
(1960) 11 BOM CK 0003
In the Bombay High Court
Case No : Appeal No. 226 of 1959

Varjivandas Khushaldas Gandhi

APPELLANT

Vs

Ravindra Motilal Shah

RESPONDENT

Date of Decision : 30-11-1960

Acts Referred:

Bombay Securities Contracts Control Act, 1925 — Section 4

Citation : (1961) 63 BOMLR 332

Hon'ble Judges : Naik, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Naik, J.—The appellants, who would hereafter be referred to as "the firm", carry on business at Bombay as share and stock brokers. The firm is a member of an Association which was originally known as the Native Share and Stock Brokers' Association. The respondent, who will hereafter be referred to as Ravindra, was a constituent of the firm. He was not a member of the Native Share and Stock Brokers' Association. In the year 1955 Ravindra entered into contracts for the purchase and sale of stocks and shares through the firm, Contract notes in the form exh. A were executed from time to time in the name of the firm by Ravindra. One of the terms of these contracts was that the contract was subject to the rules and regulations of the Native Share and Stock Brokers' Association. With regard to disputes arising between the parties, the contract note, provides:-

In the event of any dispute arising between you and us out of or relating to dealings, transactions, and contracts, the matter shall be referred to arbitration as provided overleaf.

It is not necessary to set out the terms printed overleaf at this stage of the narrative. I will refer to them extensively and in detail while discussing the issues in this case.

2. According to the firm, a sum of Rs. 19,745-10-6 became due to them from

Ravindra on account of the transactions put through by them on Ravindra's account. The Native Share and Stock Brokers' Association was recognised by the Government of Bombay u/s 4 of the Bombay Securities Contracts Control Act, 1925 (Act No. VIII of 1925). This Act was repealed by a Central enactment known as the Securities Contracts (Regulation) Act, 1956, (Act No. XLII of 1956). Thereafter the Association assumed an alias name "The Stock Exchange". The old name was retained and the new name was an additional title to the Association. The bye-laws and rules were re-cast and the Association was recognised by the Central Government in accordance with the provisions of Section 4 of the Central enactment. The firm served a notice upon Ravindra to pay the amount due to them. It was stated in the notice that, in case Ravindra failed to make the payment, the firm would be required to proceed to recover the dues according to law. Ravindra asked for certain particulars and nothing happened till 1958. On April 26, 1958, the firm wrote a letter stating that they had referred the dispute between the parties to the arbitration of the Stock Exchange and that they had appointed one Mr. C. M. Shah as Arbitrator on their behalf. On April 29, 1958, the Assistant Secretary of the Stock Exchange informed Ravindra about the reference to arbitration made by the firm and asked him to appoint an Arbitrator within seven days. On May 3, 1958, Ravindra asked for time on the ground that he was unable to come to Bombay as one of his relatives was sick and also on the ground that he wanted to obtain legal advice in the matter. On May 28, 1958, the Secretary informed Ravindra that as the latter had failed to appoint an Arbitrator on his behalf, the President of the Stock Exchange had appointed Mr. N. N. Dubash as Arbitrator on behalf of Ravindra. The President also appointed Mr. M. C. Mehta as Umpire. On May 29, 1958, the two Arbitrators, namely C. M. Shah and N. N. Dubash, sent a letter to Ravindra stating that the case was fixed for hearing on June 11, at 3 p.m. in the Board Room of the Stock Exchange. They intimated to him that, in case he chose to remain absent, they would proceed with the case ex parte during his absence. It is not necessary at this stage to refer to the various letters which Ravindra wrote to the Secretary of the Association, At this stage it is sufficient to note that, after stating that there was no valid agreement of reference and also after asking for time on one pretext or the other, the respondent did not choose to remain present on any of the dates of hearing fixed by the Arbitrators. At one stage Ravindra stated that he intended to take part in the proceedings under protest, but he did not act up to that expressed intention. Eventually, on July 30, 1958, the two Arbitrators declared their award, under which Ravindra was called upon to pay a sum of Rs. 19,000 and odd. The Secretary of the Association intimated the fact of the declaration of the award to Ravindra. He also sent a copy of the award along with the letter. On November 18, 1958, the Arbitrators filed the award in the City Civil Court. Ravindra was served with notice on November 22, 1958. On December 19, 1958, he put in his written statement, in which he prayed that the award may be set aside on certain grounds which he set out from (A) to (N). One of these grounds (ground B) was that there was no written agreement of arbitration and that the defendant-petitioner had not accepted and

