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**(1998) 08 AHC CK 0016**  
**In the Allahabad High Court**  
**Case No : C.M.W.P. No. 23761 of 1998**

Smt. Veena Ojha

APPELLANT

Vs

U.P. Stcok Exchange Association Ltd. and others

RESPONDENT

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**Date of Decision :** 07-08-1998

**Acts Referred:**

Arbitration Act, 1940 — Section 33  
Arbitration and Conciliation Act, 1996 — Section 16, 2, 34, 34(2), 34(3)  
Constitution of India, 1950 — Article 226  
Securities Contracts (Regulation) Act, 1956 — Section 9, 9(2), 9(4)

**Citation :** (1998) 3 AWC 2109

**Hon'ble Judges :** D.K. Seth, J

**Bench :** Single Bench

**Advocate :** Bajarangi Mishra and Raj Kumar Ojha, for the Appellant; S.C. and M.B. Singh, for the Respondent

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## Judgement

D.K. Seth, J.—The petitioner has alleged that the arbitrator appointed under the bye-laws framed pursuant to Section 9 of the Securities Contracts (Regulation) Act, 1956, had passed an ex parte award against her in the matter arising out of alleged dealings/transactions, which the petitioner had never entered into. It is further alleged that the petitioner had no notice of the arbitration and the arbitrator had misconducted himself in passing the said award ex parte. It is further contended that the arbitrator had no jurisdiction to enter into arbitration since the alleged transaction did not fall within the ambit of bye-laws 247 (a) and 247 (b) of the bye-laws framed under the said Act.

2. I have heard Mr. R. K. Ojha, learned counsel for petitioner and Mr. Mahendra Bahadur Singh, learned counsel appearing for respondent No. 3, at length.

3. Section 9 of the said Act provides for framing of bye-laws which in sub-section (2) clause (k), provides for the regulation of the entering into, making, performance, rescission 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 or insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer, and the responsibility of members who are not parties to such contracts.

4. The bye-laws have been framed in terms of sub-rule (4) which requires its previous publication and when approved by the Central Government it is to be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised stock exchange is situated and the same becomes effective from the date of such publication in the Gazette of India. It is not disputed that such bye-laws have, been framed under sub-section (4) of Section 9 of the aforesaid Act. It is pointed out by Mr. Ojha that the bye-laws 247 (a) and 247 (b) of the bye-laws so framed, provide for arbitration other than between the members. The said bye-laws provides as follows :

"247 (a). All claims (whether admitted or not) ; difference and disputes between a member and a non-member or non-members (the terms "non-member" and "non-members" shall include a remises, authorised clerk or any other persons with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their constructions fulfillment to validity or relating to the rights, obligation and liabilities of remises, authorised clerks, employees or any other person with whom the member shares brokerage in relating to such dealings, transaction and contracts shall be referred to be decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange.

Contract constitutes Arbitration Agreement.--(b) An acceptance whether express or implied of a contract subject to arbitration as provided In sub-clause (a) and with this provision for arbitration Incorporated therein all constitute and shall be deemed to constitute an agreement between the member and the non-member or non-members concerned that all claims (whether admitted or not), differences and disputes of the nature referred to in sub-clause (a) in respect of all dealings transactions and contract of a date prior or subsequent to the date of the contracts shall be submitted to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange and that In respect thereof any question whether such dealings, transactions and contracts have been entered into or not, shall, also be submitted to and decided by arbitration as provided in the Rules. Bye-laws and Regulations of the Exchange."

5. A plain reading of the above bye-laws indicates that all dealings and transactions whether express or implied are subject to arbitration. This bye-law has also included a rule on its own Jurisdiction to the extent that even the question as to whether there was any transaction or not between the parties going into root of jurisdiction of the arbitrator, can also be gone into. Inasmuch as u/s 16 of the Arbitration and Conciliation Act validity of the arbitration

agreement cannot be gone into by the Arbitrator. By reason of special provision of the bye-laws, the question of existence or validity of the arbitration can also be gone into by virtue of clause (b) of Bye-laws 247.

6. Thus, the very question as raised by the petitioner in the present writ petition is also open to be decided by the arbitrator.

7. The petitioner contends that since the award was passed ex parte, the petitioner had no opportunity to raise this question and the arbitrator has not gone into the same. The Arbitration and Conciliation Act while defining "Arbitration" in Section 2 clause (a) means any arbitration whether or not administered by permanent arbitral institution. Therefore, arbitration within the meaning of Arbitration and Conciliation Act also includes the arbitration contemplated under the said bye-laws and as such whole Arbitration Act would be applicable in respect of the arbitration undertaken under the said bye-laws subject however to the provisions contained in the said bye-laws.

8. It is not contended by the learned counsel for the petitioner that by reason of the provision contained in the aforesaid bye-laws, the application of Arbitration and Conciliation Act is excluded. He has not been able to show anything either by producing a copy of the bye-laws or otherwise, that the application of the Arbitration and Conciliation Act is excluded in respect of an arbitration under bye-laws 247. On the other hand, he contends that after an award is passed in such an arbitration under bye-law 247, such award is to be filed in Court, on which a decree is passed in order to render the award executable. He contends that though the award is open to challenge u/s 34 of the Arbitration and Conciliation Act, but since there was no transaction between the petitioner and the association, therefore, arbitration was wholly without jurisdiction and as such it can be challenged directly by means of an application under Article 226 of the Constitution of India.

