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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P. 673/2009

% Judgment dated 30.11.2012

M/S RADHARAMANA CAPITAL SERVICES PVT LTD ..... Petitioner
Through : Mr.J.P.Sengh, Sr. Adv. with Mr.Atul Sharma, Mr.Nitesh Jain, Mr.Sumeet Batra and Ms.Ankita Gupta, Advs.

versus

M/S JAYPEE CAPITAL SERVICES LTD ..... Respondent
Through : Mr.Anurag Kr.Agarwal and Mr.Umesh Mishra, Advs.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (*ORAL*)

1. Present objections have been filed by the petitioner for setting aside the impugned *ex parte* Award dated 27.7.2009 passed by a panel of Arbitrators.
2. The necessary facts to be noticed for disposal of the present objections are that in December, 2007, the petitioner applied for registration as a client with the respondent for sale and purchase of shares/securities at various stock exchanges. A Stock Broker-client Agreement dated 24.12.2007 was entered into between the parties with respect to the National Stock Exchange and Bombay Stock Exchange. The parties also entered into a Supplement Member Client Agreement on 24.12.2007. On the same date, other related documents were also executed between the parties. As per the understanding between the parties, the respondent was to purchase

securities/shares as per the instructions of the petitioner and not otherwise. Various obligations were caste upon the parties in terms of the agreement executed between the parties. As per the petition, the petitioner started trading through the respondent for barely about one month and then decided to stop the transactions with the respondent. The trading started on 27.12.2007 and the last transaction was carried out on 17.1.2008. As per the agreement all disputes and differences were to be decided through Arbitration of National Stock Exchange of India Limited and as per its bye-laws. As per the Award, the respondent has been awarded a sum of Rs.1,69,99,283.57 along with interest @12%, per annum.

3. Learned senior counsel for the petitioner submits that petitioner had engaged the services of a lawyer who had appeared before the learned Arbitrators and sought time to file reply, which is borne out from the record of the Arbitrators. Thereafter the counsel appearing in the matter did not inform the petitioner about his non-appearance, which led to the passing of the ex parte Award, which is the subject matter of challenge in the present proceedings. Learned senior counsel for the petitioner further submits that the Arbitrators acted in undue haste as no preemptory notice was served upon the petitioner that in case the petitioner did not appear he would be proceeded *ex parte* in the matter.

4. Learned senior counsel for the petitioner also contends that the petitioner had not only signed the reply to the claim petition but also signed the counter claim, which was to be filed before the Arbitrators. Senior counsel further contends that the petitioner cannot be made to suffer on account of the lapse on the part of the Lawyer.

5. Learned senior counsel next submits that even on merits the Arbitrators have failed to give any reasons, and without following the due process of law, and without the respondent proving its claim the Arbitrators have

passed the Award. Senior counsel also submits that the Arbitrators have relied upon the statement of account, which was filed by the respondent, however, the respondent has failed to prove the same in accordance with law. The original books of account were not produced by the respondent and thus, the respondents have failed to prove its claim and the claim petition could not have been allowed.

6. Senior counsel next contends that petitioner would have no objection if the Arbitrators are directed to re-hear the matter and decide the same expeditiously and the petitioner agrees to cooperate with the Arbitrators for expeditious disposal of the arbitration proceedings.

7. In support of his contention that the Arbitrators were bound to give a preemptory notice, learned senior counsel for the petitioner has relied upon ***M/s Lovely Benefit Chit Fund & Finance Pvt. Ltd. v. Puran Dutt Sood and Others***, reported at AIR 1983 Delhi 413, more particularly, paras 10 and 11, which read as under:

> "10. The question for decision is whether in this case the arbitrator should have given notice of change of venue and of his intention to proceed ex-parte against the respondents when they had not appeared before him. There is no hard and fast rule of giving notice by the arbitrator of his intention to proceed ex-parte or to change the venue of arbitration proceedings. But the principles of natural justice require that a person cannot be condemned unheard and he should be afforded a reasonable opportunity of being heard. In the instant case all the respondents are not residents of Delhi but of Ludhiana. The petitioner-claimant has its registered office at New Delhi. The respondents selected their Advocate, briefed him and paid his fee. They can remain confident that their lawyer will look after their interest and as such they have done what was in their power and expect the lawyer to do the needful. The respondents after having appointed the lawyer should not suffer for the in action or deliberate omission of their counsel. In Rafiq and Anr. v. Munshilal and Anr., AIR 1981 3 SCR 1400 it has been held that a party

should not suffer for the inaction of his counsel. In that case appeal was dismissed for default of appellant's counsel. The dismissal was set aside by the Supreme Court. In the instant case, as already stated, the respondents are residents of Ludhiana and Therefore the arbitrator before proceeding ex parte ought to have given notice of his intention to proceed ex parte against them on a specified date, time and place of arbitration proceedings. In Halsbury's Laws of England, Fourth Edition, Vol. 2 Page 590 page 306 it has been stated as under :

> "Whether the arbitrator proposes to proceed with the reference notwithstanding the absence of one of the parties, it is advisable that he should give that party distinct notice of his intention to do so. If reasonable excuse for not attending the appointment can be shown, the court will set aside an award made by an arbitrator who has proceeded ex parte."

