

(2013) 04 BOM CK 0067

In the Bombay High Court

Case No : Review Petition No. 2 of 2013 in Arbitration Appeal No. 6 of 2007 in Arbitration Application No. 44 of 2003

State of Maharashtra

APPELLANT

Vs

Hindustan Construction Co. Ltd. and The Arbitration Tribunal
of (Shri S.N. Jha, Shri V.M. Ranade and Shri B.S.
Panchmukhi)

RESPONDENT

Date of Decision : 04-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 19(1), 2(1)(e), 2(e), 34, 37
Bombay Public Trusts Act, 1950 — Section 47(5)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 115
Constitution of India, 1950 — Article 129, 135, 181, 182, 215
Limitation Act, 1963 — Section 11, 3, 5

Citation : (2013) 04 BOM CK 0067

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Aspi Chinoy, assisted with Mr. Arif S. Doctor, for the Appellant; A.A. Kumbhakoni, a/w. Mr. Shardul Singh, instructed by . and Mr. A.R. Patil, A.G.P., for the Respondent

Judgement

R.D. Dhanuka, J.—By this review petition filed by the original respondent no. 1 to the Arbitration Appeal No. 6 of 2007, the petitioner seeks review of the order and judgment dated 1st February, 2013 passed by this Court in Arbitration Appeal NO. 6 of 2007 and in particular paragraphs 35, 36 and 46 thereof holding that claim nos. 1 and 2 are barred by limitation. Some of the relevant facts for the purpose of deciding this review petition are as under:-

2. Pursuant to the invitation of tenders on 1st April, 1991 by the Government and submission of bid by the petitioner on 17th June, 1991, the Government awarded the work of construction of civil work of pressure and power house in ICT contract No. 2 to the petitioner. The work was completed by the petitioner on 31st March, 2000. The dispute arose between the parties during the execution of the work in respect of hidden expenses. The petitioner invoked arbitration clause.

On 27th April, 1998, first arbitration proceedings started. The matter was referred to the arbitration. On 26th June, 2003, the Arbitral Tribunal made an award in favour of the petitioner awarding a sum of Rs. 17,81,25,152/-. Being aggrieved by the said award, the State Government filed Arbitration Application No. 44 of 2003 on 22nd March, 2003 in the court of District Judge, Ratnagiri challenging the said award u/s 34 of the Arbitration and Conciliation Act, 1996. By an order and judgment dated 29th June, 2006, the learned District Judge dealt with five objections which were raised by the Government by way of preliminary objections only and negatived each of such objection and rejected the said arbitration application. Being aggrieved by the said order and judgment dated 29th June, 2006, the State Government filed appeal (6 of 2007) u/s 37 of the Arbitration and Conciliation Act, 1996 in this Court.

3. At the stage of final hearing of the said appeal, both parties filed written submissions and also made oral arguments.

4. By an order and judgment dated 1st February, 2013, this court allowed the said Arbitration Appeal (6 of 2007) filed by the State Government and set aside the order and judgment dated 29th June, 2006 passed by the learned District Judge, Ratnagiri in Arbitration Application No. 44 of 2003 and also impugned award dated 26th June, 2003 made by the Arbitral Tribunal on the ground of limitation. By the said order and judgment, this Court held that all the five claims which were awarded by the Arbitral Tribunal in favour of the review petitioner were barred by the law of limitation.

5. Mr. Chinoy, the learned senior counsel appearing for the review petitioner submits that in ground of the appeal memo filed by the State Government, it was contended that claims of the review petitioners were time barred as they had been rejected in October, 1996 and February, 1997 which referred only to the Claim Nos. 3 to 5. It is submitted that even in the notes of arguments in Para III submitted by the State Government, on or about 6th June, 2008, it was submitted that Claim Nos. 3, 4 and 5 were barred by limitation under Article 18 of the Schedule to the Limitation Act. The learned counsel submits that the plea of limitation was thus restricted to claim nos. 3 to 5 and it was not urged that the claim nos. 1 and 2 were barred by limitation. The learned senior counsel thus submits that even at the hearing of the arbitration appeal, it was clarified by the State Government that plea of limitation was being urged only vis-a-vis claim nos. 3 to 5. The learned senior counsel submits that accordingly the petitioner had also dealt with the objection/ground of limitation only vis-a-vis claim nos. 3 to 5. It is submitted that even this Court in para 17 of the said order and judgment recorded that the State Government had only urged that claim nos. 3 to 5 were barred by limitation under Article 18. However, this court in the said order and judgment dated 1st February, 2013 held that apart from the claim nos. 3, 4 and 5, claim nos. 1 and 2 were also barred by limitation and accordingly set aside the award in respect of claim nos. 1 and 2 also on the issue of limitation.

