.C. Regulation Act" for brevity), are not at all applicable. According to learned Senior Counsel Shri Mandlik, entire order, findings and result is perverse.

Shri P.M. Shah, learned Senior Counsel, representing the cause of Respondent Nos.1 to 3-original defendants, submitted that the trade name "KAT STOCKS" itself suggests that the plaintiff is a dealer in stock market. Exhibits 33 and 34 filed by Respondents No. 3 and 2 respectively, raise an objection about territorial jurisdiction of Civil Court at Jalgaon, but by paragraph 4(k) of Exhibit 35, defendant No. 1 has raised an objection to the jurisdiction of the court so far as "subject matter" is concerned. Objection raised by Defendant No. 1 is thus not confined to territorial jurisdiction of Civil Court at Jalgaon. He has placed reliance upon judgment of learned Single Judge at Nagpur Bench in the matter of Prashant Commercial v. Raj Ratan Mohta 2006 (4) BCR 874 and more particularly paragraphs 9 and 13 of the same, to support his submission that the Civil Court at Jalgaon has no "subject jurisdiction" to adjudicate the dispute in question. In paragraph 13 of the reported judgment, it is observed;

Thus, above case law demonstrates that, by 1956 Act and Regulation/bye-law of Bombay Stock Exchange, a special procedure and machinery has been evolved for looking into the grievance of the person dealing with the sale and purchase of securities.

According to learned senior counsel Shri P.M. Shah, the averments in the plaint disclose the nature of business of the plaintiff, as also the nature of the transaction on which the suit claim is based. Therefore, according to Shri Shah, the dispute is of such a nature that the SEBI will have to refer it to arbitrator which will have to resolve the dispute. In spite of being a non member, according to learned senior counsel Shri P.M. Shah, the plaintiff is governed by SEBI Act, 1992. Referring to Section 9(2)(k)(n) of the S.C. Regulation Act, it was submitted by Shri P.M.Shah that recognized stock exchange is empowered to make bye-laws for the purpose of regulation of the entering into, making, performance, recession and termination of contracts between member and his constituent and between a member and a person who is not a member and the consequences of default or insolvency etc. It is also empowered to make rules regarding method and the procedure for settlement of the claims or dispute, including settlement by arbitration. Securities and Exchange Board of India (stock brokers and sub-brokers) Regulation 1992, are the bye-laws framed by

the SEBI in exercise of the powers conferred by Section 30 of SEBI Act and as per the provisions of those regulations, a dispute between the sub-broker and a client is required to be referred to the arbitration through member broker. In fact, reliance placed by learned Counsel Shri P.M. Shah, is on different provision than the one relied upon in the reported judgment of Nagpur Bench. The learned Judge in the reported judgment, has placed reliance upon the procedure for arbitration as prescribed under Article 248(a)(b) under chapter "Arbitration". Reliance is also placed on paragraph 7 and the discussion therein of the judgment of full bench of this High Court in the matter of St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad, , on the issue of "exclusion" of jurisdiction, although otherwise it is a judgment in the matter under M.E.P.S. (Conditions of Service) Regulation Act, 1978. It is submitted that SEBI and S.C. Regulation Act, being special laws, provisions of those Acts shall prevail over the Code of Civil Procedure.

8. Learned Senior Counsel Shri Mandlik was more elaborate while replying arguments advanced by Respondents/defendants. It was contended that, the transactions in question have taken place in the year 1995. This is evident from the fact that Respondents had acknowledged the liability, by communications dated 10.4.1996 and 28.10.1996, whereafter, there has been attempt to settle by discussion, but no transaction. The bye-laws are framed in 1997 and hence those are not at all applicable to the present case. It was also submitted that the defendant is neither a member nor registered as sub-broker. The plaintiff is not a registered sub-broker and, therefore, provisions of SEBI Act and S.C. Regulation Act, are not applicable. Referring to Sub-section 2(k) of Section 9 of the S.C. Regulation Act 1956, relied upon by the learned Senior Counsel for the Respondents/defendants, it was submitted that the reference is to dispute between a member and non-member or member and non-members. It has no reference to dispute between a non-member and another non-member. Otherwise also, bye-laws are framed and published in the year 1997 and hence, those are not applicable to the transactions in question. According to him, Sections 22(E), 22(A) and 22(B) of the S.C. Regulation Act, 1956, do not cover the subject-matter and, therefore, jurisdiction of the Civil Court is not barred.

Submitting that the transaction between the plaintiff and defendants being purely private transactions, the plaintiff is not prohibited from suing the defendants for recovery of the dues under the said transactions, for the purpose; he has placed reliance upon Section 21 of the SEBI Act and urged that the learned Counsel for defendant has not referred to any provisions that empower either SEBI or any other authority under the Act to deal with the subject-matter and, therefore, the jurisdiction of the civil court cannot be said to be barred.

9. Coming back to the impugned order, after referring to several reported judgments, relied upon by the learned Counsel for the plaintiff, in paragraph 13, learned Judge observed thus in paragraph 14;

Having gone through the ratio laid down in the above cited rules, it seems that the observations are made on the territorial jurisdiction. However, the case in my hand, is based upon the issue of jurisdiction of law point.

By the contents quoted hereinabove, learned Judge has given clear indication that she is not dealing with the issue of jurisdiction on the basis of territorial limits of the court.

