

(2022) 01 MP CK 0204
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5260 Of 2021

Canara Bank

APPELLANT

Vs

Bank Of India & Others

RESPONDENT

Date of Decision : 06-01-2022

Acts Referred:

Constitution Of India, 1950 — Article 32, 136, 226, 227
Arbitration And Conciliation Act 1996 — Section 8, 9, 11, 16, 16(2), 16(3), 17, 34,
34(2)(v), 34(2)(a)(v), 34(6), 35, 34, 36, 37, 37(2)
Limitation Act, 1963 — Section 5
Code Of Civil Procedure, 1908 — Section 47, 151

Citation : (2022) 01 MP CK 0204

Hon'ble Judges : Subodh Abhyankar, J

Bench : Single Bench

Advocate : Veer Kumar Jain, Vaibhav Jain, Shishir Kumar Purohit, Manoj Kumar Agrawal

Final Decision : Dismissed

Judgement

Subodh Abhyankar, J

1. This petition has been filed by the petitioner -Canara Bank under Article 226 / 227 of the Constitution of India assailing order dated 10.04.2019 (Annexure P/19) passed by learned 25th Additional District Judge, Indore (MP) in execution proceedings as also award dated 19.08.2017 (Annexure P/10) passed by respondent No.1 - Bank of India through its Chief Manager, acting as an Arbitrator.

2. Considering the fact that the petition has essentially been filed against an order passed by the Civil Court in execution proceedings and an award by the Arbitrator, the present petition is being entertained under Article 227 of the Constitution of India only.

3. Brief facts giving rise to the present petition are that the petitioner is a Nationalized Bank in which another nationalized bank namely Syndicate Bank

also got merged; the case of the petitioner is that Syndicate Bank had sanctioned a loan to respondent No.2 - M/s. Kamal Cotspin Private Limited along with other banks who are also involved in the aforesaid sanctioning of the loan and thus there was a Consortium of Banks in which respondent No.1 - Bank of India was the Consortium Leader. According to the loan sanction letters (Annexure P/1 and Annexure P/2), and loan agreement (Annexure P/3), in the case of pre-payment of loan, respondent No.2 would be liable to pay "pre-payment charges", as agreed by Consortium. It is admitted that the loan advanced by Syndicate Bank was pre-paid, as it was taken over by Axis Bank, because of which, the petitioner - Bank also charged and recovered "pre-payment charges" on respondent No.2. The aforesaid recovery was objected to by respondent No.2 on the ground that it was to be decided by the Consortium.

4. Assailing the said recovery by the Syndicate Bank, respondent No.2 also filed a writ petition before this Court bearing Writ Petition No.12713/2013 which came to be disposed of by this Court on 15.10.2014 (Annexure P/4), observing that the petitioner is having a remedy to approach the Civil Court, Arbitrator as well as before the Banking Ombudsman and therefore, the petition was dismissed with a liberty to the petitioner to avail the appropriate alternative remedy. The aforesaid order was also challenged by respondent No.2 in Writ Appeal No.99/2015 which also affirmed the order passed by the Single Judge vide its order dated 18.03.2015 (Annexure P/5).

5. Subsequently, a notice dated 11.07.2015 was sent by respondent No.2 to respondent No.1 (Bank of India) seeking its appointment as an Arbitrator to settle the dispute between respondent No.2 and the petitioner; pursuant to which, Bank of India also issued a letter dated 22.08.2015 (Annexure P/6) to the petitioner mentioning that in terms of Clause 20 of sanction letter dated 22.02.2007, a dispute / claim reference in respect of pre-payment / commitment charges has been referred by respondent No.2 vide its letter dated 11.07.2015 hence, they were directed to attend the hearing on 04.09.2015 and the petitioner was also directed to submit its claim on the said date of hearing. One day prior to that, i.e., on 03.09.2015 (Annexure P/7), a letter was sent by the petitioner to respondent No.1 (Bank of India) stating that there is no arbitration pending as on date and also asked the respondent No.1 as to who has appointed them as an Arbitrator.

