IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 547 of 2018

Artha Vrddhi Securities Ltd. ..Petitioner.
Vs
Mahavir Prasad Gujjar
(Constituent) ..Respondent.

ALONG WITH
ARBITRATION PETITION NO. 546 of 2018

Artha Vrddhi Securities Ltd ..Petitioner.
Vs
Manoj M. Mittal ..Respondent.

ALONG WITH
ARBITRATION PETITION NO. 548 of 2018

Artha Vrddhi Securities Ltd ..Petitioner.
Vs
Mrs. Satyabhama Prabhudayal Chamria ..Respondent.

ALONG WITH
ARBITRATION PETITION NO. 549 of 2018

Artha Vrddhi Securities Ltd ..Petitioner.
Vs
Ms. Vedika Pankaj Chamria ..Respondent.

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Mr. Shaunak Thacker, Ms. Gunjan Jayakar, Ms. Priyanka Kumar, Ms. Rinku Valanju and Mr. Akshit Jain for the petitioners in ARBP/547/2018, 546/20918, 548/2018 and 549/2018.

Mr. Prateek Seksaria with Mr. Simil Purohit, Mr. Shlok Parekh, a/with Ms. Jaisha Sabawala I/by Hariani & Co. for the respondents.

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CORAM : B. P. COLABAWALLA, J.
DATED :- 25th JANUARY, 2019.

P.C. :

1. The aforesaid arbitration petitions have been filed under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 (for short "**the Act**") challenging an order passed by the Arbitral Tribunal dated 24th June, 2016 dismissing the references filed by the petitioner herein on the ground that the Arbitral Tribunal had no jurisdiction to entertain the references. To put it in a nutshell, the Arbitral Tribunal came to this conclusion because it accepted the case of the respondent herein that the original contracts which were entered into pursuant to a Client-Member Agreement which was executed some time in April, 2015, were substituted by a writing dated 19th August, 2015. The effect of this was that the original contracts perished and with it, so did the arbitration clause contained therein. The

arbitral tribunal gave a finding (and which is not even disputed before me) that this writing (referred to by the Tribunal as a settlement) was not denied by either of the parties and nor any objection regarding its validity or otherwise was raised by either of the parties. Whilst interpreting this writing, the Tribunal came to the conclusion that the earlier contract had clearly been substituted with this new writing as to the mode and manner of conduct of trades, transactions, payments and the mode and the manner of discharge and appropriation and clearing of debits, etc. This being the case, the Tribunal held that the terms governing the discharge of payments as contained in the contract notes etc., was clearly substituted and the disputes that were existing prior to the date of this writing (19th August, 2015) stood settled by these fresh terms and which admittedly did not contain an arbitration clause. It is on this basis that the Arbitral Tribunal came to the conclusion that it had no jurisdiction to entertain the reference and therefore rendered a finding to that effect. It is this order that is challenged before me.

2. Before I deal with the legal submissions canvassed by both the parties, it would be necessary to set out the few facts. The petitioner herein was the claimant before the Arbitral Tribunal and has been referred to as the applicant in the impugned order. The respondent herein was the respondent before the Tribunal and has accordingly been referred to as the respondent in the impugned order. For the sake of convenience, I shall refer to the parties as they were referred to by the Arbitral Tribunal in the order that is assailed in the aforesaid petitions.

3. It is common ground before me that the facts in all these petitions are more or less identical. In fact, the orders impugned in all these petitions is of the same date and have been decided virtually on the same grounds. In these circumstances, I shall refer to the facts in Arbitration Petition No. 547 of 2018 and which was extensively argued before me.

4. The applicant is a corporate share and the stock broker having National Stock Exchange (NSE) clearing No.

12213 as well as a SEBI registration number. The respondent (and who was a constituent of the applicant) is aged about 47 years and is a cook working on a full time basis and residing at the residence of one Mr. Ashish Chamria at Vile Parle (East), Mumbai 400-049.

5. It is the case of the applicant that Mr. Ashish Chamria introduced about ten clients to the applicant including the respondent. Accordingly, on 10th April, 2015 a client – member agreement was executed between the respondent and the applicant in the standard format approved by SEBI. According to the applicant, Clause 24 of this agreement provides for resolution of disputes by arbitration. Pursuant to this agreement, the respondent was allotted a Unique Client Code (UCC) being RMI-05.

