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

% **Order reserved on: 19 January 2023**
Order pronounced on: 24 January 2023

\+ OMP (ENF.) (COMM.) 135/2022 & EX.APPL.(OS) 3203/2022(Stay), EX.APPL.(OS) 3726/2022

HINDUSTAN ZINC LTD ..... Decree Holder

Through: Mr. Uday N. Tiwaly and Mr. Akshat Tiwaly, Advs.

versus

NATIONAL RESEARCH DEVELOPMENT CORPORATION

..... Judgement Debtor

Through: Mr. J. M. Kalia and Mr. Dhruv Kalia, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. The present execution petition has been instituted for enforcement of the final award dated 16 June 2014. The judgment debtor has preferred objections styling them as being under Section 47 of the **Code of Civil Procedure, 1908**[1]. Undisputedly, in respect of the award in question, objections under Section 34 of the **Arbitration and Conciliation Act, 1996**[2] have been preferred on 13 October 2014 and are still pending.

[1] Code
[2] Act

2. In terms of the objections preferred in these proceedings, it is contended that the sole arbitrator committed a manifest illegality while rejecting the claim of royalty as raised by the respondents herein and allowing a refund in favor of the petitioner. It is further averred that the counter claim which ultimately came to be allowed in terms of the award was also evidence of a manifest illegality having been committed since the same was barred by Section 3 of the **Limitation Act, 1963**[3] read with Section 43 of the Act.

3. In view of the aforesaid, it was the submission of learned counsel for the objector that the award thus rendered is a nullity and cannot be enforced. The submissions addressed on the objections and purporting to draw sustenance from Section 47 of the Code essentially rest upon a judgment rendered by a learned Judge of the Court in **Khanna Traders vs. Scholar Publishing House P. Ltd. & Ors.**[4] The submission of learned counsel primarily was that the objections so raised can be addressed even in enforcement proceedings as akin to the right that stands conferred in terms of Section 47 of the Code and which in turn obliges the executing court to deal with all questions that may arise in the course of execution of a decree of a court.

4. In **Khanna Traders,** the Court in course of execution of an arbitral award was called upon to deal with objections preferred by parties before it who had sought to contend that the award insofar as it permitted recourse against some of the judgment debtors in their personal capacity was invalid and should not be enforced. While

[3] The 1963 Act
[4] 2017 SCC OnLine Del 7684

dealing with the aforesaid question and considering whether such a challenge to the award could be entertained in proceedings for enforcement under Section 36, the learned Judge observed as under: -

> **"14.** As would immediately be evident from the judgments cited by respective counsels, the legal position is that an objection that the Court which passed the decree had no jurisdiction to pass the same can be taken under Section 47 of CPC in execution proceedings provided the said objection is evident on the face of the record and does not require any determination of facts. Such an objection has been distinguished from objections of other illegalities committed by the Court passing the decree viz. of awarding a high rate of interest, not awarding interest without giving any reasons therefor, not making the decree executable first against the principal debtor and making it executable simultaneously against principal debtor as well as guarantors etc., which cannot be taken in execution proceedings. What further emerges from the aforesaid judgments is that an objection that the Court which passed the decree had no jurisdiction to pass the same can be taken in execution proceedings only if it appears on the face of the record and does not require any determination of facts, not otherwise.
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> **15.** What has to however be adjudicated is, whether the said law applies to proceedings for execution of arbitral awards also particularly in the light of observations in ***MSP Infrastructure Ltd.*** and *Bharti Cellular Ltd.* supra cited by the counsel for DH.
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> **16.** Though the observations in both judgments supra to the effect that Parliament has enacted special rule of law to deal with arbitrations and contrary to general law on the subject, the said rule does not entitle an objection of jurisdiction to be taken at any time and that an objection as to jurisdiction cannot be permitted to be taken beyond the time prescribed therefor under Section 34 of the Arbitration Act, 1996, are of a very wide ambit but in my opinion are to be understood in the context of the facts in which they were made. The context in ***MSP Infrastructure Ltd.*** was, whether petition under Section 34 of the Arbitration Act, 1996 on the ground of lack of jurisdiction can be preferred, even before the Arbitral Award has been announced and during the pendency of the arbitral proceedings and immediately after such an objection has been raised before the Arbitral Tribunal and in ***Bharti Cellular Ltd.*** was whether a plea of Arbitral Tribunal not having jurisdiction can be taken after the time prescribed for filing a petition under Section 34 and by way of amendment thereto. In both cases,

objection of lack of jurisdiction in Arbitral Tribunal was sought to be taken in a manner in direct contravention of provisions of the Arbitration Act, 1996 i.e. by seeking to prefer a Section 34 petition during pendency of arbitral proceedings or by taking objection under Section 34 beyond the time prescribed in the Arbitration Act, 1996 therefor.

17. Here, however we are not concerned with any proceedings under the Arbitration Act. The proceedings under the Arbitration Act end on the challenge if made to the Arbitral Award being dismissed or on the challenge being not made within the prescribed time. Though under the Arbitration Act, 1940, the Arbitral Award was required to be made a rule of the Court and a decree but Section 36 of the Arbitration Act, 1996, after the said time confers the Arbitral Award with a status of a decree to "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".

18. In my view, the observations *MSP Infrastructure Ltd.* and *Bharti Cellular Ltd.* supra to the effect that the judgments of civil law would not apply to a proceeding under special law as the Arbitration Act, apply to only the proceedings provided for under the Arbitration Act and cannot be extended to the proceedings for execution of an Arbitral Award, as if it were a decree of the Court. Once the Arbitration Act, 1996 itself has conferred on the Arbitral Award the status of a decree of the Civil Court and made the same executable in accordance with the provisions of CPC, I see no reason to apply the aforesaid observations made in an entirely different context i.e. to execution proceedings. To interpret so would be a violation of the express provision of Section 36(1) of enforcement of the Arbitral Award in accordance with the provisions of the CPC in the same manner as if it were a decree of the Civil Court. If the intent of the legislature while enacting the Arbitration Act, 1996 had been to exclude objections of the nature permitted to be taken under Section 47 of the CPC in execution proceedings in execution of arbitral awards, for the reason of time limited for taking thereof under Section 34 of the Arbitration Act, 1996 or otherwise, it would have provided so and which has not been done. In the absence of any prohibition, the rights under the CPC cannot be taken away.

19. Moreover, the observations aforesaid in *MSP Infrastructure Ltd.* and *Bharti Cellular Ltd.* have to be harmonised with *Jagat Ram Trehan* supra which is a judgment on the proposition that a plea of lack of jurisdiction of the Arbitral Tribunal even if not taken by way of opposition to making the same rule of the Court,

> can be taken under Section 47 of the CPC in proceedings for execution thereof.
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> **20.** I thus hold that the objection of the JDs No. 2 to 5, if falls within the confines of Section 47 of the CPC, is entitled to be considered in accordance with the judgments cited by the senior counsel for the JDs No. 2 to 5 and *Vasudev Dhanjibhai Modi* supra cited by the counsel for DH."