6. On 04.09.2015 (Annexure P/8) a meeting of Consortium of Banks also took place at Bank of India, Sneh Nagar Branch including the representatives of the petitioner - Bank wherein, as submitted by the learned Senior Counsel for the petitioner, respondent No.1 appointed itself as an Arbitrator and subsequent thereto, respondent No.2 taking the order passed by this Court as a clue to file arbitration proceedings, submitted his claim before the Lead Bank i.e. Bank of India, Indore (respondent No.1) claiming a sum of Rs.31,46,000/- (Rupees Thirty One Lakh Forty Six Thousand) and other amount from the petitioner on 04.09.2015 (Annexure P/9).

7. Respondent No.1 took up the arbitration proceedings and passed the award on 19.08.2017 (Annexure P/10) in favour of respondent No.2 (M/s. Kamal Cotspin Private Limited) while deciding the objection of the petitioner regarding Bank of India's jurisdiction to hold the arbitration.

8. The aforesaid arbitration award / clause was also put in execution; and in the execution proceedings, an application dated 18.04.2018 (Annexure P/12) under Section 34 of the Arbitration & Conciliation Act, 1996 (herein after referred to as the Arbitration Act, for brevity) was filed by the petitioner herein, challenging the award itself on the ground that there was no arbitration agreement between the parties and the same being null and void, cannot be executed. An application (Annexure P/13) under Section 5 of the Limitation Act, 1963 was also filed along with the aforesaid application. Along with this application, another application Annexure P/14, under Section 47 read with Section 151 of the Code of Civil Procedure, 1908 dated 18.04.2018 was also filed challenging the execution proceedings on the same ground that arbitral tribunal i.e. respondent No.1 had no jurisdiction to adjudicate the dispute, as there was no arbitration agreement between the parties. The aforesaid application filed u/s.34 of the Arbitration Act came to be dismissed by the Executing Court (18th Additional District Judge, Indore MP) vide order dated 09.07.2018 on the ground of limitation; and in Arbitration Appeal No.78/2018 filed against the aforesaid order u/s.37 of the Arbitration Act, this Court also rejected the same vide its order dated 14.01.2019 affirming the order of the District court that the application under Section 34 of the Arbitration Act was clearly barred by time. A petition for review of the aforesaid order being Review Petition No.462/2019 was also dismissed by this Court on 02.04.2019 (Annexure P/17); and finally, in the Supreme Court, in the Special Leave Petition (Civil) No(s).18039/2019 was also dismissed vide order dated 29.07.2019 (Annexure P/18) affirming the orders passed by the High Court.

9. In the mean time, the other application filed by the petitioner under Section 47 read with Section 151 of the Code of Civil Procedure, 1908 was also decided by the execution Court vide its order dated 10.04.2019 rejecting the same on the ground that since the petitioner's application under Section 34 of the Arbitration Act has already been dismissed and subsequently appeal under Section 37 of the Arbitration Act has also been dismissed by this Court. Also holding that as the petitioner has already challenged the award under Section 34 of the Arbitration Act and in appeal under Section 37 of the Arbitration Act, it means that the petitioner has also accepted that the award was indeed passed by the Arbitrator hence, the petitioner cannot deny the same u/s.47 of the Code.

10. Shri Veer Kumar Jain, learned Senior Counsel appearing for the petitioner has vehemently argued before this Court regarding the maintainability of the petition on the basis of scores of decisions rendered by the Supreme Court and other Courts, placing strong reliance upon Section 47 of the Code of Civil Procedure, 1973 to submit that the question of jurisdiction of the arbitral tribunal

ought to have been decided by the Executing Court, as provided under Section 47 of the CPC, as the jurisdiction of the arbitral tribunal was very much a question arising between the parties to the dispute in which the award/decreed was passed.

11. Shri Jain has submitted that as per Section 36 of the Arbitration Act which refers to the enforcement of the award, it is clearly provided that an award shall be enforced in accordance with the provisions of the CPC, in the same manner as if it were a decree of the Court laying special emphasis on the phrase "in accordance with the provisions of the CPC in the same manner as if it were a decree of the Court", of s.36 of the Arbitration Act.