6. After this agreement was executed, on 6th July, 2015 the first trade in the respondent's account took place in the future and options (F & O) segment. This trade was carried out in the respondent's code – RMI-05. On 6th July, 2015 the NIFTY Index future opened at 8418 levels on the

NSE. At 10:32 a.m. the respondent placed one intra day purchase order for 5000 Nifty index at the price of Rs.8,419/-. This transaction was closed out at 11:06 a.m. by selling 5000 Nifty Index at an average price of Rs.8,403/-. By virtue of this transaction, the respondent suffered a loss / incurred a liability to the applicant in the sum of Rs.81,660.68.

7. Thereafter, on 6th July, 2015 itself at 11:13 AM the respondent sold 5000 NIFTY index at an average price of Rs.8406/-. At 11:30 AM the respondent sold further 5000 NIFTY Index at an average price of Rs.8413/-. According to the applicant and which is not in dispute, all these transactions were carried out at the instructions of Mr. Ashish Chamria who was acting for and on behalf of the respondent. As far as these two trades are concerned, the respondent suffered a loss / incurred a liability to the applicant of about 13.61 lacs.

8. It is the case of the applicant that at 2:45 PM, one Mr. Jairaj Bafna (an employee of the applicant)

informed Mr. Ashish Chamria about rising NIFTY levels, MTM losses and enquired as to when he will be squaring off intra-day positions and make payments. Mr. Jairaj Bafna further clarified that unless minimum payment through RTGS is received carrying forward of the outstanding intra trade positions of the day cannot be considered and granted. According to the applicant, Mr Ashish Chamria ultimately agreed and asked Mr. Jairaj (the employee of the applicant) to square off the outstanding intra-trade positions of 6th July, 2015 in all accounts. The applicant accordingly closed all open NIFTY Index futures intra-day positions. The applicant also sent a system generated electronic contract note in respect of the respondent's trade and margin statement to his registered Email ID (which was the Email ID of Mr. Ashish Chamria). It is the case of the applicant that on account of the aforesaid trade, the respondent had incurred a liability to the tune of approximately Rs.14.40 lakhs. Despite this liability, Mr. Ashish Chamria and/or the respondent neglected to make payment of their liability.

9. It appears that thereafter, on 19th August, 2015,

Mr. Ashish Chamria, Mr. Manoj Mittal and the applicant's representative met at Bru Cafe, Juhu Circle, Vile Parle (West) when a writing dated 19th August, 2015 was executed between the applicant and the said parties. This writing was with reference to not only the client code allotted to the respondent but was with reference to the client code allotted to Ms. Satyabhama Chamria (RMI-01), Ms. Mamta Chamria (RMI-02), Mr. Manoj M. Mittal (RMI-03), the respondent – Mahavir Prasad Gujjar (RMI-05) and Ms. Vedika Pankaj Chamria (RMI-08). I shall deal with this writing a little later in the judgment considering that the entire dispute in the present petition revolves around this writing.

10. Be that as it may, on 13th October, 2015 the respondent again disputed the squaring off of the aforesaid NIFTY transaction and finally therefore the applicant was constrained to invoke arbitration and filed the above arbitration proceedings on 4th March, 2016. In these arbitration proceedings, the respondent filed an application under Section 16 of the Act, inter alia contending that there was no valid, subsisting or legally enforceable arbitration

agreement between the applicant and the respondent and consequently the Arbitral Tribunal did not have jurisdiction to entertain and/or try the reference filed by the applicant. The basic contention of the respondent was that the writing dated 19th August, 2015 and which according to the respondent, was an agreement executed between the applicant and Mr. Ashish Chamria (on behalf of the respondent), was a fresh agreement for settling the dispute between the parties and that it was decided that the rights and obligations of both the parties would be governed by this fresh agreement executed on 19th August, 2015.

