
(2016) 02 GAU CK 0065

In the Gauhati High Court

Case No : C.R.P Nos. 196, 263, 264, 265 and 266 of 2015

Alema Khatun and Anr.

APPELLANT

Vs

Tata Motor Finance Ltd.

RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(1)(e), 36
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 5, Order 21 Rule 6, Order 21 Rule 7, Order 21 Rule 8

Citation : (2016) AIR(Gauhati) 64 : (2016) 2 GauLJ 533 : (2016) 2 GauLR 536 : (2016) 4 GauLT 434 : (2016) 5 RAJ 670

Hon'ble Judges : N. Chaudhury, J.

Bench : Single Bench

Advocate : K Bhattacharjee and K.K Dey, Advocates, for the Appellant; S. Barooah, Advocate, for the Respondent

Final Decision : Disposed off

Judgement

N. Chaudhury, J. - Five civil revision petitions involving identical question of law have been heard together on the prayer of the learned counsel of the parties and accordingly they are being disposed of by this common judgment. However, essential respective facts of each of the five revision petitions are stated separately at the threshold.

2. CRP No. 196/2015 (Alema Khatun and others v. Tata Motors Finance Ltd.):—

The petitioners purchased a truck under hire purchase agreement with the opposite party. The agreement contained a schedule for payment of EMI and an arbitration clause for resolution of any dispute. The petitioners could not make payment as per the payment schedule of the agreement and thus a dispute arose between the financier and the debtor. Opposite party Tata Motors Ltd. appointed one Mr. Nitin Chavan as sole arbitrator who initiated an arbitration proceeding at Mumbai for realisation of the dues. The arbitration proceeding was held ex-parte against the present petitioners and an award for payment of Rs.

10,75,049.82 along with interest at the rate of 12% per annum w.e.f. 17.06.2013 till realisation along with a cost of Rs. 5,000/- was passed by the sole arbitrator. Thereafter, the Tata Motors Ltd. filed Money Execution Case No. 12/2014 under Order 21, Rule 11 of the CPC in the court of learned District Judge, Dhubri.

3. On being summoned, the present petitioners as debtors submitted a written objection, inter alia, on the ground that the execution case has been instituted without complying with the mandatory provisions of Order 21, Rule 5 and 6 of the CPC. One of the other objections was that since the decree holder prayed for execution of the judgment debtor by getting him arrested and retained, compliance of the provisions of Rule 11 and 14 of Order 21 was necessary. Besides, it was also pleaded that the arbitration award itself was obtained by fraud without taking into consideration that the truck became traceless with the driver for which the judgment debtor had lodged an FIR with Sagolia OP immediately after disappearance of the truck with intimation to the decree holder, the Tata Motor Finance Ltd. The judgment debtor had furnished all relevant documents to the Tata Motors on 08.04.2013 and thus the decree holder was very much aware as to under what circumstances the judgment debtor could not make payment of the EMI. The decree holder was also assured by the judgment debtor at that time that the loan would be repaid in full once insurance claim against disappearance of the truck is settled. As per the arbitration clause, there was no appointment of arbitrator from the side of the judgment debtor and the judgment debtor had never signed the arbitration agreement. With these objections, the judgment debtor prayed for dismissal of the execution case.

4. The learned Executing court after hearing the parties passed impugned order dated 30.04.2015 holding that an award passed by an arbitrator is deemed to be a decree under section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") but it is not a decree passed by any "court" in the light of the definition of "court" under section 2(e) of the Act. The learned court also held that there being no provision in the Act for transmission of award as in the case of transfer of a decree of a court, there is no necessity for transmission of award to the executing court at Dhubri. Accordingly, the learned Executing Court rejected the written objection by impugned order dated 30.04.2015. It is this order which has been brought under challenge in the present revision petition.

5. CRP No. 263/2015 (Ramiro Infrastructure and Builder PV Chairman and Managing Director v. Tata Motors Finance Ltd.):-

Petitioner, Ramiro Infrastructures and Builder PV availed loan of Rs. 13,00,000/- from opposite party Tata Motors Finance Ltd. for purchase of vehicle by executing a hire purchase agreement on 31.01.2013. But all documents relating to the transaction was retained by the opposite party. The financier thereafter invoked arbitration clause on allegation of default in payment of EMI and appointed one Mr. Nitin Chavan, a Chartered Accountant of Mumbai, as sole arbitrator for

