

* **HIGH COURT OF DELHI: NEW DELHI**

+ **E.A. No.677/2011, E.A. No.678/2011,**
E.A. No.679/2011, E.A. No.680/2011,
E.A. No.681/2011, E.A. No.682/2011,
E.A. No.683/2011, E.A. No.684/2011,
E.A. No.685/2011, E.A. No.686/2011,
E.A. No.687/2011, E.A. No.688/2011,
E.A. No.689/2011, E.A. No.608/2011
and Ex. P. No.284/2011

% Judgment decided on: 06.07.2012

ATUL CHOPRA & ORS Decree-Holders
Through Mr. R.S. Suri, Sr. Adv. with
Mr. Rohit K. Agarwal, Adv.

Versus

TECHNOTREE CORPORATION & ORS Judgment Debtors
Through Mr. Rajiv Nayar, Sr. Adv. with
Mr. Shishir Sharma, Mr. Abhinav
Mukherji, Ms. Simran Singh,
Mr. Vaibhav Mishra & Mr. Saurabh
Seth, Advs.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present execution petition has been filed by the decree holder who seeks to execute the decree passed on 8th April, 2011 in CS(OS) No. 119/2011.

2. Brief facts of the matter are:-

a) Twenty six plaintiffs filed the suit for declaration and injunction against 18 defendants seeking the following prayer:

“a. pass a decree of declaration in favour of plaintiffs and against defendant no.1 declaring that the Share Purchase Agreement dated 14th December, 2008 is a result of fraudulent misrepresentations by defendant no.1 and its directors (defendant no. 4 to 10) and its officers (Defenatn no. 11 to 14) and is therefore null

and void and/or unenforceable and/or not binding on the plaintiffs;

b. pass a decree of declaration in favour of the plaintiffs and against defendant nos. 1 and 2 declaring that the transfer of shares by the plaintiffs held by them in the Indian Company either directly or indirectly in favour of defendant nos. 1 is null and void and be cancelled and further a decree of declaration in favour of plaintiffs and against defendant nos. 1 and 2 declaring that the swapping/exchange of shares of the plaintiffs held by them either directly or indirectly, with the shares of defendant no.1 is null and void and be cancelled and of no effect;

c. a mandatory injunction be passed in favour of the plaintiffs thereby directing the defendant nos. 1 and 2 to maintain status quo ante as prevailing before the share purchase agreement dated 14th December, 2008 and consequently to transfer back the shares held by plaintiffs in the Indian Company directly or indirectly and also to handover the share scripts to the plaintiffs as described in the SPA and further the defendants be directed to return and/or handover the entire assets, properties and records of defendant nos. 2 and 3 to the plaintiffs.

d. a decree of perpetual injunction be passed in favour of the plaintiffs and against the defendant nos. 1, 2 and 3 restraining them from transferring, in any manner directly or indirectly the cash reserve as well as the intellectual property rights of defendant nos. 2 and 3 to defendant no. 1 or to anybody else.

e. a decree of declaration be passed in favour of the plaintiffs and against defendant nos. 1 declaring that the FIPB approval dated 20th April, 2009 granted by the Government of India, defendant no.18 is null and void and therefore, defendant no. 18 be directed to recall and/or cancel the same.

f. (i) a decree be passed for rendition of accounts in favour of the plaintiffs and against

defendant no.1 and its Directors directing them to render the accounts of all the incomes, receipt, profits made as also to compensate for the losses made in respect of the business affairs of defendant no.2 which is managed and controlled by defendant no.1 and its directors pursuant to the share purchase agreement dated 14th December, 2008 and upon such rendition of accounts, a decree be passed for such amount as may be found due and payable to the plaintiffs.

(ii) further an enquiry be made into the damages and losses suffered by the plaintiffs on account of the false and fraudulent representation made by defendant no.1 and their directors and a decree be passed for such amount as may be found due to the plaintiffs.

g. award costs of the suit in favour of the plaintiffs and against the defendants.

h. pass such further order or direction as this Hon'ble Court may deem fit and proper on the facts of the present suit."

b) The suit alongwith the interim application, being I.A. No. 789/2011, were first time listed before Court on 19th January, 2011 when it was recorded in the order that the plaintiff shall make the submissions on 21st January, 2011 on the maintainability of the suit against the defendants because of the reasons that (i) the defendants No. 1 and 4 to 17 are not residents of India, (ii) the sale purchase agreement dated 14th December, 2008 was executed in Finland, (iii) the said agreement contains Clauses No.12, 14 which provides the exclusive jurisdiction of the Court in England, and (iv) that the Clause 11 provides for resolution of dispute by arbitration.

c) The matter was heard on 21st January, 2011 and 24th January, 2011 and detailed order was passed on 1st February, 2011 whereby an ex parte ad-interim order was not granted as sought by the plaintiffs. Notices were issued to the defendant Nos. 1 to 17 by ordinary registered AD covers for 21st February,

2011.

d) On 21st February, 2011, it was noticed by the Court that the defendants Nos.2 and 3 were served and service report in respect of remaining defendants was awaited. However, the learned counsel appearing on behalf of the defendants No.2 and 3 also accepted the service of defendant No.1 and 4 to 17. Senior Advocate appeared on behalf of the defendant No.18, i.e., Union of India. At joint request, the matter was adjourned to 1st March, 2011. On the said date, as the court was on leave, it was renotified for 18th March, 2011.

On 18th March, 2011, the learned counsel appearing on behalf of the plaintiff and defendants Nos. 1 to 17 informed the Court that the parties have broadly resolved their disputes and they shall be filing an application containing the terms of the settlement and the matter was adjourned for 18th April, 2011.

e) On 18th April, 2011, it was recorded by the Court that the plaintiff and defendants Nos. 1 to 17 had amicably settled their disputes in terms of settlement contained in the settlement agreement dated 21st February, 2011, an application under Order XXIII, Rule 3 being I.A. No.5513/2011 which was also listed before Court. It was recorded by the Court that the settlement agreement is signed by all the contesting parties and was marked as Ex.C-1. It was also mentioned in the order that the plaintiff and defendants Nos. 1 to 17 agreed that the decree be passed in terms of the compromise. In view of the above, the decree was passed and suit was disposed of.

3. After passing the judgment and the decree which was drawn by the Registry, the present execution petition has been filed by the decree holders under Order XXI Rule 10 and 11 read with Section 151 CPC for enforcement of the decree dated 8th April, 2011. The following prayer was made in the execution petition:

i. For the realization of the decrual amount as envisaged in clause 4.5.3 by issuing directions/orders to the judgment debtors to satisfy the claim in liquidated amount to the decree holders as decreed by the Hon'ble Court in faovur of the decree holder and against the judgment debtors.

ii. for the realization of the outstanding decretal amount as envisaged in clause 6.5 by issuing directions/orders to the judgment debtors to satisfy the claim in liquidated amount to the decree holders as decreed by the Hon'ble Court in faovur of the decree holder and against the judgment debtors.

iii. for the realization of the outstanding decretal amount as envisaged in clause 7.2 by issuing directions/orders to the judgment debtors to satisfy the claim in liquidated amount to the decree holders as decreed by the Hon'ble Court in faovur of the decree holder and against the judgment debtors.

iv. for realization of interest @ 24% p.a. on account of intentional delay in making the aforesaid payment from the time line set out in settlement agreement dated 21.02.2011 and costs.

v. for the realization of the decretal amount by issuance of warrants of attachment in respect of the bank accounts of the decree holder, the details whereof are as under:-

Bank Name and account no.