11. To this application filed under Section 16 of the Act, the applicant filed its reply. It was contended by the applicant that the respondent's challenge to the jurisdiction of the Arbitral Tribunal was baseless and frivolous as the applicant had filed the reference under the Rules, Bye-laws and Regulations of the NSE in respect of its claim that had arisen on account of F & O trades of the respondent. The F & O trades took place in the client code allotted to the respondent (namely RMI-05) on 6th July, 2015. As disputes

had arisen on account of obligation of the respondent in relation to the F & O trades, such disputes were referred to the Arbitral Tribunal as the trades took place on the NSE and were subjected to NSE Rules, Regulations and Bye-laws and were subjected to the jurisdiction of the NSE which provides for a statutory mechanism of arbitration under its rules to resolve such disputes. It was further contended by the applicant that the writing dated 19th August, 2015 created no new contract or novatio as alleged or otherwise. According to the applicant, it never discharged the respondent from its obligation nor was there any full performance of the terms of the alleged writing dated 19th August, 2015. According to the applicant, the future tone of the terms, incompleteness, non-fulfillment and non-compliance of a substantial part, unclear / imperfect / inconclusive language of points on a piece of paper showed and/or indicated that the respondent and Mr. Ashish Chamria wanted to do further trading in futures and options, earn profit therefrom and thereafter transfer the same to the account where debits existed. In these circumstances, the applicant averred that it does not admit that on account of the said writing and which was unimplemented, it could be construed that the Arbitral Tribunal had no jurisdiction. It was admitted that this writing did not have an arbitration clause and neither did it contain other clauses which are generally found in such a MOUs. It was on these grounds that the Section 16 application filed by the respondent was opposed by the applicant.

12. This application under Section 16 was thereafter heard by the Arbitral Tribunal. The Arbitral Tribunal noted that after the dispute and protracted negotiations, the applicant and the representative of the respondent had entered into certain conditions and stipulations dated 19th August, 2015 and which for the sake of convenience was referred to as "the settlement". The Tribunal further noted that neither party to the arbitration had denied or raised any objection as to the validity or otherwise of the said settlement. The signatures appended on the said settlement were not denied by either of the parties. Neither the execution nor the contents of the said settlement were in

dispute before the Arbitral Tribunal. The Arbitral Tribunal thereafter noted the case of the respondent that since disputes arose on 6th July, 2015 various meetings took place between the parties herein as well as for certain other clients. It was the case of the respondent that finally the parties decided to govern their respective rights and obligations by execution of a fresh agreement in substitution of the earlier contracts and it was in these circumstances that on 19th August, 2015 a writing was executed by and between Jairaj Bafna (for and on behalf of the applicant) and Mr. Ashish Chamria on behalf of his certain clients including the respondent. It was the specific case of the respondent that the Arbitral Tribunal also noted the specific case of the respondent that the parties, in pursuance of the said writing, had also acted upon the same and was thus in substitution of the earlier contracts. It was argued by the respondent that the said writing dated 19th August, 2015 gave a new cause of action and obliterated the earlier one and hence, the arbitration agreement which was in existence between the parties also perished. It was therefore contended by the respondent that there being no arbitration clause, the Tribunal had no jurisdiction to entertain the reference. The Tribunal also noted the contentions canvassed on behalf of the applicant. The applicant claimed before the Tribunal that in the writing dated 19th August, 2015 the applicant had just jotted down certain points which were cryptic, incomplete and inconclusive. That the same pertained to certain random points noted down on a piece of paper and which terms were not finalized by the parties. It therefore could not be stated that this writing was an agreement that substituted the earlier contracts which was in relation to the futures and options trades that was carried out by the respondent on 6th July, 2015. Thereafter, the Arbitral Tribunal gave its reasoning and conclusion. The Tribunal first examined in detail the law on the subject as to when there would be a substitution of a contract and whether the arbitration clause would perish if a new contract was substituted for the old one in which there was no arbitration clause. It referred to several decisions of the Apex Court, Delhi High Court as well as of this Court. After reviewing the law on the subject and relying upon the decision of the Apex Court in the case of **Union of India vs. Kishorilal Gupta & Bros. [AIR 1959 SC 1362]**, the Tribunal came to the conclusion that the Supreme Court had concluded that one of the modes by which the contract can be discharged is by the same process which created it, i.e. by mutual agreement. The Tribunal further held that the Apex Court had concluded that the arbitration clause of the original contract cannot survive after the execution of the new contract since (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms, but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation and it perishes with the contract; (3) the contract may be non-est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; and (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void whereas in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it.