12. Thus, it is submitted that despite the fact that the application under Section 34 of the Arbitration Act was rejected on the ground of limitation as also the subsequent appeal under Section 37 of the Arbitration Act and the SLP as well, the question of jurisdiction, going to core of the matter ought to have been decided by the Executing Court u/s.47 of the Code.

13. In support of his contentions, Shri Jain has also relied upon the following judgements: -

(1) Karan Singh and others v. Chaman Paswan and others reported as AIR 1954 SC 340;

(2) Karashiddayya Shiddayya Bennur v. Shree Gajanan Urban Cooperative Bank Limited and another reported as AIR (30) 1943 Bombay 228;

(3) Sunder Dass v. Ram Parkash reported as AIR 1977 SC 1201;

(4) Sushil Kumar Mehta v. Govind Ram Bohra (Dead) Through L.Rs. reported as (1990) 1 SCC 193;

(5) Chiranjilal Shrilal Goenka v. Jasjit Singh and others reported as (1993) 2 SSC 507;

(6) Harshad Chiman Lal Modi v. DLF Universal Limited and another reported as (2005) 7 SCC 791;

(7) Surjbai w/o Kaluram and others v. Sadashiv Jugal Kishore and another reported as AIR 1958 MP 100;

(8) K.K. Modi v. K.N. Modi and others reported as (1998) 3 SCC 573;

(9) Bharat Bhushan Bansal v. U.P. Small Industries Corporation Limited Kanpur reported as (1999) 2 SCC 166;

(10) Northern Coalfields Limited v. M/s. Saluja Construction Company reported as AIR 2018 MP 31;

(11) State of Orissa and another v. Damodar Das reported as (1996) 2 SSC 216;

(12) Nav Bharat Construction Company v. State of Rajasthan and others reported

as (1996) 7 SCC 89;

(13) Waverly Jute Mills Company Limited v. Raymon & Company (India) Private Limited reported as AIR 1963 SC 90;

(14) Jagmittar Sain Bhagat v. Director, Health Services, Haryana reported as (2013) 10 SCC 136; and

(15) Bharat Coking Coal Limited v. Annpurna Construction reported as (2003) 8 SSC 154.

14. Senior Counsel has also drawn the attention of this Court to the decision of the Supreme Court in the case of Kiran Singh (supra) wherein it is held that a decree passed by a Court without jurisdiction is nullity, and its invalidity could be set up whenever or whenever it is sought to be enforced or relied upon, even at the stage of the execution and even in collateral proceedings.

Similar findings have also been recorded in the other decisions relied upon by Shri Jain.

15. Lastly, Shri Jain has submitted that the petitioner is contesting the matter, as in the impugned award, a huge amount is directed to be paid to respondent No.2 which belongs to the public only; and it is not a question where any personal interest would be involved.

16. Learned counsel for respondent No.2, on the other hand, has opposed the prayer and it is submitted that no case for interference is made out, as the petitioner has already lost in the Civil Court under Section 34 of the Arbitration Act and its appeal Section

37 of the Arbitration Act as also further challenge before the Supreme Court in SLP has met with the same result of dismissal. Hence, at this stage, the petitioner cannot be allowed to assail the award under s.47 of the Code on the ground of lack of jurisdiction on the part of the arbitral tribunal to pass the award.

17. In support of his submission, Shri Manoj Kumar Agrawal, learned counsel for respondent No.2 has also relied upon the following judgments: -

(1) Raunaq International Limited v. I.V.R. Construction Limited and others reported as (1999) 1 SCC 492;

(2) A.V. Papayya Sastry and others v. Government of Andhra Pradesh and others reported as (2007) 4 SCC 221;

(3) Gas Authority of India Limited and another v. Ketki Construction (I) Limited and others reported as (2007) 5 SCC 38;

(4) P. Anand Gajapathi Raji and others v. G P.V. G. Raju (Dead) and others reported as (2000) 4 SCC 539; and

(5) BGS SGS Soma JV v. NHPC Limited reported as (2020) 4 SCC 234.

