Neutral Citation No. - 2023:AHC:176040 **A.F.R.**

Reserved On: 2.5.2023
Delivered On :6.9.2023

Case :- MATTERS UNDER ARTICLE 227 No. - 7573 of 2022

Petitioner :- India Oil Corporation Ltd. And Another
Respondent :- The Commercial Court And Another
Counsel for Petitioner :- Pramod Kumar Rai,Sr. Advocate
Counsel for Respondent :- Pranab Kumar Ganguli

Hon'ble Neeraj Tiwari,J.

1. Heard Sri Anil Sharma, learned Senior Counsel assisted by Sri P. K. Rai, learned counsel for the petitioners and Sri Manish Goyal, learned Senior Counsel assisted by Sri Pranab Kumar Ganguli, learned counsel for the respondents.

2. Present petition has been filed challenging the order dated 08.08.2022 passed by Commercial Court, Varanasi i.e. respondent no. 1 in Execution Case No. 24 of 2020 (Old Case No. 21/2012) and additional award dated 21.02.2006 passed by Arbitrator in the matter of M/s Vidhyawati Construction Col vs. IOCL and another.

3. Since, only legal question is involved in the present petition and pleadings have been exchanged between the parties, therefore, with the consent of parties, petition is being decided at the admission stage itself.

4. Brief facts of the case are that Original Suit No. 436 of 1989 was filed on 01.07.1989 for appointment of Arbitrator in accordance with provision of Arbitration Act, 1940 (hereinafter referred to as the ' Old Act, 1940), which was applicable at that time. Vide order dated 12.8.1991, learned Civil Court appointed Hon'ble Mr. Justice R.P. Singh (Retired) sole arbitrator to decide the dispute. Due to pending litigation proceedings, Arbitration could only commence in the year 2001 and Arbitrator has issued notice dated 07.05.2001. Statement of claim was filed by the respondent no.2 on 24.5.2001 before the Arbitrator upon which petitioner had filed a detailed objection and also counter claim. Arbitrator has passed order dated

14.04.2002 to continue the proceeding as per provision of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'New Act, 1996). Ultimately, arbitration proceeding was completed and award was given on 27.04.2005 partly in favour petitioner and respondents both. After calculating the amount, it was found that respondent has to pay Rs. 7,79,871/- to the petitioner. Thereafter, Arbitrator has sent the original records to Additional District Judge,-IX, Civil Court, Varanasi on the same day i.e. 27.04.2005. Respondent had moved application under Section 33 of the New Act, 1996 for modification of award. Arbitrator has additional the award vide order dated 21.02.2006.

5. The said award was challenged before this Court by filing petition Under Article 227 No. 30461 of 2006, which was dismissed as withdrawn vide order dated 08.05.2012 with liberty to file application under Section 34 of Act, 1996. Application was filed under Section 34 of New Act, 1996, which was registered as Arbitration Case No. 79 of 2012 and the same was dismissed vide order dated 23.03.2013. Against that order, petitioner has preferred First Appeal From Order No. 1584 of 2013, which was also dismissed vide order dated 08.04.2016. As respondent was also aggrieved with the certain observations made in the award, therefore, he has preferred Special Leave to Appeal (C) No. 681 of 2017, which was dismissed vide order dated 20.01.2017 after deleting the certain observations made in the order dated 8.4.2016 passed in First Appeal From Order No. 1584 of 2013. Ultimately, award has attained finality.

6. Respondents have filed Execution Application No. 21 of 2012 (renumbered as Execution Application No. 24 of 2020), in which petitioner has filed objection under Section 47 of CPC and same was rejected vide order dated 08.08.2022. Hence, order dated 08.08.2022 is under challenge before this Court.

7. Aforesaid facts are not disputed between the parties.

8. Sri Anil Sharma, learned Senior Counsel submitted that arbitration proceedings was initiated under Old Act, 1940 and award was given on 27.4.2005. He further submitted that as provided in Section 14 of Old Act,

1940, vide letter dated 15.5.2005, Arbitrator has sent the entire record alongwith the award in a locked and sealed box to the Court of District Judge, Varanasi and also claimed the expenses. After that, Arbitrator became functus officio and having no authority to entertain any application. He also submitted that now respondent no.2 has filed an application on 21.10.2005 under Section 33 of New Act, 1996 for modification of award beyond limitation, i.e. after 30 days from the date of receipt of award unless another period of time has been agreed upon by the parties. In the present case, there is no such agreement and it is required on the part of Arbitrator to reject the application on the ground of limitation alone, but contrary to that, application was accepted and additional award dated 21.2.2006 has been given excepting the claim of respondent. He pointed out that Arbitrator proceeded to allow the much higher amount in additional award even which was never sought in the claim petition. The additional award was also given beyond limitation without obtaining the consent of the parties as provided under Section 33 of the Act. Against the additional award, he has preferred Writ C No. 30461 of 2006, in which earlier interim order was passed on 26.05.2006, but ultimately petition was dismissed vide order dated 8.5.2012 with liberty to petitioner to challenge the additional award under Section 34 of New Act, 1996.