13. After examining the law on the subject, the Tribunal examined the writing dated 19th August, 2015 and at internal page 24 of the impugned order set out what the said writing stipulated. Once it conducted this exercise, it came to the conclusion that the earlier contracts/ agreements had been clearly substituted with this new agreement (dated 19th August, 2015) as to the mode and manner of conduct of trades, transactions, payments and the mode and manner of discharge and appropriation and clearing of debits etc. Thus, the terms governing the discharge of payment as contained in the contract notes etc. stood clearly substituted and the dispute that were existing prior to the date of this writing/agreement stood settled by these fresh terms which governed the respective rights and obligations of the parties. Admittedly, this writing did not contain any arbitration clause. It was in these

circumstances that the Arbitral Tribunal concluded that it has no jurisdiction to adjudicate the dispute raised in the reference and which was referred to it under the rules, bye-laws and regulations of the NSE.

14. In this factual backdrop, Mr. Thacker, learned Counsel appearing on behalf of the applicant, submitted that there is no novatio or substitution of the original agreement. According to Mr. Thacker, the original agreement was the client member agreement dated 10th April, 2015 that was executed between the applicant and the respondent. Clause 24 of this agreement contained an arbitration clause. He submitted that at the highest, the writing dated 19th August, 2015 was only a modification of the original agreement and did not substitute the entire agreement that was originally entered into between the applicant and the respondent. He submitted that in any event that whether there was a substitution or otherwise was a mixed question of law and fact which was to be ascertained from the intention of the parties and the Arbitral Tribunal could not have come to the conclusion that it did, without allowing the parties to lead

evidence in that regard.

15. Mr. Thacker then submitted that the writing dated 19th August, 2015 is only a document recording an understanding as to the methodology or manner of future operations and trading which had been suspended by the applicant for non-payment of dues. According to Mr. Thacker, only one client (UCC-RMI-02) agreed to make payment of his outstanding dues and were in fact paid and hence no arbitration proceedings were commenced against the said party. The writing of 19th August, 2015 only contemplated continuance of the trading and continuance of the business relations between the applicant and the respondent and the other clients mentioned in the said writing and the obligations and the terms whereof were set out in the client member agreement executed by the applicant in favour of the respective clients. Looking to all this, Mr Thacker submitted that at the highest, it could be concluded that the writing dated 19th August, 2015 modified or varied the actions taken pursuant to the client member agreement and did not substitute the terms thereof. This

being the case, Mr Thacker submitted that the arbitration clause clearly survived and therefore the arbitral tribunal certainly had jurisdiction to decide the disputes and differences raised in the reference raised before it.

16. Mr. Thacker then argued that from the language of the writing dated 19th August, 2015 it was clear that it was not the intention of the parties to substitute the client member agreement altogether and make a new business relationship with new terms and methodology of trading with new duties and obligations. According to Mr. Thacker, if it was so intended, it would be void as it is not approved by SEBI and contrary to SEBI approved norms. He submitted that trading could only be carried out as per the original contract namely a client broker agreement which was in the prescribed approved format of SEBI. This was another factor, according to Mr. Thacker, which would indicate that there was no substitution of the client member agreement with the writing dated 19th August, 2015.

17. Another point that was argued by Mr Thacker

was that the writing dated 19th August, 2015 was not approved by SEBI which would be contrary to the SEBI regulations and guidelines. For all the aforesaid reasons, Mr. Thacker submitted that the impugned order be set aside and the Arbitral Tribunal be directed to decide the disputes and differences between the applicant and the respondent on merits.

