IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.09.2020

Delivered on : 01.10.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P No.681 of 2012

Mrs.Nalini Rajkumar ... Petitioner

Vs.

1.M/s.Geojit BNP Paribas Financial Services Ltd.,
Regional Office and Branch Office
at C53, 1st Avenue, Chintamani
Annanagar East, Chenani – 600 102
Registered Office at Finance Towers
Kaloor, Kochi – 682 017

2. Mr.Sridharan Krishnamurthi
Presiding Arbitrator
National Stock Exchange of India
2nd Floor, Ispahani Centre
Door No.123-124, Nungambakkam High Road
Nungambakkam, Chennai – 600 034

3. Mr.A.P.Sreedharan
Arbitrator
National Stock Exchange of India Ltd.,
2nd Floor, Ispahani Centre
Door No.123-124, Nungambakkam High Road
Nungambakkam, Chennai – 600 034

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4.Mr.V.Sekar, Arbitrator
National Stock Exchange of India Ltd.,
2nd Floor, Ispahani Centre, Door No.123-124
Nungambakkam High Road
Nungambakkam
Chennai - 600 034 ... Respondents

(Respondents 2 to 4 deleted in and by this order)

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the impugned Award dated 23.04.2012 which confirms the Award dt. 24.11.2011 with exemplary costs.

For Petitioner : Mr.Krishna Srinivas
of M/s.S Ramasubramaniam & Associates (Law Firm)

For Respondents : Mr.T.K.Baskar for R1

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' and this Act shall hereinafter be referred to as 'A and C Act' for the sake of brevity and convenience.

2. In captioned OP, sole petitioner is a constituent and contesting

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first respondent is a trading member qua 'National Stock Exchange of India Limited Byelaws' (hereinafter 'NSE Byelaws' for the sake of brevity). Chapter XI of NSE byelaws is captioned 'ARBITRATION' and this chapter serves as arbitration agreement (between petitioner and contesting first respondent) i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

3. In the web-hearing on a video-conferencing platform today, learned counsel Mr.Krishna Srinivas of M/s.S Ramasubramaniam and Associates (Law Firm) on behalf of sole petitioner and Mr.T.K.Baskar, learned counsel on record for the contesting first respondent were before this Court. Both learned counsel agreed for captioned OP being taken up for final disposal on a web-hearing and the matter was heard out. From the submissions made by learned counsel on both sides and the case file placed before this Court, it comes to light that the three noblemen, who constituted the 'Appellate Arbitral Tribunal' (hereinafter 'AAT' for the sake of brevity), which made the 'award dated 23.04.2012' (hereinafter 'impugned award' for the sake of brevity) need not be before this Court in the array of parties in the captioned OP (to be noted, three noblemen, who constituted AAT, have been arrayed as Respondents 2 to 4 in captioned OP). Therefore, following the procedure adopted by Hon'ble

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Supreme Court in ***Zonal General Manager, Ircon International Ltd. Vs. Vinay Heavy Equipments*** reported in ***(2015) 13 SCC 680*** judgment, Respondents 2 to 4 stand deleted from the array of parties in the captioned OP in and by this order. Owing to this, the contesting first respondent now becomes the lone respondent and shall, therefore, hereinafter after be referred to as 'Respondent' in this order.

4. Chapter XI of NSE Bye-Laws, which serves as arbitration agreement between the petitioner and respondent provides for a three tiered arbitration mechanism vide which a dispute is first placed before an Investor Grievance Redressal Committee, if it is not settled before the Committee, it is carried to an 'Arbitral Tribunal' ('AT' for the sake of brevity) and thereafter, it can be carried to an 'Appellate Arbitral Tribuanl' ('AAT' for the sake of brevity). In instant case, the disputes between the parties in captioned OP have travelled through these three tiers culminating in the impugned award, made by AAT.

5. Legal landscape of an application under Section 34 makes it clear that it is not an appeal. It is not a revision either. It is not even a full-fledged judicial review. It is a mere challenge to an arbitral award within the limited perimeter of legal landscape of Section 34 which provides for challenge to an arbitral award within the 8 slots adumbrated

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in sub-sections (2) and 2A of Section 34 and the facets of these slots as explained by Courts in various case laws. Owing to the aforementioned limited scope of captioned OP, short facts shorn of elaboration or in other words, factual matrix in a nutshell containing essential facts that are imperative for appreciating this order will suffice. Short facts are that there was a Stock Broker - Client Agreement between the parties; that the respondent is engaged in the business of broking, share trading *inter alia* in equity and derivative segments; that the petitioner, pursuant to the Stock Broker - Client Agreement, had been carrying on trading activities with trading codes and client Ids allotted to the petitioner by the respondent; that such trading happened over a period of time; that at one point of time, petitioner requested the respondent to transfer her holdings to another account held by the petitioner in another company, which goes by the name 'Paterson Securities Ltd.'; that such transfer request by the petitioner is an outcome of petitioner alleging unauthorized trading of her holdings by the respondent and denial of the same by the respondent; ultimately the issue boiled down to 5,05,000 shares in a company, which goes by the name 'Electro Steel Castings Ltd.', (hereinafter 'ESC' for the sake brevity); that while the petitioner claimed that she did hold 5.05 lakh shares in ESC on a given date,

