

(2019) 12 KAR CK 0016
In the Karnataka High Court
Case No : Civil Revision Petition No. 348 Of 2016

P. Tarachand

APPELLANT

Vs

Seshamal M Jain

RESPONDENT

Date of Decision : 06-12-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 47, 151, Order 9 Rule 7, Order 9 Rule 13,
Order 20 Rule 15, Order 20 Rule 18
Arbitration Act, 1940 — Section 8, 20, 32, 34, 37(3)
Arbitration And Conciliation Act, 1996 — Section 8, 17, 19, 20, 21, 25, 32, 33, 34, 35,
85(2)(a)
Suits Valuation Act, 1887 — Section 11
General Clauses Act, 1897 — Section 6

Citation : (2019) 12 KAR CK 0016

Hon'ble Judges : S.R.Krishna Kumar, J

Bench : Single Bench

Advocate : D.L.N.Rao, Jose Sebastian, Shanmukhappa, V.B. Ravishankar, Sriram

Final Decision : Dismissed

Judgement

1. This revision petition arises out of the impugned judgment and order dated 16.06.2016 passed in FDP No.113/2010 on the file of the XXII Additional City Civil and Sessions Judge, Bengaluru, rejecting the application filed by the petitioner under Section 47 read with Section 151 CPC.

2. The aforesaid FDP No.113/2010 was filed by the respondents 1 and 2 herein pursuant to judgment and decree passed in their favour dated 28.02.2007 in O.S.No.2018/1995 filed by them against the petitioner herein and respondents 3 to 5. In the said FDP No.113/2010, the petitioner herein was arrayed as Respondent No.1 while respondents 3 to 5 were arrayed as Respondents 2 to 4.

3. Briefly stated, the facts giving rise to the above revision petition are as follows:

The respondents 1 and 2 instituted a suit in O.S.No.2018/1995 in the Court below for dissolution of the partnership constituted under partnership deed dated

11.03.1983 and for other reliefs. In the said suit, the petitioner herein was arrayed as Defendant No.1 while the respondents 3 to 5 were arrayed as Defendants 2 to 4. In the said suit, it was the specific contention that the plaintiffs and defendants constituted a partnership firm known as M/s.Mahaveer Enterprises by a deed of partnership dt.11.03.1983 under which each of the partners had specific shares. It was also contended that the suit schedule property purchased in the name of the first defendant who was the managing partner on 19.12.1983 was for and on behalf of the partnership firm and for the benefit of all the partners of the firm.

4. The plaintiffs further contended that since certain disputes arose between the plaintiffs and the defendants, in particular, the defendant No.1 with regard to the partnership business and its properties, the plaintiffs appointed K.Prabhakar, advocate as the sole arbitrator to resolve the dispute between the parties. Pursuant thereto, the said arbitrator issued a notice dated 24.12.1994 to the defendants informing them that he had been appointed as arbitrator and consequently called upon them to give their consent for his appointment and to proceed with the matter. However, since defendant No.1 issued a reply dated 13.01.1995 refusing to accept said K.Prabhakar as the arbitrator and further called upon the said arbitrator to discharge himself from any further obligation and also that the defendant No.1 would precipitate the matter in the Court of law, the plaintiffs were constrained to institute the said suit in O.S.No.2018/1995 against the defendants.

5. In the said suit O.S.No.2018/1995, the defendants 2 and 3 were placed *exparte* and defendant No.4 contested the suit. In so far defendant No.1 (petitioner herein) is concerned, he was initially placed *exparte* on 15.11.1996. Thereafter, on 28.06.1999, the defendant No.1 filed an application under order IX Rule 7 CPC to set aside the aforesaid order placing him *exparte* and for an opportunity to file his written statement and contest the suit. The said application was allowed on 08.10.1999 and defendant No.1 was permitted to file his written statement on payment of cost of Rs.200. However on the next date of hearing, i.e., 23.05.2000, defendant No.1 was absent and the earlier order dated 08.10.1999 passed in his favour having not been complied with by the defendant No.1 who did not file his written statement, the Court below took his written statement as not filed and proceeded with the suit.

