PART – A : LIMITATION

R.B. Policies at Lloyd's v. *Butler*

(1949) 2 All ER 226 (KBD)

STREATIFEILD, J - This is an action brought by R.B. Policies at Lloyd's against Mr. Alfred Butler by a writ issued on July 16, 1947, claiming the return of a motor-car which, they allege, has been wrongfully detained by the defendant. When the motorcar was first in the plaintiff's possession it had registration number JD 6412 and it was stolen from them by some person or persons unknown on June 27, 1940. In January 1947, the car, then bearing the registration number ALN 765, was found in the possession of the defendant, having passed to him through a line of intermediate purchasers during the previous seven years. It is pleaded in the defense that the plaintiffs' cause of action is barred under the Limitation Act, 1939, by S. 2 (1) of which no action shall be brought "after the expiration of six years from the date on which the cause of action accrued".

The plaintiffs were the owners of this car and the defendant was an innocent purchaser who acquired it for good consideration and in good faith may years after it was stolen. Where there is any doubt or ambiguity in an Act of Parliament, natural justice shall be done, where there is any doubt about the wording of an Act of Parliament, the words are to be understood in a way which harmonises with the policy of the Act.

In deciding this issue, it become necessary to determine the date on which the cause of action accrued. If it accrued to the plaintiffs as soon as the motor car was stolen so that they then had a cause of action against the thief for conversion or detention, it is contended that under S. 3 (1) of the Limitation Act, 1939, any subsequent detention cannot be the subject of any action. That sub-section contemplates that if a cause of action did accrue at the date of the theft and, before the plaintiffs recovered possession, there were further conversion by a line of persons of whom the defendant was the last, no cause of action will lie against any of them after six years from the date of the original cause of action. Sub-section (2) goes on to introduce what is new law:

> Where any such cause of action had accrued to any person, and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid had expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

When does the cause of action accrue? In the present case when the thief stole this car in 1940, clearly he converted it to his own use, and apart from his prosecution for the felony, if he had been known, undoubtedly an action could have been brought against him for conversion of the car then. I have to determine whether it is necessary that there should be an actual, known, and available defendant to such an action before it can be said that the cause of action has accrued so as to fulfill the phrase used in S. 2 (1) of the Act of 1939.

> A cause of action cannot accrue unless there be a person in existence capable of suing and another person in existence who can be sued.

Is it to be said, because a person is not traceable or is not known that he is not in existence, and cannot be sued? If the thief in the present case had been traceable, he could have been sued, so I doubt whether on that definition it can be said that there was no person in existence who could have been sued. It was, no doubt, a misfortune to the plaintiffs that they could not find a defendant whose name they could insert in a writ, but the fact remains that every other ingredient of the cause of action was present. S. 26 of the Act of 1939, provides:

> Where, in the case of any action which a period of limitation is prescribed by this Act…;(b) the right of action is concealed by fraud of any such person as aforesaid…; the period of limitation shall not begin to run until the plaintiff has discovered the fraud…; or could with reasonable diligence have discovered it….

A proviso protects third parties who take for valuable consideration without notice. The section does not say the cause of action shall accrue for the first time on the discovery of the fraud; but only that time "shall not begin to run" until that event. Section 26 is the only provision in the Act of 1939 where a special exception of this nature is made. Prima facie, therefore, if there is a cause of action (as there clearly was here the moment this motor car was stolen), time begins to run as from that moment, notwithstanding the fact that the plaintiff is ignorant of the identity of the thief.

Can it be said, therefore, that, the cause of action being otherwise complete the ignorance of the plaintiff regarding the person who committed the conversion is sufficient to prevent the accrual of that cause of action? I think not, and I agree with the argument of counsel for the defendant. It would lead to appalling results if someone, having lost a watch and discovered it fifty or sixty years later in the possession of a wholly innocent person who had bought it many years previously, was able to bring action for its recovery merely because he did not know who the thief was fifty or sixty years before. I cannot think that that is the policy of the Limitation Act, 1939. I agree that on of the principles of the Act is that those who go to sleep on their claims should not be assisted by the Courts in recovering their property. But another equally important principle is that there shall be an end of these matters, and that there shall be protection against stale demands. In ***A' Court v. Cross*** [(1825) 3 Bing. 329] Best, C.J., referred to the policy of the Limitation Act, 1923, in this way:

> It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the Act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have often more cruelty than of justice in them.

I am not suggesting that the plaintiffs here was guilty of heartlessness or cruel conduct, but a claim made seven or eight years after the loss of the car against a perfectly innocent holder who has given good consideration for it without any knowledge that it was stolen does not seem just. I thin that one object of this Act is to prevent injustices of that kind and to protect innocent people against demands which are made many years afterwards. In my view, the proper construction of the words "the action accrued" involves the finding that the cause of action here accrued in 1940 when the car was stolen from the plaintiffs. This preliminary point must, therefore, be decided in favour of the defendant.

Union of India **v.** *West Coast Paper Mills Ltd.*

AIR 2004 SC 1596

CJI, S.B. SINHA , S.H. KAPADIA & S.B. SINHA, JJ : Doubting the correctness of a two-Judge Bench decision of this Court in ***P.K. Kutty Anuja Raja* v.** ***State of Kerala*** [JT 1996 (2) SC 167 : (1996) 2 SCC 496], a Division Bench of this Court has referred the matter to a three-Judge Bench.

The factual matrix required to be taken note of is as under:

The respondents herein were transporting their goods through the branch line to the appellants from Alnavar to Dandeli wherefor the common rate fixed in respect of all commodities on the basis of weight was being levied as freight. However, a revision was made in the rate of freight w.e.f. 1.2.1964.

Aggrieved thereby and dissatisfied therewith, the respondents herein filed a complaint petition before the Railway Rates Tribunal (hereinafter referred to as 'The Tribunal') challenging the same as unjust, unreasonable and discriminatory as the standard telescopic class rates on three times of inflated distance was adopted for levy of freight on goods traffic. The Tribunal by a judgment dated 18.4.1966 declared the said levy as unreasonable where against the appellants herein filed an application for grant of special leave before this Court.

While granting special leave, this Court also passed a limited interim order which is in the following terms:

"The Railway may charge the usual rates without inflation of the distance, and the Respondent will give a Bank guarantee to the satisfaction of the Register of this Court for Rupees Two Lakhs to be renewed each year until the disposal of the appeal. One month's time allowed for furnishing the Bank Guarantee. The stay petition is dismissed subject to the above."

Eventually, however, the said Special Leave Petition was dismissed by this Court on 14.10.1970.

A writ petition was filed by the respondent herein on 05.01.1972 which was marked as W.P. NO. 210/1972, and the same was disposed by the High Court on 29.10.1973 observing:

"All these matters, in my opinion, cannot be properly adjudicated upon in a Writ Petition filed under Art. 226 of the Constitution. If so advised the petitioner could avail of the ordinary remedy of filing a suit for appropriate relief. If such a suit is filed, it will be open to the respondents to raise all available contentions in defence just as it is open to the petitioner to raise all available contentions in support of its claim. Having considered all relevant aspects, I am of the opinion, that this is a case where I should decline to exercise my discretion under Art. 226 of the Constitution.

Subject to the aforesaid observations, this writ petition is dismissed."

Two suits thereafter were filed by the respondents on 12.12.1973 and 18.04.1974 which were renumbered later on as OS NO. 38/1982 and OS No.39/1982.

A contention that the said suits were barred by limitation was raised by the appellants herein stating that the cause of action for filing the same arose immediately after the judgment was passed by 'The Tribunal' on 18.4.1966 and, thus, in terms of Article 58 of the Limitation Act, 1963, they were required to be filed within a period of three years from the said date, as despite the fact that the Special Leave Petition was preferred there against, no stay had been granted by this Court and, thus, the period, during which the matter was pending before this Court, would not be excluded in computing the period of limitation. Having regard to the plea raised by the Plaintiff-Respondent in the aforementioned suits as regards the applicability of Sections 14 and 15 of the Limitation Act, 1963, the Trial Court held that the suits had been filed within the stipulated period. The High Court in appeal also affirmed the said view.

Mr. P.P. Malhotra, learned senior counsel appearing on behalf of the appellant, at the outset drew our attention to the fact that the Union of India has already complied with the direction of 'The Tribunal' by refunding the excess freight charged from the respondent for the period 18.4.1966 to 25.9.1966. The learned counsel, however, would contend that the suit for refund of excess amount of the freight for the disputed periods (a) 24.6.1963 to 1.2.1964, and (b) 1.2.1964 to 18.4.1966 were barred by limitation in terms of

Article 58 of the Limitation Act, 1963, as the cause of action for filing the suit had arisen on the date on which such declaration was made by 'The Tribunal.

Mr. Malhotra would further contend that in absence of an order staying the operation of the judgment, it became enforceable and, thus, the plaintiff-respondent was required to file the suit within the period of limitation specified therefore. Furthermore, the learned counsel would urge that in terms of Section 46A of the Indian Railways Act, the judgment of the Tribunal being final, the starting period of limitation for filing the suit would be three years from the said date. Strong reliance in this behalf has been placed on ***Juscurn Boid* v. *Pirthichand Lal*** [L.R. Indian Appeals 1918-1919 page 52], P.K. Kutty (supra), ***Maqbul Ahmad and others v. Onkar Pratap Narain Singh*** [AIR 1935 PC 85] and ***Secretary, Ministry of Works & Housing Govt. of India and Others* v. *Mohinder Singh Jagdev*** [(1996) 6 SCC 229].

Mr. Harish N Salve, learned senior counsel appearing on behalf of the respondents, on the other hand, would submit that having regard to the fact situation obtaining in this case Article 113 of the Limitation Act shall apply and not Article 58 thereof. The learned counsel would urge that as admittedly this Court granted Special Leave to Appeal in favour of the appellants and passed a limited interim order, the judgment of the Tribunal was in jeopardy and, thus, cannot be said to have attained finality. Furthermore, the learned counsel would submit that when the doctrine of merger applies, the period of limitation would begin to run from the date of passing the appellate decree and not from the date of passing of the original decree. In support of the said contention, reliance has been placed on a decision of this Court in ***Kunhayammed* v. *State of Kerala*** [(2000) 6 SCC 359].

The plaintiff in this case has filed a suit for refund of the excess amount collected by the defendant-Railways for the period 24.6.1963 to 1.2.1964 and 1.2.1964 to 18.4.1966 with interest accrued thereupon. It is not in dispute that in terms of the provisions of the Indian Railways Act, as thence existing 'The Tribunal' was only entitled to make a declaration to the

effect that the freight charged was unreasonable or excessive. It did not have any jurisdiction to execute its own order.

It may be true that by reason of Section 46A of Indian Railways Act the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.

Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal.

The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition pending, excluded for computing the period of limitation. In that view of the matter, the civil suit was filed within the prescribed period of limitation.

The Trial Judge as also the High Court have recorded a concurrent opinion that the respondents were entitled to the benefits of Sections 14 and 15 of the Limitation Act, 1963. We have no reason to take a different view. It is beyond any cavil that in the event, the respondent was held to have been prosecuting its remedy bona fide before an appropriate forum, it would be entitled to get the period in question excluded from computation of the period of limitation.

Articles 58 and 113 of the Limitation Act read thus:

"Description of Suit Period of Limitation Time from which period begins to run

58. To obtain any other declaration Three years When the right to sue first accrues

113. Any suit for which no period of limitation is provided elsewhere in this Schedule Three years

When the right to sue accrues"

It was not a case where the respondents prayed for a declaration of their rights. The declaration sought for by them as regard unreasonableness in the levy of freight was granted by the Tribunal.

A distinction furthermore, which is required to be noticed is that whereas in terms of Article 58 the period of three years is to be counted from the date when 'the right to sue first accrues'; in terms of Article 113 thereof, the period of limitation would be counted from the date 'when the right to sue accrues'. The distinction between Article 58 and Article 113 is,

thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the case of action arose first whereas, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefore arose.

The fact that the suit was not filed by plaintiff-respondent claiming existence of any legal right in itself is not disputed. The suit for recovery of money was based on the declaration made by 'The Tribunal' to the effect that the amount of freight charged by the appellant was unreasonable. It will bear repetition to state that a plaintiff filed a suit for refund and a cause of action therefore arose only when its right was finally determined by this Court and not prior thereto. This Court not only granted special leave but also considered the decision of the Tribunal on merit.

In **Kunhayammed** (supra), this Court held:

"12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

It was further observed:

"41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42."To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater

is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality.(See Corpus Juris Secundum, Vol. LVII, pp. 1067-68)"

(See also ***Raja Mechanical Company Pvt. Ltd.* v. *Commissioner of Central Excise***, 2002 (4) AD (Delhi) 621).

The question as regard applicability of merger with reference to the provisions for departmental appeal and revision had first been considered by this Court in ***Sita Ram Goel* v. *Municipal Board, Kanpur*** [1959 SCR 1148] stating :

"The initial difficulty in the way of the appellant, however, is that departmental enquiries even though they culminate in decisions on appeals or revision cannot be equated with proceedings before the regular courts of law."

However, the said view was later on not accepted to be correct.

Despite the rigours of Section 3 of the Limitation Act, 1963, the provisions thereof are required to be construed in a broad based and liberal manner. We need not refer to the decisions of this Court in the matter of condoning delay in filing appeal or application in exercise of its power under Section 5 of the Limitation Act.

In ***The State of Uttar Pradesh* v. *Mohammad Nooh*** [1958 SCR 595] Vivian Bose, J. held that justice should be done in a common sense point of view stating:"I see no reason why any narrow or ultra technical restrictions should be placed on them. Justice should, in my opinion be administered in our courts in a common sense liberal way and be broadbased on human values rather than on narrow and restricted considerations hedged round with hair-splitting technicalities...."

However, in that case also a distinction was sought to be made between a judgment of a 'Court' and 'Tribunal'. In ***S.S. Rathore* v. *State of Madhya pradesh*** [(1989) 4 SCC 582], noticing the earlier Constitution Benches decision of this Court in Mohammad Nooh (supra), ***Madan Gopal Rungta* v. *Secy. To the Government of Orissa*** [1962 Supp 3 SCR 906], ***Collector of Customs, Calcutta* v. *East India Commercial Co. Ltd.*** [(1963) 2 SCR 563] as well as 3-Judge Bench of this Court in ***Somnath Sahu* v. *State of Orissa*** [(1969) 3 SCC 384], this Court observed:

"14. The distinction adopted in Mohammad Nooh case (1958 SCR 595 : AIR 1958 SC 86) between a court and a tribunal being the appellate or the revisional authority is one without any legal justification. Powers of adjudication ordinarily vested in courts are being exercised under the law by tribunals and other constituted authorities. In fact, in respect of many disputes the jurisdiction of the court is now barred and there is a vesting of jurisdiction in tribunals and authorities. That being the position, we see no justification for the distinction between courts and tribunals in regard to the principle of merger. On the precedents indicated, it must be held that the order of dismissal made by the Collector did merge into the order of the Divisional Commissioner when the appellant's appeal was dismissed on August 31, 1966."

Rathore's case (supra) was followed in ***Mohd. Quaramuddin (Dead) By LRS.* v. *State of A.P.*** [(1994) 5 SCC 118] and noticed in **Kunhayammed** (supra).

We may now, keeping in view the law laid down by this Court, as noticed hereinbefore, consider the decisions relied upon by Mr. Malhotra.

In **Juscurn Boid** (supra) the question which arose for consideration was as to in a suit for recovery of the purchase money paid for sale of a patni taluk under Bengal Regulation VIII of 1819, which had been set aside; what would be the date when cause of action therefor can be said to have arisen? In that case several suits were filed. The sale was reversed in its entirety in the first suit. Stay was not granted in the other suits. In the peculiar fact situation obtaining therein it was held that under the Indian law and procedure when a original decree is not questioned by presentation of an appeal nor is its operation interrupted; where the decree on appeal is one of dismissal, the running of the period of limitation did not stop.

In **Maqbul Ahmad** (supra) the question which arose for consideration was as to whether subsequent to the passing of a preliminary decree in the mortgage suit, an application to obtain execution under the preliminary decree can be dismissed. In that case a preliminary mortgage decree was obtained on 7th May, 1917 which was amended in some respects on 22nd May, 1917. Some of the mortgagors who were interested in different villages comprised in the mortgage, appealed to the High Court against the preliminary decree. Two such appeals were filed. One appeal succeeded while the other failed. The decrees of the High Court disposing of those appeals were made on 7th June, 1920 whereafter the decree-holder proceeded to seek execution under the preliminary decree. In the aforementioned situation, it was held:

"It is impossible to say, apart from any other objection, that the application to obtain execution under the preliminary decree was an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit. That being so, it is not permissible, on the basis of S. 14 in computing the period of limitation prescribed, to exclude that particular period."

The question which falls for consideration in this case did not arise therein.

Before we advert to **P.K. Kutty** (supra) we may notice another decision of this Court in Sales Tax Officer, ***Banaras* v. *Kanhaiya Lal Makund Lal Saraf*** [AIR 1959 SC 135]. In that case an order of assessment was in question which came up before this Court. The question which arose for consideration therein was as to whether Section 72 of the Indian Contract Act had any application. This Court held that cause of action for filing the suit for recovery would arise from the date when such payment of tax made under a mistake of law became known to the party.

In **P.K. Kutty** (supra) an order of assessment under the Agricultural Income Tax was set aside by the High Court by a judgment dated 1st January, 1968. A civil suit was filed in the year 1974. The suit was held to be barred by limitation. A Contention was raised therein that the appellant had discovered the mistake on 5th October, 1971 when the Court dismissed the appeal filed by the State against the order passed by the High Court dated 1st January, 1968. This Court negatived the said plea stating:

"3...We are unable to agree with the learned counsel. It is not in dispute that at his behest the assessment was quashed by the High Court in the aforesaid OP on 1-1-1968. Thereby the limitation started running from that date. Once the limitation starts running, it runs its full course until the running of the limitation is interdicted by an order of the Court."

Distinguishing **Kanhaiya Lal** (supra), it was observed:

"5.. .We do not have that fact situation in this case. The appellant is a party to the proceedings and at his instance the assessment of agricultural income tax was quashed as referred to hereinbefore and having had the assessment quashed the cause of action had arisen to him to lay the suit for refund unless it is refunded by the State. The knowledge of the mistake of law cannot be countenanced for extended time till the appeal was disposed of unless, as stated earlier, the operation of the judgment of the High Court in the previous proceedings were stayed by this Court."

In **Mohinder Singh Jagdev** (supra) also this Court held:

"7. The crucial question is whether the suit is barred by limitation ? Section 3 of the Limitation Act, 1963 (for short, "the Act") postulates that the limitation can be pleaded. If any proceedings have been laid after the expiry of the period of limitation, the court is bound to take note thereof and grant appropriate relief and has to dismiss the suit, if it is barred by limitation. In this case, the relief in the plaint, as stated earlier, is one of declaration. The declaration is clearly governed by Article 58 of the Schedule to the Act which envisages that to obtain "any other" declaration the limitation of three years begins to run from the period when the right to sue "first accrues". The right to sue had first accrued to the respondent on 10-9-1957 when the respondent's services came to be terminated. Once limitation starts running, until its running of limitation has been stopped by an order of the competent civil court or any other competent authority, it cannot stop. On expiry of three years from the date of dismissal of the respondent from service, the respondent had lost his right to sue for the above declaration."

Unfortunately in **P.K. Kutty** (supra) and **Mohinder Singh Jagdev** (supra) no argument was advanced as regard applicability of doctrine of merger. The ratio laid down by the Constitution Benches of this Court had also not been brought to the court's notice.

In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit.

It has not been and could not be contended that even under the ordinary civil law the judgment of the appellate court alone can be put to execution. Having regard to the doctrine of merger as also the principle that an appeal is in continuation of suit, we are of the opinion that the decision of the Constitution Bench in **S.S. Rathore** (supra) was to be followed in the instant case.

The facts obtaining in **Mohinder Singh Jagdev** (supra) being totally different, the same cannot said to have any application in the facts obtaining in the present case.

We, therefore, are of the opinion that **P.K. Kutty** (supra) does not lay down the law correctly and is overruled accordingly.

The matter may now be placed before an appropriate Bench for disposal of the appeals on merits.

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Punjab National Bank **v.** *Surendra Prasad Sinha*

AIR 1992 SC 1815

K. RAMASWAMY, J. - 2. Though the respondent was served on July 29, 1991, he neither appeared in person, nor through counsel. The facts set out in the complaint eloquently manifest on its face a clear abuse of the process of the court to harass the appellants. The respondent, an Advocate and Standing Counsel for the first appellant filed a private complaint in the court of Additional Chief Judicial Magistrate, Katni in C.C. No. 933 of 1991 for offences under Section 409 and Sections 109/114 IPC.

3. The first appellant's branch at Katni gave a loan of Rs 15,000 to one Sriman Narain Dubey on May 5, 1984 and the respondent and his wife Annapoorna stood as guarantors, executed Annexure 'P' "security bond" and handed over Fixed Deposit Receipt for a sum of Rs 24,000, which would mature on November 1, 1988. At maturity its value would be at Rs. 41,292. The principal debtor committed default in payment of the debt. On maturity, the Branch Manager, appellant 5, Shri V. K. Dubey, adjusted a sum of Rs 27,037.60 due and payable by the principal debtor as on December, 1988 and the balance sum of Rs 14,254.40 was credited to the Savings Bank Account of the respondent. The respondent alleged that the debt became barred by limitation as on May 5, 1987. The liability of the respondent being coextensive with that of the principal debtor, his liability also stood extinguished as on May 5, 1987. Without taking any action to recover the amount from the principal debtor within the period of limitation, on January 14, 1989, Shri D. K. Dubey, the Branch Manager, intimated that only Rs 14,254.40 was credited to his Savings Bank Account No. 3763. The entire amount at maturity, namely Rs. 41,292 ought to have been credited to his account and despite repeated demands made by the respondent it was not credited. Thereby the appellants criminally embezzled the said amount. The first appellant with a dishonest interest to save himself from the financial obligation neglected to recover the amount from the principal debtor and allowed the claim to be bared by limitation and embezzled the amount entrusted by the respondent. Appellants 2 to 6 abetted the commission of the crime in converting the amount of Rs. 27,037.40 to their own use in violation of the specific direction of the respondent. Thus they committed the offences punishable under Section 409 and Sections 109 and 114 IPC.

4. The security bond, admittedly, executed by the respondent reads in material parts thus: “We confirm having handed over to you by way of security against your branch office Katni F.D. Account No. 77/83 dated November 1, 1983 for Rs 24,000 in the event of renewal of the said Fixed Deposit Receipt as security for the above loan.” “We confirm... the F.D.R. will continue to remain with the bank as security here.” “The amount due and other charges, if any, be adjusted and appropriated by you from the proceeds of the said F.D.R. at any time before, or on its maturity at your discretion, unless the loan is otherwise fully adjusted from the dues on demand in writing made by you....” “We give the bank right to credit the balance to our savings bank account or any other amount and adjust the amount due from the borrowers out of the same.” “We authorise you and confirm that the F.D.R. pledged as security for the said loan shall also be security including the surplus proceeds thereof for any

other liability and obligation of person and further in favour of the bank and the bank shall be entitled to retain/realise/utilise/appropriate the same without reference to us."

5. Admittedly, as the principal debtor did not repay the debt. The bank as creditor adjusted at maturity of the F.D.R., the outstanding debt due to the bank in terms of the contract and the balance sum was credited to the Savings Bank account of the respondent. The rules of limitation are not meant to destroy the rights of the parties. Section 3 of the Limitation Act 36 of 1963, for short "the Act" only bars the remedy, but does not destroy the right, which the remedy relates to. The right to the debt continues to exist notwithstanding the remedy is barred by the limitation. Only exception in which the remedy also becomes barred by limitation is that the right itself is destroyed. For example under Section 27 of the Act a suit for possession of any property becoming barred by limitation, the right to property itself is destroyed. Except in such cases which are specially provided under the right to which remedy relates in other case the right subsists. Though the right to enforce the debt by judicial process is barred under Section 3 read with the relevant article in the schedule, the right to debt remains. The time barred debt does not cease to exist by reason of Section 3. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What Section 3 refers is only to the remedy but not to the right of the creditors. Such debt continues to subsist so long as it is not paid. It is not obligatory to file a suit to recover the debt. It is settled law that the creditor would be entitled to adjust, from the payment of a sum by a debtor, towards the time barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt due could be adjusted from the security in his possession and custody. Undoubtedly the respondent and his wife stood guarantors to the principal debtor, jointly executed the security bond and entrusted the F.D.R. as security to adjust the outstanding debt from it at maturity. Therefore, though the remedy to recover the debt from the principal debtor is barred by limitation, the liability still subsists. In terms of the contract the bank is entitled to appropriate the debt due and credit the balance amount to the savings bank account of the respondent. Thereby the appellant did not act in violation of any law, nor converted the amount entrusted to them dishonestly for any purpose. Action in terms of the contract expressly or implied is a negation of criminal breach of trust defined in Section 405 and punishable under Section 409 IPC. It is neither dishonest, nor misappropriation. The bank had in its possession the fixed deposit receipt as guarantee for due payment of the debt and the bank appropriated the amount towards the debt due and payable by the principal debtor. Further, the F.D.R. was not entrusted during the course of the business of the first appellant as a Banker of the respondent but in the capacity as guarantor. The complaint does not make out any case much less prima facie case, a condition precedent to set criminal law in motion. The Magistrate without adverting whether the allegation in the complaint prima facie makes out an offence charged for, obviously, in a mechanical manner, issued process against all the appellants. The High Court committed grave error in declining to quash the complaint on the finding that the Bank acted prima facie high-handedly.

6. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing director of the Bank by name and a host of officers. Vindication of majesty of justice and

maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta.

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Collector, Land Acquisition, Anantnag **v.** *Katiji*

AIR 1987 SC 1353

THAKKAR, J. - To condone or not to condone, is not the only question. Whether or not to apply @ the same standard in applying the "sufficient cause" test to all the litigants regardless of their personality in the said context is another.

2. An appeal preferred by the State of Jammu and Kashmir arising out of a decision enhancing compensation in respect of acquisition of lands for a public purpose to the extent of nearly 14 lakhs rupees by making an upward revision of the order of 800% (for Rs. 1,000 per kanal to Rs. 8,000 per kanal) which also raised important questions as regards principles of valuation was dismissed as time barred being 4 days beyond time by rejecting an application for condonation of delay. Hence, this appeal by special leave.

3. The legislature has conferred the power to condone delay by enacting 8.5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties-by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub-serves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated.
3. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
4. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
5. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
6. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective; there was sufficient cause for condoning the delay in the institution of the appeal.. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same

treatment and the law is administered in an evenhanded manner. There is no warrant for according step-motherly treatment, when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing and passing-on-the-buck methods, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community does not deserve a litigant non grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Held and the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.

4. Appeal is allowed accordingly.

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Ramlal **v.** *Rewa Coalfields Ltd.*

AIR 1962 SC 361

P.B. GAJENDRAGADKAR, J. - The short question which falls to be considered in this appeal relates to the construction of Section 5 of the Indian Limitation Act 9 of 1908. It arises in this way. The respondent Rewa Coalfields Limited is a registered company whose coal-mines are situated at Burhar and Umaria. Its registered office is at Calcutta. The appellant is a firm, Chaurasia Limestone Company, Satna, Vindhya Pradesh, by name and the three brothers Ramlal, Motilal and Chhotelal are its partners. The appellant prepares and deals in limestone at Maihar and Satna and for the use in their lime-kilns it purchased coal from the respondent's coal-mines at Umaria by means of permits issued to it by Coal Commissioner, Calcutta. According to respondent's case the appellant purchased from it 3,307 tons of coal at the rate of Rs 14-9-0 per ton between January 1952, and March 1953. The price for this coal was Rs 48,158-4-0. Since the appellant did not pay the price due from it the respondent filed the present suit in the Court of the District Judge, Umaria, and claimed a decree for Rs 52,514-14-0 including interest accrued due on the amount until the date of the suit.

2. A substantial part of the respondent's claim was disputed by the appellant. It was urged by the appellant in its written statement that the amount claimed by the respondent had been arbitrarily calculated and that for a substantial part of the coal purchased by the appellant from the respondent due price had been paid. The appellant pleaded that for some time past it had stopped purchasing coal from the respondent and it was obtaining its supplies from Messrs Sood Brothers, Calcutta, to whom payments for the coal supply had been duly made. The appellant admitted its liability to pay Rs 7496-11-0 and it expressed its readiness and willingness to pay the said amount.

3. On these pleadings the learned trial Judge framed seven issues. It appears that on the date when the respondent led its evidence and the appellant's turn to lead its evidence arrived an application for adjournment was made on its behalf to produce additional evidence which was granted on condition that the appellant should pay to the respondent Rs 200 as costs. On the subsequent date of hearing, however, the appellant did not appear nor did it pay costs to the respondent as ordered. That is why the trial court proceeded ex parte against the appellant. On the issues framed trial court made findings in favour of the respondent in the light of the evidence adduced by the respondent and an *ex parte* decree was passed against the appellant to the tune of Rs 52,535-7-0 with proportionate costs. The appellant was also ordered to pay interest at 6% per annum from October 6, 1953, which was the date of the suit until the date of payment. This decree was passed on November 9, 1954.

4. Against this decree the appellant preferred an appeal in the Court of the Judicial Commissioner, Vindhya Pradesh, Rewa, on February 17, 1955 (Appeal No. 16 of 1955). The main contention raised by the appellant in this appeal was that the *ex parte* decree should be set aside and the case remanded to the trial court with the direction that the appellant should be allowed to lead its evidence and the case disposed of in accordance with law in the light of the said evidence. On February 19, 1955, the appellant filed an application under Section 5 of the Limitation Act and prayed that one day's delay committed by it in filing the appeal should be condoned because Ramlal, one of the partners of the appellant's firm, who was in charge

of the litigation, fell ill on February 16, 1955, which was the last date for filing the appeal. This application was supported by an affidavit and a medical certificate showing that Ramlal was ill on February 16, 1955. The learned Judicial Commissioner, who heard this application, appears to have accepted the appellant's case that Ramlal was ill on February 16 and that if only one day's delay had to be explained satisfactorily by the appellant his illness would constitute sufficient explanation; but it was urged before him by the respondent that the appellant had not shown that its partners were diligent during the major portion of the period of limitation allowed for appeal, and since they put off the filing of the appeal till the last date of the period of limitation the illness of Ramlal cannot be said to be sufficient cause for condoning the delay though it was only one day's delay. On the other hand, the appellant urged that it had a right to file the appeal on the last day and so the delay of one day which it was required to explain by sufficient reason had been satisfactorily explained. The learned Judicial Commissioner, however, accepted the plea raised by the respondent and in substance refused to excuse delay on the ground that the appellant's partner had showed lack of diligence and negligence during the whole of the period of limitation allowed for the appeal. It is on this ground that the application for condonation of delay was rejected and the appeal was dismissed on August 6, 1955.

5. The appellant then applied to the Judicial Commissioner for a certificate and urged that on the question of construction of Section 5 of the Limitation Act there was a conflict of judicial opinion and so the point decided by the Judicial Commissioner was one of general importance. This argument was accepted by the Judicial Commissioner and so a certificate of fitness has been issued by him under Article 133 of the Constitution. It is with this certificate that the appellant has come to this Court, and the only point which has been urged on its behalf is that the Judicial Commissioner was in error in holding that in determining the question as to whether sufficient cause had been shown within the meaning of Section 5 of the Limitation Act it was necessary for the appellant to explain his conduct during the whole of the period prescribed for the appeal.

6. Section 5 of the Limitation Act provides for extension of period in certain cases. It lays down, *inter alia*, that any appeal may be admitted after the period of limitation prescribed therefore when the appellant satisfies the court that he had sufficient cause for not preferring the appeal within such period. This section raises two questions for consideration. First is, what is sufficient cause; and the second, what is the meaning of the clause "within such period"? With the first question we are not concerned in the present appeal. It is the second question which has been decided by the Judicial Commissioner against the appellant. He has held that "within such period" in substance means during the period prescribed for making the appeal. In other words, according to him, when an appellant prefers an appeal beyond the period of limitation prescribed he must show that he acted diligently and that there was some reason which prevented him from preferring the appeal during the period of limitation prescribed. If the Judicial Commissioner had held that "within such period" means "the period of the delay between the last day for filing the appeal and the date on which the appeal was actually filed" he would undoubtedly have come to the conclusion that the illness of Ramlal on February 16 was a sufficient cause. That clearly appears to be the effect of his judgment. That is why it is unnecessary for us to consider what is "a sufficient cause" in the present

appeal. It has been urged before us by Mr Andley, for the appellant, that the construction placed by the Judicial Commissioner on the words "within such period" is erroneous.

7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in ***Krishna* v. *Chathappan*** [(1890) ILR 13 Mad. 269]:

> Section 5 gives the court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant.

8. Now, what do the words "within such period" denote? It is possible that the expression "within such period" may sometimes mean during such period. But the question is: Does the context in which the expression occurs in Section 5 justify the said interpretation? If the Limitation Act or any other appropriate statute prescribes different periods of limitation either for appeals or applications to which Section 5 applies that normally means that liberty is given to the party intending to make the appeal or to file an application to act within the period prescribed in that behalf. It would not be reasonable to require a party to take the necessary action on the very first day after the cause of action accrues. In view of the period of limitation prescribed the party would be entitled to take its time and to file the appeal on any day during the said period; and so prima facie it appears unreasonable that when delay has been made by the party in filing the appeal it should be called upon to explain its conduct during the whole of the period of limitation prescribed. In our opinion, it would be immaterial and even irrelevant to invoke general considerations of diligence of parties in construing the words of Section 5. The context seems to suggest that "within such period" means within the period which ends with the last day of limitation prescribed. In other words, in all cases falling under Section 5 what the party has to show is why he did not file an appeal on the last day of limitation prescribed. That may inevitably mean that the party will have to show sufficient cause not only for not filing the appeal on the last day but to explain the delay made thereafter day by day. In other words, in showing sufficient cause for condoning the delay the party may be called upon to explain for the whole of the delay covered by the period between the last day prescribed for filing the appeal and the day on which the appeal is filed. To hold that the expression "within such period" means during such period would, in our opinion, be repugnant in the context. We would accordingly hold that the learned Judicial Commissioner was in error in taking the view that the failure of the appellant to account for its non-diligence

during the whole of the period of limitation prescribed for the appeal necessarily disqualified it from praying for the condonation of delay, even though the delay in question was only for one day; and that too was caused by the party's illness.

9. This question has been considered by some of the High Courts and their decisions show a conflict on the point. In ***Karalicharan Sarma*** **v.** ***Apurbakrishna Bajpeyi*** [(1931) ILR 58 Cal. 549] it appeared that the papers for appeal were handed over by the appellant to his advocate in the morning of the last day for filing the appeal. Through pressure of urgent work the advocate did not look into the papers till the evening of that day when he found that that was the last day. The appeal was filed the next day. According to the majority decision of the Calcutta High Court, in the circumstances just indicated there was sufficient cause to grant the appellant an extension of a day under Section 5 of the Limitation Act because it was held that it was enough if the appellant satisfied the court that for sufficient cause he was prevented from filing the appeal on the last day and his action during the whole of the period need not be explained. This decision is in favour of the appellant and is in accord with the view which we are inclined to take.

10. On the other hand, in ***Kedarnath*** **v.** ***Zumberlal*** [AIR 1916 Nag. 39] the Judicial Commissioner at Nagpur has expressed the view that an appellant who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefore is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing the appeal within time. According to this decision, though the period covered between the last day of filing and the day of actual filing may be satisfactorily explained that would not be enough to condone delay because the appellant would nevertheless have to show why he waited until the last day. In coming to this conclusion the Judicial Commissioner has relied substantially on what he regarded as general considerations. "This habit of leaving things to the last moment," says the learned Judge, "has its origin in laxity and negligence; and, in my opinion, having regard to the increasing pressure of business in the law Courts and the many facilities now available for the punctual filing of suits, appeals and applications therein, it is high time that litigants and their legal advisers were made to realise the dangers of the procrastination which defers the presentation of a suit, appeal or application to the last day of the limitation prescribed therefore". There can be no difference of opinion on the point that litigants should act with due diligence and care; but we are disposed to think that such general consideration can have very little relevance in construing the provisions of Section 5. The decision of the Judicial Commissioner shows that he based his conclusion more on this a priori consideration and did not address himself as he should have to the construction of the section itself. Apparently this view has been consistently followed in Nagpur.

11. In ***Jahar Mal*** **v.** ***G.M. Pritchard*** [AIR 1919 Pat. 503] the Patna High Court has adopted the same line. Dawson-Miller, C.J., brushed aside the claim of the appellant for condonation of delay on the ground that "one is not entitled to put things off to the last moment and hope that nothing will occur which will prevent them from being in time. There is always the chapter of accidents to be considered, and it seems to me that one ought to consider that some accident or other may happen which will delay them in carrying out that part of their duties for which the court prescribes a time-limit, and if they choose to rely upon

everything going absolutely smoothly and wait till the last moment, I think they have only themselves to blame if they should find that something has, happened which was unexpected, but which ought to be reckoned with, and are not entitled in such circumstances to the indulgence of the court." These observations are subject to the same comment that we have made about the ***Nagpur*** decision.

12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of bona fides or due diligence are always material and relevant when the court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14. In the present case there is no difficulty in holding that the discretion should be exercised in favour of the appellant because apart from the general criticism made against the appellant's lack of diligence during the period of limitation no other fact had been adduced against it. Indeed, as we have already pointed out, the learned Judicial Commissioner rejected the appellant's application for condonation of delay only on the ground that it was appellant's duty to file the appeal as soon as possible within the period prescribed, and that, in our opinion, is not a valid ground.

13. It now remains to refer to two Privy Council decisions to which our attention was drawn. In ***Ram Narain Joshi* v. *Parmeswar Narain Mahta*** [(1902-03) 30 IA 20], the Privy Council was dealing with a case where on August 9, 1895 the High Court had made an order that the appeal in question should be transferred to the High Court under Section 25 of the Code of Civil Procedure and heard along with another appeal already pending there. In making this order the High Court had given liberty to the respondent to make his objections, if any, to the said transfer. On September 16, 1895 a petition was filed on behalf of the appellant objecting to the said transfer; and the question arose whether sufficient cause had been shown for the delay made by the party between August 9, 1895 to September 16, 1895. The decree under appeal had been passed on June 25, 1894 and the appeal against the said decree had been presented to the District Judge on September 3, 1894. It would thus be seen that the question which arose was very different from the question with which we are concerned; and it is in regard to the delay made between August 9, 1895 to September 16,

1895 that the Privy Council approved of the view taken by the High Court that the said delay had not been satisfactorily explained. We do not see how this decision can assist us in interpreting the provisions of Section 5.

14. The next case on which reliance has been placed by the respondent is ***Brij Inder Singh*** **v.** ***Kanshi Ram*** [(1916-17) 44 IA 218]. The principal point decided in that case had reference to Section 14 read with Section 5 of the Limitation Act, 1908; and the question which it raised was whether the time occupied by an application in good faith for review, although made upon a mistaken view of the law, should be deemed as added to the period allowed for presenting an appeal. As we have already pointed out, when the question of limitation has to be considered in the light of the combined operation of Sections 14 and 5 of the Limitation Act the conditions expressly imposed by Section 14 have to be satisfied. It would, however, be unreasonable to suggest that the said conditions must to the same extent and in the same manner be taken into account in dealing with applications falling under Section 5 of the Limitation Act.

15. It appears that the provisions of Section 5 in the present Limitation Act are substantially the same as those in Section 5(*b*) and Section 5, para 2, of the Limitation Acts of 1871 and 1877 respectively. Section 5-A which was added to the Limitation Act of 1877 by the amending Act 6 of 1892 dealt with the topic covered by the explanation to Section 5 in the present Act. The explanation provides, inter alia, that the fact that the appellant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of Section 5. The effect of the explanation is that if the party who has applied for extension of period shows that the delay was due to any of the facts mentioned in the explanation that would be treated as sufficient cause, and after it is treated as sufficient cause the question may then arise whether discretion should be exercised in favour of the party or not. In the cases to which the explanation applies it may be easy for the court to decide that the discretion should be exercised in favour of the party and delay should be condoned. Even so, the matter is still one of discretion. Under Section 5-A of the Act of 1877, however, if the corresponding facts had been proved under the said section there appears to have been no discretion left in the court because the said section provided, inter alia, that whenever it was shown to the satisfaction of the court that an appeal was presented after an expiration of the period of the limitation prescribed owing to the appellant having been misled by any order, practice or judgment of the High Court of the presidency, province or district, such appeal or application, if otherwise in accordance with law, shall, for all purposes be deemed to have been presented within the period of limitation prescribed therefore. That, however, is a distinction which is not relevant in the present appeal.

16. In the result the appeal is allowed, the delay of one day made in filing the appeal is condoned, and the case sent back to the court of the Judicial Commissioner for disposal on the merits in accordance with law. In the circumstances of this case the appellant should pay the respondent the costs of this court. Costs incurred by the parties in the court of the Judicial Commissioner so far will be costs in the appeal before him.

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State of Nagaland **v.** *Lipok AO*

(2005) 3 SCC 752

ARIJIT PASAYAT, J. - 2. The State of Nagaland questions correctness of the judgment rendered by a learned Single Judge of the Gauhati High Court, Kohima Bench refusing to condone the delay by rejecting the application filed under Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") and consequentially rejecting the application for grant of leave to appeal. Before we deal with the legality of the order refusing to condone the delay in making the application for grant of leave, a brief reference to the factual background would suffice:

Application for grant of leave was made in terms of Section 378(3) of the Code of Criminal Procedure, 1973 (in short "the Code"). A judgment of acquittal was passed by learned Additional Deputy Commissioner (Judicial), Dimapur, Nagaland. The judgment was pronounced on 18-12-2002. As there was delay in making the application for grant of leave in terms of Section 378(3) of the Code, application for condonation of delay was filed. As is revealed from the application for condonation, copy of the order was received by the department concerned on 15-1-2003; without wasting any time on the same date the relevant documents and papers were put up for necessary action before the Deputy Inspector General of Police (Headquarters), Nagaland. On the next day, the said Deputy Inspector General considered the matter and forwarded the file for consideration to the Deputy Inspector General of Police (M&P), Nagaland. Unfortunately the whole file along with note-sheet was found missing from the office and could not be traced in spite of best efforts made by the department. Finally it was traced on 15-3-2003 and the file was put up for necessary action by the Additional Director General of Police (Headquarters), Nagaland. The said officer opined that an appeal was to be filed on 26-3-2003, and finally the appeal was filed after appointing a Special Public Prosecutor. When it was noticed that no appeal had been filed, the Secretary to the Department of Law and Justice, Government of Nagaland got in touch with the Additional Advocate General, Gauhati High Court regarding the filing of the appeal and in fact the appeal was filed on 14-5-2003. It is of relevance to note that in the application for condonation of delay it was clearly noted that when directions were given to reconstruct the file, the missing file suddenly appeared in the office of the Director General of Police, Nagaland.

3. In support of the application for condonation of delay, it was submitted that the aspects highlighted clearly indicated that the authorities were acting bona fide and various decisions of this Court were pressed into service to seek condonation of delay. The High Court, however, refused to condone the delay of 57 days on the ground that it is the duty of the litigant to file an appeal before the expiry of the limitation period. Merely because the Additional Advocate General did not file an appeal in spite of the instructions issued to him, that did not constitute sufficient cause and further the fact that the records were purportedly missing was not a valid ground. It was noted that merely asking the Additional Advocate General to file an appeal was not sufficient and the department should have pursued the matter and should have made enquiries as to whether the appeal had in fact, been filed or not.

Accordingly the application for condonation of delay in filing the appeal was rejected and consequentially the application for grant of leave was rejected.

4. Learned counsel appearing for the appellant State submitted that the approach of the High Court is not correct and in fact it is contrary to the position of law indicated by this Court in various cases. In the application for condonation of delay the various factors which were responsible for the delayed filing were highlighted. There was no denial or dispute regarding the correctness of the assertions and, therefore, the refusal to condone the delay in filing application is not proper. It has to be noted that police officials were involved in the crime. The background facts involved also assume importance. As the police officers attached to a Minister had allegedly killed two persons, therefore, the mischief played by some persons interested to help the accused colleagues could not have been lost sight of. There is no appearance on behalf of the respondent in spite of the service of notice.

5. As noted above, a brief reference to the factual aspect is necessary. The background facts of the prosecution version are as follows:

On 29-5-1999 the five accused-respondents comprised the escort party of a State Cabinet Minister. The case of the accused-respondents was that at 5.30 p.m. on 29-5-1999, the occupants of a Maruti Zen crossed the cavalcade of the Minister and shouted at them. The personal security officer attached to the Minister saw one of the occupants of the car holding a small firearm. After dropping the Minister, the escort vehicle while proceeding to another place saw the Maruti Zen and its occupants, who on seeing the police party tried to escape. Meanwhile one of the occupants of the car opened the rear glass and opened fire from his firearm. On hearing gunfire, the police party also opened fire but the Maruti Zen escaped and disappeared. Subsequently, the car was discovered with one of its three occupants who was found to be already dead and the other two had sustained bullet injuries. Of the two survivors one died subsequently in hospital and another had to have his arm amputated.

6. The said shoot-out incident was investigated by the police and a case under Sections 302/307/326/34 of the Indian Penal Code, 1860 was registered against the accused-respondents.

7. The trial court noted that the ballistic report established that the bullets were fired from the guns of the accused-respondents. A finding was also recorded that the respondents exceeded their power of opening fire, and this constituted misfeasance, but absence of the post-mortem report was held to have vitally affected the prosecution case. It was also held that the accused persons had fired with AK-47 and M-22 rifles in self-defence. Therefore, benefit of doubt was given to them. A pragmatic approach has to be adopted and when substantial justice and technical approach are pitted against each other the former has to be preferred.

8. The proof by sufficient cause is a condition precedent for exercise of the extraordinary restriction (*sic* discretion) vested in the court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In ***N. Balakrishnan* v. *M. Krishnamurthy*** [AIR 1998 SC 3222] it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the court has to go in the

position of the person concerned and to find out if the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient. Although no special indulgence can be shown to the Government which, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

9. What constitutes sufficient cause cannot be laid down by hard-and-fast rules. In ***New India Insurance Co. Ltd.*** **v.** ***Shanti Misra*** [(1975) 2 SCC 840] this Court held that discretion given by Section 5 should not be defined or crystallised so as to convert a discretionary matter into a rigid rule of law. The expression "sufficient cause" should receive a liberal construction. In ***Brij Indar Singh*** **v.** ***Kanshi Ram*** [AIR 1917 PC 156] it was observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In ***Shakuntala Devi Jain*** **v.** ***Kuntal Kumari*** [AIR 1969 SC 575] a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

10. In ***Concord of India Insurance Co. Ltd.*** **v.** ***Nirmala Devi*** [(1979) 4 SCC 365] which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In ***Lala Mata Din*** **v.** ***A. Narayanan*** [(1969) 2 SCC 770] this Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any malafide motive.

11. In ***State of Kerala*** **v.** ***E.K. Kuriyipe*** [1981 Supp SCC 72] it was held that whether or not there is sufficient cause for condonation of delay is a question of fact dependent upon the facts and circumstances of the particular case. In ***Milavi Devi*** **v.** ***Dina Nath*** [(1982) 3 SCC 366] it was held that the appellant had sufficient cause for not filing the appeal within the period of limitation. This Court under Article 136 can reassess the ground and in appropriate case set aside the order made by the High Court or the Tribunal and remit the matter for hearing on merits. It was accordingly allowed, delay was condoned and the case was remitted for decision on merits.

12. In ***O.P. Kathpalia*** **v.** ***Lakhmir Singh*** [(1984) 4 SCC 66] a Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In ***Collector, Land Acquisition*** **v.** ***Katiji*** [(1987) 2 SCC 107] a Bench of two Judges considered the question of limitation in an appeal filed by the State and held that Section 5 was enacted in order to enable the court to do substantial justice to the parties by disposing of matters on merits. The expression "sufficient cause" is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not

appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational, common-sense, pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the State is the applicant. The delay was accordingly condoned.

13**.** Experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. The State which represents collective cause of the community, does not deserve a litigant-non-grata status. The courts, therefore, have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression of sufficient cause. Merit is preferred to scuttle a decision on merits in turning down the case on technicalities of delay in presenting the appeal. Delay as accordingly condoned, the order was set aside and the matter was remitted to the High Court for disposal on merits after affording opportunity of hearing to the parties. In ***Prabha* v. *Ram Parkash Kalra*** [1987 Supp SCC 339] this Court had held that the court should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. The appeal was allowed, the delay was condoned and the matter was remitted for expeditious disposal in accordance with law.

14**.** In ***G. Ramegowda* v. *Spl. Land Acquisition Officer*** [(1988) 2 SCC 142] it was held that no general principle saving the party from all mistakes of its counsel could be laid. The expression "sufficient cause" must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. In litigations to which Government is a party, there is yet another aspect which, perhaps, cannot be ignored. If appeals brought by Government are lost for such defaults, no person is individually affected, but what, in the ultimate analysis, suffers is public interest. The decisions of Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals. The law of limitation is, no doubt, the same for a private citizen as for governmental authorities. Government, like any other litigant must take responsibility for the acts,

omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it. It was, therefore, held that in assessing what constitutes sufficient cause for purposes of Section 5, it might, perhaps, be somewhat unrealistic to exclude from the considerations that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Government decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural red tape in the process of their making. A certain amount of latitude is, therefore, not impermissible. It is rightly said that those who bear responsibility of Government must have "a little play at the joints". Due recognition of these limitations on governmental functioning — of course, within reasonable limits - is necessary if the judicial approach is not to be rendered unrealistic. It would, perhaps, be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters. Implicit in the very nature of governmental functioning is procedural delay incidental to the decision-making process. The delay of over one year was accordingly condoned.

15**.** It is axiomatic that decisions are taken by officers/agencies proverbially at a slow pace and encumbered process of pushing the files from table to table and keeping it on the table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal, needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while the State is an impersonal machinery working through its officers or servants.

16**.** The above position was highlighted in ***State of Haryana* v. *Chandra Mani*** [(1996) 3 SCC 132] and ***Special Tehsildar, Land Acquisition* v. *K.V. Ayisumma*** [(1996) 10 SCC 634]. It was noted that adoption of strict standard of proof sometimes fails to protract (*sic*) public justice, and it would result in public mischief by skilful management of delay in the process of filing an appeal.

17**.** When the factual background is considered in the light of legal principles as noted above, the inevitable conclusion is that the delay of 57 days deserved condonation. Therefore, the order of the High Court refusing to condone the delay is set aside.

18**.** In normal course, we would have required the High Court to consider the application praying for grant of leave on merits. But keeping in view the long passage of time and the points involved, we deem it proper to direct grant of leave to appeal. The appeal shall be registered and disposed of on merits. It shall not be construed that we have expressed any merits on the appeal to be adjudicated by the High Court.

19**.** Appeal is allowed.

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Darshan Singh **v.** *Gurdev Singh*

AIR 1995 SC 75

K. RAMASWAMY AND N. VENKATACHALA, JJ. - 2. The appeal arises from the judgment and decree dated 2-3-1994 in RSA No. 31 of 1987 of Punjab & Haryana High Court. The respondent filed the suit for possession on 4-11-1982. Admittedly, he was a minor at the time of the death of his father. It is also an admitted fact that he attained majority on 17-4-1977. He filed the suit for possession of the plaint schedule portion within 12 years under Article 65 of the Schedule to the Limitation Act, 1963, Act 21 of 1963 (for short. 'the Act'). It is contended for the appellant that the suit ought to have been filed within three years from the date of cessation of respondent's disability but it was filed beyond three years and that, therefore, the suit is barred by limitation. A conjoint reading of Sections 6(1) and 8 of the Act shows that where a person is entitled to institute a suit, the limitation begins to run for a minor or insane or an idiot to institute the suit within the same period after the disability has ceased as would otherwise have been allowed from the time specified therefore in the third column of the Schedule i.e. 3 years from the date of cessation of disability. We find force in the contention.