6. The learned senior counsel submits that setting aside of claim nos. 1 and 2 on

the ground of limitation by this court in these circumstances, discloses the mistake and an error apparent on the face of the record and is required to be reviewed and the said order and judgment dated 1st February, 2013 be restricted only to the said claim nos. 3 to 5. It is submitted that the present review petition is restricted to paragraphs 35, 36 and 46 of the said judgment and order dated 1st February, 2013 which hold that the said claim nos. 1 and 2 are barred by limitation.

7. Mr. Chinoy, the learned senior counsel placed reliance upon the judgment of the Supreme Court in case of Shivdeo Singh and Others Vs. State of Punjab and Others, and in particular paragraph 8 thereof in support of his plea that High Court can exercise the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. Paragraph 8 of the said judgment reads thus:-

8. The other contention of Mr. Gopal Singh pertains to the second order of Khosla, J., which in effect, reviews his prior order. Learned counsel contends that Art. 226 of the Constitution does not confer any power on the High Court to review its own order and, therefore, the second order of Khosla, J., was without jurisdiction. It is sufficient to say that there is nothing in Art. 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. Here the previous order of Khosla, J., affected the interests of persons who were not made parties to the proceeding before him. It was at their instance and for giving them a hearing that Khosla" J. entertained the second petition. In doing so, he merely did what the principles of natural justice required him to do. It is said that the respondents before us had no. right to apply for review because they were not parties to the previous proceedings. As we have already pointed out, it is precisely because they were not made parties to the previous proceedings, though their interests were sought to be affected by the decision of the High Court, that the second application was entertained by Khosla, J.

8. Mr. Chinoy, the learned senior counsel placed reliance upon the judgment of the Supreme Court in case of M.M. Thomas Vs. State of Kerala and Another, in support of his plea that the High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. It is submitted that the High Court, as a Court of Record, has a duty to itself to keep all its records correctly and in accordance with law and if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The learned senior counsel placed reliance upon paragraphs 7, 8, 9, 12, 13 to 17 which reads thus:-

7. Section 8-C consists of three subsections. The first sub-section deals with the power of Forest Tribunal to review its order. It is the second sub-section which deals with the powers of the High Court to review. Hence, that sub-section alone is relevant for consideration in this case. For understanding the scope of Section

8C(2) we extract sub-section below:

(2) Notwithstanding anything contained in this Act, or in the Limitation Act, 1963 (Central Act 36 of 1963), or in any other law for the time being in force, or in any judgment, decree or order of any Court or other authority, the Government, if they are satisfied that any order of the High Court in an appeal u/s 8A (including an order against which an appeal to the Supreme Court has not been admitted by that Court) has been passed on the basis of concessions made before the High Court without the authority in writing of the Government or due to the failure to produce relevant date or other particulars before the High Court or that an appeal against such order could not be filed before the Supreme Court by reason of the delay in applying for and obtaining a certified copy of such order, may, during the period beginning with the commencement of the Kerala Private Forests (Vesting and Assignment) Amendment Act, 1986 and ending on the 31st day of March 1987, make an application to the High Court for review of such order.

8. A Division Bench of the High Court of Kerala in *State of Kerala v. Subramonian Namboodiri*, has taken the view that a remedy of review under the sub-section is not available merely because the State feels that the decision is wrong on the merits.

Section 8C(2) envisages a review only if the decision of this Court had been made on the basis of a concession made before it without the authority in writing of the Custodian or the Government, or due to the failure to produce relevant date or other particulars before the Tribunal or that an appeal against such decision could not be filed by reason of the delay in applying for and obtaining a certified copy of the decision.

9. However, a Full Bench of the same High Court in *Pankajakshy Amma and Others Vs. Custodian of Vested Forest and Conservator of Forests, Vested Forests Circle, Kozhikode and Others*, has held that the grounds of review are not exhaustive and they cannot be restricted to specified grounds and so far as the High Court is concerned "it has inherent power to review besides power u/s 8C of the Act.