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respondent took the stand that petitioner had only 1,93,462 shares in ESC; that there were other limbs of arbitrable disputes between the parties, but this limb turning on 5.05 lakhs shares of ESC is the lone point of contention in captioned OP; that petitioner made a claim for, what according to her, are losses incurred owing to unauthorized trades in her accounts by respondent besides reimbursement / rectification of unsubstantiated penalty charges and a total value of Rs.6,60,20,018/-, which according to petitioner, is fair value of the contentious shares calculated as per NSE norms; that this was denied by the petitioners; that vide proceedings dated 10.01.2011, the Investor Grievance Redressal Committee recorded that though the petitioner was agreeable for an amicable solution, the respondent was not and therefore, the dispute was closed as not settled leaving it open to the parties to take further course of action; that pursuant to this, petitioner carried the matter to AT, which dismissed her claim; that aggrieved petitioner carried the matter to AAT, which sustained the findings and outcome of AT vide the impugned award; that assailing the impugned award captioned OP has been presented in this Court on 14.08.2012.

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6. As would be evident from the factual matrix narrative supra (which also captures the trajectory the matter has taken thus far), the entire matter now centres around 5.05 shares in ESC. Captioned OP has been presented in this Court on 14.08.2012. Therefore, the parties shall be governed by pre 23.10.2015 regime meaning A and C Act as it obtained prior to amendment by Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015.

7. Notwithstanding very many pleas in the petition qua captioned OP, learned counsel for petitioner, in the light of the limited perimeter of legal landscape of Section 34 of A and C Act focused his submissions on three points summation of which is as follows:

a) AAT failed to take note of possession of contentious 5.05 shares in ESC by petitioner;

b) AAT has simply ignored 11 documents (annexures 21, 22, 26, 30, 31 to 34, 36, 37 and 46) on the mere allegation of respondent that they are forged;

c) Post oral hearing or in other words, after conclusion of oral hearings, AAT summoned a document from 'National Stock Exchange of India Limited' (hereinafter 'NSE' for the sake of brevity), examined the same behind the back of the parties

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without even giving them an opportunity to comment on the same, came to the conclusion that it tallies with the case of the respondent and held against the petitioner.

8.To be noted, learned counsel for petitioner submitted that speaking in statutory parlance, the aforesaid three submissions fall under Section 34(2)(a)(iii) read with Section 26 of A and C Act, 34(2)(b)(ii) read with Explanation thereat, besides Sections 18 and 24(3) of A and C Act.

9. In response to the aforementioned three pronged challenge to the impugned award of AAT by learned counsel for petitioner, learned counsel for respondent made submissions, summation of which is as follows:

a) The petitioner, as claimant before AT, has not discharged its burden qua establishing possession of contentious shares and therefore, it cannot be gainsaid that AAT has not taken note of the possession of contentious shares by petitioner;

b) The question of looking into certain documents and onus shifting to respondent to establish forgery by petitioner will arise only when the petitioner discharges the aforementioned initial burden;

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c) NSE bye-laws, more particularly chapter VII(1)(b) provides for records of NSE constituting valid evidence in any dispute or claim between constituent and trading member, therefore, AAT cannot be found fault with for sustaining AT's approach of relying on the documents summoned from NSE.

10. This Court having set out the rival submissions, now proceeds to discuss the same and give its dispositive reasoning for arriving at a conclusion qua captioned OP. Before proceeding to do that, it is deemed appropriate to record that there is no disputation or disagreement before this Court that the award of AT dated 24.11.2011 has merged with the impugned award of AAT (dated 23.04.2012). This is fortified / buttressed by the fact that AAT vide impugned award has copiously extracted, reproduced findings of AT and sustained the same.

11. With regard to the first submission, the same is dovetailed with the second submission of forgery. For this purpose, Paragraph 11 of claim statement of the petitioner before AT and Paragraph 5 of Statement of Defence by the respondent before AT become relevant. These two portions of rival pleadings before AT read as follows:

'Paragraph 11 of petitioner's Claim Statement:

11. The Applicants were left with no other option but to

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transfer their holdings to another account held by the Applicants in M/s.Paterson Securities Ltd., As a result, the Applicants instructed the Respondent to transfer the entire Applicants' holding (shares of Electro Steel Castings Ltd) to their account with M/s. Paterson Securities Ltd. Subsequently, the Respondent intimated to the Applicants that they have transferred the Applicants' holdings of shares of Electro Steel Castings Ltd., to the credit of their account with M/s.Patterson Securities Ltd.(A/c.No.1204010000023766 from the A/c.No.10321537 under Transaction No.11098812). Refer Annexsures 42 to 46).

'Paragraph 5 of Statement of Defence:

5) Regarding Paragraph 11 Respondent deny the contents of this paragraph as incorrect. From ANNEZURE – 44 document of the applicant's e-mail it is clear that she had requested the transfer of Electro Steel Casting Ltd. Shares to show consolidates holding for income tax audit to avoid capital gain tax and not for the reason that is stated in the said paragraph. The applicant is making conflicting statements to mislead the Ld. Form of Arbitrators. The respondent had never intimated the applicant that it had transferred 5,05,000 shares of Electro Steel Casting Ltd. to the applicant's D.P account with M/s.Patterson Securities Ltd., Annexure – 46 document produced by the applicant is a false, forged and fabricated document. No such transaction has been effected in the D.P.account with client id.10321537. Due to mismatch of the quantity of Electro Steel Casting Ltd. shares mentioned in the DIS slip from that of the actual D.P. holding the off-market request was rejected and the slip was returned to the applicant forthwith. This fact of rejection was

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clearly clarified to the applicant at that time and even in the respondent's subsequent correspondence with her. The allegation raised by the applicant in this regard are false and baseless. The respondent is not aware of the reason for sale of such securities as stated by the applicant.'

