The Stock Exchange, Mumbai Vs Vinay Bubna and others

Court: Bombay High Court

Date of Decision: Feb. 5, 1999

Acts Referred: Arbitration Act, 1940 â€" Section 11, 12, 20, 28, 36
Arbitration and Conciliation Act, 1996 â€" Section 10, 2(4), 33, 40, 41
Bombay Cotton Contracts Act, 1932 â€" Section 4, 5, 6
Securities Contracts (Regulation) Act, 1956 â€" Section 9, 9(1)

Citation: AIR 1999 Bom 266 : (1999) 3 ALLMR 442 : (1999) 2 BomCR 597 : (2001) 103 CompCas 584 : (1999) 3 MhLj 810

Hon'ble Judges: A.V. Savant, J; A.C. Agarwal, J

Bench: Division Bench

Advocate: Virag Tulzapurkar, P.N. Modi and Nihar Mody, instructed by Wadia Gandhy and Co, for the Appellant; Sailesh Shah, Prakash Ganwani, instructed by Poddar and Co., Ajay Khandar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

A.C. Agarwal, J.
Appellant before us is the Stock Exchange, Mumbai (hereafter for the sake of brevity referred to as ""Exchange""). It is

not a party to the lis which has arisen between respondent Nos. 1 and 2. However, it is adversely affected by the impugned order passed by the

learned Single Judge and hence the present appeal.

2. Respondent No. 1 was the original petitioner in the Arbitration Petition filed before the learned Single Judge. Differences having arisen between

him and respondent No. 2 who was a broker with the exchange, a reference was made to Arbitrators under Bye-law 248 of the Exchange.

Reference was to two arbitrators, one named by each party to the dispute. Before the arbitrators a contention was advanced on behalf of

respondent No. 1 that reference to the Arbitral Tribunal consisting of two arbitrators was in contravention of section 10 of the Arbitration and

Conciliation Act, 1996 (hereinafter for brevity"s sake referred to as ""the Arbitration Act""). The arbitrators in consultation, with the Exchange held

that the constitution of their panel of arbitrators was valid and was properly constituted. Opponent No. 1 was given an opportunity either to

contest the interim order or proceed with the case. Opponent No. 1 decided to proceed ahead with the case. On 22nd January, 1998, an Award

was passed rejecting the claim of respondent No. 1. Taking exception to the Award respondent No. 1 on 30th April, 1998 filed an arbitration

petition being Arbitration Petition No. 130 of 1998 for setting aside the Award.

3. Before the learned Single Judge, by an interim order passed on 4th August, 1998, Exchange was directed to be impleaded as a party

respondent to the petition for the purpose of effectively deciding the issue whether section 10 of the Arbitration Act is attracted to arbitrations

under the rules bye-laws and regulations framed by the Exchange. The appellant Exchange was accordingly impleaded in the petition as any order

passed on the aforesaid issue regarding the validity or otherwise of the constitution of the Arbitral Tribunals under the Rules. Bye-laws and

Regulations of the Exchange was bound to have an adverse effect not only on the working of the Exchange but also on the numerous pending

arbitration proceedings as also awards passed in respect of disputes pertaining to members or non members of the Exchange.

4. By the impugned judgment and order passed on 7th September, 1998, the learned Single Judge has held that the reference made to the Arbitral

Tribunal of even numbers (two arbitrators) was in contravention of the provisions of section 10 of the Arbitration Act and hence, the award was

liable to be quashed and set aside. Even on merits, the learned Single Judge has found in favour of respondent No. 1 and has set aside the award

on other grounds also. Taking exception to the aforesaid decision of the learned Single Judge, the Exchange has preferred the present appeal.

5. We have heard Shri Tulzapurkar, the learned Counsel appearing in support of the appeal. We have also heard Shri Shah appearing for

respondent No. 1 who has supported the view taken by the learned Single Judge. Shri Khandar appearing for respondent No. 2 has stated that his

client will submit to the decision of this Court.

6. The dispute that has arisen between respondent Nos. 1 and 2 is covered by the provisions of Securities Contracts (Regulation) Act, 1956

(hereinafter for brevity''s sake referred to as the ""Regulation Act""). The controversy between the parties relates to the interpretation of sections

2(4) and 10 of the Arbitration Act, as also bye-law 249(a) of the Exchange which relate to the constitution of Arbitral Tribunals. Section 10 of the

Arbitration Act reads as under :

10. Number of arbitrators:--- (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even

number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

Aforesaid provision contemplates formation of a panel of an odd number of arbitrators for deciding disputes between the parties. The same

prohibits formation of an even number of arbitrators. However, as far as the Exchange is concerned bye-law 249(a) provides as under :

All claims, differences and disputes required to be referred to arbitration under these Bye-laws and Regulations shall be referred to the arbitration

of two arbitrators one to be appointed by each party.

8. It would thus appear that whereas under the Arbitration Act the dispute is required to be referred to odd number of arbitrators, under the

aforesaid regulation, the dispute is required to be referred to an even number of arbitrators. The short contention which was raised before the

learned Single Judge and which has found favour with him, is that the reference of the dispute between respondent Nos. 1 and 2 to an even

number of arbitrators is invalid in view of the provisions of section 10 of the Arbitration Act, and hence Award is liable to be quashed and set

aside.

9. The entire controversy between the parties revolves on the interpretation of the provisions of the section 2(4) of the Arbitration Act, which reads

as under :

2(4): This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time

being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement except in

so far as the provisions of this part are inconsistent with that other enactment or with any rules made thereunder.

The aforesaid section after deleting the portions are not relevant for resolving the controversy at hand would read as under :

This part shall apply to every arbitration under any other enactment for the time being in force except in so far as the provisions of this part are

inconsistent with that other enactment or with any rules framed thereunder.

The question which is posed for our consideration is whether the aforesaid bye-law 249(a) falls under the phrase ""any other enactment which is

inconsistent with the provisions of section 10 of the Arbitration Act"".