6. As stated *supra*, defendants 1 to 3 did not contest the suit which was contested by the defendant No.4 alone. After trial, the Court below passed a preliminary decree dated 28.02.2007 thereby decreeing the suit in favour of the plaintiffs against all the defendants including defendant No.1 (petitioner herein).

7. On 19.07.2010, plaintiffs (respondents 1 and 2 herein) instituted final decree proceedings in FDP No.113/2010 under Order 20 Rule 15 CPC in pursuance of the preliminary decree referred to *supra*. On 26.11.2010, the petitioner herein appeared in the FDP and filed his objections to the petition on 06.09.2011. Thereafter, on 18.11.2011, the petitioner filed Misc.No.781/2011 under Order IX

Rule 13 CPC to set aside the aforesaid preliminary decree passed in O.S.No.2018/1995.

8. When both the matters were pending in the Court below, on 01.10.2013, the petitioner herein who was respondent No.1 in FDP.No.113/2010 filed an application under Section 47 read with Section 151 CPC to dismiss the final decree proceedings as not maintainable by holding that the preliminary decree passed in O.S.No.2018/1995 dated 28.02.2007 is a nullity and unenforceable under law in view of the arbitration agreement contained in clause No.14 of the partnership deed dated 11.03.1983. The respondents 1 and 2 herein opposed the said application by filing their objections. By the impugned order dated 16.06.2016, the Court below rejected the aforesaid application filed by the petitioner under Sections 47 and 151 CPC. Aggrieved by the rejection of the said application, the petitioner has preferred the present revision petition.

9. I have heard the learned senior counsel appearing on behalf of the petitioner as well as the learned counsel appearing on behalf of respondents 1 and 2 and perused the material on record.

10. The learned senior counsel for the petitioner submitted that the Court below committed an error in coming to the conclusion that in final decree proceedings, it was not permissible for the Court to go behind the preliminary decree to adjudicate whether the preliminary decree is just and proper and passed by a Court having jurisdiction. Elaborating his submissions, learned senior counsel would submit that having regard to the undisputed arbitration agreement found at Clause No.14 of the Partnership Deed dated 11.03.1983, the suit filed by the respondents 1 and 2 was not maintainable and there was inherent lack of jurisdiction on the part of the Court below to adjudicate upon the suit and consequently, the judgment and decree passed in the suit was without jurisdiction or authority of law and the same being a nullity and non est in the eye of law, the final decree proceedings were liable to be dismissed on this ground alone. It was submitted that a perusal of the plaint averments would indicate that neither the partnership deed dated 11.03.1983 nor the arbitration clause were in dispute and as such, the decree passed by the Court below without taking into account the arbitration clause was a nullity and non-est on account of inherent lack of jurisdiction and this question can be gone into even in collateral proceedings including the final decree proceedings.

11. Learned senior counsel would also submit that the plea with regard to ouster of jurisdiction of the Civil Court qua existence of an arbitration clause is similar to a plea regarding a claim being barred by limitation and that accordingly, even if the petitioner-defendant No.1 had not put forth/urged the said plea before the Court below, it was incumbent upon the Court which was seized with O.S.No.2018/1995 to consider and adjudicate upon the said plea. It was also contended that the Court below committed an error in summarily rejecting the application filed by the petitioner which involved a mixed question of fact and law without giving any opportunity to the petitioner to establish his contentions and

as such, the impugned order deserves to be set aside and the matter requires to be remitted back to the Court below in order to provide an opportunity to the petitioner to substantiate his contentions in the face of the undisputed fact that the application filed by him under Section 47 CPC necessarily has to be adjudicated like a regular suit after conducting a full-fledged trial.

12. Learned senior counsel also invited my attention to the various provisions of the Arbitration Act, 1940 (for short 'the Act of 1940') in order to contend that by virtue of the provisions contained in Sections 8, 20, 32 and 34, the jurisdiction of the civil Court stood ousted on account of the Arbitration Clause. It was also contended that in view of the undisputed fact that the suit was filed in 1995 prior to coming into force of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996') which came into force on 22.08.1996, the provisions of the Act of 1940 were applicable to the facts of the instant case particularly when even as per the plaint averments, the arbitral proceedings had commenced prior to the Act of 1996 coming into force. Consequently, by virtue of Section 85(2)(a) of the Act of 1996 which deals with repeal and savings, the Act of 1940 would have to be applied to the instant case.