12. It is true that the application for review did not mention that there was any concession made by the Government counsel. Hence there is force in the contention that review could not be made on that premise. So far as Forest Tribunal is concerned its power of review can be traced to Section 8C. Unless law has conferred power of review the inferior Courts and tribunals cannot exercise any such power of review. So the Forest Tribunal can exercise power of review in conformity with Section 8C of the Act.

13. In this case we are not concerned with the power of review of the Forest Tribunal. It was High Court which reviewed its own judgment and so the question is whether the High Court has such power dehors Section 8C(2) of the Act. Power of review conferred on the Supreme Court under Article 135 of the

Constitution is not specifically made applicable to the High Courts. Does it mean that the High Court has no power to correct its own orders, even if the High Court is satisfied that there is error apparent on the face of the record?

14. High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A Court of Record envelopes all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A Court of Record is undoubtedly a superior Court which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regards is plenary. In *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, a nine Judge Bench of this Court has recognized the aforesaid superior status of the High Court as a Court of plenary jurisdiction being a Court of Record.

15. In Halsbury's Laws of England (4th Edn. Vol. 10, para 713) it is stated thus:

The chief distinctions between superior and inferior Courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court, unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court. An objection to the jurisdiction of one of the superior Courts of general jurisdiction must show what other Court has jurisdiction, so as to make it clear that the exercise by the superior Court of its general jurisdiction is unnecessary. The High Court, for example, is a Court of universal jurisdiction and superintendence in certain classes of actions, and cannot be deprived of its ascendancy by showing that some other Court could have entertained the particular action.

(Though the above reference is to English Courts the principle would squarely apply to the superior Courts in India also.)

16. Referring to the said passage and relying on the decision of this Court in *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, a two Judge Bench of this Court in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, has observed thus (Para 67 of AIR):

The High Courts in India are superior Courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction....

17. If suo power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the

High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record.

9. The learned senior counsel placed reliance upon the judgment of the Supreme Court in case of Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. and Another, and in particular paragraphs 11, 12, 13, 15, 18 and 19 which reads thus:-

11. On September 7, 1987 the appellant-Union filed an application before the Industrial Tribunal to the effect that the only question which had been argued before the Tribunal was in relation to the power and jurisdiction of the Conciliation Officer to record settlement between the parties during the pendency of the disputes. The question as to whether the settlement was fair and just, and should be accepted by the Tribunal, was not argued since that required evidence. It was, therefore, understood that the said question will be decided later on in case the Tribunal held that the Conciliation Officer had jurisdiction to record the settlement. Under some misconception the Tribunal had determined the terms of the settlement to be fair and just and had passed an Award on June 12, 1987. It was, therefore, prayed that the appellant-Union be given an opportunity to establish that the settlement was neither just nor fair. For this purpose the Award may be recalled and the appellant-Union be given an opportunity to establish that the settlement is unjust and unfair, adversely affecting a large number of workmen. It was prayed that the Award may be recalled which was in fact an ex-parte Award, and the question of fairness of the settlement be decided after providing an opportunity to the parties to produce evidence.

12. This application filed by the appellant-Union was strongly opposed by the respondent-Management, but the successor Presiding Officer of Industrial Tribunal No. II, Delhi allowed the application. It observed that a perusal of the order dated June 12, 1987 showed that the then Tribunal did not make a single observation as to whether the settlement dated May 17, 1983 was just and fair. No issue was framed nor any evidence was recorded on that point. No argument was advanced and no finding was given by his learned predecessor on this point. Relying upon the judgment of this Court in Satnam Verma Vs. Union of India (UOI), and Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, it was held that where the Tribunal proceeds to make an Award without notice to a party, the Award is a nullity and, therefore, the Tribunal has not only the power but also the duty to set aside such an ex-parte Award. It was held that in the instant case no arguments were advanced and no finding was given as to whether the settlement was just and fair. In view of its finding that the Tribunal has power to review its Award even if the same is published in the Gazette, the Tribunal proceeded to exercise its power to review its earlier order dated June 12, 1987. It further framed an additional issue which is as follows:-

Whether the settlement dated 17.5.1983 is just and fair and if so, is it not binding on the parties?

It further directed that only arguments shall be heard since there was no need to record evidence on this point. Accordingly by its order of February 19, 1990 the Industrial Tribunal decided to review its earlier order and framed an additional issue as to whether the settlement was just and fair.

