

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ EFA(OS) No.1/2015, CM Nos.16/2015, 9331/2015 & 998/2016

Reserved on : 27th January, 2016

Date of decision : 9th March, 2016

ANGLE INFRASTRUCTURE PVT.LTD. Appellant
Through: Mr. Akhil Sibal, Ms. Bina
Gupta, Ms. Shradha Deshmukh, Mr.
Abhay Anand and Mr. Ranjit Raut, Advs.
versus

ASHOK MANCHANDA & ORS. Respondents
Through: Mr. Sudhanshu Batra, Sr.
Adv. with Mr. Abhishek Sharma and Mr.
Chaitanya Puri, Advs. for R-1.
Mr. Ravinder Singh, Adv. for R-3 & 4.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

GITA MITTAL, J.

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in social life”. Wide enough in all conscience is the field of discretion that remains.”

- Benjamin Cardozo's ‘The Nature of the Judicial Process’ [1949, page 141]

1. The appellant before us is aggrieved by and assails the order dated 14th November, 2014 whereby the learned Single Judge, while disposing of Execution Petition No. 405/2014, has held that the petition seeking execution of the order dated 6th November, 2013 accepting the settlement dated 30th October, 2013 and passing a decree, was not maintainable. This order was premised on the conclusion by the learned Single Judge that the settlement dated 30th October, 2013, arrived at between the parties in the Delhi High Court Mediation & Conciliation Centre, was in the nature of an arbitral award and was required to be executed in the manner of an arbitral award and no decree in terms thereof could be passed.
2. The undisputed facts giving rise to the present appeal, to the extent necessary, are briefly noted hereafter.
3. Respondent Nos. 1, 3 & 4 jointly held rights and interest in a certain plot of land, admeasuring 14.468 acres situated in Sector 70, Village Fazilpur, Jharsa, Tehsil & District Gurgaon (hereafter 'said land'). The appellant entered into a Development Rights Agreement (hereafter 'DRA'), with the respondent no. 2 alongwith respondent Nos. 1, 3 & 4, whereby exclusive development rights over the said land were transferred to the appellant. In consideration of the development rights, the appellant had agreed to pay to the owners a sum of ₹179,00,40,000/- (at the rate of ₹2,000/- per square feet of FSI for a total of almost 8,97,000 square feet). The amount was to be paid in terms of Clause 3.1 of the DRA.
4. The appellant claims that it discharged considerable liability

to the tune of ₹110 crores in terms of the DRA, however it could not make further payments due to certain disputes which cropped up between the developer and a third party.

5. As a result, differences arose between the parties which led to filing of OMP No.378/2013 by Oasis Infra Developers Pvt. Ltd. (respondent no. 3) against M/s Capital Builders. A second petition being OMP No.420/2013 came to be filed by the present respondent no.1 against the appellant herein. Both petitions had been filed under Section 9 of the Arbitration and Conciliation Act, 1996 for grant of interim relief while seeking to invoke the arbitration clause under the DRA, and were being listed together.

6. Mr. Akhil Sibal, learned counsel for the appellant relies upon Clause 3.2 of this agreement which stipulates the procedure in the event of a default as follows :

“3.2. The Parties agree that upon completion of 4 (four) months from the date of execution of the Agreement, the Developer shall pay the balance consideration to the Owner in monthly installments of an amount of approximately ranging Rs.7,00,00,000 (Rupees Seven Crores Only) to Rs.10,00,00,000 (Rupees Ten Crores Only) (“Monthly Payments”), which payments upon launch of the Project shall be payable in accordance with Clause 3.3 below. The Parties, however agree and acknowledge that the Developer shall be entitled to deduct, from the last 3 (three) Monthly Payments, all amounts paid and/or payable towards interest on EDC/IDC by the Developer. In the event, payment of the Monthly Installments is delayed by more than 1 (One) month, the Developer shall have a grace period of 10 (ten) days to make such payments, pursuant to which such

delayed payments shall be paid along with an interest of 18% (eighteen percent) interest of 24% (twenty percent) for such period of delay. In the event the Monthly Payments are delayed by more than a consecutive period of 3 (three) months, the Developer shall be entitled to retain the FSI of the Project in proportion to the amounts/payments made by the Developer to the Owner till such date and the remaining FSI shall be returned in favour of the Owner. The amounts paid by the Developer including taxes, interest, government payments/charges or other costs/expenses including any bank guarantee charges, development charges/costs and/or EDC/IDC expenses including any bank guarantee charges, development charges/costs and/or EDC/IDC payments, which are in excess of the Developer's entitled proportion of the FSI shall be refunded by the Owner within 3 (three) months from being notified by the Developer."

7. In the petitions before the court, an order dated 8th May, 2013 came to be passed therein referring the parties to mediation with consent. In as much as the primary submission of the parties relates to construction and nature of the settlement which was reached as a result of this order of reference, for the purpose of convenience, this order may usefully be extracted and reads thus :

"1. All the parties agree to make an endeavour to resolve the disputes through Mediation by Delhi High Court Mediation and Conciliation Centre within a period of one week.