adjudicating the dispute. No notice was received by the present petitioner of the aforesaid proceedings yet the sole arbitrator passed ex-parte award on 24.07.2014 for a sum of Rs. 11,52,025.76 together with interest at the rate of 18% per annum from 27.12.2013 till payment. According to the petitioner, no copy of the award has yet been served on the debtor but the financier opposite party filed Money Execution No. 467/2014 in the court of learned Additional District Judge No. 3, Kamrup at Guwahati. Filing application in this Execution court, petitioner herein contended that it came to know about the arbitration award only after receipt of notice in the Execution case and accordingly prayed for time to file objection. Adjournment was granted fixing 02.04.2015 as next date and on which date the learned counsel for the petitioner was absent and so another adjournment was prayed for. The learned Executing court by order dated 02.04.2015 rejected the adjournment prayer and straightway issued attachment warrant against properties of the petitioner fixing 30.06.2015 for report. This order has been brought under challenge in the present revision petition, inter alia, on the ground that the award is ex-facie illegal, violative of the principle of natural justice and non-est in law. There is no question of any enforcement of such award. In course of argument, the learned counsel for the petitioner also adopted the argument made in CRP No. 196/2015 that without there being transfer of the award under section 38 read with Order 21, Rule 5 and 6 of the CPC, the Execution proceeding is liable to be dropped. Perhaps, this is the reason for listing the present revision petition for admission hearing along with CRP No. 196/2015. Thus, the principal argument as to maintainability of the Execution proceeding is also same as that of CRP No. 196/2015.

6. CRP No. 264/2015 (Ramiro Infrastructure and Builder PV Chairman and Managing Director v. Tata Motors Finance Ltd.):-

Petitioner, Ramiro Infrastructure and Builder PV availed loan of Rs. 13,00,000/- from opposite party Tata Motors Finance Ltd. for purchase of vehicle by executing a hire purchase agreement on 13.03.2013. But all documents relating to the transaction was retained by the opposite party. The financier thereafter invoked arbitration clause on allegation of default in payment of EMI and appointed one Mr. Nitin Chavan, a Chartered Accountant of Mumbai, as sole arbitrator for adjudicating the dispute. No notice was received by the present petitioner of the aforesaid proceeding yet the sole arbitrator passed ex-parte award on 24.07.2014 for a sum of Rs. 13,05,449.42 together with interest at the rate of 18% per annum from 27.12.2013 till payment. According to the petitioner, no copy of the award has yet been served on the debtor but the financier opposite party filed Money Execution No. 470/2014 in the court of learned Additional District Judge No. 3, Kamrup at Guwahati. In this case also, petitioners filed application contending that it came to know about the arbitration award only after receipt of notice in the Execution case and accordingly prayed for time to file objection. Adjournment was granted fixing 02.04.2015 as next date on which date the petitioner No. 2 was absent and so another adjournment was prayed for. The learned trial court rejected the application on the ground that the application

was not accompanied by Vakalatnama and that opportunities were already given to the petitioners for filing written objection. The learned court issued writ of attachment against the judgment and refused to grant further time fixing the case on 30.06.2015 for report on attachment. Before the fixed date, the present petitioners moved an application on 11.06.2015 praying for recalling the writ of attachment and for accepting written objection which was submitted along with the application. However, the learned Executing court rejected the application on the same date and thus the order dated 02.04.2015 as well as 11.06.2015 has been called in question in the present revision petition. As this case has also been tagged with the earlier two revision petitions and the questions arising in those petitions are also equally applicable to the present case, the learned counsel for the petitioner adopted the same argument on maintainability of the execution case.

7. CRP No. 265/2015 (Ramiro Infrastructure and Builder PV Chairman and Managing Director v. Tata Motors Finance Ltd.):-

Petitioner, Ramiro Infrastructures and Builder PV availed loan of Rs. 13,00,000/- from opposite party Tata Motors Finance Ltd. for purchase of vehicle by executing a hire purchase agreement on 18.02.2013. But all documents relating to the transaction was retained by the opposite party. The financier thereafter invoked arbitration clause on allegation of default in payment of EMI and appointed one Mr. Nitin Chavan, a Chartered Accountant of Mumbai, as sole arbitrator for adjudicating the dispute. No notice was received by the present petitioner of the aforesaid proceeding yet the sole arbitrator passed ex-parte award on 24.07.2014 for a sum of Rs. 11,72,296.84 together with interest at the rate of 18% per annum from 27.12.2013 till payment. According to the petitioner, no copy of the award has yet been served on the debtor but the financier opposite party filed Money Execution No. 468/2014 in the court of learned Additional District Judge No. 3, Kamrup at Guwahati. Having received notice like the previous case, the same petitioners filed application contending that it came to know about the arbitration award only in the third week of February, 2015 after receipt of notice in the Execution case and accordingly prayed for time to file objection. Adjournment was granted fixing 02.04.2015 as next date on which date the learned counsel for the petitioner was absent and so another adjournment was prayed for. On that date the petitioners moved yet another application seeking time for filing written objection. The learned trial court rejected the application on the ground that the application was not accompanied by Vakalatnama and that opportunities were already given to the petitioners for filing written objection. The learned court issued writ of attachment against the judgment and refused to grant further time. The Execution case was fixed on 30.06.2015 for report. This order dated 02.04.2015 has been called in question in the present revision petition. As this case has also been tagged with the earlier two revision petitions and the questions arising in those petitions are also equally applicable to the present case, the learned counsel for the petitioner adopted the same argument on maintainability of the execution case.