18. On the other hand, Mr. Seksaria, the learned Counsel appearing on behalf of the respondent, submitted that there are several arguments that have been made by Mr Thacker that were never canvassed before the Arbitral Tribunal. It would therefore be highly unfair to the Tribunal to consider these arguments when they were never put forth before it. Mr. Seksaria submitted that the argument that the writing dated 19th August, 2015 not being approved by SEBI was a point that was never taken before the Arbitral Tribunal and has been raised in fact for the first time only during arguments. It does not even find place as a ground of challenge even in the petition. He therefore submitted that this argument should not be taken note of at

all.

19. In any event, Mr. Saksaria submitted that the writing dated 19th August, 2015 was a settlement agreement under which how the liabilities of the parties thereto were to be discharged was set out. This writing in no way required any mandatory approval by SEBI. It was an independent contract entered into by the respondent with the applicant on how the liabilities were to be discharged and this being the case the question of taking approval from SEBI did not arise at all.

20. Mr. Seksaria then submitted that if one looks at the writing dated 19th August, 2015, it is clear that this writing was entered into for settling the disputes between the parties therein. This writing contemplates that the debit in the account of Ms. Mamta Ashish Chamria (RMI-02) was required to be cleared by Maverick Investments making payment of Rs.5 lakhs and by the applicant appropriating an amount of Rs.2 lakhs lying to the credit of Maverick Investments on account of brokerage. He submitted that

account was agreed to be settled by the said settlement in substitution of any prior agreement between the parties. In fact, payment of Rs. 5 lakhs has already been made and the sum of Rs. 2 lakhs has also been adjusted and the parties have acted upon the same. This position is undisputed.

21. Mr Seksaria submitted that thereafter settlement agreement further provides that the applicant would personally carry out trades and transactions in the account of Ms. Mamta Ashish Chamria (RMI-02) and permitted Mr. Ashish Chamria to carry out trades and transactions in UCC - RMI-08. These trades would be permitted by the applicant with 90% trade in futures and options, hedge positions with roll-over of a maximum of 1 to 2 days. On the basis of this, the credit or the profits generated would then at a later stage be utilized to be transferred to the debit account in such a manner as would be mutually agreed between the applicant and Mr. Ashish Chamria. As far as the debit in the account of the respondent (RMI-05) is concerned, it was agreed between the parties that the same would be kept in abeyance and

was agreed to be cleared once the losses to the tune of Rs.30 lakhs claimed by Maverick Investments/ Mittalji were cleared from the profits or surplus generated by trading in the accounts as stated above and in the manner as mutually agreed between the parties. He submitted that on a plain reading of the writing dated 19th August, 2015 it was clear that this writing clearly stipulated how the liabilities of the parties mentioned therein were to be discharged. This, according to Mr. Seksaria, was clearly an independent and a fresh agreement which did not contain any arbitration clause and therefore the Tribunal rightly came to the conclusion that the original contracts under which the liabilities arose was substituted by this writing of 19th August, 2015.

22. Mr. Seksaria then submitted that even assuming for the sake of argument that this Court was to take a different view on the interpretation of the writing dated 19th August, 2015, that would not entitle the Court to set aside the impugned order. Mr. Seksaria submitted that as long as the view taken by the Tribunal is a plausible view, merely

because this Court is of a different view, would be no ground to interfere with the order passed by the Tribunal. He submitted that the Arbitration and Conciliation Act, 1996 contemplates minimal interference by the Court and which is clear from Section 5 of the Arbitration and Conciliation Act, 1996. He submitted that it is for this very reason that even when a final award is challenged under Section 34, minimal interference is allowed by the Court. He submitted that the same principle would apply even in the present case where an appeal is filed under Section 37 challenging the order of the Tribunal. It is not as if this is a first appeal where this Court would go into the facts and law on every aspect and substitute its own opinion in place of that of the Arbitral Tribunal. To put it differently, Mr. Seksaria submitted that what this Court has to look into, is whether the order passed by the Tribunal was one that was a plausible view and once this test is satisfied, no interference is called for in the impugned order. In support of this proposition, Mr. Seksaria relied upon a decision of the Division Bench of the Delhi High Court in the case of ***NHAI vs. M/s BSC-RBM-Pati Joint Venture (2018 SCC OnLine***

Del 6780) and more particularly, paragraph 66 thereof. Mr. Saksaria submitted that in the facts of the present case, it certainly could not be said that the findings given by the Arbitral Tribunal are either perverse or contrary to the settled principles of law. He submitted that the view taken by the Arbitral Tribunal is certainly a plausible view and hence requires no interference in appeal under Section 37 of the Act. Consequently, he submitted that this petition is devoid of any merit and the same ought to be dismissed.

