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Jet Airways (India) Limited and Sahara Airlines Limited (now known as) "Jet Lite (India) Limited") Vs Mr. Subrata Roy Sahara, Indian Inhabitant and Others
 Jet Airways (India) Limited and Others Vs Sahara Airlines Limited (now known as) "Jet Lite (India) Limited")

Court: Bombay High Court

Date of Decision: Oct. 17, 2011

Acts Referred: Arbitration Act, 1940 â€" Section 17, 20, 30, 39, 39
Arbitration and Conciliation Act, 1996 â€" Section 19, 31(7), 32, 34, 36
Civil Procedure Code Amendment Act, 1976 â€" Order 21 Rule 11, Order 9 Rule 10, 100A, 104, 104(1)
Civil Procedure Code, 1908 (CPC) â€" Section 100, 115
Constitution of India, 1950 â€" Article 136
Government of India Act, 1915 â€" Section 104(1), 107, 108, 49
Income Tax Act, 1961 â€" Section 156, 16, 17, 19(1), 36
Limitation Act, 1963 â€" Section 5
Presidency Towns Insolvency Act, 1909 â€" Section 9, 9(2)
Sick Industrial Companies (Special Provisions) Act, 1985 â€" Section 22, 9

Citation: (2012) 1 ALLMR 563 : (2011) 113 BOMLR 3835

Hon'ble Judges: Mohit S. Shah, C.J; Girish Godbole, J

Bench: Division Bench

Advocate: Mr. Harish Salve, with Mr. Janak Dwarkadas, along with Mr. Zal Andhyarujina, Mr. R.J. Gagrat, Solicitor, Ms. Sheetal Sabnis, G.T. Mestha and Ms. I. Sen, Advocates instructed by y Gagrats for Jet Airways (India) Ltd. and anr. Appellants in APP 345/2011 and for APP 456/2011, Mr. Fali Nariman, Mr. Pradeep Sancheti, Sr. Counsel. and Mr. Satish Kishanchandani, Ms. Jatin Pore, Ms. Neha Shah, Advocates for Appellant Nos. 1 to 7, Subrata Roy Sahara and ors. in APP 456/2011 and for APP 345/2011, for the Appearing Parties

Final Decision: Dismissed

Judgement

Girish Godbole, J.
The fight over ownership of the shares of an airline, whose aircrafts ply at high altitude at sub zero temperatures, has

generated a lot of heat and litigation which has led to the filing of these appeals. Both the Appeals are filed for challenging the Judgment and Order

dated 4th May, 2011 passed by the Learned Single Judge (Dr. D.Y. Chandrachud, J) in Execution Application No. 161 of 2009 with Chamber

Summons Nos. 551/09, 729/09, 603/10 & 477/11 and Notice No. 734 of 2009 in Arbitration Award dated 12 April 2007. The Appellants in

Appeal No. 345 of 2011 (Jet Airways (India) Limited) was the first Claimant, whereas the Appellants in the cross-Appeal No. 456 of 2011 (Mr.

Subrata Roy Sahara & ors.) were the second Claimants in the proceedings of Arbitration to which a reference would be made in due course.

2. Initially, the second Claimants being the Appellants in Appeal No. 456 of 2011 (Appeal (Lodg.) No. 293 of 2011) had alone filed their Appeal

and on 6th May, 2011, we had passed an interim order which reads thus :

Stand over to 14th June, 2011.

1. Mr.Janak Dwarkadas, learned senior counsel for the respondent no.1 states that the respondent no.1 has to develop its property in Bandra-

Kurla complex, Mumbai and that in the process of re-development they are going to get 1,50,000 sq.feet of built-up-area property which the

respondent no.1 does not propose to alienate or dispose of said built-up property and that the till next date of hearing, the respondent no.1 shall

also not encumber 75,000 sq.feet built-up-area out of the said 1,50,000 sq.ft of built-up-area.

The question of maintainability of the Appeal is kept open.

The question of maintainability of the Appeal was kept open.

3. Thereafter, even the first claimants filed Appeal (Lodg.) No. 356 of 2011, subsequently numbered as Appeal No. 345 of 2011. Both the

Appeals were heard by us on 14/6/2011 for admission. In Appeal No. 456 of 2011, following order was passed on 14/6/2011 :

PC:

Mr. Janak Dwarkadas, learned Sr. Counsel for respondent No.1 submits that he does not press the preliminary objection which was raised about

the maintainability of the appeal at the previous hearing. Mr. Janak Dwarkadas further states that respondent No.1 has filed cross appeal against

the said order.

2 Appeal is admitted. But the question of maintainability of the appeal is still kept open.

3 The statement made by Mr. Janak Dwarkadas, learned Sr. Counsel for respondent No.1 on 6th May, 2011 shall continue to operate till the final

disposal of this appeal.

4 Leave to amend in terms of the draft amendment handed in today. Amendment to be carried out within one week from today.

5 This appeal shall be heard on 19th July, 2011. High on Board.

In Appeal No. 345 of 2011 the following order was passed on the

same date :

PC:

Not on board. Mentioned at 12.30 p.m. By consent,

taken on board.

2 Appeal is admitted. But the question of maintainability of the appeal is kept pending.

3 Appeal shall be listed for hearing along with Appeal Lodging No.293 of 2011, on 19th July, 2011. High on board.

4. Since we had some doubts regarding the maintainability of Letters Patent Appeals under clause 15 of the Letters Patent of the High Court

Bombay, considering the nature of the impugned Judgment and Order and the proceedings in which the impugned Judgment and Order was

passed, hearing was adjourned to 19/7/2011. Accordingly, on 19/7/2011 Learned Senior Counsel commenced their submissions on the question

of maintainability. In the mean time, since the Supreme Court of India had delivered its Judgment in the case of Fuerst Day Lawson Ltd. vs. Jindal

Exports Ltd. in SLP (Civil) No. 11945 of 2010 on 8/7/2011 dealing with a similar issue regarding the maintainability of a Letters Patent Appeal

against an Order passed in proceedings under Part-II of the Arbitration and Conciliation Act, 1996 (subsequently reported in Fuerst Day Lawson

Ltd. and Others Vs. Jindal Exports Ltd. and Others etc. etc., , attention of the Learned Senior Counsel appearing for the respective parties was

invited to the said Judgment. Accordingly, thereafter, Learned Sr. Counsel have advanced their respective submissions on the question of

maintainability of the Appeals and it is urged by both of them that their respective Appeals are maintainable. In all fairness it must be stated that Mr.

Fali Nariman, the Learned Sr. Counsel for the Appellants in Appeal No. 456 of 2011 also invited our attention to the fact that by way of abundant

caution and in case the question of maintainability of the Appeal is decided against the Appellants, with a view to ensure that no further

complications arise on account of limitation, the said Appellants have lodged a SLP in the Hon''ble Supreme Court of India and the question

whether the same would be prosecuted on merits or not would be decided only after the decision on the question of maintainability of these

Appeals. It must also be stated that both the learned Sr. Counsel fairly requested us to proceed with the hearing on the question of maintainability

of the Appeals despite the aforesaid fact that the Appellants in Appeal No. 456 of 2011 have already lodged the Petition for Special Leave to

appeal in the Supreme Court of India under Article 136 of the Constitution of India. It is in these circumstances that after concluding the hearing on

the question of maintainability of the Appeals, we are proceeding to decide only the question of maintainability of the 2 Appeals.

BRIEF RESUME OF FACTS

5. Though, for decision regarding question of maintainability of Appeals, detailed narration of facts may not be required, we deem it appropriate to

give a brief resume of facts leading to the passing of the Judgment and Order impugned in the Appeals as also filing of these Appeals. We are

referring only to those facts which are undisputed and hence not going into any disputed question of facts which may have to be considered if the

arguments on merits are required to be heard.

(a) On 18/1/2006 a Share Purchase Agreement (''SPA'' for short) was executed between the selling shareholders (Vendors) being the Appellants

in Appeal No. 456 of 2011 (Mr. Subrata Roy Sahara & ors.) and Jet Airways (India) Ltd. (Purchaser and Appellants in Appeal No. 345 of

2011) and a Company then known as ""Sahara Airlines Limited"", now known as ""Jet Lite (India) Limited"". Under the said Agreement, Sahara

Group agreed to sell their entire shareholding (100% shareholding) of the then Sahara Airlines Limited to Jet Airways for a total consideration of

Rs. 2000 Crores. It is not in dispute that according to the said Agreement, the effective date for sale and purchase of the shares was 18/1/2006

and the closing date was 20/4/2007. The Agreement referred to a report prepared by Earnest and Young Private Limited (EY Report) dated

2/1/2006 prepared at the instance of the Vendors and the Agreement provided for the payment of the agreed consideration in installments.

(b) Salient features of the Agreement were as follows :

(i) Subject to the provisions of the SPA, including the disclosed liabilities on the closing date, the selling shareholders were to sell, transfer and

deliver to the purchaser free from all encumbrances, all the rights, title and interest of the vendors in the ''sale shares'' being the existing equity and

preference shares, representing the entire issued and paid up share capital of Sahara Airlines Limited.

(ii) The obligation of the purchaser to acquire the shares was conditional upon the fulfillment of certain conditions mentioned in clause 3. Parties

agreed to exercise all reasonable endeavours to ensure satisfaction of the conditions precedent not later than sixty five days from the effective date

(18 January 2006) i.e. by 23 March 2006.

(iii) The gross total consideration was Rs.2,000/-crores together with interest accrued until the closing date. The total consideration was to be

deposited by the purchaser simultaneously with the execution of the SPA with an escrow agent.

(c) Since the conditions precedent were not fulfilled within sixty five days of the effective date, time was extended by ninety days by the amended

agreement of 29 March 2006; and an amount of Rs.500 crores out of the total consideration of Rs.2,000/-crores deposited by Jet with the

escrow agent was released by consent to Sahara against a personal guarantee.

(d) According to Jet, the SPA came to an end as a result of the non-fulfillment of the conditions precedent upon which it addressed a letter dated

19 June 2006. Several proceedings were initiated in Court. One of the selling shareholders moved the District Court at Lucknow u/s 9 of the

Arbitration and Conciliation Act, 1996 for an injunction restraining the escrow agent from releasing and Jet seeking the release of the consideration

of Rs.1,500/-crores. Other selling shareholders also filed an Arbitration Petition at Lucknow. Jet filed a Petition u/s 9 in this Court for interim

measures. On 28 August 2006, the Supreme Court transferred the Arbitration Petitions filed at Lucknow to this Court. Jet, in the meantime,

instituted a Summary Suit in this Court for the recovery of an amount of Rs.500/-crores based on a personal guarantee executed by Shri Subrata

Roy Sahara. This Court passed an order on 22 September 2006 on Jet''s application by consent, permitting Jet to withdraw an amount of Rs.

500/-crores from the escrow account upon furnishing a Bank Guarantee for the amount.

(e) Arbitral proceedings took place before an arbitral Tribunal consisting of Lord Steyn as Presiding Arbitrator, Mr. Justice S.P. Bharucha, former

Chief Justice of India and Mr. Justice B.P. Jeevan Reddy, former Judge of the Supreme Court. On 12 April 2007, Consent Terms were filed

before the arbitral tribunal. The consideration for the purchase of the shares of Sahara Airlines Limited was reduced from Rs.2,000/-crores to

Rs.1,450/-crores. Under the Consent Terms, Jet was liable to pay four annual installments each of Rs.137.50 crores, ""without any deduction and

set off"" on or before 30 March 2008, 30 March 2009, 30 March 2010 and 30 March 2011, time being of the essence. In the event of any default

by Jet in the payment of the installments, the concession was to stand ""automatically withdrawn"" and the consideration would stand restored from

Rs.1,450/-crores to Rs.2,000/- crores. In that event, the Consent Terms stipulated that Jet will become liable to pay and ""do pay"" to the selling

shareholders the price originally agreed of Rs.2,000/- crores.

(f) The arbitral tribunal passed a consent award on 12 April 2007, recording that under the Consent Terms parties had managed to resolve all the

disputes existing between them and all the issues that arose in the arbitration. Accordingly, (i) All claims and counter claims were withdrawn; and

(ii) An award was passed in terms of the Consent Terms. On 20 April 2007, the Consent Terms were implemented. All shares were transferred

and management came from Sahara to Jet.