18. Counsel has also submitted that since the stay order was also passed by this Court on 10.03.2021, the present respondent is also entitled to exemplary cost. In support of which, he has also relied upon the decision of the Supreme Court in the case of Raunak International Limited v. I.V.R. Constructions Limited and others reported as (1999) 1 SCC 490.

19. Counsel has also drawn the attention of this court to the decision rendered by the Supreme Court in the case of Gas Authority of India Limited (supra) to submit that the ground of lack of jurisdiction can only be made under Section 34 (2) (a) (v) of the Arbitration Act.

20. Heard, learned counsel for the parties and perused the record.

21. The sole question which falls for consideration of this Court is whether the jurisdiction of an Arbitrator to pass the award can still be challenged in the execution proceedings of the award in the Civil court under the provisions of Section 47 of the Code, as according to Section 36 of the Arbitration Act, an arbitral award is to be executed by the Civil Court in the same manner as if it were a decree of the Court.

22. For proper appreciation of the issue, it would be necessary to refer to the relevant provisions, viz., s.47 of the Code and Sections 16, 34 (2) (v), 35 and 36 of the Arbitration Act involved in the case. Relevant excerpts of Section 47 of the CPC reads, as under: -

"47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2)"

Sections 34 (2) (v), 35 and 36 of the Arbitration Act read as under: -

34. Application for setting aside arbitral award.—(1) 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).

(2) An arbitral award may be set aside by the Court only if —

(a) 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 being 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: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

35. Finality of arbitral awards.—Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

36. Enforcement.—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2)

(3)"

23. On due consideration, this Court is of the considered opinion that the Arbitration Act is a special and self contained Act confined only to the disputes covered under an arbitration agreement, whereas, CPC is the general law of procedure in cases of civil disputes, thus in case of any conflict between the two enactments, it is the special law that would prevail.

24. This aspect of the matter has also been dealt with by the Supreme Court in the case of Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706, the relevant paras of the same read, as under:-

1.....The present appeal raises important questions relating to the High Court's exercise of jurisdiction under Article 227 of the Constitution of India when it comes to matters that are decided under the Arbitration and Conciliation Act, 1996 ("the Act", for short).

11. Having heard the learned counsel for both parties, it is first necessary to set out certain provisions of the Arbitration and Conciliation Act, 1996.

12. Section 5 states:

"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."

13. Section 37 which is also material states as follows:

"37. Appealable orders.—(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely—

- (a) refusing to refer the parties to arbitration under Section 8;
- (b) granting or refusing to grant any measure under Section 9;
- (c) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to a court from an order granting of the Arbitral Tribunal—

- (a) accepting the plea referred in sub-section (2) or sub-section (3) of Section 16; or
- (b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

14. What is also important to note is that under Section 29-A of the Act which was inserted by the Amendment Act, 2016 a time-limit was made within which arbitral awards must be made, namely, 12 months from the date the Arbitral Tribunal enters upon the reference. Also, it is important to note that even so far as Section 34 applications are concerned, Section 34(6) added by the same amendment states that these applications are to be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other parties.

15. Given the aforesaid statutory provision and given the fact that the 1996 Act repealed three previous enactments in order that there be speedy disposal of all matters covered by it, it is clear that the statutory policy of the Act is that not only are time-limits set down for disposal of the arbitral proceedings themselves but time-limits have also been set down for Section 34 references to be decided. Equally, in *Union of India v. Varindera Constructions Ltd.*, dated 17-9-2018, disposing of SLP (C) No. 23155 of 2013, this Court has imposed the selfsame limitation on first appeals under Section 37 so that there be a timely resolution of all matters which are covered by arbitration awards.

16. Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of

first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see Section 37(2) of the Act].

17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.

