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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.741 OF 2012

Sharekhan Limited
Having its registered office at Lodha,
I-Think Techno Campus, 10th Floor,
Beta Building, off JVLR, Opp. Kanjur
Marg Railway Station,
Mumbai – 400 042, Maharashtra. ...Petitioner

...Versus...

Santosh Goel,
Residing at 384 (New),
Rasta Pet, Near Quarter Gate,
Pune – 411 011. ...Respondent

Mr.Rohan Cama i/b Mr.Deepak Sharma for the Petitioner.

Ms.Prachi Pande i/b Corporate Attorney for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 27TH APRIL, 2015
PRONOUNCED ON : 9TH JUNE, 2015.

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short "the said Arbitration Act"), the petitioner has impugned the arbitral award dated 9th December, 2011 passed by the appellate tribunal of National Stock Exchange, Mumbai in Arbitration Matter No.CM/M/0054/2010. Some of the relevant facts

for the purpose of deciding this petition are as under :

2. The petitioner herein was the original respondent in the arbitral proceedings, whereas the respondent herein was the original claimant.

3. The respondent herein is a chartered accountant by profession. It is the case of the respondent that he was the investor and had been investing in the shares since 1981. M/s.S.S. Kantilal Ishwarlal Securities Private Limited was a SEBI registered / broker and was the member of the National Stock Exchange and depository participant of NSDL. It is the case of the respondent that the said broker had approached the respondent in the year 2003 for opening demat and trading account of the respondent. In the month of April, 2003, the respondent and the said broker executed a Member Client Agreement for the purpose of carrying out the transactions in cash segment on the National Stock Exchange of India Limited. Since 2003 the respondent had been carrying on various transactions with the said broker M/s.S.S. Kantilal Ishwarlal Securities Private Limited till the deed of assignment came to be executed between the said broker and the petitioner herein. It is the case of the petitioner that since the date of execution of deed of assignment, the respondent started trading with the petitioner.

4. The respondent had jointly opened trading account by

jointly executing the requisite agreements and documents, including an application for online trading account. It is the case of the petitioner that the respondent had signed relevant documents for online trading of cash and futures and options segment of the National Stock Exchange and had jointly opened demat account with the said broker M/s.S.S. Kantilal Ishwarlal Securities Private Limited.

5. It was the case of the respondent that in the month of July, 2009 when the respondent went to Goa to attend the annual general meeting of Sesa Goa Limited, he was shocked to be informed by the said company that he was not a shareholder of the company though he was holding 9240 shares of the said company. The respondent contacted Pune branch of the petitioner for copies of his demat holding statements for last three years i.e. his holdings as on 31st March, 2007, 31st March, 2008 and 31st March, 2009. The petitioner sent demat holding statements of the respondent for three years vide e-mail dated 6th August, 2009. It was the case of the respondent that after going through the said demat holding statements, the respondent was shocked and surprised to realize that the shares of about 20 companies held by the respondent were missing from his demat account.

6. The respondent by e-mail dated 18th August, 2009, made a complaint to the petitioner alleging that the shares of various

companies in his demat account were missing. Both the parties thereafter exchanged various correspondence. The petitioner denied the allegations made by the respondent in various correspondence.

7. On 24th April, 2010 the respondent filed Arbitration Reference No.CM/M/0054/2010 against the petitioner under the NSC guidelines, rules and regulations and applied for appointment of the arbitral tribunal. The respondent in the said statement of claim alleged that he had not given any instructions for transactions executed in his account in the year 2008 and 2009 and had not authorized any one to carry out any such transactions. He also alleged that he had not received any contract notes for any such alleged transactions. It was the case of the respondent that he had not received demat holding and transaction statements initially however, later admitted that he had received the same. The respondent claimed that he was entitled for return / restoration of all his shares allegedly valued at Rs.1,04,67,121/- thereof as of 23rd April, 2010. The said claim was resisted by the petitioner by filing the written statement in the month of June, 2010. The petitioner denied the allegations and claims made by the respondent and opposed the said claim on various grounds.