13. The Management-respondent herein preferred a writ petition before the High Court of Delhi at New Delhi and sought quashing of the order dated February 19, 1990 passed by Industrial Tribunal No. II, Delhi, and for declaration that the Award dated June 12, 1987 earlier made by the Tribunal effectively terminated the reference pending before it. The High Court by its impugned judgment and order allowed the writ petition and granted the reliefs prayed for. The judgment and order of the High Court has been impugned before us in this appeal.

15. We shall first take up the second question namely-whether the Tribunal was functus office having earlier made an Award which was published by the appropriate Government. It is not in dispute that the Award was made on June 12, 1987 and was published in the Gazette on August 10, 1987. The application for recall was made on September 7, 1987. Under Sub-section (1) of Section 17A of the Act an Award becomes enforceable on the expiry of 30 days from the date of its publication u/s 17 of the Act. Thus the Award would have become enforceable with effect from September 9, 1987. However, the application for recalling the Award was made on September 7, 1987 i.e. 2 days before the Award would have become enforceable in terms of Subsection (1) of Section 17A of the Act. The High Court rightly took the view that since the application for recall of the order was made before the Award had become enforceable, the Tribunal had not become factious office and had jurisdiction to entertain the application for recall. This view also find supports from the judgment of this Court in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.* (supra). This Court after noticing the provisions of Sub-section (3) of Section 20 of the Act which provides that the proceedings before the Tribunal would be deemed to continue till the date on which the Award become enforceable u/s 17A, held that till the Award becomes enforceable the Tribunal retains jurisdiction over the dispute referred to it for adjudication, and up to that date it has the power to entertain the application in connection with such dispute. The jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. The judgment in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.* (supra) has been reiterated by this Court in *M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise*, and *M.P. Electricity Board Vs. Hariram etc.*,

18. It was, therefore, submitted before us relying upon *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.* (supra) that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This Court in *Grindlays Bank Ltd. v.*

Central Government Industrial Tribunal and Ors. (supra) clearly highlighted this distinction when it observed:-

Furthermore, different considerations arise on review. The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal.

19. Applying these principles it is apparent that where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In *Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.* (supra), it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again.

10. Relying upon the aforesaid judgment, the learned senior counsel submits that the a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it. The learned counsel submits that in view of the fact that though it was not the contention of the State Government that the even claim nos. 1 and 2 were barred by law of limitation, the review petitioner has not dealt with such issue of limitation in respect of such two claims and this court suo-motu holding that even claim nos. 1 and 2 were barred by law of limitation is an error and shows procedural mistake which goes to the root of the matter resulting in setting aside claim nos. 1 and 2 also on the ground of limitation. The learned counsel submits that this court thus has plenary jurisdiction to recall its order and to correct its own error apparent on the face of the record.

11. The petitioner also placed reliance upon the judgment of the Supreme Court in case of Supreme Court Bar Association Vs. Union of India and Another, in support of his plea that Article 215 of the Constitution of India declares a High Court to be a court of record. Paragraph 11 of the said judgment reads thus:-

11. The expression Court of Record has not been defined in the Constitution of India. Article 129 however, declares the Supreme Court to be a Court of Record, while Article 215 declares a High Court also to be a Court of Record.

12. Mr. Kumbhakoni, the learned counsel appearing on behalf of the respondent (State Government) submits that there is no power of review conferred on the High Court under the provisions of Arbitration and Conciliation Act, 1996. The learned counsel submits that appeal u/s 37 of the Arbitration and Conciliation Act, 1996 need not be only before the High Court. It is submitted that the court is defined u/s 2(1) (e) which includes High court in exercise of its ordinary original civil jurisdiction. However, appeal u/s 37 may also lie before the District Judge in appropriate cases. It is submitted that by the said order dated 1st February, 2013, this court had exercised power u/s 37 of the Arbitration and Conciliation Act, 1996 having power to hear the appeal from the original decree of the court passing the order. It is submitted that this court is not the court of record under Article 215 of the Constitution while hearing appeal u/s 37 of the Arbitration and Conciliation Act, 1996 and thus in absence of any power under review u/s 37, this court cannot correct any error even if apparent on the face of the record. It is submitted that this court exercising power u/s 37 of the Arbitration and Conciliation Act does not have any plenary jurisdiction to correct any errors made by this court itself. The learned counsel submits that u/s 47(5) of the Bombay Public Trust Act, Court is designated as High Court for hearing appeal, whereas there is no such provisions exist in section 37 of the Arbitration and Conciliation Act, 1996. It is submitted that this court has heard the appeal as Appellate Court and not as a High Court being the court of record. The learned counsel placed reliance upon the judgment of this court delivered on 23rd January, 2013 in case of M/s. Madhav Structural Engineering Ltd. vs. The