8. CRP No. 266/2015 (Ramiro Infrastructure and Builder PV Chairman and Managing Director v. Tata Motors Finance Ltd.):-

Petitioner, Ramiro Infrastructures and Builder PV availed loan of Rs. 13,00,000/- from opposite party Tata Motors Finance Ltd. for purchase of vehicle by executing a hire purchase agreement on 18.02.2013. But all documents relating to the transaction was retained by the opposite party. The financier thereafter invoked arbitration clause on allegation of default in payment of EMI and appointed one Mr. Nitin Chavan, a Chartered Accountant of Mumbai, as sole arbitrator for adjudicating the dispute. No notice was received by the present petitioner of the aforesaid proceeding yet the sole arbitrator passed ex-parte award on 24.07.2014 for a sum of Rs. 11,72,296.84 together with interest at the rate of 18% per annum from 27.12.2013 till payment. According to the petitioner, no copy of the award has yet been served on the debtor but the financier opposite party filed Money Execution No. 469/2014 in the court of learned Additional District Judge No. 3, Kamrup at Guwahati. The learned Executing court issued notice fixing 24.02.2015 for report. On that date the petitioner No. 2 was out of station and so application for adjournment was moved. The learned court allowed the prayer and fixed 02.04.2015 for filing objection. Even on that date the petitioner No. 2 was not available and on that ground another application praying for adjournment was filed on behalf of the petitioners. The learned trial court rejected the application on the ground that the application was not accompanied by Vakalatnama and issued warrant of attachment fixing 30.06.2015 for compliance report. Before the fixed date, the petitioners filed an application on 11.06.2015 filing objection to the Execution petition and praying for recall of the attachment order. The learned court rejected the application on the same date. This is how, both the orders dated 02.04.2015 and 11.06.2015 have been called in question in the present revision petition. As this case has also been tagged with the earlier two revision petitions and the questions arising in those petitions are also equally applicable to the present case, the learned counsel for the petitioner adopted the same argument on maintainability of the execution case.

9. I have heard Mr. K Bhattacharjee and Mr. KK Dey on behalf the petitioners in the aforesaid revision petitions. Mr. K Bhattacharjee made the leading submission and Mr. KK Dey adopted the argument of Mr. K Bhattacharjee. Mr. S Barooah, learned counsel for the Tata Motor Finance Company Ltd., the opposite party replied to the submissions made on behalf of the petitioners. Both the sides relied on judicial precedents in their respective favour.

10. Mr. K Bhattacharjee submits that ""court"" under Section 2(e) of the 1996 Act means the principal civil court of original jurisdiction in a district and it includes the High Court in exercise of its ordinary original jurisdiction. Section 36 of the Act deals with enforcement of award passed by an arbitrator under the Act. It provides that such an award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court. It presupposes that an award is a deemed decree and it is capable of being executed like any

other decree passed by a civil court. So, relevant provisions of the Code of Civil Procedure in this matter would be applicable even in case enforcement of an arbitration award. Drawing attention of the court to Section 38 of the Code of Civil Procedure, Mr. Bhattacharjee submits that a decree of civil court is capable of being executed not only by the court which passed it but also by a court to which the decree is sent for execution. Section 40 of the Code of Civil Procedure provides that when a decree is sent for execution in another state it shall be sent to such court and executed in such manner as may be prescribed by rules in force in that state. Order 21, Rule 5 of CPC provides that where a decree is to be sent for execution by another court, the court which passed such decree shall send the same directly to the court if it has no jurisdiction to execute the decree. Rule 6 of the same Order lays down the procedure for such execution on transfer. According to Mr. Bhattacharjee when the decree holder of the arbitration award in question was of the view that the property to be attached by way of execution is situated in another state in that event, the decree holder was duty bound to get the decree transferred to the court in other state. The executing court in another state has no jurisdiction to entertain an execution case without the decree being transferred in accordance with the procedure prescribed under the Code of Civil Procedure. The same not having been done in any of the cases under consideration, the execution proceedings are liable to be set aside and quashed.