signed the arbitration agreement. Ground (C) was in the following terms:-

That the contract notes given by the plaintiff respondent are not according to the Rules of the Association and that, therefore, the contract notes are illegal and the award based therein is also illegal and not binding upon the petitioner.

Ground (F) was as follows:-

That the arbitrators were not even appointed as required under law and as alleged to have been agreed upon between the parties. The appointment of the arbitrators without Umpire was not proper and, therefore, it vitiates the whole Award.

In Ground (L) Ravindra contended that the rules and regulations of the Association were not binding upon him and that he had never submitted to the arbitration proceedings, lie also put in an affidavit in support of the allegations made by him in his written statement. On March 5, 1959, Ravindra made a regular petition praying for setting aside the award on various grounds. One of the contentions raised by him was

that the Native Share & Stock Brokers" Association had ceased to exist from 1-9-1957. As the Association went out of existence from 1-9-1957, the procedure followed by the opponent, by the Secretary and by the President of this defunct Association is illegal, void ab initio and of no legal effect whatsoever.

3. Mr. B. J. Divan, who heard the matter, came to the conclusion that the Native Share & Stock Brokers" Association, which was brought into existence by the Government of Bombay by virtue of the powers conferred upon it by Bombay Act No. VIII of 1925, had ceased to exist and a new Association known as the Stock Exchange came into being as a result of the provisions of the Central Act No. XLII of 1956. He, therefore, held that the Arbitrators who were eventually chosen in 1958 were not members of the Native Share and Stock Brokers" Association, and, therefore, they could not act as Arbitrators because only Arbitrators who were members of the defunct body, namely, the Native Share and Stock Brokers" Association, were in the contemplation of the parties according to the terms of the contract note. Consequently, he set aside the award. That is why the firm has come up in appeal against that order.

4. Mr. Chandrachud, who appeared on behalf of the firm, contended that the trial Court was wrong in holding that the Native Share and Stock Brokers" Association was a creature of the statute and that, as soon as the Act under which it came into existence was repealed, the body ceased to have any kind of existence. He argued that the Native Share and Stock Brokers" Association was a voluntary organisation. Presumably it pre-existed the Bombay Act No. VIII of 1925 and actually came to be recognised by the Bombay Government u/s 4 of the Bombay enactment. He pointed out that it is one thing to say that an association has been recognised by the Government for the purposes of the Act and quite another to say that the Association has been created by the statute. He conceded

that the rules and bye-laws were re-cast and modified and new rules and bye-laws came to be framed when an application was made under the Central enactment for recognition. According to him, that would not effect a change or a metamorphosis in the old Association, nor would it mean that a new Association has come into being. The same Association, he says, has continued and only an alias name was added to the old name and there is some modification in the rules and bye-laws.

5. Mr. H. R. Gokhale on behalf of Ravindra tried to support the judgment of the lower Court not only on the ground on which the judgment was based, but also on some other grounds which have not been discussed in the judgment of the trial Court. (We do not know whether they were canvassed before the learned trial Judge). The questions raised by Mr. Gokhale are pure questions of law and, therefore, even if they were not canvassed before the trial Court, I have allowed him to urge them in this appeal. He contended that, in the correspondence, Ravindra challenged the very existence of the agreement of reference and also disputed the validity of it. That being the case, according to Mr. Gokhale, the Arbitrators had no jurisdiction to proceed with the case and an award made by them is not binding upon Ravindra and will have to be set aside. He also contended that the award was bad because proper notices of adjourned dates were not given to him, nor was it stated in these subsequent notices that, if he did not appear, the Arbitrators would proceed ex parte with the case.