- a) Citi Bank, NA, New Delhi 0325100001
- b) Citi Bank, Bangalore 0053254802
- c) HSBC, New Delhi 051730091001
- d) HSBC, New Delhi 051730091002
- e) State Bank of India, Gurgaon 30306603034
- f) HSBC, Bangalore 071368351001
- g) HDFC Bank, New Delhi 00908640000061
- h) HSBC, EEFC Account 051/730091/511

vi. for the realization of the decretal amount by issuance of warrants of attachment and sale of the shares of Technotree Convergence Ltd. held by Tecnotree OYJ Judgment Debtors in case of the inability of the judgment debtors to satisfy the claim of the decree holder in liquidated amount.

vii. for the realization of the decretal amount by issuance of warrants of attachment and sale of all moveable and immovable properties of the Judgment Debtors in case of their inability to satisfy the claim of the decree holder in liquidated amount.

viii. in case the possession of the movable/immovable properties is not delivered by the judgment debtors as aforesaid or the decretal amount is not satisfied by sale of movable properties, the Hon'ble High Court may be pleased to issue warrants to arrest the officers of the judgment debtors for detention in civil prison.

ix. by issuing a direction/order against the judgment debtor to maintain status quo with regard to the employment of Mr. Atul Chopra in terms of clause 5 of the settlement agreement and to allow him to function as the Managing Director of Technotree Convergency limited until all decretal amounts are paid.

x. by issuing a direction/order against the judgment debtor to not trespass into the office of Mr. Atul Chopra or to remove any of his possessions and to permit him full access to his office space and return his personal belongings;

xi. any other relief deemed fit and proper in the facts and circumstances of the case may also be granted in favour of the decree holder."

4. In Column No.9 of the prescribed form of the decree, it is mentioned that the execution of the decree is to be enforced against two judgment debtors, namely, Technotree OYJ Finland and Technotree Convergence Ltd., New Delhi i.e. judgment debtor Nos.1 and 2.

5. The said execution was listed before the Court on 14th October, 2011, the notice was issued for 11th November, 2011 and the following interim orders were passed:

"xxxxx

4. At this stage, this Court deems it appropriate to attach one bank account i.e. HDFC Bank account bearing no. 00908640000061 of the judgment

debtor. Accordingly, till the next date of hearing, HDFC Bank account bearing no. 00908640000061 of the judgment debtor is attached and judgment debtors are also directed to maintain status quo with respect to shares of Tecnotree OYJ held both in Tecnotree Convergence Ltd. and Cyberworks Pvt. Ltd.”

6. Upon service, the judgment debtors filed an application under Order XXI, Rule 52 CPC being EA No. 608/2011 seeking vacation of the order dated 1^{4th} October, 2011 and release of attachment of the bank accounts and freely deal with shareholding of Judgment Debtor No.1.

After some hearing, an order dated 14th October, 2011 was modified to the effect that a sum of Rs.11,07,39,134/- shall remain attached and the status quo order passed on 14th October, 2011 with regard to the shares of judgment-debtors No.1 & 2 was kept in abeyance for the time being.

7. On 23rd November, 2011, the said judgment debtors also filed an application, being EA No.689/2011, under Sections 44 and 45 of the Arbitration and Conciliation Act in which the prayer was made for reference of the matter to arbitration under clause 20 of the Settlement Agreement dated 21st February, 2011 entered between the Judgment Debtor Nos. 1 and 2 and the Decree Holders. The other judgment debtors have also filed their irrespective applications under Order 1 Rule 10 CPC for deletion of their names from the array of the parties. The details of the said EAs are already mentioned.

8. Judgment Debtors Nos.1 and 2 states that as far as execution of settlement agreement dated 21st February, 2011 is concerned, there is no dispute in this regard. The main submission is that as per the clause 3.1 of the agreement, it was obligatory on the part of decree holders to withdraw the suit (being CS(OS) No.119/2011) within ten days from the date of the agreement based on settlement. The said obligation was violated

by the decree holders by not withdrawing the suit.

Rather the decree holders filed an application under Order XXIII, Rule 3 read with Section 151 CPC being I.A. No. 5513/2011 which is only signed by the counsel for the decree holders along with affidavit of the decree holder No.1. No one appeared on behalf of the defendant Nos. 1 to 17 when the application under Order XXIII, Rule 3 CPC was listed, even the consent recorded on behalf of defendants No.1 to 17 to pass the decree in terms of the application was wrongly recorded. The submission of the Judgment Debtor Nos. 1 and 2 is that since no one was present on 8th April, 2012, when the order was passed, it was the duty of the decree holders to bring to the notice of the court clause 3.1 of the agreement wherein it was agreed between the parties that the suit would be withdrawn by the plaintiffs rather to get the decree in favour of the plaintiffs.

Both Judgment Debtors have challenged the validity of the said order dated 8th April, 2012 passed by the court by which the consent order was passed. Counsel argued that as per the settlement agreement dated 21st February, 2011, decree holder Nos. 1 and 20 who are the relevant parties in the present matter have not complied their obligations and disputes have arisen between the parties therefore as per clause 20 of the settlement, the question regarding its existence, validity and termination has to be resolved by arbitration under Arbitration Rules of Singapore International Arbitration Centre. It is argued that as settlement agreement arises out of a legal relationship, which is commercial in nature, the present execution filed by the decree holders is not enforceable. Clause 20 of the settlement agreement as referred by the judgment-debtors reads as under:

“20. Dispute Resolution

20.1 Any dispute arising out of or in connection with this Agreement, including any question regarding its exercise, validity and/or termination, shall be

referred to any finally resolved by arbitration under the Arbitration Rules of the Singapore International Arbitration Centre.

20.2 The seat, or legal place, of arbitration shall be Singapore.

20.3 The number of arbitrators shall be three.

20.4 The language to be used in the arbitral proceedings shall be English."

9. On the other hand, it was argued by the decree holders that a decree passed by the court is valid. Its validity cannot be challenged in execution proceedings by the judgment debtors. It is a well settled principle that a court executing a decree cannot go behind the decree. The court has to take the decree as it is final between the parties. As regard the arbitration clause is concerned, it was stated that all the obligations have been complied with as per the agreement by the decree-holders No.1 & 20 who are seeking relief in the present petition. Nothing further is to be complied by them. Since, no dispute is left, the matter therefore cannot be referred for arbitration under the Arbitration Rules of the Singapore International Arbitration Centre except the remaining 45% amount is to be received as per clause 6.1 of the said agreement as they are entitled to receive the remaining amounts as envisaged in clause 4.5.3 plus the amounts payable under clause 6.5 and 7.2 of the settlement agreement from Judgment Debtor Nos. 1 and 2. As regards clause 20 mentioned in the agreement is concerned, it is alleged that it was inserted due to oversight, otherwise as per agreement, arbitration can only be invoked in terms of clause 2(f) of the agreement which reads as under:

"2(f) Notwithstanding anything to the contrary stated in this Agreement, the parties acknowledge that nothing contained herein shall be construed as a waiver of, or prevent any Party from raising, claims within the applicable claims periods on the basis of possible breaches of the tax representations, warranties and/or covenants set out in the SPA."

10. It is submitted that since there is no breach on the part of the decree holders with regard to tax representation and/or conditions set out in the Special Power of Attorney as well as with regard to any obligation left on the part of the decree holders, no advantage can be taken by the judgment debtors No.1 and 2, who are to pay the remaining amount as per the settlement agreement.

11. Mr. Rupinder Singh Suri, learned Senior Counsel appearing on behalf of the decree holder has made his submissions in support of the execution and attachment order and the same are outlined as under:

- Firstly, Mr. Suri, learned Senior Counsel for the decree holder, argued that the decree has been passed on the basis of the joint application accompanying the agreement. As per Mr. Suri, the application may or may not be signed by both the parties if the agreement is signed by both the parties to the suit. Therefore, as per Mr. Suri, learned senior counsel this court should accept the validity of the decree as it suffers from no infirmity as the same has been validly passed.