3. Section 3 of the Act posits that the period of limitation applicable to a suit or other proceedings, if the period prescribed in the Schedule gets expired, the suit or application becomes barred by limitation though the right may subsist. However, Section 3 says that in particular circumstances, the limitation gets modified by the provisions of Sections 4 to 24 of the Act. Article 65 in Part V of the Schedule regulates limitation on the suits relating to immovable property. For possession of immovable property or any interest therein based on title, the period of limitation prescribed is 12 years, which begins to run when the possession of the defendant becomes adverse to the plaintiff. Section 6 deals with legal disability under sub-section (1) thereof where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, may institute the suit or make an application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule. In other words, though in a given case, the defendant may have perfected title by adverse possession during minority of the plaintiff by remaining in continuous and uninterrupted possession and enjoyment of the immovable property ascertaining his own exclusive right, title or interest in immovable property to the knowledge of the plaintiff, on cessation of the disability, even though the period of limitation prescribed in third column of the Schedule might have expired by efflux of time, Section 6 elongates the right and enlarges the limitation and entitles the minor, insane or idiot to institute the suit or make the application within the same period prescribed in the third column of the Schedule to the Act, after the disability to which the minor, the insane or the idiot has been subjected to, ceased. Section 8 makes special exception to Section 6. In other words, notwithstanding the availability of limitation in the third column of the Schedule prescribed under the relevant article, the suit or application shall be filed within three years from the cessation of the disability or the death of a person affected thereby engrafting the language thus:

> **8.** ***Special exceptions***. - Nothing in Section 6 or in Section 7 applies to suits to enforce rights of pre-emptions, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application.

4. In other words, Section 8 is a proviso to Section 6 or 7. A combined effect of Sections 6 and 8 read with third column of the appropriate article would be that a person under disability may sue after cessation of disability within the same period as would otherwise be allowed from the time specified therefore in the third column of the Schedule but special limitation as an exception has been provided in Section 8 laying down that extended period after cessation of the disability would not be beyond three years from the date of cessation of the disability or death of the disabled person. Take for instance, if a minor acquires a cause of action to sue for possession of immovable property but due to being minor, Section 6 aids him to lay the suit within the same period of 12 years after attaining majority. Suppose he dies, his legal representatives would be entitled to lay the suit within three years from the date of his attaining majority though he may die after the expiry of three years since his right to file the suit is extended only up to three years from the date of his attaining majority. In other words, cessation of disability or death whichever occurs earlier. The date of death of disabled person does not provide further extended cause of action, a period beyond three years after the disability ceases and death. Take another instance, where a cause of action for possession has arisen when the minor was at the age of 16 years. On his attaining majority, he gets three years' period but Article 65 Column 3, gives him the right to file a suit within 12 years from the date the defendant acquires prescriptive title. His cessation of disability and expiry of three years under Section 8 does not take away his right to file the suit within 12 years under Article 65. In other words the benefit of Section 6 is available to him. Take a third case, where the cause of action had arisen to a minor when he was at the age of 4 years. During his minority, the 12 years' prescriptive period expired by efflux of time at his attaining 16 years but on his becoming major, his disability ceases. Therefore, he gets a further period of three years from the date of cessation of disability to file a suit for recovery of the possession from the defendant who claims adverse possession to the plaintiff. Thus considered Section 8 is a special exception to Section 6 or 7 and the period of limitation though barred under Section 3, remained available to persons under disability specified in Section 6 or 7 and the right to lay the suit or application after disability ceased under Section 6 or 7 is regulated by the limitation prescribed by Section 8.

5. In other words, in each case, the litigant is entitled to a fresh starting period of limitation from the date of cessation of disability subject to the condition that in no case the period extended by this process under Section 6 or 7 shall exceed three years from the date of cessation of the disability. Considered from this perspective, we are clearly of the opinion that the suit of the respondent is barred by limitation. But unfortunately, the attention of the High Court was not drawn to Section 8 of the Act which laid down to its contra conclusion.

6. However, we have to see whether it is a fit case for our interference under Article 136 of the Constitution. All the courts including the High Court concurrently found as a fact that the appellant is a stranger to the family of the respondent and that he forged the 'Will', the last testamentary disposition of the father of the respondent and on its basis the appellant

wrongfully came into the possession of the suit property. Thereby he had fraudulently brought a fabricated 'Will' to gain wrongful possession of the suit property and was in enjoyment thereof. After the judgment of the High Court, the respondent came into possession of the suit property in execution of the decree. Therefore, we decline to interfere in this appeal. However, we point out that the respondent may not be entitled for mesne profits or damages against the appellant. The appeal is accordingly disposed of. No costs.

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Commissioner of Sales Tax, U. P. **v.** *Madan Lal Das*

AIR 1977 SC 523

H.R. KHANNA, J. - This is an appeal by special leave against the judgment of Allahabad High Court whereby the High Court answered the following question referred to it under Section 11(3) of the U.P. Sales Tax Act (hereinafter referred to as the Act) in favour of the dealer-respondent and against the revenue:

> "Whether the time taken by the dealer in obtaining another copy of the impugned appellate order could be excluded for the purpose of limitation of filing revision under Section 10(1) of the U.P. Sales Tax Act when one copy of the appellate order was served upon the dealer under the provisions of the Act."

The matter relates to the assessment year 1960-61. An appeal filed by the respondent against the order of Sales Tax Officer was disposed of by the Additional Commissioner (Judicial) Sales Tax, Bareilly. The copy of the appellate order was served on the dealer respondent on August 22, 1965. The respondent, it appears, lost the copy of the appellate order, which had been served upon him. On June 15, 1966 the respondent made an application for obtaining another copy of the above order. The copy was ready on August 17, 1967 and was delivered to the respondent on the following day i.e. August 18, 1967. Revision under Section 10 of the Act was thereafter filed by the respondent before the Judge (Revision) Sales Tax on September 9, 1967. Sub-section (3-B) of Section 10 of the Act prescribes the period of limitation for filing such a revision. According to that sub-section such a revision application shall be made within one year from the date of service of the order complained of but the revising authority may on proof of sufficient cause entertain an application within a further period of six months.

Question was then agitated before the Judge (Revision) as to whether the revision application was within time. The respondent claimed that under Section 12(2) of the Limitation Act, he was entitled to exclude in computing the period of limitation for filing the revision, the time spent for obtaining a copy of the appellate order. This contention was accepted by the Judge (Revision). He also observe that the fact that the said copy was not required to be filed along with the revision petition would not stand in the way of respondent relying upon Section 12(2) of the Limitation Act. The Judge (Revision) thereafter dealt with the merits of the case and partly allowed the revision petition. At the instance of the Commissioner of Sales Tax, the question reproduced above was referred to the High Court. The High Court, as stated above, answered the question in favour of the respondent and in doing so placed reliance upon the provisions of Section 12(2) of the Limitation Act, 1963 (Act 36 of 1963) which reads as under:

> "(2) In computing the period of limitation for an appeal or an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded."

Bare perusal of sub-section (2) of Section 12 of the Act of 1908 would show that it did not deal with the period of limitation prescribed for an application for revision. As against

that, the language of sub-section (2) of Section 12 of the Act of 1963 makes it manifest that its provisions would also apply in computing the period of limitation for application for revision. There can, therefore, be no manner of doubt that in a case like the present which is governed by the Act of 1963, the provisions of sub-section (2) of Section 12 can be invoked for computing the period of limitation for the application for revision if the other necessary conditions are fulfilled.

2. It is, however, contended by Mr. Manchanda that the U. P. Sales Tax Act constitutes a complete code in itself and as that Act prescribes the period of limitation for filing of revision petition, the High Court was in error in relying upon the provisions of sub-section (2) of Section 12 of the Limitation Act, 1963. The contention, in our opinion, is wholly bereft of force.

4. There can be no manner of doubt that the U.P. Sales Tax Act answers to the description of a special or local law. According to sub-section (2) of Section 29 of the Limitation Act, reproduced above, for the purpose of determining any period of limitation prescribed for any application by any special or local law, the provisions contained in Section 12(2), inter alia, shall apply in so far as and to the extend to which they are not expressly excluded by such special or local law. There is nothing in the U.P. Sales Tax Act expressly excluding the application of Section 12(2) of the Limitation Act for determining the period of limitation prescribed for revision application. The conclusion would, therefore, follow that the provisions of Section 12(2) of the Limitation Act of 1963 can be relied upon in computing the period of limitation prescribed for filing a revision petition under Section 10 of the U.P. Sales Tax Act.

5. It has been argued by Mr. Manchanda that it was not essential for the dealer-respondent to file a copy of the order of the Assistant Commissioner along with the revision petition. As such, according to the learned Counsel, the dealer-respondent could not exclude the time spend in obtaining the copy. This contention is equally devoid of force. There is nothing in the language of Section 12(2) of the Limitation Act to justify the inference that the time spent for obtaining copy of the order sought to be revised can be excluded only if such a copy is required to be filed along with the revision application. All that Section 12(2) states in this connection is that in computing the period of limitation a revision, the time requisite for obtaining a copy of the order sought to be revised shall be excluded. It would be impermissible to read in Section 12(2) a proviso that the time requisite for obtaining copy of the decree, sentence or order appealed from or sought to be revised of reviewed shall be excluded only if such copy has to be file along with the memorandum of appeal or application for leave to appeal or for revision or for review of judgment, when the legislature has not inserted such a proviso in Section 12(2). It is also plain that without procuring copy of the order of the Assistant Commissioner the respondent and his legal adviser would not have been in a position to decide as to whether revision petition should be filed against that order and if so, what grounds should be taken in the revision petition.

6. The matter indeed is not *res integra*. In the case of ***J. N. Surty* v. *T. S. Chetiyar*** [AIR 1928 PC 103], the Judicial Committee after noticing the conflict in the decisions of the High Courts held that Section 12(2) of the Indian Limitation Act, 1908 applies even when by a rule

of the High Court a memorandum of appeal need not be accompanied by a copy of the decree. Lord Phillimore speaking on behalf of the Judicial Committee observed:

> "Their Lordships have now to return to the grammatical construction of the Act, and they find plain words directing that the time requisite for obtaining the two documents is to be excluded from computation Section 12 makes no reference to the Code of Civil Procedure or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction."

If, indeed, it could be shown that in some particular class of cases there could be no object in obtaining the two documents, an argument might be offered that no time could be requisite for obtaining something not requisite. But this is not so. The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well went to see its form before attacking it by his memorandum of appeal. As to the judgment, no doubt when the case does not come from upcountry, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says, the Legislature may not wish him to hurry to make a decision till he has well considered it.

7. Following the above decision, it was held by a Full Bench consisting of five Judges of the Lahore High Court in the case of ***Punjab Co-operative Bank Ltd., Lahore*** **v.** ***Official Liquidators, Punjab Cotton Press Co. Ltd.*** [AIR 1941 Lah. 257] that even though under the Rules and Orders of the High Court no copy of the judgment is required to be filed along with the memorandum of appeal preferred under Section 202 of the Indian Companies Act from an order of a single Judge, the provisions of Section 12 of the Indian Limitation Act would be attracted. The provisions of Section 12 were also held to govern an appeal under Letters Patent.

8. A full Bench of the Patna High Court in the case of ***Mt. Lalitkumari*** **v.** ***Mahaprasad N. Singh*** [AIR 1947 Pat. 329] also held that the provisions of Section 12 of the Limitation Act were applicable to letter patent appeals under Clause 10 of the letters patent.

9. The above decision of the Judicial Committee was followed by this Court in the case of ***Additional Collector of Customs, Calcutta*** **v.** ***M/s. Best & Co.*** (AIR 1966 SC 1713).

11. It is plain that since 1928 when the Judicial Committee decided the case of ***Surty***, the view which has been consistently taken by the courts in India is that the provisions of Section 12 (2) of the Limitation Act would apply even though the copy mentioned in that sub-section is not required to be filed along with the memorandum of appeal. The same position should hold good in case of revision petitions ever since Limitation Act of 1963 came into force.

12. Lastly, it has been argued that the copy of the order of the Assistant Commissioner was served upon the respondent, and as such it was not necessary for the respondent to apply for copy of the said order. In this respect we find that the copy which was served upon the respondent was lost by him. The loss of that copy necessitated the filing of an application for obtaining another copy of the order of the Assistant Commissioner.

13. In the case of ***State of Uttar Pradesh*** **v.** ***Maharaj Narain*** [AIR 1968 SC 960] the appellant obtained three copies of the order appealed against by applying on three different dates for the copy. The appellant filed along with the memorandum of appeal that copy which

had taken the maximum time for its preparation and sought to exclude such maximum time in computing the period of limitation for filing the appeal. This Court, while holding the appeal to be within time, observed that the expression time requisite in Section 12(2) of the Limitation Act cannot be understood as the time absolutely necessary for obtaining the copy of the order and that what is deductible under Section 12(2) is not the minimum time within which a copy of the order appealed against could have been obtained. If that be the position of law in a case where there was no allegation of the loss of any copy, a fortiori it would follow that where as in the present case the copy served upon a party is lost and there is no alternative for that party except to apply for a fresh copy in order to be in a position to file revision petition, the time spent in obtaining that copy would necessarily have to be excluded under Section 12(2) of the Limitation Act, 1963.

14. The High Court, in our opinion, correctly answered the question referred to it in favour of the dealer-respondent and against the revenue.

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State of Uttar Pradesh v. *Maharaj Narain*

AIR 1968 SC 960

HEDGE, J. - 1. In this appeal by certificate, the only question that arises for decision is as to the true scope of the expression "time requisite for obtaining a copy of the decree, sentence or order appealed from" found in sub-s. 2 of s. 12 of the Indian Limitation Act 1908 which will be hereinafter referred to as the Act. The said question arose for decision under the following circumstances : The respondents were tried for various offences before the learned assistant sessions judge, Farrukhabad. The said learned judge acquitted them. Against the order of acquittal the State went up in appeal to the High Court of Allahabad. The said appeal was dismissed as being barred by limitation. The correctness of that decision is in issue in this appeal.

2. Item 157 of the first schedule to the Act prescribes that the period of limitation for an appeal under the Code of Criminal Procedure 1898, from an order of acquittal is three months from the date of the order appealed from. But sub-s. 2 of s. 12 provides that in computing the period of limitation prescribed for an appeal the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the order appealed from shall be excluded.

3. The memorandum of appeal was filed into court on March 29, 1963. The order appealed from had been delivered on November 10, 1962. According to the information contained in the copy of the order produced along with the said memorandum the appeal was within time. It showed that that copy was applied for on November 15, 1962 and the same was ready on January 3, 1963.

4. It was contended on behalf of the respondents that the appeal was out of time to view of the fact that the appellant had applied for and obtained two other copies of the order appealed from and if time is calculated on the basis of those copies the appeal was beyond time. In addition to the copy referred to earlier, the appellant had applied for another copy of the order appealed from on December 3, 1962 and that copy was ready for delivery an December 20, 1962. The appellant also applied for yet another copy of the same order on December 21, 1962 and that copy was made ready on the same day. There is no dispute that if the period of limitation is computed on the basis of those copies the appeal was barred by limitation. But the point for consideration is whether the obtaining of those copies has any relevance in the matter of computing the period of limitation for the appeal.

5. The High Court of Allahabad accepted the contention of the respondents that in determining the time requisite for obtaining a copy of the order appealed from, it had to take into consideration the copies made available to the appellant on the 20th and 21st December, 1962. In opined that the expression 'requisite' found in s. 12(2) means "property required", and hence the limitation has to be computed on the basis of the copy made available to the appellant in December, 1962.

6. It was not disputed on behalf of the respondents that it was not necessary for the appellant to apply for a copy of the order appealed from immediately after the order was pronounced. The appellant could have, if it chose to take the risk, waited till the ninety days

period allowed to it by the statute was almost exhausted. Even then the time required for obtaining a copy of the order would have been deducted in calculating the period of limitation for filing the appeal. Hence the expression 'time requisite' cannot be understood as the time absolutely necessary for obtaining the copy of the order. What is deducible under s. 12(2) is not the minimum time within which a copy of the order appealed against could have been obtained. It must be remembered that sub-s. 2 of s. 12 enlarges the period of limitation prescribed under entry 157 of Schedule I. That section permits the appellant to deduct from the time taken for filing the appeal, the time required for obtaining the copy of the order appealed from and not any lesser period which might have been occupied if the application for copy had been filed at some other date. That section lays no obligation on the appellant to be prompt in his application for a copy of the order. A plain reading of s. 12(2) shows that in computing the period of limitation, prescribed for an appeal, the day on which the judgment or order complained of was pronounced and the time taken by the court to make available the copy applied for, have to be excluded. There is no justification for restricting the scope of that provision.

7. If the appellate courts are required to find out in every appeal filed before them the minimum time required for obtaining a copy of the order appealed from, it would be unworkable. In that event every time an appeal is filed, the court not only will have to see whether the appeal is in time on the basis of the information available from the copy of the order filed along with the memorandum of appeal but it must go further and hold an enquiry whether any other copy had been made available to the appellant and if so what was the time taken by the court to make available that copy. This would lead to a great deal of confusion and enquiries into the alleged laches or dilatoriness in respect not of copies produced with the memorandum of appeal but about other copies which he might have got and used for other purposes with which the court has nothing to do.

8. The High Court in arriving at the decision that the appeal is barred by time relied on the decision of the Lahore High Court in ***Mathela* v. *Sher Mohammad*** [A.I.R. 1935 Lah. 682]. It also sought support from the decisions of the Judicial Committee in ***Pramatha Nath Roy* v. *Lee*** [49 I.A. 307] and ***J. N. Surty* v. *T. S. Chettyar*** [55 I.A. 161]. The Lahore decision undoubtedly supports the view taken by the High Court. It lays down that the words "time requisite" mean simply time required by the appellant to obtain a copy of the decree assuming that he acted with the reasonable promptitude and diligence. It further lays down that the time requisite for obtaining a copy is the shortest time during which the copy would have been obtained by the appellant, and it had nothing to do with the amount of time spent by him in obtaining the copy which he chooses to file with the memorandum of appeal. With respect to the learned judges who decided that case we are unable to spell out from the language of s. 12(2) the requirement that the appellant should act with reasonable promptitude and diligence and the further condition that the time requisite for obtaining a copy should be the shortest time during which a copy could have been obtained by the appellant. We are of the opinion that the said decision does not lay down the law correctly.

9. Now we shall proceed to consider the decisions of the Judicial Committee relied on by the High Court. In ***Pramatha Nath Roy* v. *Lee*** [49 I.A. 307] the appellant was found to be guilty of laches. The Judicial Committee held that he was not entitled to deduct the time lost

due to his laches. It is in that context the Board observed that the time which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order could not be regarded as 'requisite' within sub-s. 2 of s. 12. That decision does not bear on the question under consideration.

10. In ***J. N. Surty*** **v.** ***T. S. Chettyar*** [55 I.A. 161], the question that fell for decision by the Judicial Committee was whether in reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree or judgment must be excluded even though by the rules of the court it was not necessary to produce with the memorandum of appeal the copy of the decree or judgment. Their Lordships answered that question in the affirmative. While deciding that question, their Lordships considered some of the observations made by the High Court relating to the dilatoriness of some Indian practitioners. In that context they observed:

> There is force no doubt in the observation made in the High Court that the elimination of the requirement to obtain copies of the documents was part of an effort to combat the dilatoriness of some Indian practitioner; and their Lordships would be unwilling to discourage any such effort. All, however, that can be done, as the law stands, is for the High Courts to be strict in applying the provision of exclusion.
>
> The word 'requisite' is a strong word; it may be regarded as meaning something more than the word 'required'. It means 'properly required' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his fault.

11. In other words, what their Lordships said was that any delay due to the default of the pleader of the appellant cannot be deducted. There can be no question of any default if the steps taken by the appellant are in accordance with law. Hence, the above quoted observations of the Judicial Committee can have no application to the point under consideration.

12. Preponderance of judicial opinion is in favour of the conclusion reached by us earlier. The leading case on the subject is the decision of the full bench of the Madras High Court in ***Panjam*** **v.** ***Trimala Reddy*** [I.L.R. 57 Mad. 560], wherein the court laid down that in s. 12 the words 'time requisite for obtaining a copy of the decree' mean the time beyond the party's control occupied in obtaining the copy which is filed with the memorandum of appeal and not an ideal lesser period which might have been occupied if the application for the copy had been filed on some other date. This decision was followed by the Travancore-Cochin High Court in Kunju Kesavan v. M. M. Philip [AIR 1953 T.C. 552], by the Allahabad High Court in ***B. Govind Raj Sewak Singh*** **v.** ***Behuti Narain Singh*** [AIR 1950 All 486] and by the Madhya Pradesh High Court in ***K. U. Singh*** **v.** ***M. R. Kachhi*** [AIR 1960 MP 140].

13. From the above discussion it follows that the decision under appeal does not lay down the law correctly. But yet we are of the opinion that this is not a fit case to interfere with the order of the High Court dismissing the appeal. The respondents were acquitted by the assistant sessions judge. Farrukhabad on November 10, 1962. We were informed by learned counsel for the State that this appeal was brought to this court mainly with a view to settle an important question of law, and under instructions from the State government he told us that he does not press the appeal on merits. Accordingly this appeal is dismissed.

* * * * *

Udayan Chinubhai **v.** *R. C. Bali*

AIR 1977 SC 2319

P.K. GOSWAMI, J. - This appeal by special leave is directed against the judgment and order of the Delhi High Court dated March 28, 1977, in a regular first appeal. The High Court dismissed the appeal as time-barred and also refused to condone the delay under Section 5 of the Limitation Act, 1963.

2. The defendant is the appellant before us. The plaintiff-respondent filed a suit for rendition of accounts in the court of the Commercial Sub-Judge; Delhi and he decreed the suit by his judgment dated March 27, 1976, in the following words:

> I grant the plaintiff a final decree in the sum of Rs. 42,259.75 against the defendants with costs. The plaintiff is directed to make up deficiency in court-fee within one month.

It appears that the suit was filed with a court-fee of Rs. 20 only. The plaintiff after obtaining, from the court, an extension of time supplied the deficient court-fees on May 6, 1976, on which date the decree was prepared and signed.

3. On April 14, 1976, the appellant, who stays in Ahmedabad, requested Shri Bharatinder Singh, his Advocate in Delhi, in the trial Court, to take necessary steps to file an appeal in the High Court and the said Advocate made an application for certified copies of the judgment and the decree on April 17, 1976. Later on the appellant requested Shri P.H. Parekh, Advocate, to file the appeal in the High Court. Shri Parekh was informed by Shri Bharatinder Singh that he had made the application for certified copies in April, 1976 and that he would handover the certified copies as soon as these were received.

4. Since, however, for a long time the said certified copies were not received by him from Shri Bharatinder Singh, Shri Parekh filed another application for certified copies of the judgment and decree on July 14, 1976, after signing of the decree. The said copies were ready on September 17, 1976 and were received by Shri Parekh on that day. Shri Parekh prepared the Memo of appeal, got it approved from his client in Ahmedabad, purchased the court-fees payable on the Memorandum of appeal on September 25, 1976, and filed the appeal in the High Court on September 29, 1976.

5. It is stated that Shri Parekh was all along of the opinion that since the first copy had been applied for in April, 1976 and since that was not ready, the appeal would be well within time and since the said certified copies would be obtained from Shri Bharatinder Singh, Shri Parekh would file the said certified copies to show that the appeal was within the period of limitation. It is further stated that Shri Parekh was also of the opinion that the time for limitation would start running from May 6, 1976, since that was the date when the respondent paid the deficient court-fees and the final decree was drawn up and signed. It was under these circumstances, it was claimed before the High Court, that the appeal filed was within the period of limitation as prescribed by Article 116(a) of the Schedule to the Limitation Act, 1963.

6. The Registry of the High Court pointed out that the appeal was time barred and the appellant, therefore, filed an application explaining all the aforesaid facts and circumstances with regard to the delay in presentation of the appeal and also contended that in fact there was no delay if the time ran from May 6, 1976.

7. The High Court held that the appeal was, prima facie, time barred taking the date of the decree as March 27, 1976, which was the date of the judgment and refused to condone the delay of 12 days which, according to the High Court, was not adequately explained. The High Court, however, made a significant observation taking note of the entire circumstances of the case that "all this makes out sufficient cause for condoning the delay upto that time", that is September 17, 1976, when Shri Parekh took delivery of the certified copy. It may be mentioned here that Shri Bharatinder Singh took delivery of the certified copies on December 22, 1976, although these were ready for delivery on June 11, 1976.

8. The first question that arises for decision in this appeal is whether under Section 12(2) of the Limitation Act, 1963, read with the Explanation, the appellant is entitled to exclude the time commencing from the date of the judgment till signing of the decree prior to his application for a copy thereof. According to the appellant the Explanation should be so read as to enable a party to obtain the benefit of the time prior to the signing of the decree in computing the period of limitation. In that case the appeal will not be barred, says Mr. Tarkunde.

9. Before we proceed further, we may read Section 12 with the Explanation, which was for the first time introduced in the new Act in 1963:

> 12. (1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.
>
> (2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.
>
> (3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment on which the decree or order is founded shall also be excluded.
>
> (4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.
>
> Explanation. - In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

10. In the old Limitation Act, 1908, the Explanation was not there and there was a sharp cleavage of opinion in the High Courts with regard to the expression “the time requisite for obtaining a copy of the decree”.

14. The Bill for the new Limitation Act was introduced in the Rajya Sabha in June 1962. The Objects and Reasons appended to the Bill for inserting the new Section 12 are given as follows:

> The existing Section 12 is being amended:
>
> (i) to include applications for revision within its scope;
> (ii) to provide expressly that the time requisite for obtaining a copy of the judgment in the case of an application for leave to appeal is also to be excluded;
> (iii) to make it clear that any delay in the office of the court in drawing up a decree or order before the application for a copy thereof is made shall not be excluded.

15. As noted earlier the Explanation was introduced in order to finally put the lid on the controversy with regard to the time requisite for obtaining a certified copy of the decree under Section 12(2). The majority of the High Courts under the old Section 12(2), without the Explanation, took the view that in excluding the time requisite for obtaining a certified copy of the decree the entire time required for preparation of the decree by the office after pronouncement of the judgment and the singing of the decree was to be excluded irrespective of the fact whether the application for certified copy of the decree was made prior to the signing of the decree or after it. This Court in Lala Bal Mukand approved of the view taken by the majority of the High Courts. It is worth repeating that while approving of that view under the old Act this Court made it clear that "it expressed no opinion as to whether the law enunciated in ***Lala Bal Mukand*** would hold good in cases governed by the new Section 12 of the 1963 Act".

17. Relying on the new Section 12(2) read with the Explanation of the 1963 Act, it is not possible to accept the submission that in computing the time requisite for obtaining the copy of a decree by an application for copy made after preparation of the decree, the time that elapsed between the pronouncement of the judgment and the signing of the decree should be excluded. The Explanation does not countenance such a construction of Section 12(2). It is to set at rest the difference of views amongst the High Courts that the Explanation was introduced and it is not permissible now to allow the same controversy to be perpetuated even after the 1963 Act.

18. The appellant strongly relied upon the Full Bench decision of the Bombay High Court in ***Subhash Ganpatrao Buty* v. *Marotti s/o Krishnaji Dorlikar*** [AIR 1975 Bom. 244] in support of his submission. The Full Bench observed in that decision that:

> In other words, the plain and grammatical meaning of the Explanation, in our view, is that while computing the 'time requisite' for obtaining a copy of a decree, any time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall be included.

19. The Full Bench overruled a decision of the same court in ***Sitaram Dada Sawant* v. *Ramu Dada Sawant*** [AIR 1968 Bom. 204], wherein Chandrachud, J. (as he then was) had taken the view, on the new section, that the appellant therein should be entitled to the exclusion of time between the date on which he applied for certified copies and the date on which those copies were ready for delivery and that the time between the date of the judgment and the date on which the decree was drawn up should not be excluded if the appellant had

applied for certified copy of the decree after the decree was drawn up. The Full Bench gave a good deal of importance to what it described as "the aspect as to what topic is dealt with by the Explanation...".

21. The object of the Explanation is to facilitate computation of the time requisite for obtaining a copy of the decree about which there had been earlier sharp difference of judicial opinion. It will be an irony if the same difference of opinion continues even after the new Explanation.

22. We would not approve of reading the words in the Explanation "shall not be excluded" by mentally substituting them as "shall be included" for the purpose of construction. There is a scheme underlying the several clauses in Section 12 along with the Explanation which is the opening section in Part III of the Act under the title "Computation of period of Limitation". Sub-clauses (1), (2), (3) and (4) use the same expression "shall be excluded" for the purpose of computing the period of limitation. The period of limitation is defined in Section 2(j) and "means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act". Whenever, therefore, under Section 12 a prescribed period of limitation has to be computed certain days are permitted to be excluded in order that a person who desires to appeal is not put to any inconvenience or hardship in the prescribed period being shortened by certain exigencies for no fault of his or for reasons beyond his control.

23. When in the several clauses of Section 12, as mentioned above, certain days shall have to be excluded, what is not to be excluded, therefore, has also to be clearly explained. That is the raison d'être for the Explanation newly introduced. In the entire scheme of Section 12 dealing with exclusion of time for the purpose of computing the prescribed period of limitation, it is not possible to substitute the words "shall not be excluded" by reading the same as "shall be included" which will introduce an alien concept which is different from that disclosed in the setting of all the provisions. It will not be enough to say that the meaning of the words "shall not be excluded" is the same as "shall be included". The words "shall not be excluded" in the Explanation have to play an appropriate role in the setting and context of the expression "shall be excluded" used in all the preceding clauses in Section 12. It is only preserving the words intact in the Explanation; its correct intent has to be ascertained.

24. Let us take an illustration. The period of limitation under the Code of Civil Procedure for an appeal to a High Court from any decree is 90 days from the date of the decree. The date of the decree is the date of the judgment under Order 20, Rule 7, C.P.C. Ordinarily, therefore time begins to run subject to Section 12 from the date of the judgment which is, for the particular purpose, the date of the decree. Ninety days being the prescribed period of limitation, under Section 12(1), the day from which such period has to be reckoned shall be excluded. Again under Section 12(2), the time requisite for obtaining a certified copy of the decree shall be excluded. Under Section 12(3), even the time requisite for obtaining a copy of the judgment on which the decree is founded shall also be excluded. Having thus in the above three clauses excluded a number of days in computing the prescribed period of 90 days, it was absolutely necessary to make it clear in the Explanation that the time taken by the court to prepare the decree before an application for a copy thereof is made shall not be excluded. If

the Explanation were not in these terms the old controversy would have persisted about the time claimed by a person before making an application for a copy, whether it should be excluded or not, in view of the earlier conflict of decisions. It is because of this history of the judicial controversy that the Explanation was phrased in the way it has been done by Parliament, namely, that the time taken by the court to prepare the decree before an application thereof is made shall not be excluded. In other words, that period which may elapse in preparing the copy of the decree, prior to the making of an application for copy, shall not be excluded when excluding the time requisite for obtaining a copy while computing the period of limitation. But for this Explanation it could have been again argued that, that time also should be excluded as the entire period of time requisite for obtaining a copy in view of one line of earlier judicial decisions under the old Act. We are, therefore clearly, of opinion that the Law Commission had made a very salutary recommendation in order to make the position absolutely clear and to avoid any further controversy in the matter.

25. When the Explanation was added to Section 12, Parliament sought to put a quietus to the long-standing judicial controversy with regard to "the time requisite for obtaining a copy" by clearly explaining that when time is excluded, as provided for in sub-section (2) of Section 12, the time that has elapsed from pronouncement of the judgment to the point of time prior to application for a copy of the decree shall not be excluded in computation of the time requisite for obtaining the copy. This is in accord with reason and sound commonsense since a person does nothing in court for obtaining a copy prior to his making an application for a copy when there is nothing, in his way, not to. This was the reason underlying the Explanation which prompted the legislature not to permit exclusion of such idle time of the applicant while computing the "time requisite for obtaining a copy" for the purpose of computing the period of limitation. We have to give effect to this Explanation with its avowed intent.

26. Computation of limitation is predominantly the governing factor in Section 12. As if the section and the Explanation say: You are permitted to exclude the time requisite for obtaining a copy but in computing that time, which is requisite and which is allowed for exclusion under Section 12(2), you shall not exclude, while computing the period of limitation, the time that had elapsed from the date of judgment to the date of your application for a copy. The object seems clearly to be not to give premium to unmerited idleness and indifference of litigants in making application for copy.

27. The Explanation cannot be read in isolation disowning the substantive provision, namely, Section 12(2).

28. The position may be different if a decree in law cannot be prepared because of non-compliance with some directions in the judgment. The Explanation does a composite service, positive as well as negative. Positively it prescribes a mode of correct computation of the time requisite by a process of exclusion and negatively it mandates for not excluding the time before making an application for copy. The Explanation does not warrant inclusion of a certain period positively excluded by it for the purpose of computing the period of limitation by "including" that excluded period for the benefit of a person prior to his making an application for copy. The interdict of the Explanation must be respected.

29. The subject-matter of Section 12(2) and the Explanation is identical and, with respect, we are unable to agree with the opinion of the Full Bench in ***Subhash Ganpatrao Buty*** that there is a dichotomy of "topic" in the said two provisions.

30. In interpreting the provisions of a statute the courts have to give effect to the actual words used whether couched in the positive or in the negative. It is not permissible to alter the cohesive underlying thought process of the legislature by reading in positive sense what has been set out in negative terms. The courts will try to discover the real intent by keeping the diction of the statute intact. This is another cardinal rule of construction.

31. The view we have taken does not require us to mentally substitute the words in the statute for those used by the legislature. Besides, even under the new Act there having already arisen a conflict of decisions in several High Courts the sooner the controversy is set at rest the better.

32. The correct legal position, therefore, is that under Section 12(2) read with the Explanation a person cannot get exclusion of the period that elapsed between pronouncement of the judgment and the signing of the decree if he made the application for a copy only after preparation of the decree. We endorse the views on the line of the Bombay High Court in ***Sitaram Dada Sawant***. With respect, the Full Bench decision in ***Subhas Ganpatrao Buty*** cannot be approved.

34. While the above is the true legal position that emerges from Section 12(2) read with the Explanation there may be an exceptional case, as the instant one, before us.

35. The time requisite for obtaining a copy under Section 12(2) must be that time which is "properly required" for getting a copy of the decree [see ***Lala Bal Mukand***]. It is not possible to conceive how a person may obtain a copy of a decree if that decree, in view of the recitals in the judgment pronounced, cannot be prepared without some further action by a party. A judgment which is unconditioned by the requirement of any action by a party, stands on a different footing and in that event the date of the judgment will necessarily be the date of the decree. In such a case, a party cannot take advantage of any ministerial delay in preparing the decree prior to his application for a copy, that is to say, if there is no impediment in law to prepare a decree immediately after pronouncement of the judgment, no matter if, in fact, the decree is prepared after some time elapses. No party, in that event, can exclude that time taken by the court for preparing the decree as time requisite for obtaining a copy if an application for a copy of the decree has not been made prior to the preparation of the decree. It is only when there is a legal impediment to prepare a decree on account of certain directions in the judgment or for non-compliance with such directions or for other legally permissible reasons, the party, who is required to comply with such directions or provisions, cannot rely upon the time required by him, under those circumstances, as running against his opponent.

36. When a judgment is delivered in the presence of the parties clearly announcing certain steps to be taken by the plaintiff before the decree can be prepared, the matter stands on an entirely different footing. In the present case without deposit of the deficient court-fees by the plaintiff the decree could not be instantly prepared under the law. Time was given to the plaintiff for that purpose and there could be no decree in existence in law until the plaintiff supplied the court-fees. Without the existence of the decree any application for a copy of the

decree would be futile. Therefore, on the facts of this case, in view of the operative part of the judgment, the date of the decree was when the plaintiff furnished the court-fees as ordered. It was only then for the first time possible to prepare the decree in terms of the judgment. In this case the decree was prepared on the very day, namely, May 6, 1976, when the court fees were furnished by the plaintiff. As has been observed in ***Lala Bal Mukand*** it would have been "extravagant" for the appellant to apply for a copy of the decree before the decree could be prepared. On the special facts of this case there was no default on the part of the appellant and the appeal was not barred by limitation. The respondent cannot take advantage of his own default to defeat the appellant's appeal on the ground of limitation. The period of 90 days, in this case, will count from the date when the plaintiff had deposited the court-fees, as ordered, when only the court could take up the preparation of the decree. It is not a case of the court omitting or delaying to prepare the decree without any further action by a party.

37. Even otherwise, in the entire circumstances of the case disclosing sheer indifference, perhaps, negligence, on the part of the Advocate, Shri Bharatinder Singh, and no laches, whatever, on the part of the appellant, we would have been inclined to condone the delay of 12 days under Section 5 of the Limitation Act.

38. In the result the appeal is allowed. The judgment and decree of the High Court are set aside.

* * * * *

India House v. *Kishan N. Lalwani*

(2003) 9 SCC 393

R.C. LAHOTI, J. - 2. These appeals by special leave lay challenge to an order of the High Court whereby two civil revisions filed by the respondent herein under Section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (hereinafter "the Tamil Nadu Act" for short) feeling aggrieved by a common order disposing of two appeals, have been held to have been filed within the period of limitation. The High Court has condoned the delay in filing the revision petitions subject to payment of Rs 750 by way of costs by the petitioner to the respondent before it. The respondent in the High Court has filed these two appeals by special leave.

3. The facts in brief: the appellate order, which is the subject-matter of revision in the High Court, was passed on 25-9-2001. Application for obtaining certified copy of the order was made on 9-11-2001. Certified copy was delivered on 24-12-2001. The civil revisions were filed in the High Court on 2-1-2002. The High Court has held that there was a sufficient cause for the application for certified copy having been made belatedly on 9-11-2001 when the limitation for filing the revision petitions had already expired. The High Court has also held that the time lost between 9-11-2001 and 24-12-2001 (both days inclusive) was liable to be excluded from computing the period of limitation in accordance with sub-section (2) of Section 12 of the Limitation Act, 1963.

4. The period of limitation for filing revision in the High Court is 30 days from the date of the order impugned. It is not disputed that on 9-11-2001 when the application for obtaining certified copy was filed, the period of 30 days had already expired. It is also not disputed that if the period between 9-11-2001 and 24-12-2001 (both days inclusive) is excluded from computing the period of limitation, the revisions were filed within a period of 60 days.

5. Sub-section (2) of Section 25 of the Tamil Nadu Act provides that every application to the High Court for the exercise of its revisional power shall be preferred within one month from the date on which the impugned order is communicated to the applicant

> "provided that the High Court may, in its discretion, allow further time not exceeding one month for the filing of any such application, if it is satisfied that the applicant had sufficient cause for not preferring the application within the time specified" i.e. one month.

6. Sub-section (2) of Section 12 and sub-section (2) of Section 29 of the Limitation Act, 1963 are relevant, which are reproduced hereunder:

> "12. *Exclusion of time in legal proceedings*.—(1) * * *
>
> (2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.
>
> * * *

29. *Savings*.—(1) * * *

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."

7. It is well settled that by virtue of sub-section (2) of Section 29 of the Limitation Act the provisions of Section 12 are applicable for computing the period of limitation prescribed by any special or local law. (See ***D.P. Mishra* v. *Kamal Narayan Sharma*** [(1970) 2 SCC 369] and ***Malojirao Narasingarao Shitole* v. *State of M.P.*** [(1969) 2 SCC 723]. The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations. At the same time full effect should also be given to those provisions which permit extension or relaxation in computing the period of limitation such as those contained in Section 12 of the Limitation Act. The underlying purpose of these provisions is to enable a litigant seeking enforcement of his right to any remedy to do so effectively and harsh prescription of time bar not unduly interfering with the exercise of statutory rights and remedies. That is why Section 12 has always been liberally interpreted. To wit, the time requisite for obtaining a copy of the impugned decree, sentence or order has been held liable to be excluded from computing the period of limitation although such copy may not necessarily be required to be filed along with the appeal, application or memo of representation or review. No distinction is drawn between decrees or orders pronounced on the original side or the appellate or revisional side. No application is required to be made seeking the benefit of Section 12 of the Limitation Act; it is the statutory obligation of the court to extend the benefit where available. Although the language of sub-section (2) of Section 12 is couched in a form mandating the time requisite for obtaining the copy being excluded from computing the period of limitation, the easier way of expressing the rule and applying it in practice is to find out the period of limitation prescribed and then add to it the time requisite for obtaining the copy - the date of application for copy, and the date of delivery, thereof both included - and treat the result of addition as the period of limitation. The underlying principle is that such copy may or may not be required to accompany the petition in the jurisdiction sought to be invoked yet to make up one's mind for pursuing the next remedy, for obtaining legal opinion and for appropriately drafting the petition by finding out the grounds therefor the litigant must be armed with such copy. Without the authentic copy being available the remedy in the higher forum or subsequent jurisdiction may be rendered a farce. All that sub-section (2) of Section 12 of the Limitation Act says is the time requisite for obtaining the copy being excluded from computing the period of limitation, or, in other words, as we have put it hereinabove, the time requisite for obtaining the copy being added to the prescribed period of limitation and treating the result of addition as the period prescribed. In adopting this methodology it does not make any difference whether the application for certified copy was made within the prescribed period of limitation or beyond

it. Neither is it so provided in sub-section (2) of Section 12 of the Limitation Act nor in principle we find any reason or logic for taking such a view.

8. If we were to accept the submission of the learned counsel for the appellant yet another consequence would follow. Section 5 of the Limitation Act or the power to condone delay by reference to proviso appended to Section 25(2) of the Act shall be exercisable for a period subsequent to the obtaining of the certified copy of the impugned order but not to the period before it. Such is not the prohibition contained in any of the said provisions. Depending on the facts and circumstances of a given case, the court may be called upon to exercise its discretionary power to condone the delay occasioned by the time lost either before applying for a certified copy or after the delivery thereof.

9. In ***Murlidhar Shrinivas*** **v.** ***Motilal Ramcoomar*** [AIR 1937 Bom 162] the Full Bench, speaking through Beaumont, C.J., held that the court cannot impose upon the statutory right of an appellant a restriction not warranted by the Act and a rule providing that no time shall be allowed for obtaining a copy of the decree unless such copy be applied for within specified days from the date of the decree would be *ultra vires*. In computing the time for appeal from a decree it is legitimate (in a proper case) to exclude the period requisite for obtaining a copy of the decree even when no application for such copy was made till after the expiration of the time for appeal. A Full Bench of the Madras High Court presided over by Srinivasan, J. (later a Judge of the Supreme Court) held that though the application for certified copies of judgment and decree was made after the prescribed period of limitation, the period was liable to be excluded in all cases depending on whether sufficient cause was shown or not. We find ourselves in respectful agreement with the view so taken by the Full Benches of the Bombay and Madras High Courts.

10. The learned counsel for the appellant relied on a decision of this Court in ***A.D. Partha Sarathy*** **v.** ***State of A.P.*** [ILR 1937 Bom 443 (FB)]· The facts of the case show that an application for obtaining certified copy of the relevant order was made even before the order was pronounced. The question arising for decision before the Court was whether the time between the date of the application and the date of pronouncement of the impugned order could be treated as the time requisite within the meaning of Section 12(2) of the Limitation Act. The Court ruled against the exclusion of such time. The time running between the date of application and the date of pronouncement of order when the litigant chooses to make an advance application in anticipation of the pronouncement of the decision of the Court cannot by any stretch of imagination be called the time requisite for obtaining the copy. However, it is in that context that the Court observed that the object of the legislature was to enable the party to exclude the time requisite for obtaining a copy of the order *after the period of limitation has commenced*. While drafting the reasoning in support of the view taken by it, the Court went on to observe:

> "If time taken for obtaining a copy of the order before the commencement of the period of limitation could be excluded, on the parity of reasoning, time taken for obtaining a copy of the order after the period of limitation also could be excluded. This would lead to an anomalous position: a party can keep quiet till the period of limitation has run out and thereafter apply for a certified copy of the order and claim to exclude the

time taken for obtaining the certified copy of the order from the period of limitation. That could not have been the intention of the legislature."

Suffice it to say that such an observation was uncalled for to decide the issue arising for decision before the Court and therefore has to be treated as a mere observation having no precedential value and at the most an obiter. We cannot read a rider or an additional qualification in the language of sub-section (2) of Section 12 which the legislature itself has chosen not to provide and thereby scuttle the operation of Section 12(2) abovesaid. We are clearly of the opinion that while computing the period of limitation the time requisite for obtaining the copy has to be excluded without regard to the fact whether the copy was applied for before the expiry of the period of limitation or not.

11. So far as the applicability of Section 5 of the Limitation Act is concerned, the power of the court to extend the prescribed period of limitation on the ground of availability of sufficient cause for not preferring the appeal within the prescribed period, within the meaning of Section 5 of the Limitation Act, stands circumscribed by the limitation imposed on the power of the High Court by the proviso to sub-section (2) of Section 25 of the Act. The discretionary power to condone the delay in filing the revision can be exercised for condoning any delay which does not exceed one month over and above the period liable to be excluded from computing the period of limitation by reference to Sections 4 to 24 of the Limitation Act.

12. Computing the time within which the revisions were filed in the High Court, consistently with the law as stated hereinabove, the revisions by the respondent were filed within a period of 53 days. As the total time, excluding the time requisite for obtaining the copy, does not exceed 60 days, the High Court had power to condone the delay in filing the revision petitions. No fault can be found with the discretionary jurisdiction so exercised by the High Court.

13. The appeals are held devoid of any merit and are dismissed. Costs easy.

* * * * *

Deena (Dead) Thro. Lrs. v. *Bharat Singh (Dead) Thro. Lrs.*

AIR 2002 SC 2768

D. P. MOHAPATRA, J. - On analysis of the case of the parties and findings recorded by the courts below the question that arises for determination is whether on the facts found the plaintiffs are entitled to exclusion of the period from 21-3-1980 to 15-2-1982 under Section 14 of the Limitation Act, 1963 for computation of the period of limitation for filing the suit. The facts relevant for determination of the question, sans unnecessary details may be stated thus: The appellant Deena (deceased, represented by legal heirs) had mortgaged his land measuring 9 bighas 18 biswas (after consolidation 47 kanals 13 marlas) in Khewat No. 39 Khasra No. 34 situated in Village Manakwas, Tehsil Jhajjar in the State of Haryana, for Rs. 2500 with possession, on 7-2-1947. On 23-6-1978, Deena had filed an application for redemption of the land before the Collector, Jhajjar, which was accepted on 29-2-1980 and the land, was ordered to be redeemed on payment of the mortgage money Rs. 2500. The plaintiffs filed a suit in the Court of the Sub-Judge, Jhajjar titled Harkishan v. Deena seeking a declaration that they had become owners of the property and that the order of the Collector dated 29-2-1980 was null and void. The said suit was decreed by the trial court and the decree was challenged in appeal by the defendant. During pendency of the appeal in the Court of the District Judge, Rohtak the plaintiffs withdrew the suit with permission to file fresh suit. Thereafter the present suit, Civil Suit No. 115 of 1982 was filed on 24-2-1982 seeking a declaration that the plaintiffs were owners of the suit property and that the order passed by the Collector was void and inoperative and did not affect their rights. In his written statement the defendant took the plea, inter alia, that the suit was barred by limitation.

The trial court framed 8 issues of which Issue 3 was whether the suit was barred by time and Issue 7 was whether the plaintiffs were entitled to exclusion of time during the period from 21-3-1980 to 24-2-1982, if so, to what effect.

In support of their claim of exclusion of the period the case of the plaintiffs was that they were prosecuting the previous suit in good faith which was permitted by the court to be withdrawn with leave to file fresh suit on the same cause of action; therefore, they were entitled to exclusion of the period from 21-3-1980 to 15-2-1982 under the provisions of Section 14 of the Limitation Act and considered on that basis the suit is not barred by limitation.

The case of the defendant on the other hand was that the plaintiffs cannot claim to have prosecuted the previous suit in good faith since in the written statement itself it was specifically stated that the suit was bad for non-joinder of necessary party, Smt. Ghogri who had been impleaded in the proceeding before the Collector as one of the mortgagors. The plaintiffs being aware of the objection had pursued the matter. The suit was decreed by the trial court. The defendant had challenged the judgment in appeal. During pendency of the appeal on the prayer of the plaintiffs seeking leave to withdraw the suit with permission to file fresh suit the court granted the prayer and the suit was withdrawn. In the circumstances the defendant contended the exclusion of the period sought under Section 14 of the Limitation Act could not be granted.

The trial court answered Issues 3 and 7 in favour of the defendant holding inter alia that the plaintiffs did not pursue the proceedings of the previous suit with due diligence and good faith. In appeal the learned Additional District Judge, placing reliance on the decision of the Supreme Court in the case of ***Rabindra Nath Samuel Dawson* v. *Sivakasi*** [AIR 1972 SC 730] held:

> Therefore in view of this authority of the Hon'ble Supreme Court and for the reasons discussed above, it cannot be said that plaintiffs had been prosecuting the earlier suit in good faith or with due diligence. Accordingly it is held that they are not entitled to take benefit of Sections 14(1) and (3) of the Indian Limitation Act.

In the second appeal filed by the plaintiffs the High Court set aside the judgment of the first appellate court confirming the decision of the trial court and decreed the suit with the following observations:

> The order passed by the Collector is dated 29-2-1980. The first suit for declaring order of the Collector as void was filed on 23-3-1980 which was decreed by the trial court. The defendant-respondent filed an appeal before the District Judge and on 15-2-1982 the appellants were allowed to withdraw the suit which was decreed in their favour by the trial court with permission to file fresh one on the same cause of action. Fresh suit was filed on 24-2-1982. After hearing counsel for the parties I hold that the suit filed by the appellants is within time and they are entitled to the exclusion of time from 21-3-1980 to 15-2-1982. The findings of the lower courts on Issues 3 and 7 are set aside. In view of the above mentioned discussion the judgment and decree passed by the lower courts are set aside and the suit filed by the plaintiff-appellants is decreed. No order as to cost.

Shri. Mahabir Singh, learned counsel appearing for the appellant strenuously urged that on the facts and circumstances of the case the High Court was clearly in error in upsetting the concurrent decisions of the courts below in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure. Elucidating the point Shri Singh submitted that prosecuting the previous proceedings in good faith is a precondition for application of Section 14 of the Limitation Act. Whether the plaintiffs were prosecuting the previous suit in good faith is a question of fact. The first appellate court, which was the final court of fact, concurring with the finding recorded by the trial court had held that the plaintiffs had not been prosecuting the previous suit with due diligence and in good faith. The High Court, in second appeal, Shri. Singh contended had no jurisdiction to disturb the concurrent finding of fact recorded by the appellate court.

Per contra Shri. P. C. Jain, learned Senior Counsel appearing for the respondents contended that the plaintiffs are entitled to exclusion of the period between the date of withdrawal of the suit and the filing of the fresh suit under the provision in Section 14(3) of the Limitation Act. Since the appellate court on being satisfied that the suit was likely to fail by reason of formal defect of non-joinder of a necessary party had granted leave to the plaintiffs to withdraw the suit with permission to file a fresh suit, the High Court rightly took the view that the plaintiffs were entitled to exclusion of the period under Section 14 of the Limitation Act. Order 23 of the Code of Civil Procedure deals with withdrawal and

adjustment of suits. In Rule 1 sub-rule (3) thereof it is laid down that where the court is satisfied - (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter or a part of the claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the same subject-matter or part of the claim.

