

**(2016) 05 CAL CK 0094**  
**In the Calcutta High Court**  
**Case No : G.A. No. 1715 of 2013**

Srei Equipment and Finance Pvt. Ltd.

APPELLANT

Vs

Khyoda Apik

RESPONDENT

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**Date of Decision :** 20-05-2016

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 35, 36  
Civil Procedure Code, 1908 (CPC) — Section 38

**Citation :** (2016) AIR(Calcutta) 293 : (2017) 1 ICC 598 : (2017) 2 RAJ 676

**Hon'ble Judges :** Indira Banerjee and Sahidullah Munshi, JJ.

**Bench :** Division Bench

**Advocate :** S.N. Mukherjee, Senior Advocate and Swatarup Banerjee, Advocate, for the Appellants; Jishnu Chowdhury, Samrat Sen, Senior Advocate and Paritosh Sinha, Advocate, for the Respondents

**Final Decision :** Allowed

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## Judgement

Indira Banerjee, J.—This appeal is against a judgment and order dated 20th May, 2011 passed by the Hon'ble single Bench in GA No. 20 of 2011, relating to proceedings for execution of an arbitral award being EC No. 142 of 2009, whereby the learned single Bench declined the prayers of the appellants for examination of the judgment-debtors, by summoning the judgment-debtors to this Court and simply adjourned the execution applications till such time as appropriate applications were made for transfer of the deemed decrees to the appropriate executing fora.

2. In or about November, 2007, the appellant filed a petition in this Court, being AP No. 381 of 2007, under Section 9 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the 1996 Act. The said application under Section 9 was entertained and a Receiver was appointed over the assets being the subject-matter of arbitration. The said application was ultimately disposed of by an Order dated 11th March, 2009. The assets in question remained in the possession of the Receiver. As pointed out by Mr. S.N. Mukherjee, Senior

Advocate appearing on behalf of the appellant, it is nobody's case that this Court lacked jurisdiction to entertain or decide the said application.

3. While the application being AP No. 381 of 2007 was pending in this Court, the disputes which had arisen between the parties were referred to arbitration, and an arbitral award was passed in favour of the appellant on 11th March, 2008.

4. Sections 35 and 36 of the 1996 Act provide as follows:

"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. - 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."

5. Some of the relevant provisions of the Civil Procedure Code relating to execution of decrees are set out herein below :

"38. Court by which decree may be executed. - A decree may be executed either by the court which passed it, or by the Court to which it is sent for execution.

39. Transfer of decree. - (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court [of competent jurisdiction],

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

[(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.]

[(4) Nothing in this section shall be deemed to authorise the Court which passed

a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]

40. Transfer of decree to Court in another State. - Where 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.

42. Powers of Court in executing transferred decree. -

(1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself."

6. The appellants filed an application being EC No. 142 of 2009 in this Court for enforcement of the said award made and published on 11th March, 2008.

7. By an Order dated 16th September, 2009 in EC No. 142 of 2009, the Hon'ble single Bench directed the Receiver appointed in AP 381 of 2007 to take physical possession of the hypothecated assets being the subject-matter of the arbitration.

8. Thereafter the appellant made an application for examination of the judgment debtor, which was heard along with other similar applications, and has in effect and substance been rejected by the Hon'ble single Bench with costs assessed at 6,000 GMs, to be paid by the appellant to the second judgment debtor, being the guarantor.

9. The question which arises for consideration in this appeal is, whether this Court is the appropriate Court of competent jurisdiction, to enforce an arbitral award under the 1996 Act. Related to this issue is, the issue of whether an execution application is required to be transferred to another Court in terms of Section 39 of the Code of Civil Procedure, even if the award holder is seeking examination of the judgment-debtor. A question which follows from the aforesaid issues is, whether the expression 'property' in Section 39 of the Code of Civil Procedure is to be interpreted as immovable property, or whether the expression includes movable property.

10. Section 42 of the 1996 Act provides as follows:

"42. Jurisdiction. - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

11. Mr. S.N. Mukherjee, Senior Advocate, appearing on behalf of the appellant submitted, and in our view rightly, that this Court alone would have jurisdiction

to entertain an application for enforcement of the award against the judgement debtors and their properties in view of Section 42 of the 1996 Act.