5. As would be evident from the aforesaid passages appearing in the decision of the Court in **Khanna Traders,** the learned Judge essentially opined that once the Act had conferred on the award the status of a decree and made it executable in accordance with the provisions of the Code, there would exist no justification to exclude the applicability of Section 47 to execution proceedings. The learned Judge further held that holding otherwise would clearly do violence to the express provisions of Section 36 of the Act. It was also held that in the absence of an express prohibition in the Act excluding the applicability of Section 47 of the Code, objections raised on similar lines would clearly be maintainable. In view of the aforesaid principles as laid down in **Khanna Traders,** learned counsel for the objector contended that it would be incumbent upon the Court to deal with the objections under Section 47 before proceeding to take steps for enforcement of the award.

6. At the outset, it would merit notice that the decision in **Khanna Traders** rendered on 28 March 2017 has clearly failed to consider a judgment rendered by another learned Judge of the Court in **Morgan Securities & Credits Pvt. Ltd. v. Morepen Laboratories Ltd. &**

Anr.[5] The decision though cited by the learned Judge in **Khanna Traders** and so noticed was not accorded any consideration.

7. **Morgan Securities** was also dealing with certain objections which had come to be filed in an execution petition instituted for enforcement of a consent award. While dealing with the aforesaid objections, one of the issues which was framed by the learned Judge was whether an award could be challenged in the course of execution proceedings and in a situation where the judgment debtor had failed to assail the award itself in accordance with Section 34 of the Act. While answering the aforesaid question, the learned Judge held thus: -

> "IV: Can the judgment debtors challenge the award in execution proceedings, having chosen not to file a petition under Section 34 of the Arbitration and Conciliation Act, 1996?
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> **22.** The broad parameters concerning this question have already been discussed above. The position is that if the objections preferred by the judgment debtors are to be accepted then, it would amount to the setting aside of the arbitral award. Such a course is permissible only under Section 34. But, the judgment debtors did not file any application under Section 34 of the Arbitration and Conciliation Act. Instead, after making some payment under the arbitral award, they have moved these objections, the object of which is to set aside the arbitral award. Such a course of conduct cannot be permitted as it would amount to permitting the judgment debtors to do something indirectly which they cannot do directly. The judgment debtors did not file any application within the time prescribed under Section 34 of the Arbitration and Conciliation Act, 1996 and have lost their right, even if they had one, to petition for setting aside the award under Section 34 of the said Act. If they are not permitted to move an application for having the award set aside under Section 34 then surely they cannot be permitted to raise objections which, if accepted, would have the same effect as that of setting aside the award. This is what I mean when I say that the judgment debtors cannot be permitted to do something indirectly which it is not open for them to do directly.

[5] 2006 (91) DRJ 618

> **23.** In view of the foregoing discussion the objections preferred by the judgment debtors are not tenable and are rejected. The applications are, therefore, dismissed"

8. **Morgan Securities** was thus a binding precedent, and which had enunciated the legal position to be that once a judgment debtor had failed to invoke the provisions of Section 34 of the Act, it could not assail or question the validity of the award in proceedings for enforcement envisaged under Section 36. The learned Judge had further held that permitting such a recourse would essentially amount to enabling the judgment debtor to do something indirectly and which would otherwise appear to be prohibited under the Act. The ratio decidendi of the said decision clearly appears to be that challenges to an award can be permitted to be raised only by way of a petition under Section 34 of the Act and that its validity cannot be questioned or assailed in the course of execution proceedings. It was in the aforesaid light that the learned Judge had observed that parties cannot be permitted to raise a collateral challenge to the award in proceedings relating to its enforcement alone.

9. As noted hereinabove, while in **Khanna Traders**, the aforesaid decision was cited, the learned Judge neither accorded any consideration upon the same nor did the Court hold that the said decision was either inapplicable, inapposite, or distinguishable. It would also be pertinent to note that the decision of the learned Judge in **Morgan Securities** had been affirmed by a Division Bench of the Court which had dismissed the appeal. The judgment of the Division

Bench in **Morepen Laboratories Ltd. Vs. Morgan Securities & Credits Pvt. Ltd.**[6] though noticed was also not delved upon.

10. On a more fundamental plane, this Court finds that the learned Judge while rendering judgment in **Khanna Traders** also failed to notice the decision of the Full Bench of the Court i**n National Highway Authority of India vs. Oriental Structure Engineers Ltd.**[7] The Full Bench was called upon to consider the extent of the interplay between the provisions of the Act and other substantive and procedural laws including the Code. While dealing with the aforesaid question, the Full Bench had held as follows:-

> "**8.** We have heard the learned Counsel for the parties, and considered their submissions. In our view the answer to the issue at hand necessarily lies in the answers to the following questions which arise for consideration:
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> (i) Is the Arbitration Act a complete code by itself both on substantive and procedural laws?
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> (ii) Is the route of limited notice adopted by the Court in derogation of any known principle of law or can it be amalgamated in the principles of law generally adopted by Civil Courts, while dealing with actions of various nature *i.e.* Suits, Appeals, Revisions, statutory Appeals, etc.?
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> (iii) Is there a bar in Section 37 of the Arbitration Act in maintaining more than one Appeal?
>
> (iv) Did the Supreme Court totally exclude the possibility of the award being executed *qua* the claims which stand rejected in a proceeding under Section 36 of the Arbitration Act?
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> **9.** The Arbitration and Conciliation Act, 1996 is a broad amalgam of the Arbitration Act, 1940 (in short 1940 Act), the Arbitration (Protocol and Convention) Act, 1937 (in short 1937 Act) and the Foreign Awards (Recognition & Enforcement) Act, 1961 (in short 1961 Act). In that sense it consolidates and amends the aforementioned Acts. The Supreme Court in its judgment in the case of ***Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.***, 2011 (8)

[6] 2008 SCC OnLine Del 940
[7] 2012 SCC OnLine Del 4787

SCC 333, in the context of an issue raised before it as to whether a remedy by way of a Letters Patent Appeal would be available in respect of an order which otherwise is not Appealable under Section 50 of the 1996 Act came to the conclusion that since 1996 Act was a self-contained code the provisions of the Letter Patent Act, which provides for an intra-code Appeal, would stand excluded. The relevant observations of the Court in that regard are contained in Paragraph 89 at page 371; which for the sake of convenience is extracted herein below:

> "…..It is, thus, to be seen that Arbitration Act, 1940 from its inception and right, through to 2004 (in *P.S. Sathappan*) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amend and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by the Application of one of the general principles that where the Special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded….."