8. The petitioner also filed an application on 3rd August, 2010 for impleadment as a party and for substitution in place of M/s.S.S. Kantilal Ishwarlal Securities Private Limited in view of the fact that the

said broker had transferred and assigned all its retail clients business to the petitioner. By an order dated 23rd August, 2010, the arbitral tribunal allowed the said application and directed that the petitioner herein be substituted in the arbitral proceedings in place of M/s.S.S. Kantilal Ishwarlal Securities Private Limited. The petitioner thereafter filed the additional written statement on 8th September, 2010. The petitioner filed sur-rejoinder on 27th September, 2010. Before the arbitral tribunal, none of the party led any oral evidence. Both the parties filed their written arguments before the arbitral tribunal.

9. On 17th June, 2011, the arbitral tribunal made an award, directing the petitioner to pay to the respondent a sum of Rs.1,04,67,121.50 ps. after deducting an amount of Rs.13,77,701.77 ps. with interest at the rate of 12% p.a. from 29th April, 2010 till payment.

10. Being aggrieved by the said award dated 17th June, 2011, the petitioner filed an appeal before the appellate tribunal bearing No.CM/M/0054/2010. The appellate tribunal made an award on 9th December, 2011 and dismissed the said appeal. The said award dated 9th December, 2011 has been impugned by the petitioner in this petition filed under section 34 of the Arbitration Act on various grounds.

11. Mr.Cama, learned counsel for the petitioner submits that

though initially the respondent had alleged that he had not received any DP statements which would show the disputed transactions however, he later on admitted having received the same but alleged that they were received quarterly instead of fortnightly. He submits that the respondent was duly registered as online client and said account was a joint account along with his two sons. The petitioner had produced trade logs to prove that most of the trades, including the undisputed trades were executed by the respondents online. The respondent never produced any hard copies of the contract notes to show that he had received the same at least for undisputed trades.

12. Learned counsel submits that the arbitral tribunal however, overlooked the admitted position that the respondent being an online client, had constant access to all the statement of accounts, bills, contract notes and transaction statements on the website of the petitioner which could be viewed by him any time, at any place as per his convenience. The said trading was held by the respondent jointly with his sons – Siddharth Goel and Shantanu Goel and all of them had jointly executed the said agreement. He submits that the said account being joint account, all three family members or any of them could have executed the trades in the said account and had in fact executed the trades.

13. Learned counsel submits that it was not the case of the

respondent in the statement of claim that he was not issued any secret password for carrying out the trading. Admittedly, two of his sons who were joint account holders with the respondent, had carried out various transactions online by using the password. He submits that the respondent who is the Chartered Accountant by profession and has been carrying on investments since 1981 would not have been silent spectator even if according to him no password was issued by the petitioner for several years though there was a reference to such password and for the purpose of carrying out any transaction online password was must.

14. Learned counsel for the petitioner submits that none of the trades prior to March, 2008 were disputed by the respondent. He submits that even if the contract notes were alleged to have been sent by the petitioner by e-mail on the correct e-mail address of the respondent, the respondent had received periodical statements from the petitioner admittedly. The respondent would not have kept silence for a period of over two years if he had not carried out any trade and had left the shares with the petitioner for over two years without any enquiry or objection.

15. Learned counsel for the petitioner submits that HDFC Bank had certified and the said bank statement would indicate that there was transfer of money to/from the said trading account to/from

the said linked bank account with the HDFC Bank and the respondent had carried out such transactions vide net banking. The said certificates issued by the HDFC Bank were not disputed by the respondent. The arbitral tribunal completely overlooked the said crucial and important document in the impugned award. He submits that unless the secret password would have been issued by the petitioner to the respondent, the respondent or his two sons could not have carried out any transaction. The said statement would clearly indicate that several online trading was carried out by the respondent and/or his two sons which otherwise could not have been carried out without any password issued to them by the petitioner. Learned counsel for the petitioner invited my attention to welcome kit / KYC form which was filled in by the respondent.