9. He next submitted that as per Section 85 of New Act, 1996, arbitrator has no jurisdiction to decide the claim in New Act, 1996, once the proceeding has been initiated under the Old Act, 1940 unless there is an agreement between the parties. In the present case, agreement has never been sought or given, therefore, any award given by the arbitrator under the New Act, 1996 is without jurisdiction. In support of his contention, learned Senior Counsel placed reliance on the judgment of Apex Court in the matter of ***Thyssen Stahlunion GMBH etc. Vs. Steel Authority of India Ltd. : 1999 9 SCC 334, N D Nayak Vs. State of Goa: 2003(6) SCC 56*** and ***Neeraj Munjal Vs. Atul Grover Minor: 2005 5 SCC 404.***

10. He next submitted that as the award is without jurisdiction, therefore, this issue can be raised even at the stage of execution and for that, there is no

bar. In support of his contention, learned Senior Counsel placed reliance on the judgment of Apex Court in the matter of ***Kiran Singh and others Vs. Chaman Paswan and others: AIR Supreme Court 340, Bhavan Vaja Vs. Solanki Hanuji Khodaji Mansang: 1973(2) SCC 40, Harsad Chiman Lal Modi Vs. DLF Universal Ltd. 2005(7) SCC 791*** and ***Chief Engineer Hydel Project Vs. Ravinder Nath: AIR 2008 Supreme Court 1315***.

11. He lastly submitted that in case a judgment has been given without jurisdiction or contrary to existing law, principle of *res judicata* shall not be applicable. In support of his contention he placed reliance on the judgment ***Smt. Shakuntala Devi vs. Smt. Vimla reported in 2005 (59) ALR 5999***.

12. Sri Manish Goyal, learned Senior Counsel has vehemently opposed and submitted that petitioner cannot be permitted to blow hot and cold both as once order dated 14.04.2002 has been passed to proceed with the proceedings under New Act, 1996 and never challenged. He further submitted that first award dated 27.4.2005 has also been given under New Act, 1996, which was never been challenged by petitioner. Therefore, petitioner-plaintiff cannot said to be aggrieved person on the ground that additional award has been been given under Section 33 of the New Act, 1996 for that Arbitrator has no authority. Petitioner has also preferred appeal under Section 34 of the New Act, 1996 in compliance of order of writ court dated 8.5.2012 rather filing appeal under Section 30 of the Old Act, 1940.

13. So far as submission of record under Section 14 of Old Act, 1940 is concerned, he firmly submitted that in case of appointment of arbitrator, record has been submitted to the Court which appointed the arbitrator. In present case, the arbitrator was appointed by the District Judge and further Section 14 of Old Act, 1940 requires issuance of of notice by the Court to the parties, but in the present case, notice has never been issued, nor pressed by the petitioner-defendant. Therefore, the record has never been accepted by the Court under the provision of Old Act, 1940 as argued by learned counsel for the petitioner.

14. He next submitted that there is agreement of contract between the parties and Section 9 of agreement of contract contains arbitration clause.

Section 9.1.1.0 of Agreement of Contract Act itself provides provision of Indian Arbitration Act, 1940, all its re-enactments and modification thereof and rules made thereunder shall apply to all such arbitration, subject to certain conditions. He pointed out that Section 9.1.1.0 provides agreement of applicability of all statutory re-enactments or modification as provided in Section 85(2)(a) New Act, 1996.

15. He also submitted that in the judgment of Apex Court in the matter of ***Thyssen Stahlunion GMBH (Supra)***, three issues are decided by the Court and the third issue is almost pari materia to the issue involved in the present petition. Paragraphs 9 of the said judgment is dealing with the matter of Rani Constructions having the similar language of arbitration agreement as in the case of petitioner. It was replied in paragraph 35 of the judgment, where the Court has held that New Act, 1996 shall be applicable in the matter of Rani Constructions. Therefore, the same ratio of law as laid down by the Apex court shall also be applicable in the present case. Relying upon the same, in present matter arbitrator has passed order dated 14.04.2002 to continue the proceeding. He also submitted that from the perusal of order dated 14.04.2002, it is apparently clear that while passing the said order, it was very well accepted by the petitioner-defendant and it has never been objected. Petitioner-defendant proceeded to file four affidavits to proceed with the arbitration proceeding. Therefore, ratio of law laid down in paragraph 9 of judgment of Apex Court in the matter of ***Thyssen Stahlunion GMBH etc.(Supra)***, there is agreement and in light of Section 85(a)(2) of the New Act, 1996, arbitrator has rightly proceeded to pass order dated 14.04.2002 to commence the arbitration proceeding under New Act, 1996.