10. If the answer to the issue is in the affirmative then the provisions of Regulation 249(a) would apply to the arbitration proceedings under the

Regulation Act, 1956, and the award would be valid, if, however, the issue is answered in the negative, a reference to arbitration under the

aforesaid regulations to an even number of arbitrators would be invalid as having been made in the teeth of the provisions of section 10 of the

Arbitration Act, and the award would, therefore, be liable to be quashed and set aside.

11. The aforesaid bye-law 249(a) has now undergone an amendment with effect from 29th August, 1998. Under the amended bye-law an

arbitrators panel of an odd number of arbitrators has been prescribed. The bye-law has thus been brought in conformity with the provisions of

section 10 of the Arbitration Act, 1996.

12. Certain relevant provisions of the Regulation Act, 1956, may now be perused. Section 9 deals with the powers of the Stock Exchange to

make bye-laws. Sub-section (1) of section 9 provides that any recognised Stock Exchange may subject to the previous approval of the Securities

and Exchange Board of India make bye-laws for the regulation and control of contracts. Sub-section (2) of section 9 provides for the subjects

which may be dealt with by the bye-laws. Clause (k) of sub-section (2) provides for the regulation of the entering into making performance,

rescission and termination of contracts including contracts between members or between a member and his constituent or between a member and

a person who is not a member, and the consequences of default or insolvency on the part of a seller or buyer or intermediary, the consequences of

a breach or omission by a seller or buyer, and the responsibility of members who are not parties to such contracts. Clause (n) of sub-section (2)

provides for the method and procedure for the settlement of claims or disputes, including settlement by arbitration. It would, therefore, appear that

bye-laws and more particularly bye-law 249(a) has been made in exercise of the powers conferred under the aforesaid provision of Clause (n) of

sub-section (2) of section 9. The aforesaid bye-law therefore, has been made under an authority of law.

13. Before the learned Single Judge a contention was raised on behalf of respondent No. 1 that the constitution of Arbitral Tribunal is contrary to

the provisions of section 10 of the Arbitration Act, 1996, and the very same contention has been reiterated before us. Based on the said contention

the learned Single Judge has proceeded to frame the following issues:

(a) Whether an Arbitral Tribunal having even number of members constituted under the Bye-laws framed by the Bombay Stock Exchange under

the Securities Contracts (Regulation) Act, 1956 is in contravention of the provisions of section 10 of the Arbitration Act, 1996?

(b) Whether the constitution of such Arbitral Tribunal is saved by section 2(4) of the Arbitration Act, 1996?

(c) Whether such an award is liable to be set aside u/s 34(2)(a)(v) of the Arbitration Act, 1996?

The learned Single Judge has, after considering the rival contentions, answered the aforesaid issues (a), and (c) in the affirmative and (b) in the

negative.

14. It is contended on behalf of the Exchange that section 2(4) of the Arbitration Act, 1996, is in part materia with section 46 of the Arbitration

Act, 1940. A number of decisions rendered by this Court have held that the bye-laws of the Exchange fall within the purview of section 46 of the

1940, Act, and, therefore, prevail over the provisions of 1940 Act. Bye-laws of the Exchange providing for arbitration of 2 arbitrators being

inconsistent with the provisions of section 10 of the 1996 Act, (which falls in Part 1 of the 1996, Act) would prevail over section 10 of the 1996

Act. While interpreting section 2(4) stress has to be laid on the words ""under any other enactment"". Once it is found that arbitration is under the

Regulation Act, bye-law framed under the Regulation Act, will prevail and not section 10 of the Arbitration Act, 1996. The aforesaid position of

law has been followed in the trade and by this Court without interruption over the years. In case that view is possible, merely because another view

is also possible, that should not be a reason for this Court to depart from the well settled principles. It is further contended that if the contention

raised on behalf of respondent No. 1 is accepted, it would lead to chaos in the functioning of the Stock Exchanges. The same will set at naught

various arbitration proceedings between members and members and members and non members of the Exchanges.

15. As against this, it is contended on behalf of respondent No. 1 that what is saved by section 2(4) of the Arbitration Act, 1996, is that which is

provided under another enactment or rules made thereunder. Anything provided under the bye-laws which are inconsistent with the 1996 Act, is

not saved. It is next contended that there can be no waiver of the provision pertaining to the constitution of Arbitral Tribunal u/s 10 of the

Arbitration Act, 1996. The bye-laws framed under the Regulation Act, are not in the nature of subordinate legislation and, therefore, cannot

constitute enactment or rules. The aforesaid bye-laws, therefore, will not detract from the provisions of section 10 of the Arbitration Act, 1996,

which requires the constitution of Arbitral Tribunal of odd number of arbitrators and prohibits formation of a Tribunal consisting of even number of

arbitrators.

16. On perusal of section 2(4) of 1996 Act, we find that same is in pari materia to section 46 of the Arbitration Act, 1940. Both ""the provisions, in

so far as are material, provide that provisions of the Act shall apply to an arbitration under any other enactments for the time being in force except

in so far as the Act is inconsistent with that other enactment or with any rules made thereunder.

17. In the case Shivchandrai Jhunjhunwalla Vs. Mussamat Panno Bibi, , this Court considered the provisions of section 28 of the Arbitration Act,

1940, which deal with the powers of the Court to enlarge the time for making the Award. sub-section (1) of section 28 empowers the Court, if it

thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, to enlarge from time to time the

time for making the award. Sub-section (2) of section 28 empowers the arbitrator to enlarge the time for making the award with the consent of all

the parties to the agreement . No other mode for extending the time for making the Award has been provided in section 28. The question which

arose for consideration in the aforesaid case was whether Chairman of the East India Cotton Association or the Umpire had jurisdiction to extend

the time for the Umpire to make his award. Time to make the award in that case had been extended with reference to the bye-laws framed under

the Bombay Cotton Contracts Act, which empowered the Chairman of the Association to extend the time for making the award. In this behalf, it

has been observed on page 137 as under :