10. As a matter of fact the Supreme Court in an earlier judgment passed in the case of ***Sundaram Finance Ltd.* v. *NEPC Ltd.*, 1999** (2) SCC 479, while dwelling upon the issue as to whether a Court would have jurisdiction to pass interim orders even before Arbitral proceedings commence or the Arbitrator is appointed by taking recourse to provisions under Section 9 of the 1996 Act, observed that: The 1996 Act was very different from the provisions of the 1940 Act and, therefore, the provisions of the 1996 Act would have to be interpreted and construed independently of the 1940 Act. The Supreme Court in fact had gone on to say that a reference to the provisions of the 1940 Act in interpreting the provisions of 1996 Act may lead to mis-construction. In sum and substance the Supreme Court opined that provisions of the 1996 Act should be interpreted without being influenced by principles underlying the 1940 Act. Therefore, the debate as to whether the 1996 Act is a self-contained code is no longer *res integra*, in so far as what is contained therein. Thus, 1996 Act in effect displaces all such aspects of substantive and

procedural law in respect of which there is an explicit or implied reference in the said Act.

10.1. Would that mean that every aspect of CPC is excluded. The answer to this has to be in the negative. The reason for this according to us is simple, as the 1996 Act itself envisages the recourse to be taken to the provisions of CPC in certain circumstances. For example, in this context regard may be had to Sections 9, 27 & 36 of the 1996 Act. Under Section 9, where power has been conferred on the Court to put in place interim measures on a party approaching the Court prior to the proceedings under the 1996 Act reaching the stage of enforcement, as envisaged under Section 36, the Court is conferred with all such powers for making orders as envisaged in Section 9 as it would in "any" proceedings before it.

10.2. Likewise, under Section 27 where either the Arbitral Tribunal or the party, before the Arbitral Tribunal, with its approval applies to the Court for assistance in taking evidence, recourse can be taken to the provisions of the CPC, as would be evident from the following.

10.3. Under sub-section (4), the Court while making an order for provision of evidence under sub-section (3) is empowered to issue the same processes as it may to witnesses before it in a Suit being tried before the Court. Upon failure of persons to attend in accordance with such processes being issued to them or committing a default or refusing to give evidence or even being guilty of contempt of the Arbitral Tribunal, they would be subject to such like disadvantages, penalties and punishments, which the Court may impose by its order on a representation of the Arbitral Tribunal as it can do in Suits being tried before it.

10.4. Similarly, while enforcing an award under Section 36, the Court is empowered to resort to the provisions of the CPC, in the same manner as if the award was a decree of the Court. The only caveat being that the enforcement of the award would have to await the expiry of time provided in Section 34 of the 1996 Act for making an Application to set aside the award or the rejection by a Court of a Petition in that respect. The interesting aspect is while some aspects of the procedural law are available to the Court while dealing with issues arising in Arbitral proceedings both before, during and after passing of the award as also at the stage of execution of the award an attempt is made by the legislature, quite consciously, to not to super impose the entire web of procedural law.

> **10.5.** Therefore, while in one sense both the arbitrator and the Civil Court before whom the proceedings arise, under the 1996 Act, are free from the entanglement of any other substantive or procedural law, in respect of which provisions are contained in the 1996 Act, there is yet the scope for taking recourse to procedural law that is the CPC to provide greater efficacy to the Arbitral process. Therefore, while interpreting the provisions of Section 34 & 37 of the 1996 Act, in our view, this aspect will have to be borne in mind."

11. As would be evident from the principles enunciated in **Oriental Structure,** the Full Bench of the Court had recognized the limited applicability of the Code with principles underlying its provisions being adopted if found expedient and in the interest of providing greater efficacy to the arbitral process. In **Oriental Structure,** it was aptly observed that while certain aspects of a procedural law are available to be adopted by a court while dealing with issues arising either before, during or in the course of arbitral proceedings, or for that matter even after the passing of the award and at the stage of its execution, the provisions of the Act clearly indicated the intent of the legislature to consciously not *"superimpose the entire web of procedural law"* over arbitral proceedings.

12. The Court further notes that unlike Section 41 of the erstwhile Arbitration Act, 1940 which made the provisions of the Code applicable to all proceedings that may be instituted before a court arising out of arbitral proceedings, the present Act clearly and in unmistakable terms strikes a clear and conscious departure from that regime. It is the aforesaid context that Courts have repeatedly held that the Act is liable to be viewed and understood as being a complete and comprehensive code in itself insofar as arbitral proceedings are

concerned. This aspect was duly highlighted and underlined even by the Full Bench of our Court in **Oriental Structure**. The Court is thus of the firm opinion that while it may be open to look upon the various provisions of the Code for guidance and to aid the conduct of arbitral proceedings, it would be wholly incorrect to countenance the submission that the provisions of the Code would mandatorily apply to arbitral proceedings. This Court is constrained to observe that these significant and fundamental precepts have clearly not been considered in **Khanna Traders**. The said decision in any case not only fails to notice a prior decision rendered by a coordinate Bench but also the judgment of the Full Bench of our Court both of which were clearly germane to the issue that had arisen for consideration.

13. Before proceeding further, it would also be pertinent to notice and articulate the extent to which Section 36 envisages the provisions of the Code being embraced or applied to arbitral proceedings. As would be evident from a plain reading of the said provision, it engrafts a legal fiction in terms of which an award rendered by an Arbitral Tribunal can be enforced as if it were a decree of a court. The conferral of the status of a decree upon the award that may be rendered by an Arbitral Tribunal is only to enable its enforcement in a manner identical to that of a decree of a court. The limited application of that legal fiction was noticed by the Supreme Court initially in **Paramjeet Singh Patheja v. ICDS Ltd.**[8] Explaining the extent of the import of Section 36 when it enables an award being enforced and executed as a decree, the Supreme Court had held thus:-

[8] (2006) 13 SCC 322

"**17.** We are of the view that the Presidency Towns Insolvency Act, 1909 is a statute weighed down with the grave consequence of "civil death" for a person sought to be adjudged an insolvent and therefore the Act has to be construed strictly. The Arbitration Act was in force when the PTIA came into operation. Therefore it can be seen that the lawmakers were conscious of what a "decree", "order" and an "award" are. Also the fundamental difference between "courts" and "arbitrators" was also clear as back as in 1909.

18. Further, the Arbitration Act, 1899 clearly draws the distinction between courts and arbitrators. The Preamble of the Act shows that it is an Act for dealing with "arbitration by agreement without the intervention of a court of justice". Section 4(*a*) defines "court" and various sections deal with the powers of the court. Section 11 provides for the making of an "award". Section 15 provides for its enforcement. It can therefore be observed that it is only for the purpose of enforcement of the award that the arbitration award is treated as if it were a decree of the court.

21. The words "court", "adjudication" and "suit" conclusively show that only a court can pass a decree and that too only in a 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.

28. 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.

29. Section 36 of the Arbitration and Conciliation Act, 1996 which is in *parimateria* 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.*"
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> (emphasis supplied)

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 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 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.
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> **39.** Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus a final award, without actually being followed by a decree (as was later provided by Section 17 of the Arbitration Act of 1940), could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act are concerned.
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> **42.** The words "*as if*" demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central."