(g) Thereafter, the dispute arose between the vendors and the purchaser on account of a notice of demand dated 23 August 2007 issued u/s 156

of the Income Tax Act, 1961 for the assessment year 2004-2005 for a sum of Rs. 444.5 crores.

(h) On the backdrop of the above facts, the proceedings were initiated in this court. We have the benefit of the narration in respect of the said

proceedings as made by the Learned Single Judge in Part II of the impugned Judgment and instead of repeating the same, we deem it appropriate

to briefly summarise the same as under :

(i) On 26 March 2009, Execution Application No. 161 of 2009 was filed by Sahara for the execution of the decree in the amount of Rs.999.58

crores on the footing that the original purchase price of the shares stood restored.

(ii) Jet filed Chamber Summons No. 551 of 2009 in Execution Application 161 of 2009 on 31 March 2009, seeking a declaration that Sahara has

not become entitled to execute the award for the recovery of the sum claimed by it in Execution Application 161 of 2009.

(iii) Execution Application No. 180 of 2009 was filed by Jet on 23 April 2009 for the recovery of an amount of Rs.821/-. Execution Application

No. 180 of 2009 was withdrawn by Jet on terms set out in an order of this Court.

(iv) Chamber Summons No. 685 of 2009 was filed on 23 April 2009 by Jet in Jet"s Execution Application 180 of 2009, seeking relief to the

effect that there has been no failure on the part of Jet to pay the installment on the due date and for a direction to Sahara to forthwith pay/reimburse

to Jet an amount of Rs.821/-crores, being the tax liability incurred/suffered in respect of Assessment Years 2004-05 and 2005-06.

(v) Chamber Summons No. 729 of 2009 was filed by Jet on 29 April 2009 in Execution Application No. 161 of 2009 for satisfaction being

recorded on the decree under Order 21 Rule 2(1) of the payment of Rs.87.50 crores (the second installment) to Sahara on 30 March 2009 and

Rs.50/-crores to the Income Tax Department as adjustment of the second installment under the consent award of 12 April 2007.

(vi) Chamber Summons No. 603 of 2010 was filed by Jet on 19 March 2010 in Execution Application No. 161 of 2009 to the effect that this

Court should release and discharge Jet of the undertaking given on 2 April 2009 not to create further encumbrance on, alienate or transfer its

movable and immovable assets and properties as a condition for not executing the warrant of attachment levied by Sahara on 30 March 2009.

(vii) During the pendency of the proceedings, Jet has also filed Chamber Summons No. 477 of 2011 for permission to enter into a development

agreement with Godrej Properties Limited in pursuance of an MoU dated 26 May 2010.

6. In these proceedings as aforesaid, the Learned Single Judge (Dr. D.Y. Chandrachud, J) has passed the impugned Judgment and Order dated 4

May 2011 which is the subject matter of the 2 Appeals. For deciding the question about maintainability of the Appeals, it is not necessary to

record as to what were the respective submissions of the parties before the Learned Single Judge and the findings of the Learned Single Judge.

However, we deem it fit to record the conclusions of the learned Single Judge on Computation and conclusions.

7. The conclusions can be summarized as under :

Computation

To obviate any controversy on the mathematical calculation involved, both the learned counsel appearing on behalf of Second Claimant Nos.2 to 8

and for Jet have verified the computation of the balance due and payable by Jet to Second Claimant Nos. 2 to 8. Upon hearing the learned counsel

the Court has come to the conclusion that interest should be awarded to Second Claimant Nos.2 to 8 at the rate of 9% per annum in the facts and

circumstances of the case. The following calculation has been made on that basis. The computation of the amount due and payable by the Jet to

Second Claimant Nos.2 to 8 is as follows :

Calculation of Simple Interest on the basis of Rs.1450 Crores - Period from 31.03.2008 to

30.04.2011

Amount in

Rupees

S.No. Particulars Opening Balance Amount Paid Amount Closing Interest

appropriated Balance Due

Due towards

interest

@9%

1. Upto 31-03- 5,500,000,000 1,004,200,000- 4,495,800,0001,108,553

2008

2. Upto 31-03- 4,495,800,000 875,000,000 405,730,553 4,026,530,553404,622,000

2009

3. Upto 31-03- 4,026,530,553 - - 4,026,530,553362,387,750

2010

4. Upto 31-03- 4,026,530,553 - - 4,026,530,553362,387,750

2011

5. Upto 30-04- 4,026,530,553 - - 4,026,530,55329,785,295

2011

(i.e. for I

Month)

Total 1,160,291,348

Total interest 1,160,291,348

Less Interest appropriated 405,730,553

Balance interest 754,560,795

Add Balance principal amount* 4,026,530,553

Aggregate amount as on April 30, 4,781,091,348

2011

Note: Further Interest on principal amount of Rs.4,02,65,30,553/- @ 9 % p.a. =

Rs.9,92,843/- per day.

In the circumstances, the balance due and payable by Jet to Second Claimant Nos. 2 to 8 as on 30 April 2011 is Rs. 478,10,91,348/-(comprised

of balance interest in the amount of Rs. 75,45,60,795/-and a balance principal of Rs.402,65,30,553/-.). Further interest on the principal amount of

Rs.402,65,30,553/- at 9% per annum works out to Rs.9,92,843/-per day. Jet has deposited in Court an amount of Rs.275 Crores. This amount

together with the interest accrued thereon shall be released by the Prothonotary and Senior Master to Second Claimant Nos.2 to 8. The balance

that would cover the total sum of Rs.478,10,91,348/-together with interest on the principal sum computed at Rs.9,92,843/-per day shall be paid

over by Jet to Second Claimant Nos. 2 to 8 within a period of two weeks from today. Upon making of the aforesaid payment, the attachment

levied on 30 March 2009 shall stand raised and Jet shall be relieved of the undertaking furnished in pursuance of the order of the Learned Single

Judge dated 31 March 2009.

8. Ultimately the operative order which was passed by the learned Single Judge in paragraphs 56 and 57 of the Judgment reads thus :

56. In view of the aforesaid finding, Execution Application 161 of 2009 is disposed of. Chamber Summons 551 of 2009, 729 of 2009 and 603 of

2010 are accordingly disposed of. Counsel appearing on behalf of Jet states that Chamber Summons 477 of 2011 will not survive in view of the

judgment.

57. Notice 734 of 2009 shall stand marked as satisfied upon payment being made by Jet in terms of the directions given in this order.

RELEVANT STATUTORY PROVISIONS

9. It is necessary to decide whether the impugned order passed by the Learned Single Judge is an order passed in proceedings u/s 36 of the

Arbitration and Conciliation Act, 1996 or an order passed in proceedings under the Code of Civil Procedure, 1908. For determining the question

about maintainability of these Appeals in proper perspective, we deem it fit to note certain relevant provisions of the Arbitration and Conciliation

Act, 1996 (1996 Act), Letters Patent of the High Court, Bombay, Code of Civil Procedure, 1908, and Arbitration Act 1940 (the 1940 Act).

A. PROVISIONS OF ARBITRATION AND CONCILIATION ACT, 1996:

(a) Section 2(e) defines the word ""Court"" as the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of

its ordinary original civil jurisdiction,.....

(b) Section 5 of the Act provides for extent of judicial intervention and reads thus :

5. Extent of judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part,

no judicial authority shall intervene except where so provided in this Part.

(c) Section 19(1) of the Act deals with the determination of rules of procedure which reads thus :

19. Determination of rules of procedure.-(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence

Act, 1872.

(d) Section 30 provides for settlement and passing of an arbitral award on agreed terms and section 31 provides for forms and contents of arbitral

award.

(e) Section 32 provides that the arbitral proceedings shall be terminated by the final arbitral award. Section 33 provides for correction and

interpretation of award for passing of an additional award. Section 34 then provides for filing of an application for setting aside arbitral award.

Chapter-VIII containing sections 35 and 36 reads thus :

CHAPTER VIII

FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

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 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.

(f) Chapter IX deals with appeals containing only section 37 which reads thus :

CHAPTER IX

APPEALS

37. Appealable orders.-(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from

original decrees of the Court passing the order, namely:---

(a) granting or refusing to grant any measure u/s 9:

(b) setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal---

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure u/s 17.

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

appeal to the Supreme Court.

(g) Section 42 provides for jurisdiction and reads thus :

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.

Aforesaid are the relevant provisions in Part-I of the 1996 Act.

(h) Part-II of the Act deals with enforcement of certain foreign award. Section 49 and 50 falling in Chapter I in Part II are of some relevance since

the Judgment of the Supreme Court in the case of Fuerst Day Lawson (supra) interprets the scope of appeals u/s 50 which is almost pari materia

section 37(1) and 37(3) save and except the difference that the words (""and from no others"") in sub-section 1 of section 37 are absent in section

50.

B. PROVISIONS OF THE LETTERS PATENT HIGH COURT BOMBAY

(a) The present appeals have been filed u/s 15

of the Letters Patent of the High Court at Bombay and it is therefore necessary to extricate clauses 15 and 44 of the Letters Patent.

15. Appeal to the High Court from Judges of the Court : -And We do further ordain that an appeal shall lie to the said High Court of Judicature at

Bombay from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the superintendence of the

said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the

exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal

jurisdiction) of one Judge of, the said High Court or one Judge of any Divisional Court, pursuant to section 108 of the Government of India Act,

and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a Judgment of one Judge of the said High

Court from a Judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of February one

thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a Court subject to the superintendence of the said High

Court, where the Judge who passed the judgment declares that the case is fit one for appeal; but that the right of appeal from other judgments of

Judge of the High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided.

44. Power of Indian Legislature preserved :-And we do further ordain and declare that all the provisions of these Letters Patent are subject to the

legislative powers of the Governor-General in Legislative Council of the Government of India Act, 1915, and also of the Governor-General in

cases of emergency u/s Seventy-two of that Act and may be in all respects amended and altered thereby.

C. PROVISIONS OF CODE OF CIVIL PROCEDURE, 1908.

(a) The word ""Decree"" is defined in section 2(2) of the Code of Civil Procedure, 1908.

Prior to the enactment of the CPC (Amendment), 1976 (Act No. 104 of 1976 which came into force on 1/2/1977), the words ""section 47 or

were also part of the definition.

(b) By section 20 of the aforesaid Act 104 of 1976 sub section 2 of section 47 of the Code was omitted. Prior to its omission, the said sub-section

2 read thus :

47(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a

proceeding and may, if necessary, order payment of any additional court-fees.

(c) Section 96 of the Code provides for appeal from original decree whereas section 104 provides for orders from which appeal lies. Clauses (a)

to (f) of sub-section 1 of section 104 were omitted by section 49 and schedule III of Act 10 of 1940 i.e. Arbitration Act, 1940.

D. ARBITRATION ACT, 1940

(a) Section 49 of the said Act (Act No. 10 of 1940) inter alia repealed sub-clauses (a) to (f) of Section 104(1) of the Code. The said Act applied

only to the domestic arbitration and domestic awards. Section 14 provided for making of award and filing award in court and section 17 provided

for the power of the court either to set aside the award or pronounce judgment.

Said section 17 reads thus :

17. Judgment in terms of award. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration

or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having

been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow

and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

(b) Chapter 6 provides for appeals and contains only section 39 which reads thus :

APPEALS

39. Appealable orders. (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law

to hear appeals from original decrees of the Court passing the order:-An order-

(i) superseding an arbitration;

(ii) on an award stated in the form of a special case;

(iii) modifying or correcting an award;

(iv) filing or refusing to file an arbitration agreement;

(v) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to

appeal to the Supreme Court.

(c) Section 41 provides for procedure and powers of court and reads thus :

41. Procedure and powers of Court.-Subject to the provisions of this Act and of rules made there under-

(a) the provisions of - the Code of Civil Procedure, 1908, (5 of 1908.) shall apply to all proceedings before the Court, and to all appeals, under

this Act, and...