2. List the matter before Delhi High Court Mediation & Conciliation Centre on 9th May, 2013 at 02.30 p.m.

3. On the suggestion of Mr. Sudhanshu Batra, learned senior advocate, Mr. J.P. Sengh is appointed as a Mediator in this matter. The Conciliation

proceedings be carried out on day to day basis and endeavour be made to complete the same within one week.

4. *Respondent no. 1 in OMP No. 378/2013 and respondent no. 1 in OMP No.420/2013 is directed to place the present status of the project on record by means of an affidavit within a period of two weeks with advance copy to the learned counsel for the petitioner.*

5. *List the matter for awaiting the outcome of the mediation on 27th May, 2013.”*

8. The reference to the Delhi High Court Mediation & Conciliation Centre culminated in a “*Full and Final Settlement Agreement*” dated 30th October, 2013.

9. Under the aforesaid agreement the appellant undertook to pay a sum of ₹45,00,00,000/- (Rupees Forty Five Crores Only) to the Respondent No. 1 towards Full and Final Settlement and reduced into writing “*that they have no further claims or demands against and all the disputes and differences have been amicably settled by the Parties hereto through the process of Mediation*”. Several post dated cheques totalling to about ₹40,00,00,000/- (Rupees Forty Crores Only) in respect of paragraph 1.1 (a)(ii) and 1.1(b)(i) of the settlement agreement were issued by the appellant to the respondent no. 1 in pursuance of the aforesaid settlement.

10. Mr. Akhil Sibal, learned counsel for the appellant relies on paras VII(2) and VIII of this agreement which read thus :

“*Para VII:*

xxx

xxx

xxx

2. *The payments at paragraph 1 above shall be in full and final settlement of all disputes between the parties and of any and all amounts payable by the*

terms of the settlement directing as follows:

*“I have perused the terms of the settlement. The same are lawful. As prayed, the petitions are disposed of in terms of the settlement agreement dated 30.10.2013. Parties shall abide by the terms of the settlement. Accordingly, a **decree is passed in terms of the settlement agreement**.*

The petitions are, accordingly, disposed of.”

(Emphasis by us)

13. It appears that the parties had difficulty in the working of the terms of the settlement, inasmuch as the appellant was unable to discharge the financial liability as per the agreement and the respondent No.1 initiated criminal proceedings against the appellant, including proceedings under Section 138 of the Negotiable Instruments Act, 1881.

14. The respondent no. 1 sent a letter dated 16th August, 2014 to the appellant, whereby a demand for FSI was made in lieu of the payments that were to be made by the appellants. By a letter dated 04th October, 2014, the appellant acceded to the above request and agreed to use FSI. This acceptance was reiterated by the appellants through another letter dated 10th October, 2014, wherein they called upon the respondent no. 1 to accept the FSI.

The respondent no. 1, by a letter dated 15th October, 2014, rejected the proposal of accepting FSI instead of the payment.

15. Vide a letter dated 14th November, 2014, the appellants called upon the respondent no. 1 to take possession of 28 flats in Tower E of the project in full and final settlement of all dues. This request also was declined vide a letter dated 19th November, 2014.

16. Subsequently, the respondent no. 1 filed an execution petition being ***Execution Petition No. 405/2014*** against the present appellant (Judgment Debtor) seeking the following prayers :

“a) Issue Transfer Certificate in favour of the District Judge, Gurgaon for issuing an order of attachment and sale of the immovable properties of the Judgment Debtor No. 1 as per list attached as Annexure ‘A’.

b) Attach bank account no. - Current a/c no.: 09232560000996 in HDFC Bank, Jasola, New Delhi-25 belonging to the Judgment Debtor No.1.

c) Award costs of this Execution Petition to the Decree Holder and against the Judgment Debtor No.1.”

(Emphasis by us)

17. Inasmuch as the Execution Petition No. 405/2014 was filed within one year of the order dated 6th November, 2013, notice was not issued to the appellant/judgment debtor, and the execution was taken up *ex parte* for consideration by the learned Single Judge on 14th November, 2014. Learned counsel for the respondent stated before the court that he did not press the prayer ‘b’. On this date, the learned Single Judge was of the view that the power to refer parties to mediation is vested not only in Section 89 of the Code of Civil Procedure (hereafter ‘CPC’) but also under the Arbitration and Conciliation Act, 1996. The learned Single Judge has further noted that Section 73 of the Arbitration & Conciliation Act provided the manner in which a conciliator was required to proceed in case elements of settlement existed and thereupon a settlement is reached. Reference was also made to Section 74 of the Act noting

that it sets out the status and effect of a conciliated settlement agreement. The learned Single Judge has thereafter noted that the settlement had morphed into an arbitral award on the agreed terms. It was therefore held that the settlement agreement dated 30th October, 2013 placed before the court on 6th November, 2013 had to be treated as an award which could straight away be executed by the concerned courts in Gurgaon, (as the concerned immovable property was located in Gurgaon in the State of Haryana). Reliance was placed by the learned Single Judge on the judicial precedent reported at **2009 (3) ArbLR 524 (Del), Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.** After so concluding, the learned Single Judge disposed of the execution petition giving liberty to the respondent no. 1 herein to file a fresh execution petition in the concerned court at Gurgaon for enforcement of the arbitral award.

