

2014 (1) CTC 87

IN THE HIGH COURT OF MADRAS

V. Ramasubramanian, J.

O.P. No.409 of 2008

4.12.2013

A. Chandrasekaran

.....Petitioner

Vs.

Yoha Securities Limited, T. Nagar, Chennai-17. 2. M.V. Badrinath, Sole Arbitrator.
National Stock Exchange of India Limited, Chenna-4

.....Respondents

Indian Contract Act, 1872 (9 of 1872), Section 28 — Limitation Act, 1963 (36 of 1963), Section 29(2) — National Stock Exchange Bye-laws, Bye-law (3) of Chapter XI — Securities Contracts (Regulation) Act, 1956 (42 of 1956), Section 9(1) — Limitation period prescribed under Bye-laws framed by Stock Exchange for resolution of disputes by Arbitration — Legality — Bye-law prescribes six months' time for reference to arbitration — Bye-laws framed by Stock Exchange are only in realm of contract — Arbitration Agreement between subscriber and service provider is an implied contract — Contract simpliciter entered into between two parties including contract into by Statutory Authority or State itself cannot be construed as "Law" — Limitation period prescribed under Bye-law for reference to Arbitration is violative of Section 28 of Contract Act — Award passed by Arbitrator holding that claim is barred by Bye-law cannot be sustained — NSE directed to nominate an Arbitrator to resume hearing of claim — Award set aside.

Facts : The claim raised by subscriber of National Stock Exchange of India before the Arbitrator was rejected by holding that the claim is barred by limitation under Bye-law (3) of Chapter XI, NSE Bye-laws.

Held : But the above Hierarchy of Laws do not take within its fold, a contract simpliciter entered into between two parties including a contract entered into by a Statutory Authority or the State itself. On the contrary, there are indications in the Contract Act itself to the effect that there is a distinction between what we perceive as law and what we perceive as a contract. The very definition of the expression "contract" as found in Section 2(h) of the Contract Act is that "it is an Agreement enforceable by law". Section 21 of the Contract Act makes a contract not voidable merely because it was caused by a mistake as to any law in force in India. The question as to whether the objects and considerations of an Agreement are lawful or not, in terms of Section 23, has also to be determined only with reference to what the law is. Therefore, a contract pure and simple, entered into between two parties, cannot be taken to be a special or local law so as to fall within the scope of Section 29(2) of the Limitation Act, 1963. [Para 24]

But the Memorandum and Articles of Association of a Company, do not constitute either a local or special law. Despite the Memorandum and Articles of Association of a Company taking the form prescribed by statute and despite the fact that any alteration thereto requires the approval of the Central Government, they are only in the realm of a contract. By the same analogy, the Bye-laws framed by a Stock Exchange, despite being approved by SEBI, continue to be only in the realm of a contract. If so, Section 29(2) of the Limitation Act, 1963 will have no Application. Consequently, Section 28 of the Contract Act would be a bar. [Para 28]

In view of the above, I hold that the Arbitral Award dated 5.11.2007, holding the claim of the Petitioner to be barred by Bye-law 3, cannot be sustained. If it cannot be sustained and if the Arbitrator is obliged to consider the claim of the Petitioner on merits, the only option available to me is to take recourse to Section 34(4) of the Act. Section 34(2) merely enables this Court to set aside an Arbitral Award. The question as to whether the power to set aside would include a power to remand the matter back or to modify the Award, has become a debatable one. Therefore, the only way of resolving the present stalemate is to take recourse to Section 34(4). [Para 31]

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Ramakrishnan Viraraghavan, Advocate for Petitioner.

K.G. Vasudevan, Advocate for Respondent No.1.

PROCEEDINGS IN O.P. ADJOURNED BY 6 MONTHS WITH DIRECTION

Prayer : Petition under Section 34(3) of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 5.11.2007 in AM. No.CM/C 0059/2007 passed by the Second Respondent with costs.

JUDGMENT

1. This is a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set aside an Arbitration Award passed by the Second Respondent-Arbitrator.

2. The Petitioner opened a trading account with the First Respondent and started operations from December 2003. It appears that by the end of 2003-2004, the Petitioner was holding huge stocks traded through the First Respondent. The Account Number of the Petitioner was SC-1.