Mr. Suri relied upon the judgment passed by this court in **Pramod Kumar Rastogi vs. Gian Chand Jain** reported at **63 (1996) DLT 231** para7 which reads as under:

“7. This is further not in dispute that beneath the above order passed by the Controller all the three parties have appended their signatures. On the basis of these facts, the Additional Controller found that the satisfaction recorded by him regarding unauthorised sub-tenancy was not without basis and, therefore, no fault could be found with the order whereby the eviction decree was passed. In the written compromise which is duly signed by the objector as well as by the landlord, at various places the objector has been described as a sub-tenant. Further, as per para 5 quoted above, the parties invited the Controller to pass an eviction order on the basis of the compromise allowing the respondents in the eviction petition time upto 31st March,

1992 to hand over vacant possession of the premises. The objector who was admittedly a party to the agreement described himself as a sub-tenant at various places in the agreement without any reservations. He cannot be now allowed to contend that the finding about sub-tenancy is not justified. He cannot be allowed to challenge the said finding in the execution proceedings. In view of the admission of the objector, the Controller was right in presuming the unauthorised sub-letting and passing an eviction order on that basis. The learned Counsel for the objector relied on 21 (1982) DLT 174, **MD. Oswal Hosiery v. Swami Krishna Nand Govinda Nand Bhagwat Dham Ashram Trust** in support of his plea that the satisfaction recorded by the Controller regarding alleged sub-letting was illegal, unauthorised and unjustified. The said case relates to a finding in relation to the peculiar facts forming part thereof and is not an authority to support the contention raised by the learned Counsel for the objector in the present case. In the said judgment, the facts were that an eviction order was sought by a charitable trust on the ground that the suit premises was required by the trust for furtherance of its activities. In the written statement the tenant had denied that petitioner was a charitable trust. However, the Counsel appearing for the tenant made a statement admitting that petitioner landlord was a charitable trust and an eviction order followed. Ultimately, the Court found that the Counsel had no authority to make a concession admitting that the petitioner landlord was a charitable trust. On merits also, it was found that the petitioner trust was not a charitable trust. In the present case, the alleged sub-tenant himself admitted that he was a sub-tenant in the premises and the eviction order was passed. This leaves me with the last point raised on behalf of the objector, i.e. the compromise recorded by the Additional Rent Controller was not a lawful compromise because the application under Order 23, Rule 3 CPC was not signed by the objector tenant. In this connection, first a reference has to be made to the relevant provision contained in Order 23, Rule 3 CPC which runs as under:

“Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by parties

The learned Counsel for the objector emphasised that words “writing and signed by parties” relate to the application under Order 23, Rule 3 CPC and since in the present case the application was not signed by the objector, the requirements under Order 23, Rule 3 CPC was not satisfied. This argument is devoid of any merit in view of the fact that Rule 3 refers to compromise in writing and signed by the parties. This does not mean that the

compromise application must be signed by the parties. It only means that the compromise should be a written compromise signed by parties.

Therefore, if the application under Order 23, Rule 3 is not signed by the parties or by one of the parties it will not make any difference so long as a written and signed compromise is filed alongwith it. It is only in a case where the application itself contains the compromise and there is no other written document accompanying it, that the compromise application will have to be necessarily signed by the parties. It will be sufficient if a written and signed compromise between parties accompanies the compromise application as it has happened in the present case. The compromise in the present case is result of a written agreement signed by the parties. The written agreement Exhibit C-2 accompanied the compromise application which satisfies the requirement of Order 23, Rule 3 CPC. Further, there is an additional fact in the present case and it is, the objector as well as the other two parties have signed the order sheet of the Court on the page where the compromise and the eviction order is recorded. This puts the matter entirely out of any pale of controversy. In this connection, I may refer to a judgment of this Court in **Shri Krishan Mohan Singh v. Sri Chand Gupta and Others**, 1993 Delhi 365”

- Secondly, Mr. Suri, learned Senior counsel argued that the arbitration clause in the settlement agreement has been added in advertently and in any case the arbitration clause which may lead to frustrating the court proceedings would be against the public policy ought not be permitted to operate by the courts.
- Thirdly, Mr. Suri, learned senior counsel for the decree holder submitted that the judgment debtors themselves

state in the applications filed before this court seized of the execution that the decree was passed on the joint application of the parties. If that is so, then as per the learned senior counsel it does not lie in mouth of the judgment debtors to contend otherwise which is that the decree has been obtained mischievously. In this regard, the decree holders have obtained affidavit from the Company Secretary of Judgment Debtor No. 2 who was coordinating with the counsel for the judgment debtors who used to attend the court hearing.

- Fourthly, Mr. Suri contends that the judgment debtors are wrongly stating that they have complied with the obligations under the settlement agreement. The obligations under the settlement agreement still remain unsatisfied due to following reasons:

a) The judgment debtors are totally ignoring the deeming provision in clause 4.5.12 which reads as under:-

“4.5.12. if on the expiry of such 5 day period for accelerated sale, some shares still remain unsold, the settlement amount relating to all of the sale share shall be released and paid to Atul Chopra and Aparna, and for the purpose of calculation of the settlement amount, the unsold shares shall be deemed sold at the average market price of the shares sold in accordance with this agreement....”

b) Further in their communication dated 10.10.2011, the judgment debtors have categorically admitted as follows:-

“given the clear intention of the parties evidenced by this clause, Tecnotree has concluded that the only logical interpretation is to assume that the average market price of shares correspond to the minimum sale price i.e. Euro 0.45 per share...”

c) In view of the aforesaid deeming provision and the categorical admission made by the judgment debtors it is clear beyond doubt that

the obligation of the judgment debtors was to pay Euro 1 per share to Atul Chopra and Aparna and since no shares have been sold, the judgment debtors are liable to make the entire payment. In this regard, a confirmation from Mr. David White, an independent Director of judgment debtor no.1, who was also involved in the negotiations which culminated in the signing of the Settlement Agreement dated 21.2.2011 is annexed herewith as Annexure-B. The following extract is of relevance:-

"I refer to your note regarding the denial by Tecnotree's counsels about their liability to pay Euro 1 per share for the shares held by you and Aparna.

At the outset, I am shocked to see how can the company suddenly try to take a position that no such commitment was made by none other than its Chairman and Vice-Chairman."

- Mr. Suri argues that the arbitration clause in the settlement agreement has now become incapable of being performed and thus is null and void. The court may refrain from referring the dispute to the arbitration if it finds that the arbitration clause has become incapable of being performed.
- Fifthly, Mr. Suri argued that the arbitration clause shall be applicable to the clause 2(f) in the agreement and thus the said arbitration is meant for the limited purpose which cannot be taken recourse to for the purposes of enforcement of the settlement agreement under the decree.

12. The learned counsel appearing on behalf of the decree holders has also filed a chart in order to show that the obligations cast upon Atul Chopra and Aparna Advisory Service Pvt. Ltd., the decree holder Nos. 1 and 20 in terms of the settlement. The detail of the same are mentioned in the chart. All submissions of Mr. Suri are disputed by the learned counsel appearing for the

judgment debtors Nos. 1 and 20. They specifically deny the argument of the decree holders that the obligation has been complied by the decree holder Nos. 1 and 20.

13. Per contra Mr. Rajiv Nayar, learned Senior counsel for the judgment debtor has made his submissions which can be enumerated in the following manner:

- a) Firstly, Mr. Nayar, learned senior counsel argued that the decree ought not to have been passed as the intention of the parties emerging from the agreement is itself clear which is to the effect that the parties are released from their respective disputes filed against each other. Therefore, the said disputes were to be withdrawn by the parties. It is the plaintiff who had while placing the agreement on record got the said suit decreed unilaterally without complying the procedure under order XXIII Rule 3 of the Code.
- b) Secondly, Mr. Nayar argued that even otherwise, the said decree is not valid as the said application was not signed by all the parties, the advocate of the defendant Nos. 1 to 17 did not appear on the date when the decree was ordered to be passed. It is also argued that the agreement was also not been signed by all the parties to the suit. In the absence of the same, the said suit is in effect still alive and could not be said to be decreed against all the defendants. Therefore, the said decree is not a valid one and thus inexecutable.
- c) Thirdly, Mr. Nayar argued that the decree which contains the fresh contract outside the purview of the suit is not enforceable if it does not contain the obligations to perform in presenti. If the agreement contains the future obligations outside the purview of the subject matter of the suit, then said decree could not be enforced by the executing court

and the mechanism under the agreement or in the alternative a separate suit shall lie in order to enforce such obligations.

The Judgment of Division Bench of this court in **Iqbal Krishan v. Maharaj Krishan 68 (1997) DLT 318 (DB)** has been relied to contend that the mere executor contract not providing the obligation in presenti is not an adjustment or compromise under the eyes of the law.