10. Question of maintainability of these appeals will have to be considered in the context of the aforesaid statutory provisions in the 1996 Act, the

Letters Patent of High Court Bombay and the Code of Civil Procedure, 1908 and the various judgments to which reference would be made in the

course of this Judgment and the latest Judgment of the Supreme Court in the case of Fuerst Day Lawson (supra).

SUBMISSIONS OF RESPECTIVE COUNSELS

11. In these appeals, the learned Sr. Advocates appearing for appellants in both the appeals and who are also appearing for the Respondents in

the cross-appeals submitted that the appeals are maintainable. Thus, this is a peculiar case where all the parties to the appeals are advancing an

argument in support of the maintainability of the appeals. However, it is trite law that appeal is a creation of statute and a right of appeal inheres in

no one and therefore an appeal for its maintainability must have a clear authority of law and that explains why the right of appeal is described as a

creature by Statue. See Smt. Ganga Bai Vs. Vijay Kumar and Others, . Right of appeal is not a mere matter of procedure, but is a substantive and

vested right to be governed by a law and can be held to be barred only if it is expressly barred or is barred by necessary implication. It is in this

context that though all the parties in both the appeals argue in favour of their maintainability, we will have to independently consider the question of

maintainability particularly when it is also a well established law that even by consent of the parties jurisdiction which is otherwise not conferred on

the Court cannot be assumed by the Court and an appeal otherwise not maintainable cannot be held to be maintainable and heard on merits even if

the parties consent.

12. Mr. Fali Nariman, Learned Sr. Advocate has submitted written submissions in the form of 2 separate notes which also deal with the Judgment

in the case of Fuerst Day Lawson (supra). Advocates for the Appellants in Appeal No. 345 of 2011 have also filed separate written submissions

and have also relied upon the various judgments which would be referred to in due course. Both the learned Counsels essentially sought to

distinguish the Judgment of the Supreme Court in the case of Fuerst Day Lawson (supra) by advancing various submissions.

13. Mr. F.S. Nariman, learned senior counsel advanced the following submissions on the question of maintainability of the appeals :

Part I-Submissions regarding exclusion of appeals on account of section 37 of the 1996 Act and conflict between 1996 Act and the Letters

Patent.

a) Relying on the observations in paragraph-52 of the Judgment in the case of Fuerst Day Lawson (supra) it was submitted that this case deals only

with enforcement of foreign awards under Part-II of the 1996 Act and not domestic awards which are enforced u/s 36 falling in Part-1 of the said

Act.

b) The award in the present case being a domestic award is to be enforced under the Code of Civil Procedure, 1908 as if it were a decree of the

court whereas foreign award under Part-II are enforceable u/s 49, and, hence a proceeding for enforcement of a domestic award is not a

proceeding under the 1996 Act but is a proceedings under the Code of Civil Procedure, 1908 whereas the proceeding for enforcement of a

foreign award is a proceeding under 1996 Act.

(c) The impugned order is not in respect of or arising out of any application made under the 1996 Act but was essentially an order passed in an

application for execution under order 21 rule 11 of the Code and hence, the observations in paragraphs-52 and 72 of the Judgment of the

Supreme Court in the case of Fuerst Day Lawson (supra) are to be read together and not separately. Arbitration and Conciliation Act, 1996 is a

special Act and it provides for a separate statutory scheme only in Part-II of the 1996 Act whereas no such special statutory scheme is provided in

Part-I of the said Act. Consequently, those provisions in Part-I of the said Act which relate to the general law of procedure cannot be considered

to be a special enactment so as to override the general law/enactment relating to maintainability and procedure for filing of appeals as contained in

the clause 15 of the Letters Patent of High Court Bombay. In other words, there is no provision in Part-I of the 1996 Act which would exclude the

applicability of clause 15 of the Letters Patent to any proceedings under Part-I or any orders arising out of any proceedings in Part-I.

(d) The scheme of section 49 and 50 which are in Part-II of the 1996 Act and the nature and the character of the 1996 Act as a self contained and

an exhaustive code of matters contained in Part-II make it clear that no Letters Patent Appeal will lie against an order which is not appellable u/s

50 of 1996 Act. Whereas similar conclusion cannot be drawn in respect of the orders passed in proceedings under Part-I of the Act.

Consequently, the observations of the Supreme Court in paragraphs-73 and 74 of the Judgment in the case of Fuerst Day Lawson (supra) must be

held to be confined to maintainability of the Letters Patent Appeal arising out proceedings under Part-II of the Act and not under Part-I of the Act.

(e) There is neither an express exclusion nor is there any exclusion by necessary implication of the applicability of clause 15 of the Letters Patent in

respect of the proceedings under Part I of the Act.

(f) The conclusion drawn by the Supreme Court in paragraph-73 is not broad and all pervasive and will apply only to Part-II of 1996 Act. In any

case, the question whether the said conclusions in paragraph-73 apply even to the proceedings in Part-I of the Act or not is an exercise which can

be done only by the Supreme Court and not by this court.

Part II -Submissions regarding maintainability/non-maintainability of the appeals on account of the amendments made in the CPC 1908 by

amending Act 104 of 1976.

(g) The present appeals are not filed under the Code but are filed under clause 15 of the Letters Patent. It is trite law that though the appeal is not

maintainable under the Code, it does not become non maintainable under the Letters Patent. The test for maintainability of Letters Patent Appeal

that has stood test of time is the decision of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, which makes every

adjudication by a single Judge which has the attribute of or characterisation of finality an appealable judgment or order as the case may be.

(h) Relying on paragraph-14 of the Judgment of the Division Bench of this Court in Great Eastern Shipping Co. Ltd. vs. Sukhdev Singh 2009 (3)

Bom. C.R. 269 it was submitted that a plain reading of the Code does not make it clear that even a Letters Patent Appeal would be barred. Since,

only on account of deletion of the words ""section 47 or"" from the definition of the term ""Decree"" u/s 2(2) of the Code, an Appeal for challenging an

adjudication made u/s 47 of the Code is no longer maintainable but, there is no such expressed or implied exclusion of a letters patent appeal and,

hence, irrespective of the amendment made by Act No. 104 of 1976, the letters patent appeal will still be maintainable.

Part III Maintainability/Non maintainability on account of the Maharashtra High Court (Hearing of Writ Petitions by Division Bench and Abolition

of Letters Patent Appeals) Act, 1986.

(i) The aforesaid Act will not affect the maintainability of the appeals since section 3 of the Maharashtra Act 17 of 1986 has been amended by

Maharashtra Act 27 of 2008, which has restored the position existing before the passing of the 1986 Act.

14. Mr. Janak Dwarkadas, Ld. Sr. Advocate advanced the following submissions :

(a) The proceedings filed before the learned Single Judge were filed in the course of execution of an award and were proceedings before the

executing court and, hence, none of these proceedings were proceedings filed before the ''court'' as defined by the 1996 Act. No prayer has been

made to the High Court for the purpose of exercising any power or jurisdiction under the provisions of the 1996 Act. Thus, the proceedings were

filed under the Code of Civil Procedure, 1908 and would be governed exclusively and entirely by the provisions of the said Code.

(b) Since the High Court at Bombay is a chartered High Court having its own Letters Patent, the question whether any appeal would lie from a

Judgment rendered by the executing court will have to be considered only in the context of clause 15 of the Letters Patent and for determining this

question about maintainability, the provisions of the 1996 Act will have to be completely ignored.

(c) The provisions of the 1996 Act do not have any application whatsoever to proceedings adopted in execution of an award but essentially apply

to orders passed by the Arbitral Tribunal and proceedings before the Arbitral Tribunal. The ratio of the Judgment in the case of Fuerst Day

Lawson (supra) will have to be considered and interpreted on the aforesaid background and the said Judgment and its ratio or any observations

made therein have no application whatsoever to the facts of the present case. Relying on the Judgment of STO vs. Oriental Coal Corporation

1988 (Supp) SCC 309 : 1988 (Supp) SCC 309 it was submitted that the Judgment has to be read in the context in which it was decided and is

not an authority for a proposition that is based on a concession of counsel. While the power of arbitral tribunal ceases upon termination of the

arbitral proceedings u/s 32 of the 1996 Act, the role of the Court comes to an end once the process of enforcement of an award under Part I

begins and the role of Arbitration Act ceases.

(d) A reading of section 37 of the Act would make it apparent that the appellable orders contemplated therein are either passed by the Court u/s 9

or 34 or by the Arbitral Tribunal under sections 16 or 17 of the Act and, hence, though the Act is self contained code, this does not mean that

order which may be passed at a stage beyond operation of the Act and in the course of execution and enforcement of award under Part-I of the

Act is not appellable. In other words, the orders passed during the course of execution/enforcement of award are not subject to the limitation in

section 37 of the Act.

(e) There is a fundamental difference between the provisions of Section 50 of the Act (which falls under Part II) and Section 37 of the Act (which

falls within Part I of the Act), the difference being that enforcement of Part II Awards necessarily involves recourse to the Court under Sections 46,

47 and 48 of the Act and is a justiciable issue.

(f) An order permitting enforcement of a Part II award is an order passed in the exercise of jurisdiction under the provisions of the Act and an

appeal therefrom would therefore be clearly governed by the provisions of Section 50 of the Act. This fundamental distinction has in fact been

noticed by the Hon''ble Supreme Court in the Fuerst Day Lawson Case and brought out in paragraphs 52 and 53 of the said judgment.

(g) Neither the Judgment of the Supreme Court in Fuerst Day Lawson (supra) nor the Judgment of the Delhi and Calcutta High Courts from which

the case before the Supreme Court arose deal with the enforcement of a domestic award and all of them deal with the enforcement of foreign

awards. None of these judgments were concerned with the question as to whether an appeal would lie from an Order passed by the Executing

Court in enforcement of a domestic award governed by Part I of the Act. In any event none of them concerned an appeal from an order

enforcing/executing and/or refusing to enforce/execute an award u/s 47 read with Order 21 of the CPC.

(h) It is beyond dispute that the enforcement of an award under Part I of the Act is under the provisions of the CPC, viz. Section 47 read with

Order 21. These provisions make no distinction between orders in execution arising from arbitration and any other orders. To hold that orders in

execution arising out of arbitral proceedings are not appealable, but orders in execution arising from decrees being judgments (within the meaning

of Clause 15 of Letters Patent) and therefore appealable, would bring about an artificial distinction, which has not been made. The Act is clear that

all awards which are final and binding under Sections 35 and 36 ""shall be enforced..... ""as if it were a decree of the Court.

(Emphasis supplied)

(i) The Supreme Court judgment is clearly distinguishable, as the question of whether an order (other than those specified u/s 37 of the Act) in

execution of an award, being an order under Part I of the Act, is appealable, was not before the Hon''ble Supreme Court in this case. Section 37

of the Act deals with appealable orders. Paragraph 52 of the Lawson Case specifically brings out the differences in the objects and purpose and

the respective Schemes, as contained in Part I and Part II of the Act.

(j) The focus of the enquiry before the Hon''ble Supreme Court was solely in the context of Enforcement of Foreign Awards under Part II of the

Act (and no others).

(k) The present appeals arise from an order passed by a Single Judge under the provisions of Order 21, Rule 11, of the CPC and the Learned

Judge was acting as an executing Court in pursuance of the provisions of the CPC.

(l) All the observations made by the Hon''ble Court in paragraphs 52, 53, 72 and 74 were mere passing observations and while certainly not the

ratio, cannot even be considered to be obiter dicta.

(m) Since the bar against appeals u/s 37 of the Act is confined only to orders passed by Arbitral Courts and/or Arbitral Tribunals and not to orders

passed de hors the Act, in the conclusions reached in paragraphs 72 to 74 of the Lawson Case with regard to the Act have no bearing whatsoever

in the facts and circumstances of the present case.

(n) The Judgments of the Supreme Court in the case of State of West Bengal Vs. Gourangalal Chatterjee, , Union of India (UOI) Vs. Mohindra

Supply Company, and Union of India (UOI) and Others Vs. Aradhana Trading Co. and Others, clearly show that all of them arise out of the

Arbitration Act, 1940 where the concerned courts were exercising powers and/or jurisdiction under old Act and not de horse the Act. The courts

were not exercising any jurisdiction in the course of execution proceedings adopted for enforcement of the awards passed under the old Act.