In earlier paragraphs 9 to 11, learned Judge has clearly recorded a finding that the plaintiff is a sub-broker having no registration certificate as required by SEBI Act or the Regulations. Negative finding is recorded on the issue of jurisdiction with cryptic observations as under, in paragraph 15;

The case in my hand is certainly governed by the provisions of SEBI Act and the Civil Court has no jurisdiction to pass any order or to decide the controversy arisen between the parties....

It is also observed earlier that to deal with the cases of securities, stock etc., specific enactment like SEBI Act, has come into force. As such, when there is a statutory enactment, the civil court certainly does not have any jurisdiction to try the suit.

Before entering into examination of the provisions of the SEBI Act, 1992, S.C. Regulation Act, 1956 and regulations under either of the Acts, in order to find out whether the legislation has provided alternate forum, thereby expressly taking away jurisdiction of civil court, to deal with the dispute of the nature before us at present, we must make it clear that neither the trial court has dealt with nor we are dealing with the aspect that the suit is not maintainable, because the transaction between plaintiff, an unregistered sub-broker; although registration is compulsory, and defendants, is void, being against public policy. This is because, the aspect is regarding maintainability of the suit on merits and not regarding the competence of the court to deal with the suit, either because no part of cause of action has arisen within its territorial limits, or because the subject-matter is such, for which jurisdiction of the civil court is taken away.

We have also pointed out that learned trial judge has not recorded a finding that civil court at Jalgaon has no territorial jurisdiction of dealing with the issue. Learned Senior Counsel, while advancing submissions on behalf of the defendants, has categorically claimed that defendant No. 1 has challenged the competence of the court to deal with the matter, on the basis "subject jurisdiction". So far as territorial jurisdiction is concerned, the plaintiff has repeatedly claimed that part of the cause of action has arisen at Jalgaon, because many a times orders were placed by the defendants while Anilkumar was at Jalgaon and he had sent confirmation messages also from Jalgaon. These averments are reiterated on behalf of the plaintiff, also in the affidavit filed as evidence for the purpose of adjudication of issue of jurisdiction. Defendants have not obtained an admission, although plaintiff was allowed to be cross examined, to the effect that no cause of action arose within territorial limits of civil court at

Jalgaon. Although insisted for decision on the issue of jurisdiction as preliminary issue, the defendants have not entered the box to counter the contention of the plaintiff that, part of the cause of action arose within the territorial limits of civil court at Jalgaon. Consequently, it must be said that so far as challenge to the territorial jurisdiction of civil court is concerned, the same is required to be dismissed.

10. From the cross examination of Anilkumar, two things are clear. The plaintiff has been dealing in the business of shares and securities since 1994 as a sub-broker, but without having necessary registration as a sub-broker either with the SEBI or any other recognized Stock Exchange. Although, it is claimed that she has recently applied for such registration, as at present, we do not have any document, supporting such a claim. It is also admitted position that the suit claim is towards price of the shares purchased and sold by the defendants.

This brings us to consider the scheme of SEBI Act, 1992 and whether the said Act specifically bars jurisdiction of the Civil Court. Reliance is placed upon Section 20-A of the said Act, which reads thus:

20-A Bar of jurisdiction:

No order passed by the Board or the Adjudicating Officer under this Act shall be appellable except as provided in Section 15-T or Section 20 and no Civil Court shall have jurisdiction in respect of any matter which the Board or the Adjudicating Officer is empowered by or under this Act to pass any order and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any order passed by the Board or the Adjudicating Officer by or under this Act.

Since this is not a case wherein any order passed either by the Board or the Adjudicating Officer is being challenged or injunction being sought against any such order, we are not concerned with first and third part of the section. The relevant portion of the section, which creates a bar of jurisdiction is underlined for the purpose of emphasis. The jurisdiction of Civil Court is barred in respect of the matters which the Board or the Adjudicating Officer is empowered by or under this Act to pass any order. Naturally it becomes necessary to refer to the provisions which enable Board or Adjudicating Officer to pass any orders and the nature of the subject upon which those authorities are empowered to pass orders. Only subject matters of that nature shall stand excluded from the jurisdiction of Civil Court and for the purpose a reference to provisions elsewhere becomes necessary.

So far as nature of subjects and the orders those can be passed thereon by the Board, the same can be seen in Chapter IV titled as "Powers and Functions of the Board". From the text of Section 11, it is evident that it is the duty of the Board to protect the interest of investors in securities and to promote the development of and to regulate the securities market by measures as it thinks fit. Some of the measures those can be taken by the Board are enlisted in Sub-

section (2), which includes registration and regulation of the working of the stock brokers and sub brokers. The nature of the orders those can be passed finds place in Sub-section (4) of Section 11. By Sub-section (3), the Board is empowered with all the powers of Civil Court while exercising the powers under Clauses (i) and (i-a) of Sub-section (2) of Section 11, such as discovery and production of books of accounts, summoning and enforcing the attendance of witnesses, inspection of books, registers and documents, issuing commissions etc. Section 11-B is another provision speaking about powers of the Board to issue directions and the Board is empowered to issue appropriate orders in the interest of investors in the securities and the securities market, upon being satisfied that it is so necessary. Section 11-C empowers the Board to investigate when there are reasonable grounds for taking such a step. On going through entire chapter, there is nothing to indicate that the Board is empowered to resolve a dispute between sub broker and the client regarding non payment of dues.