12. This Court has already delineated supra that while the petitioner contends that AT and AAT have failed to take note of possession of contentious 5.05 lakh shares by the petitioner, the respondent contends that the petitioner had not discharged her initial burden in this regard and the question of onus shifting to respondent and respondent discharging its onus qua the forgery plea would have arisen only if the petitioner had discharged her initial burden in this regard. For this purpose, two paragraphs in the impugned award of AAT become relevant and they read as follows:

'The applicant has relied on Annexure 42 and 47 in support of her stand that she had 5,05,000 shares of Electro Steel Castings Ltd. interestingly Annexure 42 is dated 17th November 2009 where a request is made to the respondent to transfer 5,05,000 shares to MIS Patterson Securities Pvt. Ltd., as an off-market transaction. The annexure 47 is dated 1 December 2009 indicating in the average analysis report that the respondent indeed, sold 5,05,000 shares of Electro Steel Castings Ltd and 2000 shares of India Bulls Real Estate Ltd on November 2009.

The Respondent claimed that the annexure 47 was a

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fraudulent document.'

(To be noted, the impugned award of AAT does not give paragraph numbers).

13. It is the case of the petitioner that AAT (as done by AT) has simply ignored the documents pressed into service by the petitioner for establishing possession *inter alia* on the ground of forgery plea of respondent. The aforementioned two paragraphs in the impugned award of AAT make it clear that AAT has simply accepted the *ipsi dixit* of respondent and ignored Ex.C47 as a fraudulent document. While AAT refers to Annexure 42, the 11 annexures namely annexures 21, 22, 26, 30, 31 to 34, 36, 37 and 46 (already mentioned supra) have been completely ignored. Sheet anchor of petitioner's is that these documents establish holding qua 5.05 lakhs ESC shares of petitioner. These 11 documents are as follows:

SI.No.	Annexures	Date	Description
1	21	27.04.2009	Holding Statement
2	22	12.05.2009	Statement showing suspension of Debit to the account
3	26	27.07.2009	Letter from Geojit Annanagar reason for failure and to issue new DIS
4	30	14.06.2009	Holding Statement
5	31	27.07.2009	Letter from Geojit Annanagar to Issue DIS for transfer of share from 1031777 to 10321537

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6	32	30.07.2009	Holding Statement
7	33	23.09.2009	Holding Statement for 10321537
8	34	22.10.2009	Holding Statement for 10321537
9	36	28.10.2009	Holding Statement
10.	37	31.10.2009	Holding Statement
11	46	27.11.2009	Certificate from Geojit Annanagar for transfer of share to Paterson

14. A perusal of aforementioned documents reveal that AAT (as did the AT) has clearly ignored the evidence. This Court is not going into the question of appreciation of evidence much less re-appreciation of evidence. AAT has merely believed the plea of respondent that annexure 47 is forged and has brushed it aside without elaboration of why and how it is forged. In this regard, finding of AT (confirmed by AAT in the impugned award) assumes significance and this finding reads as follows:

> *'.....As far as the respondents' accusations about the genuineness of the data provided by the applicant allegedly given by the Anna Nagar Branch Office, the Forum felt that the respondent did not give full information and out come about the investigation made by the respondent company's higher officials.'*

15. Therefore, it is clear that the plea of the respondent that onus shifts to the respondent with regard to establishing/proving forgery arises only when the petitioner clears the threshold qua holding of 5.05 lakhs

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ESC shares and discharges its burden, falls flat. In this regard, judgment of Hon'ble Supreme Court in ***Anil Rishi***'s case being ***Anil Rishi Vs.Gurbaksh Singh*** reported in ***(2006) 5 SCC 558*** was pressed into service. In Anil Rishi's case there is an instructive elucidation of the distinction between burden of proof and onus of proof. Besides this, there is also a very instructive elucidation on how burden of proof is used three ways. This is contained in Paragraph 19 of Anil Rishi's case which reads as follows:

> *'19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.'*

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16. In ***Anil Rishi***'s case Hon'ble Supreme Court has also referred to paragraph 29 of ***Arulmigu Viswesaraswami & V.P. Temple*** case being ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple*** reported in ***(2003) 8 SCC 752.*** Paragraph 29 of ***Arulmigu Viswesaraswami & V.P. Temple*** reads as follows:

> *"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in Addagada Raghavamma v. Addagada Chenchamma [(1964) 2 SCR 933 : AIR 1964 SC 136] there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."*

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17. A careful perusal of the aforesaid paragraphs extracted and reproduced from judgment of Hon'ble Supreme Court make the position with regard to shifting of onus of proof very clear besides explaining the essential difference between the burden of proof and onus of proof. In

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the instant case, interestingly ***Anil Rishi*** case law was relied on and pressed into service by learned counsel on both sides, but this is mentioned only to make the capturing of what unfurled in the hearing, complete.