6. I will first deal with the ground on which the trial Judge has set aside the award. The main contention in that behalf is that, at the time of the contract note which contains the arbitration clause, there was an Association in existence which was known as the Native Share and Stock Brokers' Association. Under the terms of the contract, reference was to be made to two Members of that Association, one of whom was to be nominated by each party, and the Arbitrators so chosen were to appoint a third Member as an Umpire. It is pointed out that this Association was functioning under rules and bye-laws which were framed by the Association and which received the sanction of the Government in 1927. Certain modifications were made in 1927 which also received the sanction of the Government in 1938. The argument is that the Native Share and Stock Brokers' Association was recognised by the Government on the basis of the rules and bye-laws framed by them and sanctioned by the Government. Act No. VIII of 1925 was repealed by the Central enactment No. XLII of 1956, and the Association had to frame new rules and bye-laws in accordance with the provisions of the Central enactment. The Association, therefore, framed rules and bye-laws in 1957 which received the sanction of the Central Government in due course. The Stock Exchange is now functioning under the rules and regulations framed in 1957. The Association has now been recognised by the Central Government u/s 4. The Association, therefore, which is functioning to-day is not the same Association which existed at the time of the contracts. It is, therefore, contended that the Association which was in the contemplation of the parties at the time of the contracts having ceased to exist, the arbitration agreement has ceased to be

operative and cannot now be implemented.

7. In support of this contention, Mr. Gokhale drew my attention in particular to the provisions of Section 7 and Section 37 of the Central enactment and also to certain rules and bye-laws. Before proceeding to consider the provisions of the Central enactment and the rules framed in 1957, it is necessary to outline the main provisions of Bombay Act No. VIII of 1925. It is significant to note that the provisions of the Act govern transactions for the purchase and sale of securities other than ready delivery contracts. In other words, the provisions are intended to cover cases of forward contracts in the sale and purchase of securities. It is nobody's case that the Native Share and Stock Brokers' Association was not dealing in ready delivery contracts and was indulging only in forward transactions. It will be seen that the recognition of the Stock Exchange u/s 4 is only for a limited purpose and covers transactions other than ready delivery contracts. Section 4 runs thus:-

(1) A stock-exchange desirous of being recognized for the purpose of this Act shall make an application in writing to the Provincial Government for such recognition, and shall submit rules for the regulation and control of transactions in securities other than ready delivery contracts and furnish such information in regard to such recognition as the Provincial Government may require.

(2) The Provincial Government may give or refuse such recognition provided that the rules submitted by the stock-exchange under Sub-section (1) shall be published in the Official Gazette, one month before such recognition is given.

(3) The Provincial Government may at any time withdraw the recognition given to a stock-exchange under Sub-section (2), and such stock-exchange shall thereupon cease to be a recognized stock-exchange.

Section 5, Sub-section (1) empowers a stock exchange, subject to the sanction of the Provincial Government, to make and from time to time add to, vary or rescind rules for the regulation and control of transactions in securities (other than ready delivery contracts). Sub-section (2) of Section 5 enumerates the subjects on which rules may be framed by the stock exchange. Clause (g) of sub-s (2) relates to "the settlement of disputes arising between members and the punishment of defaulting members". The main point for consideration is whether, by reason of the fact that the Native Share and Stock Brokers' Association has been recognised by the Bombay Government u/s 4 and the further fact that the Association has framed rules which have been sanctioned by the Provincial Government, that Association becomes a creature of the statute. The Association has not been created by the statute, nor does it owe its existence to the statute. It is an independent voluntary organisation. The mere fact that for transacting certain kind of business it requires to be recognised by the Provincial Government does not make it a creature of the statute. As an instance in point, we may take the case of a firm which may be registered under the Shops and Establishments Act and may also be registered under the Sales Tax Act. The fact