In Russell on Arbitration, Nineteenth Edition page 271 the following passage appears.

> "Notice of intention to proceed ex parte :
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> In general, the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word" "Peremptory" marked on it is, however, sufficient.

If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorised to proceed ex-parte at the second meeting, unless the appointment for it was also marked "peremptory" or contained a similar intimation of his intention."

In Bhowanidas Ramgobind v. Harasukhdas Balkishendas : AIR1924 Cal 524 a Division Bench has held that arbitrators should give notice of their intention to proceed ex-parte if one of the parties should not appear but their award is valid if

the complainant has not been prejudiced in any manner by the failure of the arbitrators to give such notice. In Udaichand Panna Lall v. Debibux Jewanram AIR 1920 Cal 853 it has been observed that before an arbitrator proceeds ex-parte he should give notice in writing to each of the parties, otherwise the award may be liable to be set aside. In Pratap Singh v. Kishanprasad and Co. Ltd. AIR 1932 Bom 68 it has been observed that even when an arbitrator considers that the time and place fixed by him for the meeting are reasonable and if after service of notice one of the parties to the arbitration fails to attend before him he is entitled to proceed with the arbitration ex-parte. But it is still advisable for him though it is not compulsory, that he should give that party notice of his intention to do so. Similar observation were made in Ariyur Mohammad Habeebur Rahman and Ors. v. Ansuri Varama (died) AIR 1974 And Pra 113 (118) and Prem Nath L. Harsaran Dass and Anr. v. Om Parkash L. Ram Kishen Dass Aggarwal, AIR 1956 Punj 187. In Juggilal Kamlapat v. General Fibre Dealers Ltd., AIR1955 Cal 354 the following principles have been a laid down to determine whether the failure of the arbitrator to give notice of his intention to proceed ex parte amounts to misconduct.

> 1. If a party to an arbitration agreement fails to appear at one of the sittings, the arbitrator cannot or, at least, ought not to, proceed ex prate against him at that sitting. Where in such a case it does not appear that the non appearance was anything but accidental or casual, the arbitrator ought ordinarily to proceed in the ordinary way, fixing another date of hearing and awaiting the future behavior of the defaulting party.
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> 2. If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitrator should issue a notice that he intends at a specified time and place to proceed with the reference and that if the party concerned does not attend, he will proceed in his absence. But if after making such a peremptory appointment and issuing such a notice, the arbitrator does not in fact proceed ex parte on the day fixed, but fixes another subsequent date, he cannot

proceed ex parte on such subsequent date unless he issues a similar notice in respect of that date as well.

3. If he issues a similar notice and the party concerned does not appear, an award made ex parte, will be in order. But if he does not issue such a notice on the second occasion, but nevertheless proceeds ex parte, the award will be liable to be set aside in spite of a notice Of a peremptory hearing having been given in respect of the earlier date, subject, however, to the condition that prejudice was caused to the party against whom the ex parte order was made. But this duty to give notice of an intention to proceed ex parte is not an absolute duty.

4. If it appears from the circumstances of the case that a particular party is determined not to appear before the arbitrators in any event, as when he has openly repudiated either the reference itself or the particular arbitrators and has shown no desire to recent, the arbitrators are not required to issue a notice of an intention to proceed ex parte against such a resent person and may proceed ex parte and make a valid award without issuing a notice. The better course, however, even in such a case is to issue a notice and give the party concerned a change to change his mind.

5. Where the question arises after an ex parte award has, in fact, been made an it appears that no notice of an intention to proceed ex parte had been given, the principle to be applied is that the award will not be upheld, unless it is shown or it appears that the omission to give a notice has not caused any prejudice to the party against whom the ex parte award was made, because he had made it abundantly clear that he would not appear before the arbitrators in any circumstances. When there has been an omission to give a notice, there will, however, always be a presumption that prejudice has been caused. But the presumption can be rebutted by the other party or can be borne in mind in such cases is that the appearing on the face of the record. The principle to be borne in mind in such cases is that the failure to attend is not

> required to be explained on satisfactory grounds in order to dislodge the ex parte award, but the ex parte award requires to be defended by establishing that the omission to issue a notice of an intention to proceed ex parte has not caused any prejudice."
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> In Mt. Amir Begam v. Syed Badruddin Husain and Ors. AIR 1914 PC / 105 it has been observed that if irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or partiality of the arbitrator. Similar observations were made in Sadhu Singh and Ors. v. Ramdeo Singh AIR 1943 Pat 318.
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> 11. From these authorities, it is apparent that an arbitrator ought not to proceed ex parte against a party if he has failed to appear at one of the sittings. The arbitrator should fix another date for hearing and give notice to the defaulting party, of his intention to proceed ex pane on a specified date time and place. Even after notice if the defaulting party does not take part in the proceedings the arbitrator may proceed in his absence."