Maharashtra State Road Development Corporation Limited in Review Petition (St.) No. 16618 of 2010 in Arbitration Appeal No. 5 of 2008 and in particular paragraph 15 which reads thus:-

15. In my view, the Arbitration and Conciliation Act is a self contained code and as the said Act does not provide any remedy of review, it is manifest that review could not be made. In my view, remedy of review is substantive remedy and would not be maintainable unless the statute/rules permits. If, the right of review is not provided and is allowed to be exercised, any order if passed would be ultra-virus and without jurisdiction. In my view, the present proceedings filed by the petitioner are totally without jurisdiction.

13. Mr. Kumbhakoni, the learned counsel then placed reliance upon the judgment of the Supreme Court in case of Parsion Devi and others vs. Sumitri Devi and others (1997) 8 SCC 715 and in particular paragraphs 6, 9 and 10 in support of his plea that under Order 47 Rule 1 of the Code of Civil Procedure, the judgment may be open to review in case there is mistake or error apparent on face of record An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. Paragraphs 6, 9 and 10 of the said judgments reads thus:-

6. A perusal of the application filed by the judgment debtors seeking review of the order dated 25.4.1989 shows that none of the grounds stated therein can strictly speaking be said to fall within the ambit and scope of Order 47 Rule 1 CPC. The review petition in effect challenged the correctness of the order of Gupta, J. on the question of limitation without pointing out any "error apparent on the face of the record" which could have been reviewed. Sharma, J. appears to have ignored the limits of the exercise of jurisdiction under Order 47 Rule 1 CPC while passing the impugned order and reversing the order of Gupta, J. on merits.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

10. Considered in the light of this settled position we find that Sharma, J. clearly over-stepped the jurisdiction vested in the court under Order 47 Rule 1 CPC. The observations of Sharma, J. that "accordingly, the order in question is reviewed and it is held that the decree in question was of composite nature wherein both mandatory and prohibitory injunctions were provided" and as such the case was covered by Article 182 and not Article 181, cannot be said to fall within the scope

of Order 47 Rule 1 CPC. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. While passing the impugned order, Sharma, J. found the order in Civil Revision dated 25.4.1989 as an erroneous decision, though without saying so in so many words. Indeed, while passing the impugned order Sharma, J. did record that there was a mistake or an error apparent on the face of the record which was not of such a nature, "which had to be detected by a long drawn process of reasons" and proceeded to set at naught the order of Gupta, J. However, mechanical use of statutorily sanctified phrases cannot detract from the real import of the order passed in exercise of the review jurisdiction. Recourse to review petition in the facts and circumstances of the case was not permissible. The aggrieved judgment debtors could have approached the higher forum through appropriate proceedings to assail the order of Gupta, J. and get it set aside but it was not open to them to seek a "review" of the order of Gupta, J. on the grounds detailed in the review petition. In this view of the matter, we are of the opinion that the impugned order of Sharma, J. cannot be sustained and we accordingly accept this appeal and set aside the impugned order dated 6.3.1997.

14. Mr. Kumbhakoni, the learned counsel placed reliance upon the judgment in case of *Ittavira Mathai Vs. Varkey Varkey and Another*, in support of his plea that section 3 of the Limitation Act is preemptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The relevant portion of paragraph 8 relied upon by Mr. Kumbhakoni in support of his plea reads thus:-

8. The first point raised by Mr. Paikedy for the appellant is that the decree in O.S. No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. Even assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned counsel, however, referred us to the decision of the Privy Council in AIR 1935 85 (Privy Council) and contended that since the court is bound under the provisions of S. 3 of the Limitation Act to

ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says that S. 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The privy council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.