Section 15-Y is another provision which bars jurisdiction of the Civil Court. It reads:

15-Y Civil Court not to have jurisdiction:

No civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Officer appointed under this Act or a Securities Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

In order to find out which subject matters are taken out of competence of civil Court, it becomes necessary to find out the subject matters about which the Adjudicating Officer and the Securities Appellate Tribunal are empowered to deal with.

Section 15-I refers to Adjudicating Officer and it is evident from the said provision that the Board is required to appoint an officer not below the rank of a division chief to be an Adjudicating Officer for holding an enquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty Under Sections 15-A, 15-G, 15-H, 15-HA and 15-HB. In fact, Chapter VI-A, which is titled as "Penalties and Adjudication" is the chapter within which Section 15-I is placed. Section 15-Y is placed in next Chapter VI-B regarding establishment, jurisdiction, authority and procedure of Appellate Tribunal. On reference to these provisions, it is evident that these are penal provisions empowering the Adjudicating Officer to impose penalty upon any person who commits a default as mentioned in those respective provisions. And the defaults are, failure to furnish information/return, failure to enter into agreement with clients, failure to redress investors' grievances, certain defaults in mutual funds, failure to observe rules and

regulations by an asset management company, defaults on the part of stock brokers etc. Suffice it to say that these are penal provisions for various defaults and Adjudicating Officer does not seem to have any jurisdiction to deal with any civil disputes.

So far as Securities Appellate Tribunal is concerned, Section 15-T indicates that a person aggrieved by an order of the Board passed after commencement of the Securities Laws (2nd Amendment) Act, 1999, or by an order passed by an Adjudicating Officer, can prefer an appeal to Securities Appellate Tribunal. It is needless to say that the Securities Appellate Tribunal shall be dealing with the same subject matters which the Board and the Adjudicating Officer are empowered to deal with.

A reference may be made also to Section 15-K(2), which runs thus:

15 K- Establishment of Securities Appellate Tribunal.

(1) ...

(2) The Central Government shall also specify in the notification referred to in sub-section

(1) the matters and places in relation to which the Securities Appellate Tribunal may exercise jurisdiction.

No notification of the Central Government is relied upon by learned Counsel for the respondents to demonstrate that the civil dispute regarding non payment by the client to the sub broker is covered as a subject over which Securities Appellate Tribunal can exercise jurisdiction. Having gone through all the provisions of SEBI Act, 1992, pertaining to various authorities under the Act and their powers, we have not been able to find out a provision that empowers either authority to deal with a dispute regarding non payment by client to the sub broker the amounts due. On the contrary, as pointed out by Shri Mandlik, senior counsel for the plaintiff, Section 20-A regarding bar of jurisdiction of a civil Court is followed by a saving clause as contained in Section 21 of SEBI Act, 1992 and the said provision reads thus:

21.Savings Nothing in this Act shall exempt any person from any suit or other proceedings which might, apart from this Act, be brought against him.

We are of a considered view that at least Section 21 indicates that civil Court shall continue to have jurisdiction over the subject matters for which the authorities under the Act are not empowered to decide.

11. Although no particular provision of the S.C. Regulation Act, 1956, was specifically referred to, we desire to examine the scheme of the Act also in the same manner we have examined the scheme under SEBI Act in paragraph 11 above.

Section 22(E) is a provision excluding jurisdiction of the civil court and the same

reads as follows;

22(E). -Civil Court not to have jurisdiction. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Securities Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

In fact, Securities Appellate Tribunal established under Sub-section (1) of Section 15(k) of the SEBI Act, 1992, is the appellate tribunal referred in this Act. We have already discussed regarding the matters which can be dealt with by the said tribunal under SEBI Act, 1992. So far as S.C. Regulation Act, 1956, is concerned, the procedure and powers of the said tribunal are laid down in Section 22(B). None of the sub-sections of Section 22(B) deal with any of the matters that can be considered by the said tribunal. Thus, in fact, there is no provision specifying the subject matters under this Act, to be handled by the said tribunal. However, on reference to Sections 22 and 22(A), it is evident that when a recognized Stock Exchange acting in pursuance of any powers given to it by its bye-laws refuses to list the securities of any public company or any company, the appeals are available respectively to the Central Government and Securities Appellate Tribunal. By virtue of Section 23(I), an officer appointed by SEBI for the purpose, can adjudge the penalties to be imposed for defaults as prescribed by Sections 23(A) or 23(H). Section 23(L) empowers the Securities Appellate Tribunal to entertain the appeals against orders/decisions of recognized Stock Exchange, or adjudicating officer or orders passed by SEBI u/s 4(B). Section 4(B) is regarding approval by the SEBI of the scheme for corporatization and demutualization submitted by recognized Stock Exchanges. As already referred hereinabove, adjudicating officer deals with penal provisions as contained in Sections 23(A) or 23(H).

Section 7(A) empowers the recognized Stock Exchange to make rules restricting voting rights etc. Section 9 empowers them to make bye-laws. And reliance is placed by learned Counsel for the Respondents upon Clauses (k) and (n) of Sub-section (2) of Section 9, which run thus;

(k). Regulation of entering into, making, performance, recession and termination, of contracts including contracts between members and between a member and his constituent and between a member and a person who is not a member and the consequences of default or insolvency on the part of a seller or buyer or intermediary, consequences of a breach or omission by a seller or buyer and the responsibility of members, who are not parties to such contracts.

(n). Method and procedure for settlement claims or disputes including settlement arbitration.