8. For the same submission, learned senior counsel for the petitioner has also relied upon ***Dipti Bikash Sen and Another v. India Automobiles (1960) Ltd.***, reported at AIR 1978 Calcutta 454, more particularly para 2.

9. Senior counsel has next relied upon a judgment of a Division Bench in the case ***Power Grid Corporation of India Ltd. v. Electrical Mfg. Co. Ltd. & Anr.***, reported at 153 (2008) DLT 440 (DB) more particularly paras 17 to 19, which read as under:

> "17. Considering the above backdrop, we are of the view that the Arbitrators have unnecessarily acted in haste in concluding the arbitral proceedings. Once the appellant had appeared before them, the least they should have done was to afford some reasonable time to the appellant to file its objections to the statement of claim filed by the respondent EMC. The Arbitrators also could have given a peremptory notice to the appellant before proceeding ex parte

against them. Even after proceeding ex-parte against the appellant the Arbitrators still could have called upon them to cause appearance in the matter. Although, the applicability of the principle of audi alteram partem depends on the facts of each case and in a given case the parties may be required to show as to what prejudice has been caused to its rights due to non-observance of principles of natural justice, yet keeping in view the sanctity and primacy of this basic and equitable principle, it is expected of every judicial and quasi judicial authority to always give due primacy and make a serious endeavour that the sacrosanct principles of audi alteram partem are duly observed in letter and spirit. The mechanism of arbitration came to be evolved for providing speedier justice to the parties, especially in commercial transactions where monetary stakes of the parties are sometimes very high and an inordinate delay in the disposal of arbitration matters could prove fatal and ruinous. However, at the same time the cardinal principle of giving a fair opportunity to the parties should not have been lost sight of by the adjudicatory body. The appellant had appeared on 9th April, 1993 as well as on 20th April, 1993, but they were not allowed to participate in the proceedings and thereafter within four days i.e. from 21.4.1993 to 25.4.1993 the same were concluded. We do not find any justification on the part of the Arbitrators to have rushed through the matter to conclude the proceedings without examining the version of the other side.

18. In relation to reasonable opportunity of being heard, in Sohan Lal Gupta v. Asha Devi Gupta, V (2003) SLT 485 = (2003) 7 SCC 492 , the Hon'ble Apex Court observed as under:

> 20. There cannot be any dispute with regard to the proposition of law that the parties would be entitled to a reasonable opportunity of putting their case. [See Montrose Canned Foods Ltd. v. Eric Wells (Merchants) Ltd.] A reasonable opportunity would mean that a party must be given an opportunity to explain his arguments before the Tribunal and to adduce evidence in support of his case. However, under the old Act, an oral hearing would only be permitted if a party requested one, unless there was some agreement to the contrary. (See Henry Southeran Ltd. v. Norwich Union Life Insurance Society 3.)

21. What would constitute a reasonable opportunity of putting case as also qualification of the right has been stated in Russell on Arbitration , 22nd Edn., paragraphs 5-053 and 5-054 which are in the following terms:

> 5-053. *A reasonable opportunity of putting case*. – Each party must be given a reasonable opportunity to present his own case. This means he must be given an opportunity to explain his arguments to the Tribunal and to adduce evidence in support of his case. Failure to comply with this requirement may render the award subject to challenge under Section 68 of the Arbitration Act, 1996. It is also a ground for refusing enforcement of the resulting award under the New York Convention.
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> 5-054. *Qualification of the right*. – The need to allow a party a reasonable opportunity to present his case can give rise to difficulties. To what extent can the Tribunal intervene where, for example, a party's submissions or evidence is needlessly long, repetitive, focuses on irrelevant issues or is sought to be made over an extended period of time? What if a party ignores procedural deadlines imposed by the Tribunal but maintains he still has points to put before it in support of his case? Inevitably, each situation has to be dealt with in its own context but the following general considerations should be taken into account.