that the same firm has been registered under different statutes does not split the firm into two independent bodies. It is the same entity which carries on different functions and on that account requires to be registered under different enactments. Section 31 of Central Act No. XLIII of 1956 repeals the Bombay Act. The usual saving clause has not been incorporated in the said enactment. All the same, Section 6 of the General Clauses Act, which relates to the effect of the repeal of a statute, will apply to the repeal of the Bombay Act. It is not, however, necessary for the purpose of the present discussion to consider the effect of the repeal of the Bombay Act by the Central Act. That discussion perhaps would have become necessary if I had taken the view that the Native Share and Stock Brokers' Association owed its existence to the Bombay statute. Had that been the position, then as soon as the statute expired, the body also would become extinct,

8. The provisions of the Central enactment are more elaborate and cover a larger field than the provisions of the Bombay enactment. It further appears that in some respects the scope of the activities and the rules to be framed by the Association has been extended. Section 4 relates to the recognition of a stock exchange by the Central Government, One of the requirements laid down in that regard is that the rules and bye-laws of the stock exchange shall be in conformity with such conditions as may be prescribed with a view to ensure fair dealing and to protect investors. Section 9 speaks of the powers of a recognised stock exchange to make bye-laws, and it is similar to Section 5 of the Bombay Act. Section 9 also lays down that the bye-laws may be framed by the recognised stock exchange after obtaining previous approval of the Central Government. Sub-section (2) of Section 9 enumerates the topics on which bye-laws may be framed by the stock exchange. Mr. Gokhale particularly referred* to Clause (n) of Sub-section (2) which relates to the provisions of "the method and procedure for the settlement of claims or disputes, including settlement by arbitration". Mr. Gokhale contrasted the provisions of Clause (n) with those of Clause (g) of Sub-section (2) of Section 5 of the Bombay enactment. Under the Bombay enactment rules can be framed regarding the settlement of disputes arising between members. Clause (n) of Sub-section (2) of Section 9 of the Central enactment, however, does not limit itself to the framing of rules for the settlement of claims as between a member and a member. Section 10 of the Central enactment empowers the Central Government to make bye-laws after consulting a stock exchange which has made a written request to the Government for that purpose. These are the only relevant provisions which were referred to in the course of the arguments and which need be considered for the present discussion.

9. As stated above, the stock exchange in this case framed rules and bye-laws after securing the approval of the Central Government and thereafter it received recognition from the Central Government. The rules and bye-laws framed by the stock exchange are more elaborate than the rules and bye-laws framed by it earlier for the purpose of recognition under the Bombay enactment. Several new bye-laws have been added, and it was mainly on this account that Mr. Gokhale