18. We are informed that the respondent no. 1, has in fact filed an execution petition in Gurgaon, Haryana which is being considered by the court of Additional District Judge in Gurgaon. The appellant before us has filed objections to the same.

19. The order dated 14th November, 2014 has been assailed by way of the present appeal by the appellant/judgment debtor. Before us, Mr. Akhil Sibal, learned counsel for the appellant has contended that the learned Single Judge has erred in treating the settlement dated 30th October, 2013 as an arbitral award and that the same is in violation of not only the provisions of the Code of Civil Procedure but is also violative of the provisions of the

Arbitration and Conciliation Act, 1996 as well as the Delhi High Court Mediation & Conciliation Rules, 2004 framed under Section 89 of the Code of Civil Procedure.

20. We propose to decide the issues pressed before us in the following manner :

- I. **Contentions of the parties** (paras 21 to 24)
- II. **Relevant provisions of the Code of Civil Procedure and the Arbitration & Conciliation Act, 1996** (paras 24 to 27)
- III. **Whether the settlement agreement dated 30th October, 2013 was a result of mediation or conciliation?** (paras 28 to 48)
- IV. **Whether the disposal of proceedings under Section 9 of Arbitration and Conciliation Act, 1996 would result in a decree** (paras 49 to 80)
- V. **Jurisdiction of the learned Single Judge as an executing court on the 14th November, 2014 to correct the order dated 6th November, 2013** (paras 81 to 116)
- VI. **Legality of the order dated 14th November, 2014** (paras 117 to 121)
- VII. **Whether this court can pass any order in respect of the execution proceedings filed in Gurgaon pursuant to the order dated 14th November, 2014?** (paras 122 to 146)
- VIII. **Result** (para 147)

We now propose to discuss the above issues in seriatim :

I. Contentions of the parties

21. Mr. Akhil Sibal, learned counsel for the appellant submits that on 6th November, 2013, the court had rightly directed passing of a decree. It is submitted that by virtue of Rule 25 of the Delhi High Court Mediation and Conciliation Rules, the court had no option but to pass a decree. It is urged that be it a decree or an order, it makes no difference to the method of execution as, even an order has to be executed in the same manner as a decree as prescribed under Section 36 of the Code of Civil Procedure.

22. It is also urged that in the execution petition, the respondents have sought execution by attachment of immovable properties located at Gurgaon which could only be done if a transfer certificate was issued by the court under Section 39 of the CPC transferring the decree to the court of competent jurisdiction. Mr. Sibal would contend that Section 39 of the CPC is not absolute in terms but confers discretion on the executing court whether to issue the transfer certificate or not, that too upon being satisfied that the judgment debtor has no property within the local limits of the jurisdiction of the court which passed the decree and has property within the local limits of the jurisdiction of the transferee court.

23. Our attention is drawn to the covenant in the settlement agreement that if the developer (judgment debtor) fails to comply with clauses 1.1(a) & (b) of the settlement agreement, "*all rights and claims of the parties shall revive*". Based thereon, it is further contended by Mr. Sibal that consequently the judgment debtor (appellant in the present case) has the right to place all objections

including its submission that the decree is inexecutable before the transferring court. It is contended on behalf of the appellant that the jurisdiction to transfer the decree for execution in terms of Section 39 of the CPC requires judicial application of mind and is not merely a ministerial act.

This is disputed on behalf of the respondents.

II. Relevant provisions of the Code of Civil Procedure and the Arbitration & Conciliation Act, 1996

24. Before examining the rival contentions, for reasons of expediency, we may extract the statutory provisions referred to and relied upon by learned counsels on both sides during the course of their submissions.

25. In support of the challenge, reference has been made to Sections 36, 38, 39 and 89 of the Code of Civil Procedure. Reliance is also placed on Part III of the Arbitration and Conciliation Act, 1996.

26. The relevant provisions of **Code of Civil Procedure, 1908** are reproduced hereunder :

“36. Application to orders - The provisions of this Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).”

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

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

*If the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other court, or
If such person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court, or*

If the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed it, or

If the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.

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

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

[(4) Nothing in this section shall be deemed to authorise the court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]”

“89. Settlement of disputes outside the court-(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their

observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for –

(a) arbitration;

*(b) **conciliation**;*

(c) judicial settlement including settlement through Lok Adalat.

*(d) **mediation***

(2) Where a dispute has been referred—

*(a) **for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;***

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (30 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

*(d) **for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.***”

27. We may also set out the relevant provisions of Part III of the **Arbitration and Conciliation Act, 1996** hereunder :

“Part III

61. Application and scope.—

(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise

The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872. (1 of 1872).

67. Role of conciliator.—

xxx xxx xxx

68. Administrative assistance.—

xxx xxx xxx

69. Communication between conciliator and parties.—

xxx xxx xxx

70. Disclosure of information.—

xxx xxx xxx

71. Co-operation of parties with conciliator.—

xxx xxx xxx

72. Suggestions by parties for settlement of dispute.—

xxx xxx xxx

73. Settlement agreement.—

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement.