18. Owing to the discussion thus far on this aspect of the matter, this Court has no hesitation in coming to the conclusion that ***Anil Rishi'***s principle helps the petitioner in the case on hand. The reason is, AAT (as did the AT) has ignored vital evidence. Therefore, having pleaded fraud, based on the documents filed by the petitioner before the AT/AAT, the respondent certainly should have taken efforts to prove fraud and in any event it is the finding of AT, as confirmed by AAT in the impugned award that respondent did nothing in this direction. While on fraud and forgery, this Court reminds itself of the principle laid down by Hon'ble Supreme Court regarding arbitrability qua pleas of fraud / serious fraud. This issue was decided by Hon'ble Supreme Court in ***A.Ayyasamy case*** reported in ***(2016) 10 SCC 386***, but owing to the trajectory this matter is taking, this Court deems it appropriate to not to dilate much on this aspect of the matter. As already alluded to supra, the first and second submissions of petitioner as well as respondent are dovetailed and this Court finds for the petitioner on both those submissions.

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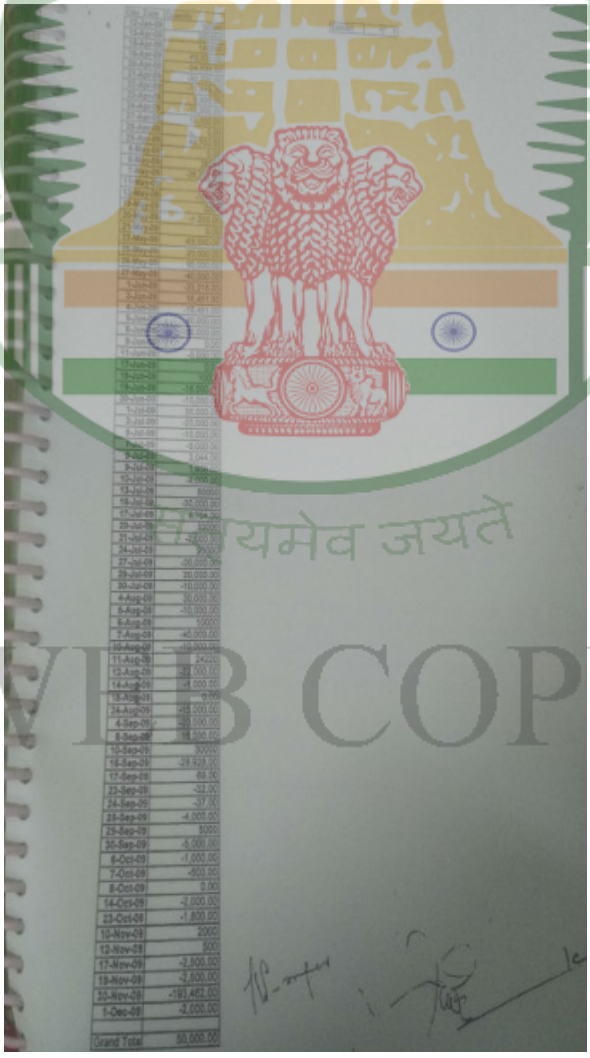
19. This takes us to the third submission regarding AT summoning a document from NSE and relying on the same after conclusion of oral hearings without giving an opportunity to both parties to even comment on the same. In this regard, this document summoned from NSE by AT post oral hearing or after conclusion of oral hearing has been marked as Ex.T1 and has been made part of the award of AT which has been confirmed by AAT vide impugned award. Scanned reproduction of Ex.T1 is as follows:



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20. What is of utmost significance is both learned counsel before this Court, submitted without any disputation or disagreement that both parties, namely the petitioner and respondent came to know about Ex.T1 only on receipt of the award of AT. In other words, there is no disputation or disagreement before this Court that this sheet of paper, which has been shown as Ex.T1 by AT was summoned by AT after the oral hearing had concluded and both sides did not know about this. To put it differently both parties were not even aware that this sheet of paper was summoned by AT and both parties i.e., petitioner and respondent herein came to know about it only when the award was received and found this sheet of paper annexed to the award and shown as Ex.T1. This makes the task of deciding this issue fairly simple.

21. As already alluded to supra, learned counsel for respondent, relied on Chapter VII(1)(b) of NSE bye-law and submitted that by operation of this bye-law, Ex.T1 becomes an unimpeachable document. For the sake of clarity, Chapter VII(1)(b) is extracted and reproduced below and the same reads as follows:

'CHAPTER VII

DEALINGS BY TRADING MEMBERS

Jurisdiction

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(1) (a) .....