12. Both Sections 9 and 36 are in Part I of the 1996 Act. The application of the appellant being A.P. No. 381 of 2007 having been made in this Court, all subsequent applications including an application for execution would have to be filed in this Court alone. No other Court could have entertained an application for enforcement of the arbitral award by reason of Section 42 of the 1996 Act.

13. In the State of West Bengal v. Associated Contractors, reported in (2015) 1 SCC 32 equivalent to AIR 2015 SC 260, the Supreme Court held that Section 42 starts with a non obstante clause which does away with anything which may be inconsistent with the Section, either in Part-I of the Arbitration Act, 1996, or in any other law for the time being in force. The expression "with respect to an arbitration agreement" widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement.

14. The expression "with respect to an arbitration agreement" thus makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings, or after an Award is pronounced under Part-I of the 1996 Act. Thus, Section 42 applies even after the arbitral proceedings come to an end. But an essential ingredient of Section 42 is that an application under Part-I must be made in a "Court".

15. The 1996 Act is special law which would prevail over the general provisions of the Code of Civil Procedure. The proposition that the 1996 Act will prevail over the general law, finds support from the judgments of the Supreme Court in Consolidated Engineering Enterprises v. Principal Sec. Irrigation Dept. reported in (2008) 7 SCC 169 : (AIR 2009 SC (Supp) 396) and in Union of India v. Popular Construction Co. reported in (2001) 8 SCC 470 : (AIR 2001 SC 4010).

16. The proposition that a special legislation has overriding effect over general legislation has been reaffirmed in Suresh Nanda v. CBI reported in (2008) 3 SCC 674 : (AIR 2008 SC 1414) and in Ratan Lal Adukia v. Union of India, reported in (1989) 3 SCC 537 : (AIR 1990 SC 104). Moreover, in Salem Advocates Bar Association v. Union of India, reported in AIR 2005 SC 3353, the Supreme Court observed "Section 39 does not authorise the Court to execute the decree outside its jurisdiction, but it does not dilute the other provisions given such as power of compliance of conditions stipulated in those provisions. Thus, the provisions such as Order 21, Rule 3 or Order 21, Rule 48 which provide differently, would not be effected by Section 39(4) of the code."

17. Moreover, the substantive provision relating to enforcement of an arbitral award is contained in Section 36 of the 1996 Act. The procedure laid down in the Code of Civil Procedure for execution of a decree, is to be followed.

18. In the 1996 Act, for the purpose of enforcement, an arbitral award is deemed to be a decree. It is deemed to be a decree only for the limited purpose of

enforcement, for which the procedural provisions of the Code of Civil Procedure are applicable. The award remains an award and does not become a decree as defined in the Code of Civil Procedure. This is evident from the use of the expression "in the same manner as if it were a decree of the court".

19. An award cannot therefore be construed as a decree, or as an order for the purpose of Sections 38 and 39 of the Code of Civil Procedure. Reference may be made to *Paramjeet Singh Patheja v. ICDS Ltd.* reported in (2006) 13 SCC 322 : (AIR 2007 SC 168). Moreover, under special statutes, where orders were executable as a decree of a Civil Court, the provisions of Sections 38 and 39 of the Code relating to execution of decrees would not be available. This proposition finds support from *M/s. Sindhu Chits and Trading (P) Ltd. v. Smt. Khayirunnissa*, reported in AIR 1992 Kar 281 and *Anand Finance (P) Ltd. (In Liquidation) v. Amrit Dasarath Kakad*, reported in 90 Comp Cas 350 (Del).

20. As argued by Mr. Mukherjee, an application under Section 36 of the 1996 Act is an application arising out of the arbitration agreement and the arbitral proceeding, for without an arbitration agreement and the arbitral proceeding, there could be no arbitral award.

21. The expression "arising out of" is of the widest amplitude as held by the Supreme Court in *Renusugar Power Co. Ltd. v. General Electric Company and Anr.*, reported in (1984) 4 SCC 679 : (AIR 1985 SC 1156) cited by Mr. Mukherjee.