9. As observed earlier, bye-laws have provided jurisdiction to the arbitrator even to decide very existence and validity of the arbitration agreement. The same question is very much open to be decided by the Arbitrator. As such any decision by the arbitrator would be equally liable to be challenged u/s 34 of the Arbitration and Conciliation Act.

10. Section 33 of the Arbitration Act, 1940, has undergone certain changes when it is re-Incorporated in Section 34 of the Arbitration and Conciliation Act, 1996. In Section 33, the existence and validity of the arbitration agreement or award or to have the effect of either determined, could be challenged in Court. While reconstructing Section 33 of the 1940 Act in Section 34 of the 1996 Act, it is provided that:

"34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if-

(a) a party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force ; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside ; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing such agreement, was not in accordance with this Part ; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.--Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict . with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had " received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the arbitral tribunal.

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may. where it is appropriate and it is so requested by a party, adjourn the proceedings for a

period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Whereas Section 33 of the Arbitration Act, 1940, provides as follows :

"33. Arbitration agreement or award to be contested by application.--Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also and it may pass such orders for discovery and particulars as it may do in a suit."

11. Thus, it indicates that the same provision has been bifurcated in several sub-clauses of sub-section (2). Sub-section 2 (a) indicates that the award could be set aside if a party was under some incapacity or if the arbitration was not valid or that proper notices were not given to the parties or a party was unable otherwise to present his case or if the award deals with a dispute not contemplated by or not falling within the terms of the arbitration. Thus, the very existence or validity of the arbitration agreement can still be challenged in a proceeding u/s 34 of the 1996 Act as indicated in clause (a) of sub-section (2) of Section 34 of the 1996 Act.

12. While interpreting Section 33 of the 1940 Act in the case of *Shiva Jute Baling Limited Vs. Hindley and Company Limited*, and *R.N. Ganekar and Co. Vs. Hindustan Wires Ltd.*, , it was held that the Court is concerned only with the existence, validity and effect of the arbitration agreement and not the merits of the dispute. It is predominantly concerned with the arbitration clause of the agreement. In the case of *Khardah Company Ltd. v. Raymon and Company (India) Private Limited*, AIR 1962 SC 1810, the Apex Court held that if the main contract is proved to be non-existent or void, the Court may grant such declaration u/s 33 of the 1940 Act. In the case of *Alliance Mills (Lessess) Pvt. Ltd. v. Madan Gopal and Sons*. AIR 1982 Col 282 , it was held that such a plea of non-existence of arbitration agreement or its being void can be taken even if the party applying u/s 33 of the 1940 Act had accused earlier in the arbitration. This view finds support from the decision in the case of *Gangaram Ratanlal Vs. Simplex Mills Co. Ltd.*, , on account of the reasons given in the said judgment that there being no agreement there was no jurisdiction to enter into arbitration by the arbitrator. The question whether the award is invalid because of invalidity of the reference also falls within Section 33 of the 1940 Act, as has been held in the case of *The Union of India (UOI) Vs. Shri Om Prakash*, . affirming the same view taken by this High Court in *Maharaj Kumar Mahmud Hasan Khan Vs. Moti Lal Banker*, , and those of *Saha and Co. Vs. Ishar Singh Kripal Singh and Co.*, ,

Orissa view, M. P. view and the view taken by Delhi High Court in its Full Bench decision in the case of Prem Sagar Chawla v. M/s. Security and Finance (P.) Ltd., AIR 1968 Del 21. While Patna High Court had taken a different view. This view does not appear to have been approved by the Apex Court in the case of Om Prakash, (supra) referred to above.

13. Therefore, the contention of learned counsel for the petitioner that he is entitled to invoke writ jurisdiction in the facts and circumstances of the case does not appear to be sound and cannot be sustained.

14. Thus, the award is very much open to be challenged by means of Section 34 of the Arbitration and Conciliation Act, 1996, before the appropriate forum. All points as has been raised in the present case can very well be raised in such proceedings. The points which are sought to be raised in the writ petition, can be decided within the scope and ambit of Section 34 of the Arbitration Act and can very well be raised in such proceedings.

15. Thus, there appears to be adequate alternative remedy which in the present case precludes this Court from exercising writ Jurisdiction in respect of the grievance of the petitioner.

16. Then again, the question that whether the petitioner had entered into arbitration agreement or not, whether the petitioner had been given notice or not, are pure questions of fact which can be determined only on the basis of evidence. This Court while exercising writ Jurisdiction cannot enter into disputed questions of fact and decide such question on the basis of evidence, in other words, it cannot take evidence except in exceptional circumstances. This is not a case of exception where such a course should be adopted.

17. In that view of the matter, this writ petition is dismissed only on the ground of alternative remedy and maintainability as observed here-in-before. This order in no way will prejudice the right of the petitioner if she has any which she may agitate in appropriate manner before the appropriate forum. The observations relating to the facts as made in this judgment are tentative and shall not in no way influence the decision in the matter that might be undertaken at the behest of the petitioner before any other forum, which shall decide the issues before it in accordance with law according to its own wisdom and discretion without being influenced by any observation made in this order. There will be no order as to costs.