(b) The record of the Exchange as maintained by a central processing unit or a cluster of processing units or computer processing units, whether Maintained in any register, magnetic storage units, electronic storage optical storage units or computer storage units or in any other manner shall constitute the agreed and authentic record in relation to any transaction entered into through automated trading system. For the purposes of any dispute the record as maintained by the computer processing units by the Exchange shall constitute valid evidence in any dispute or claim between the constituents and the trading member of the Exchange or between the Trading members of the Exchange inter-se. '

22. In an attempt to buttress aforementioned point, learned counsel for respondent pressed into service a judgment of a Hon'ble single Judge of Bombay High Court in Harinarayan Bajaj case [***Harinarayan Bajaj Vs. Sheth Securities Pvt. Ltd., and Ors*** reported in ***Manu/MH/0029/2014***]. Adverting to ***Harinarayan Bajaj*** case law, learned counsel for respondent invited the attention of this Court to Paragraph 18 thereat, which reads as follows:

'18. In my view, the contract notes and other relevant documents were on record before the arbitral tribunal. Under Chapter VII 1(b) of the Bye-Laws of NSE provides that for the purposes of any dispute the record as maintained by the computer processing units by the Exchange shall constitute valid evidence in any dispute or claim between the constituents and the trading

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member of the Exchange or between the trading members of the Exchange inter-se. The arbitral tribunal has rightly considered the authentic and valid record of NSE and has rightly allowed the claims made by respondent No. 1. The purchase price of those shares was already on record. The amount recovered on sale of shares and dividend was brought on record by placing the affidavit filed by NSE in company petition on record of arbitration proceedings before the arbitral tribunal. The arbitral tribunal rightly gave credit of sale proceeds and the dividend received from the original claim made by respondent No. 1 and have rightly allowed the claims made by the first respondent excluding damages. No other evidence was required to be led by respondent No. 1 to prove its claim. The arbitral tribunal has considered the entire material and evidence on record and has rendered a finding of fact and has allowed the claim. This Court cannot re-appreciate the evidence led by parties before the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act 1996.'

23. This Court is unable to persuade itself to follow this view taken by a Hon'ble single Judge of the Bombay High Court for more than one reason. The main reason is ***Ssangyong*** principle laid down by Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India** reported in **(2019) 15 SCC 131.** With regard to material being taken behind the back of parties, in ***Ssangyong*** case law, Hon'ble Supreme Court held that under

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the rubric of a party being otherwise unable to present its case, in cases where materials are taken behind the back of the parties by the Tribunal and the parties had no opportunity to comment on the same 34(2)(a)(iii) is attracted in the light of sub-section (3) of Section 26 of A and C Act. Most relevant paragraphs of ***Ssangyong*** case law in this regard are Paragraphs 49 to 52, which read as follows:

> '***The ground of challenge under Section 34(2)(a)(iii)***
>
> *'**49.** Under Section 34(2)(a)(iii), one of the grounds of challenge of an arbitral award is that a party is unable to present its case. In order to understand the import of Section 34(2)(a)(iii), Section 18 of the 1996 Act should also be seen. Section 18 reads as follows:*
>
> *"**18. Equal treatment of parties**.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case."*
>
> *(emphasis supplied)*
>
> *Section 24(3) also states as follows:*
>
> *"**24. Hearings and written proceedings**.—(1)-(2) * * **
>
> *(3) All statements, documents or other information supplied to, or applications made to the Arbitral Tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the Arbitral Tribunal may rely in making its decision shall be communicated to the parties."*
>
> *Section 26 of the 1996 Act is also important and states as follows:*

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*"**26. Expert appointed by Arbitral Tribunal**.—(1) Unless otherwise agreed by the parties, the Arbitral Tribunal may—*

(a) appoint one or more experts to report to it on specific issues to be determined by the Arbitral Tribunal; and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the Arbitral Tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report."

***50.** Section 24(3) is a verbatim reproduction of Article 24(3) of the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law). Similarly, Sections 26(1) and (2) are a verbatim reproduction of Article 26 of the UNCITRAL Model Law. Sub-section (3) of Section 26 has been added by the Indian Parliament in enacting the 1996 Act.*

***51.** Sections 18, 24(3) and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(a)(iii). Under Section 18, each party is to be given a full opportunity to present its case. Under Section 24(3), all statements, documents, or other information supplied by one party*

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to the Arbitral Tribunal shall be communicated to the other party, and any expert report or document on which the Arbitral Tribunal relies in making its decision shall be communicated to the parties. Section 26 is an important pointer to the fact that when an expert's report is relied upon by an Arbitral Tribunal, the said report, and all documents, goods, or other property in the possession of the expert, with which he was provided in order to prepare his report, must first be made available to any party who requests for these things. Secondly, once the report is arrived at, if requested, parties have to be given an opportunity to put questions to him and to present their own expert witnesses in order to testify on the points at issue.

***52.** Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) would be made out.*

24. To be fair, this Court deems it appropriate to mention that Bombay High Court did not have the benefit of ***Ssangyong*** principle as ***Harinarayan Bajaj*** case was decided on 18.01.2014 and Ssangyong principle was laid down by Hon'ble Supreme Court on 08.05.2019. This Court deems it appropriate to respectfully follow the principle laid down by Hon'ble Supreme Court. For this purpose, this Court deems it appropriate to extract Section 24(3) and Section 18 of A and C Act,

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which read as follows:

> '*24. Hearings and written proceedings.—*
> *(1).....*
> *(2)*
> *(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.'*
>
> *'18. **Equal treatment of parties**.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.'*

25. The plain language of Section 24(3) and Section 18 makes it clear that any evidentiary document which an arbitral tribunal relies on should be made available to the parties and parties should know that such evidence is being relied on and parties should be given an opportunity to comment upon the same, however unimpeachable the evidence may be. In this regard, it is to be noted that even expert evidence is no exception to this rule and in this regard, this Court deems it appropriate to extract/reproduce Section 26 of A and C Act, which reads as follows:

> '26. Expert appointment by arbitral tribunal.—
>
> (1)Unless otherwise agreed by the parties, the arbitral tribunal may—

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(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.'