22. There cannot, therefore, be any doubt that a party does not have an unfettered right. The arbitrator cannot only ask a party to comply with procedural orders and directions including those imposing limits as to time and content of submissions and evidence but the arbitrator also has a right of managing the hearing. In Russell on Arbitration , 22nd Edn. the law is stated thus:

> 5-057. Managing the hearing.-Similarly, a Tribunal cannot be expected to sit through extended oral hearings listening to long-winded submissions on irrelevant matters. The Tribunal is entitled, and under Section 33 is obliged and encouraged, to avoid the unnecessary delay and expense that would be caused by such an approach. The Tribunal should take a grip

> on the proceedings and indicate to the parties those areas on which it particularly wishes to be addressed and those which it does not consider relevant to the real issues in dispute. If a party fails to heed such guidance, the Tribunal might seek to focus the proceedings by allocating the remaining hearing time between the parties. This the Tribunal is entitled to do, provided it will allow a reasonable time for both parties to put forward their arguments and evidence.
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> 23. For Constituting a reasonable opportunity, the following conditions are required to be observed:
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> > 1. Each party must have notice that the hearing is to take place.
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> > 2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.
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> > 3. Each party must have the opportunity to be present throughout the hearing.
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> > 4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.
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> > 5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.
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> > 6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.

19. Indisputably, the arbitrators would in law neglect their duty if they do not listen to one party who might be interested either in controverting or who is legally entitled to controvert the claim of the party approaching them. Similarly, the person who is to be affected by the evidence ought to be present to hear it so that he would be able to meet and answer it. The arbitrator is ordinarily free from the fetters of procedural law but that does not make him free from the fundamental principles of justice. Though the arbitrator may not strictly follow the rules and procedures as

observed by the Civil Court but at the same time it would not imply that the Arbitrary Tribunal can ignore or circumvent the principles of natural justice and fair procedure. The omission in giving notice to a party before proceeding ex-party is a serious irregularity in the procedure and amounts to misconduct. It is a salutary principle of natural justice that nobody should be condemned unheard."

10. In support of his submission that absence of a Lawyer would be a ground covered within the meaning of Section 34 of Arbitration and Conciliation Act, 1996, senior counsel has next relied upon a decision rendered by the Orissa High Court in the case ***Prantik v. Gayatri Pharmaceuticals Pvt. Ltd.***, reported at 2007 (3) R.A.J. 360 (Ori.), more particularly paras 8 and 9, which read as under:

> 8. On consideration of rival contentions raised in the present proceeding, I am of the view that in terms of Section 34 of the Act, an arbitral award may be set aside by a Court if the Court is satisfied that the party making an application for setting aside an arbitral award "was otherwise unable to present his case" before the Arbitrator. I am of the view that in the circumstances as pleaded in the application, the Arbitral Proceedings were held on the following dates, i.e., on 22.9.2001,19.10.2001, 10.11.2001 and 8.12.2001. It is clear that the respondent appeared through Advocate before the learned Arbitrator on the first two dates i.e., 22.9.2001 and 19.10.2001 and also filed the statement of defence. The Respondent and its learned Counsel were absent on 8.12.2001 and the respondent has given the reason of illness of the learned Counsel for being unable to appear before the Arbitrator on that date.
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> 9. I am of the view that the inability of a lawyer to attend an arbitral sitting due to illness is a ground which would be covered under Section 34(2)(a)(iii) of the Act and in the present case on account of illness of the learned Counsel for the Respondent, "the respondent was otherwise unable to present its case" and therefore, the learned District Judge is justified in setting aside the award and remanding the matter to the Arbitrator to pass an award afresh.

11. Learned senior counsel for the petitioner has also relied upon ***Ishwar Das***

Jain (dead) through LRs v. Sohan Lal (dead) by L.Rs., reported at AIR 2000 Supreme Court Cases 426, more particularly para 23 to 25 in support of his plea that all books of accounts must be produced. Paras 23 to 25 read as under:

> "23. Now under Section 34 of the Evidence Act, entries in "account books" regularly kept in the course of business are admissible though they by themselves cannot create any liability. Section 34 reads as follows:
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> > Section 34: Entries in books of account when relevant- Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.
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> > It will be noticed that sanctity is attached in the law of evidence to books of account if the books are indeed "account books i.e. in original and if they show, on their face, that they are kept in the "regular course of business", Such sanctity, in our opinion, cannot attach to private extracts of alleged account books where the original accounts are not filed into Court. This is because, from the extracts, it cannot be discovered whether the accounts are kept in the regular course of business or if there are any interpolations or whether the interpolations are in a different ink or whether the accounts are in the form of a book with continuous page-numbering. Hence, if the original books have not been produced, it is not possible to know whether the entries relating to payment of rent are entries made in the regular course of business.
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> 24. It is only in the case of Bankers' Books Evidence Act, 1891 that certified copies are allowed or the case must come under Section 65(f) or (g) of the Evidence Act. Private extracts of accounts in other cases can only be secondary evidence and unless a proper foundation is laid for adducing such secondary evidence under Section 6 or other provisions of the Evidence Act, the privately handwritten copies of alleged account books cannot by themselves be treated as secondary evidence.