(o) Sahara having got an interim relief on 14/6/2011 and a concession from Jet that it would not press the question of maintainability of the appeal

filed by Sahara has filed a petition for special leave to appeal in the Supreme Court and has thus taken directly inconsistent and contradictory stand

and must be put to election and can be permitted to prosecute only one remedy.

CONSIDERATION OF SUBMISSIONS

15. For considering whether the aforesaid submissions deserve acceptance or not 3 core issues have to be determined namely-

A. Whether the proceedings u/s 36 of the 1996 Act are proceedings under the Code of Civil Procedure, 1908 ?

B. Whether the provisions of clause 15 of the Letters Patent are applicable to the impugned Judgment and Order and whether applicability of

clause 15 has been impliedly excluded by section 37 of the 1996 Act or by the amendment of section 2(2), 47 by Act 104 of 1976 amending the

Code?

C. Whether the Judgment of the Supreme Court in the case of Fuerst Day Lawson (supra) is an authority which is applicable only in respect of a

foreign award covered by Part II of the 1996 Act or whether the ratio of the said Judgment is a binding precedent even in respect of proceedings

under part I of the 1996 Act or the same is obiter dicta?

A. Nature of proceedings u/s 36 of the 1996 Act.

(a) Section 36 of the 1996 Act uses the words ""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 a court."" In fact section 17 of the 1940 Act does not make an arbitration award a decree of the court even though

Chapter II of the said Act dealt with the arbitration without intervention of a court. Section 30 of 1940 Act provides for filing a petition for setting

aside an award and in that context section 17 provided that when the time for filing a petition u/s 30 of that Act had expired or when the petition

filed for setting aside the award has been dismissed, the court shall proceed to pronounce judgment according to the award, and upon the

judgment so pronounced a decree shall fallow. Thus the 1940 Act clearly provided for a decree being passed by the Court. There is fundamental

difference in the provisions of section 36 of the 1996 Act and section 17 of the 1940 Act only in this regard.

(b) The words ""as if it were a decree of the court"" used in section 36 have already been interpreted by the Supreme Court in Paramjeet Singh

Patheja Vs. ICDS Ltd., . In that case, an award under 1996 Act was passed on 26/6/2000 and on the strength of the said award an insolvency

notice was issued u/s 9(2) of the Presidency Towns Insolvency Act, 1909. Section 9(2) of the said 1909 Act provides that a debtor commits an

act of insolvency if a creditor who has obtained a ""decree or order"" against him for the payment of money issues him a notice in the prescribed

form to pay the amount and the debtor fails to do so within the time specified in the notice. This issue was referred to a Division Bench. The

Division Bench answered the reference in the affirmative on 19.03.2003 and held that an award is a ""decree"" for the purpose of section 9 of the

Insolvency Act and that an insolvency notice may therefore be issued on the basis of an award passed by an arbitrator. Against this order this

order the SLP was filed. In this context the observations of the Supreme Court in paragraph-12 read thus :

12. The substantial questions of law of paramount important to be decided by this Court are :

(i) Whether an arbitration award is a ""decree"" for the purpose of Section 9 of the Presidency Towns Insolvency Act, 1909?

(ii) Whether an insolvency notice can be issued u/s 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award ?

The conclusions can be seen in paragraphs 21, 23, 28, 29, 42 and 43 which read thus :

21. The words ''Court'', ''adjudication'' and ''suit'' conclusively show that only a Court can pass a decree and that too only in suit commenced by a

plaint and after adjudication of a dispute by a judgment pronounced by the Court. It is obvious that an arbitrator is not a Court, an arbitration is not

an adjudication and, therefore, an award is not a decree.

23. The words ''decision'' and ''Civil Court'' unambiguously rule out an award by arbitrators.

28. It is settled by decisions of this Court that the words ''as if'' in fact show the distinction between two things and such words are used for a

limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created.

42. The words ""as if"" demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of

enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central.

43. For the foregoing discussions we hold :

i) That no insolvency notice can be issued u/s 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an Arbitration Award;

ii) That execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay u/s 22 of the SICA Act. As such, no

insolvency notice is liable to be issued against the appellant.

iii) Insolvency Notice cannot be issued on an Arbitration Award.

iv) An arbitration award is neither a decree nor an Order for payment within the meaning of Section 9(2). The expression ""decree"" in the Court

Fees Act, 1870 is liable to be construed with reference to its definition in the CPC and held that there are essential conditions for a ""decree"".

(a) that the adjudication must be given in a suit.

(b) That the suit must start with a plaint and culminate in a decree, and

(c) That the adjudication must be formal and final and must be given by a civil or revenue court.

An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the

institution of a plaint.

(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration Act,

1996 cannot be construed to be a ""decree"" for the purpose of Section 9(2) of the Insolvency Act.

(vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the Rules made thereunder.

(vii) It is a well established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the

light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the

principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a

sick company. To achieve that purpose, it is imperative that the expression ""suit"" in Section 22 be given its plain meaning, namely any proceedings

adopted for realization of a right vested in a party by law. This would clearly include arbitration proceedings.

(viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice.

16. Apart from the above binding precedent even on an independent consideration of the provisions of the 1940 Act and 1996 Act, the conclusion

is inevitable that proceedings under 36 are not proceedings under the Code. As noted above, the Arbitration Act 1940 (10 of 1940) amended

section 104 of the Code and sub clause (a) to (f) of sub-section 1 of section 104 of the Code, which all dealt with arbitration proceedings, were

deleted. The legislative intent was thus very clear that the Code will not deal with any matter in relation to the arbitration and precisely for this

reason the legislative intent would be clear namely that the arbitration proceedings and all proceedings arising therefrom will be governed only by

the Arbitration Act, 1940 which has been repealed and replaced by 1996 Act. The Supreme Court has already interpreted the words ""as if it was

a decree of the court"" which clearly shows that only the procedure for enforcement of a decree passed by the Civil Court is to be utilised for

enforcement of an award and, merely on that ground, the said proceedings do not become proceedings under the Code. In our opinion, they

continue to be proceedings under the 1996 Act. In fact section 19 of the 1996 Act also makes it clear that the provisions of the Code do not apply

to the arbitration proceedings. This is a departure from the 1940 Act in as much as u/s 41 of the said Act it was provided that subject to the

provisions of 1940 Act the provisions of the Code shall apply to all proceedings before the Court under that Act and to all appeals under that Act.

Such a provision is completely absent in the 1996 Act and this is one more indication that the proceedings under 1996 Act even for implementation

of award cannot be considered to be proceedings under the Code. Even section 41 of the 1940 Act has been construed by the Supreme Court in

the case of Union of India vs. Mohinder Supply Company (supra) and State of West Bengal vs. Gauranglal Chaterji (supra) & it is held that the

said provision is subject to the limitation contained in section 39 of the 1940 Act. For all the aforesaid reasons, we have no hesitation in holding

that nature of proceedings before the learned Single Judge were proceedings under the 1996 Act and not proceedings under the Code.

17. An other way of looking at this aspect is the question as to what would be effect of holding that a Letters Patent Appeal is maintainable in

juxtaposition to the scheme of the 1996 Act. u/s 2(e) of the 1996 Act, the term ""court"" is defined which we have already extracted hereinabove.

Thus, in Mumbai, the High Court is the Court which is the principal Civil Court of original jurisdiction for the geographical area of Greater Mumbai

which consists of 2 districts namely, Mumbai and Mumbai suburban. In other districts by virtue of definition of the term ""principal Civil Court of

original jurisdiction"" given in the Bombay Civil Courts Act 1862, the respective district courts would be ""courts"" u/s 2(e) of the 1996 Act. In fact,

this controversy has been now settled by the Full Bench Judgment of this Court. Thus, if we hold that the Letters Patent Appeal is maintainable,

when an order in proceedings u/s 36 of the 1996 Act is passed by a Single Judge of High Court, a Letters Patent Appeal will lie to the Division

Bench whereas if an order is passed by the District Court outside Mumbai and Mumbai suburban district, no appeal would be maintainable either

under the 1996 Act or under the Code even if one accepts the contention of the learned Advocate for both parties that proceedings for

implementation of award are not proceedings under the 1996 Act but are proceedings under the Code. If the aforesaid interpretation is accepted it

would lead to a piquant situation where if an order in proceeding u/s 36 is passed by Single Judge of High Court, the same will become appealable

whereas an order passed by the Judge of the District Court will not be appealable. With a view to avoid such Startling result it would be safe and

prudent to interpret the provisions of Section 36 of the 1996 Act in such manner as to hold that the said proceedings are not proceeding under the

Code but the same are proceeding under 1996 Act itself.

18. In the case of Kanai Lal Ghose vs. Jatindranath Chandra AIR 1918 Cal 925, the Division Bench of the Calcutta High Court has considered

the provision of Section 9 of the Specific Relief Act, 1877 which was pari materia Section 6 of the Specific Relief Act. The Calcutta High Court

took the view that the term ""suit"" includes execution proceedings on the basis of the decree in the suit. Hence, it was held that an appeal against an

order passed in execution of decree passed in such a suit u/s 9 of the said Act of 1877 will not lie. The Division Bench of the Calcutta High Court

relied upon a decision of this Court in the case of Narayan Parmanand v. Nagindas Bhaidas (1906) 30 Bom. The said decision dealt with a

Second Appeal arising out of the orders passed in execution of a decree passed in a suit cognizable by the Court of Small Causes. A preliminary

objection was raised on the ground that as a Second Appeal is not maintainable against a decree passed in a suit cognizable by the Court of Small

Causes, a Second Appeal will not lie against an order passed in execution of such a decree. While dealing with the said objection, the Division

Bench held thus:

JENKINS, C.J.:-This is an appeal arising out of an application in execution of a decree. That decree was passed in a suit of the nature cognizable

in the Court of Small Causes, and it has been established by a number of reported decisions of which, so far as we are aware, Shyama Charan

Mitter v. Debendra Nath Mukerjee (1906) 30 Bom. 113 is the last, that no Second Appeal lies. Though there is not reported case of this Court

on the point, we think we ought to follow these decisions. We must accordingly give effect to the preliminary objection and dismiss this appeal with

costs.

Thus, this Court held that if against the decree passed in the suit, a Second Appeal is barred, a Second Appeal against an order passed in

execution of such decree is not maintainable. In the case of Satguru Construction Co.Pvt. Ltd Vs Greater Bombay Co-operative Bank Ltd.

(2007)3 Mah LJ 843 : (2007)3 Mah LJ 843, a Division Bench of this Court held that ""It is settled law that execution proceeding is a continuation

of a suit."" If the interpretation sought to be put by the Appellant is accepted, it will lead to an in congruous result which will defeat the intention of

the legislature. The intention of the legislature is to provide quick and effective remedy of appeal only against certain specified orders and, hence,

there is no appeal provided against the adjudication u/s 36.

CONCLUSION RE-POINT NO. 1

19. In view of the aforesaid clear and binding pronouncement of law it has to be held that the proceedings initiated by the appellants and the

respondents before the learned Single Judge were proceedings u/s 36 of the 1996 Act and cannot be held to be proceedings of execution u/s 47

or order 21 of the Code of Civil Procedure, 1908.

Re-Point No. 2 :

20. In this regard the question regarding implied exclusion of applicability of clause 15 of the Letters Patent has to be considered in the context of -

(1) the provisions of 1996 Act, (2) the provisions of the Code.

1) Implied exclusion by the 1996 Act.

20. For considering this question it is also necessary to consider the earlier Judgments of the Supreme Court and Bombay High Court on this

aspect in the context of the 1940 Act, as also to consider the Judgments under the 1996 Act.