In support of the second ground it was argued that section 28, Arbitration Act (10 of 1940), will be applicable and any provision in the arbitration

agreement giving power to the arbitrator or umpire, except with the consent of the parties, to enlarge time for making the award, is void. By the

first part of that section, the Court is empowered to enlarge the time for making the award, whether the time originally fixed had expired or not. It is

pointed out that in this case time was not extended by the Court and the application of the umpire to the Chairman of the association to extend time

was without jurisdiction. On the other hand section. 46 Arbitration Act, is relevant. Under that section provisions of the Arbitration Act in so far as

they are inconsistent with another Act or with rules made thereunder are considered inapplicable. Having regard to this section it is necessary to

consider the effect of the bye-laws of the Association and the Bombay Cotton Contracts Act under which the bye-laws have been framed. u/s 4 of

that (Bom. IV of 1932), a cotton association will be recognised provided it complies with certain regulations. Sub-section (7) of that section

provides that the East India Cotton Association Ltd. is a recognised cotton association and the articles and bye-laws of the said association shall,

so far as they relate to matters for which bye-laws may be made under the provisions of sections 5 and 6, be deemed to be bye-laws of a

recognised cotton association. u/s 6 the Board of Directors subject to the sanction of the Governor-in-Council, is authorised to make from time to

time bye-laws for the regulation and control of transactions in cotton, and without prejudice to the generality of that principle, subsection (2), cl.

(g), empowers the Board to frame bye-laws providing for the terms, conditions and incidents of contracts and the forms of such contracts as are in

writing.

In the present case the original contracting parties were both member of the Association. It is clear that the bye-laws framed u/s 6 would be

statutory bye-laws by reason of the provisions of section 4(7) of the said Act, One of the conditions of the contracts which is settled by the Board

of Directors with the sanction of the Governor-in-Council as required by section 6 is that there shall be compulsory arbitration. If so, it seems to

me that within the meaning of section 46, Arbitration Act such special provisions as are contained in the bye-laws framed by the East India Cotton

Association Ltd. are operative, in spite of the provisions of the Arbitration Act. It is not disputed that the action of the umpire in requesting the

Chairman to extend time was according to the bye-laws. Bye-law 38-A (last paragraph) provides as follows:

The umpire shall make his award within ten days from the date of his appointment unless the time is extended by the Chairman.

It may be noted that if this bye-law is inapplicable it must be conceded also that the bye-law which limits the time within which the arbitrators and

the umpire had to make the award should also be considered inapplicable, and if the time fixed by the Arbitration Act alone was taken into

consideration, for deciding whether the award of the umpire was within time, it seems that the award is still within time. On the second point,

therefore, it seems that the bye-laws framed under the Cotton Contracts Act by virtue of section 4(7) read with sections 5 and 6 are statutory bye-

laws, and, therefore, are excepted from the operation of the Arbitration Act. In this connection my attention has been drawn to the following

observations of Rangnekar, J., in 36 Bom. L.R. 1005.

The bye-laws in this case are statutory. The Dye-laws being valid and the contract being subject to the bye-laws, the scheme of the arbitration

provided by the bye-laws is binding on the parties and, the final decision of the domestic tribunal agreed upon would be an award, and, in my

opinion, could be filed u/s 11 of the Act.

The second contention of the petitioner, therefore, fails.

18. The aforesaid decision has been followed in the case of Vijay Kumar H. Bohra v. Union of India and others, in Arbitration Petition No. 199 of

1991 decided by B.N. Srikrishna, J., on 10th December. 1991. The said case dealt with the arbitration dispute amongst the parties who were

both members of the Bombay Stock Exchange. In this case the learned Judge has proceeded to observe as under:

Mr. Surve refers to section 28(2) and section 46 of the Arbitration Act, 1940, and contends that any provision contained in the Arbitration

agreement, whereby the arbitrator may enlarge the time for making the award, except with the consent of all the parties to the agreement, is void

and can have no effect. He contends that the provisions of the Arbitration Act, 1940 shall apply to every arbitration under any other enactment for

the time being in force, and that, since the Arbitration Act, including section 28(2), shall apply to the arbitration pending before the Arbitrators,

under the rules and bye-laws of the Stock Exchange, time for making the award could not have been enlarged, without the consent of the

petitioner, which has not been done at all.

The judgment of this Court in Shivchandrai Jhunjhunwalla v. Mussomet Panno Bibi (India Law Reports 1943 Bom. 280) is precisely on this issue,

though with reference to the Bye-laws of East India Cotton Association, which were framed under another applicable statute. From this judgment

it is clear that bye-laws being statutory in character and inconsistent with the provisions of the Arbitration Act would over ride the Act and would

be saved by the saving provision in section 46 of the Arbitration Act. Consequently, the provisions of section 28 of the Arbitration Act would not

come into play. Hence, the extension of time by the Executive Director of the Stock Exchange is perfectly valid and legitimate.

19. In the case of Hemendra V.Shah v. Stock Exchange, Bombay, 1995 (2) MLJ 770, a contention was raised that the arbitration proceedings in

that case had become time barred in view of the provisions contained in section 37 of the Arbitration Act which makes the provisions of the Indian

Limitation Act applicable as they apply to the proceedings in Court. Bye-laws Nos. 254 and 261 of the Bombay Stock Exchange which fell for

consideration in that case are as follows:

254: The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in

writing from any party or within such extended time as the arbitrators may fix with the consent of the parties to the reference or as the Governing

Board or the President may allow.

261. The Governing Board or the President may if deemed fit whether the time for making the award has expired or not and whether the award

has been made or not extend from time to time the time for making the award by a period not exceeding one month at a time from the due date or

extended due date of the award.

A reference was made to the aforesaid decision in the case of Shivchandrai Jhunjhunwala and Vijaykumar H. Bohra (supra) and it was observed in

para 14 as under:

14. As is seen above, under Bye-law 261, the Governing Body can extend time, from time to time. This even though the period may have expired.

Mr. Tulzapurkar stated that even if time has not yet been extended the Governing Body or the President will be extending time to make the Award.