14. In **Pam Developments Pvt. Ltd. v. State of West Bengal**[9]**,** the Supreme Court was called upon to consider whether the provisions of Order XXVII Rule 8A of the Code would apply to an arbitral challenge which may be laid by a governmental entity. Explaining the limited extent to which the provisions of the Code could be applied, the Supreme Court held as follows: -

> **"18.** The backbone of the submissions on behalf of the respondent State of West Bengal is that under the provisions of Order 27 Rule 8-A CPC, no security shall be required from the Government in case of there being a money decree passed against the Government, and the execution of which is prayed for. If such submission of the respondent is accepted then the same would mean that mere filing of an objection under Section 34 of the Arbitration Act by a Government shall render the award unenforceable as the stay order

[9] (2019) 8 SCC 112

would be passed in a mechanical manner and as a matter of course, without imposing any condition against the Government, judgment-debtor. If the contention is accepted, the effect would be that insofar as the Government is concerned, the unamended provision of Section 36 of the Arbitration Act would automatically come into force.

19. In this backdrop, we have now to consider the effect of Section 36 of the Arbitration Act, vis-à-vis the provisions of Order 27 Rule 8-A CPC. Sub-section (3) of Section 36 of the Arbitration Act mandates that while considering an application for stay filed along with or after filing of objection under Section 34 of the Arbitration Act, if stay is to be granted then it shall be subject to such conditions as may be deemed fit. The said sub-section clearly mandates that the grant of stay of the operation of the award is to be for reasons to be recorded in writing "subject to such conditions as it may deem fit". The proviso makes it clear that the Court has to "have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure". The phrase "have due regard to" would only mean that the provisions of CPC are to be taken into consideration, and not that they are mandatory. While considering the phrase "having regard to", this Court in *Shri Sitaram Sugar Co. Ltd.* v. *Union of India* [*Shri Sitaram Sugar Co. Ltd.* v. *Union of India*, (1990) 3 SCC 223] has held that : (SCC p. 245, para 30)

> "*30*. The words "having regard to" in sub-section are the legislative instruction for the general guidance of the Government in determining the price of sugar. They are not strictly mandatory, but in essence directory".

20. In our view, in the present context, the phrase used is "having regard to" the provisions of CPC and not "in accordance with" the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. the Arbitration Act) itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act, the provisions of CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act.

26. Arbitration proceedings are essentially alternate dispute redressal system meant for early/quick resolution of disputes and in

case a money decree — award as passed by the arbitrator against the Government is allowed to be automatically stayed, the very purpose of quick resolution of dispute through arbitration would be defeated as the decree-holder would be fully deprived of the fruits of the award on mere filing of objection under Section 34 of the Arbitration Act. The Arbitration Act is a special Act which provides for quick resolution of disputes between the parties and Section 18 of the Act makes it clear that the parties shall be treated with equality. Once the Act mandates so, there cannot be any special treatment given to the Government as a party. As such, under the scheme of the Arbitration Act, no distinction is made nor any differential treatment is to be given to the Government, while considering an application for grant of stay of a money decree in proceedings under Section 34 of the Arbitration Act. As we have already mentioned above, the reference to CPC in Section 36 of the Arbitration Act is only to guide the court as to what conditions can be imposed, and the same have to be consistent with the provisions of the Arbitration Act.

27. It may be true that CPC provides for a differential treatment to the Government in certain cases, but the same may not be so applicable while considering a case against the Government under the Arbitration Act. For instance, Section 80 CPC provides for a notice of two months to be given before any suit is instituted against the Government. Further, it also provides that no ex parte injunction order can be passed against the Government. Whereas on the other hand, under the Arbitration Act no such special provision has been made with regard to arbitration by or against the Government. There is no requirement under the Arbitration Act for a notice of two months to be given to the Government before invoking arbitration proceeding against the Government. Further, Sections 9 and 17 of the Arbitration Act also provide for grant of ex parte interim orders against the Government.

28. Section 36 of the Arbitration Act also does not provide for any special treatment to the Government while dealing with grant of stay in an application under proceedings of Section 34 of the Arbitration Act. Keeping the aforesaid in consideration and also the provisions of Section 18 providing for equal treatment of parties, it would, in our view, make it clear that there is no exceptional treatment to be given to the Government while considering the application for stay under Section 36 filed by the Government in proceedings under Section 34 of the Arbitration Act."

15. While on the issue of the legal fiction which stands engrafted in Section 36, it may be noted that this Court in a recent decision rendered in **Gujarat JHM Hotels Ltd vs. Rajasthali Resorts and Studios Limited**[10] had an occasion to deal with the said issue and notice the various decisions rendered on the aforesaid aspect. The Court deems it apposite to extract the following passages from **Gujarat JHM:-**

> "37. It was significantly observed that Section 36 only provided for an award being liable to be executed as a decree. This obviously since that award is not one which has come to be rendered by a court as understood in the strict legal sense. **Sundaram Finance** thus appears to recognise the limited extent to which the legal fiction enshrined in Section 36 would extend. The limited extent of the legal fiction which stands engrafted in Section 36 of the Arbitration and Conciliation Act, 1996 was also highlighted by the Supreme Court in **Union of India v. Vedanta Ltd.** [11] in the following terms:
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> > "**69.** Section 36 of the Arbitration Act, 1996 creates a statutory fiction for the limited purpose of enforcement of a "domestic award" as a decree of the court, even though it is otherwise an award in an arbitral proceeding [*Umesh Goel* v. *H.P. Coop. Group Housing Society Ltd.*, (2016) 11 SCC 313 : (2016) 3 SCC (Civ) 795] . By this deeming fiction, a domestic award is deemed to be a decree of the court [*Sundaram Finance Ltd.* v. *Abdul Samad*, (2018) 3 SCC 622 : (2018) 2 SCC (Civ) 593] , even though it is as such not a decree passed by a civil court. The Arbitral Tribunal cannot be considered to be a "court", and the arbitral proceedings are not civil proceedings. The deeming fiction is restricted to treat the award as a decree of the court for the purposes of execution, even though it is, as a matter of fact, only an award in an arbitral proceeding. In *Paramjeet Singh Patheja* v. *ICDS Ltd.* [*Paramjeet Singh Patheja* v. *ICDS Ltd.*, (2006) 13 SCC 322] , this Court in the context of a domestic award, held that the fiction is not intended to make an award a decree for all purposes, or under all statutes, whether State or Central. It is a legal fiction which must be limited to the purpose for which it

[10] 2023/DHC/000323
[11] (2020) 10 SCC 1

was created. Paras 39 and 42 of the judgment in *Paramjeet Singh Patheja* [*Paramjeet Singh Patheja* v. *ICDS Ltd.*, (2006) 13 SCC 322] read as : (SCC pp. 345-46)