11. Per contra, Mr. S Barooah, learned counsel for the Tata Motor Finance Company Ltd., submitted that the legal propositions argued by Mr. Bhattacharjee are not entirely correct. While it is correct that an arbitration award is a deemed decree by legal fiction under section 36 of the Act but at the same time it is also correct that such decree is not a "decree of court" and so Executing court under Section 36 of the Act not being a court is not bound by Section 39 or Order 21, Rule 5 and 6 of the Code of Civil Procedure. The Act is a code in itself and the same not having provided that all provisions of the CPC applicable to a decree of a civil court are applicable to an award, the learned Executing courts in the present cases have very much acted within jurisdiction in passing the impugned orders and so the revision petitions are liable to be dismissed.

12. From perusal of the respective pleadings of the parties and the argument put forward by them it appears that the only point for consideration in all these revision petitions is as follows:-

Whether in case of enforcement of an arbitral award beyond the territorial jurisdiction of the court within the meaning of Section 2(1)(e) of the Arbitration and Conciliation Act, 1996, a formal transfer of the award is necessary under Section 39 read with Order 21, Rule 5 and 6 of the Code of Civil Procedure.

13. I have perused the pleadings of the parties available on record and all the judgments relied on by them. It appears that there is a divergence of opinion on the aforesaid point for determination among various High Courts of the country. While the High Courts of Andhra Pradesh, Karnataka and Madhya Pradesh are of

the view that unless a formal transfer of award has been taken place like any other decree of civil court, no court can entertain Execution proceeding if the award has not been passed within its territorial jurisdiction. On the other hand, the High Courts of Delhi and Madras are of contrary view. According to the latter High Courts, an arbitral award is a decree by legal fiction but it is not a decree of court and since there is no provision in the Act warranting transfer of award, there is no question of such transfer by unnecessarily importing the provisions of Code of Civil Procedure. Perhaps, such a question has not yet come up for consideration before the Hon''ble Supreme court and that is why no such decision could be found out.

14. A similar question arose before Hon''ble Karnataka High Court in the case of ICDS Ltd. v. Mangala Builders Pvt. Ltd. and others (AIR 2001 Karnataka 364). The Single Judge of that Hon''ble High Court held that a court which can entertain a suit with respect to the subject matter of arbitration dispute, it alone can exercise the power under Section 36 of the Act. This opinion was arrived at after juxtaposing the expression "court" occurring in Section 2(e) of the Act in Section 36 thereof and thereupon it was felt that the award passed by the Arbitrator shall be enforced in the same manner as if it were a decree made by the court having jurisdiction to decide questions forming subject matter of the arbitration if the same had been the subject matter of the suit. Referring to Section 36 of the Act it was further held that a right to enforce the award arises only after the period for filing application for setting aside the arbitral award under Section 34 has expired or such an application having been made is rejected. This is because before proceeding with enforcement of the award the court is duty bound to satisfy itself that the period for filing application under Section 34 has already expired or such an application having been filed has ultimately been dismissed. Inferentially, the court entitled to entertain an application under Section 34 of the Act alone can entertain the steps to enforce the arbitral award. This is how the decision was taken that court as understood in Section 34 of the Act has alone the jurisdiction to entertain application for enforcement of the award.

15. Mr. K Bhattacharjee, learned counsel for the petitioner, has placed reliance on the case of Bhoomatha Para Boiled Rice and Oil Mill v. Maheswari Trading Company and others (AIR 2010 AP 137). In this case an application under Section 115 of the Code of Civil Procedure was filed before the Hon''ble Andhra Pradesh High Court questioning as to whether an arbitral award can be enforced by any competent civil court having pecuniary and territorial jurisdiction over the subject matter and not by the "Court" as defined in Section 2(1)(e) of the Act. Considering the case in the light of various provisions like section 39 and Order 21 of the Code of Civil Procedure as well as AP Civil Courts Act, 1972 and the Arbitration and Conciliation Act, 1996, the Hon''ble Court was of the view that an arbitral award can be enforced following relevant provisions in Part-II and Order 21 of CPC by any court depending upon the amount awarded by the Arbitrator. According to the Andhra Pradesh High Court if the value of the award is less than

Rs. 1,00,000/-, the court of Junior Civil Judge, if the value of the award is more than Rs. 1,00,000/- and does not exceed Rs. 10,00,000/-, the senior Civil Judge and lastly if the value of the award is more than Rs. 10,00,000/- in that event, District Judge or Additional District Judge shall be competent to enforce the award. The revision petition was accordingly dismissed and the contention of the learned counsel for the petitioner that application under Section 36 of the Act can be entertained by the court as defined in Section 2(1)(e) of the Act was rejected. However, this judgment did not deal with the question in regard to enforcement of an arbitral award beyond the territorial jurisdiction of court.