Thus, there is no substance in the submission that the Arbitration Proceedings and adjudication are time barred. There is also no substance in the

submission that most of the claims are time barred. Section 37 of the Arbitration Act does not apply to an arbitration under the Rules, Bye-laws

and Regulations of the Bombay Stock Exchange.

20. The aforesaid case dealt with bye-laws made by the Bombay Stock Exchange. The same was found to prevail over section 37 of the

Arbitration Act, 1940.

21. In case of Kishor Jitendra Dalal Vs. Jaydeep Investment and another, , this Court was dealing with a contention that the arbitration

proceedings had become null and void since the time for arbitrator to make the award had expired and the petitioner therein had declined to give

his consent for enlargement of time for the arbitrator to make the award. According to the petitioner in the said case, the arbitrators were required

to make the award within four months of entering upon the reference and since the arbitrators had not made the award within time prescribed

under Clause 3 of the first schedule to the Act, and as the petitioner had declined to give his consent fur extension of time for the arbitrator to make

the Award the Arbitrators became functus officio and as such were not entitled to make the award and the proceedings before them had become

null and void. The Court noted the contentions raised on behalf of the first respondent therein that the rules, bye-laws and regulations of the

Exchange are statutory and by reason of the bye-law Nos. 254 and 261 of the bye-Jaws of the Exchange, the Governing Board or the President

of the Exchange has the power to extend the time for the Arbitrators to make the award and for that purpose, it was not necessary to have the

consent of either party to the reference. By reason of section 46 of the Act, the provisions contained in the statutory bye-laws of the exchange

enabling the Governing Board or the President of the Exchange to extend the time for the arbitrators or the umpire, as the case may be, though

inconsistent with the provisions of section 28 of the Act, prevail and as such, though section 28 of the Act contemplates mutual consent of the

parties to enable the arbitrators to enlarge the time to make the award in view of bye-laws 254 and 261 of the bye-laws of the Exchange, such

consent was not condition precedent for the Governing Board or the President of the Exchange to enlarge the time for the arbitrators to make the

award. In the aforesaid case, it was not even disputed that the rules and bye-laws of the Exchange are statutory rules and bye-laws and the

Exchange is duly recognised under the provisions of the Securities Contracts (Regulation) Act, 1956. In the light of the aforesaid contention, this

Court observed on page 209 of the report as under:

However, the question which still requires consideration is whether in view of Rules and Bye-laws of the Exchange being statutory, sub-section

(2) of section 28 of the Act would apply to the facts of the present case. Section 46 of the Act reads as under:

Section 46: The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12, 36 and 37, shall apply to every Arbitration under

any other enactment for the time being in force, as if the Arbitration were pursuant to an Arbitration agreement and as if that other enactment were

an Arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

As per section 46, section 6(1), 7, 12, 36 and 37 of the Act will not apply to Statutory Arbitrations so also, if there is anything in the Act which is

inconsistent with the enactment under which Arbitration is taking place or with any Rules or Bye-laws framed under that enactment the provisions

of that enactment and the Rules and Bye-laws thereunder shall prevail. Therefore, since provision has been made under Bye-laws 254 and 261 of

the Bye-laws of the Exchange empowering the Governing Board or the President of the Exchange to enlarge time for the Arbitrators to make the

award despite there being no consent of the party or parties to the agreement which provision though inconsistent with sub-section (2) of section

28 of the Act shall prevail and in that view of the matter, the Governing Board or the President of the Exchange has the power to enlarge the time

for the arbitrators to make the award. In exercise of such powers from time to time, the time for making the award by the Arbitrators has in fact

been enlarged by the Governing Board or the President of the Exchange. Even otherwise also if the time to make the award is not yet enlarged by

the Governing Board or the President of the Exchange, under Bye-laws 254 read with Bye-law 261 of the Bye-laws of the Exchange, the

Governing Board or the President of the Exchange can still enlarge the time for the Arbitrators to make the award. In the circumstances, the

arbitrators have neither become functus officio nor have ceased to have the jurisdiction to Arbitrate in the matter. The proceedings before the

Arbitrators have not become null and void.

22. In the case of Shri Hari Mills Pvt. Ltd. v. M/s. Govindji Jaawal and Co., in Arbitration Petition No. 179 of 1992 decided by P.S. Patankar, J.,

on 11th November, 1998, a similar view as the one in the aforesaid decision has been taken by observing as under:

9. The bye-laws which are framed by the East India Cotton Association Ltd. are statutory in nature. They are framed under the Bombay Cotton

Contracts Act, 1932.

Hence the extention of time by the Chairman of the Association without consent of the parties was quite legal and valid.

23. The aforesaid catena of decisions has taken a consistent stand that rules and bye-laws framed by the Exchange are framed under an authority

conferred by an enactment i.e. Regulation Act and have statutory force of law and the same prevailed and the provisions of section 46 of 1940 Act

was no impediment in following the provisions of the bye-laws.

24. Reliance has been placed on the case of Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., Seller in respect of the contract in that case

had invoked the arbitration clause of the agreement as also bye-law 38-A of the bye-laws of East India Cotton Association Ltd. Bombay and

moved the Court u/s 20 of the Indian Arbitration Act requesting that the agreement be filed in the Court and the dispute referred to the arbitration.

The buyers appeared and resisted the petition on the ground that Bye-law No. 38-A was a statutory bye-law and that section 46 of the Arbitration

Act was applicable. Since the bye-laws of the Association prescribed a different machinery and inconsistent and repugnant to the section 20 of the

Arbitration Act, latter section was applicable and the petition was incompetent. It was contended that by the application of the bye-law the Court

was left with no power u/s 20 to make a reference. The Supreme Court held that the bye-law of the Association was statutory, however, the same

did not preclude the power of the Court to make a reference in order to enable the Chairman of the Board of Directors to select the arbitrator or

arbitrators. Supreme Court has observed as under:

26. But the crux of the argument is that the provisions of subsection (4) of section 20 read with sub-section (1), ibid, cannot apply, and the Court,

after filing the agreement, will have to do nothing more with it and this shows that section 20 is not applicable. This argument overlooks the fact that

this is a statutory arbitration governed by its own rules, and that the powers and duties of the Court in sub-section (4) of section 20 are of two

distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed in Court or not. That may involve

dealing with objections to the existence and validity of the agreement itself. Once that is done and the Court has decided that the agreement must

be filed, the first part of its powers and duties is over. It is significant that an appeal u/s 39 lies only against the decision on this part of sub-section

(4). Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties. That also was perfectly possible in this case, if

the parties appointed the arbitrator or arbitrators. If the parties do not agree, the Court may be required to make a decision as to who should be

selected as an arbitrator, and that may be a function either judicial, or procedural, or even ministerial: but it is unnecessary to decide which it is. In

the present case the parties by their agreement have placed the power of selecting an arbitrator or arbitrators (in which we include also the umpire)

in the hands of the Chairman of the Board of Directors of the East India Cotton Association Ltd, and the Court can certainly perform the

ministerial act of sending the agreement to him to be dealt with by him. Once the agreement filed in Court is sent to the Chairman, the Bye-laws

lays down the procedure for the Chairman and the appointed arbitrator or arbitrators to follow and that procedure, if inconsistent with the

Arbitration Act, prevails. In our opinion, there is no impediment to action being taken u/s 20(4) of the Arbitration Act.

25. Aforesaid decision thus recognises that, the Bye-laws if inconsistent with the Arbitration Act, prevails.

26. In the case of Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, the Supreme Court it has been observed as under:

15. A more serious argument was advanced by learned Counsel based upon the submission that a power conferred by a bye-law framed u/s 11 or

12 was not one that was conferred ""by or under the Act or as may be prescribed"". Learned Counsel is undoubtedly right in his submission that a

power conferred by a bye-law is not one conferred '' by the Act" , for in the context the expression ""conferred by the Act"" would mean ""conferred

expressly or by necessary implication by the Act itself. It is also common ground that a bye-law framed u/s 11 or 12 could not fall within the

phraseology ""as may be prescribed"", for the expression ""prescribed"", has been defined to mean ""by rules under the Act"", i.e. those framed u/s 28

and a bye-law is certainly not within that description. The question therefore, is whether a power conferred by a bye-law could be held to be a

power ""conferred under the Act"". The meaning of the words ""under the Act"" is well known. ""By"" an Act would mean by a provision directly

enacted in the statute in question and which is gatherable from its express language or by necessary implication therefrom. The words ""under the

Act"" would in that context signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this

to be done; in other words, bye-laws made by a subordinate law making authority which is empowered to do so by the parent Act. The distinction

is thus between what is directly done by the enactment and what is done indirectly by rulemaking authorities which are vested with powers in that

behalf of by the Act. Vide AIR 1949 136 (Privy Council) and G. Narayanaswami Naidu Vs. C. Krishnamurthi and Another, . That in such a sense

bye-laws would be subordinate legislation ""under the Act"" is clear from the terms of sections 11 and 12 themselves.....

Having regard to these provisions it would not be possible to contend that notwithstanding that the bye-laws are rules made by an Association u/s

11 or compulsorily made by the Central Government for the Association as its bye-laws u/s 12, they are not in either case subordinate legislation

u/s 11 or 12 as the case may be of the Act and they would therefore squarely fall within the words ""under the Act"" in section 4(f).

16. His contention however was that when Clause (f) specifically made provision for powers conferred by ""rules"" by the employment of the phrase

or as may be prescribed"" and, so to speak, took the ""rules"" out of the reach of the words ""under the Act"" it must necessarily follow that every

power conferred by a Sub-ordinate law-making body must be deemed to have been excepted from the content of that expression and that

consequently in the context the words ""by the Act"" should be held to mean "" directly by the Act"" i.e., by virtue of positive enactment, and the

words ""under the Act"" should be held to be a reference to powers gatherable by necessary implication from the provisions of the Act. As an

instance learned Counsel referred us to the power of the Central Government to direct the Commission to inspect the accounts and other

documents of any recognised association or of any of its members and submit its report thereon to the Central Government u/s 8(2)(c) and

suggested that this would be a case of a power or duty which would be covered by the words ""under the Act"". We find ourselves wholly unable to

accept this argument. If without the reference to the phrase ""as may be prescribed"" the words ""under the Act"" would comprehend powers which

might be conferred under ""bye-laws"" as well as those under rules "" we are unable to appreciate the line of reasoning by which powers conferred by

bye-laws have to be excluded, because of the specific reference to powers conferred by ""rules"". Undoubtedly, there is some little tautology in the

use of the expression ""as may be prescribed"" after the comprehensive reference to the powers conferred ""under the Act"" but in order merely to

avoid redundancy you cannot adopt a rule of construction which cuts down the amplitude of the words used ""except, of course, to avoid the

redundancy. Thus the utmost that could be said would be that though normally and in their ordinary signification the words ""under the Act"" would

include both ""rules"" framed u/s 28 as well as ""bye-laws"" u/s 11 or 12, the reference to ""rules"" might be eliminated as tautologous since they have

been specifically provided by the words that follow. But beyond that to claim that for the reason that it is redundant as to a part, the whole content

of the words ""under the Act"" should be discarded, and the words ""by the Act"" should be read in a very restricted and, if one may add, in an

unnatural sense as excluding a power conferred by necessary implication, when such a power would squarely fall within the reach of these words

would not in our opinion, be any reasonable construction of the provision.

27. In the dissenting judgment rendered by Justice Subba Rao it has been observed as under:

41. Subordinate or delegated legislation takes different forms. Subordinate legislation is divided in to two main Classes, namely, (i) statutory rules

and (ii) bye-laws or regulations made, (a) by authorities concerned with local Government, and (b) by persons, societies, or corporations. The Act

itself recognises this distinction and provides both for making of the rules as well as bye-laws. A comparative study of section 11 and 12

whereunder power is conferred on the Central Government and the recognised association to make bye-laws on that one hand, and section 28,

whereunder the Central Government is empowered to make rules on the other, indicate that the former are intended for conducting the business of

the association and the latter for the purpose of carrying into effect the objects of the Act. In considering the question raised in this case this

distinction will have to be borne in mind.