13. It was therefore contended that having regard to the aforesaid facts and circumstances, the revision petition deserves to be allowed, setting aside the impugned judgment and order passed by the Court below.

14. Per contra, learned counsel for the respondents 1 and 2 submits that the conduct of the petitioner in not putting forth the plea with regard to the arbitration clause either in the suit in the Court below or in his Misc.No.781/2011 or in the objections filed by him in FDP No.113/2010 coupled with his conduct in refusing to get the matter referred to arbitration prior to filing of the suit clearly establishes that the petitioner was stopped from putting forth the present plea in final decree proceedings. It was also contended that Section 47 CPC does not apply to final decree proceedings since the said provision applies only to execution proceedings and the final decree proceedings which were not execution proceedings within the meaning of Section 47 or order 21 CPC, the application filed by the petitioner under Section 47 is not maintainable particularly when it is only the final decree that is capable of being executed by the executing Court. It was also contended that the issue regarding the arbitration clause had attained finality in the suit itself and the same could not be re-agitated in final decree proceedings. Lastly, it was contended that having filed Misc.No.781/2011 for setting aside the preliminary decree on the premise that the said decree was valid, it was not permissible for the petitioner to prosecute two parallel/dual remedies on the ground that the decree was without jurisdiction. It was therefore contended that the petitioner had filed the instant application in the Court below with malafide intention and ulterior motive of protracting the proceedings and the same was rightly rejected by the Court below under the impugned order.

15. By way of reply, learned senior counsel appearing on behalf of the petitioner submits that the contention of the respondents 1 and 2 that the conduct of the

petitioner disentitles them from any relief is untenable inasmuch as an opportunity is required to be given to the petitioner to explain the facts and circumstances which would require a full-fledged trial by the Court below. It was also contended that even assuming section 47 CPC was not applicable to final decree proceedings, the ground regarding inherent lack of jurisdiction of the Court can be raised even in collateral proceedings as held by the Apex Court and several Courts and as such, it was open for the petitioner to urge this ground in final decree proceedings. It was therefore contended that the impugned order deserves to be set aside by this Court. The learned senior counsel relied upon the following judgments:

1. Kiran Singh and others vs. Chaman Paswan and others; (AIR 1954 SC 340)
2. Urban Improvement Trust, Jodhpur vs. Gokul Narain (Dead) By. LRs. And Another; (1996) 4 SCC 178)
3. Howrah Daw Mangla Hat B.B. Samity vs Pronab Kumar Daw; (2001) 6 SCC 534)
4. Jagmittar Sain Bhagat and others vs. Director, Health Services Haryana & Others; (2013) 10 SCC 136)
5. Uday Pundalik Nadkarni & Another vs. Amarnath N.S. Talwadkar. (2006 SCC ONLINE BOMBAY 205)

16. Having given my anxious consideration to the rival submissions, the following points arise for consideration:

- i) Whether an application under Section 47 CPC is maintainable in final decree proceedings?
- ii) Whether validity of a preliminary decree on the ground of inherent lack of jurisdiction of the Court passing the preliminary decree can be raised in final decree proceedings?
- iii) Whether the suit in O.S.No.2018/1995 is governed by the Arbitration Act, 1940 or the Arbitration and Conciliation Act, 1996?
- iv) Whether the jurisdiction of the Court is ousted under the Arbitration Act, 1940 if there exists a valid and binding arbitration clause?
- v) Whether the jurisdiction of the Court is ousted under the Arbitration and Conciliation Act, 1996 if there exists a valid and binding arbitration clause?
- vi) Whether the conduct of the petitioner disentitles him from any relief at the hands of this Court?

17. Point No(i)

Before I deal with this aspect of the matter, it is necessary to extract the provisions contained in Section 47 CPC:

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.