16. In the case of Assam State Weaving and Manufacturing Co. Ltd. v. Vinny Engineering Enterprises (P) Ltd. and Anr (AIR 2010 Calcutta 52), the point for determination before the Hon"ble Calcutta High Court as to whether a party has to fork out the cost of the reference not paid by it to obtain the benefit under the award passed or to get a copy of the award. In that case, the arbitral award was passed and then presented before the District Judge, Kamrup in Assam for enforcement with prayer to transfer the same to a court in Calcutta. The Hon"ble Calcutta High Court observed that tabular statement had been taken out on 03.06.2009 before the District Judge at Kamrup and thereupon the award and deemed decree was transferred for execution to that court meaning thereby the Calcutta High Court. Showing this observation in the judgment, the learned counsel, Mr. K Bhattacharjee would argue that as per the prevailing practice in Assam, the arbitral award was presented before the District Judge at Kamrup where the arbitration was held and thereupon prayer was made for transfer of the award to the competent court in whose jurisdiction, the subject matter of the arbitration is situated. The consequent argument was that an application for enforcement of the award is to be presented to the court within the meaning of Section 2(1)(e) of the Act irrespective of whether the subject matter of the dispute is situated within the territorial jurisdiction of it and if not, in that event, the same should be transferred to a court where the subject matter of the arbitration is situated.

17. In the case of M/s Bhusan Petrofils Private Limited v. Sanjay Kakade reported in (2013) 0 Supreme (Mah) 950, a Single Bench of Hon"ble Bombay High Court considered the earlier Full Bench judgment of the said Hon"ble Court as to definition of "court" and held that the word "court" occurring in Section 36 must be held to be a court of District Judge for the purpose of enforcement of the award. This view contrary to the view of Hon"ble Andhra Pradesh High Court was taken considering the provisions of Section 2(1)(e) and Section 36 of the Act. The Single Judge found that there was already a Division Bench judgment of the same High Court that District Judge in a district alone is the Principal Civil Court of original jurisdiction within the meaning of Section 2(1)(e) of the Act and no other court subordinate to him shall have any jurisdiction to entertain application for enforcement of award. It was held that the word "court" must be given the same meaning wherever it appears in Part-I of the Arbitration and Conciliation Act, 1996.

18. A Single Bench of the Hon''ble Madhya Pradesh High Court was confronted with a similar question in the case of Computer Sciences Corporation India Pvt. Ltd. v. Harishchandra Lodwal and anr (AIR 2006 MP 34). In that case, the award holder filed Arbitration Execution Case No. 9/2002 before VII ADJ, Indore and made a prayer for transferring the award to the court at Delhi for enforcement of the award as the respondents were residing at Delhi. The learned ADJ, Indore dismissed the application on the ground that petitioner was at liberty to file the Execution proceedings at Delhi itself. Referring to Section 42 of the Act along with Section 2(1)(e) thereof, a Single Bench of the Hon''ble Madhya Pradesh High Court held that since award was passed at Indore, therefore, unless and until the court at Indore transfers the award to the Court at Delhi it cannot be executed and accordingly the revision petition was allowed setting aside the order passed by the learned ADJ, Indore.

19. In the case of Leela Hotels Ltd. v. Housing and Urban Development Corporation Ltd. reported in (2012) 1 SCC 302, the Hon''ble Supreme Court held in paragraph 45 that an award passed by Arbitrator tantamounts to a decree and it has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the court. This view was taken on reading the clear provision of Section 36 of the Act. The question as to enforcement of award with respect to property situated in another state beyond the territorial jurisdiction of court within the meaning of Section 2(1)(e) of the Act did not arise in that case.

20. On the other hand, Hon''ble Delhi High Court took a different view in the case of Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd. (EA No. 105/2009 in Ex. No. 242/2008 decided on 13.03.2009). The Delhi High Court did not accept the contention that court within the meaning of Section 2(1)(e) would not apply to Section 36 of the Act. The aforesaid judgment of the Hon''ble Madhya Pradesh High Court in the case Computer Sciences Corporation India Pvt. Ltd. was considered by Delhi High Court and it was held that Section 42 of the Act would not apply to Execution applications as an Execution application is not "Arbitral Proceedings" within the meaning of Section 42 of the Act and is not a subsequent application arising out of the agreement and the arbitral proceedings. This is because arbitral proceedings come to an end when the time for making an application to set aside the arbitral award expire and the execution application is an enforcement of the award. So, the place of filing of the execution application need not be the place of filing of the application under Section 34 of the Act. In paragraph 18 of the judgment, opinion was expressed that expression "court" occurring in Section 36 is not meant to be the court within the meaning of Section 2(1)(e) of the Act. The word "court" in Section 36 is used only to describe the manner of enforcement i.e., as a "decree of the court" and not in the context of providing for the court which will have territorial jurisdiction to execute/enforce the award. The legislature has in Section 49 provided for enforcement of foreign awards by deeming the said awards to be a decree of "that court" which would mean the decree of the court which has adjudicated on the enforcement of the award. But in Section 36 legislature in its wisdom did not