> 25. In the recent judgment of this Court in Central Bureau of Investigation v. V.C. Shukla (1998) 3 SCC 410 : (1998) AIR SCW 1298 : AIR 1998 SC 1406, it has been laid down that for purposes of Section 24, 'Book' ordinarily means a collection of sheets of paper or other material, blank, written or printed, fastened or bound together so as to form a material whole. Loose sheets of paper or scraps of paper cannot be termed as 'book' for they can be easily detached and replaced. It has also been held that the rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree, a probability of trustworthiness." When that is the legal position, extracts of alleged account books, in our view, were wrongly treated as admissible by the courts below though the original books were not produced for comparison nor their non- production was explained nor the person who had prepared the extracts was examined."

12. Senior counsel has also relied upon ***Central Bureau of Investigation v. V.C. Shukla & Others***, reported at 1998 (3) SCC 410, more particularly para 36, which reads as under:

> 36. The same question came up for consideration before different High Court on a number of occasions but to eschew prolixity we would confine our attention to some of the judgments on which Mr. Sibal relied. In M.S. Yesuvadiyan **v**. P.S.A. Subba Naicker AIR (1919) Mad. 132, one of the learned Judges constituting the Bench had this to say:
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> > "S. 34, Evidence Act, lays down that the entries in books of account, regularly kept in the course of business are relevant, but such a statement will not alone be sufficient to charge any person with liability. That merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. The legislature however does not require any particular form or kind of evidence in addition to entries in books of account,

> and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in books of account if true."

While concurring with the above observations the other learned Judge stated as under:

> *"If no other evidence besides the accounts were given, however strongly those accounts may be supported by the probabilities, and however strong may be the evidence as to the honesty of those who kept them, such consideration could not alone with reference to S. 34, Evidence Act, be the basis of a decree."*
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> *[Emphasis supplied]*

13. Per contra, learned counsel for the respondent submits that present objections are liable to be dismissed on the ground that the Arbitrators have complied with the principles of natural justice, the petitioner was given a fair opportunity to file reply to the statement of claim in fact by a communication dated 18.11.2008 petitioner was duly informed that in case necessary supporting documents are not filed within the prescribed time it would result in an *ex parte* award. Counsel further submits that even otherwise after each date of hearing the Arbitration Department of the National Stock Exchange of India Limited informed the petitioner about the next date in the matter. Copies of all such communications have been placed on record. Counsel also submits that the Arbitrators have duly followed the principles of natural justice and it is the petitioner, who has been negligent in not pursuing his matter and, thus, the petitioner cannot be allowed to shift the burden on his counsel. Counsel next submits that neither any affidavit on behalf of the petitioner has been filed nor any document has been placed on record to suggest that the petitioner at any point of time followed up the matter with the counsel or requested him to

inform the petitioner about the progress of the matter nor there is anything on record to show that the petitioner was interested in pursuing his matter and at this stage the petitioner cannot take advantage of his own wrong.

14. Learned counsel for the respondent submits that another Single Judge of this Court in the case reported in ***Anil Jain v. Madhunam Appliances (P) Ltd. & Anr.***, reported at 68 (1997) DLT 376, more particularly para 9, has differed from the view taken by another Single Judge in the decision rendered in the case of ***M/s Lovely Benefit Chit Fund & Finance Pvt. Ltd.*** (supra), sought to be relied upon by senior counsel for the plaintiff. Para 9 of ***Anil Jain*** (supra) reads as under:

> (9) The learned counsel for the appellant has then argued that the learned arbitrator never issued any notice to the appellant of his intention to proceed ex parte. Hence, the impugned award is liable to be set aside on this ground alone. The learned counsel has in this connection led me through the observations of a Single Judge of this Court as reported in Lovely Benefit Chit v. Purandutt, 1983 Rajdhani Law Reporter 420, " In general, the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice, it is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside.....". I would beg to differ from the said view on this point. I feel it is of no use to go on serving a man who is not ready to co-operate and to participate in the proceedings despite the innumerable opportunities granted to him to appear and defend himself. If the arbitrator is required to give a notice over again despite the previous notice given to a party then it would be tantamount to putting premium on his lapses. There is no rule or law which requires, an arbitrator to serve a party with a notice before initiating the ex parte proceedings against him. I am supported in my above view by the observations of a Division Bench of the Allahabad High Court as reported in Dori Lal v. Lal Sheo, AIR 1954 ALL 244 "An arbitrator, who has given due notice of the proceeding to the parties is entitled to proceed ex parte if one party does not choose to appear. There is no provision in the Arbitration Act requiring the arbitrator to give a second notice of his intention to proceed ex parte against a person who is absent