16. Learned Senior Counsel next submitted that from the perusal of the impugned order, it is apparently clear that petitioner-defendant has never disputed Clause 9.1.1.0 of Clause 9 of Arbitration Agreement and further never filed any application before the arbitrator that New Act, 1996 shall not be applicable. Not only this, he has proceeded to file appeal under Section 34 of the New Act, 1996 and not taken this ground, while filing the appeal. In objection filed under Section 47 of CPC in execution proceeding, he has

also concealed this fact. He firmly submitted that once there is such factual situation, petitioner-defendant cannot raise these grounds either before the Execution Court or before this Court.

17. Learned Senior Advocate submitted that there is an agreement between the parties which provides for arbitration clause and learned counsel for the petitioner is only relying upon the part of arbitration clause. He next submitted that so far it provides for arbitration as per existing Act, i.e. Act, 1940, he is having no objection. On other hand, the same agreement also provides consent for new enactment, which is objected by the petitioner. He next submitted that petitioner has no choice to accept the agreement in part, either he has to accept to complete agreement or discard the same. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the case of ***Caravel Shipping Services Privated Limited vs. Premier Sea Foods Exim Private Limited*** reported in ***(2019) 11 SCC 461.***

18. So far as, judgment of ***NS Naik (Supra)*** is concerned, he firmly submitted that in that case, award was pronounced in the year 1991 and only execution was remaining. Therefore, the Court is of the view that Appellate proceeding may not be initiated under the provision of New Act, 1996 and while deciding the issue in the case of ***NS Naik (Supra)***, it appears that Court has not considered the matter of Rani Construction referred in the judgment in the matter of ***Thyssen Stahlunion GMBH etc.(Supra)***, which is similar to this case.

19. He further submitted that scope of interference by the High Court under Article 227 regarding arbitration is extremely limited. In support of his contention, he placed reliance upon the judgment of this Court in the matter of ***Trading engineers Internation Ltd. Vs. U.P. power Transmission Corp. Ltd.: 2022(10) ADJ 176(LB).***

20. He next submitted that while filing appeal under Section 34 and FAFO under Section 37, petitioner has not taken any ground, which are taken here, therefore at a belated stage, he cannot be permitted to take such ground. In support of his contention, he placed reliance upon the Judgment of Apex

Court in the matter of ***Sweta construction Vs. Chhatisgarh State Power Generation Company Limited: 2022 SCC Online SC 1447.***

21. He next submitted that the arbitral award is not a decree as defined under Section 2, sub-Section (e) of C.P.C and there is difference between decree and award. An award is enforceable under Section 36 of the New Act, 1996 applying the provisions of C.P.C. This issue was dealt in detail by the Apex Court in the matter of ***Padmajeet Singh Patheja Vs. ICDS LTD: (2006) SCC 322.***

22. He next submitted that as the award is not a decree within the meaning of Section 2(e) of C.P.C., therefore, objection under Section 47 of C.P.C. is also not maintainable. This issue was earlier considered by this Court in the matter of ***Larsen & Tubro Limited Vs. Maharaji Educational Trust: 2010 SCC Online AII 1866***, relying upon the judgment of ***Padmajeet Singh Patheja (Supra).*** The judgment of ***Padmajeet Singh Patheja (Supra)*** was again followed by this Court in Civil revision No. 53 of 2022: ***Bharat Pumps and Compressors Ltd. Vs. Chopra Fabricators and Manufactures Pvt. Ltd***. Here the Court has reiterated the law that arbitral award is not a decree within the meaning of Section 2(e) of the C.P.C. and further, objection under Section 47 of CPC is not maintainable.

23. Against the judgment of ***Bharat Pumps and Compressors Ltd. (Supra)***, Opposite Party preferred SLP in the Apex court, but the Apex Court did not interefere with the ratio of law laid down by this court and only started monitoring of earlier disposal of dispute pending under Section 34. Therefore, law is on date settled that arbitral award is not a decree within the meaning of Section 2(e) and objection under Section 47 of CPC is not maintainable.

24. He lastly submitted that so far as issue of jurisdiction in arbitral proceeding is concerned, it cannot be raised at any stage of proceeding. There is specific provision for objections under Section 34 as well as 36, therefore once the objection has not been taken at the earlier stage, petitioner cannot be permitted to raise this issue before this Court.