contended that the body which came to be recognised under the Central enactment was materially different from the body which had received recognition from the Bombay Government and which was the body which the parties had in view at the time of the contracts. I will presently deal with this argument. Before doing so, I may point out that, in accordance with the provisions contained in Clause (g) of Sub-section (2) of Section 9, the Association has framed bye-laws governing the rights and liabilities of members and constituents. These bye-laws are Bye-laws Nos. 226 to 247. Bye-laws 248 to 273 relate to the arbitration of disputes as between members and their constituents. Mr. Gokhale contended that there were no similar provisions in the rules and bye-laws framed by the stock exchange in 1927. Although it is true that there was no provision in the Bombay Act which empowered the stock exchange to frame rules for the settlement of disputes arising between a member and constituent, still we find that a rule (which is Rule 242) was framed by the Native Share and Stock Brokers' Association governing the case of a dispute between a member and a constituent. It provided in effect that, if a non-member made a claim against a member, the Board shall consider whether such claim was fit for adjudication, and in the event of its deciding in the affirmative, the non-member would be asked to sign the form of reference prescribed in Appendix I to these rules. That means that, if a non-member agrees to refer to arbitration the dispute between him on the one hand and a member on the other, then that dispute could be decided by the Arbitrators. In other words, this matter was left to be governed by an agreement between the parties. That is exactly the position in the present case. Ravindra, who was a non-member and a constituent of a member, entered into an agreement under which he agreed to refer the dispute between him and the firm to arbitration. I do not, therefore, think that any material difference has arisen in that respect so far as the old rules and new rules are concerned. It may, however, be conceded that the new rules are different from the old rules in some respects and are also much more detailed and elaborate in some other respects. But, in my opinion, that does not affect the question which we are considering. The rules of an association are always liable to be changed. Even Section 5 of the Bombay enactment empowered a stock exchange to vary, alter or rescind the rules from time to time. Therefore, when the parties in this case entered into an agreement agreeing to refer disputes between them to two arbitrators who are to be chosen from amongst the members of the stock exchange, they must be deemed to have agreed to the selection of arbitrators from such members as would be on the record of the Stock Exchange at the time of the dispute. The parties must also be deemed to have envisaged the possibility of a change in the rules and bye-laws of the Stock Exchange. They must, therefore, be deemed to have agreed to abide by the rules and bye-laws which would be framed from time to time by the Stock Exchange.

10. Now, the contract-note specifically refers to the rules and regulations of the Native Share and Stock Brokers' Association and makes the contract subject to such rules and regulations. When this clause in the contract-note speaks of-the

rules and regulations, it must mean the rules and regulations as would be prevailing at the time of the dispute. That is so because the rules are always liable to be changed and altered, and the Stock Exchange was at liberty to make such alterations as it deemed fit, subject, of course, to the approval of the Government. The matter does not rest there. One of the clauses of the arbitration agreement provides that the forms relating to arbitration shall be such as may be from time to time prescribed by the said Association. There was a good deal of argument as to the meaning of the word "forms". Mr. Gokhale contended that the word "forms" refers to the forms prescribed by the Association for making reference to arbitration. I am unable to accept this line of reasoning. There is nothing to suggest that any form has been prescribed by the Stock Exchange under its rules, nor is it necessary under the rules for the parties who have entered into the arbitration agreement to submit further forms. In my opinion, the plural term "forms" refers to what is generally, known as the form and manner or the procedure. The only rational meaning that can be attached to this clause, therefore, is that "the form and manner and the procedure relating to arbitration shall be such as may be from time to time prescribed by the said Association". This again shows that the change in the rules was in the contemplation of the parties, and the parties agreed to abide by such rules as may be in prevalence from time to time at the material date. It is necessary to remember that the arbitration agreement embodied in the contract-note is a complete agreement and does not require the assistance of the rules and bye-laws framed by the Stock Exchange for its implementation. The agreement can be in force even without having recourse to the rules and bye-laws framed by the Association. All that is necessary to see is whether the Association, from which two members were to be chosen as arbitrators under the terms of the agreement, was in existence at the relevant time. The question of the existence of the Association must be decided on broad considerations. Obviously, the membership of an association is bound to be fluctuating and floating. Some of the old members may go out and some new members may be added. This routine incoming and outgoing will not affect either the identity or the continuity of the association. The identity and continuity of the association cannot be considered on the same footing as the identity of an individual with a physical organism. In the same way, the fact that rules and regulations have changed also does not introduce any metamorphosis in the body; nor does it constitute a discontinuity. As a matter of fact, no material has been placed before the Court from which it could be judged that there has been such a radical change in the Association as to lead to the inference that the present Stock Exchange is entirely a different body from the Stock Exchange which existed at the time of the contract. The onus lay upon Ravindra to establish that the continuity has been broken and that a new organisation has come into being in place of the old one. The circumstance that the organisation has persistently stuck to the old name is a strong indication in favour of the continuity of that Association. The trial Judge has fallen into the error of thinking that the old body has ceased to exist because he took the view that the body was the creature of the Bombay

statute. Once the misconception is removed, then it becomes clear that there is no warrant for the assumption or the supposition that the old body has ceased to exist and that the body which has taken its place is a radically different association. The real question for consideration is whether the reference to the selection of arbitrators from the Native Share and Stock Brokers" Association contained in the arbitration clause is void for uncertainty. I do not think that there is any uncertainty regarding the identity of the Association which was named in the contract-note with the Association that exists to-day.