23. I have heard the learned Counsel for the parties at length and have perused the papers and proceedings in the aforesaid petitions. I have also carefully gone through the impugned order. The impugned order passed by the Tribunal on an application under Section 16 is a detailed reasoned order. This order first sets out the law on the subject. It refers to various decisions of the Supreme Court as well as that of different High Courts including our Court to understand the concept of Novatio and substitution of a contract. As far as the law referred to by the Arbitral Tribunal in the impugned order is concerned, there can be

no dispute with reference to the proposition laid down in the aforesaid judgments. The only question that arises is whether those propositions would apply to the facts and circumstances of the present case. In the facts of the present case, it is undisputed that there is a writing dated 19th August, 2015. It is also undisputed that this writing was executed on behalf of the applicant as well as the respondent and several other persons. The other persons referred to in this writing are persons who were allotted UCC – RMI-01, RMI-02, RMI-03, RMI-05 and RMI-08. What this writing firstly contemplates is that the account of RMI-02 shall be squared off by payment being made to the applicant by cheque of Rs. 5 lakhs and the balance of Rs.2 lakhs to be transferred from the payment of REMISIERSHIP. This writing further contemplates that the applicant will be carrying out trades and transactions in the account of RMI-02 (the account of Ms Mamta Ashish Chamria) and Maverick Investment/Ashish Chamria will carry on trades in the account RMI-08 (the account of Ms Vedika Chamria). This writing further contemplates that Ashish Chamria will be working 90% in futures and options and hedge positions on maximum level of 1-2 days. This writing further contemplates that as a result of the trades and transactions carried out by Mr Ashish Chamria in the account RMI-08, any future debits offered (over and above the current debits) that may arise in the said account and which may be over Rs. 1 lakh, were required to be paid immediately by issuance of a cheque for the same. Whatever credits or profits that were earned out of the trading activities carried out by the applicant in RMI-02 and by the Ashish Chamria in RMI-08 would then at a later stage be utilized by setting off the debits in the accounts and in such a manner as it would be mutually agreed between the applicant and Mr Ashish Chamria. As far as the respondent herein is concerned, it was agreed that debit in his account (RMI-05) would be kept in abeyance and would be cleared only once the losses to the tune of Rs.30 lakhs incurred by Maverick Investments was cleared from the profits or surplus generated by trading in the aforesaid two accounts as stated above.