25. In his rejoinder argument, Mr. Anil Sharma, learned Senior Counsel submitted that it is never his case that first award is valid and as arbitrator lacks jurisdiction, both the awards are nullity. In support of his contention, he has placed reliance upon the Section 3 of Act, 1940 read with Paragraph 3 of First Schedule, which provides that award has to be given within four months, whereas in the present case it has not been given within the time prescribed in aforesaid Schedule, therefore, awards are nullity. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the case of ***Hari Shankar Lal vs. Shairtbhu Nath reported in 1962 0 AIR (SC) 78 (Paragraph Nos. 10, 11 & 12)***. In light of aforesaid judgement, in case award is not given within the prescribed time, it is required on the part of parties to get the time extended under Section 28 of Old Act, 1940, in lack of that award would be nullity. He further submitted that with the consent of party under Section 28 of Old Act, 1940, Arbitrator may extend the time, which was never extended in present case.

26. Being confronted by the Court as to whether he has lodge his dissent after continuance of award after four months upon which he has replied that his consent or dissent has no meaning for this purpose.

27. So far as argument with regard to Section 3 of Act, 1940 read with Paragraph 3 of First Schedule as well as Section 28 of Old Act, 1940 is concerned, Mr. Manish Goyal, learned Senior Advocate submitted that counsel for petitioner neither pleaded nor argued earlier about the nullity of first award, therefore, same cannot accepted in rejoinder argument. He has occasion to raise this objection while filing application under Section 34 of New Act, 1996 and FAFO before this Court

28. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as judgment relied by the learned counsel for the parties. It is undisputed that present petition has been filed against the rejection of objection under Section 47 of CPC in execution proceedings of arbitral award.

29. Mr. Anil Sharma, learned Senior Counsel for the petitioner had argued that the provisions of New Act, 1996 shall not be applicable in which

arbitration award has been given, therefore, award is nullity and he can raise this objection at any stage.

30. Now, the Court is coming to the issue as to whether that in light of fact that arbitration proceedings was started under the provisions of Old Act, 1940 may continue in New Act, 1996 or not. For that purpose Section 85 (2) (a) of New Act, 1996 is relevant and same is being quoted hereinbelow:-

> "***85 (2)(a). Repeal and saving. –***
>
> *(2) Notwithstanding such repeal, -*
>
> *(a) The provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;"*

31. From perusal of the same, there is no doubt that in case arbitral proceedings is commenced before this Act shall continue in Old Act, 1940 unless otherwise agreed between the parties. Now the question is as to whether in the present matter, parties agreed for continuance of proceeding or not. For that I have to see the Section 9 of the Agreement of Contract, which contains arbitration clause and for present dispute Section 9.1.1.0 is very relevant and same is being quoted hereinbelow:-

> ***Section 9.1.1.0.***
>
> *"The provisions of the Indian Arbitration Act, 1940 and all statutory re-enactments and modifications thereof and the rules made thereunder shall apply to all such arbitrations, subject further to the following conditions:*
>
> *(a) The Arbitrator shall given his award separately in respect of each claim"*
>
> *(b) Insofar as any dispute or difference referred to arbitration shall related to or involves any matter or thing in respect of which the decision, opinion, or determination (howsoever expressed of the Owner or General Manager or Engineer-in-Charge or Site Engineer or any other person has been expressed to be final in terms of the Contract. Such decision, opinion and/or determination as the case may be, shall be binding upon the Arbitrator."*

32. Section 9.1.1.0 of Agreement of Contract provides the provision of Indian Arbitration Act, 1940 i.e. Old Act, 1940 and all statutory re-enactments or modification thereof and rules made thereunder shall be applicable.

33. Section 9.1.1.0. itself provides an agreement not only for Old Act, 1940, but all statutory re-enactments and modification thereof and rules framed thereunder. The said agreement is undisputed between the parties, therefore, it cannot be said that there is no agreement between the parties for applicability of New Act, 1996, in light of Section 9 of Agreement of Contract.