22. It is true, that in *Renusugar Power Co. Ltd. v. General Electric Company and Anr.*, (AIR 1985 SC 1156) (*supra*) the expression "arising out of" was found to be of the widest amplitude, in the context of its use in a contract. That, however, makes no difference.

23. As argued by Mr. Samrat Sen appearing on behalf of an intervenor, Magma Fincorp Ltd., who supported the appellant, in view of the non obstante provision of Section 42 which provided that notwithstanding anything contained elsewhere in Part I, or in any other law for the time being in force, the Court which had entertained an earlier application with respect to an arbitration agreement, under Part I would alone be the Court to exercise jurisdiction over the arbitral proceedings and all sub-sequent applications arising out of the arbitral agreement and the arbitral proceedings.

24. The non obstante clause in Section 42 of the 1996 Act gives the said provision overriding effect, notwithstanding anything to the contrary in any other provision of Part I of the 1996, or in any other law. Section 42 would, therefore, have overriding effect and prevail over Section 36 of the 1996 Act, which is also in Part I of the 1996 Act, read with the provisions of the Code of Civil Procedure, 1908 relating to execution of decrees.

25. In *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram*, reported in (1986) 4 SCC 447 : (AIR 1987 SC 117, paras 68 & 69) the Supreme Court observed:

"67. A clause beginning with the expression 'notwithstanding anything contained

in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract? is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment.

68. It is well settled that the expression "notwithstanding" is in contra-distinction to the phrase "subject to", the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject."

26. In *Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi*, reported in (1996) 4 SCC 76 : (AIR 1996 SC 1963, para 75) the Supreme Court observed:

"77. Non obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the Section, in case of conflict, an overriding effect over the provision or Act mentioned in that clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment."

27. In *Iridium India Telecom Ltd. v. Motorola Inc.*, reported in (2005) 2 SCC 145 : (AIR 2005 SC 514) cited by Mr. Sen, the Supreme Court referred to numerous earlier judgments and held :

"There is no doubt that where the non obstante clause is widely worded, "a search has, therefore, to be made with a view to determining which provision answers the description and which does not." The historical development of the law suggests that the non obstante clause in Section 129 is intended to bypass the entire body of the Code so far as the rules made by the chartered High Court for regulating the procedure on its original sides are concerned."

28. There can be no doubt that Section 42 has overriding effect and would prevail notwithstanding any other law including Section 38(4) of the Code of Civil Procedure.

29. As argued both by Mr. Mukherjee and Mr. Sen, Senior Advocates, the 1996 Act is an exhaustive and comprehensive legislation which consolidates, amends and designs the entire law relating to arbitration. The 1996 Act is itself a self contained Code which is repository of the entire law on arbitration and all the rights and remedies of parties are to be adjudicated in accordance with the provisions thereof as held by the Supreme Court in *Fuerst day Lawson Ltd. v. Jindal Exports Ltd.*, reported in (2011) 8 SCC 333 : (AIR 2011 SC 2649) and also by this Court in *Coal India Ltd. v. Canadian Commercial Corporation*, reported in

AIR 2012 Cal 92.

30. In *Ratan Lal Adukia v. Union of India* reported in (1989) 3 SCC 537 : (AIR 1990 SC 104), cited by Mr. Sen, the Supreme Court held that when a complete self-contained exhaustive code has been enacted by the Legislature constituting a special law for conduct of proceedings thereunder, by necessary implication the operation of provisions of the Code of Civil Procedure would be excluded.

31. As argued by Mr. Sen, a harmonious construction of Section 36 with the definition of Court in Section 2(1)(e) of the 1996 Act would lead to the inescapable conclusion that an arbitral award can effectively be enforced in that principal Civil Court of original jurisdiction in a district, including the High Court in exercise of its ordinary original civil jurisdiction, which would have the jurisdiction to decide the questions forming the subject-matter of the arbitration, if the same had been the subject matter of a suit, i.e., the Court as defined in Section 2(1)(e) of the 1996 Act.