use the expression "that" which is indicative of the reference of the court therein being only to describe the manner of enforcement of the award as a decree of the court. According to Delhi High Court, there is no legislative mandate to the effect that arbitral award has to be treated as a decree of that court only which would have the jurisdiction to entertain the suit. Ultimately it was held that an award amounts to a decree by legal fiction created under Section 36 of the Act but it is not a decree of the court and so court has nothing to transfer.

21. A Single Bench of Madras High Court took the similar view in the case of Katak Mahindra Bank Ltd. v. Sivakama Sundari SNarayana SB Murthy (CRP No. 574/2011 decided on 26.08.2011). In that case, an application for enforcement of arbitral award was filed before X Assistant Judge, City Civil Court, Chennai. The learned court returned the Execution petition holding that without being transmitted through proper channel by way of transfer, the award was not enforceable. Considering the provisions of Section 38, 39, 41 and 43 of the Code of Civil Procedure and the provisions of 36 and 58 of the Arbitration and Conciliation Act, 1996, the Hon''ble Madras High Court held that the arbitral tribunal is not a court but its award has been elevated to the level of a decree for the purpose of execution by the legal fiction created under Section 36 of the Act. But it does not elevate the arbitral tribunal to the status of a civil court. Since an award can be executed directly without a seal of approval by a civil court unlike an award passed under the provisions of Arbitration Act, 1940 and since there is no provision in the Act or in the Code to treat a court within whose jurisdiction the arbitral proceedings took place as the court which passed the decree, it is only when a court within whose jurisdiction the arbitral award was passed, is taken to be the court which passed the decree within the meaning of Section 37 and Order 21, Rule 10 CPC that the award holder would be entitled to seek transmission from that court. But there is no deeming provision anywhere to hold that the court within whose jurisdiction the arbitral award was passed, should be taken to be the court which passed the decree. According to Hon''ble Madras High Court in the aforesaid case, whole procedure of filing an execution petition before the court within whose jurisdiction the arbitral award was passed, as though it is the court which passed the decree, is "pathetically misconceived" (sic). Adopting the view of the Hon''ble Delhi High Court it was held that the court within whose jurisdiction the property of the judgment debtor is situate, would have jurisdiction to entertain the execution. This view was taken having noticed that there is no provision in the 1996 Act for transmission of awards from one court to another for the purpose of execution. The civil revision petition was, accordingly, allowed by the aforesaid judgment setting aside the order of the X Assistant Judge, City Civil Court, Chennai.

22. Before embarking on any analysis in regard to the meaning of the word "the decree of the court" occurring in section 36 of the 1996 Act, it is necessary to notice basic changes brought about by the 1996 Act in regard to status and executability of award. In the old Act, the Arbitration Act, 1940, the meaning of the word "court" was wide. Section 2(c) of the 1940 Act defined court as a civil

court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of the suit. Section 2(c) of the 1940 Act is quoted below:-

"2(c). "Court" means a Civil Court having jurisdiction to decide the questions forming the subject matter of reference if the same had been the subject matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court."

Thus it is clear from the definition clause that under the old Act any civil court had jurisdiction to entertain application for and in regard to arbitration proceedings provided it had territorial and pecuniary jurisdiction.

23. But after commencement of the 1996 Act, a major change has been effected in the definition of "court". Under the new Act, all civil courts of a district do not have jurisdiction in regard to arbitration and it has been restricted to the highest civil court of the district. Section 2(1)(e) of the 1996 Act defines "court" and the same is quoted below:-

"2(1)(e). "Court" means the principal 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".

Under the present definition, the highest civil court of a district is "the court". Although, the definition includes High Court in exercise of its ordinary original jurisdiction but this applies to only few High Courts which have ordinary jurisdiction like Calcutta, Bombay etc. In all other High Courts there is no ordinary jurisdiction for civil or criminal actions and so in majority districts, the court of District Judge alone is understood to be the court within the meaning of Section 2(1)(e) of the 1996 Act.