after service of notice. The fact, Therefore, that the arbitrator did not give a second notice of his intention to proceed ex parte cannot amount to legal misconduct. The same view was expressed by a Single Judge of the Punjab High Court as reported in M/s. Azad Hind Chemicals La v. Ram Lal of United Chemical Works, Jullundur and Another, AIR 1961 Punjab 206 (V 48 C 70). It is litigant who should approach the Court and no duty is cast on the arbitrator to invite a recalcitrant party to be present when it has evinced its intention to remain absent and especially in a case when the entire ex parte evidence had already been recorded against such party....." To the same effect are the observations as reported in P.S.Oberoi v. The Orissa Forest Corporation Ltd., AIR 1982 Orissa 168 , and M/s. Hemkunt Builders Pvt. Ltd. v. Punjabi University Patiala, 1993(1) Current Civil Cases 405."

15. Counsel for the respondent has also relied upon ***N.Khadervali Saheb and Another v. N. Cudu Sahib and Others***, reported at AIR 1994 Andhra Pradesh 126, more particularly para 5, which reads as under:

> "5. Admittedly the parties nominated the arbitrators, as stated above, on 10.6.1972. The arbitrators entered upon the reference on 15.6.1972. On 4.9.1972 the arbitrators issued notice to the parties directing them to be present on 11-9-1972 making it clear that in their absence they will proceed ex parte and pass the award. However on that date no ex parte award was passed. On 22.9.1972 the petitioners issued the notice Ex. B9 to the arbitrators not to proceed with the matter. Under Ex. B10 dated 25.9.1972 the arbitrators replied to produce the accounts at the residence of Mr. Obireddy. On 26.9.1972 the arbitrators issued the notice Ex. B37 asking the parties to appear on 30.9.1972 at 10 a.m.; venue was fixed as Mr. Obireddi's house. On that date they considered the matter and decided among themselves to pronounce the award on 2.10.1972. From the chronology of events noted above it is seen that one notice was given to the parties intimating that in default of appearance by them the matter will be proceeded ex parte. The contention now raised is that before proceedings ex parte the arbitrators should have issued a further notice to the parties and failure to do so amounts to their misconduct. I am unable to accept this contention. No statutory rules dealing with the procedure before the arbitrator have been brought to my notice to show any

procedural illegality. Admittedly it is not a case of violation of statutory rules. It cannot also be said that there has been violation of principles of natural justice inasmuch as the arbitrators issued a notice of hearing and a further notice that in default of appearance and production of records the case will be proceeded with ex parte. The case was adjourned on the date specified in the notice. Thereafter also the parties were informed under Ex. B37 that the case was finally adjourned though it was not indicated therein that non-appearance will result in ex parte hearing. In my view once a notice is given to a party to appear on a noted date it implies consequence of non-appearance, that is, ex parte hearing will follow and absence of specific mention of consequence of non-appearance would not debar the arbitrators from proceeding ex parte in the absence of appearance of any party in spite of service of notice. On these facts it is impossible to hold that the arbitrators are guilty of any legal misconduct."

16. Counsel for the respondent has also relied upon ***Nagasrinivasulu and Others v. Galada Finance Ltd.***, reported at (2009) 3 MLJ 887, more particularly para 39, which reads as under:

> "It is no doubt true that after setting the petitioner *ex parte* once, learned Arbitrator set aside the said order and granted a hearing to the petitioners herein. However, subsequent thereto, except for one hearing, the petitioners did not appear; A perusal of the number of hearings given and the opportunity given to the parties herein show that there is no wanting of compliance of the principles of natural justice in giving this opportunity to the petitioners herein. There had been consistent default of the petitioners in their appearance before the Arbitral Tribunal. After posting the case finally on 5.7.2005, at the request of the first respondent, the matter was adjourned to 2.8.2005 from 26.7.2005. The petitioners did not appear. Hence, the matter was posted on 9.8.2005. As per the order dated 9.8.2005, there is no endorsement as to whether the petitioner was present. Thereafter on 27.8.2005, the last hearing date, the petitioner herein was called absent, set *ex parte* and on 6.9.2005, the award was passed. It is no doubt true that in a given set of circumstances, an *ex parte* order passed is liable to be set aside if it result in prejudice to the defaulting party by reason of the fact no fair opportunity was granted to the defaulting party to defend his stand. As already noted, Section 25 of the Arbitration and

> Conciliation Act 1996 lays down the consequences of failure of a party to appear before the learned Arbitrator. When there had been consistent defaults, the contention of the petitioners that failure to give a second notice to proceed *ex parte* would vitiate the award, cannot be accepted and it is not open to a person who is absent for the second time to contend legal infirmity in the passing of the *ex parte* award. The fact that the learned arbitrator did not give a second notice of his intention to proceed *ex parte*, hence, cannot amount to a legal misconduct."