The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

75. Confidentiality.—

xxx

xxx

xxx

76. Termination of conciliation proceedings.—

The conciliation proceedings shall be terminated—

(a) by the signing of the settlement agreement by the parties on the date of the agreement; or

xxx

xxx

xxx”

We now propose to examine the rival contentions.

III. Whether the settlement agreement dated 30th October, 2013 was a result of mediation or conciliation?

28. By the impugned order dated 14th November, 2014, the learned Single Judge has concluded that the settlement agreement resulted in conciliation between the parties. This aspect assumes importance because of the difference between the prescribed mechanisms for execution of the settlements reached in mediation and conciliation.

29. The above statutory scheme lays down that a conciliation agreement has the “*same status and effect as if it is an arbitral award*” by virtue of Section 74 of the Arbitration Act, 1996. It

would thus be enforceable under Section 36 of the enactment of 1996. On the other hand, a mediation settlement has, under Section 89(2)(d) of the CPC, to receive the treatment prescribed under the Rules framed for the purpose which, in the present case, would be the stipulations under the Delhi High Court Mediation and Conciliation Rules.

30. Before proceeding with the matter, it is therefore, firstly essential to consider and address the basic question as to whether the settlement dated 30th October, 2013 resulted out of mediation or conciliation between the parties.

31. Conciliation is one of the alternate dispute resolution mechanisms, though provided for in Section 89 of the CPC, but, specifically dealt with under Part III titled ‘*Conciliation*’, of the Arbitration and Conciliation Act, 1996.

32. ‘Conciliation’, as a specific mechanism for dispute resolution is provided under Part-III of the Arbitration and Conciliation Act, 1996, and under Section 61, applies to disputes arising out of a legal relationship as well as to proceedings relating thereon. Conciliation proceedings are initiated under Section 62 of the Act on a written invitation by one party to conciliate to the other. It commences when the other party, accepts such invitation, in writing. The appointment of a conciliator is undertaken under Section 64 while Section 66 maintains that the conciliator is "*not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872*". A settlement agreement between the parties is finalized in accordance with Section 73 while by virtue of

Section 74 of the Act, such settlement agreement shall have the same status and effect as if it is an "*arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30*". Section 76 prescribes the manner in which the conciliation proceedings are terminated.

33. Under Section 84 of the Arbitration and Conciliation Act, the power to make rules is conferred on the Central Government.

34. Therefore, enforcement of such settlement would have to be effected in accordance with Section 36 under Chapter-VIII of the Arbitration and Conciliation Act, 1996. Section 36 specifically dealing with enforcement, stipulates that an arbitral award shall be enforced "*under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree*". Therefore, such conciliation, that commences by voluntary acts as provided under Part-III of the Arbitration and Conciliation Act, 1996 does not envisage intervention of the court other than for the purposes of enforcement thereof which has to be by the civil court as it were a decree of the court. A settlement in the conciliation, therefore, would not result in a decree.

35. The Code of Civil Procedure also specifically empowers the court under Section 89 to, in a case where there exists elements of settlement which may be acceptable to the parties, formulate terms of settlement and give them to the parties for their observations. Thereafter, upon receiving the observation by parties, the court may reformulate the terms of settlement and refer them under Section 89(2) either to (a) arbitration; (b) conciliation; (c) judicial

settlement including settlement through Lok Adalat or; (d) mediation.

36. If a dispute is referred for conciliation, sub-section 2(a) specifically mandates that the provisions of the Arbitration and Conciliation Act shall apply as if the proceedings for conciliation were referred for settlement under it.

37. The scope of Section 89 CPC and reference to the abovestated alternative dispute redressal mechanisms came up for consideration before the Supreme Court in the judgment reported at **(2010) 8 SCC 24, Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Construction Co. Pvt. Ltd. & Ors.** Inasmuch as the impugned order has considered that the settlement arose out of conciliation, we propose to set out the relevant observations of the court so far as conciliation is concerned :

“How to decide the appropriate ADR process under Section 89?”

29. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non-adjudicatory) processes—conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of Section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither Section 89 nor Rule 1-A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, Section 89 of the Code makes it clear that two of the ADR processes—arbitration and conciliation, will be governed by the provisions of the AC Act and the two other ADR processes—Lok Adalat settlement and mediation (see amended definition in para

25 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes—judicial settlement (see amended definition in para 25 above), Section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).”

(Emphasis by us)

38. So far as the conciliation in a matter pending in court is concerned, in para 35, the court observed thus :

“Conciliation

35. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of the AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in Section 62 of the AC Act followed by appointment of conciliator(s) as provided in Section 64 of the AC Act. If both parties do not agree for conciliation, there can be no “conciliation”. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under Section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of the court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.”

(Emphasis by us)

39. In para 37, the court noted that as the matter is referred to arbitration under Section 89 of the CPC, the case goes out of the stream of the court and becomes an independent proceeding before the Arbitral Tribunal :

“Whether the settlement in an ADR process is binding in itself?”

37. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the Arbitral Tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of the ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.”