32. The proposition that the Court in which an earlier application under Part 1 of the 1996 Act had been filed, would be the only Court to have jurisdiction to execute an arbitral award, finds support from the following judgments cited by Mr. Mukherjee :

(i) *ICDS Ltd. v. Mangala Builders (P) Ltd.*, reported in AIR 2001 Kar 364

(ii) *National Highways Authority v. SPCL IVRCL*, reported in 2008 (2) Arb LR 404 (Del)

(iii) *Eskay Engineers v. Bharat Sanchar Nigam Ltd.*, reported in 2009 (4) Arb LR 369 (Bom): (2010 (4) AIR Bom R (NOC) 386)

33. Mr. Jishnu Chowdhury, appearing on behalf of the respondent No. 2 being the guarantor argued that the arbitral award could not be enforced by this Court, against a person residing and/or carrying on business outside the jurisdiction of this Court or against any property not situate within the jurisdiction of this Court.

34. Mr. Jishnu Chowdhury, argued that an application under Section 36 of the 1996 Act was not an application contemplated under Section 42 of the 1996 Act.

35. In support of his submission, Mr. Chowdhury cited the following decisions :

(1) *S.K. Brothers v. Delhi Development Authority*, reported in 2008 (3) Arb LR 272 (Delhi).

(2) *International Breweries Pvt. Ltd. v. Mohan Meakins Ltd. and Anr.*, reported in 2008(3) Arb. LR 581 (Delhi).

(3) *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*, reported in 2009 (3) Arb LR 524 (Delhi).

36. In *S.K. Brothers v. Delhi Development Authority* reported in 2008 (3) Arb LR 272 a single Bench of the Delhi High Court held that the execution application is

not arbitral proceedings within the meaning of Section 42 of the Act and not a subsequent application arising out of the agreement and the arbitral proceedings.

37. With the greatest of respect we are unable to agree with the view of the learned single Bench of the Delhi High Court that an execution application is not an application arising out of the arbitration agreement or the arbitral proceedings. Section 37 of the 1996 Act, relates to an appeal not to an application whereas an application has to be made for execution.

38. In *International Breweries Pvt. Ltd. v. Mohan Meakins Ltd.*, reported in 2008 (3) Arb LR 581 (Delhi) the same Bench decided that execution proceedings were neither an arbitral proceeding nor an application under para 1 of the 1996 Act, which view we respectfully do not endorse, for the reasons discussed above. There can be no doubt that an application before the Chief Justice is not an application to Court. The provisions of Section 42 would not be attracted, in a case where there was just an application under Section 11 of the 1996 Act to the Chief Justice and/or his nominee for appointment of arbitrator as held by the Supreme Court in *Ramchandra Mahadev Jagpat and Ors. v. Chief Executive Officer and Ors.*, reported in (2006) 11 SCC 661 : (AIR 2007 SC 650) and *Rodemadan India Ltd. v. International Trade Expo Centre Ltd.* reported in (2006) 11 SCC 651 : (AIR 2006 SC 3456).

39. In *National Highways Authority of India v. SPCL-IVRCL (JV)* reported in 2008 (2) Arb. LR 404 (Delhi), the Delhi High Court held that in Section 42 the rule of exclusive jurisdiction had been enacted to provide a 'forum conveniens' to the parties and to avoid conflicting orders of courts at the different stages of an arbitration proceeding arising out of the same agreement between the parties.

40. As held by the Delhi High Court in *National Highways Authority of India v. SPCL-IVRCL (JV)* (supra), Section 42 is to exclude jurisdiction of different Courts and confer power only upon one court, which first dealt with the arbitration agreement or arbitration proceeding. The rule of "that court alone" could apply to "that court" in which any application under Part I had been made. In this case, application under section 1 had been made in this Court.