(a) In K.M. Nanavati Vs. The State of Bombay, Union of India (UOI) Vs. Mohindra Supply Company, , the Supreme Court had an occasion to

consider a similar controversy. There, an award of arbitrator passed under the 1940 Act was filed in the court and an application for setting aside

the award was rejected and that order was challenged in an appeal which was allowed on the ground that the dispute could not be referred to

arbitration under the contract. Against this order a further appeal was preferred under clause 10 of the Letters Patent of the High Court of Lahore

(which is almost pari materia clause 15 of the Letters Patent of the High Court at Bombay). Since the question regarding maintainability of this LPA

was raised it was referred to the Full Bench of the Punjab High Court which held that notwithstanding the prohibition contained in section 39(2) of

the 1940 Act, the Letters Patent Appeal was maintainable. Correctness of this determination regarding maintainability was the subject matter of

challenge before the Supreme Court. The Supreme Court considered provisions of section 39 of 1940 Act and the Letters Patent. After a

complete analysis of the legislative history regarding enactment of CPC 1877, replaced by Code of Civil Procedure, 1882 and further replaced by

Code of 1908, the Supreme Court ultimately held thus :

Prior to 1940 the law relating to contractual arbitration (except in so far as it was dealt with by the Arbitration Act of 1899) was contained in the

CPC and certain orders passed by courts in the course of arbitration proceedings were made appealable under the Code of 1877 by s. 588 and in

the Code of 1908 by s. 104. In 1910, the legislature enacted Act X of 1940, repealing schedule 2 and s. 104(1) cls. (a) to (f) of the CPC 1908

and the Arbitration Act of 1899. By s. 39 of the Act, a right of appeal was conferred upon litigants in arbitration proceedings only from certain

orders and from no others and the right to file appeals from appellate orders was expressly taken away by sub-s. 2 and the clause in s. 104 of the

Code of 1908 which preserved the special jurisdiction under any other law was incorporated in s. 39. The section was enacted in a form which

was absolute and not subject to any exceptions. It is true that under the Code of 1908, an appeal did lie under the Letters Patent from an order

passed by a single Judge of a Chartered High Court in arbitration proceedings even if the order was passed in exercise of appellate jurisdiction, but

that was so, because, the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved.

There is in the Arbitration Act no provision similar to s. 4 of the CPC which preserves powers reserved to courts under special statutes. There is

also nothing in the expression ""authorised by law to hear appeals from original decrees of the Court"" contained in s. 39(1) of the Arbitration Act

which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings.

Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the

provisions of s. 39(1) and (2) of the Arbitration Act.

Under the Code of 1908, the right to appeal under the Letters Patent was saved both by s. 4 and the clause contained in s. 104(1), but by the

Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; the right of appeal can therefore

be exercised against orders in arbitration proceedings only under s. 39, and no appeal (except an appeal to this Court) will lie from an appellate

order.

..... In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act X of 1940 by codifying the law

relating to appeals in s. 39.

(b) In State of West Bengal Vs. Gourangalal Chatterjee, in an arbitration proceedings the learned Single Judge of the Calcutta High Court passed

an order revoking the authority of the Chief Engineer to act as an arbitrator and appointed a sole arbitrator. A Letters Patent Appeal was filed by

the State Government which was held not to be maintainable. In this context the Supreme Court has observed thus :

3. Section 39 of the Arbitration Act came up for consideration in Union of India v. Mohindra Supply Company 19621 3 S.C.R. 497. The Court

after going into detail and examining various authorities given by different High [Courts held that no, second appeal lay u/s 39(2) against a decision

given by a Learned Single Judge u/s 39(1). In respect of the jurisdiction under Letters Patent the Court observed that since Arbitration Act was a

consolidating and amending act relating to arbitration it must be construed without any assumption that it was not intended to alter the law relating

to appeals. The Court held that in view of bar created by sub-section (2) of Section 39 debarring an, second appeal from an order passed in

appeal under sub-section (1) the "conclusion was inevitable that it was so done with a view to restrict the right of appeal within strict limits defined

by Section 39". Therefore, so far the second part is concerned, namely, the maintainability of the appeal under Letters Patent it stands concluded

by this decision.

4. The Learned counsel for the appellant vehemently argued that since the decision by the Supreme Court was in respect of an appeal directed

against an order passed by a Learned Single Judge in exercise of appellate jurisdiction no second appeal lay but that principle could not be applied

where the order of Learned Single Judge was passed not in exercise of appellate jurisdiction but original jurisdiction. The argument appears to be

without any substance as Sub section (1) of Section 39..... provides that an appeal could lie only from the orders mentioned in the subsection

itself. Since the order passed by Learned Single Judge revoking the authority of the Chief Engineer on his failure to act as an arbitrator was not

covered in either of the six clauses mentioned in Section 39 it is obvious that no appeal could be filed against the order of the Learned Single

Judge.

c) In I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., an interim order made by the Arbitral Tribunal was challenged in an appeal u/s

37(2)(b) of the 1996 Act which was dismissed by the Civil Judge Banglore and that order was directly challenged in the Supreme Court by raising

a contention that since right of second appeal is specifically taken away u/s 37(2) of the 1996 Act, by implication even right of revision u/s 115 of

the Code was taken away and since section 5 of the 1996 Act bars judicial intervention unless the same is specifically provided under the Part I,

even a revision application was not maintainable. This argument was rejected by the Supreme Court has observed thus in paragraph 8 :

8. The question still remains as to whether when a second appeal is statutorily barred under the Act and when the Code is not specifically made

applicable, can it be said that a right of revision before the High Court would still be available to an aggrieved party ? As pointed out by Mr.

Chidambaram, this Court in the case of Nirma Ltd. (supra) while dismissing an SLP by a reasoned judgment has held : ""In our opinion, an

efficacious alternate remedy is available to the petitioner by way of filing a revision in the High Court u/s 115 of the Code of Civil Procedure.

Merely because a second appeal against an appellate order is barred by the provisions of sub-section (3) of Section 37, the remedy of revision

does not cease to be available to the petitioner, for the City Civil Court deciding an appeal under sub-section (2) of Section 37 remains a court

subordinate to the High Court within the meaning of Section 115 of the C.P.C.

(d) In Union of India Vs. M/s Popular Construction Co., , the Supreme Court had an occasion to consider the applicability of the provisions of

section 5 of the Limitation Act, 1963 to an arbitration petition u/s 34 of the 1996 Act and the Supreme Court has observed thus in paragraphs 16:

16. Furthermore, section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting

aside such award ""in accordance with"" sub Section 2 and sub Section 3. Sub Section 2 relates to grounds for setting aside an award and is not

relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub section (3) would not be an application ""in

accordance with"" that sub section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made

beyond the period prescribed. The importance of the period fixed u/s 34 is emphasised by the provisions of Section 36 which provide that

where the time for making an application to set aside the arbitral award u/s 34 has expired.....the award shall be enforced under the Code of Civil

Procedure, 1908 in the same manner as if it were a decree of a court.

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired,

the court was required to proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow"".

(Section 17). Now the consequence of the time expiring u/s 34 of the 1996 Act is that the award becomes immediately enforceable without any

further act of the Court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act

would resolve the issue in favour of curtailment of the Court''s powers by the exclusion of the operation of Section 5 of the Limitation Act.

(e) In Union of India (UOI) and Others Vs. Aradhana Trading Co. and Others, in proceedings under 1940 Act, an award was made rule of the

court i.e. a judgment and decree in terms of the award was passed exparte. Application for setting aside exparte Judgment and Decree under

Order 9 Rule 13 of the Code was filed before the learned Single Judge of the Calcutta High Court, which was dismissed and that order was

challenged before the Division Bench. The Division Bench dismissed the appeal holding that it was not maintainable. Before the Supreme Court 2

submissions were advanced namely that on account of section 41 of the 1996 Act the provisions of the Code were made applicable to all

proceedings before the Court and the appeals under the 1996 Act and hence the order dismissing application for setting aside the exparte decree

being an appealable order under Order 43 of the Code, the appeal was maintainable. It was alternatively contended that in any case against the

Judgment of learned Single Judge an appeal under clause 15 of the Letters Patent was maintainable. The Supreme Court has recorded conclusions

in paragraph 8 part as under:

We find that prohibition against appeal is provided in two ways one where it is indicated that appeal would lie against given orders and from no

other orders and secondly under sub-section (2) of Section 39 that no second appeal shall lie from an order passed in appeal u/s 39 of the

Arbitration Act. In the alternate, the Appellants'' contention is that in any case a Letters Patent Appeal would lie against the original orders of the

Single Judge of the High Court to a Division Bench. A number of decisions have been relied upon by the learned counsel for the parties in support

of their rival contentions.

Dealing with the Judgments of the Supreme Court in the cases of Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and

Others, , State of West Bengal (supra) and Mohinder Supply Company(supra), the Supreme Court observed thus :

We, however, find that so far as this case is concerned, it stands on a different footing since in the present case it is not a further appeal or a

second appeal but an appeal against an order passed by the learned Single Judge under Order IX Rule 13 CPC. It would however be relevant for

the purpose that restriction on appeal u/s 39 of Arbitration Act shall be applicable to appeals under any provision of law, may be CPC or Letters

Patent.

Thereafter, following observations and the ultimate conclusion in

paragraph 13 read thus :

In view of what has been held above a Court while exercising power by virtue of Section 41 of the Arbitration Act shall have all other related

powers of the ordinary civil court subject to the constraints contained in the special Act itself. Normally, an appeal would be maintainable but there

are two constrains as provided under the Special Act, namely, it should not be a second appeal as provided under sub-section (2) of Section 39 of

the Act which position is also clear in the case of Mohindra Supply Company (supra) where it was held that the second appeal u/s 100 CPC or

under the Letters Patent against an appellate order was barred by virtue of sub-section (2) of Section 39. Here we find that there is yet another

constraint as provided under sub-section (1) of Section 39 of the Arbitration Act itself and it is emphatic too when it says that appeal shall lie

against the orders indicated in the provision and from no other order. Section 41 of the Arbitration Act makes the provisions of CPC applicable

subject to the provisions of the Arbitration Act and the rules framed thereunder. Therefore, the nature of an order against which an appeal may lie

must conform to the nature of the order as enumerated under sub-section (1) of Section 39 of the Arbitration Act. If it does not amount to such an

order as enumerated under sub-section (1) of Section 39, the prohibition as contained in this sub-section ""(against no other order"") itself, would

become operative, subject to which alone provisions of CPC apply u/s 41 of the Act.

(f) In Municipal Corporation of Greater Bombay vs. Patel Engineering Company Limited 1994 (3) 139, the Division Bench of this Court, (S.P.

Kurdukar and S.M. Jhunjhunwalla, JJ) had an occasion to consider the question of maintainability of a letters patent appeal. A suit u/s 20 of the

1940 Act was filed for filing of arbitration agreement in this court and for an order of reference and accordingly a sole arbitrator was appointed

and pending those proceedings a petition u/s 41 of the 1940 Act was filed for restraining the Municipal Corporation from encashing or receiving

the bank guarantee in which the learned single judge passed an order dated 27/1/1993 which was challenged in an appeal before the Division

Bench. An objection regarding maintainability of such an appeal was raised. After considering the scheme of the 1940 Act visa vis Letters Patent

the Division Bench has observed thus in paragraph 6;

The two sub-sections of section 39 are manifestly part of a single legislative pattern. The language of the section is plain and unambiguous. By sub-

section (1) the right to appeal is conferred against the specified orders and against no other orders; and from an appellate order passed under sub-

section (1) no second appeal except an appeal to Supreme Court lies. In order that an appeal may lie against an order, it must be shown to be one

included in any of the clauses (i) to(iv) of sub-section (1) of section 39 of the Act since an appeal being a creature of statute, the right of appeal can

not be extended by implication and the legislature has plainly expressed itself that the right of appeal against orders passed under the Act may be

exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away.

And after noting the earlier judgment of the Supreme Court in the case of State of West Bengal (supra) and Mohindra Supply Co. (supra) and

various other judgments of the Division Bench of this court, the Division Bench held in para 10 thus :

10..... The Bank is not a party to the arbitration pending between the Appellants and Respondents. The claim relating to enforcement of the said

bank guarantees is not referable to arbitration. However, in our view, the application by way of Petition made by the Respondents for grant of

interim injunction in the arbitration proceedings could only be made u/s 41(b) read with para 4 of the Second Schedule of the Act. It could not

have been made under any other provision of law because the Act is a complete code in itself. When the said petition was filed invoking this

Court''s jurisdiction under the provisions of section 41(b) read with para 4 of the Second Schedule of the Act, the impugned order granting interim

injunction for whatever reasons, was passed under the said provisions and not outside the Act..... The order under appeal must be taken as it

stands. It is an order which ex-facie has been made by virtue of section 41(b) of the Act. Section 39(1) of the Act does not provide for an appeal

from the said order passed on the petition filed u/s 41(b) read with para 4 of Second Schedule of the Act. It is not possible to hold that the

impugned order passed by the learned Single Judge has been passed de hors the Act or that appeal therefrom, lies u/s 39 of the Act.