34. Mr. Anil Sharma, learned counsel for the petitioner has placed reliance upon the paragraph 32 of the ***Thyssen Stahlunion (supra)***. Relevant paragraph of the said judgment is quoted hereinbelow:-

> "32. *Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue that legal proceedings must be pending when the New Act, 1996, 1996 comes into force. To have the award enforced when arbitral proceedings commenced under the Old Act, 1940 under that very Act is certainly an accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the Old Act, 1940 though given after the coming into force of the New Act, 1996, 1996, would be quite grave if it is debarred from challenging the award under the provisions of the Old Act, 1940. Structure of both the Acts is different. When arbitral proceedings commenced under the Old Act, 1940 it would be in the mind of everybody, i.e., arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the Old Act, 1940. Nobody at that time could have thought that Sections 30 of the Old Act, 1940 could be substituted by Section 34 of the New Act, 1996, 1996. As a matter of fact appellant Thyssen in Civil Appeal No. 6036/98 itself understood that the Old Act, 1940 would apply when it approached the High Court under Sections 14 and 17 of the Old Act, 1940 for making the award rule of the Court. It was only later on that it changed the stand and now took the position that New Act, 1996, 1996 would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the New Act, 1996, 1996 had elapsed. Appellant itself led the respondent SAIL in believing that the Old Act, 1940 would apply. SAIL had filed objections to the award under Section 30 of the Old Act, 1940 after notice for filing of the award was received by it on the application filed by the Thyssen under Sections 14 and 17 of the Old Act, 1940. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the Old Act, 1940. We, therefore, cannot adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the Old Act, 1940 that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on the Section 85(2) (a) would only lead to the confusion and hardship. This construction put by us is consistent with the wording of Section 85(2) (a) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the Old Act, 1940 it would be the Old Act, 1940 which would apply for enforcing the award as well.*

35. Mr. Manish Goyal, learned Senior Counsel has also placed reliance upon the very same judgment and submitted before this Court that there are

three issues, which has to be decided. So far as issue no.3 Rani Constructions Pvt. Ltd. is concerned, the same is pari materia to the issue before this Court. Paragraph 9 of the said judgment is dealing with the issue of Rani Constructions Pvt. Ltd. and same is being quoted hereinbelow:-

> *"In the case of M/s. Rani Constructions Pvt. Ltd. (CA No. 61 of 1999) under the contract which was for the construction of certain works of the Himachal Pradesh State Electricity Board, there was an arbitration agreement contained in clause 25 which, in relevant part, is as under :*
> *"Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."*

36. From perusal of the same, it is apparently clear that language of Section 9.1.1.0. of Arbitration Clause is almost identical to the matter of Rani Constructions Pvt. Ltd. This issue was very well considered by the Apex Court and replied in its paragraphs 35 to 38 of the judgment of ***Thyssen Stahlunion (supra)***. Relevant paragraph of the said judgment is quoted hereinbelow:-.

> *"35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions - one of Bombay High Court and the other of Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. Expression "unless otherwise agreed" as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Construction that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give option to the parties to agree that new Act would apply to the pending arbitration proceedings. That agreement can be entered into even*

before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.36. Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by single Judge in Reshma Constructions v. State of Goa, (1999) 1 MLJ 462. In that case arbitration clause in the contract provided as under :

> *"Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re- enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."*

37. The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutory changes that may be brought about in such law. This is how the High Court considered the issue before it :

"Considering the scheme of the Act, harmonious reading of the said provision contained in sub-section (2) of Sec. 85 thereof would disclose that the reference "otherwise agreed" necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreements. It provides that though the law provides that the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Sec. 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be followed - other in terms of the new Act or the old Act - is certainly in consonance with the scheme of the Act, whereunder most of the provisions of the new Act, the procedure regarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample freedom to the parties to decide about the procedure to be followed in such proceedings; being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference "otherwise agreed by the parties" in Sec. 85(2)(c) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression "otherwise agreed" do not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act."

We agree with the High Court on interpretation put to the arbitration clause in the contract.

38. Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that. Thus construing the clause 25, in Rani Constructions (CA 61/99) new Act will apply."

37. As the language of both the matters are similar and Apex Court after considering in detail has held that an agreement can be made even before enactment of New Act, 1996 for its applicability and in arbitration clause

there is such agreement already present, therefore, there is no need to have any new agreement for compliance of Section 85(2)(a) and proceedings can be continued in New Act, 1996. Therefore, submission of learned counsel for the petitioner that there is no agreement between the parties as required under Section 85(2)(a) cannot be accepted. Judgment of ***Thyssen Stahlunion (supra)*** is not in favour of petitioner rather in favour of respondent as the similar issue has been considered and replied.

38. Once the Court is of the view that proceedings though initiated in Old Act, 1940 may continue in New Act, 1996, therefore, there is no requirement to return the finding about the other arguments of learned counsel for the petitioner upon the applicability of New Act, 1996.

39. Now coming to the another issue as to whether arbitral award is decree or not as defined under Section 2(2) of CPC and in case it is not a decree, objection filed under Section 47 of CPC is maintainable or not. It has also to be seen as to whether arbitral award can be enforced invoking the Section 36 of New Act, 1996 with the provision of CPC in the same manner as if it is decree of Court.