41. In *Mohit Bhargava v. Bharat Bhushan Bhargava & Ors.*, reported in (2007) 4 SCC 795 : (AIR 2007 SC 1717), the Supreme Court held that there cannot be any dispute over the proposition that the Court which passed the decree is entitled to execute the decree. This is clear from Section 38 of the Code which provides that the decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. However, a decree could be executed by the Court which passed the decree, so long as it was confined to the assets within its own jurisdiction or as authorised by Order 21, Rule 3 or Order 21, Rule 48 of the Code, if the judgment-debtor was within its jurisdiction, or if the decree was for personal opinions by the judgment-debtor. However, after the amendment of the Code of Civil Procedure with effect from 1st July, 2002 by incorporation of sub-section (4) of Section 39 it might not be possible to accept

the contention that it was a matter of discretion for the Court either to proceed with the execution of the decree or to transfer it for execution to the Court within the jurisdiction of which the property is situate.

42. The judgment in *Mohit Bhargava v. Bharat Bhushan Bhargava & Ors.* (AIR 2007 SC 1717) (supra) was rendered in the context of a decree in a suit which had to be executed strictly in accordance with the relevant provisions of the Civil Procedure Code. In any case, as held by the Supreme Court, just as the Court adjudicating a suit has jurisdiction to order attachment of a property even outside its jurisdiction, in execution under Order 21, Rule 54, the Court may have jurisdiction to order attachment of the property, or to prohibit the judgment-debtor from transferring or changing the property in any way when it exercises its jurisdiction over the judgment-debtor, though not over the property itself. The Court could in such a case, issue a precept in terms of Section 46 of the Code and there-upon the Court to which the precept was sent would actually attach the property in the manner prescribed.

43. Section 136 of the Code also provides for an order of attachment in respect of property outside the jurisdiction of the Court and sending the order of attachment to the District Court within whose local limits the property sought to be attached is situate. However, Section 136 excludes execution of decrees from within its purview.

44. An execution against immovable property lying outside the jurisdiction of the executing Court is possible in terms of Order 21, Rule 3 of the Code, which governs a case where the particular immovable property forms one estate or tenure within the local limits of the jurisdiction of two or more Courts and where all those Courts is approached for execution of the decree against that property. In a case, where Order 21, Rule 3 has no application, the position is that, if a decree-holder wants to proceed against a property situate outside the jurisdiction of the Court which passed the decree, he has to get the decree transferred to the appropriate Court for execution, on moving the executing Court in that behalf. In our view, Order 21, Rule 50 applies only to immovable property and not to movable property, cash etc. which would not necessarily be situate within the territory of any one Court, but could be moved from one place to another.

45. When execution is sought against move-able property the question of transfer of decree or award cannot arise since the location of movable property cannot be determined with certainty and the same may be moved by the judgment debtor from jurisdiction to jurisdiction. Furthermore, in an age of computerisation bank accounts are not necessarily operated at a single branch. Net banking enables a customer of a bank to transfer funds from any place. In this context, it may perhaps be pertinent to note that most banks have their main operations in a single branch, particularly some nationalised banks and even cheque books when requisitioned are not supplied by the branch in which the account is held, but are sent from a different branch, which could be in a different State, by reason of centralised operations. Similarly, payments for use

of credit cards are ultimately remitted to a particular branch in a particular city where centralised operations are carried on.

46. Examination of a judgment debtor under Order 21, Rule 41 is resorted to when the award holder is not aware of the assets and properties of the judgment-debtor, which might be available for satisfaction of the award. The judgment-debtor is examined to ascertain what properties or means the judgment-debtor has of satisfying the award. The situs of the assets and properties of the judgment-debtor can only be ascertained after examination of the judgment-debtor. The question of transfer to a Court having jurisdiction over the properties of the judgment-debtor could not arise at the stage of examination of the judgment-debtor. This proposition finds support from the judgment of this Court in DVM Construction v. SREI Infrastructure Finance Ltd., reported in AIR 2009 Cal 227.

47. As observed above, there was a Receiver over the assets being the subject-matter of arbitration. The assets being the subject-matter of arbitration being in the custody of this Court, through the Receiver appointed by Court, this Court might execute the award vis-a-vis those assets.

48. Mr. Mukherjee has however pointed out that the appellants did not press the execution application as against the respondent No. 2, being the guarantor. The name of the respondent No. 2 must, therefore, be struck out from the array of respondents in this appeal.