[29]* * **

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[30] [Explanation I.-For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.-(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and (b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

A perusal of Section 47 CPC would clearly establish that the same deals with execution proceedings only. It is trite law that final decree proceedings either in a suit for partition or for dissolution of partnership are nothing but applications filed under order XX Rule 18 CPC or Order XX Rule 15 CPC. It is also well settled that it is only a final decree passed pursuant to completion of final decree proceedings can be executed. In other words, it is only the final decree that is passed in a suit that is capable of being executed and a preliminary decree cannot be executed by a Court. It follows there from that a preliminary decree being incapable of being executed, a final decree proceedings cannot be construed or described as execution proceedings before an Executing Court within the meaning of Section 47 CPC. It is well settled that only a final decree can be executed as held by the Apex Court in Harsham Abbas Syad vs. Usman Abbas Syad and others (2007 (2) SCC 355) and Bikoba Deora Gaikwad and others vs. Hirabai Maruti Rao Ghorgare and others. (2008 (8) SCC 198).

18. In view of the law laid down by the Apex Court, I am of the view that the provisions contained in Section 47 CPC relating to execution are not applicable to final decree proceedings. Consequently, the application filed by the petitioner under Section 47 CPC was not maintainable and the same was liable to be dismissed on this ground. Point No.1 is answered accordingly.

19. Point No (ii):

Though while dealing with Point No.1, I have come to the conclusion that an application under Section 47 CPC challenging the jurisdiction of the Court which passed the decree was not maintainable in final decree proceedings, the question still remains as to whether the validity of a preliminary decree on the ground of

inherent lack of jurisdiction can be raised in final decree proceedings. The question as to whether a decree without jurisdiction being a nullity can be challenged even in collateral proceedings is no longer *res integra* in the light of several judgments of Apex Court and other courts. In the case of *KIRAN SINGH vs. CHAMAN* (AIR 1956 SC 340) the Apex Court held as under:

"6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was *coram non judice*, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position".

20. The said view has been reiterated in the other judgments referred to above.

21. The aforesaid law laid down by the Apex Court and other Courts clearly indicates that it is a fundamental principle that a decree passed by the Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings.

22. In the facts of the instant case, there is no gainsaying the fact that final decree proceedings are most certainly collateral proceedings since they are inter-linked and arise from the judgment and decree in O.S.No.2018/1995. It is therefore clear that the question whether the Court which passed the preliminary decree in O.S.No.2018/1995 suffered from inherent lack of jurisdiction or not, the invalidity of the said decree can clearly be set up in final decree proceedings which are collateral proceedings.

23. In view of the discussion made above, I am of the considered opinion that the validity/invalidity of a preliminary decree on the ground of inherent lack of jurisdiction of the Court passing the preliminary decree can be raised in final decree proceedings.

Point No.2 is answered accordingly.

24. Point No.3

This question relates to whether the Arbitration Act, 1940 is applicable to O.S.No.2018/1995 and all proceedings in pursuance of the same including

FDP.No.113/2010 in the light of the undisputed fact that the suit was instituted prior to 22.08.1996 when the Arbitration and Conciliation Act 1996 came into force.

25. In this context, it is necessary to refer to Section 85(2)(a) of the Act of 1996 which deals with repeal and savings:

"85. Repeal and saving:- 1[xxxx]

85 (2) Notwithstanding such repeal,-

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act Shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;"

26. A perusal of the said provision would indicate that if arbitral proceedings have commenced prior to the Act of 1996 coming into force, the Act of 1940 would apply and not the Act of 1996. Further, in view of the contrary intention clearly appearing in Section 85(2)(a), Section 6 of the General Clauses Act would have no application. The applicability of the Act of 1940 vis-à-vis the Act of 1996 has been interpreted by the Apex Court in the following judgments:

1. Shetty's construction Co.Pvt. Ltd vs. Konkan Railway Construction and others; (1998)5 SCC 599)
2. Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd; (1999)9 SCC 334)
3. Milkfood Ltd Vs. GMC Ice Cream (P) Ltd. (2004)7 SCC 288)

27. A perusal of the provisions of the 1940 Act would also indicate that under the said Act, arbitral proceedings can commence by way of two modes, viz., through Court under chapters III and IV and outside Court under Chapter II. The Apex Court in the aforesaid judgments has not only dealt with the provisions contained in Section 85(2)(a) and Section 21 of the Act of 1996, but also the provisions contained in Section 37(3) of the Act of 1940 thereby holding that if arbitral proceedings had commenced prior to the Act of 1996, the same are saved and the provisions of the Act of 1940 would be applicable.