16. Learned counsel also invited my attention to the agreement dated 16th April, 2003 between the said broker M/s.S.S.Kantilal Ishwarlal Securities Private Limited and the respondent in which the respondent and his two sons were under an obligation to take all necessary steps to ensure confidentiality and secrecy of the log-in name and password. In the said form it was also recorded that the client was aware that the transaction statement may be accessed by the other entities in case the confidentiality, secrecy of the log-in name and the password was compromised. It was also

mentioned that the client had permitted the depository participant to provide the statements through internet.

17. Learned counsel for the petitioner submits that the respondent had produced the income tax returns of the respondent deliberately only for the period upto 31st March, 2008 for which period there was no dispute between the parties. Though the petitioner had called upon the respondent to produce the income tax returns for the disputed period, the respondent deliberately did not produce and suppressed the relevant evidence before the arbitral tribunal. The respondent had suppressed the status of the transactions shown by him in the IT returns filed by him for the relevant period. There was no dispute that the respondent had received the quarterly ledger statement from the petitioner. If according to the respondent any transactions were not carried out on the instructions of the respondent or by the respondent or his two sons but were wrongly reflected in the staid quarterly ledger statement, the respondent could have raised an objection in accordance with bye-laws. No such objection was however ever raised by the respondent. Such quarterly statement would show the transaction in trading account as well as Depository Participants Account.

18. Learned counsel invited my attention to the circular issued by the National Stock Exchange of India Limited in respect of the

amendment to the regulation 6.1.5 by inserting a new clause as clause (d) and submits that under the said amended bye-law, the petitioner was under an obligation to send a complete statement of account for both i.e. the funds and security to all the clients not exceeding three months within the month of the expiry of the said period. Under the said amended bye-law, the client was under an obligation to report errors if any, in the said statement within 30 days of receipt thereof to the trading member. He submits that the appellate tribunal has erroneously relied upon the other bye-laws which were not applicable to the transaction in hand and overlooked the amended bye-law. He submits that the appellate tribunal has drawn a perverse conclusion that the respondent being a busy chartered accountant would not have noticed any error in the statement of account submitted by the petitioner.

19. Learned counsel for the petitioner invited my attention to the bank statement issued by the HDFC bank showing various payouts i.e. the amount paid by the respondent to the petitioner from 14th May, 2008 onwards. He also invited my attention to the Merge Debtor Ledger and would submit that various amounts paid by the petitioner to the respondent and by the respondent to the petitioner were duly reflected in the said statement in respect of the disputed transaction.

20. Learned counsel for the petitioner submits that the arbitral tribunal completely overlooked the fact that the respondent himself had filed an application on 29th October, 2007 for change in Client Master agreement entered into with the broker and notified HDFC Bank as his linked bank account and also notified his two new e-mail addresses which information would clearly indicates that the respondent was online trading client and was carrying on online trading. The said application if considered with the statement issued by HDFC Bank would clearly indicate that the respondent and his two sons were carrying on online trading and various payment were made by the petitioner or the respondent to each other in respect of the disputed transaction.

21. The learned counsel for the petitioner submits that the appellate tribunal has rejected the appeal filed by the petitioner by drawing various inferences against the petitioner and the entire award is based on presumptions and surmises. Several submissions made by the petitioner has not been even considered by the arbitral tribunal.

22. Ms.Pande, learned counsel for the respondent on the other hand supported the findings rendered by the arbitral tribunal and would submit that this court cannot re-appreciate the evidence and cannot interfere with the finding of facts rendered by the arbitral

tribunal. She submits that the petitioner had failed to prove before both the tribunal that the disputed transactions were carried out at the instance of the respondent. She submits that though in the application form, the respondent was allowed to carry out online trading, the petitioner had failed to prove that any trades were logged on the system of the petitioner's website by the respondent by carrying out any online trading. The petitioner had failed to prove that the petitioner had sent any logo and ID and password to the respondent to carry out any trade online. She submits that both the tribunal have rendered a finding of fact in this regard that there was no proof of issuing any secret password by the petitioner to the respondent to carry out any online trade. She submits that the petitioner did not submit any log-in or log-out details before the arbitral tribunal. Learned counsel submits that the statements produced by the petitioner would indicate that there was trading from different terminals which would clearly shows that somebody else was carrying on trading in the account of the respondent unauthorizedly.