> "*39.* Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus *a final award, without actually being followed by a decree* (as was later provided by Section 17 of the Arbitration Act of 1940), *could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act are concerned*.
>
> ***
>
> *42. The words "as if [**Ed.**: The words "as if" have been emphasised in original as well.] " demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central*."
>
> (emphasis supplied)"

38. The limited extent of the legal fiction enshrined in Section 36 as noticed in **Vedanta** was reiterated by the Supreme Court in its recent decision in **Amazon.Com NV Investment Holdings LLC v. Future Retail Limited**[12] as would be evident from the following passage: -

> "**77.** This judgment in *Vedanta* [*Union of India* v. *Vedanta Ltd.*, (2020) 10 SCC 1] is, therefore, authority for the proposition that the fiction created by Section 49 of the Arbitration Act is limited to enforcement of a foreign award, with the important corollary that an application to enforce an award is an application under the Arbitration Act and not an application under Order 21 of the Code of Civil Procedure (in which case, such application would have been governed by Article 136 of the Limitation Act as an execution application under Order 21, and not an application under the residuary Article 137 of the Limitation Act). Mr Salve's

[12] (2022) 1 SCC 209

> attempt to distinguish this judgment on the ground that Section 49 lays down an entirely different procedure from the procedure to be followed for a domestic award qua enforceability does not, in any manner, distinguish the ratio of this judgment which is that an application to enforce a foreign award is not under Order 21 of the Code of Civil Procedure but under the Arbitration Act. Also, the deeming provision in Section 49, having reference to a decree of "that Court", which refers to the court which is satisfied that the foreign award is enforceable, again, makes no difference to the aforesaid ratio of the judgment."

16. For the sake of completeness, it would also be pertinent to note that the learned Judge who authored **Khanna Traders** had while answering a question with respect to the applicability of Section 42 to enforcement petitions in **Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.**[13] observed as follows: -

> **"17.** Once, Section 42 is out of the way, the question arises as to whether "Court" in Section 36 is to take its colour from Section 2(1)(e). If that were to be so then it will have to be seen which was the Court which was competent to pass the decree had the subject matter of the arbitration been the subject matter of the suit. On such reasoning, the Court would be the Court at Guwahati to whose jurisdiction the parties had agreed in matters other than the arbitration.
>
> **18.** However, in my view the expression "Court" in Section 36 is not meant to be the Court within the meaning of Section 2(1)(e). The definitions in Section 2(1(e) are, "unless the context otherwise requires". The word "Court" is used in Section 36 only in the context of, by a legal fiction, making the award executable as a decree of the Court within the meaning of CPC. The word "Court" therein is used to describe the manner of enforcement *i.e.* as a "decree of the Court" and not in the context of providing for the Court which will have territorial jurisdiction to execute/enforce the award. In this context, the contention of the Counsel for the decree holder of the difference in language in Section 36 and in Section 49 is significant. The Legislature has in Section 49 provided for the enforcement of foreign awards by deeming the said awards to be a decree of

[13] 2009 SCC OnLine Del 511

> "that Court" which would mean the decree of the Court which has adjudicated on the enforcement of the award. However, the Legislature in Section 36 did not use the expression "that" and which is indicative of the reference to Court therein being only to describe the manner of enforcement of the award as a decree of the Court. There does not appear to be a legislative mandate to the effect that arbitral award has to be treated as a decree of that Court only which would have had the jurisdiction to entertain the suit.
>
> **19.** Section 38 of the CPC applies only to a decree passed by the Court. In the present case no Court has passed the decree. What is to be the position in such cases? which Court is empowered to execute the award, which is a decree by a legal fiction and which has not been passed by any Court?
>
> **25.** In this regard the addition of Sub-section (4) to Section 39 *vide* CPC Amendment Act, 2002 is relevant. It provides that nothing in Section 39 shall be deemed to authorize the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The legislative intent appears to be that the decree should be executed by the Court within whose territorial jurisdiction the person or the property of the judgment debtor is situated. That is logical also. The purpose of execution is realization of money from the property or the property of the judgment debtor. Thus while territorial jurisdiction for suits is determined by place of occurrence of cause of action, residence of defendant, locus of property, etc., the territorial jurisdiction for execution is determined only by locus of judgment debtor or the property. The agreement between the parties restricting jurisdiction of one, amongst many Courts also does not extend to execution and is applicable to the Court which will adjudicate the *lis*. I do not see any reason, why where an award has been made executable as a decree, the execution cannot lie at a place where the property against which the decree is sought to be enforced is situated. That Court in my view would have inherent jurisdiction to execute the decree and in the absence of applicability of mandate of Section 38 of CPC, pedantic insistence on first applying for execution to one Court, merely to obtain transfer would be also contrary to intent of expedition in the 1996 Act."

17. As would be evident from the passages extracted hereinabove, the same learned Judge in **Daelim** had found that the use of the word "Court" in Section 36 was only to indicate the manner of enforcement

of an award and in any case did not amount to the award itself being understood to mean or be equivalent to a decree of a Court. On fundamental principles, therefore, a strict importation of the various provisions of the Code to enforcement actions that may be initiated under Section 36 would not only be contrary to the express provisions made therein, but also fall foul of the legislative policy underlying the Act itself.

18. This aspect was duly highlighted by the Supreme Court in **MSP Infrastructure Ltd. vs. Madhya Pradesh Road Development Corporation Ltd.**[14] as would be evident from the following observations entered therein: -

> **"12.** It is clear from the circumstances, that in the event it is found that the newly added ground could not have been raised at this stage i.e. the stage at which it was allowed to be raised, it is not necessary to go into the wider question as to which Act will prevail, the Central Act or the State Act. Thus, the only question that falls for consideration at this stage is whether, having regard to Section 16 of the Arbitration Act, 1996, the respondent was entitled to introduce the ground that the Arbitration Tribunal constituted under the M.P. Act of 1983 would take precedence over the tribunal constituted under the Arbitration Act, 1996, that too by way of an amendment to the petition under Section 34.
>
> **13.** Section 16(2) of the Arbitration Act, 1996 reads as follows:
>
> "**16. (2)** A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator."
>
> On a plain reading, this provision mandates that a plea that the tribunal does not have jurisdiction shall not be raised later than the submission of the statement of defence. There is no doubt about either the meaning of the words used in the section nor the intention. Simply put, there is a prohibition on the party from raising a plea that the tribunal does not have jurisdiction after the

[14] (2015) 13 SCC 713

party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning a tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. This is exactly what has been done by the respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree.

14. Shri Divan, the learned Senior Counsel for the respondent vehemently submitted that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the court which decided the matter, since the order of such a court is a nullity. It is not necessary to refer to the long line of cases in this regard since, that is the law. But, it must be remembered that this position of law has been well settled in relation to civil disputes in courts and not in relation to arbitrations under the Arbitration Act, 1996. Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament, in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. In the circumstances, we reject the submission on behalf of the respondent."