- d) Fourthly, Mr. Nayar argued that the mechanism in the agreement is provided for the breach of obligation which is the arbitration clause of international commercial arbitration, thus the parties by signing the agreement not merely entered into de novo agreement but also selected the method of resolving the dispute by way of arbitration. Therefore, the decree was never and is never the intention of the parties and thus the decree of such obligations is inexecutable.

Mr. Nayar also relied upon the judgment of this court in the case of ***Bhushan Steel Ltd. vs. Singapore International Arbitration Centre and Anr.* 2010 (7) RAJ 358 (Delhi)**, wherein the court has dismissed the suit on the basis of the arbitration clause by invoking section 5 of the Arbitration and Conciliation Act, 1996 in relation international commercial arbitration.

Fifthly, Mr. Nayar argued that in the present case decree passed is only the judicial stamping of what has been agreed between the parties. The said intention of the parties under the agreement must be adhered to. It is only when the enforceability of such agreement shall come in to question before the executing court, the court will rule on whether such decree is enforceable or not.

e) Mr. Nayar argued that it is clear cut case where the parties dispute their the performance of the obligation as the judgment debtor states that they have performed their part of the obligation and the same is denied and disputed by Mr. Suri for innumerable reasons. Therefore, the said disputes are ought to be resolved by the agreed mechanism which is the arbitration. The executing court should not indulge into such an enquiry when the parties have themselves agreed to such mechanism of resolving the dispute by entering into such settlement agreement. He distinguished both the decisions referred to by Mr Suri.

14. Mr. Nayar, learned Senior Advocate has referred the various decisions in support of his submissions with regard to challenge of decree passed in the suit:

I When a compromise is to be recorded and a decree is to be passed under Order 23 Rule 3 requires that the terms to the compromise should be reduced to writing and should be signed by all the parties.

a. Bhai Swinder Singh vs. Ram Kishore & Anr. 66 (1997) DLT 575 relevant paras reads as under:-

“3. It is evident from the application moved by plaintiff No.2 that it is signed by only one of the parties and not by all the parties. It would be relevant to reproduce here Order 23 Rule 3, CPC. It reads as under:

“Compromise of suit

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise *in writing and signed by parties*, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the

subject-matter of the suit.”

4. Since the application in question is undisputedly not signed by all the parties, the applications suffer from this discrepancy and compromise could not have been recorded on the basis of the said application. In **Gurpreet Singh v. Chatur Bhuj Goel**, AIR 1988 SC 400, the Apex Court observed that strict compliance of Order 23 Rule 3 was necessary. In that case, the compromise was virtually arrived at before the Court but later on, the respondent went back taking advantage of Order 23 Rule 3. Admittedly, the compromise was not reduced to writing and signed by the parties. A Division Bench of our own High Court in **Kamla Devi & Ors. v. Prabhat Chand & Anr.**, 65 (1997) DLT 986 (DB), the same principle was followed. It may be mentioned that the provision to Rule 3 would apply only when the compromise or agreement has been reduced in writing and signed by the parties - meaning thereby all the parties and then alone the proviso would apply. Consequently, the Court could not have acted upon the said application moved for recording compromise and the natural consequence was either rejection or withdrawal.”

- b. Som Dev and others vs. Rati Ram and Anr. (2006) 10 SCC 788 para is reproduced below:-

“13. After the amendment of the Code of Civil Procedure by Act 104 of 1976, a compromise of a suit can be effected and the imprimatur of the court obtained thereon leading to a decree, only if the agreement or compromise presented in the court is in writing and signed by the parties and also by their counsel as per practice. In a case where one party sets up a compromise and the other denies it, the court can decide the question whether, as a matter of fact, there has been a compromise. But, when a compromise is to be recorded and a decree is to be passed, Rule 3 of Order 23 of the Code insists that the terms to the compromise should be reduced to writing and signed by the parties. Therefore, after 1-2-1977, a compromise decree can be passed only on compliance with the requirements of Rule 3 of Order 23 of the Code and unless a decree is passed in terms thereof, it may not be possible to recognise the same as a compromise decree. In

the case on hand, a decree was passed on 10-10-1980 after the amendment of the Code and it was not in terms of Order 23 Rule 3 of the Code. On the other hand, as the decree itself indicates, it was one on admission of a pre-existing arrangement.”

c. K. Venkatachala Bhat and Anr. vs. Krishna Nayak (D) by LRs and Ors. 2005 (3) Scale (paras 9-11 and 14):-

“9. At this juncture, it would be appropriate to take note of Order XXIII Rule 3 of the Code of Civil Procedure, 1908 (in short CPC) dealing with compromise of Suit. Same reads as follows :

“Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit :

Provided that where it is alleged by one part and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation – An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872) shall not be deemed to be lawful within the meaning of this Rule.”

10. The words “in writing and signed by the parties were inserted by Act 104 of 1976 with effect from 1.2.1977.

11. The effect of the inserted portion as noted above is that the compromise if not signed by the parties cannot be recorded by the Court. In *Byram Paestonji Gariwala Vs. Union of India and Ors.* (AIR 1991 SC 2234) it was held that the compromise can be signed by the parties, their counsel or even

their agents. The view was reiterated in *Jineshwardas (D) by Ltd. and Ors. v. Jagranj (Smt.) and Anr.* (2003(11) SCC 372).

14. Above being the position, we find the order passed by the learned Single Judge is unsustainable. When the writ petition was disposed of in an indefensible manner by learned Single Judge, the Division Bench should have condoned the delay even if it was substantial in view of the reasons indicated by the appellants. It did not even advert to the stand of the appellants that the learned Single Judge should not have disposed of the matter on the basis of the memo and affidavit which were only signed and filed by respondents 2 (a) and 2(b) and not by the appellants.”

d. *Sneh Gupta vs Devi Sarup and Ors.* (2009) 6 SCC 194 relevant paras are as follows:-

“24. Order 23 Rule 3 of the Code of Civil Procedure provides that a compromise decree is not binding on such defendants who are not parties thereto.

26. A consent decree, as is well known, is merely an agreement between the parties with the seal of the court superadded to it. [See *Baldevdas Shivilal v. Filmistan Distributors (India) (P) Ltd. and Parayya Allayya Hittalamani v. Parayya Gurulingayya Poojari.*]

27. If a compromise is to be held to be binding, as is well known, it must be signed either by the parties or by their counsel or both, failing which Order 23 Rule 3 of the Code of Civil Procedure would not be applicable. (See *Gurpreet Singh v. Chatur Bhuj Goel*)”

II Where two interpretations are possible in respect of a compromise decree, the interpretation more favourable to the judgment debtor should be accepted.

a. *Novartis A.G. vs. Wander Pvt. Ltd.* 2010 (43) PTC 279 (Delhi) relevant para reads as under:-

“33. It was also held in *J.K. Seth v. Narendra Nath Bannerjee*, AIR 1977 Cal 388 DB that where two interpretations are possible in respect of a compromise decree, that interpretation which is favourable to the judgment debtor should be

accepted. The same view was taken in Punjab & Sindh Bank Ltd. v. Jagdish Lal, AIR 1972 Punjab & Haryana 144. Of course, in relation to other decrees and on aspect of limitation, it was held in Deep Chand v. Mohan Lal, (2000) 6 SCC 259 that where language of a decree is capable of two interpretations, one which assists the decree holder to have the fruits of the decree should be preferred, but the same will have no application to compromise decree. The decree holder having failed to ensure language as to executability of decree and having acted in its zeal to protect the rights of a non party to the suit also, under an agreement then still to be entered into cannot be permitted to have benefit of the interpretation, since in view of ambiguous language, it cannot be said with certainty that the judgment debtor understood that it was suffering a decree for Rs. 5 crores. I also do not find any merit in the contention that from IA. No. 4839/2004 and other correspondence, it can be said that the judgment debtor understood the decree to be so. As aforesaid, on 1st August, 2004 the decree for permanent injunction was to come into force. The anxiety of the judgment debtor was to seek extension of coming into force of the decree for injunction and not to avoid execution of decree for Rs. 5 crores.”