26. In the instant case, a sheet of paper said to have been received from NSE, which has been described as Ex.T1, was admittedly received by the Tribunal without the knowledge of both parties. Both parties did not have any opportunity to comment on the same. Both parties admitted that they came to know about this sheet of paper from NSE described Ex.T1 only on receipt of the award from AT. This Court chooses to use the term 'described' as opposed to 'marked' as according to this Court,

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Ex.T1 can at best only qualify as a nomenclature and cannot denote or connote 'marking' of an exhibit in a manner known to law. It is made clear that this aspect has nothing to do with appreciation of evidence but it turns on a fundamental rule of evidence forming part of public policy. The argument that Chapter VII (1)(b) of NSE bye-laws means that the document is admitted hardly impresses this Court as even an admitted document has to be examined qua relevance in a manner known to law. All and every record maintained by NSE cannot become relevant qua every case under the sum. In the case on hand, as would be evident from the scanned copy of what according to AT is Ex.T1, it will be clear that there are no particulars or details as to whether Ex.T1 was sent under cover of a letter by NSE and there is nothing to demonstrate what the AT summoned from NSE, but the same has been relied on to hold that it tallies with the case of the respondent with regard to number of shares qua ESC in the hands of the petitioner on the relevant date. This Court is of the considered view that such a procedure adopted by any AT if sustained in a Section 34 application, would lead to setting the cat among pigeons. The reason is, in a given arbitral proceedings between the parties where the parties have not agreed to dispense with oral hearings, in the light of clear mandate of sub-section (3) of Section 24

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and Section 26 read in the context of ***Ssangyong*** principle, a Tribunal cannot receive a document after conclusion of oral hearings without the knowledge of parties and give an exhibit number to the same as the bare minimum requirement is, both should be able to comment upon the document even if there is a pre-agreed covenant qua admissibility of the document. In this case, as already alluded to supra, there is no cover letter and there is nothing to demonstrate that it came from NSE. In any event, the procedure of summoning and receiving a document after conclusion of oral hearing, relying on the same for returning a verdict and making such document a part of the award certainly cannot be sustained.

27. Owing to the narrative thus far, this Court deems it appropriate to not to burden this order with other case laws that were placed before this Court as they turn on other aspects of arbitration law.

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28. A very interesting argument, which is in the nature of a demurrer submission was advanced by learned counsel for respondent. This submission is to the effect that though the petitioner did not get an opportunity to comment on Ex.T1 before AT, she was given that

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opportunity by AAT in the light of a specific ground raised by the petitioner in her Statement of Appeal before AAT. Furthering his submissions in this direction, learned counsel for respondent submitted that the petitioner, who was given such opportunity before AAT, did not assail the admissibility of Ex.T1 and on the contrary, the petitioner merely took a stand that Ex.T1 cannot be accepted as unauthorized trades that took place have to be removed / excluded from Ex.T1. In other words, the demurrer submission of learned counsel for respondent is that the petitioner, who was given an opportunity to comment on Ex.T1 by AAT (though not by AT) sought exclusion of, what according to the petitioner, are unauthorized trades made by the respondent, but did not assail the exhibit.

29. For the purpose of examining this submission, which is in the nature of a demurrer submission, this Court deems it appropriate to extract and reproduce the relevant paragraphs, which bring to light the rival positions taken by the parties before AAT regarding Ex.T1. Learned counsel on both sides submit that Paragraph 29 of the Statement of Appeal and respondent's response to the same being Paragraph 24 of

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its Statement of Reply before AAT are the relevant paragraphs and the same read as follows:

Paragraph 29 of the Statement of Appeal before AAT

'29. The Hon'ble Arbitral Tribunal has taken upon itself to determine whether the Appellant had the requisite shares and consequently sought the assistance of the Officials of the NSE. The details of the information/date provided by the NSE Officials have not been forwarded to the Appellant nor has the Appellant been provided an opportunity to verify the documents and put forth its case based on the documents provided by the NSE to the Hon'ble Arbitral Tribunal. The Hon'ble Arbitral Tribunal has completely excluded the involvement of the Appellant and has proceeded to determine the issue only based on the documents provided by NSE to which the Appellant was not privy, as mentioned above. The Award is liable to be set aside for this reason alone as the Appellant was not given a proper opportunity to put forth its case particularly in light of new documents being provided by a third independent body (NSE) which is evidently contrary to the principles of natural justice. If an opportunity is provided, the Appellant would substantiate that it indeed had the requisite shares. However, no reasonable opportunity was provided to the Appellant. The Award is required to be set aside for such gross miscarriage of justice particularly since the Appellant had not been provided an opportunity to put forth its case after reviewing the documents forwarded by NSE.'