Thereafter following ratio in the case of Mohinder Supply Co. (supra) and the ratio in the case of Bhavnagar Sault and Industrial Works Pvt. Ltd.

vs. Surendra Overseas Ltd. A No. 43/1977, as also the Judgment of the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania

and Another, (on which incidentally heavy reliance incidentally has also been placed by Mr. Fali Nariman in support of his argument that the

appeals are maintainable.) and the Judgment of the Division Bench of this Court in the case of Vasudev C. Wadhawa vs. Muktaben B. Khakhar

1986 Mh. L.J. 931 :1986 Mh. L.J. 931 it was held in paragraph 13 as under :

It may be mentioned here that in view of the decision of the Supreme Court in State of West Bengal v.s M/s. Gouranglal Chatterjee (supra)

following its earlier decision in the Mohindra Supply Co. (supra) wherein it has been held that appeal could be only from the orders mentioned in

sub-section (1) of section 39 of the Act, the decision of the Division Bench of this Court in the case of Vasudev C. Wadhwa (supra) has by

implication been overruled. Since the order passed by the learned Single Judge in the case of State of West Bengal (supra) revoking the authority

of the Chief Engineer on his failure to act as an arbitrator was not covered in either of the six clauses mentioned in sub-clause (1) of section 39 of

the Act, it was held that no appeal therefrom could be filed.

After considering the scheme of Section 588 of Code of 1877, CPC 1882 and Section 104 of the CPC 1904 and considering judgment of the

privy Council in Harish Chunder Chowdhary vs. Kali Sundari Debia 10 IA 4 (P.C.) 17 10 : IA 4 (P.C.) 17 and interpreting the words ""and save

as otherwise expressly provided in the body of this Code or by any law for the time being in force"", the Division Bench has held thus in paragraphs

14 to 16 :

14..... Section 39(1) of the Act is modelled upon section 104 of the Code and the words, which were added deliberately in order to save the

right under the Letters Patent, were specifically omitted when section 39(1) of the Act was enacted. Therefore, even section 39(1) of the Act takes

away the right of appeal given by Clause 15 of the Letters Patent. If all that was intended to provide by sub-section (1) of section 39 of the Act

was to give a right of appeal, there was no necessity, int eh first instance, to add to it the words ""and from no others."" The combined effect of the

words ""and from no others"" and the omission of the words ""and save as otherwise expressly provided in the body of this Code or by any law for

the time being in force"" is, so far as section 39(1) of the Act is concerned, to take away the right of appeal given under Clause 15 of section 39 of

the Act.

15. In our view, recourse to Clause 15 of the Letters Patent for the purpose of considering maintainability of this appeal is not permitted as Clause

15 of the Letters Patent are required to be read subject to the provisions of section 39 of the Act.

16. In the result the preliminary objection is upheld. In this view of the matter, we feel that it will neither be appropriate nor proper for us to make

any observations on merits. The appeal is, therefore, dismissed as not maintainable. However, in the facts of the case, there shall be no order as to

costs.

(g) Another Bench of this Court (C.K.Thakkar, C.J. And A.M. Khanwilkar, JJ) had an occasion to consider a similar controversy in the case of

State Bank Nagar Co-operative Housing Society Ltd., Pune Vs. Ashutosh Construction Pvt. Ltd., Mumbai, . In that case, the learned Single

Judge of this court had passed an order substituting the sole arbitrator in the arbitration proceedings under the 1940 Act and the following

observations were made in paragraph 5.

5. Bare reading of the above provision makes it clear that certain orders passed under the Act were made appealable, as specified in clauses (i) to

(vi). Regarding other orders, it was expressly provided that no appeal lies by using the expression ""and from no others"". It is also not in dispute that

the order impugned in the present petition does not fall in any of the categories specified in Clauses (i) to (vi).

Since the Judgment of the Supreme Court in the case of Vinita M. Khanolkar Vs. Pragna M. Pai and Others, was relied upon in support of plea of

maintainability of appeal, the Division Bench has observed thus in paragraphs- 10 to 12 as under :

10..... The endeavour of the learned Counsel for the appellant is that while construing and interpreting the provisions of section 39 of the Act also,

this Court will have to bear in mind the ratio laid down in Vinita Khanolkar, and it must be held that the appeal is maintainable, notwithstanding

what is stated in sub-section (1) of section 39 of the Act.

11. No doubt, the argument is attractive, but, in our opinion, the learned Counsel for the respondent is right in placing reliance on the provisions of

section 39 of the Act interpreted by the Supreme Court in State of West Bengal Vs. Gourangalal Chatterjee, . In that case, an identical question

arose before the Apex Court as to whether a Letters Patent Appeal would be maintainable before a Division Bench of the High Court against an

order passed by a Single Judge of the High Court, when no such right was conferred by the statute. Dealing with the relevant provisions of the Act,

and considering earlier decision in Union of India (UOI) Vs. Mohindra Supply Company, , the Court held that no such appeal would lie. It is also

pertinent to note that Mohindra Supply Co. was as case u/s 39 of the Act. A similar view was taken by a Division Bench of this Court in Municipal

Corporation of Greater Bombay Vs. Patel Engineering Company Limited, , wherein the Division Bench considered Gourangalal Chatterjee, as also

other cases, and held that an appeal would not lie.

12. In view of the fact that the question which came up for consideration before the Supreme Court in Mohindra Supply Co. as well as Gouranglal

Chatterjee related to section 39 of the Act, and the Letters Patent Appeal was held to be not maintainable, in our opinion, the appeal must be

dismissed holding that no intra Court appeal lies.

21. From the aforesaid statutory provisions and precedents it is clear that way back in the year 1940 when the Arbitration Act 1940 (10 of 1940)

was enacted, the Code was also amended and sub-clauses (a) to (f) of Section 104(1) of the Code were deleted and that section 39 of the 1940

Act is the only section which provides for an appeal. The said Section in a special statute clearly provides that an appeal shall lie only from the

specified orders (specified in clause (i) to (vi) of sub-section 1 of section 39) passed under the 1940 Act and from no others. While interpreting

this, various judgments referred to herein above have clearly taken a view that the aforesaid special law will prevail over the general law. The

maxim -specilia generalibus derogant is a well known maxim and once a special statute is enacted, it will override the general law unless there is a

specific provisions in the special Act making the provisions of the general law applicable. In the present case, the provisions of the special Act

specifically exclude the applicability of the general law and hence, the conclusion is inevitable that the 1996 Act is a complete Code in itself.

CONCLUSION RE-IMPLIED EXCLUSION OF CLAUSE 15 OF LETTERS PATENT BY 1996 ACT.

22. In fact a perusal of 1996 Act and the 1940 Act will indicate that both the enactments provide for filing of an appeal against only some specified

orders and do not provide for an appeal against every order passed in the proceedings under the 1996 Act. It is well established that general law

cannot defeat a provision of special law to the extent to which they are in conflict; else effort has to be made on reconciling the two provisions by

homogeneous reading. In the present case, the provisions of section 37 (the relevant portion of which is pari materia relevant portion of section 39

of 1940 Act) leave no manner of doubt that the provisions of the special enactment will prevail over the general law namely, the 1908 Code. The

Statutory Scheme of 1996 Act and the Letters Patent and the binding precedents of Supreme Court and this Court lead us to only one conclusion

that clause 15 of the Letters Patent are impliedly excluded by the 1996 Act.

2) Implied exclusion by the Code of Civil Procedure, 1908.

23. Judgment of the Supreme Court in the case of Shah Babulal Khimji (supra) has been very heavily relied upon in support of the maintainability

of the appeals and the observations in paragraphs 28 to 34 and 47 of the said Judgment are relied upon and we quote the relevant portion :

28. We find ourselves in complete agreement with the arguments of Mr. Sorabjee that in the instant case s. 104 read with Order 43 Rule 1 does

not in any way abridge, interfere with or curb the powers conferred on the Trial Judge by cl. 15 of the Letters Patent. What s. 104 read with order

43 Rule 1 does is merely to give an additional remedy by way of an appeal from the orders of the Trial Judge to a larger Bench. Indeed, if this is

the position then the contention of the respondent that s. 104 will not apply to internal appeals in the High Courts cannot be countenanced. In fact,

the question of application of the CPC to internal appeals in the High Court does not arise at all because the CPC merely provides for a forum and

if order 43 Rule 1 applies to a Trial Judge then the forum created by the Code would certainly include a forum within the High Court to which

appeals against the judgment of a Trial Judge would lie. It is obvious that when the Code contemplates appeals against orders passed under

various clauses of order 43 Rule 1 by a Trial Judge, such an appeal can lie to a larger Bench of the High Court and not to any court subordinate to

the High Court. Hence, the argument that order 43 Rule 1 cannot apply to internal appeals in the High Court does not appeal to us although the

argument has found favour with some of the High Courts.....

It cannot be contended by any show of force that the Order passed by the Trial Judge being an interlocutory order, no appeal would lie to the

Division Bench or that the provisions of the Arbitration Act giving a right of appeal to a litigant from the order of a Trial Judge to the Division

Bench in any way fetter or override the provisions of the Letters Patent.

47. We find ourselves in complete agreement with the view taken and the reasons given by the three eminent Judges in the aforesaid case which

furnishes a complete answer to the arguments of the respondents that order 43, Rule I will have no application to internal appeals in the High Court

under the provisions of the Letters Patent.

Thereafter the Supreme Court considered the scope of the word ""judgment"" used in clause 15 of the letters patent and its conclusions are recorded

in paragraphs 101, 109, 114, 115, 120 and 122.

Thus, from this case an important test that can be spelt out is that where an order which is the foundation of the jurisdiction of the Court or one

which goes to the root of the action, is passed against a particular party, it doubtless amounts to a judgment. As we have already pointed out apart

from these observations this Court refused to embark on an enquiry as to in what cases an order passed by a Trial Judge would be a ''judgment''

for purposes of appeal before a larger Bench.

Clause 15 makes no attempt to define what a judgment is. As Letters Patent is a special law which carves out its own sphere, it would not be

possible for us to project the definition of the word ''judgment'' appearing in s. 2(9) of the Code of 1908, which defines ''judgment'' into the Letters

Patent:

judgment'' means the statement given by the Judge of the grounds of a decree or order.

24. The Division Bench of Dr. B.P. Saraf and M.S. Rane, JJ had an occasion to consider the question of maintainability of LPA against an order

passed in execution in the case of Laxman Bala Surve & ors. vs. M/s. Pesh Builders 1997(1) BCR 115. There an order passed under Order 21

Rule 22 making show cause notice absolute was challenged by filing LPA and a preliminary objection regarding maintainability was raised. Dealing

with this objection and after considering the judgment in the case of Shah Babulal Khimji(supra) the Division Bench has held that an order passed

in a show cause notice under Order 21 Rule 22 was a judgment within the meaning of clause 15 of the Letters Patent and hence appeal was

maintainable.

25. In the case of P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others, , Constitution Bench of the Supreme Court had occasion to

consider whether the provisions of sub-section 2 of section 104 constitute a bar to the maintainability of Letters Patent Appeal under clause 15 of

the Madras High Court. The majority judgment of S.N. Variava,J, B.P. Singh,J and H.K. Sema,J held thus in paragraph 6.

6..... To be immediately noted that now the Legislature provides that the provision of this Code will not affect or limit special law unless specifically

excluded. The Legislature also simultaneously saves, in Section 104(1), appeals under ""any law for the time being in force"". These would include

Letters Patent Appeals. After this amendment, even the Allahabad High Court changed its view.