17. Learned counsel for the respondent submits that it is not mandatory to give a preemptory notice before proceeding *ex parte* in the matter. Counsel further submits that the Arbitrators have passed a reasoned Award based on the documents placed on record and the books of accounts, which were being maintained by the respondent, in the ordinary course of their business.

18. Counsel for the respondent has also relied upon ***A.P.Nirman v. Sindhu Trade Links***, reported at 2010 (5) R.A.J. 185 (Del), more particularly paras 5 and 6, wherein it has been held that in case no challenge has been made even before the Arbitrator and if no grounds are taken in the objection petition, the same cannot be taken at the time of arguments. Paras 5 and 6 read as under:

> 5. The jurisdiction of this Court while hearing objections under Section 34 of the Act is limited. The Court interferes with an Award only in case the Award is illegal, that is the same is against the law of the land or the same is violative of the contractual provisions or that it is in any manner perverse which shocks the judicial conscience. In case the Award is an ex-parte Award, where a person after admitted service does not appear, the scope of challenge to the Award, in my opinion, becomes further restricted.
>
> 6. In my opinion, the objections which have been raised by the present petitioner in this Court are neither maintainable nor can they be sustained. Only objections going to the root of the matter with regard to the jurisdiction of the Arbitrator can be looked into and not other issues of merits.

19. Learned counsel for the respondent has also relied upon ***Vijay Packaging (Dissolved Firm) v. Spectra Packs Pvt. LTd., Madras and Another***, reported at 2002 (3) Arb.LR (Madras) (DB) more particularly paras 12 and 13, in support of his plea that the Arbitrator is not bound by the strict rules of evidence and even if such a ground is taken Arbitrator as per Section 34 of Evidence Act the same cannot have found favour of the petitioner.

20. I have heard counsel for the parties and carefully considered their rival contentions. In this case objections have been filed with respect to an ex perte award dated 27.07.2009. The main thrust of argument of Mr.J.P. Sengh, learned senior counsel for the petitioner is that the petitioner had engaged the services of a counsel, who had been authorized to appear before the Arbitrators. The said counsel misguided the petitioners, kept them in dark and did not even file reply to the statement of claim. It is also the case of the petitioners that the petitioners have a counter claim of Rs.4,01,18,974.40 and despite specific instructions the counsel neither filed reply nor the counter claim. It is also submitted that a fraud has been played upon the petitioners by the said counsel. Counsel for the petitioners has also strenuously argued that no preemptory notice was issued to the petitioner before proceeding ex parte. On merits it has also been submitted that the respondents being claimants before the Arbitrator failed to prove their case on merits, as the books of account were not produced before the arbitrators.

21. Mr.Anurag Aggarwal, counsel for the respondent has submitted that the Arbitrators have rendered a well reasoned award, the respondents duly proved their case before the arbitrator and the arbitrator is not bound by the strict rules of evidence. It is also submitted that after each hearing the

National Stock Exchange had issued a letter to the petitioners informing the petitioners the next date fixed in the matter and thus it cannot be said that the petitioners were not aware of the dates fixed. Both the parties have referred to the judgments in detail, relevant portions of which have been extracted above.

22. The first question which arises for consideration before this court is whether it is mandatory for an arbitrator to issue a preemptory notice before proceeding ex parte. Another aspect which is closely related is as to whether the letters addressed to the petitioners by the National Stock Exchange would suffice as information to the petitioners with regard to the progress of the proceedings. In the case of Lovely Benefit Chit Fund (Supra) relied upon by counsel for the petitioners, a Single Judge of this court noticed that there is no hard and fast rule of giving a notice by the Arbitrator of his intention to proceed *ex parte, h*owever, it was held that the principles of natural justice require that a person should be afforded a reasonable opportunity of being heard, and, thereafter, the arbitrator ought to have given notice of his intention to proceed ex parte. Reliance was also placed on Halsbury's Laws of England, Fourth Edition, Vol. 2 Page 590 page 306, which reads as under:

> "Whether the arbitrator proposes to proceed with the reference notwithstanding the absence of one of the parties, it is advisable that he should give that party distinct notice of his intention to do so. If reasonable excuse for not attending the appointment can be shown, the court will set aside an award made by an arbitrator who has proceeded ex parte."

23. The observations made in Russell on Arbitration, Nineteenth Edition page 271 were also extracted, which read as under:

> "Notice of intention to proceed ex parte :

> In general, the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word" "Peremptory" marked on it is, however, sufficient.