Of by be Having taken a survey of the orders those can passed by the adjudicating officers, SEBI u/s 4(B) and also what are the powers of the

recognized stock exchange, we are unable to find out any provision that enables either of these three authorities to resolve the dispute regarding non payment between a client and unregistered sub-broker.

12. We feel justified in taking such an assessment of the scheme of both the statutes i.e. SEBI Act and S.C. Regulation Act, 1956, in view of the observations of the full bench of this Court in the matter of *St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad*, . In fact, portion from paragraph 7 of the reported judgment, relied upon by learned Counsel for Respondents, discusses the principles laid down by the Hon''ble apex Court for considering the issue of exclusion of jurisdiction of civil court. In para 7.1, the full bench has, after discussing the principles formulated by the Hon''ble Apex Court in the matter of *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, , summed up the principles as follows;

The exclusion of jurisdiction of the civil court is not readily inferred. Section 9 of the Code of Civil Procedure, 1908 provides that Courts shall have jurisdiction to bring all suits, "excepting suits of which the cognizance is either expressly or impliedly barred." Where there is no express exclusion, the intent of the Legislature must be examined with reference to the rights created by the legislation, the remedies provided and the scheme of the Act. Where the statute gives finality to the orders of a Special Tribunal the jurisdiction of the Civil Court is held to be excluded if there is an adequate remedy to do what the Civil Court would normally do in the suit.

SEBI Act, 1992 is enacted to provide for the establishment of a board to protect the interest of the investors in securities and to promote the development of and to regulate the securities market. The S.C. Regulation Act, 1956 is aimed at preventing undesirable transactions in securities, by regulation of business therein. Taking into consideration this nature of the agreement of the Act and after having examined the provisions which provide remedies through the authorities established under those statutes, we have not been able to refer to any provision that will enable an unregistered sub-broker or the client to recover the amount due from other party, by obtaining an executable decree/order. In para 7.3, the full bench has borrowed observations of the Supreme Court in the matter of *Raja Ram Kumar Bhargava (Dead) by Lrs. Vs. Union of India (UOI)*, , which read thus;

Generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the Civil Courts'' jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognized by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the Civil Courts'' jurisdiction,

then both the common law and the statutory remedies might become concurrent remedies leaving open an element of election to the person of inherence.

The observations of the Supreme Court in the matter of Rajasthan State Road Transport Corporation v. Krishna Kant AIR 1955 SC 1715, as summarised in paragraph 32 of the judgment and referred to in para 7.4 by the full bench of our High Court are on the same lines, as observations in Raja Ram Kumar's case.

13. Although reliance is placed by learned Counsel for the respondents on observations in the judgment of Nagpur Bench (S.J.) in the matter of Prashant Commercial Vs. Rajratan R. Mohta, , the provision with which the court was dealing with in that matter, was different than the provision on which reliance is being placed by learned Counsel for Respondents in the present matter. For the present matter, learned Counsel has referred us to Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations 1992 and the Code of Conduct for the sub-brokers prescribed by the said regulations and contents of model agreement between the broker and sub-broker, as also sub-broker-client agreement. Before taking us to the Regulations, 1992, our attention is drawn to the Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Rules 1992, and more particularly Rule 3. These are the rules framed by the Central Government in exercise of powers conferred by Section 29 of the SEBI Act, 1992 which have come into force, on 20.8.1992, the date of their publication in the official gazette. Rule 3 reads;

3. Not to act as Stock broker or sub-broker without registration: No Stock broker or sub-broker shall buy, sell, deal in securities unless he holds a certificate granted by the Board under the Regulations.

At the cost of repetition, we may say that, we are not dealing with the issue, "Whether the suit is not maintainable on merits, because the plaintiff is unregistered sub-broker?" and learned Senior Counsel for the Respondents has not challenged the finding of the trial court that the plaintiff is not a registered sub-broker.

Regulations, 1992 are framed by SEBI in exercise of powers conferred by Section 30 of SEBI Act, 1992. Chapter III provides the procedure for registration of sub-brokers. General obligations and responsibilities (Chapter IV), procedure for inspection by the board (Chapter V) and the procedure for action in case of default (Chapter VI) as applicable to the brokers, are made applicable to the sub-brokers by regulation 16 (all these provisions are referred from Bharat's Manual of SEBI, 2001 Edn.)

Learned Counsel for the defendants has referred to Clause 17 from Model agreement between brokers and sub-brokers and more particularly later half of the same which relates to dispute between sub-broker and client. A clause identical to this later half is incorporated within Clause 6 of Sub-broker-client agreement. Clause 17 from model agreement between brokers and sub-brokers reads thus;

If any dispute arises between a member broker and the sub-broker, the same shall as far as possible be settled with the help of officials of the said exchange and if no such settlement is possible, parties hereby agree to refer such dispute to arbitration in accordance with rules, bye-laws and regulations of the said stock exchange. The member broker and the sub-broker hereby agree that they shall cooperate with the exchange officials and provide all relevant documents in their possession so as to expedite the settlement through arbitration process. If any dispute arises between sub-broker and client, the same shall be brought to the notice of main broker within six months from the date of dispute and the same shall as far as possible be settled with the help of broker, failing which it shall be brought to the notice of exchange official for resolution. If the dispute persists, the same shall then be referred to the arbitration in accordance with rules, bye-laws and regulations of the said stock exchange. The broker shall continue to be responsible for replacing bad deliveries in accordance with applicable "good and bad delivery norms" even after termination of the agreement.