In Rule 2 of Order 23 it is provided that in any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Section 14 of the Limitation Act so far as material for the purpose of the present case is quoted hereunder:

> 14. Exclusion of time of proceeding bona fide in court without jurisdiction. - (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. * * * * *
>
> (3) Notwithstanding anything contained in Rule 2 of Order 23 of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

From the provisions it is clear that it is in the nature of a proviso to Order 23 Rule 2. The non obstante clause provides that notwithstanding anything contained in Rule 2 of Order 23 of the Code of Civil Procedure the provisions of sub-section (1) of Section 14 shall apply in relation to a fresh suit instituted on permission granted by the court under Rule 1 of Order 23. For applicability of the provision in sub-section (3) of Section 14 certain conditions are to be satisfied. Before Section 14 can be pressed into service the conditions to be satisfied are: (1) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party; (2) the prior proceeding had been prosecuted with due diligence and good faith; (3) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; (4) the earlier proceeding and the later proceeding must relate to the same matter in issue; and (5) both the proceedings are in a court.

The main factor, which would influence the court in extending the benefit of Section 14 to a litigant, is whether the prior proceeding had been prosecuted with due diligence and good faith. The party prosecuting the suit in good faith in the court having no jurisdiction is entitled to exclusion of that period. The expression "good faith" as used in Section 14 means, "exercise of due care and attention". In the context of Section 14 the expression "good faith" qualifies prosecuting the proceeding in the court which ultimately is found to have no jurisdiction. The finding as to good faith or the absence of it is a finding of fact. This Court in the case of ***Vijay Kumar Rampal*** **v.** ***Diwan Devi*** [AIR 1985 SC 1669] observed:

> The expression good faith qualifies prosecuting the proceeding in the court which ultimately is found to have no jurisdiction. Failure to pay the requisite court fee found deficient on a contention being raised or the error of judgment in valuing a suit filed before a court which was ultimately found to have no jurisdiction has absolutely nothing to do with the question of good faith in prosecuting the suit as provided in Section 14 of the Limitation Act.

The other expressions relevant to be construed in this regard are "defect of jurisdiction" and "or other cause of a like nature". The expression "defect of jurisdiction" on a plain reading means the court must lack jurisdiction to entertain the suit or proceeding. The circumstances in which or the grounds on which, lack of jurisdiction of the court may be found are not enumerated in the section. It is to be kept in mind that there is a distinction between granting permission to the plaintiff to withdraw the suit with leave to file a fresh suit for the same relief under Order 23 Rule 1 and exclusion of the period of pendency of that suit for the purpose of computation of limitation in the subsequent suit under Section 14 of the Limitation Act. The words "or other cause of a like nature" are to be construed ejusdem generis with the words "defect of jurisdiction", that is to say, the defect must be of such a character as to make it impossible for the court to entertain the suit or application and to decide it on merits. Obviously Section 14 will have no application in a case where the suit is dismissed after adjudication on its merits and not because the court was unable to entertain it.

Coming to the case on hand, as noted earlier, the previous suit filed by the respondents was decreed by the trial court; and the defendant had filed appeal against the judgment and decree of the trial court. It does not appear from the discussions in the impugned judgment that there was any finding of the court in the previous suit holding the suit to be not entertainable on any ground. The ground on which withdrawal of the suit was sought was that Smt. Ghogri, one of the mortgagors, had not been impleaded in the suit. It is not the case of the plaintiffs that the court had found the suit to be not maintainable on that ground. Non-impleadment of Smt. Ghogri, a necessary party, in the suit was a clear case of laches on the part of the plaintiffs. In such circumstances it could not be said that the plaintiffs were prosecuting the previous suit in good faith.

The trial court and the first appellate court based their findings on the question of good faith on the evidence led by the parties and the law laid down by this Court in ***Rabindra Nath Samuel Dawson*** [AIR 1972 SC 730] in which it was held that a person who has registered the objection regarding non-joinder of parties at the initial stage and also at the revisional stage and taken the risk of proceeding with the suit without impleading the necessary parties cannot be said to have acted in good faith taking due care and attention; consequently, such person will not be entitled to the benefit of Section 14 of the Act for excluding the time spent by him in that proceeding in a fresh suit. In the present case concededly the objection regarding non-impleadment of necessary party was taken in the written statement. Despite such objection the plaintiffs chose to prosecute the suit. Indeed they succeeded in the trial court and the matter was pending before the first appellate court when the petition under Order 23 seeking withdrawal of the suit with permission to file a fresh suit for the same relief was filed by them. Therefore, the trial court and the first appellate court were right in holding that the plaintiffs were not entitled to exclusion of the period between 21-3-1980 to 15-2-1982 under

Section 14 of the Limitation Act as claimed and that the suit was barred by limitation. The High Court in the impugned judgment has not discussed the materials on the basis of which the courts below recorded the finding of fact relating to lack of good faith on the part of the plaintiffs. It has also not discussed the reason for taking a contrary view on that question. The concurrent decisions of the courts below have been reversed with a general observation that on the facts and circumstances of the case the plaintiffs were entitled to exclusion of the period under Section 14 of the Limitation Act as claimed. Therefore, the judgment of the High Court is clearly unsustainable.

In the result the appeal is allowed with costs. Hearing fee is assessed at Rs. 10,000.

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Rameshwarlal **v.** *Municipal Council, Tonk*

1996 (6) SCC 100

B.L. HANSARIA, K.RAMASWAMY AND S.B. MAJMUDAR, JJ. - 1. The petitioner claims that he has been denied salary for the period from 10-9-1987 to 18-8-1988. He claims to have worked in the office of the Municipal Council, Tonk. He filed writ petition in the High Court in February 1990. The learned Single Judge held that since it is a claim recoverable in a civil action, the discretionary power under Article 226 of the Constitution is not exercisable. Accordingly, he dismissed the writ petition. The same came to be confirmed in the impugned order of the Division Bench made on 6-5-1996 in Special Appeal No. 218 of 1996. Thus, this special leave petition.

2. It is not necessary for us to go into the question of the legality of the order of the High Court in refusing to grant the relief. It is axiomatic that the exercise of the power under Article 226 being discretionary, the learned Single Judge as well as the Division Bench has not exercised the same to direct the respondent to pay the alleged arrears of salary alleged to be due and payable to the petitioner. Under these circumstances, the only remedy open to the petitioner is to avail of the action in the suit. Since the limitation has run out to file a civil suit by now, which was not so on the date of the filing of the writ petition, the civil court is required to exclude, under Section 14 of the Limitation Act, 1963, the entire time taken by the High Court in disposing of the matter from the date of the institution of the writ petition.

3. Normally for application of Section 14, the court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter However, since the High Court expressly declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left remediless. Accordingly, the time taken in prosecuting the proceedings before the High Court and this Court obviously pursued diligently and bona fide, needs to be excluded. The petitioner is permitted to issue notice to the Municipality within four weeks from today. After expiry thereof, he could file suit within two months thereafter. The trial court would consider and dispose of the matter in accordance with law on merits.

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Mahabir Kishore **v.** *State of Madhya Pradesh*

AIR 1990 SC 313

K. N. SAIKIA, J. - This plaintiffs' appeal by special leave is from the appellate judgment of the Madhya Pradesh High Court dismissing the appeal upholding the judgment of the trial court dismissing the plaintiffs' suit on the ground of limitation.

2. A registered firm Rai Saheb Nandkishore Rai Saheb Jugalkishore (appellants) was allotted contracts for manufacture and sale of liquor for the calendar year 1959 and for the subsequent period from January 1, 1960 to March 31, 1961 for Rs. 2, 56, 200 and Rs. 4,71,900, respectively, by the Government of Madhya Pradesh who also charged 7 1/2 per cent. over the auction money as mahua and fuel cess. As writ petitions challenging the government's right to charge this 7 1/2 per cent were pending in the Madhya Pradesh High Court, the government announced that it would continue to charge it and the question of stopping it was under consideration of the government whose decision would be binding on the contractors. The firm (appellants) thus paid for the above contracts a total extra sum of Rs. 54,606.

4. On April 24, 1959 the Madhya Pradesh High Court's judgment in ***Surajdin* v. *State of M. P.*** [1960 MPLJ 39] declaring the collection of 7 1/2 per cent. illegal was reported in 1960 MPLJ 39. Even after this decision, government continued to charge 7 1.2 per cent. extra money. Again on August 31, 1961 the High Court of Madhya Pradesh in ***N. K. Doongaji* v. *Collector, Surguja*** [1962 MPLJ 130] decided that the charging of 7 1/2 per cent. by the government above the auction money was illegal. This judgment was reported in 1962 MPLJ 130. It is the appellants' case that they came to know about this decision only in or about September 1962. On October 17, 1964 they served a notice on Government of Madhya Pradesh under Section 80 of the Code of Civil Procedure requesting the refund of Rs. 54,606, failing which, a suit for recovery would be filed; and later they instituted Civil Suit No. 1-B of 1964 in the Court of Additional District Judge, Jabalpur on December 24, 1964. The government resisted the suit on, inter alia, ground of limitation. The trial court taking the view that Articles 62 and 96 of the First Schedule to the Limitation Act, 1908 were applicable and the period of limitation began to run from the dates the payments were made to the government, held the suit to be bared by limitation and dismissed it. In appeal, the High Court took the view that Article 113 read with Section 17, and not Article 24, of the Schedule to the Limitation Act, 1963, was applicable; and held that the limitation began to run from October 17, 1961 on which date the government decided not to charge extra 7 1/2 per cent. on the auction money, and as such, the suit was barred on December 17, 1964 taking into consideration the period of two months prescribed by Section 80 of the Code of Civil Procedure. Consequently, the appeal was dismissed. The appellants' petition for leave to appeal to this Court was also rejected observing, "it was unfortunate that the petitioners filed their suit on December 24, 1964 and a such the suit was barred by time by seven days."

5. Mr M. V. Goswami, learned counsel for the appellants, submits, inter alia, that the High Court erred in holding that the limitation started running from October 17, 1961 being the date of the letter, Ex. D-23, which was not communicated to the appellants or any other contractor and therefore the appellants had no opportunity to know about it on that very date

with reasonable diligence under Section 17 and the High Court ought to allow at least a week for knowledge of it by the appellants in which case the suit would be within time. Counsel further submits that the High Court while rightly discussing that Section 17 of the Limitation Act, 1963 was applicable, erred in not applying that section to the facts of the instant case, wherefore, the impugned judgment is liable to be set aside.

6. Mr. Ujjwal A. Rama, the learned counsel for the respondent, submits, inter alia, that October 17, 1961 having been the date on which the government finally decided not to recover extra 7 1/2 per cent. above the auction money, the High Court rightly held that the limitation started from that date and the suit was clearly barred under Article 24 or 113 of the Schedule to the Limitation Act, 1963; and that though the records did not show that the government decision was communicated to the appellants, there was no reason why they, with reasonable diligence, could not have known about it on the same date.

7. The only question to be decided, therefore, is whether the decision of the High Court is correct. To decide that question it was necessary to know what the suit was for. There is no dispute that 7 1/2 per cent. above the auction money was charged by the Government of Madhya Pradesh as mahua and fuel cess, and the High Court subsequently held that it had no power to do so. In view of those writ petitions challenging that power, government asked the contractors to continue to pay the same pending government's decision on the question; and the appellants accordingly paid. Ultimately on October 17, 1961 government decided not to recover the extra amount any more but did not yet decide the fate of the amounts already realised. There is no denial that the liquor contracts were performed by the appellants. There is no escape from the conclusion that the extra 7 1/2 per cent was charged by the government believing that it had power, but the High Court in two cases held that the power was not there. The money realised was under a mistake and without authority of law. The appellants also while paying suffered from the same mistake. There is therefore no doubt that the suit was for refund of money paid under mistake of law.

11. The principle of unjust enrichment requires: first, that the defendants has been 'enriched' by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiffs"; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.

17. There is no doubt that the instant suit is for refund of money paid by mistake and refusal to refund may result in unjust enrichment depending on the facts and circumstances of the case. It may be said that this Court has referred to unjust enrichment in cases under Section 72 of the Contract Act. See ***M/s. Shiv Shanker Dal Mills*** **v.** ***State of Haryana*** [AIR 1980 SC 1037], ***UPSEB*** **v.** ***City Board, Mussorie*** [AIR 1985 SC 883] and ***State of M.P.*** **v.** ***Vyankatlal*** [AIR 1985 SC 901].

18. The next question is whether, and if so, which provision of the Limitation Act will apply to such a suit. On this question we find two lines of decisions of this Court, one in respect of civil suits and the other in respect of petitions under Article 226 of the Constitution of India. Though there is no constitutionally provided period of limitation for petitions under

Article 226, the limitation prescribed for such suits has been accepted as the guideline, though little more latitude is available in the former.

19. A tax paid under mistake of law is refundable under Section 72 of the Indian Contract Act, 1872. In ***STO*** **v.** ***Kanhaiya Lal*** [1959 SCR 1350] where the respondent, a registered firm, paid sales tax in respect of its forward transactions in pursuance of the assessment orders passed by the Sales Tax Officer for the years 1949-51; in 1952 the Allahabad High Court held in ***M/s Budh Prakash Jai Prakash*** **v.** ***STO*** [1952 All LJ 332] that the levy of sales tax on forward transactions was ultra vires. The respondent asked for a refund of the amounts paid, filing a writ petition under Article 226 of the Constitution. It was contended for the sales tax authorities that the respondent was not entitled to a refund because (1) the amounts in dispute were paid by the respondent under a mistake of law and were, therefore, irrecoverable, (2) the payments were in discharge of the liability under the Sales Tax Act and were voluntary payments without protest, and (3) inasmuch as the monies which had been received by the government had not been retained but had been spent away by it, the respondent was disentitled to recover the said amounts. This Court held that the term "mistake" in Section 72 of the Indian Contract Act comprised within its scope a mistake of law as well as a mistake of fact and that, under that section a party is entitled to recover money paid by mistake or under coercion, and if it is established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party receiving the money is bound to repay or return it though it might have been paid voluntarily, subject, however, to questions of estoppel, waiver, limitation or the like. On the question of limitation, it was held that Section 17(1)(c) of the Limitation Act, 1963 would be applicable and that where a suit will be to recover "monies paid under a mistake of law, a writ petition within the period of limitation prescribed, i.e., within 3 years of the knowledge of the mistake, would also lie". It was also accepted that the period of limitation does not begin to run until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it.

21. In ***D. Cawasji & Co.*** **v.** ***State of Mysore*** [AIR 1975 SC 813], the appellants paid certain amount to the government as excise duty and education cess for the years 1951-52 to 1965-66 in one case and from 1951-52 to 1961-62 in the other. The High Court struck down the provisions of the relevant Acts as unconstitutional. In writ petitions before the High Court claiming refund, the appellants contended that the payments in question were made by them under mistake of law; that the mistake was discovered when the High Court struck down the provisions as unconstitutional and the petitions were, therefore, in time but the High Court dismissed them on the ground of inordinate delay. Dismissing the appeals, this Court held that where a suit would lie to recover monies paid under a mistake of law, a writ petition for refund of tax within the period of limitation would lie. For filing a writ petition to recover the money paid under a mistake of law the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered. It was held in ***D. Cawasji*** [AIR 1975 SC 813] that although Section 72 of the Contract Act has been held to cover cases of payment of money under a mistake of law, as the State stands in a peculiar position in respect of taxes paid to it, there are perhaps practical reasons for the law according different treatment both in the matter of the heads under which they could be recovered and the period of limitation for recovery. P. N. Bhagwati J. as he then was, in

Madras Port Trust **v.** ***Hymanshu International*** [(1979) 4 SCC 176], deprecated any resort to plea of limitation by public authority to defeat just claim of citizens observing that though permissible under law, such technical plea should only be taken when claim is not well founded.

22. Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could with reasonable diligence, have discovered it. In a case where payment has been made under a mistake of law as contrasted with a mistake of fact, generally the mistake becomes known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a court makes a pronouncement, it is seldom that a person can, even with reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law.

23. E. S. Venkataramiah, J., as his Lordship then was, in ***Shri Vallabh Glass Works Ltd.*** **v.** ***Union of India*** [AIR 1984 SC 971), where the appellants claimed refund of excess duty paid under Central Excise and Salt Act, 1944, laid down that the excess amount paid by the appellants would have become refundable by virtue of Section 72 of the Indian Contract Act if the appellants had filed a suit within the period of limitation; and that Section 17(1)(c) and Article 113 of the Limitation Act, 1963 would be applicable.

24. In ***CST*** **v.** ***M/s Auriaya Chamber of Commerce, Allahabad*** [(1986) 3 SCC 50], the Supreme Court in its decision dated May 3, 1954 in ***STO*** **v.** ***Budh Prakash Jai Prakash*** [(1954) 5 STC 193] having held tax on forward contracts to be illegal and ultra vires the U. P. Sales Tax Act, and that the decision was applicable to the assessee's case, the assessee filed several revisions for quashing the assessment order for the year 1949-50 and for subsequent years which were all dismissed on ground of limitation. In appeal to this Court Sabyasachi Mukharji, J. while dismissing the appeal held that money paid under a mistake of law comes within mistake in Section 72 of the Contract Act; there is no question of any estoppel when the mistake of law is common to both the assessee and taxing authority. His Lordship observed that Section 5 of the Limitation Act, 1908 and Article 96 of its First Schedule which prescribed a period of 3 years were applicable to suits for refund of illegally collected tax.

25. In ***Salonah Tea Co. Ltd.*** **v.** ***Superintendent of Taxes, Nowgong*** [(1988) 1 SCC 401], the Assam Taxation (on Goods carried by Road or Inland Waterways) Act, 1954 was declared ultra vires the Constitution by the Supreme Court in ***Atiabari Tea Co. Ltd.*** **v.** ***State of Assam*** [AIR 1961 SC 232] subsequent Act was also declared ultra vires by High Court on August 1, 1963 against which the State of Assam and other respondents preferred appeal to Supreme Court. Meanwhile the Supreme Court in a writ petition ***Khyerbari Tea Co. Ltd.*** **v.** ***State of Assam*** [AIR 1964 SC 925], declared on December 13, 1963 the Act to be intra vires. Consequently the above appeal were allowed. Notices were, therefore, issued requiring the appellant under Section 7(2) of the Act to submit returns. Returns were duly filed and assessment orders passed thereon. On July 10, 1973, the Gauhati High Court in its judgment in ***Loong Soong Tea Estate*** case [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] declared the assessment to be without jurisdiction. In November, 1973 the appellant filed writ petition in the High Court contending that in view of the decision in

Loong Soong Tea Estate case [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] he came to know about the mistake in paying tax as per assessment order and also that he became entitled to refund of the amount paid. The High Court set aside the order and the notice of demand for tax under the Act but declined to order refund of the taxes paid by the appellant on the ground of delay and laches as in view of the High Court it was possible for the appellant to know about the illegality if the tax sought to be imposed as early as in 1963, when the Act in question was declared ultra vires. Allowing the assessee's appeal, Mukharji, J. speaking for this Court held:

In this case indisputably it appears that tax was collected without the authority of law. Indeed the appellant had to pay the tax in view of the notices, which were without jurisdiction. It appears that the assessment was made under Section 9(3) of the Act. Therefore, it was without jurisdiction. In the premises it is manifest that the respondents had no authority to retain the money collected without the authority of law and as such the money was liable to refund.

26. The question there was whether in the application under Article 226 of the Constitution, the court should have refused refund on ground of laches and delay, the case of the appellant having been that it was after the judgment in the case of ***Loong Soong Tea Estate*** [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] the cause of action arose. That judgment was passed in July 1973. The High Court was, therefore, held to have been in error in refusing to order refund on the ground that it was possible for the appellant to know about the legality of the tax sought to be imposed as early as 1973 when the Act in question was declared ultra vires. The court observed:

> Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law.

27. On the question of limitation referring to ***Suganmal*** **v.** ***State of M.P.*** [AIR 1965 SC 1740] and ***Tilokchand Motichand*** **v.** ***H. B. Munshi*** [AIR 1970 SC 898], his Lordship observed that the period of limitation prescribed for recovery of money paid by mistake started from the date when the mistake was known. In that case knowledge was attributable from the date of the judgment in ***Loong Soong Tea Estate*** case [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] on July 10, 1973. There had been statement that the appellant came to know of that matter in October 1973 and there was no denial of the averment made. On that ground, the High Court was held to be in error. It was accordingly held that the writ petition filed by the appellants were within the period of limitation prescribed under Article 113 of the Schedule read with Section 23 of the Limitation Act, 1963.

28. It is thus a settled law that in a suit for refund of money paid by mistake of law, Section 72 of the Contract Act is applicable and the period of limitation is three years as prescribed by Article 113 of the Schedule to the Indian Limitation Act, 1963 and the provisions of Section 17(1)(c) of that Act will be applicable so that the period will begin to

run from the date of knowledge of the particular law, whereunder the money was paid, being declared void; and this could be the date of the judgment of competent court declaring that law void.

29. In the instant case, though the Madhya Pradesh High Court in ***Surajdin* v. *State of M.P.*** [1960 MPLJ 39] declared the collection of 7 1/2 per cent. illegal and that decision was reported in 1960 MPLJ 39, the government was still charging it saying that the matter was under consideration of the government. The final decision of the government as stated in the letter dated October 17, 1961 was purely an internal communication of the government copy whereof was never communicated to the appellants or other liquor contractors. There could, therefore, be no question of the limitation starting from that date. Even with reasonable diligence, as envisaged in Section 17(1)(c) of the Limitation Act, the appellants would have taken at least a week to know about it. Mr. Rana has fairly stated that there was nothing on record to show that the appellants knew about this letter on October 17, 1961 itself or within a reasonable time thereafter. We are inclined to allow at least a week to the appellants under the above provision. Again Mr. Rana has not been in a position to show that the statement of the appellants that they knew about the mistake only after the judgment in ***Doongaji*** case [1962 MPLJ 130] reported in 1962 MPLJ 130, in or about September 1962, whereafter they issued the notice under Section 80 CPC was untrue. This statement has not been shown to be false. In either of the above cases, namely, of knowledge one week after the letter dated October 17, 1961 or in or about September 1962, the suit would be within the period of limitation under Article 113 of the Schedule to the Limitation Act, 1963.

30. In the result, we set aside the judgment of the High Court, allow the appeal and remand the suit. The records will be sent down forthwith to the trial court to decide the suit on merit in accordance with law, expeditiously. The appellants shall be entitled to the costs of this appeal.

* * * * *

State of Kerala v. *T. M. Chacko*

2000 (9) SCC 722

S.S. MOHAMMED QUADRI AND SHIVARAJ V. PATIL, JJ. -1. The short question that arises in this appeal is whether Exhibits B-4 and A-8 do not contain any acknowledgement of the liability by the appellant-defendant, the State of Kerala, and if so is the suit filed by the respondent-plaintiff, for recovery of the bid amount paid to the Forest Department, barred by limitation under Article 47 of the Limitation Act, 1963.

2. Briefly stated, the following facts give rise to this question: The Forest Department of the State of Kerala auctioned the forest produce in different coupes. The respondent was the highest bidder of sub-coupe VII of Coupe X and his bid of rupees seventy-five thousand was accepted on 15-1-1974. The respondent paid Rs. 60,125/- towards the bid amount and other charges and a sum of rupees twenty-five thousand remained unpaid. The respondent was to collect and remove the whole forest produce of the said coupe on or before 31-3-1974. Part of it only was collected and removed by him before 21-2-1974, when unfortunately fire broke out in the reserved forest which also destroyed the remaining forest produce of the respondent's coupe. The respondent made representations to the Forest Department seeking reduction of the bid amount on the ground that his coupe was destroyed by the wild fire. On 27-6-1974, the Government of Kerala instead of reducing the bid amount thought it fit to grant further time of forty-five days to enable him to remove the forest produce. The respondent neither paid the balance of the bid amount nor removed the forest produce in his coupe. On 19-9-1974, the Divisional Forest Officer intimated to the respondent that as he failed to satisfy the conditions of the contract and remit the amount due to the Government, it was cancelled and the produce left on the site was confiscated and ordered to be auctioned at the risk and loss of the respondent.

3. The respondent, thereafter, issued notice under Section 80 of the Code of Civil Procedure to the appellant claiming the amount of compensation which included refund of the bid amount and filed the suit as an indigent person on 28-7-1977 in the Court of Subordinate Judge, Trivandrum, praying the Court to grant compensation to the tune of Rs. 83,000/- with twelve per cent interest per annum amounting to Rs. 35,690/- and future interest at six per cent per annum. The appellant denied that it was liable for payment of any compensation and pleaded, inter alia, that the suit was barred by limitation. The trial court came to the conclusion that as the appellant acknowledged the liability both under Exhibits B-4 and A-8, the suit was not barred by limitation and thus decreed the suit on 19-7-1980. The appellant carried the matter in appeal before the High Court of Kerala in AS No. 150 of 1981. On 31-3-1981 the High Court confirmed the judgment of the trial court and dismissed the appeal. From the said judgment of the High Court, the present appeal arises.

4. Ms. Malini Poduval, learned counsel for the appellant contends that neither Exhibit B-4 nor Exhibit A-8 can be treated as an acknowledgement of the liability of the respondent's claim and, therefore, the trial court as well as the High Court erred in holding that the suit was not barred by limitation.

5. Mr. Ramesh Babu, learned counsel appearing for the respondent has submitted that the representation of the respondent, requesting the Government to reduce the bid amount, would, by implication, include demand for refund of the bid amount and read in that background, Exhibits B-4 and A-8, are rightly held as acknowledgement of the liability by the appellant. In the alternative, argues the learned counsel, as under Exhibit B-4, time for performance of the contract by the respondent was extended till 10-8-1974, the suit will be within limitation from that date.

6. It is the common case of the parties that the suit of the respondent for recovery of the bid amount paid by him for the forest produce, on the ground that due to the wild fire the contract was frustrated, is governed by Article 47 of the Limitation Act, 1963. The said article reads as under:

Description of suit	Period of Limitation	Time from which period beings to run
47. For money paid upon an existing consideration afterwards fails	Three years	The date of the failure

The period of limitation is three years from the date of the failure of consideration upon which the money was paid. The bid amount was paid by the respondent for forest produce, which had failed on destruction of forest produce due to spread of the wild fire. The date of failure would, therefore, be the date of fire, which is 21-2-1974. The suit was filed on 28-7-1977. It is clearly barred by limitation unless, as pleaded by the respondent, there is acknowledgement of the liability by the appellant in Exhibits B-4 and A-8 and, therefore, the period starts from the date of the acknowledgement of the liability i.e. from 19-9-1974.

The effect of an acknowledgement is that a fresh period of limitation has to be computed from the time when the acknowledgement was so signed.

9. Sub-section (2) permits giving of oral evidence at the trial of the suit where the acknowledgement is undated but it prohibits, subject to the provisions of the Evidence Act, receiving of oral evidence of contents of the acknowledgement. Clause (a) of the explanation appended to that section says that an acknowledgement may be sufficient for purposes of Section 18 even though,

(i) it omits to specify the exact nature of the property or right;

(ii) it avers that the time for payment, delivery, performance or enjoyment has not yet come;

(iii) it is accompanied by refusal to pay, deliver, perform or permit to enjoy;

(iv) it is coupled with a claim to set off, or

(v) it is addressed to a person other than a person entitled to the property or right.

Clause (b) of the explanation defines the word "signed" to mean signed either personally or by an agent duly authorised in that behalf.

10. It may be noted that for treating a writing signed by the party as an acknowledgement, the person acknowledging must be conscious of his liability and the commitment should be

made towards that liability. It need not be specific but if necessary facts, which constitute the liability, are admitted an acknowledgement may be inferred from such an admission.

11. Here it is necessary to refer to the said documents - Exhibits B-4 and A-8. The trial court as well as the High Court accepted the plea of the respondent and held that the period of limitation would start from 19-9-1974 (Exhibit A-8) and the suit was within limitation. Both the Courts relied upon the judgment of the Kerala High Court in ***Harrisons & Crossfield Ltd.*** **v.** ***State of Kerala*** [63 KLT 215]. It is laid down therein that it was not necessary that there should be a specific and direct acknowledgement of the particular liability which is sought to be enforced; if there was an admission of facts of which the liability in question was a necessary consequence then there would be an acknowledgement within the meaning of Section 19 of the Limitation Act of 1908. It is not the correctness of the proposition but its application that is in dispute.

12. Exhibit B-4 is a government order. GR (Rt) 1516/74/AD dated 27-6-1974. It reads:

Forests - Trivandrum Division - Sale of residual growth - Agreement dated 15-1-1974 with Shri T. M. Chacko - Damage caused by fire - Extension of period of contract free of penalty etc. - Sanction - Accorded.

AGRICULTURE (FOREST) DEPARTMENT

GR (Rt) 1516/74/AD dated 27-6-1974

Read: Letter No. C1-10628/74 dated 9-5-1974 from the Chief Conservator of Forests.

ORDER

The right of collection and removal of the residual tree growth in sub-coupe VII of Coupe X, Palode Reserve, Paruthipally Range was awarded to Shri T. M. Chacko for Rs. 75,000/-. He had executed an agreement on 15.1.1974, the period of contract being up to 31-3-1974. An accidental fire occurred in the coupe on 21-2-1974 causing heaving damage to the coupe. The contractor has therefore requested the Chief Conservator of Forests, to compensate the loss caused to him by fixing the fiscal amount of the coupe at 150% of the departmental valuation. After consideration of the whole aspect of the case and precedents in the matter, the Chief Conservator of Forests has recommended to the Government to extend the period of contract by one month from the date of order free of penalty and also to grant the contractor 15 days' time to remit the balance value of the coupe (viz. Rs. 25,000/-) without penal interest.

2. Government have considered the question in all its aspect and are pleased to extend as a special case the period of contract for removal of the produce, by 45 days from the date of order free of penalty and to grant one month from the date of order for the remittance of balance value of the coupe free of interest.

By order of the Governor

Sd/- K. K. Gopalan

Deputy Secretary to Government

In the said order the representation of the respondent, Exhibit B-2, was under consideration of the appellant. A perusal of the said representation makes it clear that the claim was for remission of the bid amount by 150% (though the learned counsel for the respondent says that it is only fifteen per cent) and the claim of the respondent for recovery of the bid amount was not under its consideration.

13. Exhibit A-8 is a copy of the proceedings of the Divisional Forest Officer intimating to the respondent that as he failed to remit the balance of the bid amount and did not remove the forest produce in terms of the order of the Government, Exhibit B-4, the unremoved forest produce was confiscated and would be auctioned at the risk and loss of the respondent. On a careful reading of this letter we are unable to find that the claim of refund of bid amount by the respondent was the subject of consideration nor can we infer any acknowledgement of liability of that claim by the authority concerned.

14. We have also support for our view from the decision of this Court in ***Shapoor Fredoom Mazda v. Durga Prosad Chamaria*** [AIR 1961 SC 1236]. While interpreting Section 19 of the Limitation Act, 1908 this Court pointed out the essentials of acknowledgement thereunder and observed that acknowledgement as prescribed by Section 19 was a mere acknowledgement of the liability in respect of the right in question and that it need not be accompanied by a promise to pay either expressly or by implication. It was held that the statement on which a plea of acknowledgement was based must relate to a present subsisting liability though the exact nature or the specific character of the said liability might not be indicated in words; if words used in the acknowledgement indicated the existence of jural relationship between the parties, such as that of debtor or creditor and the statement was made with the express intention to admit such jural relationship or if such intention could be inferred by implication from the nature of the admission, the acknowledgement of liability would follow.

15. We have already indicated above that neither was the claim of refund of bid amount under consideration of the appellant nor can Exhibit B-4 or Exhibit A-8 be treated as acknowledgement of the liability of that claim of the respondent. Therefore, Section 18 of the Limitation Act cannot be called in aid to compute fresh limitation from the date of Exhibit A-8 i.e. 19-9-1974. That being the position, the suit is clearly barred by limitation and is liable to be dismissed.

17. For all these reasons, the appeal is allowed and the impugned judgment of the High Court confirming the judgment of the trial court is set aside. The suit of the respondent shall stand dismissed.

* * * * *

Tilak Ram **v.** *Nathu*

AIR 1967 SC 935

J.M. SHELAT, J. - 1. The predecessors of one Teja Hazari were the owners of lands admeasuring 155 bighas situate in the village Naraina near Delhi. Between August 1801 and October 1869 they executed seven usufructuary mortgages in favour of one Dharamdas to secure repayment of an aggregate sum of Rs. 1,290 advanced by him. Dharamdas died leaving him surviving his son Parmeshwardas. The said Parmeshwardas sub-mortgaged the suit lands in favour of one Badam, Chunder and Ganga Sahai. the ancestors of the appellants for Rs. 650 by mortgage-deeds, dated February 21, 1902 and April 8, 1902. Thereafter he sold his mortgage rights to Ganga Sahai and Hira Singh, the predecessors in title of the respondents for Rs. 1,290. By a deed of sale, dated March 9, 1903 the said Teja sold equity of redemption in his 3/4th share in the said mortgaged lands for Rs. 1,900 in favour of Badam Jaishi, Chunder Bapal, Kalu Harnam and Badam Gulab, the predecessors-in-title of the appellants. As a result of these transactions the position in 1903 was that the predecessors-in-title of the respondents stood in the position of mortgagors subject to the said sub-mortgage and the predecessors-in-title of the appellants stood in the position of mortgagors of the said lands to the extent of the 3/4th share therein and the rest of the Vdh share therein remained with the said Teja. On April 14, 1903 the said Hira Singh and Ganga Sahai, the predccessors-in-title of the respondents, filed a suit being Suit No. 31 of 1903 against the said Badam and others for redemption and for possession of the said lands. The said Badam, Teja and others, the predecessors-in-title of the appellants, thereupon brought a suit being Suit No. 50 of 1903 for redemption against the said Hira Singh and others on payment of Rs. 856 and odd. The Trial Judge by his judgment, dated August 31, 1903 decreed Suit No. 31 of 1903 and dismissed Suit No. 50 of 1903. In appeal, however, the appellate Court reversed the said judgment and decree and passed a decree for redemption and possession on payment of Rs. 8,839-13-0 in favour of the predecessors-in-title of the appellants and the said Teja and against the predecessorsin-title of the respondents. The appellants' predecessors-in-title, however, failed to redeem. Consequently the suit lands continued to remain in possession of the respondents' predecessors-in-title. The said Teja migrated to Pakistan in 1947 whereupon with share in the said lands vested in the Custodian of Evacuee Property. On December 4, 1951, the appellants applied for redemption of their 3/4th share in the said lands under the Punjab Redemption of Mortgages Act, II of 1913 before the Additional Collector, Delhi, who, however, referred the parties to a civil Court. On May 15, 1954 the appellants filed the present suit for a declaration that the said seven mortgages still subsisted and for redemption and possession of their 3/4th share in the suit lands. In answer to that suit the respondents pleaded that as sixty years had already expired since the dates of the said mortgages the suit was barred by limitation and the appellants were not entitled to redeem the said lands. The appellants relied on four statements for the purpose of saving limitation which they alleged were acknowledgments within the meaning of Section 19 of the Limitation Act, IX of 1908. These statements were in the following documents:

1. The written statement, Ex. P. 14, in Suit No. 50 of 1903 which contained a statement that Parmeshwardas held the said lands as the mortgagee thereof under the said seven mortgages.
2. The plaint, Ex. P. 15, in Suit No. 31 of 1903 wherein reference was made of Parmeshwardas having executed the said sub-mortgage.
3. Sale-deed, Ex. X, executed by Parmeshwardas thereby selling his mortgage rights in favour of the predecessors-in-title of the respondents.
4. Deed of sub-mortgage Ex. executed by Parmeshwardas in 1902.

2. In the last document the statement relied on was with regard to only the first of the said seven mortgages, dated August 16, 1861.

3. The Trial Court passed a preliminary decree, dated March 29, 1957 for possession on condition that the appellants paid Rs. 8,839-13-0 within four months. Accordingly the appellants deposited the said amount-in Court. The respondents filed an appeal challenging the said judgment and decree. On January 8, 1958 the learned District Judge dismissed the said appeal and confirmed the preliminary decree holding that the suit was within time as the statements in the aforesaid documents constituted acknowledgments within the meaning of Section 19. The respondents then took the matter to the High Court by way of second appeal. The learned Single Judge of the High Court allowed the appeal holding that the said statements were not sufficient to constitute acknowledgments and, therefore, the suit was barred by limitation and dismissed it. Thereupon the appellants filed a Letters Patent appeal which met the same fate. This appeal by certificate challenges the correctness of the said judgment and decree passed by the High Court.

4. The period of limitation for redemption of the said mortgages being sixty years the period in respect of the last of them expired as early as 1929 but the appellants relied on certain statements in the said four documents alleging that they constituted acknowledgments by the predecessors-in-title of the respondents and which gave them a fresh period of limitation saving their suit from being time-barred. The contention urged on behalf of the appellants in the Courts below and repeated by Mr. Mishra before us was that an admission of jural relationship of a mortgagor and a mortgagee was by itself sufficient to constitute an acknowledgment. It was urged that an admission by a party that he holds a property as a mortgagee or that what he is disposing of are his mortgage rights therein postulates that there is a subsisting mortgage, that his interest in the property is as a mortgagee and he acknowledges by such a statement his liability to being redeemed by the mortgagor subject of course to the mortgagor paying the mortgage debt. This contention was seriously contested by Mr. Menon who argued that a statement as to jural relationship would at best be a mere description of the rights dealt with by such a party and that a statement to fall within Section 19 has to be a conscious and deliberate admission of the right of the mortgagor or his successor-in-title to redeem and the corresponding liability of the maker of the statement to be redeemed. It is such a statement only which gives a fresh period of limitation.

5. Before we proceed to consider these contentions we may mention that none of the statements relied on by the appellants expressly admitted the appellants' right to redeem or the liability of the respondents and their predecessors-in-title to be redeemed. What these statements did was only to mention without anything more the fact of jural relationship of

mortgagor and mortgagee. But Mr. Mishra's contention was that a mere admission of such jural relationship was sufficient for the purposes of Section 19 and that the statement relied on need not in express words be an admission of the liability to be redeemed or of the right of redemption. Such a statement necessarily implies a subsisting mortgage and, therefore, of the right of redemption and the liability to be redeemed thereunder.

6. Section 19 (1) provides as under:

> (W)here, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

Explanation 1 to the section inter alia provides that

> For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right or is addressed to a person other than the person entitled to the property or right.

7. The section requires (i) an admission or acknowledgment (ii) that such acknowledgment must be in respect of a liability in respect of a property or right, (iii) that it must be made before the expiry of the period of limitation, and (iv) that it should be in writing and signed by the party against whom such property or right is claimed. Under the Explanation such an acknowledgment need not specify the exact nature of the property or the right claimed. It is manifest that the statement relied on must amount to an admission or acknowledgment and that acknowledgment must be in respect of the property or right claimed by the party relying on such a statement.

8. A large number of decisions were cited at the bar in support of the rival contentions. One line of these decisions lays down that an admission by a mortgagee in a pleading or a subsequent transaction that he holds the property as a mortgagee is a sufficient acknowledgment that the maker of the statement thinks and believes that he is liable to be redeemed at the date of the statement. On the basis of this principle an application by a judgment-debtor during execution proceedings under a mortgage-decree, claiming that a letter by the decree-holder granting extension of time for payment of the decretal amount was an acknowledgment was upheld. Similarly, a statement by the Zarpeshgidar that the property was his Zarpeshgi property in two sub-mortgages executed by him was held to be an acknowledgment. A statement in a sale-deed by the mortgagee that he was selling his mortgage rights was also held to be an acknowledgment of a subsisting mortgage and of the subsisting rights which he was competent to transfer and consequently it was held that he was estopped from setting up a defence inconsistent with his rights as the mortgagee. On the other hand there is another line of decisions where it was held that a mere admission of jural relationship is not sufficient, that a statement to constitute an acknowledgment must be in relation to the liability or the right or the property claimed and that such a statement must be shown to have been made with a consciousness and an intention of admitting such a right or liability. Hence in considering whether certain words amount to an acknowledgment of liability or right it has to be seen whether at the time of writing them the writer had in his

mind the question as to his liability or whether he was thinking of and referring to some other matter. In AIR 1942 Pat 170 the High Court of Patna held that an admission or acknowledgment of a liability must be one which can be implied from the facts and surrounding circumstances and is not one which is implied as a matter of law, that the intention of the law is to make an admission in writing of an existing jural relationship equivalent to, for the purpose of limitation, to a new contract and that for this purpose the consciousness and intention must be as clear as they would be in a contract itself. In ILR 59 Mad 312: (AIR 1936 Mad 70) the High Court held that where circumstances are such that the person making a statement has his mind directed to the question of the existence of the debt and he represents that the debt exists or represents facts consistent only with the inference that he admits the existence of the debt such a representation would be deemed to be a sufficient acknowledgment. The statement in question in that case was by a purchaser of equity of redemption in Court proceedings taken against the mortgagor, viz., that the purchaser had bought properties described as subject to a mortgage in favour of the plaintiff. In ***Maniram* v. *Rupchand***, [(1908) ILR 33 Cal 1047 (PC)], it was held that Section 19 required a definite admission of liability, that the section did not lay down that an acknowledgment would be available from a mere admission of jural relationship and that such a result depended upon the language of the document and the surrounding circumstances in which it is made. There is thus a clear divergence of opinion not only amongst the different High Courts but also sometimes in the same High Court.

9. It is not, however, necessary to go into the details of these decisions or to decide which of the two views is correct as this Court in ***Shapur Fredoom Mazda* v. *Durga Prosad*** [AIR 1961 SC 1236], has examined the contents and the scope of Section 19. After first stating the Ingredients of the section, this Court stated that an acknowledgment may be sufficient by reason of Explanation 1 even if it omits to specify the exact nature of the right. Nevertheless, the statement on which a plea of acknowledgment is based must relate to a subsisting liability. The words used in the acknowledgment must indicate the jural relationship between the parties and it must appear that such a statement is made with the intention of admitting that jural relationship. Such an intention, no doubt, can be inferred by implication from the nature of the admission and need not be in express words. It was then observed:

> If the statement is fairly clear then the intention to admit the jural relationship may be implied from it. The admission in question need not be express but must be made circumstances and in words from which he Court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement.

The Court also observed that stated generally the Courts leaned in favour of a liberal construction of such statements though that would not mean that where no admission was made one should be inferred or where a statement was made clearly without intending to admit the existence of jural relationship such as intention would be fastened on the maker of the statement by an involved or a far-fetched process of reasoning. Similarly, while dealing with an admission of a debt, Fry L. J. in ***Green* v. *Humphreys*** [(1884) 26 Ch D 474, 481], observed that an acknowledgment would be an admission by the writer that there was a debt owing by him either to the receiver of the letter or to some other person on whose behalf the

letter was received but that it was not enough that he referred to a debt as being due from somebody. In order to take the case out of the statute there must, upon a fair construction of the letter read by the light of the surrounding circumstances, be an admission that the writer owed the debt.

10. The right of redemption no doubt is of the essence of and inherent in a transaction of mortgage. But the statement in question must relate to the subsisting liability or the right claimed. Where the statement is relied on as expressing jural relationship it must show that it was made with the intention of admitting such jural relationship subsisting at the time when it was made. It follows that where a statement setting out jural relationship is made clearly without intending to admit its existence an intention to admit cannot be imposed on its maker by an involved or a far-fetched process of reasoning.

11. Do the statements relied on admit or acknowledge subsisting mortgages and the right to redeem or the liability of the maker thereof to be redeemed? Exhibit E, dated April 8, 1902 is the mortgage-deed executed by Parmeshwardas in favour of Badam for Rs. 200. The document refers only to one out of the said seven mortgages. Though it refers to the mortgage in favour of Dharamdas it does so for the purpose of describing the interest Parmeshwardas was mortgaging in favour of Badam and of his own right of redeeming the mortgage. The said mortgage thus is set out for showing the nature of the interest which he was mortgaging as security for the said debt of Rs. 200 rather than for admitting the mortgage of 1861 as a subsisting mortgage, The document thus cannot be said to be one made with the intention of admitting the jural relationship between him as the successor-in-title of Dharamdas and the successors-in-title of the said Teja. The second document Ex. X, dated August 16, 1902 was made between Parmeshwardas on the one hand and Hira Singh and others on the other and was a sale of his mortgage rights. The deed recites the mortgages executed by the said Teja in favour of Dharamdas, the fact of Parmeshwardas being in possession as Dharamdas's successor-in-title, the deed of mortgage, dated April 8, 1902 (Ex. E) and the fact that he was by this deed selling his mortgage rights for Rs. 1,290. These statements were clearly made for the purpose of describing his own rights which he was selling under this deed. But there is nothing in this document to show that he referred to the said mortgages with the intention of admitting his jural relationship with his mortgagors and, therefore, of his subsisting liability as the mortgagee thereunder of being redeemed. The third document Ex. P. 15 is the plaint in Suit No. 31 of 1903. Here again the statement as to Parmeshwardas having sold his mortgage rights to the plaintiffs was made with a view to trace their own rights as against the defendants and not with any consciousness or intention to admit the jural relationship between them or to admit the fact of the said mortgages being subsisting at the time when the plaint was filed. The statement in the plaint was made not in relation to the said mortgages but with reference to their own rights under the said deed of sale of mortgage rights in their favour. The fourth document is the written statement in Suit No. 50 of 1903 where the right of the plaintiffs in that suit to redeem has been specifically denied. The statement, therefore, cannot be availed of as an acknowledgment of a subsisting jural relationship or of a subsisting right and a corresponding liability of being redeemed.

12. In the light of the tests laid down in ***Khan Bahadur Mazda*** case, none of these statements can be regarded as acknowledgment within the meaning of Section 19. The High

Court, therefore, was right in refusing to treat these statements or any of them as acknowledgments and was equally right in its conclusion that the appellants' suit was barred by limitation.

13. In the result, the appeal fails and is dismissed with costs.

* * * * *

Sampuran Singh **v.** *Niranjan Kaur (Smt.)*

AIR 1999 SC 1047

A.P. MISRA, J. - The only question raised by the learned counsel for the mortgagor-appellants, and that is what is also decided by the courts below, is whether his suit for redemption is barred by time. This is a case of oral mortgage executed in the year 1893 for a sum of Rs. 53 and further, a question is raised, whether fresh period of limitation would revive from 11-1-1960, on which date the original mortgagee sold his mortgagee right by a registered deed to the respondents, who acknowledge the existence of the mortgage in question.

2. To appreciate the controversy, it is necessary to refer to the following short facts of this case. The suit land comprising of 37 kanals 15 marlas in Khewat No. 260, Khatauni No. 448, Rect. No. 45, Killas Nos. 14(8-0), 19(8-0), 21(5-15), 22(8-0) situated in Village Sambhli, Tehsil and District Karnal (Haryana) was originally mortgaged by Rekha and others for a sum of Rs. 53 in favour of Bakhatwara, Raju and Matu, s/o. Sahu on 21-3-1893. Mutation was sanctioned. Subsequently, on 11-1-1960, the mortgagee, Matu, s/o Raju and Smt Dasondha, wd/o Parsa, d/o Sahu sold their mortgagee rights vide registered sale deed in the even date to the respondents.

3. On the other hand, the appellants had purchased the suit land in the year 1959 from the original mortgagor; Rekha and others vide three separate registered sale deeds. According to the appellants till 1960- 61 it were the mortgagors who remained in possession of the suit land and were getting the same cultivated through their tenants. The appellants state that since in the year 1960 the original mortgagees had acknowledged the original mortgagees, therefore, a fresh period of limitation for redemption of the mortgage in question had begun to run from 11-1-1960 and prayed for possession by way of redemption on payment of Rs. 53.

4. On these facts, the appellants filed the present suit in the year 1980 for possession by way of redemption of the suit land as against the respondents. The respondents contested the suit and raised preliminary objections that the present suit is hopelessly time-barred and also raised other objections which are not necessary to refer, as both the parties pressed only the issue of limitation not only before us but even when the matter was before the courts below. The respondents' case is that they are in possession of the suit property as owners as their predecessors-in-interest mortgagees with possession transferred their entire right by means of a registered sale deed dated 11-1-1960 to the respondents, as aforesaid. At that time there was no agreement in subsistence as the original mortgagees became owners. As stated earlier, the original oral mortgage was for a sum of Rs. 53/-.

5. The trial court decreed the suit for redemption on payment of Rs. 53 and held that the suit is within time and hence they have right to redeem the mortgage. The trial court held that the suit is within time by holding that the acknowledgment by the respondents on behalf of the original mortgagees was vide sale deed dated 11-1-1960 and a fresh period of limitation starts from the date of this deed. It further placed reliance on the case of ***Inder Singh*** **v.** ***Kishno*** [(1966) 68 Punj LR 408] to hold that the period of limitation would only run after expiry of 12 years from the date of mortgage, in cases of unregistered mortgage. Since the present case is also a case of unregistered mortgage it held that such mortgage and possession

would only become valid after a period of 12 years from the date of such mortgage. The present oral mortgage in question was of the year 1893 thus the limitation would only start after 12 years of this date which would be in the year 1905 and adding 60 years from this, the limitation for filing suit would only expire in the year 1965 and since there is acknowledgment by the mortgagees on 11-1-1960, as aforesaid, a fresh limitation starts from this date hence the suit is within limitation. However, the first appellate court set aside this judgment. It held that the aforesaid decision in ***Inder Singh*** is of no help to the plaintiffs (mortgagors) as it is not disputed by the parties and rather conceded that earlier, specially during the year in question, oral agreement was permissible in the State of Punjab and was treated to be a valid agreement. This coupled with the fact that the principal money secured under the said agreement was less than Rs. 100, so the mortgage could have been effected either by a registered instrument or by delivery of possession of the land in question. In this view of the matter, admittedly, the land in the suit was mortgaged with possession for Rs. 53 in March 1893. Hence, a valid mortgage came into existence on the very day of its execution. In view of this, it held that the period of limitation of redemption of the land in suit started on that very date of the execution and thus the period of 60 years is to be counted from March 1893, hence the suit is barred by time. When the matter was taken in second appeal the High Court relied on its Full Bench decision entitled ***Shri Chand*** **v.** ***Nathi*** ((1983) 85 Punj LR 288) dated 21-1-1983, in which it overruled its earlier decision in Inder Singh and hence dismissed the appeal of the present appellants.

6. Learned Senior Counsel for the appellants, Mr. A. B. Rohtagi fairly stated that the aforesaid Full Bench decision is no doubt against the appellants but made submissions for holding contrary to what has been held therein. In the said case of ***Shri Chand*** one of the core questions raised was, whether an oral mortgage was valid in the eyes of law, which is executed on 14-6-1948 in the State of Punjab, prior to the extension of the provisions of Section 59 of the Transfer of Property Act, 1882 which requires registration of a mortgage. It is also not in dispute that the Transfer of Property Act by virtue of Section 1 is only extended in the State of Haryana on 5-8-1967, with which the Full Bench was concerned and to the State of Punjab after 1-11-1956, with which we are concerned. It held that there was no bar to give effect to an oral mortgage in a case where a mortgagor gave possession of the land to a mortgagee. The Full Bench held:

> Now once that is so on the admitted stand that an oral mortgage was made on June 14, 1948 it seems to inflexibly follow that no legal infirmity attached thereto and the transaction was in essence, legally valid and enforceable. All that, therefore, remains for adjudication is as to what would be the period of limitation for the redemption of such a valid oral mortgage.