(Emphasis by us)

40. What is the nature of the ADR process? Is it adjudicatory or non-adjudicatory? More important, what happens to the case in which a reference to ADR is made? With regard to other four ADR processes, the answer to these questions is found in para 38 of ***Afcons*** which reads as follows :

“38. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non-adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the settlement agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. xxx xxx xxx Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when

*they are made in a direct reference by parties without the intervention of court, the position will be different if they are **made on a reference by a court in a pending suit/proceedings**. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms.”*

(Emphasis by us)

41. The Supreme Court has thereafter laid down the effect of the settlement reached in the non-adjudicatory fora in para 40 of *Afcons* which reads as follows :

*“40. Whenever such settlements reached before non-adjudicatory ADR fora are placed before the court, the court should apply the **principles of Order 23 Rule 3** of the Code and make a decree/order in terms of the settlement, in regard to the subject-matter of the suit/proceeding. In regard to matters/disputes which are not the subject-matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of the AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a mediator). Only then such settlements will be effective.”*

(Emphasis by us)

42. The court finally summed up the procedure to be adopted by a court in para 43, relevant portion whereof is as follows :

“43. We may summarise the procedure to be adopted by a court under Section 89 of the Code as under:

a) When the pleadings are complete, before framing

issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of dispute between the parties.

b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

xxx

xxx

xxx

*e) If the parties are not agreeable for arbitration, the court should ascertain whether the **parties are agreeable for reference to conciliation** which will be **governed by the provisions of the AC Act**. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.*

f) If the parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three ADR processes : (a) Lok Adalat; (b) mediation by a neutral third-party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

xxx

xxx

xxx

*(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. **If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.***

(i) If the settlement includes disputes which are not

*the subject matter of the suit, the court may direct that the same will be governed by **Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat)**. This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit. xxx xxx”*
(Emphasis by us)

43. In view of the law laid down by the Supreme Court, the contention of Mr. Suldhanshu Batra that the conciliation has to commence only in the manner envisaged under Part-III of the Arbitration and Conciliation Act, 1996 and the parties in court cannot be referred to conciliation, has to be rejected.

44. From the above, it is apparent that conciliation as a dispute redressal mechanism can be initiated voluntarily by the parties in accordance with Part-III of the Arbitration and Conciliation Act, 1996. Even in a case before the court, the parties, with their consent, can be referred to conciliation under Section 89 of the CPC. Such reference would be dealt with in accordance with Section 64 of Arbitration Act. The settlement, if any, shall be governed by Section 74 of the Arbitration and Conciliation Act and would require to be enforced in the manner of an arbitral award. We discuss this aspect in more detail while considering the direction made by the court on 6th November, 2013.

45. So far as mediation is concerned, upon a settlement being effected, under Section 89(2)(d) of the CPC, “*the **court shall effect***

a compromise between the parties and shall follow such procedures as may be prescribed” being the Delhi High Court Mediation and Conciliation Rules, 2004.

46. We find that none of the elaborate steps prescribed for conciliation under Part-III of the Arbitration Act, 1996 were taken in the present case. On the contrary, by the order dated 8th May, 2013, with their consent, the parties and their disputes were specifically referred to “*mediation* by the Delhi High Court Mediation and Conciliation Centre” during the pendency of the petitions in court. The order dated 8th May, 2013 clearly appointed Sh. J.P. Sengh, Senior Advocate as a “*mediator*” to mediate between the parties. The settlement admittedly was a result of the mediation between the parties. We, therefore, have no hesitation in holding that the settlement of 30th October, 2013 was the result of mediation and not of conciliation.

47. In view of the above discussion, the impugned order of 14th November, 2014 holding that the settlement agreement was arrived at in conciliation proceedings and morphed into an arbitral award was clearly erroneous. Section 74 of the Arbitration and Conciliation Act, 1996 would have no application and the settlement could not be executable as if it is an arbitral award. Therefore, the direction by the learned Single Judge that such settlement was to be so treated which could be so executed straightway by appropriate proceedings in Gurgaon is undeniably contrary to law.

48. Having so concluded, we now come to the next issue. What

is the fate of a settlement agreement, as the settlement dated 30th October, 2013 finally disposing all issues in a petition under Section 9 of the Arbitration and Conciliation Act, 1996?

IV. Whether the disposal of proceedings under Section 9 of Arbitration and Conciliation Act, 1996 would result in a decree

49. Mr. Akhil Sibal, learned counsel appearing on behalf of the appellant has submitted that having regard to the stipulation contained in Section 89 of the CPC and Rule 25 of the Delhi High Court Mediation & Conciliation Rules, 2004, on receipt of the settlement, the court has no option but to “*pass a decree in accordance with the terms thereof*”. It is contended that the court had thereafter rightly passed a decree in terms of the settlement agreement.

50. Mr. Sudhanshu Batra, learned Senior Counsel for the respondent, however, submits that a court has no power to direct drawing up of a decree in any proceeding under the Arbitration and Conciliation Act, 1996. It is submitted that the Delhi High Court Mediation and Conciliation Rules cannot override the statutory provisions. It is also contended that in terms of the provisions of the CPC as well, no decree can result in proceedings under the Arbitration and Conciliation Act, 1996.