15. Mr. Kumbhakoni, the learned counsel placed reliance upon the judgment of this Court delivered on 27th February, 2013 in Chamber Summons No. 714 of 2012 in Arbitration Application No. 112 of 2011 in case of Rosy Blue (India) Pvt. Ltd. vs. Orbit Corporation Ltd. The learned counsel placed reliance upon para (8) of the said judgment to demonstrate that this court has rejected the Chamber Summons taken out by the parties for review of the order passed by the designate of the Hon'ble Chief Justice was rejected in view of section 5 of the Arbitration and Conciliation Act, 1996. Paragraph 8 of the said judgment reads thus:-

8. In the view which I have taken above, the application cannot be entertained even on merits. However, it must also be emphasized that the Chamber Summons which has been taken out, is a procedure which is unknown to the provisions contained in Part-I of the Arbitration and Conciliation Act, 1996. Section 5 of the Act restricts the scope of judicial intervention only in respect of those matters which are specifically provided for and in respect of no other matters. In a judgment of the Chief Justice of the Allahabad High Court construing the provisions of Section 11 in *Manish Engineering Enterprises vs. Managing Director, IFFCO, N. Delhi*, reported in AIR 2008 Allahabad 56, it has been held that there is a distinction between a procedural review and a review on merits and that a substantive review on merits is unavailable in respect of an order passed u/s 11.

16. Mr. Chinoy, the learned senior counsel appearing for the review petitioner in rejoinder submits that the plea of the petitioner to review order passed by this court is in the nature of procedural overview which is always available to the High Court to correct its own error apparent on the face of the record. The learned senior counsel submits that though the state government has filed reply to the review petition, it is not in dispute that the state government had not made any submission on the issue of limitation of claim nos. 1 and 2 either in the written arguments or across the bar. It is thus submitted that the court on its own suo-motu could not have dealt with the issue of limitation in respect of the claim nos. 1 and 2 also which error goes to the root of the matter and is error apparent on the face of the record and would come under the purview of procedural review which could be exercised by the High Court by exercising its

plenary jurisdiction. The learned senior counsel distinguished the judgment of the Supreme Court in case of Parsion Devi (supra) and relied upon by Mr. Kumbhakoni and submits that the Supreme Court came to the conclusion that there was no error or mistake apparent on the face of the record and in view thereof, the power under Order 47 Rule 1 of the CPC could not have been exercised by the court. It is submitted that the Supreme Court in the said judgment was dealing with the matter in which the High Court had exercised the power under Order 47 Rule 1 on the merits of the matter and had not exercised plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. It is submitted that the judgment of the Supreme Court in case of Parsion Devi (supra) is thus clearly distinguishable in the facts of this case.

17. Mr. Chinoy, the learned senior counsel then submits that it is not in dispute that the said order has been passed by the High Court having jurisdiction to hear such appeal. It is submitted that merely because section 37(1) of the Arbitration and Conciliation Act does not designate the High Court as Appeal Court would not mean that the appeal heard by the High Court would not be a High Court of record under Article 215 of the Constitution of India.

18. In so far as judgment of this court in case of M/s. Madhav Structural Engineering Ltd. (supra) is concerned, Mr. Chinoy, the learned senior counsel distinguished the said judgment on the ground that the view taken by this court in the said matter was by following the judgment of the Single Judge of this Court in case of M/s. Thanikkudam Bhagwati Mills vs. Mrs. Reena Ravindra Khona dealing with the powers of the court to review an order passed u/s 34 of the Arbitration and Conciliation Act, 1996. The learned senior counsel submits that in both these judgments delivered by the Single Judges of this court in both these matters, there was no issue as to whether High Court can exercise its plenary jurisdiction to review any order passed by the High Court itself for correcting the error apparent on the face of the record or as to whether the High Court can exercise its jurisdiction by way of procedural review or not. It is submitted that the judgment of the Supreme Court in case of M.M. Thomas (supra) and Shivdeo Singh (supra) and Supreme Court Bar Association (supra) were not brought to the notice of this court in the said two matters. It is submitted that in both the matters, the review sought was substantial review of the order passed by this court and not procedural review by exercising preliminary jurisdiction of the High Court under Article 215 of the Constitution of India. The learned senior counsel also placed reliance upon the judgment of the Supreme Court in case of I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., in support of his plea that after considering section 5 of the Arbitration and Conciliation Act, 1996, the Supreme Court had held that though u/s 37(3), second appeal was barred, right of remedy of revision under Code of Civil Procedure, 1908 was neither expressly nor impliedly taken away by the said Act. It is thus submitted that even if this Court takes a view that substantive review is barred, there is no bar in the High Court in exercising plenary jurisdiction by procedural review to correct the

procedural error apparent on the face of the record. The learned senior counsel placed reliance upon the said judgment and in particular paragraphs 10 to 13, 19 and 21 which reads thus:-

10. We do not agree with this submission of the learned counsel. It is true in the present Act application of the Code is not specifically provided for but what is to be noted is: Is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable.