7. The Full Bench decision rightly overruled the decision of ***Inder Singh*** as that decision wrongly based its conclusion on an earlier decision in the case of ***Purusottam Das*** **v.** ***S. M. Desouza*** [AIR 1950 Ori 213]. The facts in that case were that the mortgage was for an amount for more than Rs. 100 and was unregistered which was executed after the Transfer of Property Act was made applicable to the State of Orissa hence the mortgage was invalid. It is for this reason it held that the period of limitation would only start after the expiry of 12 years of such invalid mortgage as such possession would perfect into a valid mortgage after the expiry of

this period. Hence the Full Bench rightly held that the principle of ***Purusottam Das*** was wrongly applied in ***Inder Singh***. The Full Bench finally concluded:

> In the present case, admittedly the oral mortgage had been made on June 14, 1948. At that time the relevant provisions of the Transfer of Property Act had not been made applicable to the area. The said transaction at that time was therefore, valid and legally enforceable one and the fact whether the mortgage was registered or not was wholly irrelevant with regard to the issue of its validity. Consequently, the terminus for the limitation for redemption has to run from the aforesaid date of June 14, 1948.

8. We find no error committed in coming to the said decision by the Full Bench. No sustainable submission has been advanced to hold a contrary view.

9. In his endeavour, learned counsel for the appellants referred to Section 18 of the Limitation Act, 1963 to hold that the acknowledgment by the original mortgagees to the respondents, through the said registered document dated 11-1-1960, the period of limitation is revived which would only start from the date of acknowledgment hence the suit filed in the year 1980 would be within limitation. The said submission is without any force. Section 18 sub-section (1) itself starts with the words:

> 18. (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made .....

Thus, the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit, in other words, if the limitation has already expired, it would not revive under this section. It is only during subsistence of a period of limitation, if any, such document is executed, that the limitation would be revived afresh from the said date of acknowledgment. In the present case, admittedly, the oral mortgage deed is in March 1893. If the period of limitation for filing suit for redemption is 60 years then limitation for filing a suit would expire in the year 1953. Thus, by the execution of this document dated 11-1-1960 it cannot be held by virtue of Section 18 that the period of limitation is revived afresh from this date.

10. Learned counsel for the appellants has also made reference in the case reported in ***C. Beepathuma* v. *Velasari Shankaranarayana Kadambolithaya*** [AIR 1965 SC 241]. In view of this decision it was submitted that since the mortgagee-respondents continued to enjoy the property with possession under the mortgage they cannot shirk from accepting their obligation under it. This Court held:

> That doctrine is that a person who accepts a benefit under a deed or Will or other instrument must adopt the whole contents of the instrument, must conform to all its provisions and renounce all rights that are inconsistent with it, in other words a person cannot approbate and reprobate the same transaction.

This has no relevance to the present case. The present case is not a case where the mortgagee has received any benefit under any instrument and is renouncing to perform any obligation under it. In the present case, there is neither any deed nor document of mortgage. Even under oral mortgages the only obligation for a mortgagee was to hand over possession of the property mortgaged at the moment the mortgagor pays the mortgage money. It is

nobody's case that the mortgagor has paid back the money. This part of the judgment only refers to the doctrine of election. There is no obligation under the oral mortgage, which could be said to be not performed by the mortgagee. We are only concerned here, whether the suit filed by the appellants is within time or not. It is significant that this very decision also makes reference about the limitation in filing such suits. Here a suit was filed for redemption of mortgage deed, Ex. P-2 by the 1st and 2nd respondents. The first respondent purchased Schedule 'A' property and undertook to redeem the mortgage property described in Schedules 'A' and 'B' and hand over possession of Schedule 'B' property to the legal representatives in the family of one Madana. Before this on 14-4-1842 Madana, who was then Ejaman of the family, usufructuarily mortgaged the 'A', 'B' and 'C' Schedule properties under Ex. P-1. This deed did not contain any provision for repayment of the amount or for the usufructuary mortgage to be worked off. So no period was stated for redemption. Then it was later converted into a mortgage specifying time through Ex. P-2, as aforesaid, in 1862. The Court held:

> In 1842 when Ex. P-1 was executed, there was no law prescribing a period of limitation for the redemption of a usufructuary mortgage. Such limit came in 1859 for the first time and a period of 60 years from the date of the mortgage was prescribed. It is this statute which seems to have been the cause for the execution of Exs. P-2 and P-2 (a); the mortgagees were perhaps afraid that the mortgage could be redeemed at any time within 60 years from the date of the mortgage of 1842. The last date for redemption thus was 1902. By getting the term certain for 40 years, the date for redemption was shifted by them to 1902 and redemption could not take place till that year. The mortgagors also benefited, because they obtained a release of some properties and received Rs. 100 in cash. The period of 60 years was repeated in the Act of 1871; but it contained a rider that if during the period of 60 years, there was an acknowledgment then the period would run from the date of that acknowledgment. Article 148 of the Limitation Act as it stands today was introduced by the Act of 1877. It makes the 60 years' period run from the time when redemption is due.

The aforesaid passage clearly shows that the mortgage could be redeemed at any time within 60 years from the date of mortgage.

11. Hence we find that this case, instead of supporting, is against the submissions of learned counsel for the appellants. Lastly, learned counsel for the appellants faintly made reference to the Redemption of Mortgages (Punjab) Act, 1913 to submit that in an oral mortgage, till this Act came into force, there was no period of limitation and the right for redemption accrued only after this Act came into force, hence limitation cannot start before the date when this Act came into force and thus as in the present case neither the mortgagors offered to pay the mortgage amount nor the mortgagees communicated that the mortgage amount has been paid, hence right to redeem mortgage could not be said to have accrued, so the question of running any period of limitation never arose till this 1913 Act came into force. The submission is misconceived, without any merit and has no force. We have already recorded that the period of limitation starts the very first date of a valid mortgage. The court has only to see, whether a mortgage is valid or not. If it is valid, right to redeem to the mortgagors accrues from that very date, unless any restraint in the mortgage deed is provided specifying restriction under it as in the case of ***C. Beepathuma*** [AIR 1965 SC 241] specific

restriction was contained under Ex. P-2. So far as this 1913 Act is concerned, the Statement of Objects and Reasons clearly reveals that this Act was only brought in, as under Section 7(5) of the Punjab Alienation of Land Act, as subsequently amended in 1907, the Deputy Commissioner has, in the case of mortgages made under Section 6 of that Act, certain powers to restore mortgagors to possession of their property was provided, therefore, 1913 Act was passed to confer similar powers in respect of other mortgages not covered under Section 6. This also provided for a summary procedure in the matter of redemption mortgages. This has no correlation with the period of limitation in case of redemption of mortgages. In any case, even from the date of this Act, viz., 1913, the period of limitation expires in 1973 hence the suit is still barred by time.

12. Learned counsel also referred to the language of Article 61(a) of Part V of the Schedule to the Limitation Act, which is quoted hereunder:

"61. By a mortgagor –

Description of suit	Period of Limitation	Time from which period begins to run
(a) to redeem or recover possession of of immovable property mortgaged	Thirty years	When the right to redeem to recover possession accrues."

13. It is not in dispute that at the relevant time, period of limitation under this was 60 years and not 30 years.

14. Submission was, as aforesaid, that right to redeem only accrues when either the mortgagors tender the amount of mortgage or the mortgagees communicate satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived, as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion, the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage that would be from March 1893. In view of this, we do not find any error in the decision of the first appellate court or the High Court holding that the suit of the present appellants is time-barred.

15. Hence, for the reasons recorded above, we do not find any merit or force in the submissions made by the learned counsel for the appellants. Accordingly, the present appeal is dismissed.

Karuppaswamy **v.** *C. Ramamurthy*

AIR 1993 SC 2324

M.M. PUNCHHI, J. - 2. The plaintiff-respondent put forth a claim that one Marriappa Gounder had executed a promissory note in his favour for consideration on November 14, 1971 in the sum of Rs 20,000. Apparently, on the last date of limitation, the plaintiff-respondent filed a suit against Marriappa Gounder in the court of the Subordinate Judge, Erode, for recovery of Rs 23,378 as due until date and for future interest till recovery, with costs. Marriappa Gounder was impleaded as the sole defendant, but he, however, had died about six weeks earlier on October 5, 1974. The summons issued to the defendant were thus returned by the first hearing on January 9, 1975 with the remarks that the defendant was dead but the date of his death was not disclosed in those remarks. The plaintiff-respondent took time from the court to take necessary steps to further the suit. On February 7, 1975, an application being IA 265 of 1975 was moved by the plaintiff-respondent under Order 22 Rule 4 of CPC impleading the son, daughter and widow of the deceased as his heirs and legal representatives as defendants 2 to 4 who are the appellants herein. Counter-statement was filed by them to IA 265 of 1975 in which it was pleaded that the suit was non est on account of the death of Marriappa Gounder, having taken place on October 5, 1974. The plaintiff-respondent then moved another application being IA 785 of 1975 for change of the provision under which the earlier application IA 265 of 1975 had been made from one under Order 22 Rule 4 to one under Sections 151 and 153 of CPC. The trial court dismissed both the applications on October 23, 1975 taken the view that since IA 265 of 1975 was filed for substitution of defendants 2 to 4 as defendants, the suit on the basis of the pronote had become barred by time against them and that there was no ground to invoke inherent power under Section 151 CPC. In the result, both the applications were dismissed. Both these orders were challenged in two revision petitions before the High Court by the plaintiff-respondent where he emerged successful, the court holding that the plaintiff, in the facts and circumstances, had aced in good faith and thus in view of the proviso to sub-section (1) of Section 21 of the Limitation Act, 1963 (hereinafter referred to as 'the Act'), it was just to direct that the date of filing of the suit against the heirs and legal representatives of the deceased defendant shall date back to the original presentation of the plaint, i.e. on November 14, 1974. For the view taken, support was obtained from a decision of this Court in ***Ram Prasad Dagduram*** **v.** ***Vijay Kumar Motilal Mirakhanwala*** [AIR 1967 SC 278]. In these appeals, the said view of the High Court is under challenge.

3. Learned counsel for the parties cited before us case-law bred in various High Courts of the country on the subject of procedural law under the Civil Procedure Code as to whether a suit filed against a dead person is non est and whether that dead person impleaded could be substituted by his heirs and legal representatives or be added as parties to the suit. Having heard them and having pondered over the matter, we are of the opinion that those questions do not seriously arise, when we see the sweep of the relevant provision under the Act, governing the subject, unamended and amended. That provision under the Indian Limitation Act, 1908, was Section 22 which read as follows:

"Effect of substituting or adding new plaintiff or defendant. - Where, after the institution of a suit, new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

Now under the Limitation Act, 1963, it is Section 21 which reads as follows:

"21. Effect of substituting or adding new plaintiff or defendant.

(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

4. A comparative reading of the proviso to sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors, which have been committed due to a mistake made in good faith, but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to sub-section (1) of Section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficent proviso to sub-section (1) of Section 21 of the Act an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must on proof be satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breathes life in the suit.

5. It is noteworthy that the trial court did not attribute any neglect or contumacy to the conduct of the plaintiff-respondent. It was rather observed that the plaintiff could have known the date of the death of the first defendant only by the counter filed to IA 265 of 1975. Normally, if he had known about the date of death of the defendant, he would have filed the suit in the first instance against his heirs and legal representatives. The trial court has also opined that the plaintiff was ignorant as to such death and that is why he filed IA 265 of 1975 under Order 22 Rule 4 of CPC. The High Court too has recorded a finding that there was nothing to show that the plaintiff was aware of the death of the first defendant and yet knowing well about it, he would persist in filing the suit against a dead person. In conclusion, the learned Single Judge held that since plaintiff-respondent had taken prompt action it clearly showed that he had acted in good faith. Thus the High Court made out a case for invoking the

proviso to sub-section (1) of Section 21 of the Act in favour of the plaintiff-respondent. Sequelly, the High Court found no difficulty in allowing IA 785 of 1975 permitting change of the provision whereunder IA 265 of 1975 was filed and in allowing IA 265 of 1975 ordering the suit against the heirs and legal representatives of defendant 1 to be dating back to November 14, 1974, the date on which the plaint was originally presented.

6. The High Court relied on ***Ram Prasad Dagduram* v. *Vijay Kumar Motilal Mirakhanwala*** observing that it virtually decided the point. It seems the High Court had discerned and borne in mind the following observations of Bachawat, J. concurring with A.K. Sarkar, C.J.:

> "The Court has power to add a new plaintiff at any stage of the suit, and in the absence of a statutory provision like Section 22 the suit would be regarded as having been commenced by the new plaintiff at the time when it was first instituted. But the policy of Section 22 is to prevent this result, and the effect of the section is that the suit must be regarded as having been instituted by the new plaintiff when he is made a party, see ***Ramsebuk* v. *Ramlall Koondoo*** [ILR (1881) 6 Cal 815: 8 CLR 457]. The rigour of this law has been mitigated by the proviso to Section 21(1) of the Indian Limitation Act, 1963, which enables the Court on being satisfied that the omission to include a new plaintiff or a new defendant was due to a mistake made in good faith, to direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Unfortunately, the proviso to Section 21(1) of the Indian Limitation Act, 1963 has no application to this case, and we have no power to direct that the suit should be deemed to have been instituted on a date earlier than November 4, 1958."
>
> At the time of the cause the old Indian Limitation Act, 1908, was in force.

7. A later judgment of this Court reported in ***Munshi Ram* v. *Narsi Ram*** [AIR 1983 SC 271] being under the Limitation Act, 1963 is more to the point. Thus the appellant filed a suit for possession of a piece of land in exercise of his right of pre-emption against respondents 1 and 2 alleging that they had purchased the land from his father under a registered sale deed dated May 16, 1977 in total disregard of his right of pre-emption. It was stated in the plaint that the cause of action arose on May 16, 1977 and hence the suit filed on January 29, 1978 was in time. Certified copy of sale deed was also filed along with the plaint. In the certified copy of sale deed there was mention of only respondents 1 and 2 as vendees. In the written reply filed on May 17, 1978 one of the pleas was that all the vendees were not impleaded and hence the suit being for partial pre-emption was liable to be dismissed. On June 14, 1978, the Court proceeded to frame issues. In that course when the original sale deed was read it transpired that one 'M' was also a vendee along with respondents 1 and 2. On the next day itself the appellant filed an application to implead 'M' and prayed for amendment of plaint stating June 16, 1977 also as the date of cause of action on which day according to him the possession of land was delivered to the vendees. The amendment was sought to save the suit from bar of limitation prescribed by Article 97 of Limitation Act. The suit and application were dismissed as also the first appeal and the second appeal before High Court. This Court held that the omission to implead 'M' as defendant was due to a mistake. The mistake was made in good faith and hence the proviso to sub-section (1) of Section 21 of the Act would

apply and the suit deemed to have been filed on January 29, 1978 against 'M' and thus it would be within time as required by Article 97. The decision of the High Court was thus reversed. It was also opined to 'M' being a necessary party had to be impleaded under Order 1 Rule 10 CPC, to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

8. Thus in our opinion the course set out in ***Munshi*** case [AIR 1983 SC 271] is attracted to the instant case since the High Court has found that the plaintiff-respondent had acted in good faith and had committed mistake in that frame of mind. ***Munshi*** case (AIR 1983 SC 271) in our view, should clear the way in favour of the plaintiff-respondent, ending in dismissal of this appeal.

9. In passing, we think that it would be desirable to deal with some of the judicial precedents at least, relied upon by the respective learned counsel. Cases which arose under Section 22 of the old Indian Limitation Act, 1908, showing difference of opinion raging in the High Courts on the interpretation of the said provision interplaying with the relevant provisions of the Code of Civil Procedure, need not be adverted to. Others arising after January 1, 1964, the day of the enforcement of the Limitation Act, 1963 are noteworthy. Cases reported in ***Suraj Bhan*** **v.** ***Balwan Singh*** [AIR 1972 P & H 276], ***Lalit Kumar*** **v.** ***Jairam Dass*** [AIR 1984 P & H 426] and ***Kisan Coop. Sugar Factory Ltd.*** **v.** ***Rajendra Paper Mills*** (AIR 1984 All 143) are on their own facts in which the mistake pointed out was not found to have occurred in good faith. In contrast, in ***Rasetty Rajyalakshmamma*** **v.** ***Rajamuru Kanniah*** [AIR 1978 AP 279] the mistake was found to have occurred in good faith and the impleadment of the legal representatives was allowed even after the expiry of the limitation for filing suit. The institution of the suit was rightly held therein to be not void ab initio.

10. Not fully appreciating the ratio of the case in ***Ram Prasad Dagduram*** **v.** ***Vijay Kumar Motilal Mirkhanwala*** [AIR 1967 SC 278] a learned Single Judge of the Orissa High Court in ***Cuttack Municipality*** **v.** ***Shyamsundar Behera*** [AIR 1977 Ori 137] in our view, wrongly termed the suit to be a nullity, when the effect of its being nullified was removable through proviso to Section 21(1) of the Act. ***Khaja Begum*** **v.** ***Gulam Mohiuddin*** [AIR 1976 AP 65] is not a case under the proviso to sub-section (1) Section 21 of the Act and thus requires no comment.

11. On the above analysis, we have no hesitation in coming to the conclusion that the decision of the High Court was correct for the reasoning it advanced as well as for the effort we have made in refurbishing that view in the processual rehearing. As a result, this appeal fails land is hereby dismissed but without any order as to costs.

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Rajender Singh **v.** *Santa Singh*

AIR 1973 SC 2537

BEG, J. - The plaintiffs-appellants, before us by grant of special leave, had filed a suit on April 20, 1959 for possession against the defendants-respondents, of 331 Kanals and 11 Marlas of land, the Khasra numbers of which are given in the plaint. The plaintiffs were the sons of Smt Premi, a daughter of Sham Singh (deceased), the original owner of the plots, and of Smt Malan, who, as the widow of Sham Singh, had gifted the plots in dispute in 1935, half and half, to the plaintiffs and Smt Khemi, the younger sister of their deceased mother, Smt Premi. It appears that Smt Khemi, who was issueless, had also made a gift in favour of the plantiffs before her death in 1944. The plaintiffs are said to have obtained possession of the whole land in dispute thus gifted to them. But, as there was considerable uncertainty at that time about the rights of the daughters and the powers of a widow to donate during her life-time under the customary law in Punjab, which was applicable to the parties, the defendants-respondents, the 8th degree collaterals of Sham Singh, had filed a suit on July 3, 1940, for possession of the land in dispute. This suit had been stayed from 1941 to May 29, 1946, under the Indian Soldiers (Litigation) Act, 1925, to the benefits of which the plaintiffs were entitled. It appears that there was also a dispute over mutation of names between the plaintiffs and defendants-respondents in Revenue Courts which ended finally by an order in favour of the appellants donees passed by the Financial Commissioner of Punjab on December 13, 1946. Defendants-respondents' suit of 1940, for declaration of rights and possession, renumbered in 1949, ended with the judgment and decree of a Division Bench of the Punjab High Court passed in favour of the appellants on November 21, 1958.

2. The plaintiffs asserted, in their Suit No. 179 of 1959, filed on April 16, 1959, now before us in appeal, that the defendants-respondents had taken illegal and forcible possession of the land in dispute after the decision of the High Court on November 21, 1958, and that, as the defendants- respondents refused to deliver possession of the land to the plaintiffs, they were compelled to file their suit for possession. The defendants-respondents, however, claimed that they had taken possession over the whole of the land in dispute after the death of Smt Khemi, issueless, in 1944, and that, since then, they had been in open, continuous, exclusive possession as owners, adversely to the rest of the world. Hence, according to the defendants-respondents, the plaintiffs' suit was barred by limitation.

3. There cannot be the least doubt, after looking at the plaint, that the plaintiffs-appellants, having alleged possession and disposession, for which they claimed relief by delivery back of possession of the land in dispute to them, the case fell squarely within the ambit of Article 142 of the Limitation Act of 1908. The defendants-respondents had, however, pleaded the bar of limitation as well as acquisition of title by their adverse possession for over 12 years.

4. The trial court had framed the first three issues which had a direct bearing on the question whether Article 142 or 144 of the Limitation Act of 1908 would be applicable. These issues were:

> "*1*. Whether the plaintiffs obtained the possession of the land in dispute through the Tehsildar near about the date December 13, 1946 as alleged by them in para 3 of the plaint? O.P.

2. Whether the defendants took possession of the land in dispute after November 21, 1958, as alleged in para 5 of the plaint? O.P.

3. Whether the defendants have become owners of the land in dispute through adverse possession? O.D."

5. The trial court rightly placed the burden of proof of the first two issues on the plaintiffs and of the third issue upon the defendants. It took up and decided the three issues together holding that the plaintiffs' suit is barred by Article 142 of the Limitation Act. The first appellate court also rejected the plaintiffs' case of acquisition of possession on December 13, 1946 and then of dispossession after November 21, 1958. It accepted the defendants' version. It observed that the "oral evidence coupled with the entries in the revenue records conclusively established that the possession over the suit land right from 1946 up to the present time was not that of the plaintiffs, but, that of the defendants", who had been asserting their own proprietory rights as collaterals of Sham Singh, the husband of Smt Malan. Although, no issue was framed on the applicability of Section 52 of the Transfer of Property Act, 1882, to such a case, yet, the question appears to have been argued for the first time before the first appellate court which, relying upon a decision of the Nagpur High Court in ***Sukhubai* v. *Eknath Bellappa*** [AIR 1948 Nag 97] held that, despite the established possession of the defendants-respondents for over twelve years, the doctrine of lis pendens prevented the rights to the defendants-respondents from maturing by adverse possession. It held that the possession of the defendants-respondents became adverse when their appeal in their suit for possession was dismissed by the Punjab High court on November 21, 1958. Thus, the first appellate court had really used Section 52 of the Transfer of Property Act as though it was a provision for excluding the period of time spent in litigation in computing the prescribed period of limitation. The question whether the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, would govern such a case was referred by a Division Bench to a Full Bench of the Punjab High Court.

6. A.N. Grover, J., giving the majority opinion of the Full Bench of three Judges of the Punjab High Court held that, on the concurrent findings of fact recorded by the Courts below, the adverse possession of the defendants, who were appellants before the High Court, commenced during the pendency of the earlier suit, and, once having begun to run, could not stop running merely because of the pendency of the dependents' suit for possession which was finally dismissed by the High Court on November 21, 1958. On the other hand, I.D. Dua, J., expressing his minority opinion of the Full Bench of the High Court, held that the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, would enable the plaintiffs-appellants to overcome the consequences of defendants' adverse possession until November 21, 1958, so that the doctrine of lis pendens could operate as a provision enabling exclusion of time during the pendency of the defendants' suit of 1940.

7. One of the questions attempted to be raised here, involving investigation of fresh facts, was that a portion of the land, entered in the revenue records as "Banjar", cannot be adversely possessed at all because it is vacant so that it must be deemed to be in the possession of the plaintiffs on the principle that possession follows title. The plaintiffs had not taken such a case even in their replication in answer to the written statement of the defendants. Apart from

the fact that the question does not appear to have been missed in the Courts below, we think that the plaintiffs' admission of dispossession by the defendants, implying that the defendants-respondents were in actual adverse possession of all the land in dispute debars plaintiffs' learned Counsel from raising such a question now. Furthermore, the patent fallacy underlying such a contention is that Banjar land is incapable of adverse possession. It may be that Banjar land cannot be cultivated, but, we do not think that it could possibly be urged that it is per se incapable of being actually physically possessed by use for other purposes, such as building or storing of wood or crops, apart from cultivation. We will say no more about this unsustainable contention.

8. It was then urged that Article 142 was not applicable to this case and that no question as to its applicability should have been decided. We fail to see how such a contention could be advanced in view of the assertions in the plaint which clearly compelled the application of Article 142. As was held by a Full Bench of the Allahabad High Court., in ***Bindhyachal Chand* v. *Ram Gharib Chand*** [AIR 1934 All 993] the question whether the suit is within time, when the plaintiffs make assertions attracting the application of Article 142, becomes a question of proof of title itself. Without proof of subsisting title the plaintiffs' suit must obviously fail. It was said there by Sulaiman, C.J. (at p. 999):

> "In cases falling strictly under Article 142, in which the only question is one of discontinuance of possession of the plaintiff and not of adverse possession of the defendant, the question of limitation in one sense becomes the question of title, because by virtue of Section 28, Limitation Act, if the claim is barred by time, the title must be deemed to be extinguished."

9. It is true that the extinction of title took place in the case before us during the pendency of the suit. But, it has to be borne in mind that an extinction of title will not be hit by the doctrine of lis pendens simply because it is an extinction during the pendency of a suit. If so wide was the sweep of Section 52 of Transfer of Property Act this provision would have been differently worded. We are of opinion that a case in which the extinction of title takes place by an application of the specific and mandatory provisions of the Limitation Act falls outside the scope of Section 52 of the Transfer of Property Act. It would not be governed by provisions of an Act relating to "transfer", defined by Section 3 of the Transfer of Property Act, but by the Limitation Act, exclusively.

10. It is immaterial in the case before us, from the point of view of extinction of title by an application of Section 28 of the Limitation Act of 1908, whether Article 142 or Article 144 of the Limitation Act is applicable. The findings of the Courts below, accepted as correct and binding by A.N. Grover, J., in the majority judgment of the Punjab High Court, would make Article 144 also of the Act clearly applicable to the case. All the elements of an open, adverse, hostile, continuous, and exclusive possession of the defendants for over 12 years were present here.

11. It would be idle to contend in the case before us, in view of the pleadings of the parties and the issues framed and decided, that the applicability of Article 142 of the Limitation Act was either not put in issue by pleadings of the parties or an issue on its

applicability was not framed. The first two issues framed have a direct bearing on the applicability of Article 142. It is not necessary that the issue framed must mention the provision of law to be applied. Indeed, it is the duty of the Court, in view of Section 3 of the Limitation Act, to apply the bar of limitation where, on patent facts, it is applicable even though not specifically pleaded. Therefore, we find no force in the submissions based on the supposed inapplicability of Article 142 of the Limitation Act of 1908 or assumed defects in procedure adopted in applying it.

12. The only question of some importance which could be said to arise in this case is: Does the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, arrest the running of the period of limitation during the pendency of the suit of the defendants-respondents filed on July 3, 1940, and, finally decided in second appeal by the High Court on November 21, 1958?

13. We may here set out Section 52 of the Transfer of Property Act which runs as follows:

> "52. During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
>
> *Explanation*.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

14. The background of the provision set out above was indicated by one of us (Beg, J.,) in ***Jayaram Mudaliar* v. *Ayyaswami*** [(1972) 2 SCC 200] There, the following definition of the lis pendens from *Corpus Juris Secundum* (Vol. LIV, p. 570) was cited:

> "Lis pendens literally means a pending suit, and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein."

It was observed there:

> "Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings in fructuous."

15. The doctrine of *lis pendens* was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from the ambit of the Court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of *lis pendens* is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated.

16. It is very difficult to view the act of taking illegal possession of immovable property or continuance of wrongful possession, even if the wrongdoer be a party to the pending suit, as a "dealing with" the property otherwise than by its transfer so as to be covered by Section 52 of the Transfer of Property Act. The prohibition which prevents the immovable property being "transferred or otherwise dealt with" by a party is apparently directed against some action which would have an immediate effect, similar to or comparable with that of transfer, but for the principle of *lis pendens*. Taking of illegal possession or its continuance neither resemble nor are comparable to a transfer. They are one sided wrongful acts and not bilateral transactions of a kind which ordinarily constitute "deals" or dealings with property (e.g. contracts to sell). They cannot confer immediate rights on the possessor. Continued illegal possession ripens into a legally enforceable right only after the prescribed period of time has elapsed. It matures into a right due to inaction and not due to the action of the injured party which can approach a Court of appropriate jurisdiction for redress by a suit to regain possession. The relief against the wrong done must be sought within the time prescribed. This is the only mode of redress provided by law for such cases. Section 52 of the Transfer of Property Act was not meant to serve, indirectly, as a provision or a substitute for a provision of the Limitation Act to exclude time. Such a provision could and would have been there in the Limitation Act, where it would appropriately belong, if the policy behind the law was to have such a provision.

17. The policy underlying statutes of limitation, spoken of as statutes of "repose", or of "peace" has been thus stated in ***Halsbury's Laws of England*** Vol. 24, p. 181 (para 330):

> "330. *Policy of Limitation Acts.*—The Courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely: (*1*) that long dormant claims have more of cruelty than justice in them, (*2*) that a defendant might have lost the evidence to disprove a stale claim, and (*3*) that persons with good causes of actions should pursue them with reasonable diligence."

18. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence, or laches.

19. If Section 52 of the Transfer of Property Act was really intended to strike at the running of the period of limitation, based on the considerations mentioned above, it would

have made it clear that the law excludes the period spent in any litigation from computation. Exclusion of time in computing periods of limitation is a different subject altogether to which the whole of Part III of the Limitation Act is devoted. There, we find Section 14, which deals with "exclusion of time of proceeding bona fide in Court without jurisdiction". There are certain conditions for the applicability of Section 14 of the Limitation Act. One of these is that the plaintiff should have prosecuted, with due diligence, civil proceedings "founded upon the same cause of action". In the case before us, the cause of action arose, according to the plaintiffs, after the decision of the previous suit. The cause of action in the previous suit was entirely different. Indeed, it was the defendants-respondents who had sought relief, there and set up a cause of action. Section 14 of the Limitation Act of 1908 which is the only provision of the statute specifically dealing with exclusion of time spent in another litigation, could not obviously apply to the case now before us. The only mode of relief open to the plaintiffs was to have instituted a suit of their own within the prescribed period of limitation. They did institute the suit now before us but did so long after the period of limitation had expired. In such a case Section 52 of the Transfer of Property Act could not, in our opinion, apply at all. The matter could only be covered, if at all, by some provision of the statute of limitation which, as already observed, makes no provision for such a case. The effect of Section 3 Limitation Act is that it expressly precludes exclusion of time on a ground outside this Act even if it parades under the guise of a doctrine which has no application whatsoever here.

20. The majority judgment of the Punjab High Court cites several cases to support the view that limitation would start running against the plaintiffs-appellants when the defendants-respondents took possession. We need mention only two of these cases: ***Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar*** [AIR 1923 PC 175] *and* ***Narayan Jivangouda Patil* v. *Puttabai*** [AIR 1945 PC 5]. We are in complete agreement with the majority view.

21. It is not possible, in the absence of any provision which would entitle the plaintiffs to exclude time and thus bring their suit within 12 years period of limitation, to accept a contention which would enable the plaintiffs to escape the mandatory provisions of Section 3 of the Act read with Section 28 and Articles 142 and 144 of the Limitation Act of 1908. Courts of Justice cannot legislate or reconstruct law contained in a statute or introduce exceptions when statutory law debars them from doing so. Even hard circumstances of a case do not justify the adoption of such a course. Moreover, we fail to see how the plaintiffs could complain of hardship when their own negligence or failure to act in time enabled defendants to acquire rights by reason of the operation of a law of limitation with the wisdom or justice of which we are not concerned here.

22. A claim was sought to be advanced on behalf of the Custodian of Evacuee Property, who is also a defendant-respondent, based on the provisions of Section 8, sub-section (4) of the Administration of Evacuee Property Act 1950. This question was not gone into by the Punjab High Court. As we are affirming the Full Bench decision of the Punjab High Court, dismissing the plaintiffs' suit on the ground that it is barred by limitation, it is not necessary for us to give any decision on any dispute between co-defendants-respondents regarding the right to possess any property which may have vested in the Custodian, Evacuee Property. A decision on such a dispute is not necessary for deciding the case before us. There is, therefore,

no question of *res judicata* between co-defendants on the points raised. And, we cannot allow the plaintiffs-appellants to raise any such question on behalf of the Custodian, Evacuee Property, as their learned Counsel seemed to be attempting to do, in a desparate attempt to clutch at a straw.

23. The result is that we affirm the judgment and decree of the Punjab High Court and dismiss this appeal. An application on behalf of the plaintiffs-appellants (CMP No. 2487 of 1967), seeking permission to introduce additional questions in respect of Banjar land, is also dismissed for the reasons already given. In the circumstances of this case, we order that the parties will bear their own costs throughout.

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Shantilal M. Bhayani **v.** *Shanti Bai*

1995 Supp (4) SCC 578

K.RAMASWAMY AND N.M. KASLIWAL, JJ. - 1. The only question to be considered in this appeal is whether the provisions of Section 5 of the Limitation Act, 1963 can be made applicable to an appeal filed before the appellate authority functioning under Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (hereinafter referred to as 'the Act'). The appellant having lost the case before the small causes court, filed an appeal before the appellate authority. The appeal was barred by limitation by 12 days. The appellant, as such, filed an application under Section 5 of the Limitation Act for condoning the delay. The appellate authority took the view that provisions of Section 5 of the Limitation Act are nor applicable in the case as the appellate authority was not a court but only persona designata and as such dismissed the petition for excusing the delay. A revision filed against the said order was dismissed by the High Court. Learned counsel for the appellant submitted that under the provisions of Section 23 of the Act, an appeal can be filed within 15 days from the date of an order passed by the Controller. There is no provision under the Act excluding the provisions of the Limitation Act and as such the High Court was wrong in holding that Section 5 of the Limitation Act would not apply in the present case. Reliance in support of the above contention is placed on ***Chinna Vaira Thevar* v.** ***Vaira Thevar*** [(1982) 2 MLJ 400].

2. Admittedly, there is no specific exclusion of the provisions of Section 5 of the Limitation Act under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Section 29(2) of the Limitation Act clearly provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.

3. A perusal of the above provision read with Section 5 of the Limitation Act leaves no manner of doubt that the provisions of Section 5 of the Limitation Act will apply to an appeal filed before the appellate authority under Section 23(1)(b) of the Act. It may also be noted that the appellate authority and the High Court had placed reliance on a decision in ***Easwaran* v.** ***Palaniammal*** [1974 TNLJ 380] but this case has been overruled by a subsequent decision of the Division Bench of the High Court in ***Chinna Vaira Thevar* v.** ***Vaira Thevar*** [(1982) 2 MLJ 400].

4. In the result we allow this appeal, set aside the judgment of the High Court as well as of the appellate authority and direct the appellate authority to entertain the application under Section 5 of the Limitation Act and to dispose of the same on merits in accordance with law.

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Mukri Gopalan **v.** *Cheppilat Puthanpurayil Aboobacker*

AIR 1995 SC 2272

S.B. MAJMUDAR, J. - In this appeal by special leave a short but an interesting question falls for determination. It is to the effect:

> "(W)whether the appellate authority constituted under Section 18 of the Kerala Buildings (Lease and Rent Control) Act, 1965 (hereinafter referred to as the 'Rent Act') has power to condone the delay in the filing of appeal before it under the said section".

Majority of the Kerala High Court in the case of ***Jokkim Fernandez* v. *Amina Kunhi Umma*** [AIR 1974 Ker 162] has taken the view that the appellate authority has no such power. Following the said decision, a Division Bench of the Kerala High Court by its judgment and order under appeal has dismissed the revision application moved by the appellant herein whose appeal before the appellate authority was dismissed as time barred and the application for condonation of delay was treated to be not maintainable before the appellate authority.

2. A few relevant facts leading to these proceedings may now be looked at. The appellant is a tenant occupying the suit premises belonging to respondent-landlord. The respondent filed Rent Control Petition No. 117 of 1992 before the Rent Control Court, Kannur, Kerala State, seeking eviction of the appellant-tenant under Section 11(2)(a)(b) and Section 11(3) of the Rent Act on the grounds of default in payment of rent and bona fide need for the purpose of conducting a grocery shop for his son, Plaintiff 2. The Rent Control Court exercising its power under Section 11 of the Rent Act passed an order for possession against the appellant on 28-10-1993. The appellant applied for a certified copy of the said order on 29-10-1993. He obtained a certified copy of the order on 23-11-1993. It is the case of the appellant that he entrusted on 4-12-1993 all the relevant papers to his counsel for filing appeal. His counsel called him in the next following week for signing the vakalatnama and for completing other formalities relating to filing of appeal. It is the further case of the appellant that he suffered paralytic attack on 5-12-1993 and was bedridden until 27-12-1993. On 28-12-1993 he came to know for the first time from his counsel that the time for filing appeal had elapsed. It may be noted at this stage that as per Section 18(1)(b) of the Rent Act an appeal has to be filed within thirty days from the date of order of Rent a Control Court. In computing thirty days, the time taken to obtain a certified copy of the order appealed against has to be excluded. Ultimately the appeal was filed by the appellant on 31-12-1993 before the appellate authority, namely, District Judge, Thalassery under Section 18 of the Act. The said appeal was also accompanied by IA No. 56 of 1994 for condonation of delay supported by the affidavit of the appellant. The appellate authority by its order dated 11-1-1994 dismissed the appeal as barred by time. The appellate authority took the view that being not a court but a persona designata it has no power to condone the delay in filing appeal by invoking the provisions contained in Section 5 of the Limitation Act, 1963. As noted earlier the said order of the appellate authority was confirmed by the High Court in civil revision petition moved by the appellant and that is how the appellant is before us.

3. The learned counsel for the appellant-tenant vehemently contended that the majority view of Kerala High Court in ***Jokkim Fernandez*** **v.** ***Amina Kunhi Umma*** to the effect that Section 29(2) of the Limitation Act cannot apply to the proceeding before the appellate authority under Section 18 of the Rent Act was not correct and that the appellate authority had full powers under Section 29(2) of the Limitation Act to consider on merits the question of condonation of delay in filing appeal as per Section 5 of the Limitation Act. The learned counsel for the respondent-landlord on the other hand supported the decision rendered by the High Court.

7. As noted earlier the appellate authority, namely the District Judge, Thallassery has taken the view that since he is a persona designata he cannot resort to Section 5 of the Limitation Act for condoning the delay in filing appeal before him. So far as this reasoning of the appellate authority is concerned Mr. Nariman, learned counsel for respondent fairly stated that he does not support this reasoning and it is not his say that the appellate authority exercising powers under Section 18 of the Rent Act is a persona designata. In our view, the said fair stand taken by learned counsel for respondent is fully justified. It is now well settled that an authority can be styled to be persona designata if powers are conferred on a named person or authority and such powers cannot be exercised by anyone else. The scheme of the Act to which we have referred earlier contraindicates such appellate authority to be a persona designata. It is clear that the appellate authority constituted under Section 18(1) has to decide lis between parties in a judicial manner and subject to the revision of its order, the decision would remain final between the parties. Such an authority is constituted by designation as the District Judge of the district having jurisdiction over the area over which the said Act has been extended. It becomes obvious that even though the District Judge concerned might retire or get transferred or may otherwise cease to hold the office of the District Judge his successor-in-office can pick up the thread of the proceedings from the stage where it was left by his predecessor and can function as an appellate authority under Section 18. If the District Judge was constituted as an appellate authority being a persona designata or as a named person being the appellate authority as assumed in the present case, such a consequence, on the scheme of the Act would not follow. In this connection, it is useful to refer to a decision of this Court in the case of ***Central Talkies Ltd. v. Dwarka Prasad*** [AIR 1961 SC 606]. In that case Hidayatullah, J. speaking for the Court had to consider whether Additional District Magistrate empowered under Section 10(2) of Criminal Procedure Code to exercise powers of District Magistrate was a persona designata. Repelling the contention that he was a persona designata the learned Judge made the following pertinent observations:

> A persona designata is 'a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character'. (See Osborn's Concise ***Law Dictionary***, 4th Edn. p. 253). In the words of Schwabe, C.J. in ***Parthasarathi Naidu*** **v.** ***Koteswara Rao*** [AIR 1924 Mad 561], persona designata are 'persons selected to act in their private capacity and not in their capacity as Judges'. The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers

> equal to himself for the purposes of the Eviction Act. The decision of Sapru, J. in the Allahabad case, with respect, was erroneous.

Applying the said test to the facts of the present case it becomes obvious that appellate authorities as constituted under Section 18 of the Rent Act being the District Judges they constituted a class and cannot be considered to be persona designata. It is true that in this connection, the majority decision of the High Court in ***Jokkim Fernandez* v. *Amina Kunhi Umma*** also took a contrary view. But the said view also does not stand scrutiny in the light of the statutory scheme regarding constitution of appellate authority under the Act and the powers conferred on and the decisions rendered by it.

8. Once it is held that the appellate authority functioning under Section 18 of the Rent Act is not a persona designata, it becomes obvious that it functions as a court. In the present case all the District Judges having jurisdiction over the areas within which the provisions of the Rent Act have been extended are constituted as appellate authorities under Section 18 by the Government notification noted earlier. These District Judges have been conferred the powers of the appellate authorities. It becomes therefore, obvious that while adjudicating upon the dispute between the landlord and tenant and while deciding the question whether the Rent Control Court's order is justified or not such appellate authorities would be functioning as courts. The test for determining whether the authority is functioning as a court or not has been laid down by a series of decisions of this Court. We may refer to one of them, in the case of ***Thakur Jugal Kishore Sinha* v. *Sitamarhi Central Coop. Bank Ltd.*** [IR 1967 SC 1494]. In that case this Court was concerned with the question whether the Assistant Registrar of Cooperative Societies functioning under Section 48 of the Bihar and Orissa Cooperative Societies Act, 1935 was a court subordinate to the High Court for the purpose of Contempt of Courts Act, 1952. While answering the question in the affirmative, a Division Bench of this Court speaking through Mitter, J. placed reliance amongst others on the observations found in the case of ***Brajnandan Sinha* v. *Jyoti Narain*** [AIR 1956 SC 66] wherein it was observed as under:

> It is clear, therefore, that in order to constitute a court in the strict sense of the term, an essential condition is that the court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement.

Reliance was also placed on another decision of this court in the case of ***Virindar Kumar Satyawadi* v. *State of Punjab*** [AIR 1956 SC 153]. Following observations found therein were pressed in service:

> It may be stated broadly that what distinguishes a court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declares the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority

created by an Act is a court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a court.

When the aforesaid well settled tests for deciding whether an authority is a court or not are applied to the powers and functions of the appellate authority constituted under Section 18 of the Rent Act, it becomes obvious that all the aforesaid essential trappings to constitute such an authority as a court are found to be present. In fact, Mr. Nariman, learned counsel for respondent also fairly stated that these appellate authorities would be courts and would not be persona designata. But in his submission as they are not civil courts constituted and functioning under the Civil Procedure Code as such, they are outside the sweep of Section 29(2) of the Limitation Act. It is therefore, necessary for us to turn to the aforesaid provision of the Limitation Act. It reads as under:

29. (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.

A mere look at the aforesaid provision shows for its applicability to the facts of a given case and for importing the machinery of the provisions containing Sections 4 to 24 of the Limitation Act the following two requirements have to be satisfied by the authority invoking the said provision.

(i) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application.

(ii) The said prescription of period of limitation under such special or local law should be different from the period prescribed by the Schedule to the Limitation Act.

9. If the aforesaid two requirements are satisfied the consequences contemplated by Section 29(2) would automatically follow. These consequences are as under:

(i) In such a case Section 3 of the Limitation Act would apply as if the period prescribed by the special or local law was the period prescribed by the Schedule.

(ii) For determining any period of limitation prescribed by such special or local law for a suit, appeal or application all the provisions containing Sections 4 to 24 (inclusive) would apply insofar as and to the extent to which they are not expressly excluded by such special or local law.

10. In the light of the aforesaid analysis of the relevant clauses of Section 29(2) of the Limitation Act, let us see whether Section 18 of the Rent Act providing for a statutory appeal to the appellate authority satisfies the aforesaid twin conditions for attracting the applicability of Section 29(2) of the Limitation Act. It cannot be disputed that Kerala Rent Act is a special Act or a local law. It also cannot be disputed that it prescribes for appeal under Section 18 a period of limitation which is different from the period prescribed by the Schedule as the Schedule to the Limitation Act does not contemplate any period of limitation for filing appeal

before the appellate authority under Section 18 of the Rent Act or in other words it prescribes nil period of limitation for such an appeal. It is now well settled that a situation wherein a period of limitation is prescribed by a special or local law for an appeal or application and for which there is no provision made in the Schedule to the, Act the second condition for attracting Section 29(2) would get satisfied. As laid down by a majority decision of the Constitution Bench of this Court in the case of ***Vidyacharan Shukla* v. *Khubchand Baghel*** [AIR 1964 SC 1099] when the First Schedule at the Limitation Act prescribes no time-limit for a particular appeal, but the special law prescribes a time-limit for it, it can be said that under the First Schedule of the Limitation Act all appeals can be filed at any time, but the special law by limiting it provides for a different period, while the former permits the filing of an appeal at any time, the latter limits it to be filed within the prescribed period. It is therefore, different from that prescribed in the former and thus Section 29(2) would apply even to a case where a difference between the special law and Limitation Act arose by the omission to provide for limitation to a particular proceeding under the Limitation Act.

11. It is also obvious that once the aforesaid two conditions are satisfied Section 29(2) on its own force will get attracted to appeals filed before appellate authority under Section 18 of the Rent Act. When Section 29(2) applies to appeals under Section 18 of the Rent Act, for computing the period of limitation prescribed for appeals under that Section, all the provisions of Sections 4 to 24 of the Limitation Act would apply. Section 5 being one of them would therefore get attracted. It is also obvious that there is no express exclusion anywhere in the Rent Act taking out the applicability of Section 5 of the Limitation Act to appeals filed before appellate authority under Section 18 of the Act. Consequently, all the legal requirements for applicability of Section 5 of the Limitation Act to such appeals in the light of Section 29(2) of Limitation Act can be said to have been satisfied. That was the view taken by the minority decision of the learned Single Judge of Kerala High Court in ***Jokkim Fernandez* v. *Amina Kunhi Umma***. The majority did not agree on account of its wrong supposition that appellate authority functioning under Section 18 of the Rent Act is a persona designata. Once that presumption is found to be erroneous as discussed by us earlier, it becomes at once clear that minority view in the said decision was the correct view and the majority view was an erroneous view.

12. It is also necessary to note the change in the statutory settings of Section 29(2) as earlier obtained in the Indian Limitation Act, 1908 and the present Limitation Act of 1963. Section 29(2) as found in Indian Limitation Act, 1908 read as follows:

> 29. (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefore by the First Schedule, the provisions of Section 3 shall apply, as if such period were prescribed therefore in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law -
>
> a) the provisions contained in Section 4, Sections 9 to 18, and Section 22 shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law; and
>
> (b) the remaining provisions of this Act shall not apply.

13. As per this sub-section, the provisions contained in certain sections of the Limitation Act were applied automatically to determine the periods under the special laws, and the provisions contained in other sections were stated to apply only if they were not expressly excluded by the special law. The provision (Section 5) relating to the power of the court to condone delay in preferring appeals and making applications came under the latter category. So if the power to condone delay contained in Section 5 had to be exercised by the appellate body it had to be conferred by the special law. That is why we find in a number of special laws a provision to the effect that the provision contained in Section 5 of the Limitation Act shall apply to the proceeding under the special law. The jurisdiction to entertain proceedings under the special laws is sometimes given to the ordinary courts, and sometimes given to separate tribunals constituted under the special law. When the special law provides that the provision contained in Section 5 shall apply to the proceedings under it, it is really a conferment of the power of the court under Section 5 to the tribunals under the special law - whether these tribunals are courts or not. If these tribunals under the special law should be courts in the ordinary sense an express extension of the provision contained in Section 5 of the Limitation Act will become otiose in cases where the special law has created separate tribunals to adjudicate the rights of parties arising under the special law. That is not the intention of the legislature.

14. In view of the aforesaid provision of Section 29(2) as found in Indian Limitation Act, 1908, Section 5 would not have applied to appellate authorities constituted under Section 18 as Section 5 would not get attracted as per the then existing Section 29(2) of Indian Limitation Act, 1908 which did not include Section 5 as one of the provisions to be applied to such special or local laws. That appears to be the reason why during the time when the Limitation Act, 1908 was in force, the Rent Act of 1959 which is the forerunner of present Rent Act of 1965 contained a provision in Section 31 of that Act which read as under:

> 31. ***Application of the Limitation Act***. - The provisions of Section 5 of the Indian Limitation Act, 1908 (9 of 1908), shall apply to all proceedings under this Act.

15. After repealing of Indian Limitation Act, 1908 and its replacement by the present Limitation Act of 1963 a fundamental change was made in Section 29(2). The present Section 29(2) as already extracted earlier clearly indicates that once the requisite conditions for its applicability to given proceedings under special or local law are attracted, the provisions contained in Sections 4 to 24 both inclusive would get attracted which obviously would bring in Section 5 which also shall apply to such proceedings unless applicability of any of the aforesaid sections of the Limitation Act is expressly excluded by such special or local law. By this change it is not necessary to expressly state in a special law that the provisions contained in Section 5 of the Limitation Act shall apply to the determination of the periods under it. By the general provision contained in Section 29(2) this provision is made applicable to the periods prescribed under the special laws. An express mention in the special law is necessary only for any exclusion. It is on this basis that when the new Rent Act was passed in 1965 the provision contained in old Section 31 was omitted. It becomes therefore apparent that on a conjoint reading of Section 29(2) of Limitation Act of 1963 and Section 18 of the Rent Act of 1965, provisions of Section 5 would automatically get attracted to those proceedings, as there

is nothing in the Rent Act of 1965 expressly excluding the applicability of Section 5 of the Limitation Act to appeals under Section 18 of the Rent Act.

17. In order to support his contention Mr. Nariman invited our attention to the relevant provisions of the Rent Act, namely, Sections 20, 22, 23 as well as second proviso to Section 11(1) and contended that a Rent Court functioning under the Rent Control Act is not a full-fledged civil court. If it was a full-fledged civil court there would have been no occasion for the legislature to provide that certain provisions of Code of Civil Procedure, 1908 will govern such proceedings. To that extent Mr. Nariman is right. We will proceed on the basis that Rent Court functioning under the Rent Act or for that matter the appellate authority adjudicating disputes between landlords and tenants in a judicial manner may not be considered strictly as civil courts fully governed by the Code of Civil Procedure. Still the question remains whether only because of that their proceedings will go out of the provision of Section 29(2) of the Limitation Act. Mr. Nariman submitted that Section 29(2) will apply only to the proceedings of those courts constituted under special or local law, which are civil courts, stricto sensu.

19. On the other hand, there are two decisions of this Court which have directly spoken on the point, and on which reliance was rightly placed by the counsel for appellant. The first decision rendered in the case of ***CST* v. *Madan Lal Das and Sons*** [(1976) 4 SCC 464] by a Bench of three learned Judges of this Court was concerned with the question whether Section 12(2) of the Limitation Act, 1963 would be applicable to revision petitions filed under Section 10 of the same U. P. Sales Tax Act. The appellant had contended that the time spent by him in obtaining certified copy of the order of the lower authority was required to be excluded for computing period of limitation for filing revision under Section 10, as per provisions of Section 12 of the Limitation Act. Khanna, J. speaking for this Court held that for the purpose of determining any period of limitation prescribed for any application by any special or local law, the provisions contained in Section 12(2), inter alia, shall apply insofar as, and to the extent to which they are not expressly excluded by such special or local law, and there is nothing in the U. P. Sales Tax Act expressly excluding the application of Section 12(2) of the Limitation Act. Consequently, the said provision was held applicable to the filing of revision applications under Section 10 of the U. P. Sales Tax Act. It becomes therefore obvious that the aforesaid decision clearly applied Section 29(2) to the revision petitions filed before revision authorities under a special law like U. P. Sales Tax Act and via Section 29(2) applied Section 12(2) of the Limitation Act to such revisional proceedings. Mr. Nariman contended that the said decision was per incuriam as the earlier decision of three learned Judges in ***CST v. Parson Tools and Plants*** was not cited before them. As we have already held earlier the said decision proceeded on the language of Section 10(3)(B) of the U. P. Sales Tax Act for excluding the applicability of Section 14(2) of the Limitation Act. It had no relevance for deciding the question whether Section 12(2) of the Limitation Act could be applied to such revisional proceedings when there was no express exclusion of Section 12(2) by the special law, namely, the U. P. Sales Tax Act. Consequently, it cannot be said that the decision rendered by this Court in ***CST* v. *Madan Lal Das & Sons***, was *per incuriam*. On the other hand, it is a direct decision on the point, namely, applicability of Section 29(2) of the Limitation Act for computing periods of limitation prescribed by local or special law even though the authority before which such proceeding may be filed under the local or special law may not be full-fledged civil courts.