3. It was the claim of the Petitioner that he was introduced to the First Respondent by a Sub-Broker by name T.K. Srinivasan, to whom, commission used to be paid. But, after the relationship between T.K. Srinivasan and the First Respondent got severed, the Petitioner started making a claim for bringing down the brokerage structure. At one time, the

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Petitioner claimed that there was an excess brokerage of ₹7,80,000/- and the Petitioner protested on 8.2.2005. Thereafter, the Petitioner filed a Criminal Complaint on the file of the VI Metropolitan Magistrate, Egmore. It appears that the matter was referred under Section 156(3) of the Code of Criminal Procedure.

4. The Petitioner stopped trading from 8.2.2005. Thereafter, the Petitioner made a claim with the National Stock Exchange and invoked the Arbitration clause and the matter was referred to the Second Respondent for arbitration. Noting that the last trade was made on 8.2.2005, but the claim was made to the concerned Authority in the National Stock Exchange only on 17.10.2006 and that the Applicant actually filed an Application for Arbitration only on 11.5.2007, the Arbitrator passed an award rejecting the claim, on the basis of the limitation prescribed by Bye-law 3 of Chapter XI of NSE Bye-Laws, by his Award dated 5.11.2007. Therefore, the Petitioner is before this Court.

5. It must be mentioned here that after the Petitioner filed an Application on 11.5.2007 for Arbitration, the Respondent raised the question of limitation. Therefore, the Petitioner also filed an Application before this Court under Section 43(3) of the Act, seeking extension of time. It was filed on 22.10.2007, but was not pursued.

6. In the above background of facts, the only question that arises for consideration is as to whether the Arbitrator was right in rejecting the claim on the ground of limitation or not.

7. Before I go into the said question, it should be pointed out that according to Mr. K.G. Vasudevan, learned Counsel appearing for the First Respondent, the Arbitration award was not solely on the basis of limitation, but was actually on merits also. Drawing my attention to Paragraphs 4.2, 4.3, 4.4 & 4-5, the learned Counsel appearing for the First Respondent submitted that the whole claim of the Petitioner was found to be baseless by the Arbitrator and that in addition, the Arbitrator also rejected the claim on the basis of limitation.

8. But I find that in the last portion of Paragraph 4.1 of the award, the Arbitrator has stated "*at the outset, the present Application for Arbitration was barred by limitation.*" Therefore, I think the observations made from Paragraphs 4.2 to 4.5 were only incidental and cannot be considered to be a pronouncement on merits. Moreover, the actual findings of the Arbitrator are recorded only in Chapter V of the award from Paragraphs 5.1 to 5.4. Therefore, I do not consider the award to be one on merits.

9. Coming to the question of limitation, it is seen that Bye-law 3 of Chapter XI of NSE Bye-laws, as it stood at that time, reads as follows:

"All claims, differences or disputes referred to, shall be submitted to Arbitration within six months from the date on which the claim, difference or dispute arose

or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and time taken by the Relevant Authority to administratively resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months.”

10. But subsequently, the Securities and Exchange Board of India issued a Circular dated 11.8.2010 streamlining the procedure for Arbitration mechanism available at Stock Exchanges. In the said circular, SEBI indicated that the period of limitation for filing a reference should be governed by the provisions of the Limitation Act, 1963. But unfortunately, the reference to Arbitration and the passing of the Award happened before the said Circular and hence, I have to test the question only with reference to the provision that existed then.

11. There is no dispute about the fact that if there was no Arbitration Agreement at all between the parties, the Petitioner would have had a period of limitation of three years to lodge a claim against the First Respondent. There is also no dispute about the fact that the Arbitration Agreement between the Petitioner and the First Respondent, is not an express contract, but an implied one. The First Respondent is a member of the National Stock Exchange and hence, the First Respondent is a subscriber to the Bye-laws of the National Stock Exchange of India Limited. The said Bye-laws contain a Chapter under Chapter IX, which provides for Arbitration. The relevant Bye-law stipulates that all claims, differences or disputes between the trading members *inter se* and between trading members and constituents arising out of or in relation to dealings, contracts and transactions, shall be submitted to Arbitration. The Bye-law also provides that the provisions contained therein shall be deemed to form part of all dealings, contracts and transactions. Therefore, the Petitioner, by becoming a subscriber and by indulging in trading operations through the First Respondent, became a party to the said Arbitration Agreement provided under the Bye-laws. Thus, the Arbitration Agreement existing between the Petitioner and the First Respondent is actually an implied or at least indirect one. This is why, Bye-law 3 of Chapter XI of NSE Bye-laws, stipulating only a period of 6 months to lodge a claim, is put against the Petitioner. Therefore, the question to be considered is as to whether this stipulation can be held against the Petitioner or not.