24. It is also significant to notice in the 1996 Act that civil courts other than principal civil court of original jurisdiction (ordinarily meaning thereby the court of District Judge) have been described as judicial authorities wherever such reference has become necessary. In section 5, it has been provided that no "judicial authority" shall intervene except where so provided in this part. Similarly, in section 8 of the 1996 Act, it is provided that a "judicial authority" before which an action is brought in a matter which is the subject of an arbitration agreement, a party is entitled to apply while submitting the first statement on the substance of the dispute for referring the parties to arbitration. This means that when a suit has been brought in any civil court and subject matter of such suit involves an arbitration agreement, in that event, a party is entitled to apply for referring the parties to arbitration in accordance with the procedure prescribed under the section. But in Section 8 without making mention of "any civil court", the legislature has chosen to use the words "judicial

authority". In section 41 (2) of the 1996 Act, there is mention of the words "judicial authority" again to provide for provisions in case of insolvency proceedings.

25. On the other hand, whenever the word "court" has been used in 1996 Act, it has referred to "court" within the meaning of section 2(1)(e) of the 1996 Act only. For example, in Section 9, statute provides for making interim measures before, or during arbitral proceedings or at any time after making of the arbitral award. Section 9 refers to the word "court" having power to pass necessary orders as an interim measure including interim injunction or appointment of receiver. Such power has been given to "court" meaning thereby that such power is vested on principal civil court of original jurisdiction in a district. An application for an interim measure does not lie before any other court except the principal civil court of original jurisdiction in a district. Similarly in section 11(12)(b), there is a mention of the word "court" but it has been clearly indicated that it is nothing but court within the meaning of section 2(1)(e). In section 13(6) of the 1996 Act, it is provided where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the Arbitrator is entitled to any fees. Under section 34, the power to set aside arbitral award has been vested only on principal civil court of original jurisdiction in a district and so the word "court" referred to Section 13(6) of the 1996 Act also refers to said court. In section 14(2), there is yet another reference to the word "court". It provides that if a controversy remains concerning any of the grounds as to failure or impossibility to act by the arbitrator, a party may apply to court to decide on the termination of the mandate. The "court" mentioned in Section 14(2) is also not any other civil court but principal civil court of original jurisdiction in a district. Next reference to the word "court" in 1996 Act is traceable in Section 27 for assistance in taking evidence. It enables a party with approval of the arbitral tribunal to apply to "the Court" for assistance in taking evidence. In section 27(3), "the Court" has been given the jurisdiction to execute the request as to assistance in taking evidence by ordering that the evidence be provided directly to the arbitral tribunal. The principal civil court of original jurisdiction in a district has been referred in section 27(4) and (5) whenever the word "court" has been mentioned. Section 34 of the 1996 Act provides for forum to challenge an arbitral award and it is provided that recourse to a Court against an arbitral award may be made by filing application for setting aside of such award in accordance with the procedure prescribed in the section. No court other than principal civil court of original jurisdiction in a district has jurisdiction to entertain an application under section 34. So, it is clear from above that whenever the word "court" has been used in the 1996 Act, it has referred to principal civil court of original jurisdiction in a district only.

26. The role of civil court under the 1940 Act was virtually all pervasive. Under section 8 of the said Act, a civil court had jurisdiction to appoint an arbitrator or an umpire at the request of a party. After the arbitrator passed an award the same had to be filed before the court under section 14 and if there was no

reason either to modify or remit the award, the civil court had to pronounce judgment under section 17 of the Act and thereupon a decree had to be drawn up. Such a decree being a decree of civil court was capable of being executed under section 38 read with the provisions of Order 21 of the Code of Civil Procedure. Naturally, if the subject matter of execution was beyond the jurisdiction of the court within the meaning of section 2(c) of the 1940 Act, in that event the same had to be transferred under section 39 like any other decree of civil court. The transferability of a decree drawn on the basis of an arbitral award was beyond any doubt. But after the 1940 Act has been replaced by the 1996 Act, a scope for questioning requirement of such transferability has arisen.

27. Under the 1996 Act, award does not require to be filed before court as in 1940 Act. Section 35 of the 1996 Act has conferred finality on an arbitral award. It provides that subject to this part, meaning thereby Part-I of the 1996 Act, an arbitral award shall be final and binding on the parties and persons claiming under them respectively. By section 36, provision has been made for enforcement of a domestic arbitral award. Foreign awards are covered by Part-II of the 1996 Act and the present set of revision petitions have no relation to that part as all the awards herein are arbitral awards of domestic arbitral proceedings.