Relying upon these contents of model agreement, it was contended by senior counsel Shri P.M. Shah that reference to arbitration is part of terms and conditions which are statutory in the character and, therefore, those are binding upon the plaintiff, irrespective of the fact whether there is/is not a written agreement executed between plaintiff and the defendant. For supporting the proposition, learned Counsel has placed reliance upon observations of the Hon'ble Supreme Court in the matter of M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others, , and more particularly the contents in paragraph 20 of the judgment, which is captioned as "nature of agreement, statutory or contractual".

In the reported case, the appellant, a manufacturer of vanaspathi, had entered into two agreements with Andhra Pradesh State Electricity Board, for supply of high tension power. The officers of the board, after inspection of the factory, noticed pilferage of energy. The power supply was, therefore, immediately disconnected and the provisional assessment of the loss was made at Rs. 61,28,535/=. A prosecution was launched u/s 379 of the I.P.C. read with Section 39 of Indian Electricity Act, 1910. Upon considering objections filed by the company, which denied the allegations, final assessment was made, fixing the loss at Rs. 55,72,511.81 ps. The order was challenged by the company in appeal, but invain. The appellant-company, therefore, filed a suit in the court of Additional Chief Judge, City Civil Court (Temp.) Hyderabad, for a declaration that it was not liable to pay any amount as penal damages and prayed for a direction for refund of amount of Rs. 22.50 lacs.

Several issues, including challenge to jurisdiction of civil court, were raised. The trial court held that it had jurisdiction to try the suit, but negated all the contentions of the plaintiff-company and dismissed the suit. On appeal, Division Bench of the Andhra Pradesh High Court rejected the pleas of the appellant and dismissed the appeal. The High Court held that the terms and conditions of

supply, on the basis of which the agreements were entered into between the appellant and the board, did not, in any way, contravene provisions of either Electricity Act, or Electricity Supply Act and that ample opportunity was given to the appellant, before final order of the assessment was made and the enquiry was not vitiated. Aggrieved by the decision, the appellant-company had approached the Supreme Court with special leave.

The questions decided by the High Court in the aforesaid proceedings were again raised in writ petitions under Article 226 by some industrial undertakings, which had also entered into agreements with the board for supply of electricity, when the board had initiated proceedings against those industrial undertakings on the ground of pilferage of energy. In one of the writ petitions, appeal was filed against the interlocutory order, refusing interim relief to the petitioner therein. While admitting that appeal, the Division Bench referred the matter to a Full Bench for disposal, as the Division Bench opined that, the view taken by the Division Bench in the civil appeal referred earlier, was likely to be in conflict with the "possible view that the contractual obligation upon the consumer of electricity that in case of a dispute as to the consumption, the adjudication shall be by the officers of the Board, shall be derivative of Article 14 of the Constitution of India." The Full Bench of three judges opined that, the creation of adjudicatory process by contractual obligation in condition No. 39 of the "Terms and Conditions of Supply" of electricity was wholly vitiated and that though there is no bar against the Board to recover compensation for the loss caused to it, even when a consumer is prosecuted for the same offence, under the Act, the enquiry into and estimate of the loss should be made by an independent and properly constituted body. Ultimately, the Full Bench concluded that condition 39 of the conditions framed by the Board, to the extent it prescribes the procedure for adjudication of the dispute relating to pilferage or malpractice of energy and for final assessment of additional charges, is ultra vires of Sections 24, 26(6) and Cl.IV (3) of Schedule of the Act of 1910 and Section 49 of Act of 1948, and is wholly vitiated as being arbitrary and violative of Article 14 of the Constitution and was accordingly struck down.

Observations in para 20 of the judgment of the Hon"ble Supreme Court in Hyderabad Vanaspathi"s case read thus;

We have already seen that Section 49 of the Supply Act empowers the Board to prescribe such terms and conditions as it thinks fit for supplying electricity to any person other than a licensee. The section empowers the Board also to frame uniform tariffs for such supply. u/s 79(j) the Board could have made regulation therefore but admittedly no regulation has so far been made by the Board. The Terms and Conditions of Supply were notified in B.P. Ms. No. 690 dated 17.9.1975 in exercise of the powers conferred by Section 49 of the Supply Act. They came into effect from 20-10-1975 They were made applicable to all consumers availing supply of Electricity from the Board. The section in the Act does not require the Board to enter into a contract with individual consumer.

Even in the absence of an individual contract, the terms and Conditions of Supply notified by the Board will be applicable to the consumer and he will be bound by them. Probably, in order to avoid any possible plea by the consumer that he had no knowledge of the terms and Conditions of Supply, agreements in writing are entered into with each consumer. That will not make the term purely contractual. The Board in performance of a statutory duty supplied energy on certain specific terms and conditions framed in exercise of statutory power. Undoubtedly the terms and conditions are statutory in character and they cannot be said to be purely contractual." Because the Board in performance of its statutory duty had supplied energy on certain terms and conditions framed in exercise of statutory powers, the terms and conditions were held to be statutory in character and not contractual.

There is a fine distinction in the legal position as in the reported matter and the case on hands. In the reported matter, Section of the Act did not require the Board to enter into a contract with individual consumer. Consequently, the terms and conditions framed in exercise of powers u/s 49 for supply of energy to the consumer, are held to be binding on the consumer, irrespective of whether a written contract is entered into by the Board and the consumer, or not. The conditions framed in exercise of statutory powers, were held to be statutory.