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Paragraph 24 of its Statement of Reply before AAT

'14) Regarding Paragraph 29: The ground raised by the Appellant in Paragraph 29 is false, illogical and baseless and therefore, cannot to be entertained. The statements and allegations of the Appellant in this paragraph are specifically denied. The Appellant failed to prove that she was holding 5,05,000 shares of ELESTE shares at the material point of time even though ample opportunity was given to her by the Ld. Arbitral Forum. This is clear from the records of arbitration proceedings held with the Forum and the Exchange. Constrained due to the circumstance and inability of the Appellant to prove her claim and further to ascertain the genuineness of the Appellant's demand for a sum of Rs.6,60,20,018/- and to take an unbiased decision the Forum need to obtain date generated by NSE, it is submitted that as per the Bye-law, Rules and Regulations of the Exchange if deemed necessary the Arbitrators can seek assistance of the Exchange and the Exchange shall generally do such things and take all such steps as may be necessary to assist the arbitrator in the execution of their function. Moreover, in all claims, differences or disputes which are required to be submitted to arbitration as per the provisions of the Exchange Byelaws and Regulations, the parties shall be deemed to have arranged for administrative assistance of the Relevant Authority in order to facilitate the conduct of the arbitral proceedings. Therefore, the action of Ld. Forum of Arbitrators seeking assistance of the Exchange officials for finding out whether the Appellant had requisite numbers of ELESTE shares at the material point of time is justifiable and correct. Moreover, due to the act of obtaining the

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said data from the Exchange has caused no prejudice to the Appellant. In other words, there is nothing on record to prove that Appellant has been prejudiced due to the collection of such data by Ld. Arbitrators from the Exchange. Further, it is to be noted that no new facts, points or documents has been emerged from these data provided by the Exchange. The data provided by the Exchange is already on the records of the Ld. Arbitral Forum (Respondent's submission dated 12.09.2011 page 2 to 4) and what the Forum had done is only that it had verified the correctness/genuineness of the data provided by the parties to the arbitration. This is clear from Exhibit T1 Trade Data of the Arbitral Award. It is worth noting that the above said trade data produced by the Respondent has not been disputed or proved to be incorrect by the Appellant. Therefore, it is not correct to say that the Appellant was not given an opportunity to verify the documents and put forth its case based on Ex.T1 Trade Data provided by NSE. Moreover, even the Statement of Appeal speaks nothing to prove the contrary with respect to the trade data provided by the Respondent and NSE.

It is false to state that the Arbitral Forum has completely excluded the involvement of the Appellant and has proceeded to determine the issue only based on the documents provided by NSE to which the Appellant was not privy. There is no violation of principles of natural justice or miscarriage of justice as alleged by the Appellant. The Ld. Forum had categorically observed that after verifying the Trade Data provided by NSE it is has been proved beyond doubt that the Appellant could not establish its position in respect of holding of above shares as on

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the date of dispute. On the other hand, the Respondent by submitting the transaction statement and other corroborative Annexures proved that their figures are tallying with those of NSE and as such to this extent Respondent could establish its credentials. Form the observations of the Ld. Forum of Arbitrators it is clear that they have considered all submissions, documents and annexures produced by both the parties and as a precaution, Forum has availed the facility to verify the date available on their records with that of the Exchange, which is marked as Ex.T1. It is only the failure on the part of the Appellant to substantiate her case/demand/claim that necessitated the Arbitral Forum to ascertain the genuineness of demand made by her and finding out of date from the Exchange.'

30. On the aforesaid rival /contesting positions taken by petitioner and respondent before AAT, after hearing of appeal on 15.03.2012 and 03.04.2012, AAT vide the impugned award has observed as follows:

'The Applicant could not furnish any fresh documentary evidence proving her point that she did have the 505000 shares of Electro Steel Castings Ltd. The applicant merely claimed that the statement provided by the NSE cannot be taken as the unauthorised trades that took place should be removed from the statement and if that is done it will establish that the applicant did have 505000 shares in her account. The question that arises here is whether there were indeed unauthorised trades in the account

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leading to a reduction in the number of shares of Electro Steel Castings Ltd.,'

31. This Court carefully and closely considered the rival/contesting positions taken by the parties before AAT (regarding Ex.T1) and the finding returned by AAT on the same besides noticing the trajectory, which the proceedings had taken, in travelling through the successive tiers in this tiered arbitration clause. This Court is unable to accept the argument advanced by learned counsel for respondent for more than one reason and this Court shall now set out those reasons infra in the paragraphs to follow.

32. The first reason is, in a tiered arbitration, if a crucial document is being relied upon, parties should be given the opportunity to comment upon the same in each tier if one tier (AT in this case) receives a document post oral hearing from an entity (NSE in this case), examines the same, relies on the same and more importantly makes it a part of the award, it is of no avail to say that the parties were thereafter given an opportunity to comment on the document in the next tier. After all the objective of having a multi-tiered arbitration is to ensure that the parties get equal treatment (ingrained in Section 18 of A and C Act) and an

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equal say before each tier so that the arbitrable dispute is decided by more than one tier. This clearly becomes a case of arbitral procedure not being in accordance with the agreement of the parties and this attracts one limb of Section 34(2)(a)(v) besides causing legal infarct of second limb of Section 18 of A and C Act. To be noted, second limb of Section 18 of A and C Act, this Court refers to each party being given full opportunity to present its case. In a multi-tiered arbitration this second limb of Section 18 should be applied in each tier and infarct of the same in one tier certainly impacts the impugned award made by the last tier as there is no disputation (as already alluded to supra) that the award of the AT merges with the impugned award made by AAT. If the principle that violation of substantive law of India, i.e., provisions of the A and C Act, sounds the death knell of an arbitral award laid down by Hon'ble Supreme Court in celebrated ***Associate Builders*** case [***Associate Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49]*** is applied to the case on hand, owing to the violation of Section 34(2)(a)(v) and infarct of second limb of Section 18 it is certain death knell qua impugned award as violation and infarct of these two provisions go to the root of the matter. Be that as it may, for the sake of convenience and ease of reference this Court extracts and reproduces the

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relevant paragraph in ***Associate Builders*** case and same reads as follows:

> '**42.1.** (*a*) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(*a*) of the Act, which reads as under:
>
> "**28.*Rules applicable to substance of dispute***.—(1) Where the place of arbitration is situated in India—
>
> (*a*) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.'