24. Mr.Anurag Agarwal, has relied upon ***Anil Jain v. Madhunam Appliances (Supra)*** where another Single Judge of this court has differed from the view taken in the case of Lovely Benefit Chit Fund & Finance Pvt. (Supra). Although there may be a divergence in view in the case of Lovely Benefit Chit Fund & Finance Pvt. (Supra) and Anil Jain Vs. Madhunam Applicances (Supra), but in the case of Power ***Grid Corporation of India (Supra)*** a Division Bench of this court has held that the arbitrators could have given a preemptory notice to the party before proceeding ex parte against him. The Arbitration Act does not provide that before proceeding ex parte a preemptory notice is mandatory. Thus it can safely be said that there is no hard and fast rule that an arbitrator must issue a notice before proceeding ex parte against a person. However, it is a rule of prudence. Non-issue of such a notice should not act as a tool in the hands of a clever and crafty litigant to delay the proceeding nor any innocent litigant should suffer. Reading of the award would show that the petitioner was served and on 27.01.2009 two weeks time was granted to file the reply and the matter was adjourned to 06.03.2009. Neither the reply was filed nor anyone appeared on behalf of respondent except that a fax message was received, seeking an adjournment on the ground of illness of the counsel. Two weeks time was granted and the matter was adjourned to 01.04.2009 when again none appeared on behalf of the respondent, however, a letter was brought to the

National Stock Exchange by the clerk of the counsel seeking adjournment on the ground that the counsel was getting married on 03.04.2009 and further time was sought and the matter was adjourned to 21.05.2009 when none appeared again and the matter was proceeded ex parte.

25. The dates so mentioned above clearly reveal that the arbitrators did follow the principles of natural justice and afforded reasonable opportunity to the petitioner herein to defend himself. The record also shows that after each hearing a letter was addressed by the National Stock Exchange to the petitioner informing the petitioner the next date in the matter. However, in none of these communications the petitioner was informed that none had appeared on their behalf or that no reply was filed or that in case of absence, the matter would be heard ex parte. In fact it is these letters which are misleading, as counsel for the petitioners submits that these letters were being received by them and thus petitioners were under the impression that they were being duly represented by the counsel engaged by them. Since the format of the letters is identical, letter of 29.01.2009 is reproduced below:

> "NATIONAL STOCK EXCHANGE
> OF INDIA A.M.No.:F&OD-441/2008 stock of the nation
>
> BETWEEN
>
> jaypee Capital Services Ltd.
> (Trading Member) ….. Applicant
>
> AND
>
> Radharaman Capital Services Pvt. Ltd.
> (Constitutent) ….. Respondent

NSE/ARBN/F&SOD-441/2008/7386 January 29, 2009

Jaypee Capital Services Ltd.
Trading Member
1114, 11th Floor, Naurang House,
21, K.G. Marg,
New Delhi -110 001

Sir,

This is to inform you that Shri S.P. Biswas, Shri R.K. Ahooja and Mrs.Lakshmi Swaminathan Panel of Arbitrator in the above mentioned Arbitrator Matter held the hearing on January 27, 2009. The matter now stands adjourned to March 06, 2009 at 03:00 p.m. at the office of National Stock Exchange of India Limited, 4th Floor, "Jeevan Vihar Building", Parliament Street, New Delhi-110 001 Ph.No.: 23344313 (15 –Lines), Fax No.23366658.

Yours faithfully,

For National Stock Exchange of India Limited

Officer in Charge
Arbitration Department

Copy to : Shri R.K. Ahooja, Presiding Arbitrator
Mrs Lakshmi Swaminathan, Sole Arbitrator,
Shri S.P. Biswas, Sole Arbitrator."

26. Although it has become a normal practice to blame counsel for the inaction on the part of the party, in the present case the petitioner has also made a complaint to the Bar Council of Delhi against the said lawyer, which would show that there is at least some sense of seriousness on the part of the petitioner. In the present case if any of the letters addressed by the National Stock Exchange had informed the petitioners that they were not being represented or that no reply was filed, there would have been no

requirement of issuing a preemptory notice, but the said letters dated 29.01.2009, 09.03.2009 and 06.04.2009 have in fact mislead the petitioners and thus, therefore, the benefit of doubt is to be granted to the petitioners. The petitioners should not be made to suffer on account of the lapse of their lawyer.

27. In the facts of this case it would have been prudent to issue a preemptory notice of proceedings ex parte. Accordingly, the objections are allowed and impugned award dated 27.7.2009 is set aside. Counsel for the petitioners has assured this court that the petitioners will not seek any unnecessary adjournment before the Arbitrator.

28. Reply to the claim petition be filed within three weeks. Petitioners will fully cooperate with the arbitrators in early disposal of the arbitration proceedings and no unnecessary adjournments will be sought. Since the objections have been allowed only on the short ground of inability of the petitioners from appearing, the legal objections which have been raised are not being decided and are kept open.

G.S.SISTANI, J

NOVEMBER 30, 2012
msr/ssn