12. Section 28 of the Indian Contract Act, as it originally stood, prescribed that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under the contract or which limits the time for enforcement of his rights, is void to that extent. The effect of this unamended Section 28, was stated in the form of two propositions by the Law Commission of India in its 97th Report as follows:

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(a) The parties to an Agreement are not allowed to substitute their own periods of limitation in place of the period laid in the general law of limitation; and

(b) but the parties to an Agreement are allowed to substitute their own periods of prescription, that is to say, they are free to provide that if a party does not sue within a specified period, then the rights accruing under the contract shall be forfeited, or extinguished or that a party shall be discharged from all liability under the contract. (The precise words used may differ from Agreement to Agreement, but in substance their object is usually to forfeit or extinguish the rights). In other words, a clause limiting the time for enforcing a remedy is prohibited, but a clause limiting the duration upto which the rights remain alive, and extinguishing those rights at the end of such period, is permissible.”

13. The above provision led to lot of disputes. Several Courts took the view that though the prescription of a lesser period of limitation for the enforcement of a right was contrary to law, the prescription of a period for extinction of a right under the contract, was valid. This view was approved by the Supreme Court in *Vulcan Insurance Co. v. Maharaj Singh*, AIR 1976 SC 287, where a clause in an Insurance Policy prescribing the forfeiture of all benefits under the Policy, unless a Suit was brought within a specified period, was held to be valid. The Courts pointed out that when the period of limitation for the enforcement of a contract is curtailed by Agreement, it was void. But, when the contract prescribed extinction of a right to sue or when the contract discharged one party from all liability after a particular point of time, Section 28 did not have any application.

14. This provision of law provided a disturbing feature and hence, the Law Commission made the following recommendations in its 97th Report:

“5.1. We now come to the changes that are needed in the present law. In our opinion, the present legal position as to prescriptive clauses in contracts cannot be defended as a matter of justice, logic, commonsense or convenience. When accepting such clauses, consumers either do not realise the possible adverse impact of such clauses, or are forced to agree because big corporations are not prepared to enter into contracts except on these onerous terms. “Take it or leave it all”, is their general attitude, and because of their superior bargaining power, they naturally have the upper hand. We are not, at present, dealing with the much wider field of “standard form contracts” or “standard” terms. But confining ourselves to the narrow issue under discussion, it would appear that the present legal position is open to serious objection from the common man’s point of view. Further, such clauses introduce an element of uncertainty in transactions, which are entered into daily by hundreds of persons.

5.2. It is hardly necessary to repeat all that we have said in the preceding Chapters about the demerits of the present law. Briefly, one can say that the present law, which regards prescriptive clauses as valid while invalidating time limit clauses which merely bar the remedy, suffers from the following principal defects:

(a) It causes serious hardship to those who are economically disadvantaged and is violative of economic justice.

(b) In particular, it harms the interests of the consumer, dealing with big corporations.

(c) It is illogical, being based on a distinction which treats the more severe flaw as valid, while invalidating a lesser one.

(d) It rests on a distinction too subtle and refined to admit of easy application in practice. It thus, throws a cloud on the rights of parties, who do not know with certainty where they stand, ultimately leading to avoidable litigation.

5.3. On a consideration of all aspects of the matter, we recommend that Section 28 of the Indian Contract Act, 1872, should be suitably amended so as to render invalid contractual clauses which purport to extinguish, on the expiry of a specified term, rights accruing from the contract. Here is a suggestion for re-drafting the main Paragraph of Section 28.

Revised Section 28, main paragraph, Contract Act as recommended:

28. Every agreement—

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary Tribunals, or
- (b) which *limits* the time within which he may thus enforce his rights, or
- (c) which extinguishes the rights of any party thereto under or in respect of any contract on the expiry of a specified period or on failure to make a claim or to institute a Suit or other legal proceeding within a specified period, or
- (d) which discharges any party thereto from any liability under or in respect of any contract in the circumstances specified in clause (c), is void to that extent.”