In the matter at hands, Rules and Regulations of 1992 made in exercise of powers conferred by Sections 29 and 30 respectively of the SEBI Act, 1992, are relied upon for demonstrating that a sub-broker requires a registration and also for demonstrating that there is required to be an agreement between a broker and sub-broker (regulation 17(1)(m)) and a sub-broker and client (regulation 15(1)(b) and (c) read with model agreement). In fact, we have already observed that the model agreements between broker and sub-broker, as also sub-broker and client, contain a clause that dispute between a sub-broker and a client, if cannot be resolved by the broker and thereafter by the Board, is required to be referred to arbitrator in accordance with the rules. Although regulations 17(1)(m) and 15(1)(b) and (c) compell the broker and sub-broker to enter into agreement, those regulations do not prescribe that the agreement must be in absolute conformity with the model agreement and, therefore, terms and conditions demonstrated in the model agreement possibly cannot be termed as statutory in nature. In the reported matter, the Electricity Board was not required by the Section to enter into a written agreement with the consumer, although it had so entered.

In the matter at hands, the sub-broker is required by regulation to enter into a written agreement with the client and no such agreement is relied upon by the defendants/clients while resisting suit on the point of jurisdiction of the Civil Court, by relying upon the provision of requirement of reference to arbitration. The moot question that is required to be considered is, when the regulation, having the statutory force, required the sub-broker to enter into an agreement but not necessarily containing arbitration clause, with the client, whether the

existence of arbitration clause can be presumed as bar to entertainment of civil suit when, in fact, the sub-broker has not entered into an agreement with the client. And in the matter at hands, it is an established position that the plaintiff is not a registered sub-broker at all.

Some reliance was placed on Section 9(2)(k) of the S.C. Regulation Act, which refers to the subject on which the recognized Stock Exchange with the approval of SEBI can make bye-laws. We have already reproduced the same in para. 11 ante and the opening part reads thus;

9. Power of recognized stock exchanges to make bye-laws.

(k). the regulation of the entering into, making, performance, recission and termination, of contracts, including contracts between members or between a member and his constituent or between a member and a person who is not a member and the consequences of default....

The regulation contemplated, is about the contracts between the member and member, member and his constituent and between a member and a person who is not a member. The regulation contemplated does not govern a contract or transaction between two persons, both of whom not being members.

In the matter at hands, the defendants, as client, are not members of recognized stock exchange, or SEBI. The Plaintiff, as a sub-broker, by taking into consideration definition of "sub"broker" in Rule 2(f) of 1992 rules, is bound to be not a member of stock exchange, and the plaintiff is admittedly not a registered sub-broker. The dispute before us is, therefore, a dispute between the two persons, who are not members of a registered stock exchange and the question to be considered, therefore, will be, "whether the rules or regulations of recognized stock exchange or SEBI will be capable of governing, controlling and regulating the transactions between the two persons, who are not its members ?."

14. Reliance is placed upon the judgment of learned Single Judge of this High Court in the matter of Prashant Commercial Vs. Rajratan R. Mohta, , wherein in paragraph 9, the learned Single Judge observed;

It is to be noted that even dispute between two non members is regulated under it and full effect needs to be given to these fictions.

The learned Judge was dealing with bye-law No. 248(a) of Bombay Stock Exchange Regulations/Bye-laws, the text of which is reproduced in paragraph 8 of the judgment. It is somewhat worded as Section 9(2)(k) of the S.C. Regulation Act. For the sake of convenience, we reproduce opening part of the said bye-law.

All claims (whether admitted or not) difference and disputes between a member and a non-member, or non-members. (The term "non-member" and "non-members" shall include a remisier, authorised clerk, a sub-broker who is

registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings transactions and contracts made subject to the Rules, Bye laws and Regulations of the Exchange or with reference to anything incidental thereto....

Since the observations in paragraph 9 are relied upon for the purpose of propounding a submission that even disputes between two non members are regulated by the regulations/bye-laws of SEBI/recognized stock exchange, we have quoted only opening part of regulation No. 248(a) of Bombay Stock Exchange, relied upon before the learned Single Judge. We are afraid, we are unable to read the regulation in the same manner as read by the learned Single Judge. It speaks about claims, differences and disputes between a member on one side and a non-member or more than one non-members on the other side. It does not seem to be referring a dispute between member and member or a non-member and non-member. If a dispute between non-member and non-member was desired to be controlled by regulation 248(a), the words "between a member and a non-member or non-members" would have been required to be "between a member and a non-member/s" and " between a non-member and non-member/s". With the bye-law as it is worded, we are unable to agree with the learned Single Judge that it contemplates dispute between two non-members to be regulated under it. The term "non-member" is not defined, but illustrated by the words in the bracket and that, by no stretch of imagination, expands the scope of the bye-law, regarding parties to the dispute. It refers to dispute between a member on one side and single or more non-members on the other. It does not include even a dispute between a member and another member, much less a dispute between two non-members. With due respect, we are inclined to disagree with the learned Single Judge, so far as interpretation of bye-law 248(a) as done in paragraph 9 of his judgment relied upon by learned Counsel for Respondents, is concerned. The language of bye-law 248(a) is plain and unambiguous and scope of the provision regarding nature of parties, disputes between whom are to be referred to arbitration could not have been expanded by illustrating definition of non-member as quoted in the bracket and to which the learned Single Judge has referred as "full effect needs to be given to these fictions." There is nothing in regulation 248(a) which will attract a dispute between two non-members.