Further, judgment of 4 judges Bench of the Supreme Court in case of Union of India vs. Mohinder (supra) was considered and it was held in

paragraph- 10 thus :

This Court however noticed that in the Arbitration Act, there was no provision similar to Section 4 of the CPC which preserved powers reserved

to Courts under special statutes. Under the Code of Civil Procedure, the right to appeal under the Letters Patent is saved both by Section 4 and

the clause contained in Section 104(1), but by the Arbitration Act, 1940, the jurisdiction of the Courts under any other law for the time being in

force is not saved. The right of appeal could therefore be exercised against orders in arbitration proceedings only u/s 39, and no appeal lay from

the appellate order (except an appeal to this Court). The provisions in the Letters Patent providing for appeal, in so far as they related to orders

passed in Arbitration proceedings, were held to be subject to the provisions of Section 39(1) and (2) of the Arbitration Act, as the same is a self

contained Code relating to arbitration.

Thereafter the Judgment of the Constitution Bench of the Supreme Court in the case of Gulab Bai and Another Vs. Puniya, was considered and it

was held in paragraph 14 thus:

14..... Thus, a Constitution Bench of this Court has held that the words ""under any law for the time being in force"" in Section 104(1) saves Letters

Patent Appeals. This decision is binding on this Court.

The ultimate conclusions of the majority judgment are drawn in paragraphs 22, 29 to 32 which read thus :

22. Thus the unanimous view of all Courts till 1996 was that Section 104(1) C.P.C. specifically saved Letters Patent Appeals and the bar under

104(2) did not apply to Letters patent Appeals. The view has been that a Letters Patent Appeal cannot be ousted by implication but the right of an

Appeal under the Letters Patent can be taken away by an express provision in an appropriate Legislation. The express provision need not refer to

or use the words ""Letters Patent"" but if on a reading of the provision it is clear that all further Appeals are barred then even a Letters Patent Appeal

would be barred.

29. Thus, the consensus of judicial opinion has been that Section 104(1) CPC expressly saves a Letters Patent Appeal. At this stage it would be

appropriate to analyze Section 104 C.P.C. Sub-section (1) of Section 104 CPC provides for an appeal from the orders enumerated under sub-

section (1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by

any law for the time being in force. Sub-section (1) therefore contemplates three types of orders from which appeals are provided namely, 1)

orders enumerated in sub-section (1). 2) appeals otherwise expressly provided in the body of the Code and 3) appeals provided by any law for

the time being force. It is not disputed that an appeal provided under the Letters Patent of the High Court is an appeal provided by a law for the

time being in force.

30. As such an appeal is expressly saved by Section 104(1). Sub-clause 2 cannot apply to such an appeal. Section 104 has to be read as a whole.

Merely reading sub-clause (2) by ignoring the saving clause in sub-section (1) would lead to a conflict between the two sub-clauses. Read as a

whole and on well established principles of interpretation it is clear that sub-clause (2) can only apply to appeals not saved by sub-clause (1) of

Section 104. The finality provided by sub-clause (2) only attaches to Orders passed in Appeal u/s 104, i.e., those Orders against which an Appeal

under ""any other law for the time being in force"" is not permitted. Section 104(2) would not thus bar a Letters Patent Appeal. Effect must also be

given to Legislative intent of introducing Section 4 C.P.C. and the words ""by any law for the time being in force"" in Section 104(1). This was done

to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent. As Appeals under ""any other law for the

time being in force"" undeniably include a Letters Patent Appeal, such appeals are now specifically saved. Section 104 must be read as a whole and

harmoniously. If the intention was to exclude what is specifically saved in sub-clause (1), then there had to be a specific exclusion. A general

exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a Letters Patent Appeal. However

when Section 104(1) specifically saves a Letters Patent Appeal then the only way such an appeal could be excluded is by express mention in 104

that a Letters Patent Appeal is also prohibited.

31. Applying the above principle to the facts of this case, the appeal under Clause 15 of the Letters Patent is an appeal provided by a law for the

time being in force. Therefore, the finality contemplated by Sub-section (2) of Section 104 did not attach to an Appeal passed under such law.

32..... It is well settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no

conflict between Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the CPC then the provisions of Letters

Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 CPC which provides that nothing in the Code

shall limit or affect any special law. As set out in Section 4 C.P.C. only a specific provision to the contrary can exclude the special law. The

specific provision would be a provision like Section 100A.

26. Reliance was placed by Mr. Nariman on the Judgment of the learned Single Judge(D.Y.Chandrachud,J) in Eskay Engineers Vs. Bharat

Sanchar Nigam Limited, Raigad Telecom Division, and it was contended that the said Judgment lays down a proposition that the expression ""all

subsequent applications arising out the arbitral proceedings"" used in section 42 of the 1996 Act must be read in comprehensive manner to include

recourse to execution proceedings. However, said judgment is an authority only for the purpose of deciding the issue as to which court is

competent to entertain an application for enforcement of the award u/s 36 of the 1996 Act. In fact, the learned Single Judge has held as under in

paragraph-10 of the report :

The submission which was urged on behalf of the judgment debtor is that the application of the Arbitration and Conciliation Act, 1996 concludes

with the delivery of the arbitral award and the forum for initiating proceedings for execution cannot be traced to any provision of the Act. That

would not be an accurate reading of the language and the provisions of the Act. Section 36 specifically speaks of enforceability and Section 42 of

jurisdiction. The expression all subsequent applications arising out arbitral proceedings has been used in a comprehensive sense by the Legislature

and must be given full width in interpretation. The judgment debtor sought a recourse to its remedies before this Court in order to challenge the

arbitral award. Once that was done, this Court alone would have jurisdiction to entertain all subsequent applications arising out of the arbitral

proceedings including applications in the execution of the award as a decree of the Court to the exclusion of any other Court.

In our opinion, this judgment is an authority only for the proposition regarding the court to which an application for enforcement can be made and

award of interests u/s 31(7)(b) of the 1996 Act and does not even remotely consider on the question of maintainability of the Letters Patent

Appeal.

27. Mr. Nariman also relied upon the Judgment of the Supreme Court in the State of Haryana and Others Vs. S.L. Arora and Company, .

According to our opinion even this judgment deals only with the issue of award of interest u/s 31(7) and is not of much assistance for determining

the question of maintainability of the appeals. Initially, since the counsel for the Jet Airways relied upon the judgment of the Division Bench of this

Court in the case of Ramesh Kumar Swarup Chand Sancheti and Another Vs. Rameshwar Vallabhram Bhatwal and Another, , Mr. Nariman has

sought to distinguish the said Judgment. The said Judgment deals with the amendment effected by Act No. 104 of 1976 whereby Code was

exhaustively amended. In this Judgment the Division Bench has considered the effect of exclusion of the words ""section 47 or"" from the definition

of the term ""decree"" u/s 2(2) of the Code. The following observations were made :

As we are in respectful agreement with the view taken by the Full Bench of the Allahabad High Court it is not necessary to make detailed

reference to the several decisions cited before us. In our opinion the intention of the legislature is quite clear from the omission of the words

Section 47 or"" from Section 2(2) of the Code. It is well settled that if two interpretations of a provision are possible then one which is in tune with

the intention of the legislature should preferred.

If the provisions of Section 2(2) as amended, and Secs. 97(2), 97(3) and 99A are read together, and harmoniously then it is quite clear to us that

the amendment is retrospective in operation.

28. In our opinion, since we have reached a conclusion that the proceedings u/s 36 of the 1996 Act are not proceedings under the Code, this issue

really becomes academic. However, if our first conclusion on point No. 1 were that the proceedings u/s 36 are proceedings under the Code of

Civil Procedure, 1908; then considering the nature of proceedings and adjudication done by the learned Single Judge which is a subject matter of

the present appeals, would certainly be a ""judgment"" under clause 15 of the Letters Patent of High Court, Bombay. In that eventuality, present

appeals would have been maintainable since the proceedings before the Ld. Single Judge were original proceedings and as held by the Constitution

Bench majority view in P.S.Sathappan (Supra), since there is no express bar u/s. 104(1) of the Code or in section 100A as amended following the

ratio in the case of P.S. Sathappan (Supra) and the Judgment of this Court in Laxman Bala Surve (Supra) and of the Supreme Court in Shah

Babulal Khimji (supra), it would have been required to be held that appeals were maintainable. However, in view of our conclusion on Point No.1

and Point No.2(a) recorded above, as we have held that the proceedings before the Ld. Single Judge were proceedings under the Special Law i.e.

1996 Act, our ultimate conclusion about maintainability does not change.

C. Whether controversy about maintainability is covered by the Judgment of the Supreme Court in Fuerst Day Lawson (supra).

29. It is now necessary to consider the submissions about the Judgment of the Supreme Court in the case of Fuerst Day Lawson (supra).

(a) In the latest judgment delivered by the Hon"ble Supreme Court on 8/7/2011 in SLP (Civil) No. 11945 of 2010 and other connected cases in

Fuerst Day Lawson Ltd. and Others Vs. Jindal Exports Ltd. and Others etc. etc., , the question regarding maintainability of Letter Patent Appeal

under clause 15 of the Letter Patents of Calcutta High Court (which is ad verbatim clause 15 of the Letters Patent of the High Court at Bombay)

was considered. Paragraphs-2, 3 and 4 of the said judgment framed precise points for consideration and the same read thus :

2. The common question that arises for consideration by the Court in this batch of cases is whether an order, though not appealable u/s 50 of the

Arbitration and Conciliation Act, 1996 (hereinafter ""1996 Act""), would nevertheless be subject to appeal under the relevant provision of the

Letters Patent of the High Court. In other words even though the Arbitration Act does not envisage or permit an appeal from the order, the party

aggrieved by it can still have his way, by-passing the Act and taking recourse to another jurisdiction.

3. Mr. C.A. Sundaram, senior advocate, however, who led the arguments on behalf of the appellants, would like to frame the question differently.

He would ask whether there is any provision in the 1996 Act that can be said to exclude the jurisdiction of the High Court under its Letters Patent

either expressly or even impliedly. He would say that the jurisdiction of the High Court under the Letters Patent is an independent jurisdiction and

as long as the order qualifies for an appeal under the Letters Patent an appeal from that order would be, undoubtedly, maintainable before the High

Court.

4. A correct answer to both the questions would depend upon how the 1996 Act is to be viewed. Do the provisions of the 1996 Act constitute a

complete code for matters arising out of an arbitration proceeding, the making of the award and the enforcement of the award? If the answer to the

question is in the affirmative then, obviously, all other jurisdictions, including the letters patent jurisdiction of the High Court would stand excluded

but in case the answer is in the negative then, of course, the contention of Mr. Sundaram must be accepted.

(b) Before the Supreme Court, there were 6 cases which were being heard, one of which was de-linked and of the remaining five cases four come

from the Delhi High Court and one from the Calcutta High Court. In SLP (C) No. 4648 of 2010 and SLP (C) No. 31068 of 2010, the

applications filed by the respective respondents in these cases for enforcement of the foreign award in their favour were allowed by orders passed

by a single judge of the High Court. Against the orders of the single judge, the petitioners in these SLPs filed appeals before the division bench of

the High Court. All the appeals were taken together and dismissed by a common order as not maintainable. The petitioners had come before the

Supreme Court against the order passed by the division bench only, on the question of maintainability of their appeals. Civil Appeal No.36 of 2010

coming from the Calcutta High Court was opposite of the aforementioned two SLPs coming from the Delhi High Court. In that case, against an

order passed by a single judge of the High Court, by which he granted relief for enforcement of a foreign award, an appeal was preferred before

the division bench of the High Court. The appeal was admitted but a preliminary objection was raised in regard to its maintainability in view of

section 50 of the 1996 Act. The division bench by order dated May 8, 2007 rejected the preliminary objection holding that the appeal was

maintainable. On this background the Supreme Court observed thus in paragraph 31 :

31. In Mohindra Supply Co., a bench of four judges of this Court held that a letters patent appeal against an order passed by a single judge of the

High Court on an appeal u/s 39(1) of the 1940 Act was barred in terms of sub-section (2) of section 39. This decision is based on the bar against

further appeals as contained in sub-section (2) of section 39 of the 1940 Act and, therefore, it may not have a direct bearing on the question

presently under consideration.