40. To opine on this issue, Section 2(2) and Section 36 of New Act, 1996 of CPC are required to be seen and same is being quoted hereinbelow:-

> **"Decree- Section 2 (2) of CPC**
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> *"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-*
> *(a) any adjudication from which an appeal lies as an appeal from an order,*
>
> *or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;"*
>
> **Section 36 of New Act, 1996**
>
> *"36. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.*

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).]

2[Provided further that where the Court is satisfied that a prima facie case is made out,-—

(a) that the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.— For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.]"

41. Arbitral award is decree or not in the meaning of Section 2(2) of CPC is concerned, has been considered by the Apex Court in the matter of ***Paramjeet Singh Patheja (Supra).*** Relevant paragraph of the same are quoted hereinbelow:- 20 to 29

"Sections 2(2) and 2(14) of the CPC define what 'decree' and 'order' mean. For seeing whether a decision or determination is a decree or order, it must necessarily fall in the language of the definition. Section 2(2) of the CPC defines 'decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-
(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation : A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

The words 'Court', 'adjudication' and 'suit' conclusively show that only a Court can pass a decree and that too only in suit commenced by a plaint and after adjudication of a dispute by a judgment pronounced by the Court. It is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree.

Section 2(14) defines 'order' to mean "the formal expression of any decision of a civil court which is not a decree;"

The words 'decision' and 'Civil Court' unambiguously rule out an award by arbitrators.

The above view has been consistently taken in decisions on Section 15 of the Indian Arbitration Act, 1899 viz. Tribhuvandas Kalidas vs. Jiwan Chand 1911(35) Bombay 196, Manilal Vs. The Bharat Spinning & Weaving (35) Bom. L.R. 941, Ramshai v. Joylall, AIR 1928 Calcutta 840, Ghulam Hussein vs. Shahban AIR 1938 Sindh 220. In Ramshai v. Joylall (supra), the Calcutta High Court held as follows:

"(a) Presidency Town Insolvency Act, S.9 (e) Attachment in execution of award is not one in executive of a decree.

Attachment in execution of an award is not attachment in the execution of a decree within the meaning of S.9(e) for the purpose of creating an act of insolvency: Re. Bankruptcy Notice, (1907) 1 K.B. 478, Ref.

(b) Arbitration Act, S.15 Award, An award is a decree for the purpose of enforcing that award only."

In Ghulam Hussein vs. Shahban AIR 1938 Sindh 220, the Court observed as follows:

"Section 9(e) must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency law is one of vital importance. Any inconvenience arising out of such a construction is for the Legislature to consider and remedy if they think proper by amendment; it is not for the Court to enlarge the meaning of the words used by the Legislature. An attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of S.9(e) for the purpose of creating an act of Insolvency: AIR 1928 Cal.840 approved and followed; 35 Bom. 196 relied on."

".The words: "In execution of the decree of any Court for the payment of money" cannot be extended by analogy. They must be extended, if at all, by the Legislature and we cannot hold that there has been an act of Insolvency when the definition given by the Legislature has not been complied with.

These are strong words and strong language, and as I have said above the judgment of Rankin C.J. must be treated with the greatest respect. The case of Ramsahai vs. Joylall is referred to by Sir D. Mulla in his Commentary on the Law of Insolvency at P. 94. In para 123 Sir D. Mulla states:

"An award for the payment of money filed in Court under S.11 of I.A.A. 1890 is not a 'decree' within the meaning of the present clause although it is enforceable under that Act as if it were a decree. No Insolvency petition can therefore be founded on an attachment or sale in execution of an award."

In support of this proposition Sir D. Mulla cites the case of Ramasahai v. Joylall (supra). The commentator proceeds:

It is therefore for consideration whether Cl.(e) should not be amended by adding the words 'or in execution of an award for the payment of money.' Now, it cannot be disputed that Sir D. Mulla as a commentator on the Law of Insolvency is universally regarded as an authority, and in the course of his Commentary on the Law of Insolvency Sir D. Mulla has not hesitated in several places to record his respectful dissent when he has considered that the judgment of any High Court in India is doubtful or incorrect. It is significant that in referring to the case in AIR 1928 Cal. 840, the learned commentator has not recorded any dissent, but on the contrary states that it is for consideration whether Cl.(e) should not be amended by adding the words 'or in execution of an award for the payment of money.' In this part of his commentary Sir D. Mulla has also referred to the case in 35 Bom 196, where it was held by a Bench of the Bombay High Court that an award filed in Court under S.11, Arbitration Act, was nothing more than an award although it

was enforceable as if it were a decree. In that case an application had been made under O.21, R.29, for stay of execution of a decree. The application was dismissed on the following grounds set out in the judgment of Sir Basil Scott C.J.:

Now, such an order can only be made by the Court, if there is a suit pending on the part of a person against whom a decree has been passed, against the holder of a decree of the Court. It appears to me that the petitioner is not a holder of a decree of the Courtfor the award, to which the applicants seek to give the force of a decree, is nothing more than an award, although it is enforceable as if it were a decree."