11. In the course of the above discussion, I have also considered the argument which was incidentally advanced by Mr. Gokhale, namely, that inasmuch as the arbitration agreement was subject to the rules of the Association, since the rules have changed the reference to arbitration must necessarily, therefore, become invalid. So far as the procedure to be followed by arbitrators appointed under the rules of the Native Share and Stock Brokers" Association is concerned, there is not any material or vital change effected by the new rules. Apart from this aspect of the matter, as pointed out above, the arbitration agreement contained in the contract-note is a complete and self-contained clause and can be enforced without reference to the procedure laid down by the rules and bye-laws. It is sufficient if the Association is in existence and two Members of the Association are available for doing the work of arbitrators.

The third argument advanced by Mr. Gokhale was that, at the very inception (or, to borrow the expression used by Mr. Justice S. T. Desai, "at the very threshold"), Ravindra not only challenged the existence of the arbitration agreement, but he also challenged its legality. It is, therefore, contended that once a challenge was entered about the existence of the arbitration agreement and/or about its legality, the arbitrators had no jurisdiction to proceed in the matter. It was not necessary for Ravindra to proceed to appoint an arbitrator on his behalf as the entire proceedings that have taken place after the challenge was made are completely void. For this purpose Mr. Gokhale relied upon the decision in *Chiranjilal Fulchand v. Dwarkadas & Co.* (1956) 59 Bom. L.R. 1053 In that case, Mr. Justice S. T. Desai followed the principles laid down by the House of Lords in *Heyman v. Darwins, Ltd.* [1942] A.C. 356, as also the decision of the Supreme Court in *Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another*, . Lord Simon, Lord Chancellor, laid down the position in *Heyman v. Darwins, Ltd.* in the following words (p. 366) :

... At the risk of some repetition, I would summarize what I conceive to be the correct view on the matter as follows. An arbitration clause is written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission.

Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void.

In the case decided by Mr. Justice S. T. Desai (*Chiranjilal Fulchand v. Dwarkadas & Co.*) during correspondence, the petitioner, who was a constituent of the respondents-firm with which he had entered into certain transactions for the sale of certain bales of cotton, contended that the transactions were illegal and that there was no valid arbitration agreement of reference. It is not necessary to refer to the facts of that case and it is sufficient to state that there was an arbitration clause in the contract-notes, but the legality of the contracts themselves was assailed. The main question which was canvassed before Mr. Justice Desai was whether the position in law, when the legality of the present contract in which the arbitration clause is included is challenged, is the same as when the very existence of the agreement is challenged. Relying on the observations in the House of Lords case and also in the Supreme Court judgment, Mr. Justice S. T. Desai came to the conclusion that the legal position is the same in both the cases and that the arbitrators had no jurisdiction to enter upon the reference once one of the parties had challenged either the existence of the contract itself or its legality. What is, however, necessary to remember is that, in the case which was considered by Mr. Justice S. T. Desai, what was assailed was not the arbitration clause alone, but the entire contract of which the arbitration clause was an integral part. The principle underlying this view is that, when the very existence of the contract is disputed, the arbitration clause which is a part and parcel of the agreement no longer remains in force. The jurisdiction of the arbitrators stems from the contract. That being the position, the arbitrators have no jurisdiction to decide upon either the existence or the legality of the contract itself. In such an event, therefore, it is not open to the arbitrators to enter upon the reference and proceed to declare the award. That the challenge must be to the entire contract is also obvious from the following observations of Lord Simon (p. 366) :-

...If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission.