20. Our attention was also invited by counsel for the appellant to a later decision of this Court in the case of ***Sahkari Ganna Vikas Samiti Ltd.*** **v.** ***Mahabir Sugar Mills (P) Ltd***., [(1976) 4 SCC 158]. In that case a Bench of two learned Judges was concerned with the question whether Divisional Commissioner acting under the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 acted as a revenue court or whether he was a persona designata. It was held that the Divisional Commissioner had been constituted as appellate authority under the Act. That showed that the Divisional Commissioner was made an appellate court not as persona designata but as a revenue court. That being so it was obvious that Section 5 of the Act applied to appeals before Divisional Commissioner and he could condone the delay in fling appeals. It becomes obvious that this Court in the aforesaid decision was dealing with revenue court constituted under U. P. Sugarcane (Regulation of Supply and Purchase) Act, which was a special law. It was in terms held that Section 5 of the Limitation Act was applicable to revisional proceedings before such revenue courts. It is of course true as pointed out by Mr. Nariman that in the said decision no other decision of this Court was cited and Section 29(2) was not expressly referred to but the ratio of the decision is necessarily and implicitly based on the applicability of Section 29(2) but for which Section 5 of the Limitation Act would not have been made applicable to such revision proceedings before revenue court functioning under the special law. It has to be kept in view that Section 29(2) gets attracted for computing the period of limitation for any suit, appeal or application to be filed before authorities under special or local law if the conditions laid down in the said provision are satisfied and once they get satisfied the provisions contained in Sections 4 to 24 shall apply to such proceedings meaning thereby the procedural scheme contemplated by these sections of the Limitation Act would get telescoped into such provisions of special or local law. It amounts to legislative shorthand. Consequently, even this contention of Shri Nariman cannot be countenanced.

21. Before parting with the discussion we may also note that a Division Bench of Madras High Court in the case of ***Rethinasamy*** **v.** ***Komalavalli*** [AIR 1983 Mad 45] took the view that the Tamil Nadu Buildings (Lease and Rent Control) Act was a special and local enactment and as Sections 4 to 24 of the 1963 Act were not excluded in their application to the appeals filed under Section 23 of the Rent Control Act, Section 29(2) enabled the application of Sections 4 to 24 to Rent Control Courts. Consequently, Section 5 of the Limitation Act is applicable to an appeal preferred before the appellate authority, constituted under Section 23(1)(b) of the Rent Control Act. We entirely agree with the aforesaid view. In the said decision the majority view of the Full Bench of the Kerala High Court in ***Jokkim Fernandez*** **v.** ***Amina Kunhi Umma*** was dissented from and the minority view as found therein was accepted. The said decision of the Madras High Court lays down the correct law and has rightly dissented from the majority view of the Full Bench of the Kerala High Court and has rightly accepted the minority view as discussed by us earlier.

22. As a result of the aforesaid discussion it must be held that appellate authority constituted under Section 18 of the Kerala Rent Act, 1965 functions as a court and the period of limitation prescribed therein under Section 18 governing appeals by aggrieved parties will be computed keeping in view the provisions of Sections 4 to 24 of the Limitation Act, 1963. Such proceedings will attract Section 29(2) of the Limitation Act and consequently Section 5 of the Limitation Act would also be applicable to such proceedings. Appellate authority will

have ample jurisdiction to consider the question whether delay in filing such appeals could be condoned on sufficient cause being made out by the applicant concerned for the delay in filing such appeals. The decision rendered by the High Court in the present case as well as by the appellate authority taking contrary view are quashed and set aside. The proceedings are remanded to the court of the appellate authority. Rent Control Appeal filed before the said authority by the appellant is restored with a direction that the appellate authority shall consider IA No. 56 of 1994 filed by the applicant for condonation of delay on its own merits and then proceed further in accordance with law. Appeal is allowed accordingly. No costs.

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Venkappa Gurappa Hosur **v.** *Kasawwa*

AIR 1997 SC 2630

D. P. WADHWA AND K. RAMASWAMY, JJ. - 1. This appeal by special leave arises from the judgment of the learned Single Judge of the Karnataka High Court, made on 30-7-1984 in Second Appeal No. 646 of 1976.

2. The appellant had filed a suit for specific performance of the sale agreement dated 9-8-1959 in respect of the land in Village Linganur for a consideration of Rs. 10,200. It is the case of the appellant that he paid as part consideration a sum of Rs. 501 on the said date and a further sum of Rs. 700 on 4-3-1960. In the meanwhile, the defendant filed Suit No. 9 of 1960 for possession of the said properties. The suit was decided in his favour on 9-11-1971. The appellant, therefore, issued notice for the first time on 22-8-1972. Thereon, the respondent denied execution of the agreement. Then the appellant filed the suit on 5-11-1972. Thus, according to the plaintiff the suit was filed within limitation. The respondent has denied the execution of the agreement of sale, but the courts below have found that it is one of money transaction. It is, therefore, clear from Suit No. 9 of 1960 itself that he had asserted to be the owner of the property and the property is unencumbered property. Therefore, no one has a right to interfere with his possession. Thus, it could be seen that the suit document itself was denied as early as in 1960. As a consequence, mere issuance of notice dated 22-8-1972 does not stop the running of limitation period. Once the same has begun to run, it runs its full course. Therefore, the suit having been filed after the expiry of 3 years from the date of the knowledge of denial, by operation of Article 54 of the Schedule to the Limitation Act, 1963, the suit is hopelessly barred by limitation. The High Court, therefore, is right in dismissing the suit in the second appeal.

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State of Punjab v. *Gurdev Singh*

(1991) 4 SCC 1

AGANNATHA SHETTY, J. - These appeals against the decision of the High Court of Punjab and Haryana raise a short issue concerning limitation governing the suit for declaration by a dismissed employee that he continues to be in service since his dismissal was void and inoperative. The High Court has observed that if the dismissal of the employee is illegal, void or inoperative being in contravention of the mandatory provisions of any rules or conditions of service, there is no limitation to bring a suit for declaration that the employee continues to be in service.

2. The facts giving rise to these appeals, as found by the courts below, may be summarised as follows:

C.A. No. 1852 of 1989

3. The respondent in this appeal was appointed as an ad hoc sub-inspector in the District Food and Supply Department of Punjab State. He absented himself from duty with effect from September 29, 1975. On January 27, 1977, his services were terminated. On April 18, 1984, he instituted the suit for declaration that the termination order was against the principles of natural justice, terms and conditions of employment, void and inoperative and he continues to be in service. The State resisted the suit contending inter alia, that the plaintiff's services were terminated in accordance with the terms and conditions of his ad hoc appointment and the suit was barred by time. The trial court accepted the plea of limitation and dismissed the suit, but on appeal the Additional District Judge, Jullundhar decreed the suit. He observed that the termination order though simpliciter in nature was passed as a measure of punishment. The plaintiff's services were terminated for unauthorised absence without an enquiry and he should have been given an opportunity to explain his conduct by holding proper enquiry. On the plea of limitation, learned Additional District Judge held that no limitation is prescribed for challenging an illegal order. Since the order of termination was bad, the suit was not barred by time. In the second appeal preferred by the State the High Court agreed with the view following its earlier decisions.

C.A. No. 4772 of 1982

4. The respondent in this appeal was a Railway Police Constable. He was appointed on November 14, 1977. On March 15, 1979, he was discharged from service for some misconduct. On June 15, 1979, his appeal was rejected by AIG, Railways, Patiala, Punjab. On November 30, 1979, his revision petition was dismissed by the Inspector General of Police, Punjab. On February 12, 1985 he brought a suit seeking declaration that the order discharging him from service and confirmed in the appeal and revision, was illegal, ultra vires, unconstitutional and against the principles of natural justice and he continues to be in service as constable. The trial court dismissed the suit. The appeal preferred by the plaintiff was accepted by the Additional District Judge who decreed the suit as prayed for. He has inter alia stated that the plaintiff was discharged from service in contravention of the mandatory provisions of the rules and as such it has no legal effect. There is no period of limitation for

instituting the suit for declaration that such a dismissal order is not binding upon the plaintiff. While affirming that principle, the High Court dismissed the second appeal in limine.

5. These are not the only cases in which the Punjab and Haryana High Court has taken the view that there is no limitation for instituting the suit for declaration by a dismissed or discharged employee on the ground that the dismissal or discharge was void or inoperative. The High Court has repeatedly held that if the dismissal, discharge or termination of services of an employee is illegal, unconstitutional or against the principles of natural justice, the employee can approach the court at any time seeking declaration that he remains in service. The suit for such reliefs is not governed by any of the provisions of the Limitation Act [See (*i*) ***State of Punjab* v. *Ajit Singh*** [(1988) 1 SLR 96 (P & H)] and (*ii*) ***State of Punjab* v. *Ram Singh*** [(1986) 3 SLR 379 (P & H)].

6. First of all, to say that the suit is not governed by the law of limitation runs afoul of our Limitation Act. The statute of limitation was intended to provide a time limit for all suits conceivable. Section 3 of the Limitation Act provides that a suit, appeal or application instituted after the prescribed "period of limitation" must subject to the provisions of Sections 4 to 24 be dismissed although limitation has not been set up as a defence. Section 2(*j*) defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 2(*j*) also defines, "prescribed period" to mean the period of limitation computed in accordance with the provisions of the Act. The court's function on the presentation of plaint is simply to examine whether, on the assumed facts, the plaintiff is within time. The court has to find out when the "right to sue" accrued to the plaintiff. If a suit is not covered by any of the specific articles prescribing a period of limitation, it must fall within the residuary article. The purpose of the residuary article is to provide for cases which could not be covered by any other provision in the Limitation Act. The residuary article is applicable to every variety of suits not otherwise provided for. Article 113 (corresponding to Article 120 of the Act of 1908) is a residuary article for cases not covered by any other provisions in the Act. It prescribes a period of three years when the right to sue accrues. Under Article 120 it was six years which has been reduced to three years under Article 113. According to the third column in Article 113, time commences to run when the right to sue accrues. The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted (See (*i*) ***Mt. Bolo* v. *Mt. Koklan*** [AIR 1930 PC 270] and (*ii*) ***Gannon Dunkerley and Co. Ltd.* v. *Union of India*** [(1969) 3 SCC 607].

7. In the instant cases, the respondents were dismissed from service. May be illegally. The order of dismissal has clearly infringed their right to continue in the service and indeed they were precluded from attending the office from the date of their dismissal. They have not been paid their salary from that date. They came forward to the court with a grievance that their dismissal from service was no dismissal in law. According to them the order of dismissal was illegal, inoperative and not binding on them. They wanted the court to declare that their

dismissal was void and inoperative and not binding on them and they continue to be in service. For the purpose of these cases, we may assume that the order of dismissal was void, inoperative and *ultra vires,* and not voidable. If an Act is void or *ultra vires* it is enough for the court to declare it so and it collapses automatically. It need not be set aside. The aggrieved party can simply seek a declaration that it is void and not binding upon him. A declaration merely declares the existing state of affairs and does not 'quash' so as to produce a new state of affairs.

8. But nonetheless the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or court. In ***Smith* v. *East Elloe Rural District Council*** [1956 AC 736, 769] Lord Radcliffe observed:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

9. Apropos to this principle, Prof. Wade states[7]: "the principle must be equally true even where the 'brand' of invalidity" is plainly visible; for there also the order can effectively be resisted in law only by obtaining the decision of the court. Prof. Wade sums up these principles:

> "The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another."

10. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the court within the prescribed period of limitation. If the statutory time limit expires the court cannot give the declaration sought for.

11. Counsel for the respondents however, has placed strong reliance on the decision of this Court in ***State of M.P.* v. *Syed Qamarali*** [(1967) 1 SLR 228 (SC)]. The High Court has also relied upon that decision to hold that the suit is not governed by the limitation. We may examine the case in detail. The respondent in that case was a Sub-Inspector in the Central Province Police Force. He was dismissed from service on December 22, 1945. His appeal against that order was dismissed by the Provincial Government, Central Provinces and Berar on April 9, 1947. He brought the suit on December 8, 1952 on allegation that the order of dismissal was contrary to the para 241 of the Central Provinces and Berar Police Regulations and as such contrary to law and void, and prayed for recovery of Rs 4724/5/- on account of his pay and dearness allowance as Sub-Inspector of Police for the three years immediately

preceding the date of the institution of the suit. The suit was decreed and in the appeal before the Supreme Court, it was urged that even if the order of dismissal was contrary to the provisions of law, the dismissal remained valid until and unless it is set aside and no relief in respect of salary could be granted when the time for obtaining an order setting aside the order of dismissal had elapsed. It was observed: (SLR p. 234, para 20)

> "We therefore hold that the order of dismissal having been made in breach of a mandatory provision of the rules subject to which only the power of punishment under Section 7 could be exercised, is totally invalid. The order of dismissal had therefore no legal existence and it was not necessary for the respondent to have the order set aside by a court. The defence of limitation which was based only on the contention that the order had to be set aside by a court before it became invalid must therefore be rejected."

12. These observations are of little assistance to the plaintiffs in the present case. This Court only emphasized that since the order of dismissal was invalid being contrary to para 241 of the Berar Police Regulations, it need not be set aside. But it may be noted that Syed Qamarali brought the suit within the period of limitation. He was dismissed on December 22, 1945. His appeal against the order of dismissal was rejected by the Provincial Government on April 9, 1947. He brought the suit which has given rise to the appeal before the Supreme Court on December 8, 1952. The right to sue accrued to Syed Qamarali when the Provincial Government rejected his appeal affirming the original order of dismissal and the suit was brought within six years from that date as prescribed under Article 120 of the Limitation Act, 1908.

13. The Allahabad High Court in ***Jagdish Prasad Mathur*** **v.** ***United Provinces Government*** [AIR 1956 All 114] has taken the view that a suit for declaration by a dismissed employee on the ground that his dismissal is void, is governed by Article 120 of the Limitation Act. A similar view has been taken by Oudh Chief Court in ***Abdul Vakil*** **v.** ***Secretary of State*** [AIR 1943 Oudh 368]. That in our opinion is the correct view to be taken. A suit for declaration that an order of dismissal or termination from service passed against the plaintiff is wrongful, illegal or ultra vires is governed by Article 113 of the Limitation Act. The decision to the contrary taken by the Punjab and Haryana High Court in these and other cases (***State of Punjab*** **v.** ***Ajit Singh*** and ***State of Punjab*** **v.** ***Ram Singh***) is not correct and stands overruled.

14. In the result, we allow the appeals; set aside the judgment and decree of the High Court and dismiss the suit in each case. In the circumstances, however, we make no order as to costs.

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Ajaib Singh v. *Sirhind Cooperative Marketing-Cum-Processing Service Society Limited*

AIR 1999 SC 1354

R.P. SETHI, J. - 2. The services of the appellant workman were terminated by the respondent management allegedly without compliance of the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). The dispute regarding his termination of services was referred to the Labour Court by the appropriate Government on 19-3-1982. The management justified their action on the ground that as the workman, being a salesman, had embezzled thousands of rupees, the termination of his services was justified. The jurisdiction of the Labour Court to entertain and adjudicate the reference was also disputed. However, after the evidence of the parties, the Labour Court vide its award dated 16-4-1986 directed reinstatement of the workman with full back wages from 8-12-1981. It may be worth noticing that the issue regarding jurisdiction of the Labour Court to entertain the reference was not pressed by the management. Not satisfied with the award of the Labour Court, the management filed a writ petition in the High Court praying for quashing the award of the Labour Court mainly on the ground of the workman having approached the Court for the grant of the relief after a prolonged delay. The learned Single Judge of the High Court held that the workman was not entitled to any relief as he was allegedly shown to have slept over the matter for 7 years and confronted the management at a belated stage when it might have been difficult for the employer to prove the guilt of the workman. The judgment of the learned Single Judge was upheld by the Division Bench vide the impugned judgment in this appeal.

3. Supporting the impugned judgment, the learned counsel appearing for the respondent management has contended that the principle incorporated under Article 137 of the Limitation Act, 1963 though not specifically made applicable yet would be deemed to be applicable in a case under the Act for the purpose of making a reference in terms of Section 10 thereof. In support of his contentions, he has referred to different judgments under various enactments. The learned counsel appearing for the workman has, however, submitted that the principles incorporated under Article 137 of the Limitation Act cannot be held to be applicable under the Act for the purposes of making a reference of the dispute to the Labour Court and that reliance of the learned counsel on different judgments was misconceived for reasons of not taking note of the special provision of the Act which admittedly is a social welfare legislation intended to protect the interests of the workmen employed in various industries.

4. It is not in dispute that the services of the workman were terminated on 16-7-1974 and he had issued the notice of demand only on 8-12-1981. It is also not disputed that no plea regarding delay appears to have been taken by the management before the Labour Court. It is also acknowledged that Article 137 of the Limitation Act has not been specifically made applicable to the proceedings under the Act seeking reference of industrial disputes to the Labour Court. This Court, in no case, has so far held that either Article 137 of the Limitation Act or the principle incorporated therein is applicable to the proceedings under the Act.

5. Before appreciating the rival contentions urged on behalf of the parties, it has to be noticed as to under what circumstances the Act was enacted and what were the objectives

sought to be achieved by its legislation. It cannot be disputed that the Act was brought on the statute-book with the object to ensure social justice to both the employers and employees and advance the progress of industry by bringing about the existence of harmony and cordial relationship between the parties. It is a piece of legislation providing and regulating the service conditions of the workers. The object of the Act is to improve the service conditions of industrial labour so as to provide for them the ordinary amenities of life and by the process, to bring about industrial peace which would in its turn accelerate productive activity of the country resulting in its prosperity. The prosperity of the country in its turn helps to improve the conditions of labour ***Hindustan Antibiotics Ltd.*** **v.** ***Workmen*** [AIR 1967 SC 948]. The Act is intended not only to make provision for investigation and settlement of industrial disputes but also to serve industrial peace so that it may result in more production and improve the national economy. In the present socio-political economic system, it is intended to achieve cooperation between the capital and labour which has been deemed to be essential for maintenance of increased production and industrial peace. The Act provides to ensure fair terms to workmen and to prevent disputes between the employer and the employees so that the large interests of the public may not suffer. The provisions of the Act have to be interpreted in a manner, which advances the object of the legislature contemplated in the Statement of Objects and Reasons. While interpreting different provisions of the Act, attempt should be made to avoid industrial unrest, secure industrial peace and to provide machinery to secure the end. Conciliation is the most important and desirable way to secure that end. In dealing with industrial disputes, the courts have always emphasized the doctrine of social justice, which is founded on the basic ideal of socioeconomic equality as enshrined in the Preamble of our Constitution. While construing the provisions of the Act, the courts have to give them a construction, which should help in achieving the object of the Act.

7. This Court in ***Bombay Gas Co. Ltd.*** **v.** ***Gopal Bhiva*** [AIR 1964 SC 752] held that the provisions of Article 181 (now Article 137) of the Limitation Act apply only to applications which were made under the Code of Civil Procedure and its extension to applications under Section 33-C (2) of the Act Was not justified. This position was further reiterated and explained by this Court in ***Town Municipal Council, Athani*** **v.** ***Presiding Officer, Labour Courts*** [(1969) 1 SCC 873, 882-83]:

> 11. It appears to us that the view expressed by this Court in those cases must be held to be applicable, even when considering the scope and applicability of Article 137 in the new Limitation Act of 1963. The language of Article 137 is only slightly different from that of the earlier Article 181 inasmuch as, when prescribing the three years' period of limitation, the first column giving the description of the application reads as 'any other application for which no period of limitation is provided elsewhere in this division'. In fact, the addition of the word 'other' between the words 'any' and 'application' would indicate that the legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of *ejusdem generis* should be applied when interpreting the new Article 137. This word 'other' implies a reference to earlier articles, and, consequently, in interpreting this article, regard must be had to the provisions contained in all the earlier articles. The other articles in the third division to the

Schedule refer to applications under the Code of Civil Procedure, with the exception of applications under the Arbitration Act and also in two cases applications under the Code of Criminal Procedure. The effect of introduction in the third division of the Schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered by this Court in the case of ***Sha Mulchand & Co. Ltd.*** [***Sha Mulchand and Co. Ltd.*** v. ***Jawahar Mills Ltd.***, AIR 1953 SC 98.] We think that, on the same principle, it must be held that even the further alteration made in the articles contained in the third division of the Schedule to the new Limitation Act containing references to applications under the Code of Criminal Procedure cannot be held to have materially altered the scope of the residuary Article 137 which deals with other applications. It is not possible to hold that the intention of the legislature was to drastically alter the scope of this article so as to include within it all applications, irrespective of the fact whether they had any reference to the Code of Civil Procedure.

12. This point, in our opinion, may be looked at from another angle also. When this Court earlier held that all the articles in the third division to the Schedule, including Article 181 of the Limitation Act of 1908, governed applications under the Code of Civil Procedure only, it clearly implied that the applications must be presented to a court governed by the Code of Civil Procedure. Even the applications under the Arbitration Act that were included within the third division by amendment of Articles 158 and 178 were to be presented to courts whose proceedings were governed by the Code of Civil Procedure. At best, the further amendment now made enlarges the scope of the third division of the Schedule so as also to include some applications presented to courts governed by the Code of Criminal Procedure. One factor at least remains constant and that is that the applications must be to courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. We cannot, therefore, accept the submission made that this article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the article and in the new Act cannot, in our opinion, justify the interpretation that even applications presented to bodies, other than courts, are now to be governed for purposes of limitation by Article 137.

8. In ***Sakuru* v. *Tanaji*** [AIR 1985 SC 1279] it was held that the provisions of the Limitation Act applied only to proceedings in courts and not to appeals or applications before the bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The view taken

by this Court in ***Municipal Council, Athani*** [(1969) 1 SCC 873] and ***Nityananda M. Joshi*** **v.** ***LIC of India*** [(1969) 2 SCC 199] was reiterated with approval.

9. In ***Jai Bhagwan*** **v.** ***Ambala Central Coop. Bank Ltd***. [AIR 1984 SC 286] this Court declined to set aside the order of reinstatement of the workman who was shown to have approached the Court after a prolonged delay. However, in the circumstances of the case, the Court directed the workman to be reinstated in service with continuity from the date on which his services were terminated but having regard to the fact that he had raised the industrial dispute after a considerable delay without doing anything in the meanwhile, he was not awarded the back wages. The grant of half back wages from the date of termination of service until the date of order and full back wages from that date till his reinstatement was found in the circumstances to meet the ends of justice. In ***H.M.T. Ltd.*** **v.** ***Labour Court*** ((1994) 2 SCC 38) where there was a delay of 14 years in invoking the jurisdiction of the court, this Court found that instead of full back wages, the grant of 60 per cent of the back wages upon the reinstatement of the workman would meet the ends of justice.

10. It follows, therefore, that the provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defense. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent management on the Full Bench judgment of the Punjab and Haryana High Court in ***Ram Chander Morya*** **v.** ***State of Haryana*** [(1999) 1 SCT 141 (P & H)] is also of no help to him. In that case the High Court nowhere held that the provisions of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases". However, it went on further to say that "reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay".

We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 33-C of the Act to be adjudicated. It is not the function of the court to prescribe the limitation where the legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding over the Court cannot be stretched to authorise them to interpret law in such a manner, which would amount to legislation intentionally left over by the legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on

the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the courts/boards and tribunal under the Act.

11. In the instant case, the respondent management is not shown to have taken any plea regarding delay as is evident from the issues framed by the Labour Court. The only plea raised in defense was that the Labour Court had no jurisdiction to adjudicate the reference and the termination of the services of the workman was justified. Had this plea been raised, the workman would have been in a position to show the circumstances preventing him in approaching the Court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. The learned Judges of the High Court, therefore, were not justified in holding that the workman had not given any explanation as to why the demand notice had been issued after a long period. The findings of facts returned by the High Court in writ proceedings, even without pleadings were, therefore, unjustified. The High Court was also not justified in holding that the courts were bound to render an even-handed justice by keeping balance between the two different parties. Such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. Even after noticing that "it is true that a fight between the workman and the management is not a just fight between equals", the Court was not justified to make them equals while returning the findings, which if allowed to prevail, would result in frustration of the purpose of the enactment. The workman appears to be justified in complaining that in the absence of any plea on behalf of the management and any evidence, regarding delay, he could not be deprived of the benefits under the Act merely on the technicalities of law. The High Court appears to have substituted its opinion for the opinion of the Labour Court, which was not permissible in proceedings under Articles 226/227 of the Constitution.

12. We are, however, of the opinion that on account of the admitted delay, the Labour Court ought to have appropriately moulded the relief by denying the appellant workman some part of the back wages. In the circumstances, the appeal is allowed, the impugned judgment is set aside by upholding the award of the Labour Court with the modification that upon his reinstatement the appellant would be entitled to continuity of service, but back wages to the extent of 60 per cent with effect from 8-12-1981 when he raised the demand for justice till the date of award of the Labour Court, i.e., 16-4-1986 and full back wages thereafter till his reinstatement would be payable to him. The appellant is also held entitled to the costs of litigation assessed at Rs. 5000 to be paid by the respondent management.

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Part – B : ARBITRATION AND CONCILIATION

K.K. Modi v. *K.N. Modi*

(1998) 3 SCC 573

SUJATA MANOHAR, J.- 2. The present litigation has arisen on account of disputes between Seth Gujjar Mal Modi's five sons - K.K. Modi, V.K. Modi, S.K. Modi, B.K. Modi and U.K. Modi on the one hand (hereinafter referred to as "Group B") and Kedar Nath Modi, the younger brother of Seth Gujjar Mal Modi and his three sons - M.K. Modi, Y.K. Modi and D.K. Modi (hereinafter referred to as "Group A") on the other hand. The Modi family owns or has a controlling interest in a number of public limited companies. They also own various assets. Differences and disputes have arisen between Kedar Nath Modi and his sons constituting Group A and the sons of late Gujjar Mal Modi constituting Group B on the other hand. To resolve these differences, negotiations took place with the help of the financial institutions which had lent money to these companies, and through whom substantial public funds had been invested in the companies owned and/or controlled by these two groups. Representatives of several banks, Reserve Bank of India and financial institutions were also invited to participate. Ultimately, on 24-1-1989, a Memorandum of Understanding was arrived at between Group A and Group B. Under the Memorandum of Understanding so arrived at, it is agreed between the parties that Group A will manage and/or control the various companies enumerated in clause 1. One of the companies so included is Modipon Ltd. minus Indofil (Chemical Division) and selling agency. Under clause 2, Group B is entitled to manage, own and/or control the companies enumerated in that clause. One of the companies so included is Modipon Ltd. minus Modipon Fibre Division. The agreement also provides for division of assets which are to be valued and divided in the ratio of 40:60 — Group A getting 40% of the assets and Group B getting 60% of the assets. The shares of the companies are required to be transferred to the respective groups after their valuation. Under clause 3, valuation has to be done by M/s S.B. Billimoria & Company, Bombay. Clause 5 provides for companies which are to be split between the two groups as per the Memorandum of Understanding. The division has to be done under clause 5 by a scheme of arrangement to be formulated by M/s Bansi S. Mehta & Company, Bombay after taking into consideration the valuation done by M/s S.B. Billimoria & Company, Bombay. Units of a company to be given to each group are to be given along with assets and liabilities. Clause 6 provides for interim arrangements which are to be made in respect of the three companies which are being split — these being Modi Industries Ltd., Modipon Ltd. and Modi Spinning and Weaving Mills Company Ltd. We are not concerned with the other clauses, except to note that the date for carrying out valuation, the date of transfer, the appointment of independent Chairmen of these companies which are to be split and certain other matters specified in the Memorandum of Understanding shall be done in consultation with the Chairman, Industrial Finance Corporation of India (IFCI).

3. Clause 9 provides as follows:

> Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall

be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups.

Pursuant to the Memorandum of Understanding, M/s S.B. Billimoria & Company gave reports between January and March 1991. M/s Bansi S. Mehta & Company who were required to provide a scheme for splitting of the three companies by taking into account the valuation fixed by M/s S.B. Billimoria & Company, also sent various reports between November 1989 and December 1994. The members of both the groups were dissatisfied with these reports. They sent various representations to the Chairman and Managing Director of the Industrial Finance Corporation of India Ltd. in view of clause 9 of the Memorandum of Understanding.

4. The Chairman and Managing Director, Industrial Finance Corporation of India formed a Committee of Experts to assist him in deciding the questions that arose. The Committee of Experts and the Chairman, IFCI had discussions with both the groups. Meetings were also held with the Chairmen of the companies concerned who were independent Chairmen. The discussions took place from 12-3-1995 to 8-12-1995.

5. On 8-12-1995, the Chairman, IFCI gave his detailed decision/Report. In his covering letter of 8-12-1995, the Chairman and Managing Director, Industrial Finance Corporation of India Ltd. has described this Report as his decision on each dispute raised or clarification sought. He has quoted in his covering letter that since the Memorandum of Understanding has already been implemented to a large extent during 1989 to 1995, with the decisions on the disputes/clarifications given by him now in the enclosed Report, he has hoped that it would be possible to implement the remaining part of the Memorandum of Understanding. He has drawn attention to para 9 of his Report where he has said that it is now left to the members of Groups A and B to settle amongst themselves the family matter without any further reference to the Chairman and Managing Director of the Industrial Finance Corporation of India. In para 7 of the letter he has stated that on the basis of the total valuation of Modi Group assets and liabilities and allocation thereof between Groups A and B and the decisions given by him in the Report, a sum of Rs. 2135.55 lakhs would be payable by Group B to Group A. The said amount should be deposited by Group B with IFCI at its Delhi Regional Office by 15-1-1996 failing which Group B will be liable to pay interest at the prevailing prime lending rate of the State Bank of India (which was then 16.5% p.a.).

6. This Report was not filed in court as an award nor was any application filed by Group B to make the Report a rule or decree of the Court. The Chairman, Modipon Ltd. who was an independent Chairman nominated by IFCI, however, issued a series of directions for implementing or giving effect to the Report of 8-12-1995.

7. On 18-5-1996 the present appellants (Group B) filed an arbitration petition under Section 33 of the Arbitration Act, 1940, bearing OMP No. 58 of 1996 in the Delhi High Court challenging the legality and validity of the said decision of the Chairman and Managing Director, IFCI dated 8-12-1995 on the basis that it was an award in arbitration proceedings between Group A and Group B. In the petition other directions were also sought against the Chairman, Modipon Ltd.

8. On the same day Group B also filed a Civil Suit No. 1394 of 1996 in the Delhi High Court to challenge the same decision of the Chairman and Managing Director, IFCI dated 8-12-1995. The averments and prayers in this suit were substantially the same as those in the arbitration petition. In one paragraph, however, in the plaint, it was stated that the same reliefs were being claimed in a suit in the event of it being held that the decision of the Chairman and Managing Director, IFCI was not an arbitration award but was just a decision.

9. In arbitration petition OMP No. 58 of 1996 the present appellants also applied for interim relief by IA No. 4550 of 1996. By an ad interim order in OMP No. 58 of 1996 and IA No. 4550 of 1996 dated 24-5-1996, the Delhi High Court stayed the operation of the "award" dated 8-12-1995 and directions of the Chairman, Modipon Ltd. as set out in the said order. The High Court also restrained Respondents 6 and 7 (Group A) from selling and/or transferring and/or disposing of, in any manner, the shares held by them in Godfrey Phillips India Limited until further orders. From this ad interim order a special leave petition was preferred by the respondents which was dismissed by this Court on 3-6-1996 on the ground that it was only an ad interim order.

10. Interim application IA No. 4550 of 1996 in arbitration petition OMP No. 58 of 1996 was heard and disposed of by the Delhi High Court by its impugned judgment dated 11-2-1997. A learned Single Judge of the Delhi High Court held by the said judgment that the decision of the Chairman and Managing Director, IFCI dated 8-12-1995 cannot be considered as an award in arbitration proceedings. The parties did not have any intention to refer any disputes to arbitration. All the disputes were settled by the Memorandum of Understanding dated 24-1-1989 and what remained was only the valuation of shares and division of the three companies as agreed to in the Memorandum of Understanding. In order to avoid any disputes, the parties had agreed that the Chairman and Managing Director, IFCI would issue all clarifications and give his decision in relation to the valuation under clause 9 of the Memorandum of Understanding. The arbitration petition, according to the learned Single Judge, was, therefore, not maintainable, since the decision impugned was not an award within the meaning of the Arbitration Act, 1940. Under the circumstances he dismissed the interim application IA No. 4550 of 1996 in arbitration petition OMP No. 58 of 1996. By the said order he posted the hearing of a similar interim application IA No. 5112 of 1996 in Suit No. 1394 of 1996 on 26-3-1997.

11. Another interim application being IA No. 2293 of 1997 in arbitration petition OMP No. 58 of 1996 was heard by the learned Single Judge on 13-3-1997. The learned Single Judge passed an interim order to the effect that until further orders, no meeting of the Modipon Board shall be held for considering any matter.

12. On 6-9-1997 Suit No. 1394 of 1996 filed by Group B, interim application in the suit being IA No. 5112 of 1996 as also interim application IA No. 2293 of 1997 in arbitration petition OMP No. 58 of 1996 were heard together and decided by the learned Single Judge by his judgment and order of the same date i.e. 6-9-1997. The learned Single Judge held that the entire exercise of filing Suit No. 1394 of 1996 was an abuse of the process of the Court. According to him the allegations in the arbitration petition and in the plaint in the suit were identical. Both proceedings were instituted on the same date. The learned Single Judge struck down the plaint under Order VI Rule XVI of the Code of Civil Procedure and dismissed the

suit. By the same order, he also dismissed IA No. 5112 of 1996 in the suit and IA No. 2293 of 1997 in the arbitration petition.

13. Being aggrieved by the above judgment and order dated 6-9-1997, the present appellants filed an appeal before the Division Bench of the Delhi High Court being RFA (OS) No. 41 of 1997. The appellants also made an interim application being CM No. 1270 of 1997 in RFA (OS) No. 41 of 1997. The Division Bench of the Delhi High Court, by its order dated 15-9-1997, admitted the appeal being RFA (OS) No. 41 of 1997. It also disposed of by the same order, CM No. 1270 of 1997 by passing an order reviving the order passed by the learned Single Judge on 13-3-1997 by which the learned Single Judge had directed that pending further orders no meeting of the Modipon Board should be held to consider any matter.

14. SLP (Civil) No. 18711 of 1997 is filed before us from this impugned order of 15-9-1997. Thus we have before us SLP (Civil) No. 14905 of 1997 from the judgment and order of the learned Single Judge of the Delhi High Court dated 11-2-1997 in IA No. 4550 of 1996 in arbitration petition OMP No. 58 of 1996. We have also before us SLP (Civil) No. 18711 of 1997 from the order of the Division Bench of the Delhi High Court dated 15-9-1997 in CM No. 1270 of 1997 under which the interim order of 13-3-1997 is revived. By consent of parties, RFA (OS) No. 41 of 1997 has also been transferred to us being TC (Civil) No. 30 of 1997 for consideration. All these three proceedings have been heard together. During the pendency of SLP (Civil) No. 18711 of 1997, in IA No. 3 we have by our ad interim order dated 18-11-1997 varied the interim order of 13-3-1997 to the following effect:

> "Until further orders no meeting of the Modipon Board shall be held for considering any matter relating to decision of the CMD, IFCI dated 8-12-1995 or concerning the sale of shares held in Godfrey Phillips India Limited."

Thereafter on 7-1-1998 after hearing both sides, the following order has been passed in IA No. 3 in SLP (Civil) No. 18711 of 1997, in terms of the minutes:

> For a period of eight weeks from today, neither Mr K.K. Modi nor Mr M.K. Modi will acquire directly or indirectly any further shares of Modipon Limited nor take any steps that would in any way directly or indirectly destabilise the control and management of the Fibre Division of Modipon Limited by Mr K.K. Modi and of the Chemical Division of Modipon Limited by Mr M.K. Modi.
>
> Liberty to apply for variation if circumstances change.

15. The present proceedings raise two main questions:

> *Question 1*: Whether clause 9 of the Memorandum of Understanding dated 24-1-1989 constitutes an arbitration agreement; and whether the decision of the Chairman, IFCI dated 8-12-1995 constitutes an award? and
>
> *Question 2*: Whether Suit No. 1394 of 1996 is an abuse of the process of court?

Question 1

16. Mustill and Boyd in their book on ***Commercial Arbitration***, 2nd Edn., at p.30, point out that in a complex modern State there is an immense variety of tribunals, differing

fundamentally as regards their compositions, their functions and the sources from which their powers are derived. Dealing with tribunals whose jurisdiction is derived from consent of parties, they list, apart from arbitral tribunals, persons (not properly called tribunals) entrusted by consent with the power to affect the legal rights of two parties inter se in a manner creating legally enforceable rights, but intended to do so by a procedure of a ministerial and not a judicial nature (for example, persons appointed by contract to value property or to certify the compliance of building works with a specification). There are also other tribunals with a consensual jurisdiction whose decisions are intended to affect the private rights of two parties inter se, but not in a manner which creates a legally enforceable remedy (for example, conciliation tribunals of local religious communities, or persons privately appointed to act as mediators between two disputing persons or groups). Mustill and Boyd have listed some of the attributes which must be present for an agreement to be considered as an arbitration agreement, though these attributes in themselves may not be sufficient. They have also listed certain other considerations which are relevant to this question, although not conclusive on the point.

17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(*1*) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(*2*) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(*3*) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(*4*) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(*5*) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(*6*) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.

19. In ***Russell on Arbitration***, 21st Edn., at p. 37, para 2-014, the question how to distinguish between an expert determination and arbitration, has been examined. It is stated,

> Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they

> are likely to be persuasive although not always conclusive... . Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; ... . An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion....

20. The authorities thus seem to agree that while there are no conclusive tests, by and large, one can follow a set of guidelines in deciding whether the agreement is to refer an issue to an expert or whether the parties have agreed to resolve disputes through arbitration.

21. Therefore our courts have laid emphasis on (*1*) existence of disputes as against intention to avoid future disputes; (*2*) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (*3*) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and purport of the agreement. There are, of course, the statutory requirements of a written agreement, existing or future disputes and an intention to refer them to arbitration. (Vide Section 2 Arbitration Act, 1940 and Section 7 Arbitration and Conciliation Act, 1996.)

22. In the case of ***Rukmanibai Gupta* v. *Collector, Jabalpur*** [(1980) 4 SCC 556] this Court dwelt upon the fact that disputes were referred to arbitration and the fact that the decision of the person to whom the disputes were referred was made final, as determinative of the nature of the agreement which the Court held was an arbitration agreement.

23. In the case of ***State of U.P.* v. *Tipper Chand*** [(1980) 2 SCC 341] a clause in the contract which provided that the decision of the Superintending Engineer shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions was construed as not being an arbitration clause. This Court said that there was no mention in this clause of any dispute, much less of a reference thereof. The purpose of the clause was clearly to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time.

24. In the case of ***Cursetji Jamshedji Ardaseer Wadia* v. *Dr R.D. Shiralee*** [AIR 1943 Bom 32] the test which was emphasised was whether the intention of the parties was to avoid disputes or to resolve disputes. In the case of ***Vadilal Chatrabhuj Gandhi* v. *Thakorelal Chimanlal Munshaw*** [AIR 1954 Bom 121] the emphasis was on judicial enquiry and determination as indicative of an arbitration agreement as against an expert opinion. The test of preventing disputes or deciding disputes was also resorted to for the purpose of considering

whether the agreement was a reference to arbitration or not. In that case, the agreement provided that the parties had agreed to enter into a compromise for payment of a sum up to, but not exceeding, Rs.20 lakhs,

> "which shall be borne and paid by the parties in such proportions or manner as Sir Jamshedji B. Kanga shall, in his absolute discretion, decide as a valuer and not as an arbitrator after giving each of us summary hearing".

The Court said that the mere fact that a judicial enquiry had been held is not sufficient to make the ultimate decision a judicial decision. The Court held that Sir Jamshedji Kanga had not to decide upon the evidence led before him. He had to decide in his absolute discretion. There was not to be a judicial enquiry worked out in a judicial manner. Hence this was not an arbitration.

25. In the case of ***State of W.B.*** **v.** ***Haripada Santra*** [AIR 1990 Cal 83] the agreement provided that in the event of a dispute, the decision of the Superintending Engineer of the Circle shall be final. The Court relied upon the fact that the reference was to disputes between the parties on which a decision was required to be given by the Superintending Engineer. Obviously, such a decision could be arrived at by the Superintending Engineer only when the dispute was referred to him by either party for decision. He was also required to act judicially and decide the disputes after hearing both parties and after considering the material before him. It was, therefore, an arbitration agreement.

26. In the case of ***J&K State Forest Corpn.*** **v.** ***Abdul Karim Wani*** [(1989) 2 SCC 701] this Court considered the agreement as an agreement of reference to arbitration. It has emphasised that (*1*) the agreement was in writing; (*2*) it was a contract at the present time to refer the dispute arising out of the present contract; and (*3*) there was a valid agreement to refer the dispute to arbitration of the Managing Director, Jammu and Kashmir State Forest Corporation. The Court observed that endeavour should always be made to find out the intention of the parties, and that intention has to be found out by reading the terms broadly and clearly without being circumscribed.

27. The decision in the case of ***Rukmanibai Gupta*** has been followed by this Court in the case of ***M. Dayanand Reddy*** **v.** ***A.P. Industrial Infrastructure Corpn. Ltd***. [(1993) 3 SCC 137] Commenting on the special characteristics of an arbitration agreement this Court has further observed in the above case that arbitration agreement embodies an agreement between the parties that in case of a dispute such dispute shall be settled by an arbitrator or an umpire of their own constitution or by an arbitrator to be appointed by the Court in an appropriate case. (SCC p. 143, para 8)

> It is pertinent to mention that there is a material difference in an arbitration agreement inasmuch as in an ordinary contract the obligation of the parties to each other cannot, in general, be specifically enforced and breach of such terms of contract results only in damages. The arbitration clause, however, can be specifically enforced by the machinery of the Arbitration Act.

28. The Court has further observed that it is to be decided whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and

circumstances of the case. This, in turn, depends on the intention of the parties to be gathered from the relevant documents and surrounding circumstances.

29. The decisions in the case of ***State of U.P.* v. *Tipper Chand* and *Rukmanibai Gupta*** have also been cited with approval by this Court in the case of ***State of Orissa* v. *Damodar Das*** [(1996) 2 SCC 216]. In this case, this Court considered a clause in the contract which made the decision of the Public Health Engineer, final, conclusive and binding in respect of all questions relating to the meaning of specifications, drawings, instructions ... or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to the contract, drawings, specifications, estimates ... or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract. This Court held that this was not an arbitration clause. It did not envisage that any difference or dispute that may arise in execution of the works should be referred to the arbitration of an arbitrator.

30. A long line of English cases starting with ***Carus-Wilson and Greene, In re*** [(1886) 18 QBD 7 : 56 LJQB 530] have also been cited before us. In ***Carus-Wilson and Greene, In re*** on the sale of land, one of the conditions of sale was that the purchaser should pay for the timber on the land at a valuation for which purpose, each party should appoint a valuer and the valuers should, before they proceed to act, appoint an umpire. The Court said that such valuation was not in the nature of an award. The Court applied the tests which we have already referred to, namely, (*1*) whether the terms of the agreement contemplated that the intention of the parties was for the person to hold an enquiry in the nature of a judicial enquiry, hear the respective cases of the parties and decide upon evidence laid before him, (*2*) whether the person was appointed to prevent differences from arising and not for settling them when they had arisen. The Court held the agreement to be for valuation. It said that the fact that if the valuers could not agree as to price, an umpire was to be appointed would not indicate that there were any disputes between the parties.

31. In the case of ***Sutcliffe* v. *Thackrah*** [(1974) 1 All ER 859] the clause in question provided that at specified intervals the architect should issue interim certificates stating the amount due to the builders in respect of work properly executed. There was a separate arbitration clause. The question was whether the function of the architect was sufficiently judicial in character for him to escape liability in negligence. The House of Lords was not directly concerned with the question whether the architect was acting as an arbitrator or a valuer. It was required to decide whether the architect, who had not taken sufficient care in certifying the amount payable, should be held liable in negligence. And the Court said that when a professional man was employed to make a valuation, and to his knowledge, that valuation was to be binding on his principal and another party under an agreement between them, it did not follow that because he was under a duty to act fairly in making his valuation, he was immune from liability for negligent valuation. A similar question arose in connection with valuation of shares by auditors in the case of ***Arenson* v. *Casson Beckman Rutley & Co***. [(1975) 3 All ER 901]. The House of Lords said that an auditor of a private company who, on request, valued the shares in the company in the knowledge that his valuation was to determine the price to be paid for the shares under a contract of sale, was liable to be sued by

the seller or the buyer if he made the valuation negligently. These two cases do not directly assist us in the present case.

32. In the case of ***Imperial Metal Industries (Kynoch) Ltd.*** **v.** ***Amalgamated Union of Engineering Workers*** [(1979) 1 All ER 847], CA the contract between the parties included a clause to the effect that persons in the employment of the contractor were required to be paid fair wages as per Fair Wages Resolution. A trade union complained that the conditions of the Fair Wages Resolution were not being observed by the employers. This dispute was referred to the Central Arbitration Committee. The Court said that even though the Committee was acting as arbitrators, they were not doing so pursuant to arbitration agreement as defined in the Act because the arbitration was required to be between the parties to the agreement about a matter which they had agreed to refer to arbitration. In the present case, the Union was not a party to the contract.

33. In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. The valuation is to be done by M/s S.B. Billimoria & Co. Three companies which have to be divided between the two groups are to be divided in accordance with a scheme to be prepared by Bansi S. Mehta & Co. In the implementation of the Memorandum of Understanding which is to be done in consultation with the financial institutions, any disputes or clarifications relating to implementation are to be referred to the Chairman, IFCI or his nominees whose decision will be final and binding. The purport of clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. This clause does not contemplate any judicial determination by the Chairman of the IFCI. He is entitled to nominate another person for deciding any question. His decision has been made final and binding. Thus, clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for a proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated. The decision of the Chairman, IFCI is to be binding on the parties. Moreover, difficulties and disputes in implementation may not be between the parties to the Memorandum of Understanding. It is possible that the valuers nominated in the Memorandum of Understanding or the firm entrusted with the responsibility of splitting some of the companies may require some clarifications or may find difficulties in doing the work. They can also resort to clause 9. Looking to the scheme of the Memorandum of Understanding and the purpose behind clause 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with the valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so.

34. Undoubtedly, in the course of correspondence exchanged by various members of Groups A and B with the Chairman, IFCI, some of the members have used the words "arbitration" in connection with clause 9. That by itself, however, is not conclusive. The intention of the parties was not to have any judicial determination on the basis of evidence led before the Chairman, IFCI. Nor was the Chairman, IFCI required to base his decision only on the material placed before him by the parties and their submissions. He was free to make his own inquiries. He had to apply his own mind and use his own expertise for the purpose. He was free to take the help of other experts. He was required to decide the question of valuation and the division of assets as an expert and not as an arbitrator. He has been authorised to nominate another in his place. But the contract indicates that he has to nominate an expert. The fact that submissions were made before the Chairman, IFCI, would not turn the decision-making process into an arbitration.

35. The Chairman, IFCI has framed issues before answering them in his decision. These issues have been framed by himself for the purpose of enabling him to pinpoint those issues which require his decision. There is no agreed reference in respect of any specific disputes by the parties to him.

36. The finality of the decision is also indicative of it being an expert's decision though of course, this would not be conclusive. But looking at the nature of the functions expected to be performed by the Chairman, IFCI, in our view, the decision is not an arbitration award. The learned Single Judge was, therefore, right in coming to the conclusion that the proceedings before the Chairman, IFCI, were not arbitration proceedings. Nor was his decision an award. Appeal arising out of Special Leave Petition No. 14905 of 1997 is, therefore, dismissed with costs.

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Bhatia International v. *Bulk Trading S. A.*

AIR 2002 SC 1432

S. N. VARIAVA, J. - This Appeal is against a judgment dated 10th October 2000 passed by the Madhya Pradesh High Court. Briefly stated the facts are as follows:

The appellant entered into a contract with the 1st respondent on 9th May 1997. This contract contained an arbitration clause, which provided that arbitration was to be as per the rules of the International Chamber of Commerce (for short ICC). On 23rd October 1997, the 1st respondent filed a request for arbitration with ICC. Parties agreed that the arbitration be held in Paris, France. ICC has appointed a sole Arbitrator.

1st respondent filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (herein after called the said Act) before the IIIrd additional District Judge, Indore, M.P. against the appellant and the 2nd respondent. One of the interim reliefs sought was an order of injunction restraining these parties from alienating, transferring and/or creating third party right, disposing of, dealing with and/or selling their business assets and properties. The appellant raised the plea of maintainability of such an application. The appellant contended that Part I of the said Act would not apply to arbitrations where the place of arbitration is not in India. This application was dismissed by the IIIrd Additional District Judge on 1st February 2000. It was held that the Court at Indore had jurisdiction and the application was maintainable. The appellant filed a writ petition before the High Court of Madhya Pradesh, Indore Bench. The said writ petition has been dismissed by the impugned judgment dated 10th October 2000.

On behalf of the appellants, Mr. Sen submits that Part I of the said Act only applies to arbitrations, were the place of arbitration is in India. He submits that if the place of arbitration is not in India then Part II of the said Act would apply. He relies on sub-section (2) of Section 2 of the said Act, which provides that Part I shall apply, where the place of arbitration is in India. He submits that sub-section (2) of Section 2 makes it clear that the provisions of Part I do not apply where the place of arbitration is not in India. Mr. Sen points out that Section 2(f) of the said Act defines an "international commercial arbitration". Mr. Sen submits that an international commercial arbitration could take place either in India or outside India. He submits that if the international commercial arbitration takes place out of India then Part I of the said Act would not apply. He submits that Part II of the said Act applies to foreign awards.

Mr. Sen submits that sub-sections (3), (4) and (5) of Section 2 would necessarily only apply to arbitration which takes place in India. Mr. Sen submits that a plain reading of Section 9 also makes it clear that it would not apply to arbitrations, which take place outside India. He submits that Section 9 provides that an application for interim measure must be made before the award is enforced in accordance with Section 36. Mr. Sen submits that Section 36 deals with enforcement of domestic awards only. Mr. Sen submits that provisions for enforcement of foreign awards are contained in Sections 48, 49, 57 and 58. He submits that it is very significant that Section 9 does not talk of enforcement of the award in accordance with

Sections 48, 49, 57 and 58. Mr. Sen submits that this also makes it clear that the provisions of Part I of the said Act do not apply to arbitrations which do not take place in India.

Mr. Sen also relies on Section 5 of the said Act and submit that the underlying principle is that a judicial authority should not interfere except as provided in said Act. He submits that the rationale behind this is that there should be minimum interference by Courts. Mr. Sen states that on this aspect there is no authority of this Court. He points out that now a division bench of the Delhi High Court has held that part I does not apply to arbitrations which take place outside India. He submits that therefore now the only High Court which has held, that Part I applies to arbitrations which take place outside India, is the Madhya Pradesh High Court, which has so held by the impugned judgment.