33. The second reason as to why this Court is unable to agree with the learned counsel for respondent is, even according to the impugned award of AAT, the respondent has not divulged the findings of the forensic expert regarding fraudulent documents, but has merely maintained that the documents have not been issued by them and has been gotten up fraudulently. Relevant paragraph in this regard in the impugned award of AAT reads as follows:

> *'On the part of the respondent side also the fact that they have not divulged the findings of the forensic expert regarding the fraudulent documents. But maintain that some of the documents*

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were not issued by them and are fraudulently done.' Therefore, on a clean reading of the impugned award of AAT without adding, subtracting and without even applying any inferential process it becomes clear as daylight that the AAT has return a finding that respondent has not produced the bet evidence in its position regarding fraudulent document. In this regard, even if the argument of the respondent that onus of establishing fraudulent document would shift only on prima facie discharge of burden is applied, the respondent does have the onus shifted on it. The moment the petitioner says let us accept Ex.T1, but deduct or exclude what according to the petitioner are unauthorised transactions, nothing prevented the respondent from demonstrating that the documents relied on by the petitioner qua unauthorised transactions are fraudulent and therefore, they need not be excluded from Ex.T1.'

34. The third reason owing to which this Court is unable to accept the argument of the respondent is, there is no answer to 11 documents alluded to supra which were not looked into as it is the petitioner's case that these documents would have clinchingly established unauthorised trade. In this regard, the submission of learned counsel for the petitioner by relying on annexures 1 to 4 before AT regarding unauthorised trade and respondent's reply assumes significance. To be noted, this issue has been raised and the respondent's branch has also corresponded with the

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petitioner in this regard. This is not only a case of ignoring vital evidence but it takes the wind out of the sails qua opportunity to comment on Ex.T1 being given by AAT (though not by AT)

35. The fourth reason is, even in the concluding paragraph of the impugned award, AAT mentions that several unauthorised transactions have occurred in her account, but it has been brushed aside on the sole ground that the petitioner continued to trade with the respondent despite her allegations regarding unauthorised transactions.

36. The fifth and last reason is, arbitral tribunal within the meaning of Section 2(1)(b) read with Section 7 of A and C Act being a creature of contract based on party autonomy, after creating a multi-tiered arbitral mechanism it cannot be gainsaid that opportunity given in one tier will cure the defect of a document being received behind the back of parties in an earlier tier. In this regard, to be noted, NSE itself is a company and it is settled law that byelaws are a contract amongst its members (in this case constituent and trading company)

37. Before parting with this case, this Court deems it appropriate to record a very interesting feature of the multi-tiered arbitration clause

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in NSE Bye-laws. As already alluded to supra, Chapter XI of NSE Bye-Laws captioned 'ARBITRATION' is this multi-tiered arbitration mechanism. Bye-law 19 of Chapter XI is captioned 'Appellate Arbitration' and (19)(a) reads as follows:

> '(19)(a) A party aggrieved by an Arbitral Award may appeal to the Appellate Arbitrator against Arbitral Award within one month from the date of receipt of Arbitral Award and in such manner as prescribed by the Relevant Authority from time to time notwithstanding the provisions contained under Byelaw 3.'

38. This Court is informed that reference to bye-law 3 therein is reference to Clause (3) of Chapter XI, which reads as follows:

> *'(3) The limitation period for filing an arbitration application shall be governed by the law of limitation i.e., The Limitation Act, 1963 as specified under Section 43 of the Act.'*

39. Bye-Law 3 is a mere reiteration that the law of limitation and more particularly, the Limitation Act 1963 will apply for arbitration proceedings under NSE Bye-Law owing to Section 43 of A and C Act. This means that the second part of bye-laws 19(a) tantamounts to virtually contracting out a statute. This requires to be examined. As this issue does not fall for consideration in the captioned OP, this Court

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deems it appropriate to leave this question open in this order. To be noted, this Court deems it appropriate to record this observation as a parting remark as it is pertinent though not put in issue in this case. In other words, the entire arbitration proceedings culminating in the impugned award, which is under challenge in the captioned OP, it is based on Chapter XI of NSE Bye-Law, which as delineated supra, serves as an arbitration agreement between the parties within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. Therefore, it is pertinent though not put in issue. As it has not been put in issue and as it is not imperative to examine/find an answer to this issue to return a verdict in captioned OP, this question is left open in this issue.

40. In the light of the narrative thus far, this Court has no hesitation in setting aside the impugned award dated 23.04.2012 made by AAT and which confirms the award dated 24.11.2011 made by AT.

Instant OP is allowed. There shall be no order as to costs.

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Speaking order: Yes
Index: Yes
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M.SUNDAR.J.,

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order in

O.P No.681 of 2012

01.10.2020