23. Learned counsel for the respondent invited my attention to the application for online trading account in which the respondent had disclosed the name of the bank and the saving account number of the respondent with the Andhra Bank. In the said form, it was disclosed by the respondent that the internet banking of the said account with

the Andhra Bank was not enabled.

24. Learned counsel for the respondent submits that insofar as delivery of contract notes by e-mail by the petitioner is concerned, the e-mail ID on which the petitioner had alleged to have sent contract notes was dilapidated and were never received by the respondent. The arbitral tribunal has rendered a finding of fact on this issue which cannot be interfered with by this court.

25. Learned counsel for the respondent submits that the respondent and his two sons had joint account with the petitioner. Those two sons of the respondent were also carrying out trading with the petitioner. The petitioner has tried to confuse before the arbitral tribunal by placing reliance on the bank statement issued by the HDFC Bank. She submits that the first three transactions reflected in the said statement were pertaining to the sons of the respondent but it inadvertently showed the name of the respondent. She submits that accordingly, the respondent and his two sons had reversed those transactions and entries in their respective accounts. Learned counsel submits that both the arbitral tribunal have rightly rejected the submissions made by the petitioner and this court cannot interfere with the award.

26. In rejoinder, Mr.Cama, learned counsel for the petitioner submits that the arguments advanced by the petitioner insofar as the

joint account of the respondent with his two sons is concerned is rejected by the appellate tribunal based on the income tax returns produced by the respondent which were for the undisputed period i.e. 2003 to March 2008. The respondent had not produced the income tax returns for the relevant years. The award shows patent illegality and the perversity on the face of the award. The appellate tribunal has drawn inference against the petitioner based on such income tax returns which were not for the disputed period. He submits that the award shows the total non application of mind on the part of the appellate tribunal.

27. Learned counsel for the petitioner invited my attention to the copy of the HDFC account of the respondent which was filed by the respondent himself before the appellate tribunal alongwith written argument. He submits that even the said account would reflect various payments received by the respondent from the petitioner during the disputed period which crucial document was totally overlooked by the appellate tribunal.

28. Insofar as reliance placed by the respondent on the application form showing that the internet account with the Andhra Bank Limited was not enabled is concerned, he submits that the respondent and his two sons had carried out online trading by operating the internet banking with HDFC Bank Limited and not with

Andhra Bank Limited. He submits that the reliance placed on the said application form showing the status of the account with the Andhra Bank opened by the respondent was totally misplaced and was relied upon for the purpose of confusing the issue.

29. Learned counsel for the petitioner invited my attention to the findings rendered by the appellate tribunal that admittedly quarterly statement of the account of the respondent were sent by the petitioner. The respondent had received the trade logs of the petitioner. He submits that the arbitral tribunal has mixed up the relevance of the bye-laws by relying upon on clause (6) of the Depository Participants statement and not relying upon the separate regulation of National Stock Exchange regarding trading account. He submits that once the respondent had been delivered the quarterly statement according to the relevant bye-laws and if no objection was raised by the respondent within 30 days of receipt of such quarterly statement, the respondent could not have been allowed to raise any objection belatedly. The objections raised by the respondent was as and by way of afterthought. He submits that the findings of the arbitral tribunal as well as the appellate tribunal in respect of the issue whether respondent was online client is based on per-preponderance of probability. The petitioner had produced on record the trade logs, bank statement which had reflected the payments made by the

petitioner to the respondent and by the respondent to the petitioner through the said HDFC account of the respondent. The respondent had withheld the best evidence i.e. income tax returns for the disputed period which would have reflected the disputed transaction. Instead of drawing an adverse inference against the respondent, the appellate tribunal has drawn adverse inference against the petitioner which discloses non application of mind on the part of the appellate tribunal and shows perversity in the impugned award.