On the other hand Mr. Sundaram for the respondents had taken us through the various provisions of the said Act. He has ably submitted that a conjoint reading of the provisions shows that Part I is to apply to all arbitrations. Whilst the submissions of Mr. Sen are attractive one has to keep in mind the consequence which would follow if they are accepted. The result would:

> (a) amount to holding that the Legislature has left lacunae in the said Act. There would be lacunae as neither Part I or II would apply to arbitrations held in a country, which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called a non-convention country). It would means that there is no law, in India, governing such arbitrations.
>
> (b) lead to an anomalous situation, inasmuch Part I would apply to Jammu and Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.
>
> (c) lead to a conflict between sub-section (2) of Section 2 on one hand and sub-sections (4) and (5) of Section 2 on the other. Further sub-section (2) of Section 2 would also be in conflict with Section 1, which provides that the Act extends to the whole of India.
>
> (d) leave a party remediless inasmuch as in international commercial arbitrations, which take place out of India, the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all.

In selecting out of different interpretations, the Court will adopt that which is just reasonable and sensible rather than that which is none of those things, as it may be presumed that the Legislature should have used the word in that interpretation which least offends our sense of justice. In ***Shanon Realities Ltd***. v. ***Sant Michael*** [(1924) AC 185]. Lord Shaw stated, "where words of a statute are clear they must, of course, be followed, but in their Lordships opinion, where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system". This principle was accepted by Subba Rao, J. while construing Section 193 of the Sea Customers Act and in coming to the conclusion that the chief of customs authority was not an officer of custom (AIR 1961 SC 1549).

A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals, and to international commercial arbitrations whether held in India or out of India. Section 2(f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country, which is a signatory to either the New York convention or the Geneva Convention (hereinafter called the convention country). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations, which take place in a non-convention country. Admittedly Part II only applies to arbitrations, which take place in a convention country. Mr. Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes place in a non-convention country. He also fairly admitted that there would be countries, which are not signatories either to the New York convention or to the Geneva convention. It is not possible to accept submission that the said Act makes no provision for international commercial arbitrations which take place in a convention country.

Section 1 of the said Act reads as follows:

> *"1. Short title, extent and commencement* -
> (1) This Act may be called the Arbitration and Conciliation Act, 1996;
> (2) It extends to the whole of India.
>
> Provided that Part I, III and IV shall extend to the State of Jammu and Kashmir only insofar as they relate to international commercial arbitration or, as the case may be, international commercial arbitration."

The words "this Act" means the entire Act. This shows that the entire Act, including Part I, applies to the whole of India. The fact that all parts apply to whole of India is clear from the proviso, which provides those Parts; I, III and IV will apply to the State of Jammu and Kashmir only so far as international commercial arbitrations/conciliations are concerned. Significantly the proviso does not state that Part I would apply to Jammu and Kashmir only if the place of the international commercial arbitration is in Jammu and Kashmir. Thus, if sub-section (2) of Section 2 is read in the manner suggested by Mr. Sen, there would be conflict between Section 1 and Section 2(2). There would also be an anomaly inasmuch as even if an international commercial arbitration takes place outside India, Part I would continue to apply in Jammu and Kashmir, but it would not apply to the rest of India. The legislature could not have so intended.

Section 2(a) defines "arbitration" as meaning any arbitration whether or not administered by a permanent arbitral institution. Thus, this definition recognises that the arbitration could be under a body like the Indian Chambers of Commerce or the International Chamber of Commerce, Arbitrations under International Chamber of Commerce would be held, in most cases, out of India. Section 2(c) provides that the term "arbitral award" would include an interim award.

Section 2(f) of the said Act defines an international commercial arbitration. It reads as follows:

> 2(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is -
>
> (i) an individual who is a national of, or habitual resident in, any country other than India; or
>
> (ii) a body corporate which is incorporated in any country other than India; or
>
> (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
>
> (iv) the government of a foreign country.

As stated above the definition of "international commercial arbitration" makes no distinction between international commercial arbitrations, which take place in India, or international commercial arbitrations, which take place outside India.

Section 2(e) defines "Court" as follows:

> 2(e) "Court" means the principle Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of small causes.

A Court is one, which would otherwise have jurisdiction in respect of the subject matter. The definition does not provide that the Courts in India will not have jurisdiction if an international commercial arbitration takes place outside India. Courts in India would have jurisdiction even in respect of an international commercial arbitration. As stated above an ouster of jurisdiction cannot be implied. An ouster of jurisdiction has to be express.

Now let us look at sub-section (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is India. To be immediately noted that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that part I will "only" apply where the place of arbitration is in India. Thus the Legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The Legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations, which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that part I will not apply to international commercial arbitrations, which take place outside India, the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the Legislature appears to be to ally parties to provide by agreement, that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.

If read in this manner there would be no conflict between Section 1 and Section 2(2). The words "every arbitration" in sub-section (4) of Section 2 and the words "all arbitrations and all proceedings relating thereto" in sub-section (5) of Section 2 are wide. Sub-sections (4) and (5) of Section 2 are not made subject of sub-section (2) of Section 2. It is significant that sub-section (5) is made subject to sub-section (4) but not to sub-section (2). To accept Mr. Sen's submission would necessitate adding words in sub-sections (4) and (5) of Section 2, which the Legislature has purposely omitted to add viz. "Subject to provision of sub-section (2)". However read in the manner set out hereinabove there would also be no conflict between sub-section (2) of Section 2 and sub-sections (4) and/or (5) of Section 2.

That the Legislature did not intend to exclude the applicability of Part I to arbitrations, which take place outside India, is further clear from certain other provisions of the said Act. Sub-section (7) of Section 2 reads as follows:

(7) An arbitral award made under this part shall be considered as a domestic award.

As is set out hereinabove, the said Act applies to (a) arbitrations held in India between Indians (b) international commercial arbitrations. As set out hereinabove, international commercial arbitrations may take place in India or outside India. Outside India, an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act however only classifies awards as "domestic awards" or "foreign awards". Mr. Sen admits that provisions of Part II makes it clear that "foreign awards" are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings, which take place in a non-convention country, are not considered to be "foreign awards" under the said Act. They would thus not be covered by Part II. An award passed in an arbitration, which takes place in India, would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards, which would otherwise not be covered by this definition. Strictly speaking an award passed in an arbitration which takes place in a non-convention country would not be a "domestic award". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

Section 5 provides that a judicial authority shall not intervene except where so provided in Part I. Section 8 of the said Act permits a judicial authority before whom an action is brought in a matter to refer parties to arbitration, if the matters were to be taken before a judicial authority in India. It would be a Court as defined in Section 2(e). Thus if Part I was to only apply to arbitrations which take place in India, the term "Court" would have been used in Sections 5 and 8 of the said Act. The Legislature was aware that in international commercial arbitrations, a matter may be taken before a judicial authority outside India. As Part I was also to apply to international commercial arbitrations held outside India the term “judicial authority” has been used in Sections 5 and 8.

The beginning part of Section 28 reads as follows:

(28) Rules applicable to substance of dispute:

(1) where the place of arbitration is situate in India:

Section 28 is in Part I. If part I was not to apply to an arbitration which takes place outside India, there would be no necessity to specify that the rules are to apply "where the place of arbitration is situate in India". It has been held in the case of ***National Thermal Power Corporation*** v. ***Singer Company*** [(1992) 3 SCC 551], that in international commercial arbitrations parties are at liberty to choose, expressly or by necessary implication, the law and the procedure to be made applicable. The procedure or the rules governing such arbitration may be of the country where the arbitration is being held or the body under whose aegis the arbitration is being held. All bodies which conduct arbitrations and all countries have rules and laws governing arbitrations. Thus Section 28 does not provided for rules where the place of arbitration is out of India.

Mr. Sen had also submitted that Part II, which deals with enforcement of foreign awards, does not contain any provision similar to Section 9 or Section 17. As indicated earlier, Mr. Sen had submitted that this indicated the intention of Legislature not to apply Sections 9 and 17 to arbitrations, like the present, which are taking place in a foreign country. The said Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all chapters or parts. The general provisions will apply to all chapters or parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is a separate provision in a separate chapter or part. Part II deals with enforcement of foreign awards. The Sections 44 in (Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York convention and the Geneva convention respectively. Part II then contains provisions for enforcement of "foreign awards" which necessarily would be different. For that reason, special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded, the provisions of Part I will also apply to "foreign awards". The opening words of Sections 45 and 54, which are in Part II, read "notwithstanding anything contained in Part I". Such a non-obstante clause had to be put in because the provisions of Part I apply to Part II.

Mr. Sen had also relied upon Article 1(2) of the UNCITRAL Model Law and had submitted that India was purposely not adopted this article. He had submitted that the fact that India had not provided (like in the UNCITRAL Model Law) that Section 9 would apply to arbitral proceedings, which take place out of India, indicated the intention of the Legislature not to apply Section 9 to such arbitrations. We are unable to accept this submission. Article 1(2) of UNCITRAL Model Laws reads as follows:

> (2) The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this state.

Thus Article 1(2) of UNCITRAL Model Laws uses the word "only" to emphasize that the provisions of that law are to apply if the place of arbitration is in the territory of the state. Significantly in Section 2(2) the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only" in Section

2(2) indicates that this sub-section is only an inclusive and clarificatory provision. As stated above it is not providing that provisions of Part I do not apply to arbitration which take place outside India. Thus, there was no necessity of separately providing that Section 9 would apply.

[After re-producing section 9, the court proceeded] Thus under Section 9 a party could apply to the Court (a) before, (b) during arbitral proceedings or (c) after the making of the arbitral award but before it is enforced in accordance with Section 36. The words "in accordance with Section 36" can only go with the words "after the making of the arbitral award". It is clear that the words "in accordance with Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". Thus it is clear that an application for interim measure can be made to Courts in India, whether or not the arbitration takes place in India before or during arbitral proceedings. Once an award is passed, then that award itself can be executed. Sections 49 and 58 provide that awards covered by part II are deemed to be a decree of the court. Thus "foreign awards" which are enforceable in India are deemed to be decrees. A domestic award has to be enforced under the provisions of Civil Procedure Code. All that Section 36 provides is that an enforcement of a domestic award is to take place after the time to make an application to set aside the award has expired or such an application has been refused. Section 9 does suggest that once an award is made, an application for interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus where the Legislature wanted to restrict the applicability of Section 9 it has done so specifically.

We see no substance in the submission that there would be unnecessary interference by Courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in Clauses (i) and (ii) thereof. Thus, there cannot be applications under Section 9 for stay of arbitral proceedings or to challenge the existence or validity of arbitration agreements or the jurisdiction of the arbitral tribunal. All such challenges would have to be made before the arbitral tribunal under the said Act.

Mr. Sen had also submitted that the term "arbitral award" includes an interim award. He had submitted that it would be open for the arbitral tribunal to pass interim awards and those interim awards could be enforced in India under Part II. However, there is a difference between an "interim award" and an "interim order". Undoubtedly, the arbitral tribunal could pass an interim award. But an interim order or directions passed by the arbitral Tribunal would not be enforceable in India. Thus even in respect of arbitrations covered by Part II, a party would be precluded from getting any interim relief. In any event, on Mr. Sen's interpretation, an award passed in arbitral proceedings held in a non-convention country could not be enforced. Thus, such a party would be left completely remediless.

If a party cannot secure, before or during the pendency of the arbitral proceedings, an interim order in respect of items provided in Section 9(i) and (ii) the result may be that the arbitration proceedings may themselves get frustrated e.g. by non appointment of a guardian for a minor or person of unsound mind or the subject matter of the arbitration agreement not being preserved. This could never have been the intention of the Legislature.

To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply. Faced with this situation Mr. Sen submits that, in this case the parties had agreed that the arbitration be as per the rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view in such cases the question would be whether Section 9 gets excluded by the ICC rules of arbitration. Article 23 of ICC rules reads as follows :

Conservatory and Interim Measures

> (1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral Tribunal considers appropriate.
>
> (2) Before the file is transmitted to the arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the secretariat. The secretariat shall inform the arbitral Tribunal thereof.

Thus Article 23 of the ICC rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Section 9 of the said Act.

Lastly it must be stated that the said Act does not appear to be a well drafted legislation. Therefore, the High Courts of Orissa, Bombay, Madras Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there is no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus, such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law.

In this view of the matter we see no reason to interfere with the impugned judgment. The appeal stands dismissed.

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Sukanya Holding Pvt. Ltd. **v.** *Jayesh H. Pandya*

JT 2003 (4) SC 58

M.B. SHAH, J. - 1. This appeal by special leave is directed against the judgment and order dated 18.9.2001 passed by the High Court of Bombay in arbitration petition no. 500 of 2001.

2. Appellant and respondent nos. 1 and 2 entered into a partnership agreement on 30th April 1992 for carrying on business in the name and style of M/s IIetali Construction Company to develop the land belonging to Ms. Jaykirti Mehta who brought the said land as her capital contribution. Land was valued at Rs. 65,51,000/-. A plan for construction of building was submitted in April 1992 and on 20.1.1993, commencement certificate was issued. It is submitted that till issue of commencement certificate, appellant's contribution in the said partnership was to the extent of Rs. 1,25,00,000/- as capital contribution. By award dated 11.3.1993, Ms. Jaykriti Mehta was directed to stand retired from the partnership firm. It was agreed that after retirement of Ms. Mehta, other partners were to continue with the partnership. It is submitted that the appellant provided a fund of Rs. 60,88,000/- to the said partnership firm for being paid to Ms. Jaykirti Mehta which was paid to her along with the amount of Rs. 5,24,000/- in terms of the award dated 11.3.1999. Further, a sum of Rs. 47,50,000/- was paid to one Mr. Kirti Desai to settle the suit filed by him. The partnership firm entered into an agreement with M/s Laxman Commercial and Finance Ltd. and accordingly construction was started. It is contended that from 1996 to 1998, respondents took away some amount from the partnership without contribution to capital construction. On 7.4.1998, five flats were sold to the creditors of the partnership firm in order to repay the loans and excess amount was paid to the firm. In April 1999, M/s Laxman Commercial and Finance Ltd. sold flats no. 401 to 701 to different purchasers. On 23.6.1999, the partnership firm executed a deed of conveyance subject to rights of other parties in favour of M/s West End Gymkhana Ltd. in respect of disposed of flats. On 1.1.1999, respondent no. 1 wrote to the Income Tax Officer to complete the assessment to the partnership firm. Accordingly, assessment order was passed on 30.3.2000.

3. Thereafter, respondent no. 1 filed suit no. 1991 to 2000 in the High Court of Bombay for dissolution of partnership firm and accounts and *inter alia* challenging the conveyance deed executed by partnership firm in favour of M/s West End Gymkhana Ltd. respondent no. 1 also took out a notice of motion no. 1576 of 2000 for various interim reliefs.

4. On the same day, appellant filed an application under Section 8 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as "the Act"). That application was kept for hearing along with the notice of motion.

5. Subsequently, respondent no. 1 filed fresh suit bearing no. 2812 of 2001 for dissolution of the suit firm, accounts and other reliefs including the relief for setting aside the transfer of suit flats in favour of various defendants. The respondent withdrew the suit filed on 9th May, 2000.

6. The appellant filed an arbitration petition no. 500 of 2001 under Section 8 of the Act. That application was opposed by respondent no. 1 by contending that the subject matter of the suit is not between the contracting parties and the reliefs are claimed not only against

respondent nos. 1 and 2 who are contracting parties but are claimed against remaining 23 parties, who are purchasers/so-called tenants of the disputed flats.

7. The High Court by its judgment and order dated 18.9.2001 rejected application under Section 8 of the Act. The court arrived at the conclusion that the suit apart from the relief of dissolution and accounts, plaintiff has prayed for other reliefs. All the defendants to the suit are not parties or partners in the partnership firm and the terms of the partnership deed including the arbitration clause are not binding to them. Only part of the subject matter could at the most be referred to the arbitration. Further, there is no power conferred on the court to add parties who are not parties to the agreement in the arbitration proceedings. The court also negatived the alternative prayer for referring part of the subject matter in respect of those parties who are parties to the partnership agreement which contains arbitral clause. The court arrived at the conclusion that such procedure is not contemplated under the Act. The object and purpose of the Act is to avoid multiplicity of the proceedings and not to allow two forums simultaneously to proceed with the matter. That judgment and order is challenged in this appeal.

8. Learned senior counsel Mr. Shekhar Naphade appearing for the appellant submitted that under Section 8 of the Act, the court was required to refer the dispute arising because of the dissolution of the partnership to the arbitrator as contemplated by the arbitration clause. He further submitted that in any case there is no bar in referring the dispute which arises between the appellant and respondent nos. 1 and 2 who are bound by the agreement to the arbitrator as envisaged in the partnership deed. He next contended that if the interpretation given by the High Court is accepted, arbitration clause could be defeated by an interested party by adding some relief's which are not covered by the arbitration clause or by adding a few parties who are not bound by the arbitration clause. This interpretation would be against the object and purpose of the Act and against the spirit of Section 89 of Code of Civil Procedure.

9. He also submitted that the third parties who purchased the flat that is stock-in-trade of the firm and entered into transactions in connection with the business of the firm, are not necessary parties to the dispute amongst the partners relating to dissolution and accounts of the firm and, therefore, dispute ought to have been referred to the arbitrator.

10. As against this, learned senior counsel Mr. R.F. Nariman submitted that the order passed by the High Court does not call for any interference as the plaintiffs have claimed various reliefs in the suit which could not be referred to the arbitrator. He further submitted that defendants no. 3 to 25 are not parties to the arbitration agreement.

11. For appreciating the contentions raised by the learned counsel for the parties, we would refer to the relevant provisions namely Section 5 and 8 of the Act, which are 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 8. Power to refer parties to arbitration where there is an arbitration agreement*:**
>
> (1) A judicial authority before which an action is brought *in a matter which is the subject of an arbitration agreement* shall, if a party so applies no later than when

submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by part-1 of the Act, judicial authority shall not intervene except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if – (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would therefore, mean that Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub-sections (1) and (2) of Section 8 of the Act.

13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. Thirdly, there is no provision – as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is: **"*in a matter which is the subject matter of an arbitration agreement*"**, court is required to refer the parties to arbitration. Therefore, the suit should be in respect of **'*a matter*'** which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced – "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words **'*a matter*'** indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is – even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others

is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows the bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

18. Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section.

19. Lastly, considering the language used in Section 8, in our view, it is not necessary to refer to the decisions rendered by various High Courts interpreting Section 34 of Indian Arbitration Act, 1940 which gave a discretion to the court to stay the proceedings in a case where the dispute is required to be referred for arbitration.

20. For the reasons stated above, there is no substance in this appeal and is, therefore, dismissed.

* * * * *

P. Anand Gajapathi Raju **v.** *P. V. G. Raju (Dead)*

AIR 2000 SC 1886

D.P. WADHWA AND RUMA PAL, JJ. - 2. During the pendency of this appeal all the parties have entered into an arbitration agreement. They have agreed to refer their disputes in this appeal and others to Justice S. Ranganathan, a retired Judge of this Court as sole Arbitrator. The arbitration agreement is in the form of an application and has been signed by all the parties and meets the requirements of Section 7 of the Arbitration and Conciliation Act, 1996 (new Act).

3. The question that arises for consideration is whether this court in appeal can refer the parties to arbitration under the new Act. The Arbitration Act, 1940 expressly provided for the parties to a suit to apply for an order of reference of the subject matter of the suit (see Sections 21 to 25, Chapter IV relating to arbitration in suits). There is also authority for the proposition under the 1940 Act that with the reference of the disputes, the suit itself may stand disposed of.

4. Part I of the new Act deals with domestic arbitrations. Section 5, which is contained in Part I of the new Act, defines the extent of judicial intervention in arbitration proceedings. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in that Part. Section 5 brings out clearly the object of the new Act, namely, that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement the Court's intervention should be minimal. Keeping the legislative intention in mind, Section 8 of the new Act may be construed.

5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. This last provision creates a right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the Court referring the parties to arbitration.

6. In our view, the phrase "which is the subject of an arbitration agreement" does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the Court. The phrase also cannotes an arbitration agreement being brought into existence while the action is pending. Black’s Law Dictionary has defines the word 'is' as follows:

> This word, although normally referring to the present, often has a future meaning, but is not synonymous with “shall have been”. It may have, however, a past signification, as in the sense of “has been”.

7. A further question arises whether the Court is in these circumstances obliged to refer the parties to arbitration and if so with what effect.

8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is per-emptory. It is therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the Award. The Court to which the party shall have recourse to challenge the Award would be the Court as defined in Clause (e) of Section 2 of the new Act and not the Court to which an application under section 8 of the new Act is made. An application before a Court under section 8 merely brings to the Court's notice that the subject matter of the action before it is the subject matter of an arbitration agreement. This would not be such an application as contemplated under section 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent Court within the meaning of Section 2(e) of the new Act.

9. We, therefore, allow the application and would refer the parties to arbitration. No further orders are required in this appeal and it stands disposed of accordingly.

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Haryana Telecom Ltd. **v.** *Sterlite Industries (India) Ltd.*

AIR 1999 SC 2354

B.N. KIRPAL AND S. RAJENDRA BABU, JJ. - 1. On a winding-up petition having been filed by the respondent before the High Court, the petitioner herein moved an application under Section 8 of the Arbitration and Conciliation Act, 1996, inter alia, contending that the High Court should refer the matter to arbitration.

2. The Single Judge dismissed the application and the same was upheld by the Division Bench. While dismissing the appeal the High Court referred to similar cases relating to applications which have been filed under the provisions of the Indian Arbitration Act, 1940 where the consistent view of the High Courts was that the question regarding the winding up of a company could not be referred to an arbitrator.

3. It is submitted by learned counsel for the petitioner that the language of Section 8 of the 1996 Act is different. Mr. Jaitley submits that according to Section 8(1) the judicial authority is bound to refer that matter to arbitration when an arbitration agreement exists between the parties.

4. Sub-section (1) of Section 8 provides that the judicial authority, before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under' the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the Company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.

6. For the aforesaid reasons this petition is dismissed *in limine*.

* * * * *

M.M.T.C. Limited **v.** *Sterlite Industries (India) Ltd.*

(1996) 6 SCC 716

J.S. VERMA AND B.N. KIRPAL, JJ. - 1. The point involved for decision is, the effect of The Arbitration and Conciliation Act, 1996 ("New Act") in the present case on the arbitration agreement made prior to the commencement of the New Act. Clause VII of the agreement dated December 14, 1993 between the parties is, as under:

> VII. In the event of any question or dispute arising under or out of or relating to the construction, meaning and operation or effect of this agreement or breach thereof, the matter in dispute shall be referred to arbitrator. *Both the parties shall nominate one Arbitrator each and the arbitrators shall appoint an umpire before proceeding with the reference.* The decision of arbitrators or in the event of their not agreeing the decision of the umpire will be final and binding on the parties. *The provisions of the Indian Arbitration Act and Rules made thereunder shall apply for proceedings.* The arbitrators or the umpire, as the case may, shall be entitled with the consent of the parties to enlarge the time, from time to time, for making the award. The arbitrators/umpire shall give a reasoned award. The venue of the arbitration shall be Bombay.

2. Sterlite Industries (India) Ltd., respondent, claimed that it had not received certain dues under the contract from the appellant-MMTC Ltd. and, therefore, it invoked the above arbitration clause in the agreement between them by a letter dated January 19, 1996 which was received by the MMTC Ltd. on January 31, 1996. On February 7, 1996 the respondent appointed Shri M.N. Chandurkar, a former Chief Justice of Madras High Court, as its arbitrator. The MMTC Ltd. claimed that arbitration could not be resorted to and, therefore, it did not name its arbitrator. The Sterlite Industries (India) Ltd. filed an application in the Bombay High Court for appointing an arbitrator in accordance with the New Act.

3. Before the High Court, learned Counsel for the MMTC Ltd. contended that the arbitration clause was not attracted but this objection was rejected. The other contention on behalf of the MMTC Ltd. was that the. arbitration agreement provided for the appointment of two arbitrators while Section 10(1) of the New Act does not envisage the appointment of an even number of arbitrators. The High Court by its order dated 28.6.1996 rejected the contention and gave time to the MMTC Ltd. till July 5, 1996 to appoint an arbitrator. In further held that in the event of the MMTC Ltd. failing to name its arbitrator, the arbitrator appointed by Sterlite Industries (India) Ltd. would be the sole arbitrator under Section 10(2) read with Section 11(5) of the New Act. Time for appointment of the arbitrator was later extended. The MMTC Ltd. has in the meantime appointed Shri. S.N. Sapra, a former Judge of the Delhi High Court as its arbitrator. Hence this appeal by special leave.

4. The contention of the learned Attorney General on behalf of the appellant is that an arbitration agreement providing for the appointment of an even number of arbitrators is not a valid agreement because of Section 10(1) of the New Act; and, therefore, the only remedy in such a case is by a suit and not by arbitration. For this reason, he urged, that Sub-section (2) of Section 10 is not attracted since there is no failure to determine the number of arbitrators

according to Sub-section (1). Another argument of the learned Attorney General was that Section 10 is a departure from para 2 of the First Schedule of the Arbitration Act, 1940 (for short 1940 Act), which reads as under;

> 2. If the reference is to an even number of arbitrators the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

5. In reply Shri Dave, learned Counsel for the respondent contended that there is no such inconsistency between Section 10 of the New Act and the corresponding provision in the '1940 Act, both being substantially the same. Learned Counsel contended that the provisions of the New Act must be construed to promote the object of implementing the scheme of alternative dispute resolution; and the New Act must be construed to enable the enforcement of the earlier arbitration agreements. It was urged that each of the parties having nominated its arbitrator, the third arbitrator was required to be appointed according to Section 11(3) and the failure to do so attracts the consequential results under the New Act. Learned Counsel contended that the provision for number of arbitrators is a machinery provision and does not affect the validity of the arbitration agreement which is to be determined according to Section 7 of the New Act.

6. Some provisions of the New Act may now be referred. Section 2(b) defines the 'arbitration agreement' to mean an agreement referred to in Section 7. Section 7 deals with arbitration agreement, Section 10 with the number of arbitrators and Section 11 with the appointment of arbitrators.

8. Chapter II of the New Act contains Sections 7 to 9 under the heading "Arbitration Agreement". Chapter III under the heading "Composition of Arbitral Tribunal" contains Sections 10 to 15.

9. Sub-section (3) of Section 7 requires an arbitration agreement to be in writing and Sub-section (4) describes the kind of that writing. There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General.

10. Section 10 deals with the number of arbitrators. Sub-section (1) says that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Sub-section (2) then says that failing the determination referred to in Sub-section (1), the arbitral tribunal shall consist of a sole arbitrator. Section 11 provides for appointment of arbitrators. This is how arbitral tribunal is constituted.

11. The arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceeding with the reference. The arbitration agreement is valid as it satisfies the requirement of Section 7 of the New Act. Section 11(3) requires the two arbitrators to appoint the third arbitrator or the umpire. There

can be no doubt that the arbitration agreement in the present case accords with the implied condition contained in para 2 of the First Schedule to the Arbitration Act, 1940 requiring the two arbitrators, one each appointed by the two sides, to appoint an umpire not later than one month from the latest date of their respective appointment.

12. The question is: whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of Sub-section (1) of Section 10 is satisfied and Sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the Act and, therefore is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by Section 11 of the New Act.

13. In view of the fact that each of the two parties have appointed their own arbitrators, namely, Justice M.N. Chandurkar (Retd.) and Justice S.P. Sapra (Retd.), Section 11(3) was attracted and the two appointed arbitrators were required to appoint a third arbitrator to act as the presiding arbitrator, failing which the Chief Justice of the High Court or any person or institution designated by him would be required to appoint the third arbitrator as required by Section 11(4)(b) of the New Act. Since the procedure prescribed in Section 11(3) has not been followed the further consequence provided in Section 11 must follow.

14. Accordingly, we direct that the chief Justice of the High Court is to appoint the third arbitrator under Section 11(4)(b) of the New Act in view of the failure of the two appointed arbitrators to appoint the third arbitrator within thirty days from the date of their appointments. Direction given by the Chief Justice of the High Court is substituted to this effect.

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Narayan Prasad Lohia **v.** *Nikunj Kumar Lohia*

AIR 2002 SC 1139

S. N. VARIAVA, J. – 1. The appellant and the respondents are family members who had disputes and differences in respect of the family businesses and properties. All the parties agreed to resolved their disputes and differences through one Mr. Pramod Kumar Khaitan. Subsequently, on 29th September 1996 they agreed that the said Mr. Pramod Kumar Khaitan and one Mr. Sardul Singh Jain resolve their disputes. The parties made their respective claims before these two persons. All parties participated in the proceedings. On 6th October, 1996 an award came to be passed by the said Mr. Pramod Kumar Khaitan and Mr. Sardul Singh Jain. On 22nd December 1997 the 1st respondent filed an application in the Calcutta High Court for setting aside the award dated 6th October 1996. On 17th January 1998 the 2nd respondent filed an application for setting aside this award. One of the grounds, in both these applications was that the arbitration was by two Arbitrators whereas under the Arbitration and Conciliation Act, 1996 (hereinafter called the said 'Act') there cannot be an even number of Arbitrators. It was contended that arbitration by two Arbitrators was against the statutory provision of the said Act and therefore, void and invalid. At this stage, we are only deciding the question of law referred i.e. whether a mandatory provision of the said Act can be waived by the parties.

[After setting out the provisions of sections 4, 5, 10, 11, 16 and 34, the court proceeded.] The said Act was enacted to consolidate and amend the law relating to domestic and international commercial arbitration and for matters connected therewith and incidental thereto. One of the objects of the said Act is to minimise the role of Courts in the arbitration process. It is with this object in mind that Section 5 has been provided. Judicial authorities should not interfere except where so provided in the Act. Further, Section 34 categorically provides that the award can be set aside by the Court only on the grounds mentioned therein. Therefore, one of the aspects which would have to be considered is whether the 1st and 2nd respondents' case fell within any of the categories provided under Section 34.

2. Mr. Venugopal submits that Section 10 of the said Act is a mandatory provision, which can be derogated. He points out that even though the parties are free to determine the number of Arbitrators, such number cannot be an even number. He submits that any agreement which permits the parties to appoint an even number of Arbitrators would be contrary to this mandatory provision of the said Act. He submits that such an agreement would be invalid and void, as the arbitral tribunal would not have been validly constituted. He submits that composition of the arbitral tribunal itself being invalid, the proceedings and the award, even if one be passed, would be invalid and unenforceable. Mr. Venugopal submits that Section 4 of the said Act would only apply provided:

(a) a party knew that he could derogate from any provision of this part or;
(b) a party knew that any requirement under the arbitration agreement had not been complied with; and the party still proceeded with the arbitration.

He submits that, this case does not fall under category (b) above. He submits that even category (a) would not apply because waiver can only be in respect of a matter from which a party could derogate. He submits that in respect of provisions, which are non-derogable, there

can be no waiver. He submits that Section 10 is a provision from which a party cannot derogate. He submits that matters from which a party cannot derogate are those provided in Sections 4, 8, 9, 10, 11(4) and (6), 12, 13(4), 16(2), (3) and (5), 22(4), 27, 31, 32, 33, 34(2) and (4), 35, 36, 37, 38(1) and 43(3). He submits that as against this matters from which a party can derogate are those provided under Section 11(2), 19(1) and (2), 20(1) and (2), 22(1), 24, 25, 26 and 31(3).

3. Mr. Venugopal submits that if there are an even number of Arbitrators, there is a high possibility that at the end of the arbitration, they may differ. He submits that in such a case, parties would then be left remediless and would have to start litigation or a fresh arbitration all over again. He submits Section 16 does not provide for any challenge to the composition of the arbitral tribunal. He submits that a reading of Section 34(2)(a)(v) shows that the Legislature contemplated a challenge to the composition of the arbitral tribunal. He submits that significantly Section 16 does not provide for a challenge to the composition of the arbitral tribunal. He submits that an invalid composition of the arbitral tribunal goes to the root of the jurisdiction. He submits that an arbitral tribunal, which has been illegally constituted, would have no jurisdiction or power to decide on the question of its inherent lack of jurisdiction. He submits that Section 16 does not cover and would not govern such a challenge. Mr. Venugopal submits that the High Court was right in setting aside the award on this ground. He submits that this Court should not interfere.

On the other hand, Mr. Dwivedi submits that Sections 4, 10 and 16 are part of the integrated scheme provided in the said Act. He submits that the provisions have to be read in a manner whereby there is no conflict between any of them or by which any provisions is not rendered nugatory. He submits that undoubtedly Section 10 provides that there should not be an even number of Arbitrators. He points out that Section 10 starts with the words "The parties are free to determine the number of Arbitrators". He submits that arbitration is a matter of agreement between the parties. He submits that generally, in arbitration, the parties are free to determine the number of Arbitrators and the procedure. Parties could agree upon an even number of Arbitrators. He submits that even after a party has agreed to an even number of Arbitrators, he can still object to the composition of the arbitral tribunal. He submits that an award could be challenged on ground of composition of the arbitral tribunal only provided that an objection is first taken before the arbitral tribunal under Section 16 and the arbitral tribunal has rejected such an objection.

4. Mr. Dwivedi submits that Section 34(2)(a)(v) does not permit the setting aside of an award on the ground of composition of the arbitral tribunal if the composition was in accordance with the agreement of the parties. He submits that Section 34(2)(a)(v) would come into play only if the composition was not in accordance with the agreement of the parties. He points out that in this case, the composition is in accordance with the agreement of the parties and, therefore, the award cannot be set aside on this ground. He submits that the impugned orders of the High Court cannot be sustained and required to be set aside.

5. We have heard the parties at length. We have considered the submissions. Undoubtedly, Section 10 provides that the number of Arbitrators shall not be an even number. The question still remains whether Section 10 is a non-derogable provision. In our view, the answer to this question would depend on question as to whether, under the said Act, a party

has a right to object to the composition of the arbitral tribunal, if such composition is not in accordance with the said Act and if so at what stage. It must be remembered that arbitration is a creature of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties.

In the said Act, provisions have been made in Sections 12, 13 and 16 for challenging the competence, impartiality and jurisdiction. Such challenge must however, before the arbitral tribunal itself.

6. It has been held by a constitution bench of this Court, in the case of ***Konkan Railway Corporation Ltd***. v. ***Rani Construction Pvt. Ltd***. [JT 2002 (1) SC 587], that Section 16 enables the arbitral tribunal to rule on its own jurisdiction. It has been held that under Section 16, the arbitral tribunal can rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the arbitral tribunal's authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but also we are in respectful agreement with the same. Thus, it is no longer open to contend that under Section 16; a party cannot challenge the composition of the arbitral tribunal before the arbitral tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the Arbitrator and/or may have himself appointed the Arbitrator. Needless to state, a party would be free, if he so chooses, not to raise such a challenge. Thus, a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the arbitral tribunal is a matter, which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object, there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view, Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

7. We are also unable to accept Mr. Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non-derogable. Even though the said Act is now an integrated law on the subject of arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the Legislature to cover all aspects. Just by way of example Section 10 permits the parties to determine the number of Arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the Arbitrator or Arbitrators. Section 11 then provides how Arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one Arbitrator or three Arbitrators. By agreement parties may provide for appointment of 5 or 7 Arbitrators. If they do not provide for a procedure for their appointment or there is failure of the agreed procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the agreement of the parties is invalid. The answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 more Arbitrators. Similarly even if parties provide for appointment of only two Arbitrators, that does not mean that the agreement becomes invalid. Under

Section 11(3) the two Arbitrators should then appoint a third Arbitrator who shall act as the presiding Arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two Arbitrators cannot appoint a third Arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion, the arbitration proceedings are not frustrated. But if the two Arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third Arbitrator, presuming there was one, had differed. Thus we do not see how there would be wastage of time, money and expense if a party, with open eyes, agrees to go to arbitration of two persons and then participates in the proceedings. On the contrary, there would be wastage of time, money and energy if such a party is allowed to resile because the award is not of his liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.

8. Even otherwise, under the said Act the grounds of challenge to arbitral award are very limited. Now an award can be set-aside only on a ground of challenge under Sections 12, 13 and 16 provided such a challenge is first raised before the arbitral tribunal and has been rejected by the arbitral tribunal. The only other provision is Section 34 of the said Act. The only ground, which could be pressed in service by Mr. Venugopal, is provided under Section 34(2)(a)(v). Section 34(2)(a)(v) has been extracted hereinabove. According to Mr. Venugopal, if the composition of the arbitral tribunal or the arbitral procedure, even though it may be in accordance with the agreement of the parties, is in conflict with a provision of the Act from which the parties cannot derogate, then the party is entitled to have the award set aside. He submits that the words "unless such agreement was in conflict with a provision of this part from which the parties cannot derogate" as well as the words "failing such agreement" show that an award can be set aside if the agreement is in conflict with a provision of Part-I of the said Act or if there is no agreement which is in consonance with the provisions of Part I of the said Act. In other words, according to Mr. Venugopal, even if the composition or procedure is in accordance with the agreement of the parties, an award can be set aside if the composition or procedure is in conflict with the provisions of Part-I of the said Act. According to Mr. Venugopal, the words "failing such agreement" do not mean that there should be no agreement in respect of the composition of the tribunal or the arbitral procedure. According to Mr. Venugopal, an agreement in respect of the composition of the arbitral tribunal or arbitral procedure which is not in consonance with a provision of Part-I of the said Act would be invalid in law and therefore would be covered by the phrase "failing such agreement". He submits that the words "failing such agreement" mean failing an agreement, which is in consonance with a provision of Part-I of the said Act. He submits that Section 34(2)(a)(v) entitles the respondents to challenge the award and have it set aside.

9. In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the arbitral tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement was in conflict with the provisions of this Act" would only arise if the composition of the arbitral tribunal or the arbitral procedure is not

in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case, the right to challenge the award is restricted. The challenge can only be provided when the agreement of the parties is in conflict with a provision of Part-I, which the parties cannot derogate. In other words, even if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The word "failing such agreement" have reference to an agreement providing for the composition of the arbitral tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure. If there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure and the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part-I of the said Act, then also a challenge to the award would be available. Thus, so long as the composition of the arbitral tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with the provisions of Part-1 of the said Act. This also indicates that Section 10 is a derogable provision.

10. Respondents 1 and 2, not having raised any objection to the composition of the arbitral tribunal, as provided in Section 16, they must be deemed to have waived their right to object. [For the reasons aforesaid, the judgment of the learned single Judge and division bench on the question of law discussed cannot be sustained. They are accordingly set aside.

* * * * *

Datar Switchgears Ltd. **v.** *Tata Finance Ltd.*

2000 (3) Arb. LR 447 (SC)

K. G. BALAKRISHNAN, J. - 2. The appellant challenges an order passed by the Chief Justice of Bombay High Court, under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the Act"). The appellant had entered into a lease agreement with the 1st respondent in respect of certain machineries. Dispute arose between the parties and the 1st respondent sent a notice to the appellant on 5-8-1999 demanding payment of Rs. 2,84,58,701/- within fourteen days and in the notice it was specifically stated that in case of failure to pay the amount, the notice be treated as one issued under Clause 20.9 (Arbitration clause) of the Lease Agreement. The appellant did not pay the amount as demanded by the 1st respondent. The 1st respondent did not appoint an Arbitrator even after the lapse of thirty days, but filed Arbitration Petition No. 405/99 on 26-10-1999 under Section 9 of the Act for interim protection. On 25-11-1999, the 1st respondent appointed the 2nd respondent as the sole Arbitrator by invoking Clause 20.9 of the Lease Agreement and the Arbitrator in turn issued a notice to the appellant asking them to make their appearance before him on 13th March, 2000. Thereafter, the appellant filed Arbitration Application No. 2/2000 before Hon'ble the Chief Justice of Bombay and prayed for appointment of another Arbitrator and the 1st respondent opposed this application. This petition was rejected by the Chief Justice holding that as the Arbitrator had already been appointed by the first respondent, the Lessor, the petition was not maintainable. This order is challenged before us.

3. We heard the appellant's counsel Mr. V. A. Mohta and respondent's counsel Mr. R. F. Nariman. The appellant's counsel questioned the authority of the 1st respondent in appointing an Arbitrator after the long lapse of the notice period of 30 days. According to the appellant, the power of appointment should have been exercised within a reasonable time. The appellant's counsel also urged that unilateral appointment of Arbitrator was not envisaged under the Lease Agreement and the 1st respondent should have obtained the consent of the appellant and the name of the Arbitrator should have been proposed to the appellant before appointment. On the other hand, the counsel for the 1st respondent supported the impugned order.

4. Learned counsel for the appellant, Shri V. A. Mohta argued that the order passed by the Chief Justice is amenable to Article 136 of the Constitution of India. Even if it is an administrative order as decided by a three Judge Bench in ***Konkan Railway Corporation Ltd. v. Mehul Const. Co.*** [2000 (9) JT 362 (SC)]. It is amenable to Article 136. Learned senior counsel for the first respondent Shri R. F. Nariman, however, stated that in this case we need not go into this controversy and we may decide the matter on merits on the assumption that Article 136 is attracted. In view of the above stand taken for the respondents, we are not deciding the question of maintainability.

5. The Arbitration and Conciliation Act, 1996 made certain drastic changes in the Law of Arbitration. This Act is codified in tune with Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). Section 11 of the Act deals with the procedure for appointment of Arbitrator. Section 11(2) says that the parties are free to agree to any procedure for appointing the

Arbitrator. If only there is any failure of that procedure, the aggrieved party can invoke Sub-clauses (4), (5) or (6) of Section 11, as the case may be. In the instant case may be. In the instant case, the Arbitration clause in the Lease Agreement contemplates appointment of a sole Arbitrator. If the parties fail to reach any agreement as referred to in sub-section (2), or if they fail to agree on the Arbitrator within thirty days from receipt of the request by one party, the Chief Justice can be moved for appointing an Arbitrator either under Sub-clause (5) or Sub-clause (6) of Section 11 of the Act.

6. Sub-clause (5) of Section 11 can be invoked by a party who has requested the other party to appoint an Arbitrator and the latter fails to make any appointment within thirty days from the receipt of the notice. Admittedly, in the instant case, the appellant has not issued any notice to the 1st respondent, seeking appointment of an Arbitrator. An application under Sub-clause (6) of Section 11 can be filed when there is a failure of the procedure for appointment of Arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an Arbitrator, refuses to appoint the Arbitrator or where two appointed Arbitrators fail to appoint the third Arbitrator. If the appointment of Arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of Arbitrator.

7. The appellant in his application does not mention under which sub-section of Section 11 the application was filed. Evidently it must be under sub-section (6)(a) of Section 11, as the appellant has no case that a notice was issued but an Arbitrator was not appointed or that there was a failure to agree on certain Arbitrator. The contention of the appellant might be that the first respondent failed to act as required under the procedure.

8. Therefore, the question to be considered is whether there was any real failure of the mechanism provided under the Lease Agreement. In order to consider this, it is relevant to note the Arbitration clause in the Agreement.

9. Clause 20.9 of the agreement is the Arbitration clause, which is to the following effect:

> 20.9. It is agreed by and between the parties that in case of any dispute under this lease, the same shall be referred to an Arbitrator to be nominated by the lessor and the award of the Arbitrator shall be final and binding on all the parties concerned. The venue of such arbitration shall be in Bombay. Save as aforesaid, the Courts at Bombay alone and no other Courts whatsoever, will have jurisdiction to try suit in respect of any claim or dispute arising out of or under this lease or in any way relating to the same.

10. The above clause gives an unfettered discretion to the 1st respondent-lessor to appoint an Arbitrator. The 1st respondent gave notice to the appellant and later appointed the 2nd respondent as the Arbitrator. It is pertinent to note that no notice period is prescribed in the above Arbitration clause and it does not speak about any concurrence or consent of the appellant being taken in the matter of the choice of Arbitrator.

11. The question then arises whether for purposes of Section 11(6), the party to whom a demand for appointment is made, forfeits his right to do so if he does not appoint an Arbitrator within 30 days. Learned senior counsel for the appellant contends that even though

Section 11(6) does not prescribe a period of 30 days, it must be implied that 30 days is a reasonable time for purposes of Section 11(6) and thereafter, the right to appoint is forfeited. Three judgments of the High Courts from Bombay, Delhi and Andhra Pradesh are relied upon in this connection.

17. In all the above cases, the appointment of the Arbitrator was not made by the opposite party before the application was filed under Section 11. Hence, all the above cases are not directly point.

18. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an Arbitrator after the expiry of 30 days from the date of demand.

19. So far as cases falling under Section 11(6) are concerned - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an Arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words. In cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an Arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an Arbitrator under Section 11(6) is forfeited.

20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the Arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

22. While interpreting the power of the Court to appoint Arbitrator under Section 8 of the Arbitration Act, 1940, this Court in ***Bhupinder Singh Bindra*** **v.** ***Union of India*** [(1995) 5 SCC 329], in para 3 held as under:

> It is settled law that Court cannot interpose and interdict the appointment of an Arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the Arbitrator's fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the Arbitrator appointed with his consent. There must be just and sufficient cause for revocation.

23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the Court has to respect the terms of the contract entered into by parties and endeavour to give importance and

effect to it. When the party has not disputed the Arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.

24. Therefore, we do not think that the first respondent, in appointing the second respondent as the Arbitrator, failed to follow the procedure, contemplated under the agreement or acted in contravention of the Arbitration clause.

27. Nomination virtually amounts to appointment for a specific purpose and the 1st respondent has acted in accordance with Section 20.9 of the agreement. So long as the concurrence or ratification by the appellant is not stated in the Arbitration clause, the nomination amounts to selection of the Arbitrator.

28. Hence, the appellant, while filing the application under Section 11 of the Act, had no cause of action to sustain the same as there was no failure of the agreement or that the 1st respondent failed to act in terms of the agreement. The application was rightly rejected. The appeal deserves to be and is accordingly dismissed, however, without any order as to costs.

* * * * *

SBP & Co. **v.** *Patel Engg. Ltd.*

(2005) 8 SCC 618

P. K. BALASUBRAMANYAN J. - 2. What is the nature of the function of the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996 is the question that is posed before us. The three-Judge Bench decision in ***Konkan Rly. Corpn. Ltd.* v. *Mehul Construction Co***. (2000) 7 SCC 201 as approved by the Constitution Bench in ***Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd***. [(2002) 2 SCC 388] has taken the view that it is purely an administrative function, that it is neither judicial nor quasi-judicial and the Chief Justice or his nominee performing the function under Section 11(6) of the Act cannot decide any contentious issue between the parties. The correctness of the said view is questioned in these appeals.

3. Arbitration in India was earlier governed by the Indian Arbitration Act, 1859 with limited application and the Second Schedule to the Code of Civil Procedure, 1908. Then came the Arbitration Act, 1940. Section 8 of that Act conferred power on the court to appoint an arbitrator on an application made in that behalf. Section 20 conferred a wider jurisdiction on the court for directing the filing of the arbitration agreement and the appointment of an arbitrator. Section 21 conferred a power on the court in a pending suit, on the agreement of parties, to refer the differences between them for arbitration in terms of the Act. The Act provided for the filing of the award in court, for the making of a motion by either of the parties to make the award a rule of court, a right to have the award set aside on the grounds specified in the Act and for an appeal against the decision on such a motion. This Act was replaced by the Arbitration and Conciliation Act, 1996 which, by virtue of Section 85, repealed the earlier enactment.

4. The Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") was intended to comprehensively cover international and commercial arbitrations and conciliations as also domestic arbitrations and conciliations. It envisages the making of an arbitral procedure which is fair, efficient and capable of meeting the needs of the arbitration concerned and for other matters set out in the Objects and Reasons of the Bill. The Act was intended to be one to consolidate and amend the law relating to domestic arbitrations, international commercial arbitrations and enforcement of foreign arbitral awards, as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The preamble indicates that since the United Nations Commission on International Trade Law (UNCITRAL) has adopted a Model Law for International Commercial Arbitration and the General Assembly of the United Nations has recommended that all countries give due consideration to the Model Law and whereas the Model Law and the Rules make significant contribution to the establishment of a unified legal framework for a fair and efficient settlement of disputes arising in international commercial relations and since it was expedient to make a law respecting arbitration and conciliation taking into account the Model Law and the Rules, the enactment was being brought forward. The Act replaces the procedure laid down in Sections 8 and 20 of the Arbitration Act, 1940. Part I of the Act deals with arbitration. It contains Sections 2 to 43. Part II deals with enforcement of certain foreign awards, and Part III deals with conciliation and Part IV contains supplementary provisions. In

this case, we are not concerned with Part III, and Parts II and IV have only incidental relevance. We are concerned with the provisions in Part I dealing with arbitration.

5. Section 7 of the Act read with Section 2(*b*) defines an arbitration agreement. Section 2(*h*) defines "party" to mean a party to an arbitration agreement. Section 4 deals with waiver of objections on the part of the party which has proceeded with an arbitration, without stating his objections referred to in the section, without undue delay. Section 5 indicates the extent of judicial intervention. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in Part I. The expression "judicial authority" is not defined. So, it has to be understood as taking in the courts or any other judicial fora. Section 7 defines an arbitration agreement and insists that it must be in writing and also explains when an arbitration agreement could be said to be in writing. Section 8 confers power on a judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement, to refer the dispute to arbitration, if a party applies for the same. Section 9 deals with the power of the Court to pass interim orders and the power to give interim protection in appropriate cases. It gives a right to a party, before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement in terms of Section 36 of the Act, to apply to a court for any one of the orders specified therein. Chapter III of Part I deals with composition of Arbitral Tribunals. Section 10 gives freedom to the parties to determine the number of arbitrators but imposes a restriction that it shall not be an even number. Then comes Section 11 with which we are really concerned in these appeals.

6. The marginal heading of Section 11 is "*Appointment of arbitrators*". Sub-section (1) indicates that a person of any nationality may be an arbitrator, unless otherwise agreed to by the parties. Under sub-section (2), subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Under sub-section (3), failing any agreement in terms of sub-section (2), in an arbitration with three arbitrators, each party could appoint one arbitrator, and the two arbitrators so appointed could appoint the third arbitrator, who would act as the presiding arbitrator. Under sub-section (4), the Chief Justice or any person or institution designated by him could make the appointment, in a case where sub-section (3) has application and where either the party or parties had failed to nominate their arbitrator or arbitrators or the two nominated arbitrators had failed to agree on the presiding arbitrator. In the case of a sole arbitrator, sub-section (5) provides for the Chief Justice or any person or institution designated by him, appointing an arbitrator on a request being made by one of the parties, on fulfilment of the conditions laid down therein. Then comes sub-section (6), which may be quoted hereunder with advantage:

> "11. (6) Where, under an appointment procedure agreed upon by the parties,—
>
> (*a*) a party fails to act as required under that procedure; or
>
> (*b*) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
>
> (*c*) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

> a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

Sub-section (7) gives a finality to the decision rendered by the Chief Justice or the person or institution designated by him when moved under sub-section (4), or sub-section (5), or sub-section (6) of Section 11. Sub-section (8) enjoins the Chief Justice or the person or institution designated by him to keep in mind the qualifications required for an arbitrator by the agreement of the parties, and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Sub-section (9) deals with the power of the Chief Justice of India or a person or institution designated by him to appoint the sole or the third arbitrator in an international commercial arbitration. Sub-section (10) deals with the Chief Justice's power to make a scheme for dealing with matters entrusted to him by sub-section (4) or sub-section (5) or sub-section (6) of Section 11. Sub-section (11) deals with the respective jurisdiction of the Chief Justices of different High Courts who are approached with requests regarding the same dispute and specifies as to who should entertain such a request. Sub-section (12) clause (*a*) clarifies that in relation to international arbitration, the reference in the relevant sub-sections to the "Chief Justice" would mean the "Chief Justice of India". Clause (*b*) indicates that otherwise the expression "Chief Justice" shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Court is situated. "Court" is defined under Section 2(*e*) as the Principal Civil Court of original jurisdiction in a district.