19. In **Mahanagar Telephone Nigam Limited v. Applied Electronics Ltd.**[15]**,** the Supreme Court was called upon to consider whether cross objections could be entertained on principles analogous

[15] (2017) 2 SCC 37

to those contained in the Code. While rejecting that contention, the Supreme Court held as under: -

> "**9.** Relying on the aforesaid provisions, it is proponed by Mr Kaul that it is a complete code from all angles and hence, CPC would not have any application and once CPC is not applicable, entertaining a cross-objection under Order 41 Rule 22 is totally impermissible. In this context, we may usefully refer to Section 41(*a*) of the 1940 Act. The said provision dealt with procedure and powers of court. For the sake of completeness, we extract the same:
>
> > "**41.** ***Procedure and powers of court***.—Subject to the provisions of this Act and of rules made thereunder—
> >
> > (*a*) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the court, and to all appeals, under this Act; and
> >
> > (*b*) * * *"
>
> **10.** <u>On a perusal of the said provision, in juxtaposition with the provisions contained in the 1996 Act, it seems to us that the legislature has intentionally not kept any provision pertaining to the applicability of CPC. On the contrary, Section 5 of the 1996 Act lays the postulate, that notwithstanding anything contained in any other law for the time being in force in matters covered by Part I, no judicial authority shall intervene except so provided wherever under this Act.</u>
>
> **16.** In *Pandey & Co. Builders (P) Ltd.* [*Pandey & Co. Builders (P) Ltd.* v. *State of Bihar*, (2007) 1 SCC 467], the Court reproduced a passage from the treatise *Law and Practice of Arbitration and Conciliation* wherein the learned authors have stated thus: (SCC pp. 472-73, para 22)
>
> > "*22.* … 'In the context of this Act, Section 37(3) barring second appeal against an appellate order under Sections 37(1) and (2) is really superfluous. This Act has not enacted any provision analogous to Section 41 of the previous Act. It is radically different from the Act of 1940. Therefore, the Code of Civil Procedure, 1908 proprio vigore does not apply to the proceedings before the court in its original or appellate jurisdiction. Section 5 imposes a blanket ban on judicial intervention of any type in the arbitral process except "where so provided under Part I" of this Act. Pursuant to this provision, Section 37(1) provides appeals against certain orders of the court, while Section 37(2) provides appeal against certain orders of the Arbitral Tribunal. However, Section 37(3) prohibits a second appeal against the appellate

> order under Sections 37(1) and (2). However, in view of the provisions of Section 5, a second appeal against the appellate order under Sections 37(1) and (2) would not be permissible, even if Section 37(3) had not been enacted. It was, therefore, not really necessary to enact this provision, and it seems to have been enacted by way of abundant caution.'"

17. We may immediately state that Mr Kaul has commended the said passage to highlight that the same has been given the stamp of approval by this Court. We have referred to the said passage only to emphasise the effect and impact of Section 5 of the 1996 Act. In the said decision, it has also been ruled that even if the bar under Section 37(3) of the 1996 Act would not have been provided by the legislature, Section 5 would have been adequate enough to bar a second appeal.

18. In *Fuerst Day Lawson Ltd.* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178], the issue that arose for consideration was whether an order, though not appealable under Section 50 of the 1996 Act, could nevertheless be subject to appeal under the relevant provisions of the Letters Patent of the High Court. We are absolutely conscious that the said judgment was delivered in the context of Part II of the Act. Section 5, as noticed earlier, does not relate to Part II. However, analysing various authorities relating to maintainability of the letters patent appeal, the Court pointed out the distinction between the language of the 1940 Act and the 1996 Act. In this context, it is profitable to quote para 89 in its entirety: (SCC p. 371)

> "*89.* It is, thus, to be seen that the Arbitration Act, 1940, from its inception and right through to 2004 (in *P.S. Sathappan* [*P.S. Sathappan* v. *Andhra Bank Ltd.*, (2004) 11 SCC 672]) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carried with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the

special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

26. As is manifest, a person grieved by the award can file objection under Section 34 of the 1996 Act, and if aggrieved on the order passed thereon, can prefer an appeal. The court can set aside the award or deal with the award as provided by the 1996 Act. If a corrective measure is thought of, it has to be done in accordance with the provision as contained in Section 37 of the 1996 Act, for Section 37(1) stipulates for an appeal in case of any grievance which would include setting aside of an arbitral award under Section 34 of the Act.

27. Section 5 which commences with a non obstante clause clearly stipulates that no judicial authority shall interfere except where so provided in Part I of the 1996 Act. As we perceive, the 1996 Act is a complete code and Section 5 in categorical terms along with other provisions, lead to a definite conclusion that no other provision can be attracted. Thus, the application of CPC is not conceived of and, therefore, as a natural corollary, the cross-objection cannot be entertained. Though we express our view in the present manner, the judgment rendered in *ITI Ltd.* [*ITI Ltd.* v. *Siemens Public Communications Network Ltd.*, (2002) 5 SCC 510] is a binding precedent. The three-Judge Bench decision in *International Security & Intelligence Agency Ltd.* [*MCD* v. *International Security & Intelligence Agency Ltd.*, (2004) 3 SCC 250] can be distinguished as that is under the 1940 Act which has Section 41 which clearly states that the procedure of CPC would be applicable to appeals. The analysis made in *ITI Ltd.* [*ITI Ltd.* v. *Siemens Public Communications Network Ltd.*, (2002) 5 SCC 510] to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act clearly envisages otherwise and the legislative intendment also so postulates."

20. **Mahanagar Telephone,** assumes significance in light of the emphasis which was laid by the Supreme Court on Section 5 of the Act and the enactment itself being liable to be construed and understood as being a comprehensive legislation governing all aspects of arbitral proceedings. The Court deems it apposite to lay emphasis on the above since the acceptance of the contention as advanced by

learned counsel for the objector would essentially amount to recognizing a right inhering in the objector to challenge or question the award on its merits in proceedings which stand restricted to enforcement and execution. That cannot possibly be permitted in light of the plain command of Section 36 of the Act. It would be pertinent to note that the Act envisages a challenge to an arbitral award being mounted solely within the contours of Section 34. Section 34 not only constructs the forum but also creates the right to question an arbitral award on grounds specified in that provision itself. This is manifest from the use of the expression *"only if...."* as occurring in Section 34(2). Accepting the contention of learned counsel for the objector that a challenge to the award on merits would also be permissible in proceedings referable to Section 36 would clearly amount to recognizing the same being an avenue available to be invoked in addition to the limited right which stands conferred by Section 34. Bearing in mind the principal objectives of the Act as well as the legislative policy underlying Sections 34 and 36, the Court finds itself unable to countenance the submission as addressed at the behest of the objector.