30. The learned counsel for the petitioner submits that even if the petitioner had not sent contract notes by e-mail at the correct e-mail address, the respondent being online client had complete access on his account by using password and thus the respondent could not have made any such grievance against the petitioner that he was not aware of any disputed transaction at all for more than two years.

<u>REASONS AND CONCLUSIONS :</u>

31. It is not in dispute that the respondent had opened trading account with M/s.S.S. Kantilal Ishwarlal Securities Private Limited jointly with his two sons by executing various documents and agreements, including an application for online trading account. In the said application for online trading account, it was specifically provided that the constituent could carry out online trading based on the secret password, which was not to be shared with anybody else. It

was however, the case of the respondent that though the respondent along with his two sons had filled in the said application for online trading account, he was never issued any secret password by the petitioner.

32. A perusal of the record indicates that it was not disputed by the respondent that the two sons of the respondent, who had also signed the said application for online trading account with the respondent jointly with the respondent had carried out various online trading after submission of the application for the said online trading account. It is not in dispute that online trading could be done only if a secret password was issued by the member broker to the constituent which password could be subsequently changed by the constituent. The respondent did not deny in the entire arbitral proceedings that his two sons had carried out various online trading transactions in the said account opened by the respondent jointly with them.

33. A perusal of the record indicates that the respondent being a Chartered Accountant and it was his own case that he was carrying in investment since 1981. The respondent had also not disputed any transaction prior to 2008. It was also not the case of the respondent that though in the application for online trading, there was a reference to the password and without the password, no such online trading could be done at all by the constituent, such password was not given

by the petitioner or M/s.S.S. Kantilal Ishwarlal Securities Private Limited for more than two and half years or that the respondent had made any demand for issuance of such password which was refused by the petitioner at any point of time. The respondent did not plead before the appellate arbitral tribunal as to how his two sons who were joint account holder with the respondent and were the signatories to the said application for online trading carried out online transactions without such password.

34. It is thus clear that online trading was carried out by the respondent and his two sons which could be done only if a secret password was issued by the petitioner. In my view, learned counsel for the petitioner is thus right in his submission that the respondent being online client had constant access of the statement of accounts, bills, contract notes and transaction statements on the website of the petitioner. It is not in dispute that on the agreement dated 16th April, 2003, which was entered into between the respondent and the said M/s.S.S. Kantilal Ishwarlal Securities Private Limited, the respondent and his two sons were under an obligation to take all necessary steps to ensure the confidentiality and secrecy of the log-in made and password which was referred in the said agreement and that the client was aware that the transaction statement could be accessed by other entity in case confidentiality, secrecy of the log name and password

was compromised. Under the said agreement, the client had permitted the depository participant to provide the statements through internet.

35. A perusal of the award however, indicates that the appellate tribunal has rejected the submission of the petitioner about issuance of the password to the respondent only on the ground that the petitioner had not produced any record whereby secret password was allotted to the respondent to go online and therefore, it was difficult to accept the case of the petitioner that the respondent was online client. The appellant tribunal, in my view, has totally overlooked the admitted position that the sons of the respondent, who were joint account holders with the respondent and were also the signatories to the said application for online trading had carried out various transactions online which could not have been done unless password was issued by the petitioner. The appellate arbitral tribunal also overlooked the crucial fact that it was not the case of the respondent that he had demanded issuance of the secret password from the petitioner and the same was refused by the petitioner and thus the respondent could not carry out any online trading though was permitted under the agreement.

36. The award on this issue, in my view, is based on the presumption and surmises and has been rendered overlooking and

ignoring the material and crucial part of evidence. The appellate arbitral tribunal in the impugned award has dismissed the appeal filed by the petitioner and upheld the impugned award rendered by the lower arbitral tribunal by holding that such cases were to be decided on the preponderance of probabilities. The award, in my view, shows patent illegality and the findings rendered by the appellate arbitral tribunal are *ex-facie* perverse.