11. It has been held by this Court in more than one case that the jurisdiction of the civil court to which a right to decide a lis between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section 37(2), we cannot draw an inference that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable. This general principle apart, this issue is now settled by the judgment of a 3-Judge Bench of this Court in the case of *Bhatia International Vs. Bulk Trading S.A. and Another*, in C.A. No. 6527/2001--decided on 13.3.2002 where in while dealing with a similar argument arising out of the present Act, this Court held:

While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion.

12. In the said view of the matter, we are in respectful agreement with the view expressed by this Court in the case of *Nirma Ltd.* (supra) and reject the argument of Mr. Parasaran on this question.

13. We also do not find much force in the argument of learned counsel for the appellant based on Section 5 of the Act. It is to be noted that it is under this Part, namely, Part I of the Act that Section 37(1) of the Act is found, which provides for an appeal to a civil court. The term "Court" referred to in the said provision is defined u/s 2(e) of the Act. From the said definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the Code, therefore, the remedy by way of a revision u/s 115 of the Code will not amount to a judicial intervention not provided for by Part I of the Act. To put it in other words, when the Act u/s 37 provided for an appeal to the

civil court and the application of Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar u/s 5 will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also.

19. Revisional jurisdiction of superior court cannot be taken as excluded simply because subordinate courts exercise a special jurisdiction under a special act. The reason is that when a special Act on matters governed by that Act confers a jurisdiction on an established court, as distinguished from a "persona designata", without any words of limitation, then the ordinary incident of procedure of that Court right of Appeal or revision against its decision is attracted. The right of Second Appeal to the High Court has been expressly taken away by Sub-section (3) of Section 37 of the Act, but for that reason it cannot be held that the right of revision has also been taken away. See *National Telephone Company Ltd. v. Postmaster-General* [1913 Appeal Cases 546] and decision of the Privy Council in AIR 1948 12 (Privy Council) which have been relied by Supreme Court in case of *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee)*, In *National Telephone Company's case* (Supra), Viscount Haldane L.C. observed thus:-

When a question is stated to be referred to an established Court without more, it in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches.

21. Provisions of Section 37 of the Act of 1996 bars Second Appeal and not revision u/s 115 of the Code of Civil Procedure. The Power of appeal u/s 37(2) of the Act against order of arbitral Tribunal granting or refusing to grant an interim measure is conferred on court. Court is defined in Section 2(e) meaning the "principal Civil Court of Original Jurisdiction" which has "jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been the subject matter of the suit". The power of appeal having conferred on a Civil court all procedural provisions contained in the Code would apply to the proceedings in appeal. Such proceedings in appeal are not open to Second Appeal as the same is clearly barred under Subsection (3) of Section 37. But I agree with the conclusion reached by Brother Hegde J. that the supervisory and revisional jurisdiction of High Court u/s 115 of the CPC is neither expressly nor impliedly barred either by the provisions of Section 37 or Section 19(1) of the Act. Section 19(1) under Chapter V of the Part I of the Act merely states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure. The said action has no application to the proceedings before civil court in exercise of powers in appeal u/s 39(2) of the Act.

19. On perusal of the records including the written arguments filed by both parties, it is clear that the State Government had pressed the issue of limitation only in respect of claim nos. 3 to 5 and not claim nos. 1 and 2. Perusal of the affidavit in reply filed by the State Government in the present proceedings

indicates that the State Government has not disputed the statement made by the review petitioner in the review petition that the State Government had not raised issue of limitation in respect of the claim nos. 1 and 2 in their written arguments and had addressed the court on the issue of limitation only in respect of claim nos. 3 to 5. The only submission made in the affidavit in reply is that u/s 3 of the Limitation Act, it is duty cast upon the court itself to consider as to whether or not any suit, proceeding or claim is within the period of limitation or barred by the statutes of limitation. The duty so cast upon the court under aforesaid section 3 is mandatory, peremptory and is not whittled down for the lack or absence of pleadings or oral submissions made in this regard by a contesting party. In my view, Mr. Chinoy, the learned senior counsel is right in his submission that in absence of any such plea raised by the respondents on the issue of limitation in respect of the claim nos. 1 and 2 either in the written submission or across the bar, the review petitioner had no opportunity to deal with any such plea which was not raised by the respondents.