42. It would be unreasonable to assume that a private association though registered under the Act, could confer powers on statutory authority

under the Act. That is why u/s 4(f), the Legislature did not think fit to provide for the assignment of a function to the Commission in exercise of a

power under a bye-law. The non-mention of the bye-laws in Clause (f) is not because of any accidental omission but a deliberate one, because of

the incongruity of an assignment of a function to the Commission under a bye-law. I would, therefore, construe the words by or under this Act, or

as may be prescribed as follows: by this Act"" applies to powers assigned proprio vigore by the provisions of the Act; ""under this Act"" applies to an

assignment made in exercise of an express power conferred under the provisions of the Act; and ""may be prescribed"" takes in an assignment made

in exercise of a power conferred under a rule. This construction gives a natural meaning to the plain words used in the section and avoids stretching

the language of a statutory provision to save an illegal bye-laws.

27. Aforesaid decision thus lays down that ""By an Act"" means by a provision directly enacted in the Statute itself. The words ""under the Act

means what is not directly found in the statute but is conferred or imposed by virtue of rules or bye-laws which are framed by a subordinate law

making authority which is empowered by the parent Act. Bye-laws of the Exchange are framed in exercise of power conferred u/s 9 of the

Regulation Act. Hence, they are statutory. They would thus squarely fall under the phrase ""under any other enactment"" appearing in sub-section (4)

of section 2 of the Arbitration Act, 1996 and the same in so far as are inconsistent with provisions of the Act would prevail.

28. In case of Managing Committee/Governing Body of R.K. Arya College Nawanshahr v. B.S. Gonga and others, 1977 L.I.C. 1812, the High

Court of Punjab and Haryana has observed as under:

8. The second question for determination is whether the college can challenge the constitution of the Committee u/s 33 of the Act. Section 33 says

that any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration

agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question. Section 46

relates to application of Act to statutory arbitrators. It provides that the provisions of the Act, except sub-section (1) of section 6 and sections 7,

12, 36, and 37, shall apply to every arbitration under any other enactment for the time being inforce, as if the arbitration were pursuant to an

arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other

enactment or with any rules made thereunder. A reading of the two sections leaves no doubt in my mind that the existence or validity of a statutory

arbitration can be challenged u/s 33 of the Act. In the present case, the University as already discussed above, has got powers to frame

ordinances. The word ""enactment"" does not find place in the definition section of the Act. This, word, in my view, would include bye-laws, rules,

regulations, ordinances, statutes etc. framed under an Act. The ordinances framed by the University will, therefore, form part of the University Act.

For the aforesaid reasons the college is entitled to challenge the constitution of the Committee u/s 33 of the Act.

29. Aforesaid decision has thus held that the phrase ""under any enactment"" includes bye-laws, rules, regulations, ordinances, statutes etc. From the

aforesaid decision it would be clear that the word ""enactment "" would mean and include bye-laws, framed under an Act. It would, therefore, follow

that the Bye-laws framed under the Regulation Act, would form part of the Regulation Act and the same will prevail over provisions of section 10

of Arbitration Act, 1996

30. A conclusion is, therefore, irresistible that bye-laws 249(a) is a statutory bye-law. The same will operate and will apply in respect of all

arbitrations under the Regulation Act and the same will not be hit by the provisions of section 10 of the Arbitration Act, 1996. Aforesaid bye-laws

will be saved by the provisions of section 2(4) of 1996 Act and will prevail over the provisions of section 10 of the Act. The decision of the

learned Single Judge taking a contrary view is thus liable to be set aside. The Award passed by the Arbitral Tribunal consisting of an even number

of arbitrators as provided under the bye-laws would be valid and the same wilt not be rendered void by virtue of the provisions of section 10 of

1996 Act.

31. In our view, the impugned judgement suffers from the following errors.

1. The foundational basis for the ratio of the impugned judgment is that ""bye-laws"" are not ""enactment"" or ""rules"" and that the saving clause of sub-

section (4) of section 2 of the 1996 Arbitration Act refers only to ""enactment"" and ""rules"" and not ""bye-laws"" and the Exchange''s bye-laws relating

to arbitration are not therefore within the purview of the said section or saved thereby. The said finding is found to be erroneous for the following

reasons.

It is contrary to the judgments reported in (i) 1995 (2) M.L.J. 770, (ii) Kishor Jitendra Dalal Vs. Jaydeep Investment and another, and (iii) the

unreported judgment dated 10th December, 1997 of this Court in Arbitration Petition No. 199 of 1991, all of which categorically held that the

Exchange''s said arbitration Bye-laws fall within the purview of and are saved by section 46 of the Arbitration Act, which as aforesaid is identical in

material language to section 2(4} of the 1996 Act.

It is contrary to the judgments reported in (i) Shivchandrai Jhunjhunwalla Vs. Mussamat Panno Bibi, (which deals with Bye-laws under the

Bombay Cotton Contracts Act, 1932) and (ii) Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., (which dealt with Bye-laws under the

Forward Contracts (Regulation) Act, 1952), wherein it is held that ""bye-laws"" under those respective Acts were saved by and/or fell within the

purview of section 46 of the 1940 Act.

The impugned judgment has placed strong reliance upon the judgment reported in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, .

The said judgment (a) does not relate to or consider the Exchange''s Rules, Bye-laws or Regulations, (b) does not relate to or consider the old or

new Arbitration Acts.

Even otherwise the said judgment reported in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, supports the contentions of the Exchange

in that Supreme Court in paragraph 15 and 16 has held:-

(a) that bye-laws are subordinate legislation (under the Act)

(b) that bye-laws are rules made-and they would therefore squarely fall within the words ""under the Act"" Thus the Supreme Court has equated

bye-laws with rules.

In our view the view taken by the learned Single Judge will adversely affect thousands of arbitration references pending before 2 arbitrators as also

awards passed pursuant to references to 2 arbitrators. Several other Stock Exchanges in India have similar provisions for arbitration, and

consequently a very large number of pending and completed arbitrations would be adversely and prejudicially affected by the ratio of the impugned

order.