37. A perusal of the record also indicates that the parties had produced before the arbitral tribunal the bank statements issued by the HDFC Bank showing the transactions in the bank account of the respondent opened with the said bank. The said statement admittedly reflected various payments made either by the petitioner to the respondent or by the respondent to the petitioner during the disputed period. The respondent did not dispute the payments reflected in the said bank statement. The only submission made by the respondent was in respect of the first three entries that though the payments were made on account of the two sons of the respondent, in the said statement, the name of the respondent was reflected inadvertently. A perusal of the record indicates that no such plea was raised by the respondent before the arbitral tribunal nor any such stand was proved. Be that as it may, it was clear that the respondent as well as the sons of the respondent were carrying on online trading with the

petitioner which was clearly demonstrated and proved from the bare perusal of the bank statements issued by the HDFC Bank which was not in dispute. The finding rendered by the arbitral tribunal that the respondent was not online client of the petitioner is thus *ex-facie* perverse and overlooking crucial and important evidence on record.

38. Insofar as the submission of learned counsel appearing for the respondent that in the application form, the respondent had disclosed the details of the internet banking facility in respect of the account of the respondent with Andhra Bank showing the status of the said account as “internet not enabled” and thus no online transaction could have been reflected in the said account is concerned, in my view, the said submission made by learned counsel for the respondent deserves to be rejected on the ground that the respondent operated the net banking facility in respect of the account opened with HDFC Bank and not Andhra Bank. The statement of account issued by HDFC Bank was part of the evidence before both the arbitral tribunal which admittedly reflected various transactions showing payments during the disputed period inter-se. In my view, Mr.Cama, learned counsel for the petitioner is right in his submission that the said crucial and material piece of evidence which clearly reflected the transactions and payments carried out by the respondent during the disputed period, was completely overlooked by both the arbitral

tribunal.

39. A perusal of the record clearly indicates that on 29th October, 2007, the respondent himself had filed an application for change in the client master agreement which was entered into with the said broker and notified the HDFC Bank as his linked bank account and also notified his two new e-mail addresses. Both these informations provided by the respondent to the petitioner would clearly indicate that the respondent was online trading client and was carrying on trading online. The respondent was otherwise not required to make any change in client master agreement and to provide such details of his linked bank account in which the payments were to be routed through. The appellate arbitral tribunal as well as lower arbitral tribunal have completely overlooked this crucial and material piece of evidence in the impugned award and has rendered a perverse and patently illegal finding.

40. It was the case of the respondent before both the arbitral tribunal that the contract notes and other statements were not sent by the petitioner to the respondent at the correct e-mail ID. The respondent at later stage had given the correct e-mail ID of the respondent to the petitioner. It was however, the case of the respondent that even on the said correct e-mail ID, the petitioner did not forward any contract notes or other document relating to the

alleged transaction to the respondent. It was however, the case of the petitioner that even if the respondent was not at all delivered the copies of the contract notes at the correct e-mail ID, it is not in dispute that the respondent had been served with quarterly statement of account.

41. A perusal of the award rendered by the appellate arbitral tribunal clearly indicates that the finding is recorded in favour of the petitioner that the hard copies of the quarterly ledger statements were sent by the petitioner to the respondent which were received by the respondent. The appellate arbitral tribunal however, placed reliance on clause 6 of the depository agreement and rejected the submissions made by the petitioner by holding that there was nothing wrong if the respondent thought that there was no transaction in the trading account since the said statements were received every quarterly and not after fortnightly. The appellate arbitral tribunal also expressed that since the respondent was busy professional person as the Chartered Accountant, he must not have gone to quarterly statement sent to him assuming that there was no transaction in his trading account because the statements otherwise would have been sent fortnightly and not quarterly.

42. A perusal of the circular dated 22nd May, 2002 issued by the National Stock Exchange of India Limited by which all trading

members in the capital market were informed about the amendment to regulation 6.1.5 by inserting a new clause s clause (d) would clearly indicate that under the said amendment every member was under an obligation to send a complete statement of accounts for both funds and securities in respect of each of its clients in such periodicity not exceeding three months within a month of the expiry of the said period. In the said statement, the member also has to state that the clients shall report errors, if any, in the statement within 30 days of receipt thereof to the trading member.