51. In order to adjudicate on these submissions, it is essential to first and foremost consider the meaning of the expressions “*judgment*”, “*order*” and “*decree*”. The expression “*judgment*” is

defined under Section 2(9) of CPC in the following terms :

“judgment” means the statement given by the Judge on the grounds of a decree or order;

52. The expression ‘order’ used in the Arbitration & Conciliation Act is also not defined and would derive colour from the Code of Civil Procedure. An ‘order’ is defined under Section 2(14) of the CPC as under:

“order” means the formal expression of any decision of a Civil Court which is not a decree;

53. So far as a ‘decree’ is concerned, it is specifically defined under Section 2(2) of the Code as under:

“decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

A ‘decree’ includes rejection of a plaint and determination of a question within Section 144.

54. On the question as to whether proceedings under the Arbitration Act, 1996 can result in a decree, we may also usefully refer to the pronouncement of the Supreme Court reported at ***AIR 2007 SC 168 Paramjeet Singh Patheja v. I.C.D.S. Ltd.*** wherein it was held as follows :

“21. The words “court”, “adjudication” and “suit” conclusively show that only a court can pass a decree and that too only in a suit commenced by a plaintiff 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.

xxx

xxx

xxx

43. For the foregoing discussion we hold:

...

(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 CPC and hold 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.”

(Emphasis supplied)

55. “*Proceeding commenced by the institution of a plaint*” would include a proceeding in a suit; appellate or execution proceedings or applications under the CPC during the pendency of the suit or appeal. Proceedings under the Arbitration Act, 1996 in a court could, *inter alia*, be under Sections 8, 9, 11, 36 of the Act. No proceeding under this Act commences with a plaint. Final adjudication by the Arbitral Tribunal does not result in an ‘order’ but an ‘award’, which is not “*a formal expression of an adjudication*” by a civil court as defined in Section 2(14) of the Code of Civil Procedure.

56. By virtue of Section 36 of the Arbitration & Conciliation

Act, which is concerned with enforcement of an arbitral award, the Legislature has directed that such award, shall be “*enforced*” in accordance with the provisions of the Code of Civil Procedure, 1908, in the same “*manner as if it were a decree of the court*”. Therefore, even the passing of an arbitral award does not result in the passing of a decree. It is only to be executed in the same manner as a decree would be executed.

57. On the other hand, final disposal of the other petitions under the Arbitration and Conciliation Act, 1996 is effected by an order of the court thereon. Section 2(14) of the CPC clearly excludes an “*order*” from a “*decree*” of the court as defined under the CPC.

58. It is therefore, well settled that even if a petition under Section 9 of the Arbitration Act was to be allowed, no decree could be passed nor a decree sheet could be ordered to be drawn up. Proceedings under Section 9 of the Arbitration Act culminating in a settlement agreement between the parties result in the passing of an order in terms thereof.

59. We are supported in the view which we have taken by several instances of final closures of matters in mediation which do not result in decrees. It is common knowledge that parties to all kinds of proceedings including matrimonial; child guardianship; motor accident claims etc. are being referred to mediation with their consent. Settlement agreements are reached in these mediations. As a result, the court proceedings are disposed of by orders in terms of the mediation agreements between the parties. Orders on mediation settlements finally disposing of petitions

seeking guardianship or custody of children under the Guardians & Ward Act do not result in the passing of a decree. However, dissolution of a marriage between the parties under Section 13 of the Hindu Marriage Act can only be by a decree passed in accordance with the specific provisions of law to this effect.

Similarly, final orders on mediation settlements in proceedings for compensation under the Motor Vehicles Act before the Motor Accident Claims Tribunals do not result in a decree.

60. Final orders are also passed in exercise of extraordinary jurisdiction by the High Court finally adjudicating writ petitions under Article 226 of the Constitution of India. No decree results on these orders as well.

61. In winding up proceedings also, the petitioning creditor and the company concerned, often agree to mediation and the settlements arrived at therein result in orders disposing of the winding up proceedings in terms thereof, not a decree.

62. Similarly, private parties seeking quashing of criminal complaints under Sections 498A and 406 of the IPC arising out of matrimonial proceedings are also sent to mediation and settlement agreements are reached. No decree can be or is passed thereon.

63. As is evident from the above discussion, a settlement agreement arrived at by mediation when placed before the concerned court, results in passing of an appropriate order or a decree in accordance with the substantive law binding the parties to the settlement agreement. If the mediation settlement is reached in a reference arising out of a civil suit, when placed before the civil

court is given the same treatment as is accorded to a compromise under Order XXIII of the Code of Civil Procedure and dealt with on the considerations and manner prescribed thereunder. If disposing of a suit, such settlement results in a decree being passed in terms thereof. Such decree would be executable under Section 38 read with Order XXI of the Code of Civil Procedure.

Rules cannot be inconsistent with provisions of the enabling Act

64. Mr. Akhil Sibal, learned counsel for the appellant has placed strong reliance on Rule 25 of the Mediation Rules which has mandated that a decree is to be passed in terms of the settlement agreement. This would not, however, be the correct position in law.