15. Thereafter, Section 28 of the Contract Act was amended in 1996, when the Arbitration and Conciliation Act, 1996 was enacted. The amended provision of Section 28 reads as follows:

“*Agreements in restraint of legal proceedings, void.*—

Every agreement —

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary Tribunals, or which limits the time within which he may, thus, enforce his rights; or
- (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”

16. In *Biba Sethi v. Dyna Securities Ltd.*, MANU/DE/1325/2009, the Delhi High Court was concerned with a Petition under Section 34, challenging the Awards passed by the Arbitral Tribunal, rejecting certain claims as barred by limitation in terms of Bye-law 3 of Chapter XI. One of the questions that the Delhi High Court framed for consideration was

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whether the said Bye-law 3 of Chapter XI, is a local/special law, within the meaning of Section 29(2) of the Limitation Act, 1963 or whether it was a contract to be governed by Section 28 of the Contract Act, 1872. After noting that the Bye-laws were framed in terms of Section 9 of the Securities Contracts (Regulation) Act, 1956, the Delhi High Court took note of the power granted to the Court under Section 43(3) of the Arbitration and Conciliation Act, 1996, and came to the conclusion that the Arbitration Agreement was thrust upon the constituents of stock brokers only by virtue of a contract and not by virtue of an enactment. The Delhi High Court also took note of the fact that Section 9(2) of the Securities Contracts (Regulation) Act, 1956, by itself did not provide a lesser period of limitation. Therefore, the Delhi High Court held that if Bye-law 3 was only contractual then by virtue of Section 2(4) of the Arbitration Act, Section 28 of the Contract Act would come into play. Consequently, the Court held that Bye-law 3 was void. Ultimately, the Delhi High Court set aside the Arbitral Award in that case, on the ground that the Award was contrary to Section 28 of the Contract Act and was not in accordance with substantive law of India.

17. In *Pandit Construction Company v. Delhi Development Authority*, 2007 (3) Arb.L.R. 205, the Delhi High Court was concerned with an Award, where a claim was rejected on the ground that it was not preferred within the period of 90 days, as stipulated in Clause 25 of the General Conditions of Contract. After taking note of the judgment of the Supreme Court in *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.*, 1997 (2) CTC 275 (SC) : AIR 1997 SC 2049, and the amendment made to Section 28 of the Contract Act, the Delhi High Court held, following its earlier decision in *Explore Computers Pvt. Ltd. v. Cals Ltd.*, 2006 (131) DLT 477, that a clause restricting the right of a person to file a Suit or claim within one month of expiry of Bank guarantee, would be barred by the amended provisions of Section 28.

18. While the Delhi High Court appears to have consistently taken the view as above mentioned, this Court appears to have taken a contrary view in *HDFC Securities Ltd v. S. Vivekanandan*, 2010 (5) MLJ 686. In the said decision, Chitra Venkataraman, J., disagreed with the view taken by the Delhi High Court in *Biba Sethi* and followed the decision of the Supreme Court in *H.P. State Forest Company Ltd. v. United India Insurance Co. Ltd.*, 2009 (2) SCC 252.

19. In the decision in *HCG Stock & Share Brokers Ltd v. Gaggar Suresh*, 2007 (73) SCL 1 (SC), the Supreme Court was concerned with an Award that was upheld by a Single Judge and a Division Bench of the Bombay High Court, on the ground of limitation. In other words, the rejection of the claim by the Arbitral Tribunal on the basis of Bye-law 3 of Chapter XI was upheld right upto the Supreme Court. But a careful perusal of the said decision would show that the validity of Bye-law No.3 was never

in question, with reference to Section 28 of the Contract Act, 1872 and Section 29(2) of the Limitation Act, 1963.

20. Even the decision of this Court in *HDFC Securities*, cannot be taken to be laying down the law on the point, in view of the fact that the question of validity of Bye-law 3 was never raised in that case before the Arbitral Tribunal. Therefore, it was observed by this Court in *HDFC Securities* (Para 25), that the question as to the validity of the Bye-law was not raised before the Arbitral Tribunal and that therefore, the question did not arise in the petition under Section 34. Once it is held that that question did not arise before this Court, even the observations made in Paragraph 22 of the Report, disagreeing with the views of the Delhi High Court, may at the most tantamount to arbiter. Therefore, there is no impediment for me to consider the issue independently.