43. It is thus clear beyond reasonable doubt that the petitioner, who was the member of National Stock Exchange of India Limited, was under an obligation to send the statement of account for both i.e. funds and securities to all the clients not exceeding three months within a month of expiry of the said period. The constituent was under an obligation to raise the objection, if any, in respect of any errors in the said statement within 30 days of the receipt of such statement to a trading member. A perusal of the award indicates that though the appellate arbitral tribunal rendered a finding that the respondent was getting quarterly ledger statement from the petitioner, however rejected the submission of the petitioner on the ground that the respondent being a busy professional person would not have gone through such quarterly statement assuming that there was no

transaction in his trading account. The entire basis of the impugned award is based on presumption and surmises and contrary to the by-laws and circulars of the National Stock Exchange of India Limited.

44. It was not the case of the respondent that though the respondent had received such quarterly ledger statements reflecting the transactions, the respondent had pointed out errors, if any, in the said statement within the time prescribed under the said circular or at any other point of time. If the respondent had admittedly received such periodical statement from the petitioner in compliance with the said circular and the respondent had not reported any errors, the appellate arbitral tribunal ought to have considered that all such transactions reflected in the said statements were in fact carried out by the respondent and were rightly reflected in such quarterly statements. The appellate arbitral tribunal however, has proceeded on an erroneous premise by overlooking the binding circulars and has rendered a perverse and patently illegal finding in the impugned award. In my view the award shows total non-application of mind on the part of the appellate arbitral tribunal.

45. A perusal of the record does not indicate that it was the case of the respondent that he was busy professional person and he could not go through the periodical ledger statements received by the respondent from the petitioner. Be that as it may, since such

statements were received by the respondent, the respondent was under an obligation to report the errors, if any, in such statements within the time prescribed. The appellate arbitral tribunal as well as the lower arbitral tribunal thus in my view, could not have allowed the claim of the respondent by holding that there were no such transactions carried out by the respondent.

46. A perusal of the impugned award rendered by the appellate arbitral tribunal also indicates that the appellate arbitral tribunal has rejected the submissions made by the petitioner also on the ground that no transaction was done by the respondent some time in the month of March, 2008 and copy of the income tax return produced by the respondent did not show any short term gain due to to the alleged sale of shares which would mean that he did not carry out any sale of shares. The appellate arbitral tribunal, in my view, has committed an *ex-facie* error by considering the income tax returns of the respondent for undisputed period i.e. for the year 2003 to March, 2008. Admittedly, the respondent had not produced the income tax returns for the disputed period. The transactions, if any, during the disputed period thus obviously could not have been reflected in the income tax returns of the prior period when there was no dispute between the parties. The respondent in my view has withheld the best evidence by not producing the income tax returns for the

disputed period which would have reflected the disputed transaction. Instead of drawing adverse inference against the respondent the appellate arbitral tribunal has drawn an adverse inference against the petitioner which disclosed non-application of mind on the part of the appellate arbitral tribunal and shows perversity in the impugned award.

47. Insofar as the submission of learned counsel for the respondent that this Court cannot interfere with the findings of fact rendered by both the arbitral tribunals is concerned, in my view since the findings rendered by both the arbitral tribunals were *ex-facie* perverse and shows patent illegality and discloses non-application of mind, this Court has ample power under section 34 of the Arbitration & Conciliation Act, 1996 to interfere with such perverse finding and which discloses patent illegality. The impugned award rendered by the appellate arbitral tribunal has been passed overlooking the crucial and material piece of evidence which would have gone to the root of the matter. I am thus not inclined to accept the submission made by learned counsel for the respondent that no interference with the impugned award is warranted in this case.

48. I therefore, pass the following order :-

a). Arbitration Petition No.741 of 2012 is made absolute in terms of prayer (a). The impugned arbitral award dated 9th December, 2011 passed by the appellate arbitral tribunal for National Stock Exchange of India Limited in Arbitration Matter No.CM/M-0054/2010 is set aside.

b). No order as to costs.

(R.D. DHANUKA, J.)