III Compromise decree is like any other agreement between the parties.

- a. Ruby Sales and Services (P) Ltd. and Anr. vs. State of Maharashtra and Ors. (1994) 1 SCC 531 para 15 reads as under:-

“15. As we have noticed earlier the definitions of “conveyance” and “instrument” start with the expression “includes” which shows that the definitions are very wide. It appears to us that the amendment was made out of abundant caution and it does not mean that the consent decree was not otherwise covered by the definitions given in Section 2(g) or 2(l) of the Act. As stated earlier it depends on the terms thereof. Merely because an agreement is put in the shape of a consent decree it does not change the contents of the document. It remains an agreement and it is subject to all rights and liabilities which any agreement may suffer. Having a stamp of court affixed will not change the nature of the document. A compromise decree does not stand on a

higher footing than the agreement which preceded it. A consent decree is a mere creature of the agreement on which it is founded and is liable to be set aside on any of the grounds which will invalidate the agreement.”

- b. Novartis A.G. vs. Wander Pvt. Ltd. 2010 (43) PTC 279 (Delhi) relevant paras read as under:-

“25. The Apex Court in Ruby Sales and Services (P.) Ltd. v. State of Maharashtra, (1994) 1 SCC 531 held that merely because an agreement is put in the shape of a consent decree, it does not change the contents of documents - it remains an agreement and it is subject to all rights and liabilities which any agreement may suffer; having a stamp of court affixed will not change the nature of the documents; a compromise decree does not stand on a higher footing than the agreement which preceded it. It was held, a consent decree is a mere creature of the agreement on which it is founded and liable to be set aside on any of the grounds which will invalidate the agreement.”

IV Decree passed by a court without jurisdiction is a nullity.

- a. Kiran Singh and Ors. vs. Chaman Paswan and Ors. (1955) SCR 117 wherein it was held:-

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

15. By making the aforesaid submissions and citing several

judgments, Mr. Nayar concluded his arguments by stating that the petition filed by the petitioner must be dismissed as the decree was not lawful or in due compliance of Order XXIII Rule 3 of the CPC and it was passed without jurisdiction. Moreover, the same could not be enforced as terms of the agreement are executory in nature and also contains the arbitration clause in the event of the breach. Therefore, in all probability, the execution of the decree is not feasible before this court and the same is liable to be sent for arbitration as per the agreed arrangement between the parties.

16. I have gone through the petition for execution, the order sheets and the objections raised by the judgment debtor as well as the submissions made by the learned counsel for the parties at the bar. I shall now proceed to discuss the issues which according to me are arising in the present case.

17. First thing according to me which requires consideration in the present case is to see as to whether the agreement which is in the nature of settlement entered into by the parties to the suit prior to the passing of the decree wherein the parties have fully and finally resolved the dispute and entered into arrangement entailing the future obligations upon the parties can be looked into by the executing court.

18. If the answer of the said question comes in affirmative, then, the court has to further examine as to whether the executing can enforce such agreement by proceeding to insist upon compliance of the said obligation or relegate the parties to a separate suit or for that matter the adopted and agreed mechanism for the resolution of dispute in the said agreement.

19. Admittedly, now it is found that the said application is not signed by the contesting parties as recorded in the order nor any affidavit of judgment-debtors was filed. The statement of the parties was also not recorded and no one appeared on behalf of

the defendants No.1 to 17 when the matter was taken up on 8th April, 2011. Vakalatnama in favour of the counsel for the defendant, who earlier appeared on their behalf, is also not available on record. The application is merely signed by the counsel for the plaintiff/decreed-holder No.1 and supported by his affidavit.

20. Let me proceed to first discuss the law relating to execution of the decree in order to find the answer to the question whether the agreement of the nature described above can be taken into consideration by the executing court.

21. The powers of the executing court are regulated by Section 47 of Code of Civil Procedure, which reads as under:-

Section 47- Questions to be determined by the Court executing decree

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

xxxxxx

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

²[Explanation I.-For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.-(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

22. From the bare reading of the aforesaid provision, it

becomes clear that all the matters relating to execution, discharge and satisfaction of the decree shall be determined by the court executing the decree. The wordings of this section are interpreted by the courts from time to time in order to come to the conclusion as to what nature of aspects of the matter can be subsumed within its ambit so as to be called as “questions relating to discharge, execution or satisfaction of decree”, and time and again the courts have incorporated number of events which are held to be the ones that are facets of discharge, execution or satisfaction. Basing upon the said determination, the objections against the execution proceedings can be entertained by the courts executing the decree.

23. It is well settled that the court seized of the execution of decree cannot go behind the decree to adjudicate the validity or the correctness of the decree except the decree is *void ab initio* or without jurisdiction but lack of jurisdiction must be patent. The objections as to the nullity of the decree can be taken which goes into the root of the matter and proceeds to nullify the decree. On the other hand, the objections relating to decree being irregular, illegal, not having followed the due procedure under the law can be entertained only by the court which has passed the decree and not by the executing court.

24. Reference is invited to the observation of Supreme Court in the case of **Rafique Bibivs Sayed Waliuddin, AIR 2003 SC 3789 decided on 28th August, 2003**, wherein the Supreme Court has observed thus:-

“8. A distinction exists between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing Court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior Court failing

which he must obey the command of the decree. A decree passed by a Court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings."

25. Likewise, in the case of **Balvant N. Viswamitra And Ors. vs Yadav Sadashiv Mule, AIR 2004 SC 4377**, the observations *Rafique Bibi (supra)* are approved by the Supreme Court, by observing as under:-

"A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings." (emphasis supplied)

15. From the above decisions, it is amply clear that all irregular or wrong decrees or orders are not necessarily null and void. An erroneous or illegal decision, which is not void, cannot be objected in execution or collateral proceedings."

26. The sum and substance of the observations of Supreme Court is that the enquiry before the executing court is microscopic in nature and the said enquiry is limited to the extent of examining the affairs of execution or the objections which goes into the root of the matter and proceeds to nullify the decree and not all other objections which can conveniently be tried by the courts passing the decree or which requires enquiry into further facts as entertaining such objections may give unnecessary liberty to the litigant to resist the execution even if the decree has attained finality in law.

27. On this basis, illegal nature of decree or irregular nature of decree or wrong decree which is not necessarily null and void cannot be attacked in execution or collateral proceedings.

28. However, the evolution of this principle and the line of authorities emerging therefrom is one set of authorities wherein the objections relating to validity of the decree cannot be undertaken by the executing courts.

29. On the other hand, there is certain permissible extent upto which the objections can be entertained by the executing court. Such nature of objections which can be entertained by the executing court have been judicially culled out by the courts from time to time and include objections relating to pre decree arrangement, post decree arrangements, question relating to excess or deficient execution, objections relating to impact of subsequent legislation making the decree inexecutable, reciprocal obligations and other kinds of objections which in a way affect the executability of the decree and are the matters relating to execution, discharge or satisfaction of the decree and therefore, are the matters which are covered within the ambit of Section 47 CPC.

30. The said nature of objections are in a way exception to the principle that the executing court normally does not go behind the decree in order to adjudge the validity of the decree.

31. One such exception is the case relating to pre-decretal arrangement or agreement is an agreement which is entered into by the parties wherein the intention of the parties is to end the litigation by entering into an arrangement and thereby either foreclosing the right to execute the decree or adopting other methods whereby the execution of decree becomes affected in one way or the other.

32. Such agreements are taken into cognizance by the executing courts either as a matter of adjustment or otherwise affecting the executability of the decrees in one way or the other.