28. In the instant case, the plaint averments clearly indicate that the arbitral proceedings had commenced on 24.12.1994 itself when at the instance of respondents 1 and 2, the arbitrator communicated the request made by them to the petitioner herein to refer the dispute to arbitration. This letter dated 24.12.1994 is clearly a request made for commencement of arbitral proceedings as contemplated under Section 21 of the Act of 1996 as well as Section 37(3) of the Act of 1940. It is therefore clear that the arbitral proceedings had commenced prior to the Act of 1996 coming into force and consequently, by virtue of the provisions contained in Section 85(2)(a) of the Act of 1996, the 1940 Act was applicable to the facts of the instant case. Point No.3 is answered accordingly.

29. Point No(iv)

The main contention urged on behalf of the petitioner is that the jurisdiction of the Court below which passed the preliminary decree dated 28.02.2007 in O.S.No.2018/1995 was without jurisdiction in the face of the arbitration clause contained in the partnership deed. In other words, it is contended that by virtue of the said arbitration clause, the Civil Court lacked jurisdiction to adjudicate upon the suit and pass a decree therein and since the jurisdiction of the Civil Court was ousted on account of the arbitration clause in the light of the provisions of the Act of 1940, the aforesaid decree was a nullity and non est in the eye of law.

30. Having regard to the aforesaid contention urged on behalf of the petitioner, the question that arises for consideration is:

"Whether the jurisdiction of the Court to adjudicate upon a suit is ousted under the Act of 1940 if there exists an arbitration clause.

31. The law relating to ouster of jurisdiction of Civil Court has been succinctly laid down by the landmark judgment of the Apex Court in (DHULABHAI ETC. vs. STATE OF MADHYA PRADESH AND ANOTHER) AIR 1969 SC 78

"35. Neither of the two cases of Firm of Illuri Subayya or Kamla Mills can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

(1) Where the statute gives a finality to the orders of the special Tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot

go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegality collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

32. At the outset, it has to be stated that a perusal of the entire scheme of the Act including all the provisions of the Act of 1940 will clearly indicate that there is no specific provision which would expressly oust the jurisdiction of the Court on account of an arbitration clause. So also a perusal of various provisions of the Act will also indicate that there is no implied ouster of the jurisdiction of the Court merely on account of existence of the arbitration clause. Therefore, in order to ascertain whether jurisdiction of the Civil Court has been ousted either expressly or impliedly by virtue of the provisions of the Act of 1940, it is necessary to examine the provisions contained in the said Act. Before doing so, it is necessary to refer to the Act of 1996 which may have some bearing on this issue.

33. In this context, it is relevant to state that Section 8 of the Act of 1996 enables a party to a suit to seek reference of the matter to arbitration by taking necessary steps in that regard as contemplated under the said provisions contained in Section 8. It is well settled that unless a party to an arbitration agreement seeks reference to arbitration in a pending suit governed by Act of 1996 by filing necessary application in accordance with the provisions contained in Section 8, the jurisdiction of the Civil Court is not ousted and the party who does not take recourse to the procedure provided under Section 8 is deemed to have waived his right not only to seek reference to arbitration but also his contention that the Civil Court's jurisdiction stood ousted because of the arbitration clause. It is interesting to note that under the Act of 1940, there was no provision similar to Section 8 of the Act of 1996 and consequently, in the absence of a similar provision in the Act of 1940, jurisdiction of the Civil Court cannot be said to have been ousted simply/merely on account of the arbitration clause.

34. It is contended by the learned senior counsel for the petitioner that the provisions contained in Section 8 of the Act of 1996 has to be read into the 1940

Act. This contention is clearly devoid of merit in as much as, so long as the 1940 Act is applicable, the Act of 1996 will have no application to a particular case and the question of reading any provision of the Act of 1996 into the Act of 1940 will not arise. Accordingly the said contention urged on behalf of the petitioner deserves to be rejected.