7. Section 12 sets out the grounds of challenge to the person appointed as arbitrator and the duty of an arbitrator appointed, to disclose any disqualification he may have. Sub-section (3) of Section 12 gives a right to the parties to challenge an arbitrator. Section 13 lays down the procedure for such a challenge. Section 14 takes care of the failure of or impossibility for an arbitrator to act and Section 15 deals with the termination of the mandate of the arbitrator and the substitution of another arbitrator. Chapter IV deals with the jurisdiction of Arbitral Tribunals. Section 16 deals with the competence of an Arbitral Tribunal, to rule on its jurisdiction. The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. A person aggrieved by the rejection of his objection by the Tribunal on its jurisdiction or the other matters referred to in that section, has to wait until the award is made to challenge that decision in an appeal against the arbitral award itself in accordance with Section 34 of the Act. But an acceptance of the objection to jurisdiction or authority, could be challenged then and there, under Section 37 of the Act. Section 17 confers powers on the Arbitral Tribunal to make interim orders. Chapter V comprising Sections 18 to 27 deals with the conduct of arbitral proceedings. Chapter VI containing Sections 28 to 33 deals with making of the arbitral award and termination of the proceedings. Chapter VII deals with recourse against an arbitral award. Section 34 contemplates the filing of an application for setting aside an arbitral award by making an application to the Court as defined in Section 2(*e*) of the Act. Chapter VIII deals with finality and enforcement of arbitral awards. Section 35 makes the award final and Section 36 provides for its enforcement under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of court. Chapter IX deals with appeals and Section 37

enumerates the orders that are open to appeal. We have already referred to the right of appeal available under Section 37(2) of the Act, on the Tribunal accepting a plea that it does not have jurisdiction or when the Arbitral Tribunal accepts a plea that it is exceeding the scope of its authority. No second appeal is contemplated, but the right to approach the Supreme Court is saved. Chapter X deals with miscellaneous matters. Section 43 makes the Limitation Act, 1963 applicable to proceedings under the Act as it applies to proceedings in the Court.

8. We will first consider the question, as we see it. On a plain understanding of the relevant provisions of the Act, it is seen that in a case where there is an arbitration agreement, a dispute has arisen and one of the parties had invoked the agreed procedure for appointment of an arbitrator and the other party has not cooperated, the party seeking an arbitration, could approach the Chief Justice of the High Court if it is an internal arbitration or of the Supreme Court if it is an international arbitration to have an arbitrator or Arbitral Tribunal appointed. The Chief Justice, when so requested, could appoint an arbitrator or Arbitral Tribunal depending on the nature of the agreement between the parties and after satisfying himself that the conditions for appointment of an arbitrator under sub-section (6) of Section 11 do exist. The Chief Justice could designate another person or institution to take the necessary measures. The Chief Justice has also to have the qualification of the arbitrators in mind before choosing the arbitrator. An Arbitral Tribunal so constituted, in terms of Section 16 of the Act, has the right to decide whether it has jurisdiction to proceed with the arbitration, whether there was any agreement between the parties and the other matters referred to therein.

9. Normally, any tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the tribunal. Here, sub-section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or institution designated by him in respect of matters falling under sub-sections (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty exist. Therefore, unaided by authorities and going by general principles, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final.

10. The very scheme, if it involves an adjudicatory process, restricts the power of the Chief Justice to designate, by excluding the designation of a non-judicial institution or a non-judicial authority to perform the functions. For, under our dispensation, no judicial or quasi-judicial decision can be rendered by an institution if it is not a judicial authority, court or a quasi-judicial tribunal. This aspect is dealt with later while dealing with the right to designate under Section 11(6) and the scope of that designation.

11. The appointment of an arbitrator against the opposition of one of the parties on the ground that the Chief Justice had no jurisdiction or on the ground that there was no arbitration agreement, or on the ground that there was no dispute subsisting which was capable of being arbitrated upon or that the conditions for exercise of power under Section 11(6) of the Act do not exist or that the qualification contemplated for the arbitrator by the parties cannot be ignored and has to be borne in mind, are all adjudications which affect the rights of parties. It cannot be said that when the Chief Justice decides that he has jurisdiction to proceed with the matter, that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon, he is not adjudicating on the rights of the party which is raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power, gets all the more emphasised, when sub-section (7) designates the order under sub-sections (4), (5) or (6) a "decision" and makes the decision of the Chief Justice final on the matters referred to in that sub-section. Thus, going by the general principles of law and the scheme of Section 11, it is difficult to call the order of the Chief Justice merely an administrative order and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

12. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the

Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case.

Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him.

13. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration, but at the same time it has made some departures from the Model Law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11 of the Act are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. "Court" is defined in the Act to be the Principal Civil Court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The Principal Civil Court of original jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the court concerned would be the District Court. Obviously, Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an Arbitral Tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post-arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of "court" in the Act.

It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on the Chief Justices of the High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the State or in the country concerned. This is to ensure the utmost authority to the process of constituting the Arbitral Tribunal.

14. Normally, when a power is conferred on the highest judicial authority who normally performs judicial functions and is the head of the judiciary of the State or of the country, it is difficult to assume that the power is conferred on the Chief Justice as *persona designata*. Under Section 11(6), the Chief Justice is given a power to designate another to perform the functions under that provision. That power has generally been designated to a Judge of the High Court or of the Supreme Court respectively. *Persona designata*, according to ***Black's Law Dictionary***, means "a person considered as an individual rather than as a member of a class". When the power is conferred on the Chief Justices of the High Courts, the power is conferred on a class and not considering that person as an individual. In ***Central Talkies Ltd.* v. *Dwarka Prasad*** [(1961) 3 SCR 495 : AIR 1961 SC 606] while considering the status in which the power was to be exercised by the District Magistrate under the United Provinces (Temporary) Control of Rent and Eviction Act, 1947 this Court held:

> A *persona designata* is 'a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character'. (See ***Osborne's Concise Law Dictionary***, 4th Edn., p. 253.)
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> In the words of Schwabe, C.J., in ***Kokku Parthasaradhi Naidu Garu* v. *Chintlachervu Koteswara Rao Garu*** AIR 1924 Mad 561
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> *personae designatae* are, 'persons selected to act in their private capacity and not in their capacity as Judges'. The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purposes of the Eviction Act.

In ***Mukri Gopalan* v. *Cheppilat Puthanpurayil Aboobacker*** [(1995) 5 SCC 5], this Court after quoting the above passage from ***Central Talkies Ltd.* v. *Dwarka Prasad*** applied the test to come to the conclusion that when Section 18 of the Kerala Buildings (Lease and Rent Control) Act, 1965 constituted the District Judge as an Appellate Authority under that Act, it was a case where the authority was being conferred on the District Judges who constituted a class and, therefore, the Appellate Authority could not be considered to be persona designata. What can be gathered from ***P. Ramanatha Aiyar's Advanced Law Lexicon***, 3rd Edn., 2005, is that "*persona designata*" is a person selected to act in his private capacity and not in his capacity as a judge. He is a person pointed out or described as an individual as opposed to a

person ascertained as a member of a class or as filling a particular character. It is also seen that one of the tests to be applied is to see whether the person concerned could exercise the power only so long as he holds office or could exercise the power even subsequently. Obviously, on ceasing to be a Chief Justice, the person referred to in Section 11(6) of the Act could not exercise the power. Thus, it is clear that the power is conferred on the Chief Justice under Section 11(6) of the Act not as *persona designata.*

15. Normally a *persona designata* cannot delegate his power to another. Here, the Chief Justice of the High Court or the Chief Justice of India is given the power to designate another to exercise the power conferred on him under Section 11(6) of the Act. If the power is a judicial power, it is obvious that the power could be conferred only on a judicial authority and in this case, logically on another Judge of the High Court or on a Judge of the Supreme Court. It is logical to consider the conferment of the power on the Chief Justice of the High Court and on the Chief Justice of India as Presiding Judges of the High Court and the Supreme Court and the exercise of the power so conferred, is exercise of judicial power/authority as Presiding Judges of the respective courts. Replacing of the word "court" in the Model Law with the expression "Chief Justice" in the Act, appears to be more for excluding the exercise of power by the District Court and by the court as an entity leading to obvious consequences in the matter of the procedure to be followed and the rights of appeal governing the matter. The departure from Article 11 of the Model Law and the use of the expression "Chief Justice" cannot be taken to exclude the theory of its being an adjudication under Section 11 of the Act by a judicial authority.

16. We may at this stage notice the complementary nature of Sections 8 and 11. Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. The expression used in this section is "shall" and this Court in ***P. Anand Gajapathi Raju* v. *P.V.G. Raju*** [(2000) 4 SCC 539] and in ***Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums*** [(2003) 6 SCC 503] has held that the judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. Thus, the judicial authority is entitled to, has to and is bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11 only covers another situation. Where one of the parties has refused to act in terms of the arbitration agreement, the other party moves the Chief Justice under Section 11 of the Act to have an arbitrator appointed and the first party objects, it would be incongruous to hold that the Chief Justice cannot decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question or cannot decide the question, it will lead to an anomalous situation in that a judicial authority under Section 8 can decide, but not a Chief Justice under Section 11, though the nature of the objection is the same and the consequence of accepting the objection in one case and rejecting it in the other, is also the same, namely, sending the parties to arbitration.

The interpretation of Section 11 that we have adopted would not give room for such an anomaly.

17. Section 11(6) does enable the Chief Justice to designate any person or institution to take the necessary measures on an application made under Section 11(6) of the Act. This power to designate recognised in the Chief Justice, has led to an argument that a judicial decision-making is negatived, in taking the necessary measures on an application, under Section 11(6) of the Act. It is pointed out that the Chief Justice may designate even an institution like the Chamber of Commerce or the Institute of Engineers and they are not judicial authorities. Here, we find substance in the argument of Mr F.S. Nariman, learned Senior Counsel that in the context of Section 5 of the Act excluding judicial intervention except as provided in the Act, the designation contemplated is not for the purpose of deciding the preliminary facts justifying the exercise of power to appoint an arbitrator, but only for the purpose of nominating to the Chief Justice a suitable person to be appointed as arbitrator, especially, in the context of Section 11(8) of the Act. One of the objects of conferring power on the highest judicial authority in the State or in the country for constituting the Arbitral Tribunal, is to ensure credibility in the entire arbitration process and looked at from that point of view, it is difficult to accept the contention that the Chief Justice could designate a non-judicial body like the Chamber of Commerce to decide on the existence of an arbitration agreement and so on, which are decisions, normally, judicial or quasi-judicial in nature. Where a Chief Justice designates not a Judge, but another person or an institution to nominate an Arbitral Tribunal, that can be done only after questions as to jurisdiction, existence of the agreement and the like, are decided first by him or his nominee Judge and what is left to be done is only to nominate the members for constituting the Arbitral Tribunal. Looking at the scheme of the Act as a whole and the object with which it was enacted, replacing the Arbitration Act of 1940, it seems to be proper to view the conferment of power on the Chief Justice as the conferment of a judicial power to decide on the existence of the conditions justifying the constitution of an Arbitral Tribunal.

The departure from the UNCITRAL Model regarding the conferment of the power cannot be said to be conclusive or significant in the circumstances. Observations of this Court in paras 389 and 391 in ***Supreme Court Advocates on Record Assn.* v. *Union of India*** [(1993) 4 SCC 441] support the argument that the expression "Chief Justice" is used in the sense of collectivity of Judges of the Supreme Court and the High Courts respectively.

18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as *persona designata*. Therefore, the

fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power.

19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(*e*) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see ***Fair Air Engineers (P) Ltd.*** **v.** ***N.K. Modi*** [(1996) 6 SCC 385)]. When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication [see ***R.M.A.R.A. Adaikappa Chettiar*** **v.** ***R. Chandrasekhara Thevar,*** AIR 1948 PC 12].

20. Section 16 is said to be the recognition of the principle of *Kompetenz-Kompetenz*. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering

upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In ***Konkan Rly***. what is considered is only the fact that under Section 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

21. We will now consider the prior decisions of this Court. In ***Sundaram Finance Ltd.* v. *NEPC India Ltd***. [(1999) 2 SCC 479] this Court held that the provisions of the Act must be interpreted and construed independently of the interpretation placed on the Arbitration Act, 1940 and it will be more relevant to refer to the UNCITRAL Model Law while called upon to interpret the provisions of the Act. This Court further held that under the 1996 Act, appointment of arbitrator(s) is made as per the provisions of Section 11 which does not require the Court to pass a judicial order appointing an arbitrator or arbitrators. It is seen that the question was not discussed as such, since the court in that case was not concerned with the interpretation of Section 11 of the Act. The view as above was quoted with approval in ***Ador Samia (P) Ltd.* v. *Peekay Holdings Ltd*** (1999) 8 SCC 572 and nothing further was said about the question. In other words, the question as to the nature of the order to be passed by the Chief Justice when moved under Section 11(6) of the Act, was not discussed or decided upon.

22. In ***Wellington Associates Ltd.* v. *Kirit Mehta*** (2000) 4 SCC 272 it was contended before the designated Judge that what was relied on by the applicant was not an arbitration clause. The applicant contended that the Chief Justice of India or the designated Judge cannot decide that question and only the arbitrator can decide the question in view of Section 16 of the Act. The designated Judge held that Section 16 did not exclude the jurisdiction of the Chief Justice of India or the designated Judge to decide the question of the existence of an arbitration clause. After considering the relevant aspects, the learned Judge held:

> I am of the view that in cases where — to start with — there is a dispute raised at the stage of the application under Section 11 that there is no arbitration clause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the 'existence' of the arbitration clause cannot be doubted and cannot be said to be excluded by Section 16.

23. Then came ***Konkan Rly. Corpn. Ltd.* v. *Mehul Construction Co***. in which the first question framed was, what was the nature of the order passed by the Chief Justice or his nominee in exercise of his power under Section 11(6) of the Arbitration and Conciliation Act,

1996? After noticing the Statement of Objects and Reasons for the Act and after comparing the language of Section 11 of the Act and the corresponding article of the Model Law, it was stated that the Act has designated the Chief Justice of the High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of an arbitrator, whereas under the Model Law, the said power was vested with the court. When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it was imperative for the Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues left to be raised before the Arbitral Tribunal itself. It was further held that at that stage, it would not be appropriate for the Chief Justice or his nominee, to entertain any contention or decide the same between the parties. It was also held that in view of the conferment of power on the Arbitral Tribunal under Section 16 of the Act, the intention of the legislature and its anxiety to see that the arbitral process is set in motion at the earliest, it will be appropriate for the Chief Justice to appoint an arbitrator without wasting any time or without entertaining any contentious issue by a party objecting to the appointment of an arbitrator. The Court stated: (SCC p. 207, para 4)

> Bearing in mind the purpose of legislation, the language used in Section 11(6) conferring power on the Chief Justice or his nominee to appoint an arbitrator, the curtailment of the powers of the court in the matter of interference, the expanding jurisdiction of the arbitrator in course of the arbitral proceeding, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing an arbitrator by the Chief Justice or his nominee under Section 11(6) has to be decided upon. If it is held that an order under Section 11(6) is a judicial or quasi-judicial order then the said order would be amenable to judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a court of law even against an order of appointment of an arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting the UNCITRAL Model.

24. The Court proceeded to say that if it were to be held that the order passed was purely administrative in nature, that would facilitate the achieving of the object of the Act, namely, quickly setting in motion the process of arbitration. Great emphasis was placed on the conferment of power on the Chief Justice in preference to a court as was obtaining in the Model Law. It was concluded:

> *6*. The nature of the function performed by the Chief Justice being essentially to aid the constitution of the Arbitral Tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order, as has been held by this Court in ***Ador Samia*** case [(1999) 8 SCC 572] and the observations of this Court in ***Sundaram Finance Ltd***. case [(1999) 2 SCC 479] also are quite appropriate and neither of those decisions require any reconsideration.

25. It was thus held that an order passed under Section 11(6) of the Act, by the Chief Justice of the High Court or his nominee, was an administrative order, its purpose being the speedy disposal of commercial disputes and that such an order could not be subjected to judicial review under Article 136 of the Constitution. Even an order refusing to appoint an arbitrator would not be amenable to the jurisdiction of the Supreme Court under Article 136 of the Constitution. A petition under Article 32 of the Constitution was also not maintainable. But, an order refusing to appoint an arbitrator made by the Chief Justice could be challenged before the High Court under Article 226 of the Constitution. What seems to have persuaded this Court was the fact that the Statement of Objects and Reasons of the Act clearly enunciated that the main object of the legislature was to minimise the supervisory role of courts in the arbitral process. Since Section 16 empowers the Arbitral Tribunal to rule on its own jurisdiction including ruling on objections with respect to the existence or validity of an arbitration agreement, a party would have the opportunity to raise his grievance against that decision either immediately or while challenging the award after it was pronounced. Since it was not proper to encourage a party to an arbitration, to frustrate the entire purpose of the Act by adopting dilatory tactics by approaching the court even against the order of appointment of an arbitrator, it was necessary to take the view that the order was administrative in nature. This was all the more so, since the nature of the function performed by the Chief Justice was essentially to aid the constitution of the Arbitral Tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not on the court, it was apparent that the order was an administrative order. With respect, it has to be pointed out that this Court did not discuss or consider the nature of the power that the Chief Justice is called upon to exercise. Merely because the main purpose was the constitution of an Arbitral Tribunal, it could not be taken that the exercise of power is an administrative power. While constituting an Arbitral Tribunal, on the scheme of the Act, the Chief Justice has to consider whether he as the Chief Justice has jurisdiction in relation to the contract, whether there was an arbitration agreement in terms of Section 7 of the Act and whether the person before him with the request, is a party to the arbitration agreement. On coming to a conclusion on these aspects, he has to enquire whether the conditions for exercise of his power under Section 11(6) of the Act exist in the case and only on being satisfied in that behalf, could he appoint an arbitrator or an Arbitral Tribunal on the basis of the request. It is difficult to say that when one of the parties raises an objection that there is no arbitration agreement, raises an objection that the person who has come forward with a request is not a party to the arbitration agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Can he constitute an Arbitral Tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of the power under Section 11(6) of the Act are not fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an Arbitral Tribunal the rights of the parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious

liability for meeting the expenses of the arbitration, even if it be the preliminary expenses and his objection is upheld by the Arbitral Tribunal. Therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an Arbitral Tribunal.

26. It is also somewhat incongruous to permit the order of the Chief Justice under Section 11(6) of the Act being subjected to scrutiny under Article 226 of the Constitution at the hands of another Judge of the High Court. In the absence of any conferment of an appellate power, it may not be possible to say that a certiorari would lie against the decision of the High Court in the very same High Court. Even in the case of an international arbitration, the decision of the Chief Justice of India would be amenable to challenge under Article 226 of the Constitution before a High Court. While construing the scope of the power under Section 11(6), it will not be out of place for the court to bear this aspect in mind, since after all, the courts follow or attempt to follow certain judicial norms and that precludes such challenges.

27. In ***Nimet Resources Inc.*** **v.** ***Essar Steels Ltd***. [(2000) 7 SCC 497] the question of existence or otherwise of an arbitration agreement between the parties was itself held to be referable to the arbitrator since the order proceeded on the basis that the power under Section 11(6) was merely administrative.

28. The correctness of the decision in ***Konkan Rly. Corpn. Ltd.*** **v.** ***Mehul Construction Co***. was doubted in ***Konkan Rly. Corpn. Ltd.*** **v.** ***Rani Construction (P) Ltd*** [(2000) 8 SCC 159]. The reconsideration was recommended on the ground that the Act did not take away the power of the Court to decide preliminary issues notwithstanding the arbitrator's competence to decide such issues including whether particular matters were "excepted matters", or whether an arbitration agreement existed or whether there was a dispute in terms of the agreement. It was noticed that in other countries where UNCITRAL Model was being followed, the court could decide such issues judicially and need not mechanically appoint an arbitrator. There were situations where preliminary issues would have to be decided by the court rather than by the arbitrator. If the order of the Chief Justice or his nominees were to be treated as an administrative one, it could be challenged before the Single Judge of the High Court, then before a Division Bench and then the Supreme Court under Article 136 of the Constitution, a result that would cause further delay in arbitral proceedings, something sought to be prevented by the Act. An order under Section 11 of the Act did not relate to the administrative functions of the Chief Justice of the High Court or of the Chief Justice of India.

29. The reference came up before a Constitution Bench. In ***Konkan Rly. Construction Ltd.*** **v.** ***Rani Construction (P) Ltd***. the Constitution Bench reiterated the view taken in ***Mehul Construction Co.*** case, if we may say so with respect, without really answering the questions posed by the order of reference. It was stated that there is nothing in Section 11 of the Act that requires the party other than the party making the request, to be given notice of the proceedings before the Chief Justice. The Court went on to say that Section 11 did not contemplate a response from the other party. The approach was to say that none of the requirements referred to in Section 11(6) of the Act contemplated or amounted to an adjudication by the Chief Justice while appointing an arbitrator. The scheme framed under the Arbitration Act by the Chief Justice of India was held to be not mandatory. It was stated that the UNCITRAL Model Law was only taken into account and hence the Model Law, or

judgments and literature thereon, was not a guide to the interpretation of the Act and especially of Section 11.

30. With respect, what was the effect of the Chief Justice having to decide his own jurisdiction in a given case was not considered by the Bench. Surely, the question whether the Chief Justice could entertain the application under Section 11(6) of the Act could not be left to the decision of the Arbitral Tribunal constituted by him on entertaining such an application. We also feel that adequate attention was not paid to the requirement of the Chief Justice having to decide that there is an arbitration agreement in terms of Section 7 of the Act before he could exercise his power under Section 11(6) of the Act and its implication. The aspect, whether there was an arbitration agreement, was not merely a jurisdictional fact for commencing the arbitration itself, but it was also a jurisdictional fact for appointing an arbitrator on a motion under Section 11(6) of the Act, was not kept in view. A Chief Justice could appoint an arbitrator in exercise of his power only if there existed an arbitration agreement and without holding that there was an agreement, it would not be open to him to appoint an arbitrator saying that he was appointing an arbitrator since he has been moved in that behalf and the applicant before him asserts that there is an arbitration agreement. Acceptance of such an argument, with great respect, would reduce the high judicial authority entrusted with the power to appoint an arbitrator, an automaton and subservient to the Arbitral Tribunal which he himself brings into existence. Our system of law does not contemplate such a situation.

31. With great respect, it is seen that the Court did not really consider the nature of the rights of the parties involved when the Chief Justice exercised the power of constituting the Arbitral Tribunal. The Court also did not consider whether it was not necessary for the Chief Justice to satisfy himself of the existence of the facts which alone would entitle him or enable him to accede to the request for appointment of an arbitrator and what was the nature of that process by which he came to the conclusion that an Arbitral Tribunal was liable to be constituted. When, for example, a dispute which no more survives as a dispute, was referred to an Arbitral Tribunal or when an Arbitral Tribunal was constituted even in the absence of an arbitration agreement as understood by the Act, how could the rights of the objecting party be said to be not affected, was not considered in that perspective. In other words, the Constitution Bench proceeded on the basis that while exercising power under Section 11(6) of the Act there was nothing for the Chief Justice to decide. With respect, the very question that fell for decision was whether there had to be an adjudication on the preliminary matters involved and when the result had to depend on that adjudication, what was the nature of that adjudication. It is in that context that a reconsideration of the said decision is sought for in this case. The ground of ensuring minimum judicial intervention by itself is not a ground to hold that the power exercised by the Chief Justice is only an administrative function. As pointed out in the order of reference to that Bench, the conclusion that it is only an administrative act is the opening of the gates for an approach to the High Court under Article 226 of the Constitution, for an appeal under the Letters Patent or the High Court Act concerned to a Division Bench and a further appeal to this Court under Article 136 of the Constitution.

32. Moreover, in a case where the objection to jurisdiction or the existence of an arbitration agreement is overruled by the Arbitral Tribunal, the party has to participate in the arbitration proceedings extending over a period of time by incurring substantial expenditure and then to come to the court with an application under Section 34 of the Arbitration Act seeking the setting aside of the award on the ground that there was no arbitration agreement or that there was nothing to be arbitrated upon when the Tribunal was constituted. Though this may avoid intervention by court until the award is pronounced, it does mean considerable expenditure and time spent by the party before the Arbitral Tribunal. On the other hand, if even at the initial stage, the Chief Justice judicially pronounces that he has jurisdiction to appoint an arbitrator, that there is an arbitration agreement between the parties, that there was a live and subsisting dispute for being referred to arbitration and constitutes the Tribunal as envisaged, on being satisfied of the existence of the conditions for the exercise of his power, ensuring that the arbitrator is a qualified arbitrator, that will put an end to a host of disputes between the parties, leaving the party aggrieved with a remedy of approaching this Court under Article 136 of the Constitution. That would give this Court, an opportunity of scrutinising the decision of the Chief Justice on merits and deciding whether it calls for interference in exercise of its plenary power. Once this Court declines to interfere with the adjudication of the Chief Justice to the extent it is made, it becomes final. This reasoning is also supported by sub-section (7) of Section 11, making final, the decision of the Chief Justice on the matters decided by him while constituting the Arbitral Tribunal. This will leave the Arbitral Tribunal to decide the dispute on merits unhampered by preliminary and technical objections. In the long run, especially in the context of the judicial system in our country, this would be more conducive to minimising judicial intervention in matters coming under the Act. This will also avert the situation where even the order of the Chief Justice of India could be challenged before a Single Judge of the High Court invoking Article 226 of the Constitution or before an Arbitral Tribunal, consisting not necessarily of legally trained persons and their coming to a conclusion that their constitution by the Chief Justice was not warranted in the absence of an arbitration agreement or in the absence of a dispute in terms of the agreement.

33. Section 8 of the Arbitration Act, 1940 enabled the court when approached in that behalf to supply an omission. Section 20 of that Act enabled the court to compel the parties to produce the arbitration agreement and then to appoint an arbitrator for adjudicating on the disputes. It may be possible to say that Section 11(6) of the Act combines both the powers. May be, it is more in consonance with Section 8 of the old Act. But to call the power merely as an administrative one, does not appear to be warranted in the context of the relevant provisions of the Act. First of all, the power is conferred not on an administrative authority, but on a judicial authority, the highest judicial authority in the State or in the country. No doubt, such authorities also perform administrative functions. An appointment of an Arbitral Tribunal in terms of Section 11 of the Act, is based on a power derived from a statute and the statute itself prescribes the conditions that should exist for the exercise of that power. In the process of exercise of that power, obviously the parties would have the right of being heard and when the existence of the conditions for the exercise of the power are found on accepting or overruling the contentions of one of the parties it necessarily amounts to an order, judicial in nature, having finality subject to any available judicial challenge as envisaged by the Act or any other statute or the Constitution. Looked at from that point of view also, it seems to be

appropriate to hold that the Chief Justice exercises a judicial power while appointing an arbitrator.

34. In ***Attorney General of the Gambia* v. *Pierre Sarr N'Jie*** [1961 AC 617 : (1961) 2 All ER 504] the question arose whether the power to judge an alleged professional misconduct could be delegated to a Deputy Judge by the Chief Justice who had the power to suspend any Barrister or Solicitor from practising within the jurisdiction of the court. Under Section 7 of the Supreme Court Ordinance of the Gambia, the Deputy Judge could exercise "all the judicial powers of the Judge of the Supreme Court". The question was, whether the taking of disciplinary action for professional misconduct was a judicial power or an administrative power. The Judicial Committee of the Privy Council held that a Judge exercises judicial powers not only when he is deciding suits between the parties but also when he exercises disciplinary powers which are properly appurtenant to the office of a Judge. By way of illustration, Lord Denning stated: (All ER p. 510 C-D)

> "Suppose, for instance, that a Judge, finding that a legal practitioner had been guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see ***Myers* v. *Elman*** [(1939) 4 All ER 484 : 1940 AC 282, per Lord Wright]. That would be an exercise of the judicial powers of the Judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off."

35. The above example gives an indication that it is the nature of the power that is relevant and not the mode of exercise. In ***Shankarlal Aggarwal* v. *Shankarlal Poddar*** [(1964) 1 SCR 717 : AIR 1965 SC 507] this Court was dealing with the question whether the order of the Company Judge confirming a sale was merely an administrative order passed in the course of the administration of the assets of the company under liquidation and, therefore, not a judicial order subject to appeal. This Court held that the order of the Company Judge confirming the sale was not an administrative but a judicial order. Their Lordships stated thus: (SCR pp. 718-19)

> It is not correct to say that every order of the Court, merely for the reason that it is passed in the course of the realisation of the assets of the Company, must always be treated merely as an administrative one. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely an administrative order, for before confirming the sale the Court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realisation.

It is not possible to formulate a definition which would satisfactorily distinguish between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a court is not decisive of the question whether the act or decision is administrative or judicial. An administrative order would be one which is directed to the

regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective consideration, it would be a judicial decision. It has sometimes been said that the essence of a judicial proceeding or of a judicial order is that there would be two parties and a lis between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. No doubt it would not be possible to describe an order passed deciding a lis between the authority that is not a judicial order but it does not follow that the absence of a lis necessarily negatives the order being judicial. Even viewed from this narrow standpoint, it is possible to hold that there was a lis before the Company Judge which he decided by passing the order. On the one hand were the claims of the highest bidder who put forward the contention that he had satisfied the requirements laid down for the acceptance of his bid and was consequently entitled to have the sale in his favour confirmed, particularly so as he was supported in this behalf by the Official Liquidators. On the other hand, there was the first respondent and the large body of unsecured creditors whose interests, even if they were not represented by the first respondent, the court was bound to protect. If the sale of which confirmation was sought was characterised by any deviation from the conditions subject to which the sale was directed to be held or even otherwise was for a gross undervalue in the sense that very much more could reasonably be expected to be obtained if the sale were properly held, in view of the figure of Rs 3,37,000 which had been bid by Nandlal Agarwalla it would be the duty of the court to refuse the confirmation in the interests of the general body of creditors, and this was the submission made by the first respondent. There were thus two points of view presented to the court by two contending parties or interests and the court was called upon to decide between them, and the decision vitally affected the rights of the parties to property. Under the circumstances, the order of the Company Judge was a judicial order and not an administrative one, and was therefore not inherently incapable of being brought up in appeal.

36. Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existence of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the rival parties, is called upon to decide between them and the decision vitally affects the rights of the parties in that, either the claim for appointing an Arbitral Tribunal leading to an award is denied to a party or the claim to have an arbitration proceeding set in motion for entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to the opposite side before appointing an arbitrator.

37. It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an

arbitrator or an Arbitral Tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the party concerned had certified that he had no further claims against the other contracting party. In other words, there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the arbitration clause concerned at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by ***Ridge* v. *Baldwin*** [(1963) 2 All ER 66] are well known. Therefore, to the extent, ***Konkan Rly***. states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable.

38. It is true that finality under Section 11(7) of the Act is attached only to a decision of the Chief Justice on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) of that section. Sub-section (4) deals with the existence of an appointment procedure and the failure of a party to appoint the arbitrator within 30 days from the receipt of a request to do so from the other party or when the two appointed arbitrators fail to agree on the presiding arbitrator within 30 days of their appointment. Sub-section (5) deals with the parties failing to agree in nominating a sole arbitrator within 30 days of the request in that behalf made by one of the parties to the arbitration agreement and sub-section (6) deals with the Chief Justice appointing an arbitrator or an Arbitral Tribunal when the party or the two arbitrators or a person including an institution entrusted with the function, fails to perform the same. The finality, at first blush, could be said to be only on the decision on these matters. But the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the applicant before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the State concerned. Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the requirements of sub-section (4), sub-section (5) or sub-section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator. It is difficult to understand the finality referred to in Section 11(7) as excluding the decision on his competence and the *locus standi* of the party which seeks to invoke his jurisdiction to appoint an arbitrator. Viewed from that angle, the decision on all these aspects rendered by the Chief Justice would attain finality and it is obvious that the decision on these aspects could be taken only after notice to the parties and after hearing them.

39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.

40. An aspect that requires to be considered at this stage is the question whether the Chief Justice of the High Court or the Chief Justice of India can designate a non-judicial body or authority to exercise the power under Section 11(6) of the Act. We have already held that, obviously, the legislature did not want to confer the power on the Court as defined in the Act, namely, the District Court, and wanted to confer the power on the Chief Justices of the High Courts and on the Chief Justice of India. Taking note of Section 5 of the Act and the finality attached by Section 11(7) of the Act to his order and the conclusion we have arrived at that the adjudication is judicial in nature, it is obvious that no person other than a Judge and no non-judicial body can be designated for entertaining an application for appointing an arbitrator under Section 11(6) of the Act or for appointing an arbitrator. In our dispensation, judicial powers are to be exercised by the judicial authorities and not by non-judicial authorities. This scheme cannot be taken to have been given the go-by by the provisions in the Act in the light of what we have discussed earlier. Therefore, what the Chief Justice can do under Section 11(6) of the Act is to seek the help of a non-judicial body to point out a suitable person as an arbitrator in the context of Section 11(8) of the Act and on getting the necessary information, if it is acceptable, to name that person as the arbitrator or the set of persons as the Arbitral Tribunal.

41. Then the question is whether the Chief Justice of the High Court can designate a District Judge to perform the functions under Section 11(6) of the Act. We have seen the definition of "Court" in the Act. We have reasoned that the intention of the legislature was not to entrust the duty of appointing an arbitrator to the District Court. Since the intention of the statute was to entrust the power to the highest judicial authorities in the State and in the country, we have no hesitation in holding that the Chief Justice cannot designate a District

Judge to perform the functions under Section 11(6) of the Act. This restriction on the power of the Chief Justice on designating a District Judge or a non-judicial authority flows from the scheme of the Act.

42. In our dispensation of justice, especially in respect of matters entrusted to the ordinary hierarchy of courts or judicial authorities, the duty would normally be performed by a judicial authority according to the normal procedure of that court or of that authority. When the Chief Justice of the High Court is entrusted with the power, he would be entitled to designate another Judge of the High Court for exercising that power. Similarly, the Chief Justice of India would be in a position to designate another Judge of the Supreme Court to exercise the power under Section 11(6) of the Act. When so entrusted with the right to exercise such a power, the Judge of the High Court and the Judge of the Supreme Court would be exercising the power vested in the Chief Justice of the High Court or in the Chief Justice of India. Therefore, we clarify that the Chief Justice of a High Court can delegate the function under Section 11(6) of the Act to a Judge of that Court and he would actually exercise the power of the Chief Justice conferred under Section 11(6) of the Act. The position would be the same when the Chief Justice of India delegates the power to another Judge of the Supreme Court and he exercises that power as designated by the Chief Justice of India.

43. In this context, it has also to be noticed that there is an ocean of difference between an institution which has no judicial functions and an authority or person who is already exercising judicial power in his capacity as a judicial authority. Therefore, only a Judge of the Supreme Court or a Judge of the High Court could respectively be equated with the Chief Justice of India or the Chief Justice of the High Court while exercising power under Section 11(6) of the Act as designated by the Chief Justice. A non-judicial body or institution cannot be equated with a Judge of the High Court or a Judge of the Supreme Court and it has to be held that the designation contemplated by Section 11(6) of the Act is not a designation to an institution that is incompetent to perform judicial functions. Under our dispensation a non-judicial authority cannot exercise judicial powers.

44. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.

45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

47. We, therefore, sum up our conclusions as follows:

(*i*) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(*ii*) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(*iii*) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(*iv*) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(*v*) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(*vi*) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(*vii*) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(*viii*) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(*ix*) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(*x*) Since all were guided by the decision of this Court in ***Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd***. and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(*xi*) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(*xii*) The decision in ***Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.*** is overruled.

48. The individual appeals will be posted before the appropriate Bench for being disposed of in the light of the principles settled by this decision.

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Citation Infowares Limited **v.** *Equinox Corporation*

2009 (6) SCALE 430

V.S. SIRPURKAR,J. - This is an application under Section 11 (5) of the Arbitration and Conciliation Act, 1996. The applicant M/s Citation Infowares Ltd. is a company registered under the Companies Act carrying on business in United States of America as also in Gurgaon, India through its establishment/subsidiary. The respondent Equinox Corporation is also a company registered within the appropriate laws of United States of America, having its office at 10, Corporate Park, Suit o.130, Irvine, CA-92606, USA. The Equinox Corporation has been carrying on business in India through outsourcing. It is also carrying on business in India through its own establishment in India, Equinox Global Services Private Limited (hereinafter called `EGSPL'). The said EGSPL is a company registered under the Companies Act and has its office in Gurgaon. It is pleaded in the application that the respondent company Equinox Corporation (hereinafter called `EC') had entered into an outsourcing agreement singed in Kolkata, India with the applicant Citation Infowares Ltd (hereinafter called `CIL') on 09.02.2004 wherein the applicant was engaged as a service provider on terms and conditions contained in the agreement. It was agreed in this agreement dated 09.02.2004 that CIL which had bagged orders from its client and since it had sufficient funds, space and existing infrastructure to execute the projects and since it required expert manpower to provide service to its client and further since CIL had approached EC for providing the required number of resources to CIL as against the monthly charges at mutually agreed consideration, EC had agreed to provide resources and, hence, both the parties had, in short, mutually agreed to do the business on certain agreed terms. The terms included that the duration of the agreement was to be for three years. There was a confidentiality clause 10. Following was the clause 10:

> "10. Any dispute between the parties hereto to arising from this Agreement, or from an individual agreement concluded on the basis thereof, shall be finally referred to a mutually agreed Arbitrator."

2. Two more agreements were entered into, they being agreements dated 23.07.2004 and 25.01.2007 in between the parties. It is the claim of the applicant that it created infrastructure for seating capacity of 200 customized seats at Gurgaon address of the respondents and same were being utilized by the respondent. All the three agreements were signed at Kolkata, India and the services were being provided and rendered under the said agreement by the applicant at Gurgaon, India.

3. On this backdrop, by a notice dated 09.01.2008 sent through e-mail, the respondent terminated the agreements dated 25.01.2007 w.e.f. 07.03.2008. According to the applicant, this termination of agreement was illegal and wrongful, causing it huge loss. The applicant assessed the damages to be compensated by the respondent tentatively at US $ 23,49,182. The applicant also pleads that the respondent had also failed to pay the outstanding amount of US $ 6,32,182 payable to the applicant under the contract against the invoice raised by the applicant for the period from July, 2007 to January, 2008. The applicant also claimed on this amount the interest @ 18 % per annum.

4. What is important is the agreement dated 25.01.2007 which has already been referred to. Under the said agreement clause 10.1 provided as under:

> "10.1 Governing law- This agreement shall be governed by and interpreted in accordance with the laws of California, USA and matters of dispute, if any, relating to this agreement or its subject matter shall be referred for arbitration to a mutually agreed Arbitrator."

5. Thus, in between, first agreement dated 09.02.2004 and the subsequent agreement dated 25.01.2007 there was an essential difference that under the last agreement the governing law was to be that of California, USA. However, that clause did provide for arbitration in case of disputes. On the disputes arisen, the applicant invoked arbitration clause by its notice dated 08.02.2008 and further notice dated 09.02.2008 informing the respondent about appointment of Arbitrator and requested the respondent to agree to the said appointment. The respondent did not agree within the period of 30 days provided in Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter called the `Arbitration Act') and, thus, parties have failed to agree to the appointment of sole Arbitrator within the time limit prescribed under that Section necessitating the present application for appointment of an Arbitrator by this Court since this happens to be an international arbitration.

6. There is no dispute between the parties that this is an international arbitration and, therefore, under the Arbitration Act, the Chief Justice or his nominee alone would have the jurisdiction to appoint the Arbitrator. There is also no dispute that there is a live dispute between the parties and there is an Arbitration Clause in case of dispute between the parties.

7. So far so good. However, the question that has arisen is whether this Court would have the jurisdiction, in the present factual scenario and on the backdrop of the fact that the parties vide the aforementioned clause 10.1 had agreed that the governing law would be that of California, USA. According to the applicant, it is only this Court which would have the jurisdiction to appoint the Arbitrator, while according to the respondent this Court does not have the jurisdiction to appoint the Arbitrator as the provisions of the Arbitration Act would necessarily stand excluded in view of the specific language of clause 10.1 of the agreement wherein the governing law would be the law of California, USA.

8. Both the sides have extensively canvassed the rival contentions. Shri S.K. Bagaria, Learned Senior Counsel appearing on behalf of the applicant contended that this question is no more res integra and stands concluded by the judgment of this Court in ***Indtel Technical Services Private Ltd.* v. *W.S. Atkins Rail Limited*** [2008(10) SCC 308]. He further pointed out that the said judgment exclusively place reliance on other judgment of this Court in ***Bhatia International* v. *Bulk Trading S.A.*** [2002 (4) SCC 105]. The Learned Senior Counsel also made a reference to another judgment in ***Venture Global Engineering* v. *Satyam Computer Services Ltd.*** [2008(4) SCC 190]. It was pointed out that in the mentioned decision, the Learned Single Judge (Hon'ble Altamas Kabir, J.) of this Court, while interpreting the clause identically worded as Clause 10.1 came to the conclusion and recorded his findings in para 36 and 37 of that judgment and ultimately held that the provisions of Part I of Arbitration and Conciliation Act, 1996 would be equally applicable to international commercial arbitrations held outside India unless any of the said provisions are excluded by

agreement between the parties expressly or by implication. The Learned Judge also found that this question of the applicability of the Part I of Arbitration and Conciliation Act, 1996 to the international agreements, even where the governing law was to be a foreign law, was concluded by the decision in ***Bhatia International*** **v.** ***Bulk Trading S.A***.

9. As against this, Shri Krishnan Venugopal, Learned Senior Counsel appearing on behalf of the respondent urged from the language of the clause that where the governing law is agreed between the parties, say foreign law, then essentially, the question of appointment of arbitrator also falls in the realm of the said foreign law and not within the realm of Arbitration and Conciliation Act. The Learned Senior Counsel further urged that in the wake of language of Clause 10.1, it was very clear that the agreement was to be governed by and interpreted in accordance with the Laws of California and further in continuation of the earlier words, it was provided that the matters of dispute relating to the agreement or its subject matter, would be referred to arbitration to a mutually agreed arbitrator. The Learned Senior Counsel, therefore, urged that considering the positive language of Clause 10.1, it was clear that the parties had specifically agreed that the matter of appointment of arbitrator would also be governed by the Laws of California. The Learned Senior Counsel urged that, therefore, there was a clear cut agreement between the parties to that effect and as such, as held in ***Bhatia International v. Bulk Trading S.A.***, parties had expressly excluded the provisions of Part I of the Arbitration and Conciliation Act, 1996. The Learned Senior Counsel very heavily relied on the last part of Para 32 of the judgment in case of ***Bhatia International***. The learned Senior Counsel, therefore, urged that even if judgment in case of ***Bhatia International*** was held applicable, it was in fact, liable to be read in favour of the respondent and not the applicant. The Learned Senior Counsel also invited our attention to another judgment of this Court in ***National Thermal Power Corporation*** **v.** ***Singer Company*** [1992 (3) SCC 551] and ***Sumitomo Heavy Industries Limited*** **v.** ***ONGC Limited*** [1998(1) SCC 305]. Apart from these judgments, the Learned Senior Counsel relied on a decision of the House of Lords in ***James Miller & Partners Ltd.*** **v.** ***Whitworth Street Estates Ltd.*** [1970 AC 583] in support of the proposition that where the parties have agreed that the governing law would be a foreign law, normally the question relating to Arbitral Tribunal would also be governed by such foreign law. The other decision relied upon by the Learned Senior Counsel is the decision of Privy Council in ***Bay Hotel and Resort ltd.*** **v.** ***Cavalier Construction Co. Ltd***. [2001 UKPC 34/2001 WL 825663] and the decision of Queen's Bench (Commercial Court) in case of ***ABB Lummus Global Ltd.*** **v.** ***Keppel Fels Ltd.*** [1999(2) Lloyds Law Report 24]. The Learned Senior Counsel also painstakingly took us through the provision of California Code of Civil Procedure and more particularly, in Chapter II and III thereof. Judgments of Bombay High Court and Gujarat High Court were also relied upon.

10. On these conflicting claims, it is to be found as to whether it would be for this Court to appoint the arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996.

11. There can be no dispute that such appointment can be made by this Court only and only if Part I of the Arbitration and Conciliation Act is applicable to the present arbitration proceedings.

12. Shri Bagaria, learned senior counsel appearing on behalf of the petitioner heavily relied on the Bhatia International (cited supra) and pointed out that the law on this subject is

no more *res integra* as it was concluded by the judgment of this Court in ***Indtel Technical Services'*** case Learned counsel pointed out that in the said judgment of ***Indtel Technical Services'*** case, the earlier judgments in ***Bhatia International*** and even ***National Thermal Power Corporation'*** case have been considered. Learned counsel pointed out that the clause of arbitration which fell for consideration was as follows:

> Although the matter has been argued at great length and Mr. Tripathi has tried to establish that the decision of this Court in ***Bhatia International*** case is not relevant for a decision in this case, I am unable to accept such contention in the facts and circumstances of the present case. It is no doubt true that it is fairly well settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The decisions cited by Mr. Tripathi and the views of the jurists referred to in ***NTPC's*** case support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is he fact that in Bhatia International this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996 indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable. (emphasis supplied)

13. Again in paragraph 37 the Court expressed that the decision in Bhatia International's case has been rendered by a Bench of three Judges and governs the scope of application under Section 11, thereby expressing the binding nature of the judgment. It was specifically held that unless language of the provisions of Part I are excluded by agreement between the parties either expressly or by implication, Part I of the Act including Section 11 would be applicable even where the international commercial agreements are governed by the clause of another country. It is not, therefore, necessary to consider the argument of Shri K.K. Venugopal, learned Senior counsel to the effect that the law laid down in ***National Thermal Power Corporation*** case, would govern the field. Even otherwise it is difficult to accept the contention that ***National Thermal Power Corporation*** case can clinch the issue.

14. In paragraph 23 thereof the Court undoubtedly expressed that the proper law of arbitration is normally the same as the proper law of contract and it is only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties. The Court further expressed about the presumption arising that the law of the country where arbitration is agreed to be held is the proper law of arbitration. This presumption was heavily relied on by Shri K.K. Venugopal. In my opinion the scope of the expressions in paragraph 23 must be held to be limited. There may be presumption where the parties have agreed to hold arbitration in a particular country. In that circumstance, the presumption would arise that the law of the country where the arbitration is agreed to be held would apply as a law of contract. Where there has been no specific expression about the law of contract, the situation is otherwise. In this way the law of contract is agreed upon as the Californian law.

15. However, there is no agreement in respect of the law governing the procedure of arbitration. Again in paragraph 25 the Court expressed that the party had the freedom to choose the law governing international agreement of choosing substantive law of arbitration agreement as well as the procedural law governing the conduct of the arbitration. It is then the choice to be exercised by the parties or by implication, except to such situations where there is no express choice of the law governing the contract as a whole or the arbitration agreement in particular. There is, in absence of any contrary intention, a presumption that the parties have intended that the proper law of contract as well as the law governing arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. Here again the stress is on the agreement about the country where the arbitration is agreed to be held and precisely this situation is absent in the present case. Here the substantive law of contract governing the contract is specifically agreed upon. However, the place where arbitration would be held is not to be found in the language of Clause 10.1. Therefore, the situation in National Thermal Power Corporation's case was not applicable to the present case.

16. The Court undoubtedly further goes on to say that where the proper law of contract is expressly chosen by the parties such a law must, in the absence of unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the contract, is nevertheless a part of the contract. It is this expression which has been heavily relied upon by the learned senior counsel for the respondent.

17. However, in ***Bhatia International***, duly considered in ***Indtel Technical Services'*** case is apart from the fact that the provisions of the Arbitration and Conciliation Act, 1996 were not applicable either in Singer's case or even in ***Sumitomo Heavy Industries'*** case. The issue regarding the applicability of Part I of the 1996 Act to international commercial arbitration also did not fall for consideration in these cases. It may be that the Arbitrator might be required to take into account the applicable laws which may be the foreign laws but that does not effect the jurisdiction under Section 11 which falls for Part I which has been specifically held applicable in ***Bhatia International***.

18. The learned Judge, deciding the ***Indtel Technical Services*** case also has taken into consideration this aspect and has expressed in Paragraph 36 as follows:

> The decisions cited by Mr. Tripathi and the views of the jurists referred to in ***NTPC*** case support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is he fact that in Bhatia International this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996 indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable.

19. The situation therefore is identical in the present matter. Shri K.K. Venugopal, however, contended that if the parties intended specifically in this case that the law governing

the contract was Californian law, as expressed in ***Bhatia International*** as well as in ***Indtel Technical Services***' case, an implied exclusion of Part I should be presumed. I am afraid it is not possible to read such an implied exclusion.

20. Seen the striking similarity between Clause 10.1 and Clauses 13.1 and 13.2 which have been quoted above and further the view expressed by learned Judge in ***Indtel Technical Services'*** case regarding the exclusion, it is only possible to read even distantly such an implied exclusion of Part I. It cannot be forgotten that one of the contracting parties is the Indian party. The obligations under the contract were to be completed in India. Further considering the nature of the contract, it is difficult to read any such implied exclusion of Part I in the language of Clause 10.1. That argument of learned senior counsel for the respondent therefore must be rejected.

21. Learned senior counsel for the respondent invited attention of this Court to paragraphs 32 and 34 of ***Bhatia International*** and again reiterated that the implied exclusion must be read in the language of Clause 10.1. I have already however, held that considering the various factors, such exclusion cannot be read and, therefore, ***Bhatia International*** will have to be held applicable.

22. Identical view has been taken even in Venture Global Engineering's case (cited supra) where the Court took the view that even the foreign award could be challenged under Section 34 of the Act. This is a judgment by Two Judges Bench. The observations made in paragraphs 31, 35 and 37 are extremely apposite and binding. The comments against this judgment that it does not consider the question of implied exclusion would be of no consequence in view of the findings which have earlier been referred to. In the present matter it cannot be said that there was any implied exclusion of the provisions of Part I. The law laid down, therefore, is clearly binding.

23. Similarly the language of Clause 10.1, it is suggested was expressly agreed between the parties that the procedural law would be that of California. The suggestion given by the learned senior counsel for the respondent that since the provision about the arbitration is included in the same sentence the intention must be presumed that the parties intended only the Californian law even to govern the procedure. As I have said, that by itself it cannot be the way to read the said Cause as the decision in Bhatia International (cited supra) was available on the date when the agreement was signed.

24. This means that the contentions raised based on the three foreign cases by Shri K.K. Venugopal ***James Miller & Partners'*** case, ***Bay Hotel and Resort'*** case and ***ABB Lummus Global's*** case need not be considered in view of the binding nature of the three aforementioned decisions in ***Bhatia International***, ***Venture Global Engineering's*** case and ***Indtel Technical Services'*** case. However, since those cases are actively relied upon the same are considered as follows.

25. In the first mentioned case, the question was as to the applicable law of contract and not the applicable law of arbitration where the parties had specifically agreed on the law of contract. The factual situation was, therefore, different. The relied on observations at page 616 of the decision are more in the nature of obiter.

26. In so far as the Bay Hotel and Resort' case (cited supra) is concerned the reliance is placed on paragraph 35 of the said decision to the following effect:

> "Two points in the speech of Lord Wilberforce are notable here. First, he said that in the normal case where the contract itself is governed by English law, any arbitration would be held under English procedure. Secondly, he said that the mere fact that the arbitrator was to set either partly or exclusively in another part of the United Kingdom, or, for that matter, abroad, would not lead to a different result; the place might be chosen for many reasons of convenience or be purely accidental; a choice so made should not affect the parties' rights. The passage in his speech is at page 616 of the report."

These observations apply to the normal case which is not a case here.

27. As regards the third decision in ***ABB Lummus Global*** case the relied upon passage again does not clinch the issue. What is stated there is that where the parties chose the curial law of arbitration they would be taken to chose the place and sitting of arbitration. In my opinion the observations are not apposite to the present controversy.