We may state here that while deciding the issue regarding jurisdiction of civil court, learned Single Judge has neither referred to relevant provisions which create a bar against the jurisdiction of civil court, which we have discussed at length in the earlier part of this judgment and he has also not referred to Section 21 of SEBI Act, 1992 which dilutes bar of jurisdiction created by Section 20-A (both provisions are reproduced in earlier part (para 10) of our judgment).

The learned Single Judge has observed in paragraph 13 that the above case law demonstrates that by 1956 Act and Regulations/Bye-law of Bombay Stock Exchange, a special procedure and machinery has been evolved for looking into

the grievance of person dealing with the sale and purchase of securities. It appears that the two cases were referred before the learned Single Judge, as can be seen from paragraph 6 of his judgment. In the matter of *The Stock Exchange, Mumbai Vs. Vinay Bubna and others*, there was a reference to arbitration under bye-law 248, by mutual consent and reference was to two arbitrators, one named by each party. Respondent No. 1 was the original petitioner in the arbitration petition. Differences had arisen between him and Respondent No. 2, who was a broker with the exchange and hence, a reference was made to arbitrators. The issue involved was, as to which provision will prevail-by law 249(a) which was a statutory bye-law having force of "enactment" within the meaning of Section 2(4) of the Arbitration Act, 1996, and provided for reference to even number of arbitrators, this being inconsistent with the provision of Section 10 of the 1996 Act, which prescribes that number of arbitrators should not be even.

It was held by Division Bench that requirement of Section 10 of number of arbitrators to be uneven is not applicable.

The issue of exclusion of jurisdiction of civil court was not under consideration and reference to the arbitration was regarding a dispute between parties out of which at least one was a member of the stock exchange, Respondent No. 2 being a broker of the exchange. Definition of "stock-broker" as contained in Rule 2(e) makes it clear that a stock broker means a member of a stock exchange. Thus, this was a dispute between parties out of which at least one was a member, thereby justifying a reference to arbitrators.

Second case relied upon before the learned Single Judge was, *Hemendra V. Shah Vs. Stock Exchange, Bombay and others*. This was a petition filed for a declaration that there is no valid, subsisting and binding agreement between the petitioner and the 6th Respondent. The petitioner was a clerk of 6th Respondent and the 6th Respondent was a member of Bombay Stock Exchange. On petitioner's application for membership, 6th Respondent gave his no objection and also stood as guarantor and hence, the petitioner was enrolled as a member. The 6th Respondent filed before Bombay Stock Exchange, a claim in the sum of Rs. 2.80 crores against the petitioner in respect of transactions in groups of shares. Arbitration under the rules, bye-laws and regulations of Bombay Stock Exchange, was invoked. The argument advanced was that an arbitration under the rules, bye-laws and regulations of the Bombay Stock Exchange, can only take place, provided there are contract notes between the parties. Challenge was dismissed by learned Single Judge of this High Court, observing;

...Bye-law 226(a) provides that all contracts made by a Member for or with a non-Member, for the purchase or sale of securities in which dealings are permitted on the Exchange, shall in all cases be deemed to be made subject to the Rules, Bye-laws, Regulations and Usage of the Exchange.

As can be seen from paragraph 17, during the period of relevant transactions,

the petitioner was not a member and, therefore, this was a dispute between non-member petitioner and a member-Respondent No. 6.

In the matter before us, no such bye-law, as by law 226(a) in the reported matter, making all contracts subject to rules, bye-laws, regulations and usages of the Exchange, is referred. But, the requirement of making a reference to an arbitrator is demonstrated by longer route that, bye-law requires an agreement between a broker and sub-broker, as also an agreement between sub-broker and client and that model agreements include within those, an arbitration clause. The requirement of regulation is execution of agreement between broker and sub-broker, as also between sub-broker and client. Even regulation 17(1)(m) and 15(1)(b) (c) pertaining to agreements between stock broker and his sub-broker and sub-broker-client do not seem to lay down that the parties must stick to all the terms and conditions as indicated in the model agreement. We have also not been able to locate regulation that will compel the sub-broker to stick to all the terms and conditions as contained in the model sub-broker-client agreement. (both model agreements are in annexure 4).

Regulations 15(1)(c) and (17(1)(m), both provisions referring to agreement between the stock broker and sub-broker, lay down that there should be agreement "specifying scope of authority and responsibilities" of the stock broker and sub-broker, but do not make it obligatory that such an agreement must be in conformity with the model agreement provided in annexure 4. So far as sub-broker is concerned, the Code of Conduct for sub-brokers, in regulation 15, does not contain any such compulsion, requiring the sub-broker to stick to model sub-broker-client agreement. Therefore, there is room to infer that the stock-broker-sub-broker agreement, as also sub-broker-client agreement, can be different than the model agreement given in annexure 4.

15. We have taken a note that the plaintiff, although acted as a sub-broker, was not a registered sub-broker. Even as a sub-broker, the plaintiff will not get status of being a member of SEBI/Stock Exchange and thus, the dispute before us is a dispute between two persons, both of whom are non-members, although the dispute relates to price of shares purchased and sold by the plaintiff on behalf of the defendants. This factual aspect is found by us to be of crucial importance, because all the provisions relied upon by learned Senior Counsel Shri P.M. Shah for Respondents, are the provisions pertaining to agreements and contracts between parties, out of which at least one is a member i.e. dispute between a member and member, member and non-member/s. No provision touching the dispute between two non-members was brought to our notice.