33. In the case of **Burjorji Shapurji Shethvs Madhavlal Jaisingbhai, (1934) 36 BOM LR**, the Division Bench of Bombay High Court speaking through Sir John Beaumont, Kt., C.J (as he then was).while determining two relevant questions; one of which was whether the court can look into any such kind of agreement affecting the decree. The court answered the said question in affirmative in the following words:-

“5. Now, the first point taken by the appellant is that the executing Court cannot look at that agreement at all because it is said that there has been no payment or adjustment certified under Order XXI, Rule 2, and therefore, by virtue of sub-paragraph (3) of that rule, the agreement cannot be looked at. In my opinion the answer to that is to be found in the decision of a full bench of this Court in Laldas v. Kishordas (1896) I.L.R. 22 Bom. 463 F.B. It was there held that an executing Court can look at an agreement made before the date of the decree providing that the decree shall not be executed according to its terms. I think that the effect of this agreement, Exh. 15, is to provide that if certain moneys are paid within a specified time then the decree is not to be executed for the balance. [emphasis supplied] Mr. CardenNoad for the appellant distinguishes Laldas v. Kishordas on the ground that it is necessary in this case not only to refer to the agreement but also to the payment, and he says that the agreement and the payment are an adjustment within Order XXI, Rule 2. In Laldas v. Kishordas (supra) it was held that an agreement made before the date of the decree could not be treated as an adjustment of the decree within that rule, and so far as the payment is concerned, the payment in this case is not a payment proved in order to show that execution for the amount paid cannot be levied. It is a payment proved merely to establish the fact that a condition precedent to the operation of the agreement has been performed. It is a mere accident that the condition happens to be a payment, and **I can see nothing in Order XXI, Rule 2, which prevents proof of the fact that a condition precedent to the coming into**

operation of such an agreement as this has been performed. We are bound by the decision in *Laldas v. Kishordas* (supra), though it has not met with universal approval in other High Courts, and I think we must, therefore, hold that the executing Court was entitled to look at this agreement in order to see whether it prevented execution according to the terms of the decrees."

(Emphasis Supplied)

34. The same view was taken by the Madras High Court that the agreement entered into subsequent to the suit but prior to the passing of the decree can be set up as a bar to the execution and it does not in any way vary or alter the terms of the decree as the intention of the parties are discerned from the agreement itself. The Division Bench of Madras High Court in the case of **Rangaswamy Reddiar (Died) And ... vs C. Jayalakshmi Ammal, AIR 1974 Mad 6** has held the same **after quoting its earlier full bench decision of Madras High Court in *Chidambaram Chettiar v. Krishna Vathiar*, ILR 40 Mad 233 = (AIR 1918 Mad 1174) (FB) and *Papamma v. Venkayya*, ILR 58 Mad 994 = (AIR 1935 Mad 860) with approval.** The learned Division Bench observed thus:

"The question in this appeal is whether a predecree agreement made subsequent to the suit could be pleaded in bar of execution. There are two Full Bench decisions of this Court, *Chidambaram Chettiar v. Krishna Vathiar*, ILR 40 Mad 233 = (AIR 1918 Mad 1174) [\(FB\) and *Papamma v. Venkayya*, ILR 58 Mad 994 = \(AIR 1935 Mad 860\) \(FB\)](#), which bear on the question. In the earlier case the parties to the appeals in this court entered into an agreement with the appellant, who submitted to a decree in a suit by the respondent then pending against him, that the former should make an arrangement for satisfaction of such decree within a fixed date, and that the latter should not, before that date, execute or transfer it. The court by a majority opinion held that the agreement could be pleaded in proceedings taken in execution of decree....."

After observing the above, the Madras Division Bench venture into the analysis of further decision of the same court which somehow made a distinction between the predecree agreements affecting the mode of execution and those attacking the validity. The court thereafter proceeded to hold that the agreement which contains the express clauses not to execute the decree can be set up and such clause does not vary the decree or alter the same and the court can look into the same under section 47 of the code. The court observed thus:

“Mullah, in his Civil Procedure Code, Volume I, 13th Edn., refers to ILR 58 Mad 994 = (AIR 1935 Mad 860) (FB) as laying down the proposition that "a distinction should be made between an agreement which related to the mode of execution or satisfaction of a decree and one which had the effect of rendering the decree nugatory and inexecutable in whole or in part and that, while the former may be pleaded in execution, the latter could not be". But this is not to say that a predecree agreement was held by Papamma v. Venkayya, 58 Mad 994 as one in attack of the decree or as one which by itself rendered the decree nullity or nugatory. **A predecree agreement not to execute a decree presupposes a decree which is valid and in full force as well as executable. Such an agreement does not, in any way, vary the terms of affect its validity or deny its existence.** There may be cases where a predecree agreement possibly involves a fraud practised on court, on the basis of which it is made to pass a decree. We are not concerned in the instant case with such cases. **Here, the agreement, made subsequent to the suit and prior to the decree, was merely an understanding that the decree passed should not be executed. That recognises that such an agreement can well be pleaded, as it relates to execution of the decree and is within the purview of Section 47, C.P. Code. (Emphasis Supplied)**

We are aware that in ILR 58 Mad 994 = (AIR 1935 Mad 860) (FB) predecree agreement was between the decree-holder and one of the defendants. But

that, on principle could make no difference to the view we have taken.” (Emphasis Supplied)

35. From the reading of the said observations of Divisionary Bench Bombay High Court in the case of Burjorji (Supra) which still holds the field as the same has been consistently been relied upon by the Bombay High Court till recently coupled with the observations of **Laldas v. Kishordas**(supra) which is the decision of Full Bench of Bombay High Court relied in Burjorji (Supra) (Kindly also see the judgment passed in **Sunil Mehra vs Rajinder Singh Gulati**, 2008 (1) BomCR 359 decided on 8th October 2007 wherein Hon’ble Swantantar Kumar J approved Burjorji (supra)) and also the judgments passed by Division Bench of Madras High Court and Full Benches of Madras High Court , it is clear that the consistent view of the Courts is that an executing court can look into such agreement in the form of settlement which may settle the dispute besides the decree and affects the executability of the decree by volition of the parties or curtail the scope of executability by way of adjustment.

36. It is also to be seen as to whether the agreements executed by the parties which can affect the execution of the decree by discharging the obligations of the parties under decree and by entering into fresh future obligations with simultaneously altering the methodology of governance of the breach of such future obligations becomes a question to be seen by the executing court covered within the realm of Section 47.

37. I think that answer of this lies in the proposition emerging in answer to the previous question itself which is that the pre decreetal agreements whereby the parties can agree not to execute the decree can be set up as a bar to the execution of the decree. If the pre decreetal agreement containing such intention of the parties not to execute the decree can be set up

as bar to the execution, then, I find no reason as to why the settlement agreement which proposes to discharge the parties from the obligations under the civil suit and enters into fresh future obligations with the agreed mechanism to resolve such disputes or breach cannot act as a bar to the execution petition. This is more so when the agreement uses the words “discharge” or release at places as well as mandates the parties to withdraw the suit rather than getting it decreed. Thus, the said intention of the parties prior to the decree and subsequent to the suit shall continue to bind the parties and will also affect the executability of the decree.

38. Such contracts will include the contracts which can extinguish the liability as a full and final settlement with the contract containing future obligations leading to the new arrangement or *de novo* contract, the enforceability of which shall be dependent upon the terms of the contract containing future obligation and therefore the decree becomes inexecutable leaving the parties to such future litigation or future suit.

39. It is noteworthy to refer the observations of Privy Council which very aptly summarized the law and powers of the executing court in such circumstances in the decision of **Oudh Commercial Bank Limited Vs Bind Basini Kuer AIR 1939 PC 80: 66**. In the said case the question arose was that the agreement to pay the higher interest is enforceable in execution of the decree, which was the future obligation to that of what is stated in the decree. On the question whether the agreement to pay interest at a rate higher than the rate provided in the decree can be enforced in execution proceedings there was a conflict of judicial opinion. The Privy Council decision settled the law on this point and answered the question in affirmative, however the court observed that for the purposes of enforceability of such agreements containing future obligations much shall rest upon

the intention of the parties whether they intend to govern such obligations in the execution or not. The Privy Council observed thus:-

“If it appears to the Court, acting under Section 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of the enforcement, it is a matter to be dealt with under Section 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court.” **(Emphasis Supplied)**

40. From the reading of the aforementioned observations of Privy Council, it is clear that there are certain agreements either pre-decreetal or post decreetal in nature which create future obligations and attempts to discharge the decree or the liability of the parties in the decree and therefore affects its executability and in those cases, the intention of the parties is to be gathered from the agreement so as to discern as to whether the parties under the agreement intended to enforce such agreement within the execution of the decree or not.