28. In the result the application must succeed. Accordingly, I appoint Hon'ble Mr. Justice R.C.Lahoti (Ex.CJI) as the sole Arbitrator to arbitrate upon the disputes which have arisen between the parties hereto as set out in the present application. The sole Arbitrator would be entitled to decide upon the procedure to be followed in the arbitration proceedings, sittings of the proceedings as also to settle his fees in respect thereof. However, the law governing the contract would be the Californian Law.

* * * * *

Krishna Bhagya Jala Nigam Ltd. **v.** *G. Harischandra Reddy*

(2007) 2 SCC 720

S.H. KAPADIA, J. - 2. Two issues arise for determination in this civil appeal filed by Krishna Bhagya Jala Nigam Ltd. ("Jala Nigam") against the decision of the Division Bench of the Karnataka High Court dated 28-1-2005 in Miscellaneous First Appeal No. 1785 of 2002 dismissing the said appeal preferred by Jala Nigam under Section 37(1)(*b*) of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act").

3. The first issue is: whether Jala Nigam could be allowed to raise the contention, on the facts and circumstances of this case, that clause 29 of the contract (agreement) is not an arbitration clause and due to want of jurisdiction of the Arbitral Tribunal to adjudicate upon the claims made by the contractor (Respondent 1), award dated 25-6-2000 published on 14-11-2000 was a nullity.

4. The second issue is regarding the merits of the claims made by the contractor.

5. The facts giving rise to the above civil appeal are as follows:

On 27-11-1993 agreement bearing No. 41/93 was entered into between Jala Nigam and the claimant (Respondent 1) concerning construction of Mulawad Lift Irrigation Scheme. The contract was for 36 months. It was to be completed by 26-11-1996. In the course of execution of the contract, Jala Nigam entrusted to the contractor, certain extra work vide two supplementary agreements dated 11-6-1996 and 7-11-1998. The contract was extended up to 31-12-2003. The claimant (contractor) raised disputes, said to have arisen out of the works entrusted under the contract. By letter dated 23-3-1998 the contractor called upon the Chief Engineer to act as an arbitrator under clause 29 of the contract which is reproduced hereinbelow:

> "Clause 29(*a*) If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/Superintending Engineer and the contractor regarding the following matters namely:
>
> (*i*) the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned,
>
> (*ii*) the quality of workmanship or materials used on the work, and
>
> (*iii*) any other question, claim, right, matter, thing whatsoever, in any way arising out of or relating to the contract, designs, or those conditions or failure to execute the same whether arising during the progress of the work or after the completion, termination or abandonment thereof the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the contractor to do so, give written notice of his decision to the contractor.
>
> (*b*) Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the contractor. The said decision shall forthwith be given effect to and the contractor shall proceed with the execution of the work with all due diligence.

(*c*) In case the decision of the Chief Engineer is not acceptable to the contractor, he may approach the law courts at ….(*) for settlement of dispute after giving due written notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of this written notice of the decision of the Chief Engineer.

(*d*) If the Chief Engineer has given written notice of his decision to the contractor and no written notice to approach the law court has been communicated to him by the contractor within a period of ninety days from receipt of such notice, the decision shall be final and binding upon the contractor."

6. By letter dated 26-3-1998 the Chief Engineer refused to act as an arbitrator on the ground that the contract did not provide for arbitration. This led the contractor to file CMP No. 26 of 1999 under Section 11 of the Arbitration Act. By order dated 10-9-1999 the High Court directed the Chief Engineer to act as an arbitrator. By the said order the High Court directed both the parties to file their respective claims and counterclaims before the arbitrator. By letter dated 12-11-1999 the arbitrator entered upon the reference. He fixed the date of appearance of the parties. The arbitrator gave necessary directions to both sides to file statements and counter-statements. The contractor placed before the arbitrator, 11 claims in all. Jala Nigam filed its counter-statement. Ultimately, on the basis of the evidence produced by the parties, the arbitrator gave his award on 25-6-2000 and the same was published on 14-11-2000.

7. Aggrieved by the award, Jala Nigam filed a petition under Section 34(2)(*v*) of the Arbitration Act before the Principal Civil Judge (Senior Division), Bijapur vide Arbitration Case No. 1 of 2001. The award was confirmed by the said civil court vide judgment dated 15-12-2001. Aggrieved by the said decision, Jala Nigam carried the matter in first appeal filed under Section 37(1)(*b*) of the Arbitration Act to the High Court. Vide impugned judgment dated 28-1-2005 the appeal stood dismissed. Hence this civil appeal.

8. Mr C.S. Vaidyanathan, learned Senior Counsel for Jala Nigam, contended that the abovequoted clause 29 of the contract was not an arbitration clause and, therefore, the proceedings before the arbitrator stood vitiated for lack of jurisdiction. He contended that the proceedings before the arbitrator were without jurisdiction for want of arbitration agreement which cannot be cured by appearance of the parties, even if there was no protest or even if there was a consent of Jala Nigam, since consent cannot confer jurisdiction and, therefore, the impugned award was null and void. Learned counsel submitted that though the plea of "no arbitration clause" was not raised in the counter-statement before the arbitrator, such a plea was taken by Jala Nigam in CMP No. 26 of 1999 filed by the contractor and, therefore, Jala Nigam was entitled to raise the plea of "no arbitration clause". Learned counsel submitted that under the circumstances the courts below had erred in holding that Jala Nigam had waived its right to object to the award on the aforementioned grounds.

9. We do not find any merit in the above arguments. The plea of "no arbitration clause" was not raised in the written statement filed by Jala Nigam before the arbitrator. The said plea was not advanced before the civil court in Arbitration Case No. 1 of 2001. On the contrary, both the courts below on facts have found that Jala Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jala Nigam had participated in the arbitration proceedings. It submitted itself to the authority of the arbitrator. It gave consent to the appointment of the

Chief Engineer as an arbitrator. It filed its written statements to the additional claims made by the contractor. The Executive Engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the Arbitral Tribunal. He did not call upon the Arbitral Tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the Arbitral Tribunal. It also filed written arguments. It did not challenge the order of the High Court dated 10-9-1999 passed in CMP No. 26 of 1999. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now be allowed to contend that clause 29 of the contract did not constitute an arbitration agreement.

10. Before concluding on this issue, one clarification needs to be mentioned. On 26-7-2005 a three-Judge Bench of this Court has referred the question involving interpretation of clause 29 of the contract to the Constitution Bench in ***P. Dasaratharama Reddy Complex* v. *Govt. of Karnataka*** [CA No. 1586 of 2004, decided on 26.7.2005]. Placing reliance on the said order, learned counsel for Jala Nigam submitted that the hearing of this civil appeal be postponed pending disposal of the above reference by the Constitution Bench. We do not find any merit in this argument. As stated above, the plea that clause 29 of the contract was not an arbitration clause, was raised in the present case for the first time only in Miscellaneous First Appeal No. 1785 of 2002 filed under Section 37(1)(*b*) of the Arbitration Act before the High Court. As stated above, Jala Nigam, on the contrary, had consented to the Chief Engineer, acting as an arbitrator. For the aforestated reasons and particularly in view of the fact that there has been considerable delay in the litigation no useful purpose would be served in keeping the matter pending in this Court awaiting the decision of the Constitution Bench. Therefore, on the facts and circumstances of this case and in view of the conduct of the parties, we hold that Jala Nigam cannot be allowed to urge that clause 29 of the contract is not an arbitration clause.

11. On the merits of the claims made by the contractor we find from the impugned award dated 25-6-2000 that it contains several heads. The arbitrator has meticulously examined the claims of the contractor under each separate head. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the award. Here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the *pendente lite* period and future interest be reduced to 9%.

12. As far as idling charges are concerned, the arbitrator has awarded Rs 42,000 per day for the period 1-2-1994 to 17-12-1994 and from 1-6-1995 to 31-12-1995 excluding the period 18-12-1994 to 31-5-1995 and from 1-1-1996 to 12-11-1996. On this basis the idling charges awarded by the arbitrator was arrived at Rs. 1.47 crores. It is contended that the contractor has not led any evidence to show the existence of the machinery at site and, therefore, he was not entitled to idling charges. We are of the view that the award of the arbitrator is fair and equitable. He has excluded certain periods from calculations, as indicated above. We have examined the records. The delay took place on account of non-supply of drawings and designs and in the meantime the establishment of the contractor stood standstill. We

suggested to the learned counsel for the respondent (contractor) for reduction of the awarded amount under this head from Rs 1.47 crores to Rs 1 crore. Learned counsel for the respondent fairly accepted our suggestion. We suggested the aforestated figure keeping in mind the long-standing dispute between the parties. Therefore, the amount awarded under this head shall stand reduced from Rs 1.47 crores to Rs 1 crore.

13**.** Accordingly, the civil appeal stands allowed to the extent indicated above with no order as to costs.

* * * * *

Union of India **v.** *Popular Construction Co.*

(2001) 8 SCC 470

RUMA PAL, J. - 2. The question which arises for determination in this case is whether the provisions of Section 5 of the Limitation Act, 1963 are applicable to an application challenging an award, under Section 34 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act").

3. The award in this case was made by the arbitrator on 29-8-1998. Under the impression that the Arbitration Act, 1940 applied, the arbitrator forwarded the original award to the appellant with a request to file the award in the High Court of Bombay so that a decree could be passed in terms of the award under the provisions of the Arbitration Act, 1940. The award was accordingly filed by the appellant in the Bombay High Court on 29-3-1999. The appellant filed an application challenging the award on 19-4-1999 under Section 30 read with Section 16 of the Arbitration Act, 1940. Subsequently, the application was amended by inserting the words "Arbitration and Conciliation Act, 1996" in place of "Arbitration Act, 1940". The application was dismissed by the learned Single Judge on 26-10-1999 on the ground that it was barred by limitation under Section 34 of the 1996 Act. The Division Bench rejected the appeal and upheld the findings of the learned Single Judge.

4. Before us, the appellant has not disputed the position that if the Limitation Act, 1963 and in particular Section 5, did not apply to Section 34 of the 1996 Act, then its objection to the award was time-barred and the appeal would have to be dismissed. The submission, however, is that Section 29(2) of the Limitation Act makes the provisions of Section 5 of the Limitation Act applicable to special laws like the 1996 Act since the 1996 Act itself did not expressly exclude its applicability and that there was sufficient cause for the delay in filing the application under Section 34. Counsel for the respondent, on the other hand, has submitted that the language of Section 34 plainly read, expressly excluded the operation of Section 5 of the Limitation Act and that there was as such no scope for assessing the sufficiency of the cause for the delay beyond the period prescribed in the proviso to Section 34.

5. The issue will have to be resolved with reference to the language used in Section 29(2) of the Limitation Act, 1963 and Section 34 of the 1996 Act. Section 29(2) provides that:

> "29. (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."

6. On an analysis of the section, it is clear that the provisions of Sections 4 to 24 will apply when:

(*i*) there is a special or local law which prescribes a different period of limitation for any suit, appeal or application; and

(*ii*) the special or local law does not expressly exclude those sections.

7**.** There is no dispute that the 1996 Act is a "special law" and that Section 34 provides for a period of limitation different from that prescribed under the Limitation Act. The question then is - is such exclusion expressed in Section 34 of the 1996 Act? The relevant extract of Section 34 reads:

> "**34.** ***Application for setting aside arbitral award***.—(1)-(2) * * *
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:
>
> Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

8**.** Had the proviso to Section 34 merely provided for a period within which the court could exercise its discretion, that would not have been sufficient to exclude Sections 4 to 24 of the Limitation Act because "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5" **Mange Ram v.** ***MCD*** [(1976) 1 SCC 392].

9**.** That was precisely why in construing Section 116-A of the Representation of the People Act, 1951, the Constitution Bench in ***Vidyacharan Shukla*** **v.** ***Khubchand Baghel*** AIR 1964 SC 1099 rejected the argument that Section 5 of the Limitation Act had been excluded: (AIR p. 1112, para 27)

> "*27*. It was then said that Section 116-A of the Act provided an exhaustive and exclusive code of limitation for the purpose of appeals against orders of tribunals and reliance is placed on the proviso to sub-section (3) of that section, which reads:
>
> 'Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the Tribunal under Section 98 or Section 99:
>
> Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.'

The contention is that sub-section (3) of Section 116-A of the Act not only provides a period of limitation for such an appeal, but also the circumstances under which the delay can be excused, indicating thereby that the general provisions of the Limitation Act are excluded. There are two answers to this argument. Firstly, Section 29(2)(*a*) of the Limitation Act speaks of express exclusion but there is no express exclusion in sub-section (3) of Section 116-A of the Act; secondly, the proviso from which an implied exclusion is sought to be drawn does not lead to any such necessary implication."

10**.** This decision recognises that it is not essential for the special or local law to, in terms, exclude the provisions of the Limitation Act. It is sufficient if on a consideration of the language of its provisions relating to limitation, the intention to exclude can be necessarily implied. As has been said in ***Hukumdev Narain Yadav*** **v.** ***Lalit Narain Mishra*** [(1974) 2 SCC 133:

> "If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act."

11. Thus, where the legislature prescribed a special limitation for the purpose of the appeal and the period of limitation of 60 days was to be computed after taking the aid of Sections 4, 5 and 12 of the Limitation Act, the specific inclusion of these sections meant that to that extent only the provisions of the Limitation Act stood extended and the applicability of the other provisions, by necessary implication stood excluded. [***P.N. Marghabhai* v. *D. Gilbhibhai*** [(1992) 4 SCC 214]

12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, "express exclusion" may follow from the scheme and object of the special or local law:

> "[E]ven in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process" This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

> "**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."

15. The "Part" referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act.

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an

arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

> "where the time for making an application to set aside the arbitral award under Section 34 has expired … 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".

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act.

17. The appellant then sought to rely on a decision of this Court in ***Union of India* v. *Hanuman Prasad & Bros*** [(2001) 8 SCC 476] to which one of us (Ruma Pal, J.) was a party. It is contended that the decision is an authority for the proposition that Section 5 of the Limitation Act applied to objections to an award under the 1996 Act. It is true that in the body of that judgment, there is a reference to the 1996 Act. But that is an apparent error as the reasoning clearly indicates that the provisions of Section 30 of the Arbitration Act, 1940 and not Section 34 of the 1996 Act were under consideration. In order to clarify the position, we have scrutinised the original record of ***Hanuman Prasad & Bros*** decided on 6-3-2000. We have found that that was indeed a case which dealt with an award passed and challenged under the Arbitration Act, 1940. No question was raised with regard to the applicability of the Limitation Act to the 1940 Act. The only issue was whether the High Court should have refused to condone the delay of 2 months and 22 days in filing the objection to the award. This Court found that sufficient cause had been shown to condone the delay and accordingly set aside the decision of the High Court. This decision is as such irrelevant.

18. In the circumstances and for the reasons earlier stated we answer the question posed at the outset in the negative. The appeal is accordingly dismissed without any order as to costs.

* * * * *

Union of India v. *G.S. Atwal & Co.*

AIR 1996 SC 2965

K. RAMASWAMY, J.- 1. This appeal by special leave arises from the judgment and order dated February 12, 1992 of the Division Bench of the Calcutta High Court in F.M.A.T. No. 1390 of 1991. The respondent had entered into an agreement in 1968-69 for excavation of Feeder canal from RD.68.00 to RD.97.00. During the course of the execution of the work certain disputes had arisen between the respondent and the appellant. The disputes were referred from time to time to arbitration. This is the 5th arbitration in the instalment. Details of previous four arbitrations are as under:

S. No.	Name of the Arbitrator	Award Rs.	Interest Rs.	Amount Rs.
1.	R.P. Ahuja	4,70,000.00	78,129.45	5,48,129.45
2.	O.P. Gupta	7,00,974.00	7,604.96	7,08,578.96
3.	T. Rajaram	23,78,100.00	23,34,501.00	47,12,601.60
4.	Brig. D.R. Kathuria	78,90570.00	38,40,653.88	1,17,31223.00

2. The dispute as regards hire charges of equipment loan by Farakka Barage Project was referred to Goyal Committee for rationalisation. On submission of its report and in furtherance thereof the respondent by letter dated August 8, 1984 had claimed for reference to the arbitration thus:

> And whereas M/s. Tarapore & CO. having long back been refunded the excess hire charges recovered earlier, but having became refundable on the basis of said Goyal Committee Report, in our case the excess recovered amount and now refunded to us despite repeated, written as well as oral requests and *demands in this respect.*

3. In furtherance thereof, by proceedings dated November 18, 1984, the General Manger, Farakka Barrage project appointed T. Raja Ram as the sole arbitrator to settle the disputes. After entering into the reference on December 12, 1984, admittedly the respondent laid claim for the refund of hire charges which was disputed by counter-statement by the appellant. Later the respondent laid further claims on March 6, 1985 for Rs. l,68,000/- towards repairs on departmental equipments; Rs. 1,38,600/-towards refund of expenses on security watch and ward; Rs.28,12,085.33 towards final bill of the firm; Rs.95,60,653.10 towards part interest and the amount of claim in addition to the refund of hire charges was Rs,32,45,538.27. The appellant in its statement had objected to unilateral enlargement of the reference. The arbitrator awarded by a non-speaking award dated August 18, 1987, a sum of Rs.35,72,750/- with interest at 15% per annum from July 1, 1976 or the date of the payment of decree whichever was earlier.

4. The appellant filed Misc. Case No. 95/87 on April 8, 1988 under Section 30(c) of the Arbitration Act, 1940 questioned the award contending that the claim was barred by limitation; the arbitrator had no power to enlarge the scope of the arbitration and he had no power to award interest at higher rate without any claim before it. The Assistant District Judge, Murshidabad by his order dated January 19, 1991 set aside the award upholding these contentions. On appeal, in the impugned order the High Court set aside the order of the civil Court holding that there was no error apparent on the face of the award warranting setting

aside of the award. It directed the civil Court to take steps for passing a decree in terms of the award as expeditiously as possible not later than four months. Thus this appeal by special leave.

5. Since Shri Goswami, learned senior counsel appearing for the appellant has not pressed the bar of limitation for our consideration, it is unnecessary for us to go into that question. Only two questions have been canvassed, viz., the power of the arbitrator to unilaterally enlarge the scope of the reference and the power to award the amount in a non-speaking award and the rate of interest. The question, therefore, is: whether the arbitrator has jurisdiction and power to unilaterally enlarge the reference? As extracted above, the specific demand and acceptance by the Manager of Farakka Barage project Was to refer the dispute of refund of hire charges pursuant to the report of the Goyal committee. That was acceded to and reference to T. Raja Ram was made for arbitration on November 18, 1984 and claim in that behalf was duly made. On March 6, 1985 claims were laid by the respondent for arbitration. They were objected to by the respondent. The question emerges: whether the arbitrator has power to unilaterally enlarge the reference and adjudicate the claims? It is seen that impugned award is a non-speaking award. Shri Soli J. Sorabjee, learned senior counsel for the respondent contended that the appellant having participated before the arbitrator and had an award unfavourable to them, could not question invalidity thereafter. The appellant had participated in the proceedings before the arbitrator with full knowledge of these facts. The conduct on the part of the appellant amounts to acquiescence to the power and jurisdiction of the arbitrator to make the award. Thereby the plea of lack of jurisdiction cannot be permitted to be raised by the unsuccessful party to the arbitration.

6. To constitute an arbitration agreement, there must be an agreement that is to say the parties must be ad idem. Arbitrability of a claim depends upon the dispute between the parties and the reference to the arbitrator. On appointment, he enters upon that dispute for adjudication. The finding of the arbitrator on the arbitrability of the claim is not conclusive, as under Section 33 ultimately it is the court that decides the controversy. In ***U.P. Rajkiya Nirman Nigant Ltd.*** **v.** ***Indure Pvt. Ltd.*** decided on February 9, 1996, a three-Judge Bench of this Court [to which one of us, K. Ramaswamy, J., was a member] was to consider the question whether the arbitrator had jurisdiction to decide the arbitrability of the claim itself. In that context, the question arose: whether there was an arbitration agreement for reference to the arbitrator? It was held that the arbitrability of the controversy of the claim being a jurisdictional issue, the arbitrator cannot cloth (sic) himself with jurisdiction to conclusively decide, whether or not he had power to decide his own jurisdiction. Relying upon the passage in "Russel on Arbitration" [19th Edn.] at page 99, this Court had held that it can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. The arbitrator had no power to decide his own jurisdiction. The arbitrator is always entitled to inquire whether or not he has jurisdiction to decide the dispute. He can refuse to deal with the matter at all and leave the parties to go to the court if he comes to the conclusion that he has no power to deal with the matter; or he can consider the matter and if he forms the view that the contract upon which the claimant is relying on and from which, if established, he alone has jurisdiction, he can proceed to decide the dispute accordingly. Whether or not the arbitrator has jurisdiction and whether the matter is referred

to or is within the ambit of clause for reference of any difference or dispute which may arise between the parties, it is for the court to decide it. The arbitrator by a wrong decision cannot enlarge the scope of the submission. It is for the court to decide finally the arbitrability of the claim in dispute or any clause or a matter or a thing contained therein or the construction thereof. It was, therefore, held that "arbitrators cannot cloth (sic)themselves . with jurisdiction to decide conclusively the arbitrability of the dispute." "It is for the court under Section 33 or on appeal thereon to decide it finally". There is no estoppel to challenge the action and to seek a declaration under Section 33. It was further held that "mere acceptance or acquiescence to the jurisdiction of the arbitrator for adjudication of the dispute as to the extent of the arbitration agreement or arbitrability of the dispute does not disentitle the appellant to have the remedy under Section 33 through the court." The remedy under Section 33 is "the only right royal way for deciding the controversy."

7. In Law of Arbitration by Justice Bachawat [2nd (1987) Ed.] at page 90 it is stated that jurisdiction of the arbitrator is solely derived from the arbitration agreement. The arbitrator has jurisdiction to deal only with matters which on a fair construction of the terms of the contract the parties agreed to refer to him. Whether or not the arbitrator acts within the jurisdiction depends solely upon the clause of reference. The court may grant a declaration that the party appointed by the defendants as the arbitrator has no jurisdiction. The submission furnishes the source and prescribes the limit of the arbitrators' authority. The arbitrator take upon himself an authority which the submission does not confer on him. The award must in substance and form conform to the submission. It must comply in point of form to the directions contained in the submission. If the award determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred, the award is invalid. It may be remitted to the arbitrator for reconsideration under Section 18 and if the arbitrator acts in excess of authority, the award should be set aside.

8. In ***N. Chellappan*** **v.** ***Secretary, Kerala State Electricity Board*** [(1975)1 SCC 289], the facts therein were that the arbitrators nominated an umpire. The arbitrators did not make the award within the time limit which ultimately expired. Thereupon the appellant had invoked the jurisdiction of the civil Court to revoke the authority of the arbitrator under Sections 5 and 11 of the Act. An application was made to appoint 'K' to enter upon the reference as an umpire and to proceed with the arbitration. Another application was made to appoint 'K' as the sole arbitrator in place of two arbitrators. The court revoked the authority of the arbitrators and directed the umpire to enter upon the dispute in his capacity as an umpire and allowed the application of the appellant to appoint 'K' as the sole arbitrator. The umpire entered upon the reference in his capacity as an umpire. The party submitted to his jurisdiction, conducted the proceedings and when the award went against the respondent-Board umpire's jurisdiction was challenged. On those facts a three-Judge Bench of this Court had held that when the respondent-Board acquiesced to the jurisdiction of the umpire as the sole arbitrator, the Board was, by acquiescence, precluded from challenging the jurisdiction of the umpire. When the party consented to the appointment and took part in the proceedings with full knowledge of the relevant fact of appointment as the sole arbitrator it amounted to acquiescence. Same is the ratio in ***M/s. Neelakantan & Bros. Construction*** **v.** ***Superintending Engineer, National***

Highways, Salem [(1988) 4 SCC 462] wherein a two-Judge Bench of this Court held that if the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence. The rest of the decisions are not directly on the point. Therefore, it is not necessary to burden the judgment with reference to those cases.

9. It would thus be seen that appointment of an arbitrator is founded upon the agreement between the parties. Once on his appointment either by consensus or by an order of the court, the parties put forth their claim and participate in the proceedings, the parties acquiesce to the appointment of arbitrator and the award made thereon binds the parties. The party who has suffered, the award is precluded from questioning the power and jurisdiction of the arbitrator to make the award. The reason being that the parties have by contract consented to the forum to adjudicate their dispute and to give a decision, by a non-speaking or speaking award in terms of the agreement. This principle is inapplicable to the jurisdiction of the arbitrator to unilaterally enlarge his own power to arbitrate any of the disputes. It is seen that by express agreement between the parties, arbitrability of the claim, for refund of the hire charges was referred to arbitration and T. Raja Ram came to be appointed as arbitrator and entered upon that reference. But when claim was made, he enlarged the dispute unilaterally without there being any agreement by the appellant. In fact they objected to the enlargement of the scope of the arbitration. Since arbitrator went on adjudicating the disputes, they were left with no option but to participate in the proceedings as the claims were pressed for and parties submitted to the jurisdiction of the arbitrator. Therefore, it did not amount to acquiescence. The jurisdiction of the arbitrator is founded upon the agreement between the parties. To the extent of the agreement, the parties are bound by the decision of the arbitrator. But the arbitrator cannot enlarge the scope of his arbitration and make in a non-speaking award, a lump sum amount of, all claims, after enlarging his jurisdiction on non-accepted or objected claims. In Champsey Bhara Company case [supra] Lord Dunedin, speaking for the Privy Council had held that "(T)he question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of the reference. It is, therefore, for the Court to decide.... whether the dispute which has arisen is a dispute covered by Clause 13 of the Articles". In ***Gobardhan Das*** **v.** ***Lachmi Ram*** [AIR 1954 SC 689], this Court held that so long as the arbitrator acts within the scope of his authority there is no doubt that the decision must be accepted as valid and binding on the parties. In that case, the agreement entered into between the parties read as under:

> that the arbitrators should sit together, take down the statements of the parties, hear and consider the arguments brought forward by the parties, inspect the documents of all descriptions and take other evidence and evidence of witnesses and whatever award they shall give, is and shall be, acceptable to the parties and whatever award the arbitrators may give unanimously or by majority of votes shall be treated as true and correct and valid in every court and shall be binding upon all of us executants parties.

10. The arbitrators went out of their way to declare that whatever amount in addition to Rs.3,500/- was found due from respondent No. 1 upon the bahikhata account was remitted having regard to his labour and poverty and the whole unspecified amount found due against respondent No. 2 was remitted in full in view of his labour and poverty. It was contended that the award was decided outside the authority of the arbitrators. It was held that the arbitrators had clearly misdirected themselves and had exceeded the scope of their authority and the award was, therefore set aside.

11. Thereby, the arbitrator had misdirected himself and committed legal misconduct in making the award vitiating the entire award itself. It is difficult to decide as to what extent each of the claims was accepted or rejected. In that view, it is not necessary to go into the second question of the power of the arbitrator to award interest or excess rate of interest.

12. The appeal is accordingly allowed. The order and judgment of the High Court is set aside and that of the trial Court is restored, but in the circumstances, parties are directed to bear their own costs.

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New India Civil Erectors (P) Ltd. **v.** *Oil & Natural Gas Corpn.*

(1997) 11 SCC 75

B.P. JEEVAN REDDY, J. - 2. A contract was entered into between the appellant and the Oil & Natural Gas Corporation (ONGC), whereunder the appellant undertook to construct 304 pre-fabricated housing units at Panvel, Phase-I. The appellant commenced the construction but did not complete it even within the extended period. The respondent thereupon terminated the contract and got the said work done through another agency. Disputes arose between the parties in the above connection, each party raising claims against the other, which were referred for decision to two arbitrators (joint arbitrators). By their award dated 18-6-1991, the arbitrators decided that while the ONGC shall pay to the appellant a sum of Rs.1,09,04,789, the appellant shall pay to the ONGC a sum of Rs. 41,22,178. In other words the appellant was held entitled to a net amount of Rs. 67,82,620 with interest at the rate of 18 per cent per annum from the date of award till the date of payment or till the date of decree whichever was earlier. While the appellant applied for making the said award a Rule of the Court, the respondent-Corporation filed objections seeking to have the award set aside. The learned Single Judge overruled the objections of the respondent-Corporation and made the award a Rule of the Court. The Corporation appealed against the same, which has been partly allowed by the Division Bench.

3. The appellant had claimed various amounts under as many as 19 heads, while the respondent-Corporation claimed certain amounts under three heads. The arbitrators rejected the appellant's claim under heads 3, 5, 7, 8, 10, 11, 12 and 18. They awarded various amounts under the other heads, the total of which came to Rs.1,09,04,789. So far as the respondent's claims are concerned, the arbitrators rejected claim 2 but accepted claim 1 (partly) and claim 3 (partly) and awarded various amounts totalling Rs.41,22,178.

4. In the appeal before the Division Bench the respondent-Corporation confined its attack only to claims 1, 4, 6, 9 and 13. The Division Bench rejected the respondent's contentions with respect to claims 1 and 13 but upheld the same with respect to claims 4, 6 and 9. Only the appellant has come to this Court challenging the judgment of the Division Bench. We shall deal with these three claims in their proper order.

5. *Claim 4*: Appellant's claim 4 arises on account of the shortage of cement in the bags supplied by the respondent. The appellant's case was that the Corporation had undertaken to supply cement to it in bags, each bag containing 50 kgs of cement, but as a matter of fact, the cement actually found in the bags was less. The appellant complained of the same to the officers of the Corporation from time to time and a record of the shortages has indeed been kept by the parties. On this count, the appellant claimed a sum of Rs 3,96,984.50p, against which the arbitrators awarded an amount of Rs.3,70,221.50 paise. The defence of the Corporation was that according to the stipulation contained in Schedule A to the Tender Notice, the Corporation was not to be held responsible for any variation in the weight of the cement in the bags supplied by them. The relevant stipulation read as follows:

> Ordinary Portland construction cement M.T. 830 Ex Commission's Godown, Greater Bombay.

NOTE: 20 (Twenty) bags of cement shall mean one metric tonne for the purpose of recovery *irrespective of variation in standard weight of cement filled in bags.*

6. The appellant's case, however, was that though the Schedule to the Tender Notice did contain the above stipulation, the appellant had, in its letter dated 5-3-1984, which was in the nature of a counter-offer, clearly stipulated that "ordinary portland cement; Rs.8.30 per metric tonne, (each 50 kg bag)" will be supplied by the Corporation "at site". The appellant had stipulated in the said letter that the terms set out by it therein "shall take precedence over ... tender conditions". It is pointed out by Shri Nariman that the said letter forms part of the contract between the parties and that indeed it is this letter which contains the arbitration clause whereunder the disputes between the parties have been adjudicated by the arbitrators. It is further submitted by the learned counsel that in their acceptance letter dated 10-1-1985, the respondent-Corporation merely stated that the cement will be supplied only at Bombay and not at the site, but did not say anything with respect to the stipulation in the appellant's letter dated 5-3-1984 (counter-offer) that each bag of cement supplied to it shall contain 50 kgs of cement.

7. The Division Bench has not referred to the letter dated 5-3-1984 nor to the acceptance letter dated 10-1-1985, but has rejected the appellant's claim only and exclusively with reference to the stipulation in the schedule to the Tender Notice. Mr. F.S. Nariman submits that the Division Bench was in error in holding that the arbitrators exceeded their authority in awarding the said amount. According to him, the arbitrators merely construed the relevant stipulation as contained in the schedule to the Tender Notice read with the appellant's letter dated 5-3-1984 (counter-offer) and the Corporation's acceptance letter dated 10-1-1985 — which they were entitled to do. It is submitted that since the award is a non-speaking award (though it has awarded separate amounts under each head of the claim) no interference is permissible on the ground that the arbitrators have misconstrued the terms of the agreement. On the other hand, the learned Attorney General submitted that the stipulation aforesaid in the Tender Notice was not modified or qualified in any manner by the appellant's letter dated 5-3-1984 or by the respondent's acceptance letter dated 10-1-1985, and, therefore, the Division Bench was right in rejecting this claim as prohibited by the agreement between the parties. We are of the opinion that this appears to be a borderline case. It is possible to take either view. It must be remembered that in this case *there is no formal contract* and the terms of agreement have to be inferred from the Tender Notice and the correspondence between the parties. Since the attempt of the court should always be to support the award within the letter of law, we are inclined to uphold the award on this count (claim 4). Accordingly, we reverse the judgment of the Division Bench to the above extent. The amount awarded by the arbitrators under this claim is affirmed.

8. *Claim 6*: The claim of the appellant under this head is in a sum of Rs. 53,11,735.60 p, against which the arbitrators have awarded an amount of Rs. 49,91,327. The dispute between the parties is with respect to the method/mode of measuring the constructed area. The case of the respondent is that according to the tender conditions, as well as clause (10) of the aforesaid letter dated 5-3-1984 (written by the appellant to the Corporation), the area covered by balconies is liable to be excluded from the measurements. We may refer to clause (10) of the appellant's own letter dated 5-3-1984 which reads as follows:

"*Mode of measurement*.- We have based our price on the total built-up area of one floor (four flats) including staircase and common corridor but excluding balconies only. Hence work should be measured on the built-up area, excluding balcony areas."

The tender condition is to the same effect.

9. The above stipulation clearly says that total built-up area of a floor shall include the staircase and the common corridor but shall exclude balconies. It expressly provides that "work should be measured on the built-up area excluding balcony area". It is undisputed that in the plan of flats attached to the Tender Notice, balconies are provided. Shri Nariman contended that the said plans were modified later and that the flats as finally constructed, did not have any balconies and, hence, no question of excluding the balconies' area can arise. Shri Nariman could not, however, bring to our notice any agreed or sanctioned plan modifying the plan attached to the Tender Notice. The appellant could not have constructed flats except in accordance with the plans attached to the Tender Notice, unless of course there was a mutually agreed modified plan later - and there is none in this case. We cannot, therefore, entertain the contention at this stage that there are no balconies at all in the flats constructed and that, therefore, the aforesaid stipulation has no relevance. We must proceed on the assumption that the plans attached to the Tender Notice are the agreed plans and that construction has been made according to them and that in the light of the agreed stipulation referred to above, the areas covered by balconies should be excluded. In this view of the matter we agree with the Division Bench that the arbitrators overstepped their authority by including the area of the balconies in the measurement of the built-up area. It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account. We, therefore, affirm the decision of the Division Bench on this score (claim 6).

10. *Claim 9*: The appellant claimed an amount of Rs.32,21,099.89 p under this head, against which the arbitrators have awarded a sum of Rs. 16,31,425. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-Corporation with reference to and on the basis of the stipulation in the Corporation's acceptance letter dated 10-1-1985 which stated clearly that "the *above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work*". The Division Bench has held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation *on any ground whatsoever* and the said prohibition is effective *till the completion of the work*. The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is

binding upon them both and the arbitrators. We are of the opinion that the learned Single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. This is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. We, therefore, affirm the decision of the Division Bench on this count as well (claim 9).

11. So far as the position of law on the subject is concerned, there is hardly any dispute between the parties. It is sufficient to refer to the well-considered decision of this Court in ***Sudarsan Trading Co.* v. *Govt. of Kerala*** [AIR 1989 SC 890] wherein it has been held:

> ... if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him and the court can find that he exceeded his jurisdiction on proof of such excess.... Therefore, it appears to us that there are two different and distinct grounds involved in many of the cases. One is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.

12. For the above reasons, the appeal is allowed in part, i.e., to the extent of claim 4 (in a sum of Rs.3,70,221.50p). In other respects, the appeal is dismissed.

* * * * *

Oil & Natural Gas Corporation Ltd. v. *Saw Pipes Ltd.*

2003 (4) SCALE 92

M.B. SHAH, J. - 1. Before dealing with the issues involved in this appeal, we would first decide the main point in controversy, namely-the ambit and scope of court's jurisdiction in a case where award passed by the Arbitral Tribunal is challenged under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") as the decision in this appeal would depend upon the said finding. In other words-whether the court would have jurisdiction under section 34 of the Act to set aside an award passed by the Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract?

3. Learned senior counsel Mr. Ashok Desai appearing for the appellant submitted that in case where there is clear violation of sections 28 to 31 of the Act or the terms of the contract between the parties, the said award can be and is required to he set aside by the court while exercising jurisdiction under section 34 of the Act.

7. However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of part-1 of the Act from which parties cannot derogate.

8. In the aforesaid sub-clause (v) of sec. 34, the emphasis is on the agreement and the provisions of part-1 of the Act from which parties cannot derogate. It means that the composition of Arbitral Tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in part-1 of the Act i.e. sections 2 to 43. At the same time agreement for composition of Arbitral Tribunal or arbitral procedure should not be in conflict with the provisions of the Act from which parties cannot derogate. Chapter V of part-1 of the Act provides for conduct of arbitral proceedings. Section 18 mandates that parties to the arbitral proceedings shall be treated with equality and each party shall be given full opportunity to present his case. Section 19 specifically provides that Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and the parties are free to agree on the procedure to be followed by Arbitral Tribunal in conducting its proceedings. Failing any agreement between the parties subject to other provisions of part-1, the Arbitral Tribunal is to conduct the proceedings in the manner it considers appropriate. This power includes the power to determine the admissibility, relevance, the materiality and weight of any evidence. Section 20, 21 and 22 deal with place of arbitration, commencement of arbitral proceedings and language respectively. Thereafter, sections 23, 24 and 25 deal with statements of claim and defence, hearings and written proceedings and procedure to be followed in case of default of a party.

(i) 10. Thereafter, Chapter VI deals with making or arbitral award and termination of proceedings. Relevant sections which require consideration are sections 28 and 31.

11. The aforesaid provisions prescribe the procedure to be followed by the Arbitral Tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the Arbitral Tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the tribunal to decide the dispute is prescribed. In these sections there is no distinction between the jurisdiction/power and procedure.

12. Hence, the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is *de hors* the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.

13. The question, therefore, which requires consideration is- whether the award could be set aside, if the arbitral Tribunal has not followed the mandatory procedure prescribed under sections 24, 28 or 31(3), which affects the rights of the parties? Under sub-section 1 (a) of section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law whould include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be- whether such award could be set aside? Similarly, under sub-section (3), Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non-speaking one and is in violation of section 31(3), can such award be set aside? In our view, reading section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it could not be set it aside by Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under section 34.

14. The aforesaid interpretation of the clause (V) would be in conformity with the settled principle of law that the procedural law cannot fall to provide relief when substantive law gives the right. Principle is- there cannot be any wrong without a remedy. In ***M.V. Elisabeth* v. *Harwan Investment & Trading Pvt. Ltd.*** [JT 1992 (2) SC 65] this Court observed that where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy form other systems of law and practice. Similarly, in ***Dhanna Lal* v. *Kalawatibai*** [JT 2002 (5) SC 53] this Court observed that wrong must not be left unredeemed and right not left unenforced.
15. Result is – if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under section 34. However, such failure of procedure should be patent affecting the rights of the parties.

CONCUSIONS

76. In the result, it is held that: -

A. (1) The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that: -

(i) a party was under some incapacity , or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time be, in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(2) The Court may set aside the award:-

(i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part – I of the Act.

(ii) if the arbitral procedure was not in accordance with :-

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with part – I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions, of Part-I of the Act from which parities cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to: -

(a) fundamental policy of Indian Law,

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

(4) It could be challenged:-

(a) as provide under Section 13(5); and

(b) Section 16(6) of the Act.

B. (1) The impugned award requires to be set aside mainly on the grounds:-

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor.

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.

77. For the reasons stated above, the impugned award directing the appellant to refund US $ 3,04,970.20 and Rs. 15,75,559/- with interest which were deducted for the breach of contract as per the agreement requires to be set aside and is hereby set aside. The appeal is allowed accordingly. There shall be no order as to costs.

* * * * *

Haresh Dayaram Thakur **v.** *State of Maharashtra*

AIR 2000 SC 2281

D.P. MOHAPATRA, J. - 2. Appellant Haresh Dayaram Thakur and Respondent 3 Pitambar Dayaram Thakur are brothers. Raj Kumari Pitambar Thakur, Respondent 4 is the wife of Respondent 3. The dispute raised in the case centres round the flat bearing No. 16/199 at Ramakrishna Nagar, Khar (W), Mumbai, belonging to the Maharashtra Housing and Area Development Authority, Mumbai ('MHADA'). MHADA had granted lease of the said flat to one N.H. Krishnan, who transferred his right, title and interest thereunder to one Manmeet Singh Chadha under an agreement of transfer dated 7-4-1986. By the agreement for transfer dated 21-11-1989 the right, title and interest of the flat was purchased by the appellant for a consideration of Rs.3,45,000. The appellant also became a member of the society of flat-owners of the building called Melody Cooperative Housing Society of which the flat in question is a part. The appellant had applied to MHADA for regularisation of allotment of the flat in his name. In December 1992 on a routine inspection of the premises the Estate Manager of MHADA reported that the property was in occupation of the appellant and his family members including Respondent No. 3, though it stood in the name of N.H. Krishnan, and therefore, they were unauthorised occupants of the flat. On receipt of the report a proceeding was initiated under Section 66(1) of the Maharashtra Housing and Development Act, 1966 (for short "the Act"). In pursuance of the order dated 23-4-1997 MHADA evicted all the unauthorised occupants from the flat and sealed the same. In the said order leave was given to the present appellant to establish his claim in respect of the property in light of the deed of transfer dated 21-11-1989 and other documents executed by the allottee in his favour. Subsequently, after examining the relevant documents MHADA regularised the allotment of the flat in favour of the appellant by an order under the Act.

3. On 19-9-1998 Respondent No. 3 filed Writ Petition No. 5072 of 1998 before the Bombay High Court challenging the order of eviction passed by MHADA under Section 66(1) of the Act against him. It was the case of Respondent No. 3 (writ petitioner) that he had also contributed a sum of Rs 1,25,000 for the purpose of purchase of the flat along with his brother, the appellant herein, though the documents stood in the name of the later. A Division Bench of the High Court disposed of the writ petition by the order dated 7-10-1998 directing, inter alia, that the competent authority of MHADA would re-examine the claims of Respondent 3 as well as the appellant herein and pass a speaking order in accordance with the law. In compliance with the directions of the High Court the competent authority of MHADA passed the order dated 18-12-1998 rejecting the claim of Respondent No. 3 and confirming the allotment/regularisation of the flat in the name of the appellant.

4. Respondents No. 3 and No. 4 challenged the order dated 18-12-1998 of MHADA by filing a writ petition under Articles 226 and 227 of the Constitution, Writ Petition No. 510 of 1999, asserting their title to the property. They prayed for a writ of certiorari or any other appropriate writ, direction or order under Article 226 of the Constitution of India quashing the order of the appellate authority dated 23-4-1997 and the eviction order dated 18-12-1998; for

a writ of mandamus or any appropriate writ, direction or order directing MHADA and its Estate Manager and Respondent No. 7 in the writ petition (appellant herein) to restore to them possession of Flat No. 16/199 at Ramakrishna Nagar, Khar (W), Mumbai and for issue of writ of mandamus to MHADA to regularise allotment of the said flat in favour of the writ petitioners and for an interim direction restoring possession of the flat to them after obtaining possession thereof from Respondent No. 7 (appellant herein). In the said writ petition the High Court by the order dated 6-3-1999 appointed a conciliator with regard to the dispute between the parties. The relevant portion of the order reads thus:

> "By consent of the petitioners and Respondent 7 hereto, Shri H. Suresh, retired Judge of the Bombay High Court, is appointed as conciliator with regard to dispute between the petitioners and Respondent 7 relating to Flat No. 16/199, Melody Cooperative Housing Society Ltd., Ramakrishna Nagar, 9th Road, Khar, Mumbai-400 052 including the issue of title, regularisation/possession and compensation, if any."

The parties agree and undertake to this Court that the decision of the conciliator will be final and binding on both the parties.

Court Receiver, High Court, Bombay is hereby appointed as receiver of aforesaid Flat No. 16/199, with a further direction to take formal possession of the said flat from Respondent 7, and appoint Respondent 7 as his agent, on monthly royalty of Rs 1000 to be deposited with the conciliator, subject to the final award. The receiver shall not insist for security and shall not display his board at the suit flat.

> The learned conciliator is requested to submit his report/award, and preferably within six months.

5. In pursuance of the said order Justice H. Suresh (retired) held meetings on 20-4-1999, 5-7-1999, 25-7-1999, 8-8-1999 and on 24-8-1999 in presence of the counsel for the parties. In the minutes of the meeting held on 8-8-1999 it was recorded:

> After hearing both the parties, the conciliator suggested that the matter could be settled on the petitioner paying an amount as may be fixed by the conciliator, to the respondent; the petitioner would be entitled to the flat in question and would be put in possession. The parties agreed to the above and requested the conciliator to settle on these lines, and the conciliator to fix all the relevant terms, including the requirement that the petitioner forego his claim for the ancestral flat i.e. Flat No. 18/224, R.K. Nagar.
>
> The meeting is now adjourned to 24-8-1999 at 4.30 p.m. when the advocates will make all the relevant submissions which will enable the conciliator to fix the amount and the other terms of settlement.

6. In the minutes of the last meeting held on 24-8-1999 the conciliator recorded that both the advocates have completed their submissions in respect of the amount to be paid by the petitioner to the respondent to enable the conciliator to fix the amount as noted in the last meeting; that both the advocates stated that there are no further submissions to be made. In the concluding portion of the minutes of the said meeting it is recorded "accordingly these

proceedings come to an ending excepting the conciliator will make a report to the High Court incorporating the terms of settlement". The conciliator in his report dated 31-8-1999 which was sent to the High Court stated, inter alia, that after taking into account all the submissions made by both the parties and after considering all the relevant documents and papers and pleadings he (conciliator) proposes to settle the dispute in the manner set out in the report. The proposals in the conciliator's report included the stipulation i.e.:

> (*1*) that on the petitioner's (Respondents 3 and 4 herein) paying a sum of Rs 4,00,000 to Respondent No. 7 (appellant herein) he shall vacate Flat No. 16/199 and the petitioners shall be put in possession thereof;
>
> (*2*) Petitioner 1 (Respondent No. 3 herein) shall forego and relinquish all his claims in respect of Flat No. 18/224, Sunshine Cooperative Housing Society Ltd., 9th Road, Khar, Mumbai-400 052;
>
> (*3*) that on the basis of the above settlement, the possession of the said Flat No. 16/199 by the petitioners be regularised in their favour by the Maharashtra Housing and Area Development Authority (Respondent No. 2) and that in view of the settlement Respondent No. 7 (appellant herein) will have no claim whatsoever in respect of Flat No. 16/199 and the writ petitioners (Respondents No. 3 and 4 herein) will have no claim whatsoever in respect of Flat No. 18/224.

The other stipulations of the settlement set out in the report are not very material for the purpose of the present case. It is relevant to state here that the so called "proposal" by the conciliator was not signed by the parties, nor were its terms disclosed to the parties by the conciliator. As submitted by Shri. Tulsi, learned Senior Counsel appearing for the appellant the report was sent by the conciliator in a sealed cover to the High Court directly.

7. The appellant filed an objection against the report of the conciliator setting out various grounds of challenge. A Division Bench of the High Court summarily rejected the objections raised against the conciliator's report. Referring to the statement in the previous order dated 6-3-1999 that the parties agreed to undertake to the Court that the decision of the conciliator would be final and binding on both the parties the Division Bench was of the opinion that when the conciliator has been appointed for taking a decision, with the consent of the parties *no amount of objections raised in the form of application can be entertained at all*. (emphasis is mine) The Division Bench observed in the order

> but in the present case, at the time when conciliator was agreed to be appointed, clear-cut understanding was there between the parties to give it finality.

The conclusion arrived at by the Court as expressed in para 4 of the order reads:

> The net result of the matter is that the report filed by the conciliator shall be treated as the order in the writ petition and parties rights will be governed thereunder. Petition is disposed of accordingly. Civil application is disposed of.

8. The said order is under challenge in this appeal filed by Respondent No. 7 of the writ petition.

9. The Arbitration and Conciliation Act, 1996, as the name itself suggests, deals with two types of proceedings: arbitration proceedings and conciliation proceedings. While provisions

relating to arbitration proceedings are contained in Part I in which are included Chapters I to X, the conciliation proceedings are dealt with in Part III which includes Sections 61 to 81. On a perusal of the provisions of the Act the position is manifest that a clear distinction is maintained in the statute between arbitration proceedings and conciliation proceedings.

10. Section 61 which deals with application and scope of the provisions, in Part III provides, *inter alia*, that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

11. In Section 64 provision is made that the appointment of conciliators shall be by agreement of parties or if the parties agree they may request a suitable institution or a person to appoint a conciliator on their behalf. In Section 65 it is provided, inter alia, that on being appointed the conciliator shall request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

12. Section 67 which makes provision regarding the role of conciliator provides in sub-section (1) that the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. In sub-section (2) thereof, it is provided that the conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. In sub-section (4) of Section 67 it is laid down that the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor. Section 69 contains the provision regarding communication between the conciliator and the parties whether orally or in writing and about the place of meetings etc. In Section 70 provision is made regarding disclosure of information. Therein it is provided, inter alia, that when the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. In the proviso to the section it is stated that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party. Under Section 72 it is laid down that each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

13. Section 73 in which provision is made regarding settlement agreement reads as follows:

> **73. *Settlement agreement*.** - (1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

14. Section 74 provides that the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30.

15. Section 75 which incorporates in the statute the confidentiality clause provides that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

16. Section 76 wherein provision is made regarding termination of conciliation proceedings is extracted hereunder:

76. *Termination of conciliation proceedings*.—The conciliation proceedings shall be terminated—

(*a*) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(*b*) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(*c*) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(*d*) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

17. Section 77 contains the provision that the parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

18. At this stage it will be convenient to refer to Section 30, which is a provision in Chapter VI dealing with the making of an arbitral award and termination of proceedings. [After re-producing section 30, the court held]

19. From the statutory provisions noted above the position is manifest that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. For this purpose the conciliator is vested with wide powers to decide the procedure to be followed by him untrammelled by the procedural law like the Code of Civil Procedure or the Indian

Evidence Act, 1872. When the parties are able to resolve the dispute between them by mutual agreement and it appears to the conciliator that their exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in Section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it. Under sub-section (3) of Section 73 the settlement agreement signed by the parties is final and binding on the parties and persons claiming under them. It follows therefore that a successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74.

20. In the case in hand, as appears from the materials on record, no such procedure as prescribed under Part III of the Act has been followed by the conciliator. The conciliator appears to have held some meetings with the parties in which there was discussion and thereafter drew up the so-called settlement agreement by himself in secrecy and sent the same to the Court in a sealed cover. Naturally the so-called settlement agreement drawn up by the conciliator does not bear the signatures of the parties. As the impugned order shows, the said settlement has been given a status higher than an arbitral award inasmuch as the Court has refused to even entertain any objection against the said settlement agreement reiterating the position that the settlement arrived at by the conciliator will be binding on the parties. The conciliator who is a former Judge of the High Court and the learned Judge who passed the impugned order failed to take note of the provisions of the Act and the clear distinction between an arbitration proceeding and a conciliation proceeding. The learned Judge in passing the impugned order failed to notice the apparent illegalities committed by the conciliator in drawing up the so-called settlement agreement, keeping it secret from the parties and sending it to the Court without obtaining their signatures on the same. The position is well settled that if the statute prescribes a procedure for doing a thing, a thing has to be done according to that procedure. Thus the order passed by the High Court confirming the settlement agreement received from the conciliator is wholly unsupportable.

21. Accordingly, the appeal is allowed. The order dated 6-10-1999 passed by the High Court of Bombay in Civil Application No. 7117 of 1999 is set aside. The settlement agreement dated 31-8-1999 filed by Justice H. Suresh before the High Court is also set aside. The High Court is directed to dispose of the writ petition afresh on merits in accordance with law. Parties to bear their own costs.

THE END