The same view was taken on Section 36 of the 1996 Act in Sidharth Srivastava v. K.K. Modi Investment & Financial Service P.Ltd. 2002(4) Mah. L.J. 281. It was held thus:

"Where the Award in favour of the petitioning creditor came to be passed on the basis of the consent terms and not on the basis of an adjudication, the Award which has the force of decree does not fulfil the essential conditions of decree as contemplated by Section 2(2) of the Civil Procedure Code. Even though the Award dated 5.9.1997 is enforceable as if it were a decree still it is not a decree within the meaning of the term as defined in section 2(2) of the Civil Procedure Code and, therefore, obtaining of such as Award does not fulfil the requisite conditions contemplated by clause (i) of section 9(1) of the Presidency Towns Insolvency Act. Consequently, on that basis the respondent cannot be said to have committed act of insolvency, either under clause (i) of sub-section 9(1) or sub-section (2) of section 9 of the Act. AIR 1928 Cal.840, AIR 1938 Sind 220, AIR 1975 Cal 169 and AIR 1976 SC 1503, Ref."

It is settled by decisions of this Court that the words 'as if' in fact show the distinction between two things and such words are used for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created.

Section 36 of the Arbitration & Conciliation Act, 1996 which is in pari materia with Section 15 of the 1899 Act, is set out hereinbelow:

"36. Enforcement Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court."

In fact, Section 36 goes further than Section 15 of the 1899 Act and makes it clear beyond doubt that enforceability is only to be under the CPC. It rules out any argument that enforceability as a decree can be sought under any other law or that initiating insolvency proceeding is a manner of enforcing a decree under the CPC.

Therefore the contention of the respondents that, an Award rendered under the Arbitration and Conciliation Act, 1996 if not challenged within the requisite period, the same becomes final and binding as provided under Section 35 and the same can be enforced as a Decree as it is as binding and conclusive as provided under Section 36 and that there is no distinction between an Award and a Decree does not hold water."

42. From perusal of the hereinabove, it is apparently clear that Apex Court has firmed view that though the arbitral award can be enforced under Section 36 of New Act alongwith the provisions of CPC, but arbitral award is not a decree under Section 2(2) of CPC. In the present case, there is no

dispute on the point that execution proceeding is initiated under Section 36 of New Act, 1996 for enforcement of an award, which is not a decree in light of discussion made hereinabove.

43. Now the second issue is as to whether in execution proceedings under Section 36 of New Act, 1996, objection under Section 47 of CPC is maintainable or not. The very same issue for consideration was before the Apex Court in the matter of ***Larsen & Tubro Limited (Supra).***

44. This Court in the matter of ***Larsen & Tubro Limited (Supra)*** relying upon the judgment of ***Padmajeet Singh Patheja (supra)*** has considered this issue that once the stage of Section 34 of New Act, 1996 is over and the question that were raised or could have been raised at that stage cannot be allowed to be raised again by filing objection under Section 47 of CPC at the time of execution of award. Relevant paragraph of the judgment ***Larsen & Tubro Limited (Supra)*** is being quoted hereinbelow:-

> *"The question which arises for consideration is whether the validity of arbitral award can be challenged in proceeding for its enforcement under Section 36 of the Arbitration and Conciliation Act, 1996 (herein after referred to as the "Act') taking recourse to section 47 C.P.C……..*
>
> *The matter can be viewed from another angle. Section 47 CPC provides for questions to be determined by the Court executing the decree. The said section reads as under :*
>
> *"47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*
>
> *(2)Omitted by the Code of Civil Procedure (Amendment Act, 1976, S. 20 (w.e.f. 1.2.1977)*
>
> *(3)Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.*
>
> *Explanation I.- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.*
>
> *Explanation II.- (a) for the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and*
>
> *(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."*
>
> *It is, thus, clear that in order to invoke section 47 CPC, there must be a decree. Section 2 (2) CPC defines the decree. For a decision or determination to be a decree, it must necessarily fall within the fore-corners of the language*

used in the definition. Section 2 (2) CPC defines decree to mean "formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include - (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default." Explanation. _ A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