35. A perusal of the provisions contained in the Act of 1940 will indicate that arbitral proceedings under the said enactment are governed by three modes, viz:

a) Chapter II which deals with arbitral proceedings without intervention of the Court, the relevant provisions being Sections 8, 17 and 19;

b) Chapter III which deals with arbitration with the intervention of the Court when there is no suit pending and the arbitral proceedings are commenced in accordance with Section 20;

c) Chapter IV which deals with arbitral proceedings with the intervention of the Court when there is a suit pending, the relevant provisions being sections 21 and 25.

d) Chapter V contains general provisions including Sections 32, 33, 34 and 35.

36. A perusal of the provisions contained in the aforesaid chapters II, III, IV and V keeping in mind the scheme of the Act of 1940 will clearly indicate there is no provision whatsoever by virtue of which the jurisdiction of the Civil Court is ousted merely or simply on account of existence of an arbitration clause. In fact, Section 34 indicates that the maximum step a Civil Court can do in the face of an arbitration clause is to stay the proceedings before the Civil Court and await the Tribunal to pass an award in accordance with the provisions of the Act. By no stretch of imagination can it be said that mere/simple existence of an arbitration clause ousts the jurisdiction of the civil Court under the provisions contained in the Act of 1940.

37. In support of his contention, learned senior counsel was not in a position to draw my attention to any provision in the Act of 1940 or place any judgment/precedent of any Court to the effect that the jurisdiction of the civil Court was straightaway automatically ousted either expressly or impliedly by virtue of the existence of an arbitration clause.

38. In the grounds urged in the memorandum of revision petition, it has been repeatedly contended that the jurisdiction of the Court stands ousted by virtue of Section 32 of the Act of 1940. In this context, it is necessary to refer to Section 32.

"32. Bar to suits contesting arbitration agreement or award. - Notwithstanding any law for the time being in force, no suit shall lie on any ground, whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or an award not shall any arbitration agreement or award be set aside amended, modified or in any way affected otherwise than as provided in this Act".

39. A plain reading of the aforesaid provision will clearly indicate that what is prohibited therein is the filing of a suit on any ground for a decision upon the existence, effect or validity of an arbitration agreement. In other words, if there exists an arbitration agreement which is in dispute or the validity of the arbitration agreement is in dispute or if the effect of the arbitration agreement is in dispute, a suit calling upon the civil court to decide the existence, validity or effect of the arbitration clause would not be maintainable. In the instant case, it is not in dispute that the suit in O.S.No.2018/1995 was not filed seeking a decision with regard to the existence, validity or effect of the arbitration agreement contained in the partnership deed. It is therefore clear that Section 32 of the Act of 1940 has no application to the facts of the instant case.

40. It is also relevant to note that the petitioner herein has not taken any steps to initiate arbitral proceedings in terms of chapters II, III or IV referred to supra. It is also not in dispute that the petitioner has also not invoked the provisions of chapter V, in particular, Sections 32 to 35. On the other hand, the petitioner has filed Misc.No.781/2011 to set aside the preliminary decree passed in O.S.No.2018/1995. Under these circumstances, it is clear that the petitioner not having taken any steps to agitate his rights under the arbitration clause, it is not open for him to challenge the validity of the decree on the ground of lack of jurisdiction in final decree proceedings.

Viewed from this angle also, I am of the opinion that the contention of the petitioner deserves to be rejected.

41. In view of the aforesaid discussion, I am of the opinion that the jurisdiction of the civil Court to pass a preliminary decree dated 28.02.2007 in O.S.No.2018/1995 was not ousted under the Act of 1940 merely simply because an arbitration agreement was found in Clause No.14 of the partnership deed dated 11.03.1983. Thus the said preliminary decree can not be said to be without jurisdiction or a nullity/non-est in the eye of law.

Point No (iv) is answered accordingly.