(c) Paragraphs 32 & 33, 34 (part) and 35 briefly record submissions regarding difference in the terminology used in Section 39(1) of the

Arbitration Act 1940 and section 37 of the Arbitration and Conciliation Act 1996 vis a vis section 50 of the 1996 act in so far as section 37 uses

the words ""(and from no others)"" which are absent in section 50. The same read as under:

32. More to the point are two later decisions. In M/s Gourangalal Chatterjee, a bench of two judges of this Court held that an order, against which

no appeal would lie u/s 39(1) of the 1940 Act, could not be taken in appeal before the division bench of the High Court under its Letters Patent.

The same view was reaffirmed by a bench of three judges of this Court in Aradhana Trading Co.

33. In regard to these two decisions, Mr. Sundaram took the position that both M/s Gourangalal Chatterjee and Aradhana Trading Co. were

rendered on section 39 of the 1940 Act, the equivalent of which is section 37 of the 1996 Act. In view of the two decisions, he conceded that in

the event an order was not appealable u/s 37(1) of the 1996 Act, it would not be subject to appeal under the Letters Patent of the High Court.

34. Mr. Sundaram submitted that section 50, unlike section 39 of the previous Act and section 37 of the current Act does not have the words

(and from no others)"" and that, according to him, made all the difference. He contended that the omission of the words in parenthesis was

significant and it clearly pointed out that unlike section 37, even though an order was not appealable u/s 50, it would be subject to appeal under the

Letters Patent of the High Court. At any event the decisions rendered u/s 39 of the 1940 would have no application in a case relating to section 50

of the 1996 Act.

35. Mr. Dave, in reply submitted that the words ""(and from no other)"" occurring in section 39 of the 1940 Act and section 37 of the 1996 Act

were actually superfluous and seen, thus, there would be no material difference between the provisions of section 39 of the 1940 Act or section 37

of the 1996 Act and section 50 of the 1996 Act and all the decisions rendered on section 39 of the 1940 Act will apply with full force to cases

arising u/s 50 of the 1996 Act.

(d) Thereafter regarding said difference, the Supreme Court has observed thus :

42. Having regard to the grammatical use of brackets or parentheses, if the words, ""(and from no others)"" occurring in section 39 of the 1940 Act

or section 37 of the 1996 Act are viewed as `an explanation or afterthought" or extra information separate from the main context, then, there may

be some substance in Mr. Dave"s submission that the words in parentheses are surplusage and in essence the provisions of section 39 of the 1940

Act or section 37 of the 1996 Act are the same as section 50 of the 1996 Act. Section 39 of the 1940 Act says no more and no less than what is

stipulated in section 50 of the 1996 Act.

43. But there may be a different reason to contend that section 39 of the 1940 Act or its equivalent section 37 of the 1996 Act are fundamentally

different from section 50 of the 1996 Act and hence, the decisions rendered u/s 39 of the 1940 Act may not have any application to the facts

arising u/s 50 of the 1996 Act.

52. Once it is seen that Part I and Part II of the Act are quite different in their object and purpose and the respective schemes, it naturally follows

that section 37 in Part I (analogous to section 39 of the 1940 Act) is not comparable to section 50 in Part II of the Act. This is not because, as Mr.

Sundaram contends section 37 has the words in parentheses ""and from no others"" which are not to be found in section 50 of the Act. Section 37

and section 50 are not comparable because they belong to two different statutory schemes. Section 37 containing the provision of appeal is part of

a much larger framework that, as seen above, has provisions for the complete range of law concerning domestic arbitration and international

commercial arbitration. Section 50 on the other hand contains the provision of appeal in a much limited framework, concerned only with the

enforcement of New York Convention awards. In one sense, the two sections, though each containing the appellate provision belong to different

statutes.

53. Having come to this conclusion, it would appear that the decisions rendered by the Court on the interplay between section 39 of the 1940 Act

and the Letters Patent jurisdiction of the High Court shall have no application for deciding the question in hand. But that would be only a superficial

view and the decisions rendered u/s 39 of the 1940 Act may still give the answer to the question under consideration for a very basic and

fundamental reason.

58. Section 49 of the present Act makes a radical change in that where the court is satisfied that the foreign award is enforceable, the award itself

would be deemed to be a decree of the Court. It, thus, not only omits the procedural formality for the court to pronounce judgment and a decree

to follow on that basis but also completely removes the possibility of the decree being in excess of, or not in accordance with the award. Thus,

even the limited basis on which an appeal would lie under sub-section (2) of section 6 of the 1961 Act, is taken away. There is, thus, no scope left

for an appeal against an order of the court for the enforcement of a foreign award. It is for this reason that section 50(1)(b) provides for an appeal

only against an order refusing to enforce a foreign award u/s 48.

59. There can be no doubt that u/s 6, except on the very limited ground, no appeal including a Letters Patent Appeal was maintainable against the

judgment and decree passed by the Court u/s 6(1). It would be futile, therefore, to contend that though the present Act even removes the limited

basis on which the appeal was earlier maintainable, yet a Letters Patent Appeal would lie notwithstanding the limitations imposed by section 50 of

the Act. The scheme of sections 49 and 50 of the 1996 Act is devised specially to exclude even the limited ground on which an appeal was earlier

provided for u/s 6 of the 1961 Act. The exclusion of appeal by section 50 is, thus, to be understood in light of the amendment introduced in the

previous law by section 49 of the Act.

(e) Ultimately, after examining the entire scheme of the 1996 Act and independently considering the provisions of section 50 of the said Act and

the Judgment of the Constitution Bench of the Supreme Court in P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others, and the

Judgment of the Supreme Court in the case of Union of India (UOI) Vs. Mohindra Supply Company, the ultimate conclusion reached in paragraph

68 to 73 which read thus:

68. We now come back to the decision of this Court in Mohindra Supply Co. in which the issue was about the maintainability of an appeal,

particularly, a letters patent appeal. It is seen above that, in Mohindra Supply Co. the court held that a letters patent appeal was not maintainable in

view of section (2) of section 39 of the 1940 Act. To that extent, the decision may not have any bearing on the present controversy. But, in that

decision observations of great significance were made in regard to the nature of the 1940 Act. It was observed (SCR page 500):

The proceedings relating to arbitration are, since the enactment of the Indian Arbitration Act X of 1940, governed by the provisions of that Act.

The Act is a consolidating and amending statute. It repealed the Arbitration Act of 1899, Schedule 2 of the CPC and also cls. (a) to (f) of s.

104(1) of the CPC which provided for appeals from orders in arbitration proceedings. The Act set up machinery for all contractual arbitrations

and its provisions, subject to certain exceptions, apply also to every arbitration under any other enactment for the time being in force, as if the

arbitration were pursuant to an arbitration agreement and as if that, other enactment were an arbitration agreement, except in so far as the

Arbitration Act is inconsistent with that other enactment or with any rules made thereunder.....

69. It was further observed and held (SCR page 506):

But it was urged that the interpretation of s.39 should not be divorced from the setting of legislative history, and if regard be had to the legislative

history and the dictum of the Privy Council in (1882) L.R. 10 I.A. 4 (Privy Council) which has been universally followed, in considering the extent

of the right of appeal under the Letters Patent, the Court would not be justified in restricting the right of appeal which was exercisable till 1940 by

litigants against decisions of single Judges of High Courts in arbitration matters from orders passed in appeals. In considering the argument whether

the right of appeal which was previously exercisable by litigants against decisions of single Judges of the High Courts in appeals from orders passed

in arbitration proceedings was intended to be taken away by s. 39(2) of the Indian Arbitration Act, the Court must proceed to interpret the words

of the statute without any predisposition towards the state of the law before the Arbitration Act was enacted. The Arbitration Act of 1940 is a

consolidating and amending statute and is for all purposes a code relating to arbitration.....

70. And (SCR pages 512-513):

Prior to 1940 the law relating to contractual arbitration (except in so far as it was dealt with by the Arbitration Act of 1899) was contained in the

CPC and certain orders passed by courts in the course of arbitration proceedings were made appealable under the Code of 1877 by s. 588 and in

the Code of 1908 by s.104. In 1940, the legislature enacted Act X of 1940, repealing schedule 2 and s. 104(1) clauses (a) to (f) of the CPC

1908 and the Arbitration Act of 1899. By s. 39 of the Act, a right of appeal was conferred upon litigants in arbitration proceedings only from

certain orders and from no others and the right to file appeals from appellate orders was expressly taken away by sub-s.2 and the clause in s.104

of the Code of 1908 which preserved the special jurisdiction under any other law was incorporated in s. 39. The section was enacted in a form

which was absolute and not subject to any exceptions. It is true that under the Code of 1908, an appeal did lie under the Letters Patent from an

order passed by a single Judge of a Chartered High Court in arbitration proceedings even if the order was passed in exercise of appellate

jurisdiction, but that was so, because, the power of the Court to hear appeals under a special law for the time being in operation was expressly

preserved.

There is in the Arbitration Act no provision similar to s. 4 of the CPC which preserves powers reserved to courts under special statutes. There is

also nothing in the expression ""authorised by law to hear appeals from original decrees of the Court"" contained in s. 39(1) of the Arbitration Act

which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings.

Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the

provisions of s. 39(1) and (2) of the Arbitration Act.

Under the Code of 1908, the right to appeal under the Letters Patent was saved both by s. 4 and the clause contained in s. 104(1), but by the

Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; the right of appeal can therefore

be exercised against orders in arbitration proceedings only under s. 39, and no appeal (except an appeal to this Court) will lie from an appellate

order.

71. Mohindra Supply Co. was last referred in a constitution bench decision of this Court in P.S. Sathappan, and the way the constitution bench

understood and interpreted Mohindra Supply Co. would be clear from the following paragraph 10 of the judgment:

10.....The provisions in the Letters Patent providing for appeal, in so far as they related to orders passed in Arbitration proceedings, were held to

be subject to the provisions of Section 39(1) and (2) of the Arbitration Act, as the same is a self-contained code relating to arbitration.

72. It is, thus, to be seen that Arbitration Act 1940, from its inception and right through 2004 (in P.S. Sathappan) was held to be a self-contained

code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act,

1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL

Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held,

using the lucid expression of Tulzapurkar, J., that it carries with it ""a negative import that only such acts as are mentioned in the Act are permissible

to be done and acts or things not mentioned therein are not permissible to be done"". In other words, a Letters Patent Appeal would be excluded

by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law

procedure would be impliedly excluded.

73. We, thus, arrive at the conclusion regarding the exclusion of a letters patent appeal in two different ways; one, so to say, on a micro basis by

examining the scheme devised by sections 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal

u/s 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and

exhaustive code in itself.

75. In the result, Civil Appeal No.36 of 2010 is allowed and the division bench order dated May 8, 2007, holding that the letters patent appeal is

maintainable, is set aside. Appeals arising from SLP (C) No.31068 of 2009 and SLP (C) No.4648 of 2010 are dismissed.

CONCLUSIONS ON POINT NO. 3

30. In our opinion the aforesaid Judgment of the Supreme Court in the case of Fuerst Day Lawson (supra) conclusively determines the question of

maintainability and the observations in paragraphs-70 to 73 constitute a binding precedent even in respect of the maintainability of an appeal

against an order passed in the proceedings arising out of a domestic award under Part I of the 1996 Act and the submissions of the learned

Counsel for the Appellants to the effect that the said Judgment of the Supreme Court determines the issue of only an appeal against proceedings

under Part-II for New York Convention foreign awards or the submission that the said judgment does not constitute a binding precedent cannot

be accepted.

31. Before we conclude the Judgment we may note that there is no bar to LPAs on account of the 1986 Act of the State Legislature and we need

not delve deeper into that issue as the amendment made in the year 2008 concludes the issue and is clear.

32. Before we part, we must express that all the Learned Counsel have rendered very able assistance which helped us in determining the vexed

question regarding maintainability.

33. Accordingly, we arrive at a conclusion regarding exclusion of the Letters Patent Appeal in 2 different ways on a micro basis by examining the

scheme devised by section 36 and 37 of the 1996 Act and the other on a macro basis by taking into account the nature and character of the 1996

Act as a self contained and exhaustive code in itself. We again make it clear that we have not gone into the merits of the controversy and our

judgment is restricted only to the question of maintainability.

34. Consequently, both the appeals are dismissed as not maintainable.