49. In S.K. Engineers v. Bharat Sanchar Nigam Ltd., reported in 2009 (4) Arbitration Law Reporter 369 (Bom) : (2010 (4) AIR Bom R (NOC) 386) cited by Mr. Mukherjee the Bombay High Court held that the expression Court, cannot for the purpose of Section 36, be read at variance with the meaning of the expression under Section 34.

50. We are in full agreement with the view of Bombay High Court. Where an application under Part I has been made in a Court with respect to an arbitration agreement, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and arbitral proceedings including execution proceedings.

51. As held by the Bombay High Court the expression "all subsequent applications arising out of the arbitral proceedings" must be read in a comprehensive manner to include recourse to execution proceedings.

52. In I.C.D.S. Ltd. v. Mangala Builders Pvt. Ltd., reported in AIR 2001 Karnataka 364, a single Bench of the High Court held, and in our view, rightly, that the Court which could exercise jurisdiction under Section 34 of the 1996 Act would be the only Court which could enforce an award. We approve the view of the learned single Bench.

53. It is a well settled principle of interpretation that literal construction may be avoided if such literal construction defeats the objects and purposes of that Act.

54. In Punjab Land Development and Reclamation Corporation Limited, Chandigarh v. Presiding Officer Labour Court, Chandigarh and Ors. reported in (1990) 3 SCC 682 the Supreme Court held where the statute has been passed to remedy a weakness in the law, it is to be interpreted in such a way as to bring about that remedy. The literal rules of construction require the wording of the Act to be construed according to its literal and grammatical meaning.

55. It is well settled that a judgment is a precedent for the issue of law that is decided. A decision cannot be relied upon in support of a proposition that it did not decide, as held by the Supreme Court in Mittal Engineering Works Private Ltd. v. Collector of Central Excise, Meerut, reported in (1997) 1 SCC 203.

56. As observed by the learned single Bench, there has, in the recent past, been a proliferation of execution proceedings filed by finance companies for implementation of arbitral awards.

57. These finance companies finance the purchase of vehicles, machinery, equipments including agricultural equipment etc. The agreements in the nature of higher purchase are executed whereby the amount advanced is payable over a period of time in fixed monthly instalments. These agreements contain provisions for adjudication of disputes by arbitration. Most of them contain forum selection clauses which exclude the jurisdiction of Courts other than Courts in the city of Kolkata.

58. By virtue of the forum selection clauses and a printed clause in the agreement indicating that the agreement was executed within the jurisdiction of the Court agreed upon, applications are filed in the Court of the choice of the financier as specified in the agreement for injunction and for appointment of Receivers in respect of assets financed to borrowers in different parts of India.

59. Numerous such applications are filed in this Court. More often than not, the agreements are signed by the borrowers hundreds of miles outside the jurisdiction of this Court, through agents and even branch offices, even though the head-office and/or the registered office of the finance companies might be situate within the jurisdiction of this Court.

60. All that might have been done within the jurisdiction of this Court, could very well be the affixation of the signature of the official of the financier and may be affixation of the seal of the financier. Applications are moved in this Court ex parte for injunction and orders of injunction are obtained. Middle income group borrowers defaulting in payment of instalments seldom appear to contest the proceedings, may be due to financial constraints or inconvenience otherwise of defending proceedings in a distant Court.

61. It is only after a Receiver is appointed and the Receiver takes possession that the borrowers come to contest the proceedings. By that time, it becomes difficult to question the jurisdiction, because of the jurisdiction clause which prima facie records that the agreement has been executed within the jurisdiction of this

Court and secondly, because of the applicability of Section 42 of the 1996 Act, because an earlier application might already have been entertained by this Court.

62. Moreover, it is often seen that finance companies have their chosen arbitrators, who arbitrate disputes between the financiers and borrowers in bulk. By recourse to fine print terms exorbitant amounts are charged by way of cheque bouncing charges, which are many times the amount charged by banks for the bouncing of cheques, as noted by the leaned single Bench.

63. In the execution case before the single Bench being EC 142 of 2009, disposed of along with others by the judgment and order under appeal, the learned single Bench found that the 2nd judgment-debtor had been detained in custody for 22 days on the strength of a warrant of arrest issued by this Court, requiring the judgment-debtor to be present in this Court for being examined as to how the decretal debt would be discharged. If any judgment-debtor had been wrongfully taken into custody and harassed, the judgment-debtor may be directed to be compensated.