42. Point No.5

As already held by me earlier, the present proceedings are governed by the Act of 1940 and not by the Act of 1996. However, assuming that the Act of 1996 is applicable to the present proceedings, the question still remains as to whether the jurisdiction of the Court is ousted under the 1996 Act also. In this context, it is relevant to state that as per the provisions contained in the Act of 1996 in the provisions pertaining to domestic arbitration, the only provision that purports to oust the jurisdiction of the Court is Section 8 of the Act of 1996. The provisions of the Act of 1996 clearly indicate that apart from Section 8 there is no other provision under the Act of 1996 that ousts the jurisdiction of the civil court. Even Section 8 contemplates that the matter is referred to arbitration by the civil court only subject to a party invoking and complying with the mandatory requirements of Section 8 within the time stipulated therein. It is only after the matter is

referred to arbitration that the Civil Court's jurisdiction stands ousted and never before that. It is needless to state that if an application under Section 8 of the Act of 1996 is not filed within a stipulated time that too after complying with the mandatory requirements contained therein, the party waives his right to seek reference and consequently, acquiesces to the jurisdiction of the Court as held by the Apex Court in the case of Sukanya Holdings - (2003(5) SCC 531) "12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the Act, the judicial authority shall not intervene except where so provided in the Act. 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 the 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."

43. It is not in dispute that in the instant case, the petitioner not only chose not to contest the matter prior to passing of the preliminary decree, but he also did not file an application under section 8 of the Act of 1996. Consequently, the right of the petitioner, if any, to seek reference to arbitration and consequent ousting of the jurisdiction of the Court stood waived and the petitioner is stopped from contending that the preliminary decree passed by the court in O.S.No.2018/1995 was without jurisdiction.

44. In view of the aforesaid discussion, even under the provisions of the Act of 1996, I am of the opinion that the jurisdiction of the civil Court to pass a preliminary decree dated 28.02.2007 in O.S.No.2018/1995 was not ousted under the Act of 1996 merely because an arbitration agreement was found in clause No.14 of the partnership deed dated 11.03.1983. Thus the said preliminary decree can not be said to be without jurisdiction or a nullity/non-est in the eye of law even under the provisions of the Act of 1996 also.

Point No.5 is answered accordingly.

45. Point No(vi)

As stated supra, the suit in O.S.No.2018/1995 having been decreed on 28.02.2007, final decree proceedings in FDP No.113/2010 were filed by respondents 1 and 2 on 19.07.2010. The petitioner herein filed objections to the said final decree proceedings. However, in his statement of objections, the petitioner did not contend that the preliminary decree passed in O.S.No.2018/1995 was without jurisdiction and the present contentions urged by

the petitioner were not put forth by him. So also, in the Misc.No.781/2011 filed by the petitioner seeking to set aside the preliminary decree under Order IX Rule 13 CPC, the petitioner did not contend that the preliminary decree was without jurisdiction. On the other hand, the entire Misc. petition proceeded on the basis that the said preliminary decree passed in O.S.No. 2018/1995 was a valid decree and since the same stared at the petitioner and would affect his valuable legal rights, the same required to be set aside and an opportunity is to be afforded to the petitioner to contest the suit. Having specifically challenged the said preliminary decree inter alia on the premise that the same was legal and valid and therefore, requires to be set aside, the petitioner is clearly stopped from contending in final decree proceedings that the decree was without jurisdiction. As stated above, the application filed by the petitioner which is the subject matter of the present revision petition was filed on 01.10.2013 after the aforesaid events and consequently, the petitioner was guilty of approbation and reprobation in that he is clearly trying to prosecute dual/parallel remedies which is impermissible in law as held by the Apex Court in the following cases:

1. Delhi Gate Auto Service Station and others vs. Bharat Petroleum Corporation Limited, Agra through Senior Divisional Manager and others; (2009 16 SCC 766)
2. Mumbai International Airport Private Limited vs. Golden Chariot Airport and another With Airports Authority of India Vs. Golden Chariot Airport and another; (2010 10 SCC 422)

Point No.6 is also answered accordingly.

46. In view of the aforesaid discussion, I am of the opinion that there is no merit in the revision petition and the same is liable to be dismissed. Accordingly, the Civil Revision Petition is hereby dismissed. No costs.