21. A careful look at Section 3(1) of the Limitation Act, 1963 shows that every Suit instituted, Appeal preferred and Application made after the prescribed period shall be dismissed, although limitation had not been set up as a defence, subject to the provisions of Sections 4 to 24. Section 29(2) of the Limitation Act, 1963, saves any special or local law which prescribes a period of limitation different from the period prescribed by the Schedule to the Limitation Act, 1963. Sub-section (2) of Section 29 also mandates that for the purpose of determining any period of limitation, prescribed by any special or local law, the provisions of Sections 4 to 24 would apply only in so far as and to the extent to which they are not expressly excluded by such special or local law.

22. The question as to the interpretation to be given to the expressions "local law" and "special law" appearing in Section 29(2), fell for consideration in a few cases. Though the expression "local law" is defined in Section 42 of the Indian Penal Code, the same meaning cannot be adopted for the purpose of understanding the expression appearing in Section 29(2). Wherever the Civil Procedure Code prescribed a period of limitation for taking out an Application, that provision was considered by the Supreme Court to be a special law *AIR 1976 SC 105* though the Code by itself is only a general law. Similarly, the French Civil Code was understood to be a local law of Pondicherry. The Portuguese Civil Code was held to be a local law. The Letters Patent were held to be special or local law *AIR 1962 SC 247*.

23. But irrespective of what the expressions "local law" or "special law" would mean, there can be no dispute about the meaning to be assigned at least to the expression "law". The Supreme Court has recognised, with reference to *Kelson's Hierarchy of Laws* that law could fall under any of the following categories:

- (i) Law made by Parliament or by Legislatures;

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- (ii) Rules issued by the appropriate Government, in exercise of the power conferred by an enactment of Parliament or State Legislature;
- (iii) The Regulations issued by Statutory Authorities or creatures of Statutes in exercise of the power conferred by the Statute or the Rules;
- (iv) Executive instructions issued in exercise of the power conferred by Statutes or Statutory Rules.

24. But the above Hierarchy of Laws do not take within its fold, a contract simpliciter entered into between two parties including a contract entered into by a Statutory Authority or the State itself. On the contrary, there are indications in the Contract Act itself to the effect that there is a distinction between what we perceive as law and what we perceive as a contract. The very definition of the expression "contract" as found in Section 2(h) of the Contract Act is that "*it is an Agreement enforceable by law*". Section 21 of the Contract Act makes a contract not voidable merely because it was caused by a mistake as to any law in force in India. The question as to whether the objects and considerations of an Agreement are lawful or not, in terms of Section 23, has also to be determined only with reference to what the law is. Therefore, a contract pure and simple, entered into between two parties, cannot be taken to be a special or local law so as to fall within the scope of Section 29(2) of the Limitation Act, 1963.

25. As pointed out by the Delhi High Court, the Bye-laws of the National Stock Exchange, are framed in exercise of the powers conferred under Section 9(1) of the Securities Contracts (Regulation) Act, 1956. The said Act defines a contract under Section 2(a) to mean a contract for or relating to the purchase or sale of securities. The Act also defines the expression "stock exchange" under Section 2(j) to mean (i) any body of individuals constituted before corporatisation and de-mutualisation under Sections 4-A & 4-B or (ii) a body of corporate incorporated under the Companies Act, 1956. The Securities Contracts (Regulation) Act, 1956 contains some provisions that deal with making of Rules, making of Regulations and making of Bye-laws. Section 7-A of the Act enables a recognised Stock Exchange to make rules to provide for certain matters. These rules are required to be approved by the Central Government and also published in the Official Gazette. Section 8 empowers the Central Government itself to make rules. Section 9(1) enables a recognised Stock Exchange to make Bye-laws. But as seen from sub-section (1), *the purpose of enabling a Stock Exchange to make Bye-laws is only for the regulation and control of contracts*. These Bye-laws require the prior approval of the Securities and Exchange Bureau of India (SEBI). SEBI itself has the power under Section 10 to make or amend Bye-laws of recognised Stock Exchanges.

26. The above provisions can be compared to some provisions of the Companies Act, 1956. Such comparison is permissible in view of Section 2-

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A of the Securities Contracts (Regulation) Act, 1956, which states that words and expressions used in that Act, but not defined therein, would have the same meaning assigned to them if defined in the Companies Act, 1956. Therefore, it is permissible to make a comparison.