21. It would be pertinent to note that Order XXI of the Code compendiously deals with the subject relating to execution of decrees. Those provisions extend from attachment of properties to sale and auction thereof. It also envisages the trial of questions that may arise in the course of execution as would be evident from the various provisions contained in that chapter such as Order XXI Rule 46C as well as Rules 58 to 63 and 101. As this Court reads those provisions,

they clearly appear to be restricted to questions that would be indelibly connected with actions and steps that may be taken by a court in the course of execution of a decree. Even those provisions cannot possibly be construed as extending to a challenge to the validity or correctness of the original judgment and decree that may be rendered. While it may be open the Court to draw sustenance and guidance from the principles underlying the provisions contained in Order XXI in the course of enforcement of an arbitral award, it would be wholly incorrect to understand or interpret Section 36 as envisaging the adoption of its various provisions. The principles which inform the various provisions of Order XXI can at best only act as a guide for the trial of various questions that may arise in the span of enforcement of an arbitral award.

22. In summation, it must be held that a challenge to an award on the ground that it is a "nullity" or is otherwise illegal can be addressed only in proceedings that may be initiated in accordance with Section 34 of the Act. The grounds on which an award can possibly be assailed are comprehensively set out in Section 34(2). A challenge mounted on those lines in proceedings duly instituted under Section 34 alone can be recognised to be the remedy available to a judgment debtor. The Act neither envisages nor sanctions a dual or independent challenge to an award based on the various facets of nullity as legally recognised being laid in enforcement proceedings. The conclusion of the Court in this respect stands fortified from a conjoint reading of Sections 5, 35 and 36 of the Act as well as the precedents noticed hereinabove. The aforesaid statement of the law would necessarily be

subject to the caveat which is liable to be entered in respect of foreign awards and which are governed by Part II of the Act. Insofar as enforcement proceedings are concerned, while the Court would be obliged to deal with all questions that may relate to or arise out of steps that may be taken in the course of execution, it would be wholly incorrect to understand the scope of those proceedings as extending to the trial of questions touching upon the merits of the award.

23. Accordingly, and for all the aforesaid reasons, the Court comes to conclude that the challenge to the award on merits as is sought to be raised by learned counsel for the objector cannot be countenanced in these enforcement proceedings in light of the observations as made hereinabove. The objection to the enforcement of the arbitral award on that score is consequently negated.

24. The Court further notes from the objections which have been preferred in these proceedings that the objector additionally takes the ground of the amended Section 36 being inapplicable since the award had come to be rendered prior to the amendments which came to be introduced by virtue of Act 3 of 2016 coupled with the fact that the petition under Section 34 had also been instituted prior to the aforesaid amendments being brought into force.

25. The aforesaid objection is noticed only to be rejected in view of the aforesaid question having been authoritatively ruled upon and determined in light of the decision of the Supreme Court in **Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd.**[16]**.** This

[16] (2018) 6 SCC 287

would be evident from the following passages of the aforesaid decision: -

> "**2.** The questions raised in these appeals require the mentioning of only a few important dates. In four of these appeals, namely, *BCCI* v. *Kochi Cricket (P) Ltd.* [SLPs (C) Nos. 19545-46 of 2016], *Arup Deb* v. *Global Asia Venture Company* [SLP (C) No. 20224 of 2016], *Maharashtra Airport Development Co. Ltd.* v. *PBA Infrastructure Ltd.* [SLP (C) No. 5021 of 2017] and *U.B. Cotton (P) Ltd.* v. *Jayshri Ginning and Spg. (P) Ltd.* [SLP (C) No. 33690 of 2017], Section 34 applications under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") were all filed prior to the coming into force of the Amendment Act w.e.f. 23-10-2015. In the other four appeals, the Section 34 applications were filed after the Amendment Act came into force. The question with which we are confronted is as to whether Section 36, which was substituted by the Amendment Act, would apply in its amended form or in its original form to the appeals in question.
>
> **58.** From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted. But, what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions? To answer this question, we have necessarily to decide on what is meant by "enforcement" in Section 36. On the one hand, it has been argued that "enforcement" is nothing but "execution", and on the other hand, it has been argued that "enforcement" and "execution" are different concepts, "enforcement" being substantive and "execution" being procedural in nature.
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> **62.** In *Narhari Shivram Shet Narvekar* v. *Pannalal Umediram* [*Narhari Shivram Shet Narvekar* v. *Pannalal Umediram*, (1976) 3 SCC 203], this Court, following *Lalji Raja* [*Lalji Raja and Sons* v. *Firm Hansraj Nathuram*, (1971) 1 SCC 721] , held as follows: (SCC p. 207, para 8)
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> "*8.* The learned counsel appearing for the appellant however submitted that since the Code of Civil Procedure was not applicable to Goa the decree became inexecutable and this being a vested right could not be taken away by the application of the Code

of Civil Procedure to Goa during the pendency of the appeal before the Additional Judicial Commissioner. It seems to us that the right of the judgment-debtor to pay up the decree passed against him cannot be said to be a vested right, nor can the question of executability of the decree be regarded as a substantive vested right of the judgment-debtor. A fortiori the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retroactive in operation and the appellate court is bound to take notice of the change in law."

Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment-debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

63. The matter can also be looked at from a slightly different angle. Section 36, prior to the Amendment Act, is only a clog on the right of the decree-holder, who cannot execute the award in his favour, unless the conditions of this section are met. This does not mean that there is a corresponding right in the judgment-debtor to stay the execution of such an award. The learned counsel on behalf of the appellants have, however, argued that a substantive change has been made in the award, which became an executable decree only *after* the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege in favour of the respondents. It has been argued, relying upon a number of judgments, that since Section 36 is a part of the enforcement process of awards, there is a vested right or at least a privilege accrued in favour of the appellants in the unamended 1996 Act applying insofar as arbitral proceedings and court proceedings in relation thereto have commenced, prior to the commencement of the Amendment Act. The very judgment strongly relied upon by the Senior Counsel for the appellants, namely, *Garikapati Veeraya* [*Garikapati Veeraya* v. *N. Subbiah Choudhry*, 1957 SCR 488 : AIR 1957 SC 540] , itself states in Proposition (*v*) at p. 515, that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides specifically or by necessary intendment and not otherwise. We have already held that Section 26 does specifically provide that the court proceedings in relation to arbitral proceedings, being independent from arbitral proceedings, would not be viewed as a continuation of arbitral proceedings, but would be viewed separately. This being the case, it is unnecessary to refer to the

judgments such as *Union of India* v. *A.L. Rallia Ram* [*Union of India* v. *A.L. Rallia Ram*, (1964) 3 SCR 164 : AIR 1963 SC 1685] and *NBCC Ltd.* v. *J.G. Engg. (P) Ltd.* [*NBCC Ltd.* v. *J.G. Engg. (P) Ltd.*, (2010) 2 SCC 385 : (2010) 1 SCC (Civ) 416] , which state that a Section 34 proceeding is a supervisory and not an appellate proceeding. *Snehadeep Structures (P) Ltd.* v. *Maharashtra Small-Scale Industries Development Corpn. Ltd.* [*Snehadeep Structures (P) Ltd.* v. *Maharashtra Small-Scale Industries Development Corpn. Ltd.*, (2010) 3 SCC 34 : (2010) 1 SCC (Civ) 603] , SCC at pp. 47-49, which was cited for the purpose of stating that a Section 34 proceeding could be regarded as an "appeal" within the meaning of Section 7 of the Interest on Delayed Payments to Small-Scale and Ancillary Industrial Undertakings Act, 1993, is obviously distinguishable on the ground that it pertains to the said expression appearing in a beneficial enactment, whose object would be defeated if the word "appeal" did not include a Section 34 application. This is made clear by the aforesaid judgment itself as follows: (SCC pp. 47-49, paras 36 & 40)