20. In my view, merely because the "High Court" is not described as *persona designata* in section 37 of the Arbitration and Conciliation Act, 1996, would not mean that if any such appeal is entertained by the High Court u/s 37(1) of the Arbitration and Conciliation Act, 1996, it would not be the High Court exercising its power under Article 215 of the Constitution of India and would not be the court of record. In my view, there is no substance in the submission made by Mr. Kumbhakoni that while exercising power u/s 37 of the Arbitration and Conciliation Act, 1996, High Court would not be the court of record under Article 215 and would not have plenary jurisdiction including procedural review relating to the errors apparent on the face of the record.

21. In case of *M.M. Thomas (supra)* the Supreme Court has dealt with its prior judgment in case of *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, and AIR 1967 SC 1 and held that it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record. The Supreme Court has quoted the observations in its earlier judgment in case of *M.V. Elisabeth (supra)* in which it was held that the High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction. The Supreme Court has held that the High Court is court of record which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regards is plenary. In my view, the provisions of Arbitration and Conciliation Act, 1996 does not exclude the powers of High Court to exercise its plenary powers and to exercise procedural review in case of error apparent on the face of the

record with a view to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

22. In case of Shivdeo Singh (*supra*), the Supreme Court dismissed the appeal by holding that by the order passed by the High Court, the interests of persons who were not made parties to the proceedings were affected and thus second application filed by such parties affected was rightly entertained by the High Court. It is held by the Supreme Court that the High Court has power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. In my view, the respondents not having pressed the issue of limitation in respect of claim nos. 1 and 2, there was no opportunity given to the review petitioner to address this court on issue of limitation in respect of those two claims. In my view there is error apparent on the face of the record in paragraphs 35, 36 and 46 of the judgment holding that claim nos. 1 and 2 also barred by law of limitation and were set aside on the ground of limitation.

23. In my view, judgment of this court in case of M/s. Madhav Structural Engineering Ltd. (*supra*) does not deal with the submission that in view of section 5 of the Arbitration and Conciliation Act, 1996, this court cannot even exercise the procedural review by exercising plenary jurisdiction. On perusal of the said judgment it is clear that the power of High Court to exercise procedural review by exercising plenary jurisdiction under Article 215 of the Constitution of India was not an issue before this court in the said judgment. The judgment of the Supreme Court relied upon by the review petitioner in this proceedings were not brought to the notice of this court. In my view, thus the said judgment of this court is clearly distinguishable in the facts of this case and is of no assistance to the respondents.

24. As far as unreported judgment of this court delivered on 27th February, 2013 in case of Rosy Blue (India) Pvt. Ltd. vs. Orbit Corporation Ltd. in Chamber Summons NO. 714 of 2012 (*supra*) relied upon by Mr. Kumbhakoni is concerned, the Designate Judge of the Hon'ble Chief Justice in the said judgment has referred to the judgment of the Allahabad High Court construing the provisions of Section 11 in case of Manish Engineering Enterprises vs. Managing Director, IFFCO, N. Delhi, reported in AIR 2008 Allahabad 56, in which it has been held that there is distinction between a procedural review and a review on merits and that a substantive review on merits is unavailable in respect of an order passed u/s 11. By the present review petition, the review petitioner seeks procedural review of the order passed by this court. In my view, the procedural review can be exercised under the plenary jurisdiction which this court has. The judgment in case of Rosy Blue (India) Pvt. Ltd. vs. Orbit Corporation Ltd. relied upon by Mr. Kumbhakoni thus is of no assistance to the respondents.

25. In my view, the provisions of CPC 1908 can be applied to the proceedings in court to the extent the provisions thereof are not inconsistent with the provisions of the Arbitration and Conciliation Act, 1996. In my view, none of the provisions

of the Arbitration and Conciliation Act, 1996 bars High Court from exercising power to have procedural review by exercising plenary jurisdiction. In my view, the present review petition thus filed by the review petitioner for seeking procedural review by praying this court to exercise plenary jurisdiction for correcting an error apparent on the face of the record is maintainable. I, therefore, pass the following order:-

(a) The review petition is made absolute in terms of prayer (a).

(b) The review petitioners are directed to comply with the directions of this court in order dated 1st February, 2013 in respect of the claims other than claim nos. 1 and 2 within four weeks from today.

(c) Arbitration Appeal No. 6 of 2007 to be placed on board for hearing on claim nos. 1 and 2 on 16th April, 2013.

(d) There shall be no order as to costs.