41. If the intention is not to govern such obligations under the decree, the parties must be relegated to the separate suit as per the observations of Oudh (supra) .If that is so, then if the parties in contract instead prescribe any mode of enforcement and resolution like arbitration, then the said mode of enforcement and resolution has to be adopted and the parties must be left/ relegated to that mode which in the instant case is an arbitration only. The exception to the said principle is that if

the intention the parties is clear from the agreement to govern such enforcement of executory contract under the decree, then the court must take cognizance of such contracts and proceed to execute the decree.

42. The dictum of Oudh Commercial Bank (supra) again holds the field and from time to time referred by the Supreme Court as well as by other courts laying down the cardinal principle relating to agreements affecting the executability of the decree. (Kindly see **Moti Lal Banker vs Mahraj Kumar Mahmood Hasan Khan, 1968 SCR (3) 758** wherein Supreme Court approved Oudh Commercial (supra))

43. Applying the said dictum of Oudh (supra) and reading it together with the principles of law laid down judgment of Burjorji (supra) and full benches of Bombay and Madras High Court, the broad proposition which emerges therefrom is that the executing court can take into cognizance of pre decretal agreements discharging the parties liabilities and containing future obligations, and proceed to discern the intent of the parties by examining the provisions/ clauses of the said agreement to find out if the parties really intended to govern such obligations within the purview of the decree. Whatever the answer comes, the court must respect the intention of the parties. If the answer comes in affirmative, the court can proceed to enforce such obligation and else relegate the parties to the separate suit or agreed remedy whichever is applicable.

44. Applying the said proposition to the present case, let me discuss the nature of the settlement agreement in the case in hand in order to discern the intention of the parties.

45. The agreement dated 21st February, 2011 begins with the background of litigation between the parties which contains clause D which refers to Delhi High Court proceedings and clause I declares that the settlement arrived at is a full and final

settlement. There are other clauses to the said deed which are not reproduced related to other litigation. Clause D and Clause I reads thus:

(D) On or about 15th January, the Legal notice parties commenced a legal action in the Delhi High Court in India, asserting that Share Purchase Agreement (SPA) was null and void. (The Delhi High Court proceedings)

(I)“ The parties recognize that the litigation and arbitration is not in the best interest of any party and without prejudice to their respective claims and contentions have agreed to settle their differences . the parties have agreed terms for full and final settlement of all the disputes referred to above and to record those terms of settlement on the binding basis, in this agreement.”

Thereafter, the said agreement contains the clause relating to release which reads as under:

2.1 As a part of this settlement, the management shareholders have agreed not to challenge the validity of the SPA. The parties have agreed not to pursue or make any claims against each other based on or in relation to the SPA and the transactions carried out in accordance with the SPA, except for any claims relating to possible breaches of the tax representation set out in the SPA, as set out in clause 2.2 (f)

2.2 Save as provided in clause 2.2(f) below, the agreement is in full and final settlement of, and each party hereby irrevocably releases and forever discharges all or any actions, claims, rights, demands or set offs whether in the jurisdiction of Finland, India, England, Singapore, Dubai or any other, whether or presently known to the parties or to the law, whether or not presently asserted and whether in law or equity that it ever had, may have or hereafter can, shall or may have against the other party arising out of, relating to or connected with:

b) The underlying facts r claims relating to management dispute and/ or the SPA dispute, including without limitation, all claims made in the legal notice and in the Delhi High Court proceedings, the CLB petition and/ or the notice of arbitration (jointly the dispute)

f) Notwithstanding anything to the contrary

3. Agreement not to sue

3.1 The legal notice parties agree to take all necessary steps to withdraw the Delhi High Court proceedings within ten days of the date of this agreement based on the settlement reached in this agreement without seeking an order as to costs. Technotree shall cooperate in the withdrawal of the Delhi High Court proceedings and shall not deny or make any submissions in the Delhi High Court contrary to, the terms of this settlement.

3.2 Technotree agrees to take all necessary steps to withdraw the CLB petition.....

Thereafter, there are number of obligations casted upon the parties in the agreement which are not reproduced for the sake of brevity. However, the arbitration clause which is relevant is reproduced herein after:

Arbitration clause

19 Governing law

20 Dispute resolution

46. On conjoint reading of the aforementioned clauses of the agreement, the following aspects relating to intention of the parties become immediately clear:-

- a) That the intention of the parties to the agreement is to fully and finally resolve all the disputes including Delhi High Court proceedings relating to SPA referred categorically and all other disputes which are referred in the background clause as a full and final settlement by entering into the present agreement.
- b) The intention of the parties was also to fully and finally release and discharge the parties from all the pending actions in India including the one relating to Delhi High Court. This is clear from clause 2.1 and 2.2 if read conjointly except the claims relating to clause 2.2(f).
- c) The intention of the parties was also to not to pursue the said litigation and to withdraw the suit pending in the Delhi

High Court and not to make any contrary submissions before the court. The parties also intended to withdraw the CLB petition as well.

- d) The intention of the parties is furthered by entering into fresh obligations out of court which may be resolved to dispute resolution mechanism in the form of international commercial arbitration as per the rules of Singapore international Arbitration Center (SIAC).

47. Therefore, plainly and clearly, the intention of parties at the time of entering into contract was to discharge the parties from all the actions and also not to pursue the litigation especially clear from reading of the agreement to not to sue clause contained in the agreement.

48. The said intention is thus to discharge the parties from their relevant previous obligations and releasing the parties from claiming anything in the court of law. Further, the said intention is also clear by reading the covenant whereby the parties entered into were to withdraw the proceedings and not to urge the contrary pleas before the court.

49. Overall effect of the said covenants entered into by the parties to the agreement is that the settlement agreement is an agreement entered into by the parties before passing of the decree, outside the court which discharges the claims raised in the suit and also bind the parties not to pursue their remedies in the court of law and opting an agreed mechanism of arbitration. Therefore, the said agreement is an agreement relating to discharge or satisfaction of the claims raised in the suit which can be looked into by the court executing the decree under Section 47 of the Code of Civil Procedure.

50. Therefore, it is clear that the agreement purports full and final settlement of debts between the parties by virtue of agreement by providing future obligations prescribed under the

agreement and proceeds to release the parties from the disputes and their liabilities. This is also seen when the other side withdraws the petition before the Company Law Board. However, the adversary does not do so and proceeds to obtain the decree when the intention of the parties was otherwise.

51. Alongside the said discharge of claims, applying the judgment of Privy Council in Oudh Bank (supra), the intention of the parties emerging from the agreement is that the parties have entered into future obligation in lieu of the discharge or release made in the previous claims and not merely the same, the parties have also chosen the agreed mode of resolution of dispute which is an arbitration.

52. Thus, the court though can look into such SPA and examine the clauses of the same, however if it appears that the parties did not intend to enforce such obligations with in the decree cannot proceed to enforce such obligations under the decree. In the present case, such is the case where the parties have chosen an agreed mechanism of Arbitration for the purposes of the enforcement of such obligation and resolution of the disputes arising out of the agreement. thus the said intention of the parties under the agreement is to be respected by the executing court.

53. Therefore, the enforceability of the obligations contained in the settlement agreement dated 21st February, 2011 shall be regulated by the agreed mechanism of the arbitration and not by the executing court. The executing court shall only record the discharge of the claims earlier raised and accept the covenants entered into by the parties and relegate the parties to agreed mechanism of the arbitration.

54. As regard the case of **Pramod Kumar Rastogi** (supra) is concerned, the facts in the said case are materially different and the said decision does not help the case of the

decree holder due to the reason that the compromise recorded in the subsequent suit by filing of the application under Order XXIII, Rule 3 CPC which was not signed by the parties was a result of a written agreement signed by the parties, i.e., objector as well as by the landlord and was earlier recorded in the Court itself.