64. The learned single Bench observed "the pugnacity with which the decree-holder proceeded to cross-examine this person, despite the constant request by Court to be more humane, smacked of the arrogance of the influence that finance companies wield that had resulted in a man being detained for 22 days when the warrant of arrest required him to be present in court on a particular date with no mandate to take him into custody during the interregnum." The judgment-debtor in the aforesaid case had applied for orders preventing the award holder from using the machinery of the police as a tool for extortion and had also sought compensation. The decree-holder however abandoned its claim against such judgment-debtor and has undertaken to proceed only against the first judgment-debtor hirer.

65. The learned Court also took note of the fact that the total finance provided by the financier was Rs.50.05 lakh. The principal sum awarded was in excess of Rs.46 lakhs, even though several instalments had been paid. The award declared the financier to be the owner of the assets and required possession thereof to be made over to the financier. In lieu of possession, the value of assets were assessed at Rs.32 lakh. In addition, the judgment-debtors were found liable for a sum of Rs.46,65,785/- with interest at 18% per annum from the date of the award till realization. The additional quantum assessed included, in addition to the outstanding instalment amounts, overdue charges to the tune of Rs.8,36,785/-. Finally, the arbitrator had awarded costs of Rs. 10,000/-.

66. Similar observations were made in EC No. 179 of 2009, where the amount claimed in the Tabular Statement was Rs. 12,79,694/-together with interest, costs and mesne profits. We are, however, not concerned with those observations since this appeal arises out of EC 142 of 2010. The award was ex parte. It recorded that none had appeared on behalf of the respondents despite repeated directions and opportunities. In addition to the award on account of the missed

instalments, the financier had been declared to be entitled to the vehicle and an amount of Rs.7.5 lakh was assessed in lieu of possession. Mesne profits of Rs.500 per diem had been awarded from the date following the termination of the agreement till possession was recovered by the financier. Interest had been awarded on the failed instalments at 36% per annum and further interest at 24% per annum had been provided on the awarded amount from the date of the award till payment. The learned Judge was perhaps justifiably annoyed, for no Court can be a silent spectator to gross arbitrariness or patent illegality.

67. However, when a contract appears to be unconscionable, the Court may intervene. It is for the Courts to ensure that no injustice is done to the financially weak. Similarly it is for the Court to exercise restraint before passing unduly harsh orders.

68. A forum selection clause is not in itself unconscionable. The borrowers enter into agreements containing forum selection clauses with their eyes open, and also default in making payment as per agreement.

69. The learned single Bench found that only in respect of EC No. 142 of 2009 there had been a previous application to this Court under Section 9 of the 1996 Act and an ex-parte order had been made. The affidavits in support of EC No. 179 of 2009 and EC No. 358 of 2010 did not refer to any previous application under Section 9. This appeal, however, arises only out of the application being EC No. 142 of 2009. In this case, there were earlier applications filed in this Court. Receivers had been appointed over the assets being the subject-matter of arbitration. The assets were in the custody of this Court through the Receiver appointed by this Court. At least in this case, the learned single Bench should perhaps have not refused to even examine the judgment-debtor.

70. The features noted by the learned single Bench in some of the awards of which execution has been sought, ex facie render these awards liable to be set aside on the ground of the same being against public interest. The limitation for filing an application for setting aside of the award would only start running from the date of receipt by the borrower and/or the guarantor of a copy of the award duly signed by the arbitrator. If an award is found ex facie unsustainable in law, the Court might decline to execute the award.

71. However, where an application had earlier been filed in this Court, the Court cannot refuse to execute the award on the ground that the judgment-debtor and/or the assets were located outside the jurisdiction of this Court.

72. The appeal is allowed. The judgment and order under appeal is set aside only to the extent it relates to the execution application being EC No. 142 of 2009.

73. EC No. 142 of 2009 shall proceed before the single Bench of this Court in accordance with law.

74. Photostat certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities.

Sahidullah Munshi, J. - I agree.