24. To my mind, what this settlement agreement

contemplates is that the liability that was incurred by the respondent under the contract notes for the trades that were executed by the respondent on the NSE was substituted by this writing. How these liabilities were to discharged has been specifically stated therein. This writing categorically contemplates that as far as the respondent is concerned, his outstandings are to be kept in abeyance and would be cleared, once the loss in the account of Maverick Investment / Manoj Mittal account is cleared or settled. This being the position, I do not find that the Tribunal was in any way incorrect in coming to the conclusion that the earlier contracts had clearly been substituted with this new writing as to the mode and manner of conduct of trade, transactions, payment and the mode and the manner of discharge and appropriation and clearing of debits etc. The term governing the discharge of payment as contained in the contract notes etc., clearly stood substituted by this writing of 19th August, 2015 and the dispute that was existing prior to the date of this writing/agreement stood settled by these fresh terms which governs the respective rights and obligations of the parties. As stated earlier, admittedly, this writing did not contain an arbitration clause. This fact is undisputed. This being the case, the Tribunal was fully justified in coming to the conclusion that it had no jurisdiction to entertain the reference. I am unable to agree with the submission made by Mr. Thacker that the writing dated 19th August, 2015 was at the highest only a modification of the original agreement or varied the actions taken pursuant to the Client-Member Agreement dated 10th April, 2015. The disputes that have been referred to arbitration arise on account of the trades that were carried out on the NSE. For this trade separate contract notes have been issued and the disputes arise out of these contract notes. The liability of the parties also arise on account of these contract notes. These contract notes contemplate a statutory arbitration as per the rules and bye-laws of the NSE. In fact, this is the specific case even of the applicant in his reply to the Section 16 application. The applicant in Paragraph 2 of his reply has categorically stated that as disputes have arisen on account of the obligations of futures and options trades, such disputes ought to be referred to the arbitration Forum as trades took place on the NSE and were subject to NSE's Rules, Regulations and Bye-laws and were subject to jurisdiction of the NSE which has provided a statutory mechanism of arbitration under its rules to resolve the disputes. It is therefore clear that even before the Arbitral Tribunal what the applicant understood was that the dispute that was referred to Arbitration was not under the Client-Member Agreement but the individual contract notes under which the liability arose for making payment by the respondent to the applicant. It is therefore wholly incorrect to submit that this was merely a modification of the Client-Member Agreement. The liability and the disputes did not arise under that agreement at all. They arose under the contract notes that were entered into pursuant to that agreement and which contract notes itself provides for arbitration. It was on this basis also that the applicant approached the Arbitral Tribunal for redressal of its grievances. This being the case, I do not think that this argument of Mr. Thacker has any substance. What has been substituted by the writing of 19th August, 2015 is the contract notes issued by the applicant to the respondent for the trades carried out on the NSE by the applicant for and on behalf of and on the instructions of the respondent. It is under this trade that the liability arose and for which arbitration was invoked. This has been substituted by the writing of 19th August, 2015 which clearly contemplates how that liability is to be discharged and in what fashion. I, therefore think that the Arbitral Tribunal was correct in coming to the conclusion that the original contract was clearly substituted by this writing and since this writing did not have any arbitration clause, the Arbitral Tribunal had no jurisdiction to entertain the reference filed by the applicant.

25. As far as argument of Mr. Thacker that the writing of 19th August, 2015 is illegal and contrary to law in view of the fact that it is not approved by the SEBI, I find this argument is one of the desperation. Firstly, this is not an argument that was ever canvassed before the Arbitral Tribunal and neither does it find place in the petition filed before me. This argument is canvassed for the first time across the Bar and in the written submissions that were tendered before me yesterday. It would be highly unfair to

the Arbitral Tribunal as well as to the opposite party to first entertain an argument that was never canvassed before the Arbitral Tribunal and thereafter accepting the same to set aside the order passed by the Tribunal on that ground. Be that as it may, in any event, prima facie, apart from merely making this submission, nothing has been brought to my notice as to why this writing of 19th August, 2015 would mandatorily require the approval of SEBI, and if it is so required, what would be the consequences if such approval is not taken. This being the case, even this argument of Mr. Thacker cannot be accepted.

26. On going through the impugned order, I do find that the view taken by the Arbitral Tribunal is certainly a plausible view. I do not find that the order suffers from any perversity that would require my interference in appeal as held by the Delhi High Court in the case of **NHI Vs. M/s BSC-RBM-Patil Joint Venture (supra)**. The position that emerges from the law, as it stands crystallized today, is clearly, that findings, of fact as well as of law, of the Arbitrator/Arbitral Tribunal are ordinarily not amenable to

interference either under Section 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by the Court, is necessary. The Arbitrator/ Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity do not merit interference under Sections 34 or 37 of the Act. Paragraph 66 of this decision culls out the aforesaid proposition and reads thus :-

> *"66. We have already highlighted, herein above, the limited arena of the jurisdiction of this Court, in the matter of interference with arbitral awards, under Sections 34 and 37 of the Act. The position that emerges from the law, as it stands crystallized today, is, clearly, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is necessary. The arbitrator/Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Insofar as the ultimate view of the learned arbitrator/ Arbitral Tribunal, on any issue is concerned, so long as the view is plausible, and not merely possible, this Court would be loath to interfere therewith. We may usefully make reference, in this regard, to the following postscript, entered by this Court in its judgment in P.C.L Suncon (JV) v N.H.A.I.:-*

> *"As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petition before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost".*

27. For all the aforesaid reasons and in view of the foregoing discussion, I find no merit in these arbitration petitions. They are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)