32. The Supreme Court in the case of Kattite Valappil Pathumma and others Vs. Taluk Land Board and others, has observed on page 120 as

under;

We are further of the view, that even if another view is possible, we are not inclined to take a different view at this distance of time. Interpretation

of law is not a mere mental exercise. Things which have been adjudged long ago should be allowed to rest in peace. A decision rendered long ago

can be overruled only if this Court comes to the conclusion that it is manifestly wrong or unfair and not merely on the ground that another

interpretation is possible and the Court may arrive at a different conclusion. We should remember that the law laid down by the High Court in the

above decision has not been doubted so far. The Act in question is a State enactment. These are weighty considerations to hold that even if a

different view is possible, if it will have the effect of upsetting or reopening past and closed transactions or unsettling titles all over the State, this

Court should be loathe to take a different view. On this ground as well, we are not inclined to interfere with the judgment under appeal.

33. Having regard to the aforesaid discussion, we are constrained to hold that the impugned judgment and order passed by the learned Single

Judge cannot be sustained and the same is accordingly set aside. We hold that arbitrations under the bye-law 249 (a) of the Bye-laws of the

Exchange are valid.

34. Per A.V. SAVANT J.: While I am in respectful agreement with the views expressed by my learned brother, I wish to add my reasons in brief.

35. It has already been indicated above, that bye-laws 249(a) of the bye-laws of the appellant Exchange is a statutory bye-law and will, therefore,

operate in respect of all the arbitrations under the Regulation Act, 1956 and will not be hit by the provisions of section 10 of the Arbitration Act.

1996. The provisions of Part I of the Arbitration Act, 1996, will not apply to the arbitration under the bye-laws of the appellant-Exchange-in so far

as the provisions of the said Part I are inconsistent with the regulations made by the Exchange. Section 10 falls in Part I of the Arbitration Act,

1996. The said provision makes it clear that the number of arbitrators shall not be an even number. Where as bye-law 249 (a) makes it clear that

the arbitration under the bye-laws shall be by two arbitrators - one appointed by each party.

36. The words ""as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement

appearing in sub-section (4) of section 2 have to be given their true meaning and full effect. The words ""as if appearing twice in sub-section (4) of

section 2 would make it clean that if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so,

also imagine as real the consequences and incidents which if the putative state of affairs had in fact existed, must inevitably have flowed from or

accompanied it. This would be clear from the judgment of Lord Asquith of Bishopstone in East India Dwellings Co.Ltd. v. Finsbury Borough

Council, 1952 A C109 . The words ""as if used in sub-section (4) of section 2 would put bye-law 249(a) on the same pedestal as an enactment

within the meaning of sub-section (4) of section 2. The view expressed by Lord Asquith in the above mentioned case decided by the House of

Lords has been approved by the Apex Court in The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, . The Apex Court has

observed that when the statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is

entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given

to the statutory fiction and it should be carried to its logical conclusion. After making these observations at page 246 of the report, the Apex Court

has quoted with approval, the observations of Lord Asquith in East India Dwellings Co. Ltd. v. Finsbury Borough Council (supra).

37. It is well settled that subordinate or delegated legislation takes different forms. Subordinate legislation is divided into two main classes, namely,

(a) statutory rules and (b) bye-laws or regulations made by (i) authorities concerned with local Government and (ii) persons, societies or

Corporation. This is clearly enunciated in the judgment of the Apex Court in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, to which a

reference has been made in paras 26 and 27 above. Again, in the case of the The Trustees of the Port of Madras Vs. Aminchand Pyarelal and

Others, , the Apex Court observed that a bye-law is an ordinance affecting the public, or some portion of the public, imposed by some authority

clothed with statutory powers, ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-

observance.

38. We may at this stage refer to the dictionary meaning of the word ""enactment"". In ""The Oxford Companion to Law"" by David M. Walker, 1980

edition at page 401, the word ""enactment"" has been defined to include a statutory instrument, bye-law or other statement of law made by a person

or body with legislative powers by the appropriate means."" The exact definition may be reproduced.

Enactment"" A general term for a statute or Act of Parliament, statutory instrument, bye-law or other statement of law made by a person or body

with legislative powers by the appropriate means.

In the dictionary of Modern Legal Usage, second edition, by Bryan A. Garner, at page 313, the word ""enactment"" has been defined to have more

than one sense namely (i) the action or process of making (a legislative bill) into law; enactment of the bills; or (ii) a statute - a recent enactment -

As far as the sense (iii) is concerned, it means ""statute or Act of Parliament; statutory instrument, bye-law or other statement of law made of a

person or body with legislative powers.

39. In P. Ramanatha Aiyar''s Law Lexicon 1997 edition at page 261, ""bye-law"" has been defined to include all orders, ordinances, regulations,

rules and statutes made by any authority subordinate to the Legislature. The subordinate authority must, of course, have power expressly or

impliedly conferred on it to legislate on the matters to which the bye-law relates. At page 1697, of the same law dictionary ""Rule"" has been defined

as ""a prescribed, suggested or self imposed guide for conduct or action; a principle; a kind of regulation or bye-law: a principle regulating some

action. In D.D. Basu''s Administrative Law, 4th edition, 1996 at page 128 subordinate legislation has been referred to as including rules, bye-laws,

regulations orders etc. Bye-law has been defined to mean bye-laws are rules made, in exercise of statutory power, by some authority, subordinate,

to the Legislature (i.e. Municipal and other local bodies, public utility corporations, empowered by statute to make bye-laws), for the regulation,

administration or management of some local area, property undertaking etc. which are binding on all persons who come within their scope.