The use of words "adjudication' and "suit' used by Legislature clearly goes to show that it is only a court which can pass a decree in a suit commenced by plaint adjudicating the dispute between the parties by means of a judgment pronounced by the Court. The Hon'ble Apex Court in the case of Paramjeet Singh Patheja Vs. ICDS Ltd., AIR 2007 SC - 168 after considering the definition of decree as contained in CPC in paragraph 29 has held that "it is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree". Again in paragraph 31, it has been held that words "decision', and "Civil Court' unambiguously rule out an award by arbitrators to be a decree. In the said case, the Hon'ble Apex Court while considering the question as to whether an insolvency notice under Section 9 of the Presidency Town Insolvency Act, 1909 can be issued on the basis of an arbitration award, held that such notice cannot be issued for the reason the arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2) of the Insolvency Act and it is not rendered in a suit. Thus, the award not being covered under the definition of a decree, objection with respect to its validity can only be raised as provided under Section 34 of the Act and not by taking resort to section 47 C. P. C.

Apart from above, the extent of judicial intervention has been circumscribed by Section 5 of the Act. In other words, judicial interpretation is prohibited except as provided under the Act. Section 5 of the Act reads as under :

"Section 5. Extent of judicial intervention._ Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

Section 5 of the Act falls under Part-I which includes within its ambit Section 2 to Section 43 of the Act. Thus, Sections 34 and 36 are also included in Part-I of the Act. The judicial intervention having been limited by the legislature, the Court cannot interfere at any and every stage on a ground other than those available in the Act itself. Thus, once stage of Section 34 is over and the award becomes final under Section 35, judicial intervention in the execution of the award under Section 36 cannot be held to be permissible on any ground, whatsoever, in view of the limitation imposed by Section 5 of the Act.

Thus, having regard to the provisions of Sections 5, 12, 13, 16, 34, 35 and 36 of the Act, the irresistible conclusion is only grounds which can be pressed into service for challenge to an award is within the ambit and scope of Section 34 of the Act. Once the stage of section 34 is over and the questions that were raised or could have been raised at that stage cannot be allowed to be raised again and again by pressing into service section 47 of the Code of Civil Procedure at the time of execution of award under Section 36 of the Act.

In view of the aforesaid facts and discussions, the applicant did not have any right to challenge the enforceability of the award by taking recourse

to Section 47 C. P. C. and the same were liable to be dismissed. It is altogether different question that the objections have been dismissed by the court below on different grounds and reasons but since they are liable to be dismissed, the impugned order does not require any interference.

The revision accordingly stands dismissed.

However, in the facts and circumstances, there shall be no order as to costs."

45. So far as present case is concerned, position is same as discussed in the matter of ***Larsen & Tubro Limited (Supra).*** Petitioner had full occasions to raise all these issues while filing appeal in Section 34 of New Act, 1996 and FAFO, but the same has never been raised. Therefore, by way of objection under Section 47 of CPC, he cannot be permitted to raise this issues nullifying the provision of Section 36 of Act, 1996.

46. Again the very same issue of filing of objection under Section 47 of CPC came before this Court in the matter of ***Bharat Pumps and Compressors Ltd. (supra)*** and Court following the ratio of law laid down by this Court in the matter of ***Larsen & Tubro Limited (Supra)*** has held as follows:-

"22. The Arbitration Act, 1940 is self-contained, complete code and section 17 thereof is in pari-materia with section 36 of the Arbitration & Conciliation Act, 1996. Section 20 thereof, provides for challenging the appointment of an Arbitrator. The revisionist never challenged appointment of the Arbitrator under section 20 thereof. Sections 30/33 and 37 of the Arbitration Act, 1940, read with Article 119 of the Limitation Act, give provision for an application to be filed within 30 days of notice of award; however, no such application within the said period was filed by the revisionist.

23. The arbitration award by way of friction is executed as decree, but it is not a decree as defined under section 2(2) of CPC and therefore, the objection under section 47 of CPC, which was filed only in execution of decree (as defined under section 2(2) CPC), is not maintainable in the proceedings seeking execution of award."

47. This Court has again taken view that arbitral award is not a decree under Section 2(2) of CPC, therefore, objection filed under Section 47 of CPC is not maintainable.

48. To conclude this point on the basis of undisputed fact, objection under Section 47 of CPC filed against the arbitral award is not maintainable as the same is not a decree under Section 2(2) of CPC. Further, arbitral award can be executed invoking Section 36 of New Act, 1996 alongwith the provisions of CPC in the same manner as if it is decree of the Court.

49. Therefore, in light of facts of the case, provisions of law as well as pronouncements made by the Apex Court as well as this Court, I found no good reason to interfere with the impugned orders. Writ petition lacks merit and is, accordingly, **dismissed** with the cost of Rs.1,00,000/- to be paid by the petitioners to respondent no.2.

Order Date :- 6.9.2023
Junaid