65. Perusal of Section 89 of the Code of Civil Procedure would show that sub-section (a) of Section 2 of Section 89, mandates that so far as ‘*conciliation*’ is concerned, the procedure under the Arbitration & Conciliation Act, 1996 has to be followed. As against this, Clause (d) of sub-section 2 of Section 89 prescribes that in mediation, “*such procedure as may be prescribed*” has to be followed.

66. The Mediation and Conciliation Rules, 2004, prescribing the procedure, were framed in furtherance of the rule making power prescribed under Part X and the enabling mandate under Section 89 of the Code of Civil Procedure and were notified by the High Court of Delhi. We reproduce the notification hereunder :

“NOTIFICATION

No.171/Rules/DHC

Dated: 11th August, 2005

In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of Section 89 of the said Code and all other powers enabling it in this behalf, the High Court of Delhi hereby makes the following Rules:-

MEDIATION AND CONCILIATION RULES, 2004

xxx

xxx

xxx”

67. Such procedure guiding settlement agreements is to be found in Rules 24 and 25 of the Delhi High Court Mediation and Conciliation Rules which read as follows :

“Rule 24 : Settlement Agreement

(a) Where an agreement is reached between the parties in regard to all the **issues in the suit or proceeding** or some of the issues, the same shall be **reduced to writing and signed by the parties** or their constituted attorney. If any counsel has represented the parties, the Mediator/Conciliator may obtain his signature also on the settlement agreement.

(b) The agreement of the parties so signed **shall be submitted to the Mediator/Conciliator who shall, with a covering letter signed by him, forward the same to the Court in which the suit or proceeding is pending.**

(c) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 or where, the Mediator/Conciliator is of the view that no settlement is possible, he shall report the same to the Court in writing.

Rule 25 : Court to fix a date for recording settlement and passing decree.

(a) On receipt of any settlement, the court shall fix a date of hearing normally within seven days but in any case not beyond a period of fourteen days. On such date of hearing, if the Court is satisfied that the parties have settled their dispute(s), it shall pass a decree in accordance with terms thereof.

(b) If the settlement dispose of any certain issues arising in the suit or proceeding, on the basis of which any decree is passed as stated in Clause (a), the Court shall proceed further to decide remaining issues.”

(Emphasis by us)

68. It is trite that rule-making power vested in an authority does not enable it to make rules which traverse beyond the scope of the enabling Act or which are inconsistent or repugnant to the Act. When legislative power is delegated the power must be exercised within the scope of the authority conferred by the enabling Act.

69. In this regard, we may advert to the judicial pronouncements of the Supreme Court. In a judgment reported at *(1983) 2 SCC 402 State of Karnataka & Anr. v. H. Ganesh Kamath & Ors.* the Supreme Court struck down certain rules made under the Motor Vehicles Act as being inconsistent with the Act. It was held thus:

“7. ... Though the substituted clause (aa) inserted in sub-section (2) of Section 21 confers power upon a State Government to make rules providing for the minimum qualifications of persons to whom licences to drive a transport vehicle are issued, such power cannot include within its scope the power to make a rule contrary to the provisions of the Act conferring the rule-making power. It is a well-settled principle of interpretation of statutes that the conferment of rule-making power by an Act does not enable the rule-making authority to make a

rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.”

70. The Supreme Court has extensively considered the scope of delegated legislation in a pronouncement reported at **(2012) 7 SCC 683 *Union of India v. S. Srinivasan***. It was held thus:

“21. At this stage, it is apposite to state about the rule-making powers of a delegating authority. If a rule goes beyond the rule-making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it.”

71. In the pronouncement reported at **(1989) 4 SCC 187 *Supreme Court Employees' Welfare Assn. v. Union of India*** it was held thus:

“62. Thus, as delegated legislation or a subordinate legislation must conform exactly to the power granted. ...

xxx

xxx

xxx

98. ... Rules, whether made under the Constitution or a statute, must be intra vires the parent law under which power has been delegated. xxx xxx xxx”

72. In **(2004) 8 SCC 747 *Mahachandra Prasad Singh (Dr.) v. Chairman, Bihar Legislative Council***, it was held thus :

“13. ...The rules being delegated legislation are subject to certain fundamental factors. Underlying the concept

*of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the **intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it.** The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. **The delegate's function is to serve and promote that object, while at all times remaining true to it.** That is the rule of primary intention. Power delegated by an enactment does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. **But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.** (See Section 59 in chapter "Delegated Legislation" in Francis Bennion's Statutory Interpretation, 3rd Edn.)..."*

(Emphasis by us)

73. In the pronouncement reported at (1975) 1 SCC 421 *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, the Court has held thus:

*"18. ... The rules and regulations comprise those actions of the statutory or public bodies in which the legislative element predominates. These statutory bodies **cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature.** Rules and regulations made by reason of the specific power conferred on the statute to make rules*

and regulations establish the pattern of conduct to be followed. Rules are duly made relative to the subject-matter on which the statutory bodies act subordinate to the terms of the statute under which they are promulgated...”