We have considered in para 10 above, all the provisions creating a bar of jurisdiction against entertainment of an issue by a civil court i.e. Section 20-A and Section 15(Y) of SEBI Act, and Section 22(E) of the S.C.Regulation Act, in the light of provisions relating to powers of the authorities under the respective Acts, i.e. adjudicating officer, Securities Appellate Tribunal and the Board, and found that none of the provisions enable either of these authorities to resolve a

dispute regarding non-payment between a client and sub-broker (much less unregistered sub-broker).

We have considered at length, the arguments advanced by learned Senior Counsel for the Respondents that the dispute is required to be referred to an arbitration. Such an argument was based on the submission that arbitration clause is a statutory term and condition of the contract between broker and sub-broker, as also sub-broker and client. After considering 1992 rules and regulations framed in exercise of powers under Sections 29 and 30 of SEBI Act, 1992, we have found ourselves to be unable to agree with such a submission. The regulations seem to lay down that there must be an agreement between broker and sub-broker, as also sub-broker and client, specifying the scope of their authority and responsibilities, but regulations do not seem to compel incorporation of all the terms and conditions in the agreement, as per the model agreements in annexure 4, and more particularly arbitration clause. It is, therefore, not possible to accept the argument that, arbitration clause is a statutory term and condition of a contract between the broker and sub-broker, or sub-broker and a client. The attempt to claim that Section 8 of Arbitration Act, 1996, would operate as bar against entertainment of the suit, therefore, must fail.

If at all, for the sake of arguments, arbitration clause is presumed to be a statutory condition, all the transactions between the parties are prior to 10.4.1996, the date of first acknowledgment of dues by defendant No. 1 and the Arbitration Act 1996 has come into force with effect from 22.08.1996 and, therefore, whether the Arbitration Act 1996 and more particularly Section 8 thereof would come into play, is also a doubtful question.

With above observations regarding provisions creating bar against jurisdiction of the civil court read with Section 21 of SEBI Act, 1992, laying down that nothing in this Act shall exempt any person from any suit or other proceedings which might, apart from this Act, be brought against him, it does not appear to be a situation wherein exclusion of jurisdiction of civil court can be readily inferred. This is not a case, where cognizance of suit for recovery of dues, although arising out of sale-purchase of securities, is expressly barred. The intent of the legislature, if to be examined, Section 21 of the SEBI Act, 1992, speaks against total exclusion of jurisdiction of civil court. Recovery of the dues is a right pre-existing under common law and not a right created by SEBI Act, 1992. This, therefore, is not a case wherein the statute itself creates a right and also provides machinery for enforcement of the same. On the contrary, it is a case wherein a right is pre-existing under common law and one more remedy is provided by arbitration clause, if included in the agreement, without expressly excluding the jurisdiction of the civil court. Consequently, this is a case wherein both, the common law and the statutory remedies, are the concurrent remedies. Since the transactions are of a period prior to coming into force of Arbitration Act, 1996, the difference in the legal position as under Arbitration Act, 1940 and

Arbitration Act, 1996, also cannot be ignored, because when the model agreements were prescribed, Arbitration Act, 1996 was not in existence.

We are, therefore, unable to accede to the submission of learned Counsel for the Respondents that there is implied agreement containing arbitration clause between sub-broker and client by virtue of statutory terms and conditions and that, therefore, jurisdiction of the civil court is taken away.

16. The learned Trial Judge, at the conclusion of the impugned order, has rejected the plaint. On reference to Order VII, Rule 11 of the Code of Civil Procedure, 1908, the plaint is required to be rejected, if it does not disclose a cause of action or if relief claimed is undervalued and the plaintiff, on being required to correct the valuation, fails to do so, or if the plaint is properly valued but insufficiently stamped and the plaintiff fails to remove deficiencies, even on being required by the court to do so, or if the suit is barred by any law. The case certainly does not fall within first three categories. Even if the trial court were to arrive at a conclusion that the civil court has no jurisdiction, either territorial or of the subject-matter, it would have been required to return the plaint as under Rule 10 of Order VII. Even if we were to uphold the argument of Advocate Shri P.M. Shah that there is implied agreement containing arbitration clause, we would have been required to return the plaint (if governed by Section 8 of the Arbitration Act, 1996).

In paragraph 11 of her judgment, the learned Trial Judge observed that the plaintiff is a sub-broker, not having obtained mandatory registration certificate. Although learned Judge has not expressly said so, if the Judge was of the view that hence the suit by plaintiff is not maintainable, the order should have been for dismissal of the suit. The possibility of rejection of plaint under Order 7 Rule 11(d) of the Code of Civil Procedure, because it is "barred by any law" does not survive, if it is the claim of the defendants that SEBI Act, 1992, S.C. Regulation Act, 1956 and Rules and Regulations thereunder, have provided an alternate remedy. The order of rejection of plaint, therefore, is patently erroneous.

However, arriving at a conclusion that the jurisdiction of the civil court is not excluded and more so, because both the parties before us are non-members of the stock exchange, the impugned order cannot be sustained and hence, the same is quashed and set aside. The trial court shall proceed with the suit, on merits. Once again, we clarify that we have not dealt with issue of non maintainability of the suit, because the plaintiff is not a registered sub-broker. We have also not dealt with issue, whether the transactions between the parties are void, against public policy and, therefore, right to recover dues thereunder is not enforceable in the court of law.