> "*36*. On a perusal of the plethora of decisions aforementioned, we are of the view that "appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve reagitation of entire matrix of facts and law. We have already seen in *Abhyankar* [*Shankar Ramchandra Abhynkar* v. *KrishnajiDattatreya Bapat*, (1969) 2 SCC 74] that even an order passed by virtue of limited power of revision under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving such a wide meaning to the term "appeal", we are constrained to disagree with the contention of the learned counsel for the respondent Corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be reagitated with respect to the impugned order/decree. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council.
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> ***
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> *40*. It may be noted that Section 6(1) empowers the buyer to obtain the due payment by way of *any proceedings*. Thus the proceedings that the buyer can resort to, no doubt, includes

arbitration as well. It is pertinent to note that as opposed to Section 6(2), Section 6(1) does not state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by the Arbitration Act. Hence, the right context in which the meaning of the term "appeal" should be interpreted is the Interest Act itself. The meaning of this term under the Arbitration Act or the Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that the Arbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term "appeal" in the Interest Act, and not in the Arbitration Act."

(emphasis in original)

65. Being a procedural provision, it is obvious that the context of Section 36 is that the expression "has been" would refer to Section 34 petitions filed before the commencement of the Amendment Act and would be one pointer to the fact that the said section would indeed apply, in its substituted form, even to such petitions. The judgment in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.* [*L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*, (1994) 1 AC 486 : (1994) 2 WLR 39 (HL)] is instructive. A new Section 13-A was introduced with effect from 1-1-1992, by which the arbitrators were vested with the power of dismissing a claim if there is no inordinate or an inexcusable delay on the part of the claimant in pursuing the claim. This section was enacted because the House of Lords in a certain decision had suggested that such delays in arbitration could not lead to a rejection of the claim by itself. What led to the enactment of the section was put by Lord Mustill thus: (AC p. 522 B-D)

"My Lords, the effect of the decision of the House in *Bremer Vulkan case* [*Bremer Vulkan Schiffbau und Maschinenfabrik* v. *South India Shipping Corpn. Ltd.*, 1981 AC 909 : (1981) 2 WLR 141(HL)] , coupled with the inability of the courts to furnish any alternative remedy which might provide a remedy for the abuse of stale claims, aroused a chorus of disapproval which was forceful, sustained and (so far as I am aware) virtually unanimous. There is no need to elaborate. The criticisms came from every quarter. Several Commonwealth countries hastily introduced legislation conferring on the court, or on the arbitrator, a jurisdiction to dismiss stale claims in arbitration. The history of the matter, and the reasons why the question was not as easy as it might have appeared, were summarised in an article published in 1989 by Sir Thomas Bingham (*Arbitration International*, Vol. 5, pp. 333 et seq.), and

there is no need to rehearse them here. Taking account of various apparent difficulties the Departmental Advisory Committee on Arbitration hesitated for a time both as to the principle and as to whether the power to dismiss should be vested in the court or the arbitrator, but the pressure from all quarters became irresistible and in 1990 the Courts and Legal Services Act inserted, through the medium of Section 102, a new Section 13-A in the Arbitration Act, 1950."

76. The learned counsel for the appellants have painted a lurid picture of anomalies that would arise in case the Amendment Act were generally to be made retrospective in application. Since we have already held that the Amendment Act is only prospective in application, no such anomalies can possibly arise. It may also be noted that the choosing of Section 21 as being the date on which the Amendment Act would apply to arbitral proceedings that have been commenced could equally be stated to give rise to various anomalies. One such anomaly could be that the arbitration agreement itself may have been entered into years earlier, and disputes between the parties could have arisen many years after the said arbitration agreement. The argument on behalf of the appellants is that parties are entitled to proceed on the basis of the law as it exists on the date on which they entered into an agreement to refer disputes to arbitration. If this were to be the case, the starting point of the application of the Amendment Act being only when a notice to arbitrate has been received by the respondent, which as has been stated above, could be many years after the arbitration agreement has been entered into, would itself give rise to the anomaly that the amended law would apply even to arbitration proceedings years afterwards as and when a dispute arises and a notice to arbitrate has been issued under Section 21. In such a case, the parties, having entered into an arbitration agreement years earlier, could well turn around and say that they never bargained for the change in law that has taken place many years after, and which change will apply to them, since the notice, referred to in Section 21, has been issued after the Amendment Act has come into force. Cut-off dates, by their very nature, are bound to lead to certain anomalies, but that does not mean that the process of interpretation must be so twisted as to negate both the plain language as well as the object of the amending statute. On this ground also, we do not see how an emotive argument can be converted into a legal one, so as to interpret Section 26 in a manner that would be contrary to both its plain language and object.

77. However, it is important to remember that the Amendment Act was enacted for the following reasons, as the Statement of Objects and Reasons for the Amendment Act states:

"**2.** The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. *Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act*. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22-12-2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee, submitted its Report to Parliament on 4-8-2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost-effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. <u>As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity</u>.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to

promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely—

(*i*) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(*ii*) to ensure that an Indian court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(*iii*) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(*iv*) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(*v*) to provide that the Arbitral Tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(*vi*) to provide for a model fee schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of Arbitral Tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(*vii*) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast-track procedure and the award in such cases shall be made within a period of six months;

(*viii*) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(*ix*) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost-effective and lead to expeditious disposal of cases."

(emphasis supplied)

78. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it

proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,

> "… have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act",

and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in *HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471 of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)"*18*. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705 has been expressly done away with. So has the judgment in *ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Plant Co. Ltd.* v. *General Electric Company*, 1994 Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in *Renusagar*, 1994 Supp (1) SCC 644. "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in *Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204. Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."] It

> would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated."

26. The Court consequently holds that the objections as canvassed and noticed above clearly fall beyond the contours and scope of the present proceedings. While it thus leaves it open to the respondent to raise those objections in appropriate proceedings, they cannot impede or stall the continuance of the present proceedings for enforcement. All contentions of respective parties relating to the merits of the objections raised here are kept open to be addressed in appropriate proceedings.

27. Let the Enforcement Petition be now called again on 09.03.2023.

YASHWANT VARMA, J.

JANUARY 24, 2023
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