The following observations of Lord Simon will be apposite to the point:-

If, however, "the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of, or "with regard to", or "under" the contract, and an arbitration clause which uses these, or similar expressions, should be construed accordingly.

In the case decided by the Supreme Court in *Ruby General Insurance Co. Ltd. v.*

Pearey Lal Kumar, the appellant company contended that the arbitration agreement had ceased to remain in force. They did not contend that the arbitration agreement was void ab initio. It was, therefore, held that such a contention cannot oust the jurisdiction of the arbitrators to enter upon a reference. At page 507 of the Reports, Mr. Justice Fazl Ali pointed out that in that case both the parties admitted the contract and stated that they were bound by it. At page 511 Mr. Justice Fazl Ali stated:

.. .How can it be held that the existence of the arbitration agreement is challenged, when both parties admit that the clause in the policy which contains that agreement binds them?.

12. He then proceeded to say (p. 511) :-

... It is true that the appellant contends that the arbitration agreement has ceased to be applicable, but that contention cannot be sustained without having recourse to the arbitration agreement. It is said that the agreement no longer subsists, but that is very different from saying that the agreement never existed or was void ab initio and therefore is to be treated as non-existent.

13. Let me now examine the nature of the challenge issued by Ravindra to the jurisdiction of the Arbitrators, Mr. Gokhale relied upon stray sentences appearing in the letters sent by Ravindra to the Secretary of the Stock Exchange after he was informed about the arbitration proceedings. In the letter dated June 1, 1958, Ravindra stated that there was no written arbitration agreement between the respondents and himself and he added:-

There is no provision or condition of arbitration in my dealings or transactions with Messrs. Varjivan Khushal Gandhi (the respondents). There is no existence of arbitration agreement. So reference to arbitration is illegal.

There is no provision for such arbitration proceeding in the Rules and Regulations of the Stock-Exchange. So the above arbitration is invalid which please note and oblige.

Again in the letter dated June 4, 1958, he stated:-

The above arbitration is illegal and invalid. However I intend to take part in Arbitration Proceeding with protest.

In his letter dated July 10, 1958, he stated:-

The above arbitration is without jurisdiction and illegal. There is no arbitration agreement between Messrs. Varjivan Khushal Gandhi and myself.

It is significant to note that at no time Ravindra had challenged either the existence or the legality of the original contract, which may be called the parent contract of which the arbitration agreement is an offspring. Indeed, in his letter dated June 1, 1958, what he challenged was the arbitration agreement and that also on the ground that there was no written arbitration agreement between

himself and the firm. A stray sentence here and there, namely, that the arbitration is illegal and invalid, or that there is no arbitration agreement, does not amount to a clear denial of the parent agreement. This position will become clear if we refer to the pleadings which Ravindra has put before the trial Court, In his first written statement put in on December 19, 1958, Ravindra at para. 3 stated:-

That the principal terms and conditions were that the transactions mentioned in the Contract Notes had been entered subject to the Rules and Regulations of the Native Share & Stock Brokers' Association, Bombay, and that it was also agreed between them that all the disputes arising between them in connection with the said transaction shall be referred to arbitration. It was agreed that there should be an Umpire in addition also.

This averment amounts to a clear admission not only of the original contract but, also of the arbitration agreement. In the grounds that he set out in the same petition for setting aside the award, he stated -.-

(A). That the Reference to arbitration is not according to law and hence not binding on the Defendant-petitioner.

(B). That there is no written agreement of arbitration and the Defendant-petitioner has not accepted and signed the arbitration agreement.

(C). That the contract notes given by the plaintiff-Respondent are not according to the Rules of the Association and that, therefore, the contract notes are illegal and the award based thereon is also illegal and not binding upon the petitioner.