18. In *Nivedita Sharma v. COAI*, this Court referred to several judgments and held: (SCC pp. 343-45, paras 11-16)

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation— *L. Chandra Kumar v. Union of India*. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

12. In *Thansingh Nathmal v. Supt. of Taxes*, this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7)

'7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally

will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, this Court observed:

'11. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* in the following passage: (ER p. 495)

"... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* and has been reaffirmed by the Privy Council in *Attorney General of Trinidad & Tobago v. Gordon Grant & Co. Ltd.* and *Secy. of State v. Mask & Co.* It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In *Mafatlal Industries Ltd. v. Union of India*, B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

'77. ... So far as the jurisdiction of the High Court under Article 226— or for that matter, the jurisdiction of this Court under Article 32— is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/ Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'

15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Muzaffarnagar*, it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in *Thansingh Nathmal v. Supt. of Taxes* and other similar judgments that the High Court will

not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field.”

19. In *SBP & Co.*, this Court while considering interference with an order passed by an Arbitral Tribunal under Articles 226/227 of the Constitution laid down as follows: (SCC p. 663, paras 45-46)

“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.”

20. While the learned Additional Solicitor General is correct in stating that this statement of the law does not directly apply on the facts of the present case, yet it is important to notice that the seven-Judge Bench has referred to the object of the Act being that of minimising judicial intervention and that this important object should always be kept in the forefront when an Article 227 petition is being disposed of against proceedings that are decided under the Act.

21. It is true that in *Punjab Agro Industries Corpn. Ltd.*, this Court distinguished *SBP & Co.* stating that it will not apply to a case of a non-appointment of an arbitrator. This Court held: (*Punjab Agro Industries Corpn. Ltd.* case, SCC p. 132, para 9)

"9. We have already noticed that though the order under Section 11(4) is a judicial order, having regard to Section 11(7) relating to finality of such orders and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP & Co. does not bar such a writ petition. The observations of this Court in SBP & Co. that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of that High Court . The said observations do not apply to a subordinate court functioning as designate of the Chief Justice."

23. We reiterate that the policy of the Act is speedy disposal of arbitration cases. The Arbitration Act is a special Act and a self-contained code dealing with arbitration. This Court in Fuerst Day Lawson Ltd. , has specifically held as follows: (SCC p. 371, para 89)

" 89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan) was held to be a self- contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it

'19. ... a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done. ...' (S.N. Srikantia & Co. case, SCC OnLine Bom para 19)

In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

What becomes clear is that had the High Court itself disposed of the first appeal in the present case, no Article 227 petition could possibly lie — all that could perhaps have been done was to file an LPA before a Division Bench of the same High Court. This, as we have seen, has specifically been interdicted by Fuerst Day Lawson Ltd. Merely because, on the facts of this case, the first appeal was disposed of by a court subordinate to the High Court, an Article 227 petition ought not to have been entertained."

(emphasis supplied)

So far as the competence of arbitral tribunal to rule on its jurisdiction is concerned, the same is provided u/s.16 of the Arbitration Act which reads as under:-

"16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3)

(4).....

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

(emphasis supplied)

25. Similarly, an award passed by an Arbitrator is liable to be challenged under Section 34 (2) of the Arbitration Act in which there is a clear provision that an arbitration award may be set aside by the Court only if certain conditions are fulfilled, on the specific grounds raised by the parties, as provided under Section 34 of the Arbitration Act. It is also apparent that an award cannot be challenged on any other ground except under Section 34 of the Arbitration Act. The grounds raised by the petitioner in the present petition are also covered under Clause (v) of Sub Section (2) of Section 34 of the Arbitration Act, which reads, as under: -

"34. Application for setting aside arbitral award.—(1) 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).

(2) An arbitral award may be set aside by the Court only if —

(a) the party making the application furnishes proof that—

(i)

(ii)

(iii)

(iv)

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part”

(Emphasis supplied)

26. The Supreme Court in the case of Gas Authority of India Limited v. Ketu Construction (I) Limited & others (supra) has also held that a plea of jurisdiction must be raised at the initial stage itself before Arbitral Tribunal and normally not later than in a statement of defence. Relevant part of the same reads, as under: -

“23. So, the commentary on the Model Law which was drafted by UNCITRAL and has been adopted by many countries including India shows that where a party asserts that the arbitral tribunal has not been properly constituted or it has no jurisdiction, then such a plea must be raised before the arbitral tribunal right at the beginning and normally not later than in the statement of defence.

24. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the arbitral tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the arbitral tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the arbitral tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

25. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the arbitral tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34 (2) (v) of the Act on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.”

(emphasis supplied)

A perusal of the aforesaid decision also reveals that the ground of lack of jurisdiction has to be taken by a party at the threshold of the arbitration proceedings only and before no other forum. Thus, it is held that validity of an arbitral award cannot be challenged under s.43 of the Code on the pretext that s.36 of the Arbitration Act provides for the execution of an award in the same manner as if it were a decree of the court.

27. On merits, it is found that the petitioner has placed on record letter dated

03.09.2015 (Annexure P/7), in which the jurisdiction of the Arbitrator was also challenged; and soon thereafter, i.e., on 04.09.2015 (Annexure P/8), a meeting of the Consortium of the Banks took place in which it was decided that respondent No.1 would act as an Arbitrator being the Leader of the Consortium. At this juncture, it would be germane to refer to s.7 of the Arbitration Act which reads as under:-

"7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in —

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication¹ [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

(emphasis supplied)

28. It is apparent from s.7 of the Act that an arbitration agreement comes into existence if it is in writing, and is contained in a document signed by the parties. This court is of the considered opinion that s. 7 clearly conveys that it is not necessary that the parties must enter into an arbitration agreement at the initial stage itself and it would suffice even at the subsequent stage if the parties decide to resolve to dissolve their dispute through arbitration. In such circumstances, even if there was no specific condition in the agreement that respondent No.1 (Bank of India) would be an Arbitrator to decide the issue regarding "pre-payment charges", by their subsequent conduct of passing the resolution in the meeting of the Consortium dated 04.09.2015 (Annexure P/8), which is also signed by the officer of the petitioner Syndiate Bank of India, Indore, That the matter is to be referred to the Arbitrator-respondent No.1 who is to act as an Arbitrator being the Leader of the Consortium of Banks, it can be safely presumed that there was an arbitration agreement between the parties. This objection regarding the jurisdiction of the Arbitrator has also been decided by respondent No.1 (Arbitrator) in its final award dated 19.08.2017 (Annexure

P/10) and it was the for the petitioner to challenge the same, in accordance with the provisions of Section 34 of the Arbitration Act; and admittedly, the aforesaid award was challenged, but after the period of limitation as provided under Section 34 of the Arbitration Act, hence the same was dismissed on the ground of limitation. And the appeal under Section 37 of the Arbitration Act, and finally the SLP in the Supreme Court also came to be dismissed.

29. In such circumstances, this Court is unable to accept the contentions raised by the learned Senior Counsel appearing for the petitioner, that the challenge as to the jurisdiction of the arbitral tribunal can very well be raised by petitioner under Section 47 of the CPC in the execution proceedings. The decisions cited by the learned Senior Counsel appearing for the petitioner are distinguishable as none of the decisions have been rendered in respect of arbitration proceedings involving execution of an arbitration award. If the contention of the petitioner is accepted, it would defeat the whole purpose of the Arbitration Act of expeditious relief to the parties and lead to opening of the Pandora's Box even after an award has attained the finality.

30. It is true that the petitioner is a Nationalized Bank, however, this plea cannot be entertained to cover up the incompetency of the Bank Officers to take timely legal recourse to challenge the award which involves a huge amount. In such circumstances, the petition being wholly misconceived, the same is liable to be dismissed with costs.

31. Accordingly, the petition being devoid of merits is liable to be and is hereby dismissed with exemplary cost of Rs.50,000/-(Rupees fifty thousand) to be paid to the respondent No.2 within a period of two weeks from the date of this order.

Petition stands dismissed.