27. Section 13 of the Companies Act, 1956 prescribes the requirements of a Memorandum of Association of an incorporated Company. Sections 14 mandates that the Memorandum of Association should be in one of the forms stipulated in Tables B, C, D & E of Schedule-I. Any alteration to the Memorandum of Association requires the approval of the Central Government or the Company Law Board as the case may be. Similarly, Section 28 mandates that the Articles of Association of a Company limited by shares may be an adaptation of all or any of the Regulations contained in Table A of Schedule-I. The alteration of the Articles of Association also requires approval of the Central Government.

28. But the Memorandum and Articles of Association of a Company, do not constitute either a local or special law. Despite the Memorandum and Articles of Association of a Company taking the form prescribed by statute and despite the fact that any alteration thereto requires the approval of the Central Government, they are only in the realm of a contract. By the same analogy, the Bye-laws framed by a Stock Exchange, despite being approved by SEBI, continue to be only in the realm of a contract. If so, Section 29(2) of the Limitation Act, 1963 will have no Application. Consequently, Section 28 of the Contract Act would be a bar.

29. It must be pointed out that in the decision in *H.P. State Forest Company Ltd.*, the Supreme Court was concerned with a provision only in the realm of a contract. But the contract in that case had been entered into before the amendment to Section 28 of the Contract Act in the year 1996. This aspect was noted by the Supreme Court in *H.P. State Forest Company Ltd.*, in Paragraph 11 of the Report. Paragraph 11 of the report in *H.P. State Forest Company Ltd.*, reads as follows:

“11. We see from the order of the Commission that it has relied upon *Sujir Ganesh Nayak case*, 1997 (4) SCC 366, to hold that the Complaint could not be entertained as being time-barred. The counsel for the Appellant had, however, argued before the Commission as also before us, that as Section 28 of the Contract Act had undergone significant amendments, the aforesaid Judgment required a reappraisal. This submission had been rejected by the Commission by observing that it was bound by the Judgment in *Sujir Ganesh Nayak case* and that the Appellant could agitate the question as to its correctness before the Supreme Court. The matter was, accordingly, adjourned by us to enable the parties to find out if the amendment had, indeed, been made and, if so, to what effect. During the resumed hearing, the learned Counsel for the Appellant candidly admitted that the amendment had been made but had, thereafter, been repealed and the matter would, thus, have to be examined under Section 28 of

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the Contract Act, as originally placed. We have, accordingly, chosen to deal with this matter under that provision.”

30. Therefore, it is clear that the decision of the Supreme Court in *H.P. State Forest Co.*, arose out of an Insurance Policy issued in 1987/1988, much before Section 28 of the Contract Act was amended. This distinction was not noted by the learned Judge of this Court in *HDFC Securities Ltd.* In any case, what was observed in *HDFC Securities Ltd.*, is only an obiter in view of the fact that the validity of Bye-law 3 was not questioned before the Arbitrator in *HDFC Securities Ltd.* Therefore, the learned Judge of this Court refused to test the validity of Bye-law 3. But in this case, the Petitioner has raised the issue of validity before the Arbitrator. Hence, the decision in *HDFC Securities Ltd.*, would not go to the rescue of the First Respondent.

31. In view of the above, I hold that the Arbitral Award dated 5.11.2007, holding the claim of the Petitioner to be barred by Bye-law 3, cannot be sustained. If it cannot be sustained and if the Arbitrator is obliged to consider the claim of the Petitioner on merits, the only option available to me is to take recourse to Section 34(4) of the Act. Section 34(2) merely enables this Court to set aside an Arbitral Award. The question as to whether the power to set aside would include a power to remand the matter back or to modify the award, has become a debatable one. Therefore, the only way of resolving the present stalemate is to take recourse to Section 34(4).

32. Section 34(4) of the Act provides that the Court can adjourn the proceedings to give the Arbitral Tribunal an opportunity to resume the Arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal, will eliminate the grounds for setting aside the Award. Therefore, I am of the view that the proceedings in this Petition can be adjourned with a direction to the Arbitral Tribunal to eliminate the ground on which the Award is liable to be set aside.

33. In view of the above, the following Order is passed for the present:

- (i) The proceedings in the main Petition are adjourned by 6 months.
- (ii) Since the Second Respondent who acted as the Arbitrator, is stated to be not available anymore, the National Stock Exchange of India is directed to nominate an Arbitrator, to resume the hearing and hear the parties on merits and pass an Award afresh. This shall be done within 6 months.
- (iii) Call after 6 months.