(F). That the arbitrators were not even appointed as required under law and as alleged to have been agreed upon between the parties. The appointment of the arbitrators without Umpire was not proper and, therefore, it vitiates the whole Award.

(L). That the Rules and Regulations of the Association are not binding upon the Defendant-petitioner; nor had he ever submitted to the arbitration proceedings.

It will thus be clear that his contention was of a limited character. All that he stated was that the reference to arbitration was not in accordance with law because there was no written agreement of arbitration. The idea appears to be that, according to Ravindra, unless there is a separate agreement of reference, there cannot be any valid arbitration. Even in the petition that he filed for setting aside the award, he has assailed the validity of the arbitration agreement on the ground that there is no special agreement of reference to arbitration. At para. 3 of his petition he says:-

There are no rules relating to arbitration as between a broker and his constituent prescribed by the Association. Unless there is special agreement or a valid reference to arbitration arrived at between parties apart from the aforesaid invalid contract notes, the arbitration proceedings based on facts stated in para

No. 3 of the affidavit are not operative and binding against me.

The averments at para. 5 are still more interesting, lie says :-

Referring to para 6 of the Affidavit, I say that the Native Share and Stock Brokers" Association had ceased to exist from 1-9-1957, As the Association went out of existence from 1-9-1957, the procedure followed by the opponent, by the Secretary and by the President of this defunct Association is illegal, void ab initio and of no legal effect whatsoever.

It is, therefore, clear that what Ravindra had challenged is not the parent contract, but that he had challenged only the part of the contract containing the arbitration clause. Even the challenge to the arbitration clause is of a limited character. In the first place, he says that the arbitration agreement is not valid because it is not contained in a separate document signed by him and the other party. Secondly, he says that it has ceased to exist by reason of the supervening events, namely, the fact that the old Native Share and Stock Brokers" Association has gone out of existence. This is not the kind of challenge which will have the effect of ousting the jurisdiction of the arbitrators as contemplated by the decisions referred to above. Mr. Chandrachud also pointed out that, whatever challenge had been issued by Ravindra in regard to the jurisdiction of the Arbitrators, was conveyed to the Secretary of the Association and that Ravindra never gave any intimation to the Arbitrators as such about this challenge. He contended that the Arbitrators were not bound to act upon the challenge which was not intimated to them either in person by the party concerned or in letters addressed to them. It is not necessary to consider this line of argument in view of my findings arrived at above on the interpretation of the statements and pleadings made by Ravindra from time to time.

14. That takes me to the last point argued by Mr. Gokhale, namely, that there was no sufficient opportunity given to Ravindra by the Arbitrators to put forward his case. In this connection, Mr. Gokhale pointed out that in the letter written by the Arbitrators on May 29, 1958, the Arbitrators intimated to him that the case was fixed on June 11, 1958, at 3 p.m. They also intimated to him that, in case he absented himself, they would, at their discretion proceed with the reference ex parte. According to Mr. Gokhale, the case was not taken up on June 11, but was adjourned to July 14, 1958. He, therefore, contended that it was incumbent upon the Arbitrators to have intimated to him that, in case he did not appear on the adjourned date, the Arbitrators would be at liberty to proceed with the case ex parte. In the first place, Mr. Gokhale's statement that the case was not proceeded with on June 11, 1958, does not appear to be correct. The Arbitrators have stated in the award that the matter was taken up on that date and that the case was adjourned for further hearing. If that is so, it was not necessary for the Arbitrators to have given a further intimation that on the adjourned date the Arbitrators would be at liberty to proceed ex parte in case Ravindra did not choose to appear before him. It was enough for them to give an intimation about the next date of hearing, and admittedly such an intimation was given to

Ravindra. This argument also, therefore, is devoid of any substance.

15. The result is that the appeal succeeds. The order setting aside the award is hereby reversed. The case, is sent back to the trial Court for proceeding with it according to law. The respondent to pay the costs of this appeal to the appellants. The order regarding the costs of the trial Court will be passed by the trial Judge.