40. In the light of the above legal position, let us turn to the brief history of bye-law 249(a) of the appellant Exchange. Initially, under the Bombay

Securities Contracts Control Act, 1925 rules were framed as ""Rules of the Native Share & Stock Brokers'' Association, 1939"". These rules were

sanctioned under Government Resolution No. 2902-D dated 31st May, 1938 as amended by subsequent Government Resolutions. Rule

corresponding to bye-law 249(a) of the present bye-laws as Rule 106(a) dealing with the appointment of arbitrators. Rule 106(a) of the Rules of

the Native Share & Stock Brokers'' Association, 1939, provided that whenever any dispute was referred to the Arbitration Committee, it should

be heard by two of its members acting as arbitrators with reference to such dispute. On coming into force of the Securities Contracts (Regulation)

Act, 1956, an application was made by the Native Share & Stock Brokers'' Association on 9th April, 1957, followed by another application

dated 25th April, 1957, praying for recognition of the Stock Exchange u/s 3 of the said Regulation Act of 1956. The said section 3 requires an

application to be made by the Stock Exchange which is desirous of being recognised for the purpose of the 1956 Act. Alongwith an application for

recognition, the Stock Exchange has to submit a copy of the bye-law of the Stock Exchange for Regulation and Control of the contracts. Section 4

of the 1956 Act deals with the grant of recognition to the Stock Exchange. It is the Central Government which, after making such equity as may be

necessary in that behalf, may grant recognition to the Stock Exchange.

41. In the light of the above, pursuant to the applications made on 9th April and 25th April 1957 by the Native Share & Stock Brokers''

Association to the Central Government, the Deputy Secretary, Government of India, Ministry of Finance wrote to the President of the Stock

Brokers'' Association on 6th August, 1957 and the opening para of the said letter reads as under:

With reference to your letters dated the 9th April and 25th April, 1957 on the subject mentioned above, I am to inform you that the Central

Government are pleased to approve the Rules, Bye-laws and Regulations submitted with your application and to sanction your application for

recognition u/s 3 of the Securities & Contracts (Regulation) Act, 1956, It has been decided to issue a Certificate of Recognition to your Exchange

with effect from 31st August, 1957 subject to the following conditions.

At the end of the letter, it has been observed as under:

The necessary Certificate of Recognition will be issued in favour of your Association, making it effective from 31st August, 1957. Government

also proposed to issue a notification declaration section 13 of the Securities Contracts (Regulation) Act, 1956 to be application to the area

comprising of the Greater Bombay with effect from the 15th October, 1957. The Rules, Bye-laws and Regulations of your Exchange which have

been approved by Government may be brought into force from any date convenient before the 15th of October, 1957.

The above letter will make it clear that, in the first place, the Central Government had granted recognition to the appellant Exchange u/s 4 of the

1956 Regulation Act and bye-laws of the Exchange were also approved. Under sub-section (3) of section 4, the grant of recognition to a Stock

Exchange is required to be published in the Government Gazette. Accordingly on 31st August, 1957, Ministry of Finance, Government of India

issued the requisite Gazette notification that the recognition was conferred on the Bombay Stock Exchange u/s 4 of the 1956 Regulation Act.

42. Having regard to the above, there is no doubt in our mind that bye-law 249(a) of the appellant Exchange is a statutory bye-law having the

force of enactment within the meaning of sub-section (4) of section 2 of the 1996 Arbitration Act and since the said bye-law is inconsistent with the

provisions of section 10 of the said 1996 Act, in so far as the number of arbitrators is concerned, the bye-law would prevail. We may, in this

behalf, refer to a decision of a learned Single Judge of this Court in V.V. Ruia Vs. S. Dalmia, . The question arose as to whether the bye-laws of

the appellant Exchange which were made prior to its recognition u/s 4 needed publication under sub-section (4) of section 9 of the 1956

Regulation Act. The learned Judge held that the bye-laws made by the appellant Exchange prior to its recognition did not require publication in the

official gazette. This is obvious because for obtaining recognition from the Central Government, the Stock Exchange has to submit a copy of the

bye-laws and rules. It is after scrutiny of the said bye-laws and rules that the recognition is granted u/s 4. If, however, after recognition any

subsequent bye-law is made, u/s 9 of the Act, then by virtue of sub-section (4) of section 9, such a post recognition bye-law requires publication.

Bye-law 249(a) being a pre recognition bye-law would not require any publication but would still be valid and enforceable.

43. In view of the above, we have no hesitation in coming to the conclusion that bye-law 249(a) of the appellant Exchange is a statutory bye-law

and having regard to the series of judgments of this Court, namely (i) Shivchandrai Jhunjhunwalla Vs. Mussamat Panno Bibi, ; (ii) Vijay Kumar M.

Bohra v. Union of India and others, Arbitration Petition No. 199 of 1991 decided on I0th December, 1991). (iii) Hemendra V. Shah v. Stock

Exchange, Bombay and others, 1995(2) M.L.J. 770. (iv) Kishor Jitendra Dalal Vs. Jaydeep Investment and another, and (v) Arbitration Petition

No. 179 of 1992 decided on 11th November. 1998, the said bye-law would have the force of law and would, being inconsistent with the

provisions of section 10 of the Arbitration Act, 1996, exclude the application of the said section 10. In the circumstances, we hold that no

objection can be taken to the arbitral panel being of two arbitrators.

44. In the circumstances, the impugned judgment is clearly unsustainable in law and takes a view which is contrary to the above mentioned

decisions. The impugned judgment unsettles the settled legal position which course, in our view was wholly unnecessary. In fact, the Apex Court

has made it clear in the case of Kattite Valappil Pathumma and others Vs. Taluk Land Board and others, that even if two views were possible,

things which have been adjudged long ago should be allowed to rest in peace. The decisions which have been rendered by this Court since 1943,

took a consistent view and the law laid down by this Court in those decisions was never doubted. Merely because another view is possible,

assuming that was so in this case, the Apex Court in the case of Kattite Valappil Pathumma has clearly ruled that such a recourse is not permissible

in law. Interpretation of law is not mere mental exercise. We have already referred to this judgment in para 32 above.

45. ORDER OF THE COURT:

Hence for the reasons aforestated the impugned judgment is clearly unsustainable in law and is accordingly set aside.

46. Accordingly, the appeal is allowed. In the facts and circumstances, there will be no order as to costs.

47. Appeal allowed.