28. Section 36 of the 1996 Act has elevated an arbitral award to the status of a civil court decree by legal fiction and so it is capable of being executed as if it were a decree of the court. Now, what shall be the meaning of the words "the decree of the court" is the crux of the present revision petitions. To understand the meaning of these words, it is necessary to keep in mind the observations made herein above as to definition of "court" in the 1940 Act as well as the 1996 Act and also the status of an arbitral award under both the statutes as discussed above. Section 36 casts light in this regard and so it is quoted below:-

"36. Enforcement. - Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

There is no reason as to why the word "court" mentioned in section 36 should not be understood to be principal civil court of original jurisdiction, having jurisdiction to decide the questions forming the subject matter of arbitration if the same had been the subject matter of a suit. If it is so construed, in that event, "the decree of the court" occurring in section 36 would mean decree passed by principal civil court of original jurisdiction in a district having jurisdiction to decide the questions forming the subject matter of the arbitration in terms of definition of "court" under section 2(1)(e) of the 1996 Act. This is because, the place of arbitration and the principal civil court of original jurisdiction in a district may not be at same place. Under section 20 of the 1996 Act, parties are free to agree on the place of arbitration irrespective of whether the subject matter of the dispute is situated at that place. Parties at two different

places may agree to hold arbitration in a third place as per their convenience/ contract although such a place may not be the place of the subject matter of the dispute. At any event the court, in all those cases, shall be the principal civil court of original jurisdiction in a district in whose territorial jurisdiction the subject matter of the arbitration is situated. Consequently, it shall be the court for the purpose of Section 34 as well as Section 36 of the 1996 Act. In this regard, the view taken by Hon''ble Madhya Pradesh High Court appears to be of more persuasive force than that of Hon''ble Delhi High Court.

29. In view of what has been stated above, when an application under section 36 is filed before any principal civil court of original jurisdiction, it is duty bound to find out:-

(i) whether it has territorial jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, and if so

(ii) whether period for filing application for setting aside the arbitral award under section 34 of the Act has expired, and if so

(iii) whether such an application has at all been filed, and if so

(iv) whether such application on being filed has already been refused;

then and then only, the court can proceed to enforce the award as if it were a decree of that court. But if it is found that it does not have jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, in that event, it cannot go for enforcing the award taking recourse to the provisions of Order 21 of the Code of Civil Procedure because by describing an arbitral award as "decree of the court", the legislature had amply mandated that it would only be the principal civil court of original jurisdiction, having jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of a suit. Otherwise, the words "the court" occurring at the end of section 36 after the word "a decree of" shall become redundant which is contrary to the principles of interpretation of statutes.

30. However, if the court to which an application under section 36 has been filed, finds that it does not have jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, then it can entertain application only if the principal civil court of original jurisdiction having jurisdiction to decide the questions forming the subject matter of arbitration transfers the same to it. This is because, as discussed above, the arbitral award at all events is the decree of the court having jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of the suit and not otherwise. If an arbitral award is the decree of the principal civil court having jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of the

suit by legal fiction created by section 36 of the 1996 Act all other attributes of a civil court decree shall be available to it and so it shall also be capable of being transferred under section 39 as well as Rules 5, 6, 7 and 8 of Order 21 of the Code of Civil Procedure.

31. The above questions are fundamental and also inherent in section 36 of the Act. Unless an executing court is satisfied on these points, it does not derive jurisdiction to proceed further for enforcing an arbitral award. As these questions go to the root of the matter and are intimately related to the inherent jurisdiction of a court, a court cannot entertain an execution application under section 36 of the Act read with the provisions of Order 21 of the CPC merely at the asking of an award holder. As observed above, these aspects have not been gone into by the learned Executing Courts involved in any of these revision petitions. Consequently, it is to be held that the impugned orders are vitiated by jurisdictional error and so, they are liable to be set aside. The impugned orders are accordingly set aside.

32. In view of what has been discussed above, all the revision petitions stand allowed and the concerned learned Executing courts are directed to pass orders afresh taking into consideration the observations made including the questions framed herein above. To avoid any further confusion and avoidable multiplicity of proceedings, it is hereby made clear that in deciding the questions referred to in question No. (ii) and (iii) in paragraph 29 above, the learned court shall first determine the date since when limitation within the meaning of section 34(3) of the 1996 Act would start running and thereupon proceed to decide the next question. However, if the court finds after hearing the parties that it does not have jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of the suit in that event, shall not proceed to decide any other question or to enforce the award until and unless the award is transferred to it by the principal civil court having jurisdiction to decide questions forming the subject matter of the arbitration if the same had been the subject matter of the suit.

33. The revision petitions stand disposed of accordingly.

34. No order as to costs.