55. Consequently and resultantly as the parties can be left to future suit as per the dictum of Oudh Commercial Bank (supra) for enforcement of future obligations for a separate suit. Similarly, if the intention of the parties is to resolve the dispute by way of arbitration in the form of agreement arrangement, then the court must adopt the said agreed procedure and relegate the parties to such agreed procedure which is in the form of arbitration.

56. The matter can be looked at from another angle also, as it is seen above, after the entering into the agreement, the parties were to withdraw the suit as per the agreed mechanism. It is altogether different matter that the decree holder chose to take a diametrically opposite stand by unilaterally got the suit decreed although the agreement containing the clause of withdrawal of suit was signed by the parties to the suit.

57. However, when the executing court is faced with the execution of the said decree in the form executory contract, the court is not powerless to examine as to whether there is any legal bar which is militating against the execution of the decree.

58. It is now well-settled proposition that the subsequent legal position or change in law or the subsequent events which creates bar in enforcement of the decree can operate as bar to the execution of the decree. The same is again an exception to the rule that the court cannot go behind the decree and the court in suitable cases of subsequent legal bar can negate to execute the decree being inexecutable.

59. In the case of **Transport Corporation Of India vs**

Haryana State Industrial Development Corporation, AIR 1991 P H 225, a similar question arose before the learned single judge of the Punjab and Haryana High Court wherein there was a decree passed by the court where under the judgment debtor was ordered to transfer sum shares of its company to decree holder . However, after the passing of the decree, the judgment debtor company was ordered to be wound up by the company court. The judgment debtor filed the objections under order 21 rule 58 which were sustained on the ground that there is subsequent legal bar of section 536 of the companies which precludes the court from transferring the shares of the judgment debtor company as per the decree. The learned single judge allowing the revision petition and overturning the order of the executing court observed thus:

"After hearing learned Counsel for the parties, I find that the order of learned Executing Court is liable to be set aside. Learned Executing Court has observed that there is no effect of winding up order of HDL on the execution since the decree was passed against TCL The learned trial Court while observing this lost sight of the fact that under the agreement, on receipt of certain payments, HSIDC was to transfer shareholding of HDL in favour of TCI. Section 536 of the Act reads as under :--

"536. (1) In the case of a voluntary winding up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void.

(2) In the case of a winding up by or subject to the supervision of the Court, any dis-position.of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void."

A bare reading of sub-section (2) of S. 536 of the Act shows that in the case of winding up of the Company, any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall be void. In view of this, HSIDC is not in a position to perform its obligations, then how it can be expected that by way of execution, TCI can be forced to make certain payments which were to be made on performance of certain obligations by HSIDC. It has been ruled by the Supreme Court in Jai Narain v. Kedar Nath, AIR 1956 SC 359, that where a decree imposed reciprocal and interlinked obligations, then the Executing Court can go into the question as to whether the defendant is in a position to perform his part of the decree.

9. This matter is clearly linked with the execution, discharge or satisfaction of the decree as provided under Sec. 47 of Civil P.C. and it can be determined only by the Court executing the decree. Learned Executing Court was not right in saying that the Executing Court cannot go behind the decree. **As noticed earlier, Mark A and Mark B formed part of the agreement which contained obligations on both sides and the performance of which has now become impossible because of the passing of the winding up order against HDL. If HSIDC is not in a position to perform its obligations under the agreement, then how the Executing Court can force TCI to perform its obligations under the execution of the decree.” (Emphasis Supplied)**

60. In the present case too, the parties have themselves by entering into the arbitration clause have ousted the jurisdiction of the civil court to execute or enforce/ insist upon the execution of the obligations within the said decree and precluded the agreement to operate within the realm of the decree. Therefore, by virtue of the applicability of section 5 of the Arbitration and Conciliation Act which limits the jurisdiction of the civil court to interfere in arbitration matters which is equally applicable to international commercial arbitration, the legal bar is created whereby the civil court is estopped by operation of law to

not to enforce such contract by executing such decree. (Kindly see the judgment passed in the case of Bhushan Steel (supra) and other line of authorities where it is settled that section 5 of the Arbitration Act acted as a bar to the civil proceedings even in respect of Part II of the Arbitration and Conciliation Act which deals with international commercial arbitration.)

61. Now it is time to examine the submissions of the learned counsel for the decree holder which are dealt with hereinafter:

- a) Firstly, I do not agree with Mr. Suri that the application may not be signed even if the agreement is signed will suffice in the present case. Though my decision is not based on the irregular nature of the decree but still for clarity sake, it is clarified that in the present case, the agreement and application do not speak in the same voice and thus, the same ought to have been signed anyways. However, this is the matter to be gone into by the court passing the decree as my decision making is based on the enforceability of the agreement as well as the creation of legal bar by the parties by entering into the arbitration.
- b) Secondly, the submission of Mr. Suri that the arbitration clause has become ineffective or inoperative is wrong and thus rejected. It would be equally wrong to say that the said agreement was entered into to frustrate the orders of the court and thus against public policy. Rather, the parties when they entered into such contract were at their free will enter into such a contract and at that time no decree was passed. Therefore, the said agreement was in no way against public policy. So far as the arbitration clause become inoperative is concerned, it is wrong to contend that by just passing the decree over what the parties never intended to do so, the court can impose something outside

the intent of the parties. The compromise is just imprimatur of the court to what the parties have agreed to and thus, the intent of the parties is to govern the agreement by arbitration. Therefore, the said intention shall be respected and the legal bar is created which prevents the execution of the said contract within the purview of the decree.

- c) Thirdly, the argument of Mr. Suri that at some places, the judgment debtor suggests that the matter was decreed jointly should operate to the detriment of the judgment debtor. Again, the document from which intent of the parties flow is a settlement agreement, this court has to examine the said document and decide what was the governing intention at the time of entering into the agreement. The said agreement completely discharges the parties to the suit and calls upon the parties to withdraw the suit. This court is not to go by the concession of any of the parties but has to decide the matter on the basis of what has been agreed to by the parties to the agreement and their intention thereof.
- d) Fourthly, Mr. Suri contended that the judgment debtors have not complied with their obligation and the judgment debtors disputes the same. It is again noteworthy even the decree holder has not complied with the obligations in the agreement. The first breach is itself to get the matter decreed though the intention of the parties was not to pursue the matter and withdraw the same. Therefore, the petitioner or decree holder is guilty of equal breach of the contract. But all the disputes as well as the disputed performance of the obligations are the matters which shall form the disputes arising out of the agreement and thus form a matter of the arbitration. Thus, the same cannot be enforced by the executing court.

e) Fifthly, the submission of Mr. Suri is also non meritorious that the claim of the decree holder falls within clause 2(f) which is the excepted matter from that of the arbitration. Firstly, this apparently seemed to not valid argument as the reading of the said clause reveals that the said clause talks about other claims relating to tax liability etc. the claim sought to be enforced by Mr. Suri forms the part of the obligation under the contract pursuant to High Court proceedings which is specifically finds mention in the agreement and the future acts of the parties are demarcated. Thus, the same cannot be said to be an excepted matter within clause 2.2(f) of the agreement.

62. All other submissions of Mr. Suri are either factual or give response to Mr Nayar's submissions and thus the same are covered by my discussion done above.

63. In view of the above discussion, it is clear that the parties did not intend to regulate the settlement agreement by way of the execution of the decree and adopted the mechanism of resolution of disputes if any which is an arbitration. Consequently, the execution petition is not maintainable in view of the legal bar under section 5 of the Arbitration Act and also on the basis of unenforceability of the agreement within the purview of the decree as per the intention of the parties. Accordingly, the execution petition is disposed of as not intended to be enforceable under the agreement and the bar created by the law. The decree holders and judgment debtor Nos. 1 and 20 are referred to arbitration to resolve their disputes in accordance with Clause 20 of the settlement agreement. EA No. 608/2012 and EA No. 689/2012 filed by judgment debtor Nos. 1 and 2 are allowed.

64. As the execution petition is being disposed of, consequently, all the EAs filed by other judgment debtors are

disposed of and all interim orders are vacated.

JULY 06, 2012

MANMOHAN SINGH, J.