74. In (2011) 9 SCC 573, **Pratap Chandra Mehta v. State Bar Council of M.P.**, while discussing about the conferment of extensive meaning, it has been opined that :

“58. ... The Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act, while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation, when discretion is vested in such delegatee bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved, would be the relevant factors to be considered by the Court.”

75. The reference in Rule 25 of the Delhi High Court Mediation and Conciliation Rules that, on receipt of any settlement, if the court is satisfied with regard to the settlement, it “shall” pass “a decree” in accordance with terms thereof would neither override the statutory mandate of the Arbitration & Conciliation Act, 1996 nor the provisions of the Code of Civil Procedure. It cannot proscribe the jurisdiction of the court to pass a decree as well.

76. The Mediation and Conciliation Rules, 2004 derive their existence as well as statutory authority from the Code of Civil Procedure and cannot confer such substantive rights which the enabling Act does not prescribe. The intention of the rule making

authority by Rule 25 is to give sanctity to a settlement agreement reached in mediation in accordance with law. Such intention and purpose is achieved if the substantive proceedings are disposed of either by passing a decree in the suit in terms of the settlement or the proceeding only if the substantive law so mandates. It is also achieved by an order accepting and disposing of the proceeding in terms of the settlement in proceedings where the substantive law does not envisage passing a decree as under the Arbitration and Conciliation Act, 1996.

Such an order (passed in terms of the settlement agreement) would be executable under Section 36 of the Code of Civil Procedure in the same manner as a decree.

77. In the present case, the parties and the mediator followed the procedure prescribed under Rules 24 and 25 of the Rules before the Delhi High Court Mediation & Conciliation Centre.

78. The parties achieved resolution of all pending disputes in both the petitions and executed the “*Full and Final Settlement Agreement*” dated 30th October, 2013. The agreement was placed before the court in OMP No.378/2013 and 420/2013 both being petitions under Section 9 under the Arbitration & Conciliation Act, 1996, on the 6th of November 2013. At this stage, the court have only passed a final order disposing of the matter in terms thereof. However, when the settlement was placed before the court, the same was accepted and the petitions disposed of on the 6th of November 2013. Thereafter the court additionally directed passing of a decree in terms thereof.

Clearly, such direction was an unnecessary surplusage.

79. On the 6th of November 2013, the court was legally empowered only to pass an order accepting the settlement in the pending petitions under Section 9 of the Arbitration and Conciliation Act and disposing the petitions in terms of the settlement. The court had no jurisdiction at all to pass a decree in terms thereof. Such direction was contrary to law.

80. Mr. Sudhanshu Batra, learned senior counsel appearing for the respondent also submits that in a petition under Section 9 of the Arbitration & Conciliation Act, in case a settlement is arrived at between the parties, only an order in terms thereof can be passed. No formal decree is required to or can be drawn up. It is submitted by Mr. Batra that for this reason, the direction in the order dated 6th November, 2013 to the extent that a decree was passed in terms of the settlement agreement is erroneous.

Learned senior counsel would submit that, however, it makes no difference to the remedy which is followed by the parties. For the time being, we are not examining the execution mechanism and shall look into this aspect a little later.

V. **Jurisdiction of the learned Single Judge as an executing court on the 14th November, 2014 to correct the order dated 6th November, 2013**

81. At this stage, it has been submitted by Mr. Sudhanshu Batra, learned Senior Counsel that the direction (that a decree is passed on the 6th of November 2013) was erroneous and could have been

corrected by the executing court in exercise of the power under Section 152 of the CPC. This is staunchly contested by Mr. Sibal who submits that the decree was rightly passed.

82. The above narration would show that neither party contested the acceptance of the settlement or the disposal of the petitions in terms thereof. It is only when the respondent sought execution of the decree passed on 6th November, 2013, that the executing court examined the matter on 14th November, 2014 and rightly observed that there could not be a decree on 6th November, 2013 but erroneously concluded that the settlement was a conciliation agreement liable to be enforced in the manner of an arbitral award.

83. The core issues which therefore, arise are that, when the execution petition was before the executing court, what would be the options available to the court? Would the order dated 6th November, 2013 have to be declared illegal by the executing court? Or did the court have the jurisdiction to ignore the direction passing a decree and proceed to execute the order to the extent it accepts the settlement?

84. It was incumbent upon the executing court to examine the same in accordance with Part II and Order XXI of the CPC. The appellant objects that the jurisdiction under Order XXI CPC did not enable the executing court to go behind the decree and question its validity.

85. Mr. Sudhanshu Batra, learned Senior Counsel, however, submits that the direction on 6th September, 2013 passing a decree was an error which was liable to be corrected under Section 152

CPC and on the 14th of November 2014, the court has exercised the jurisdiction thereunder to do so.

(i) Scope of Section 152 of the CPC

86. Mr. Batra would also submit that the finding in the order dated 14th November, 2014 that the settlement agreement dated 30th September, 2013 was a result of conciliation which morphed into an arbitral award and was executable straight away, was also a bonafide error and could also be corrected by this court in exercise of power under Section 152 of the CPC.

87. These submissions are opposed with some vehemence by Mr. Akhil Sibal, learned counsel for the appellant. It is urged that even the respondents before us accept that the order dated 14th November, 2014 to the extent it holds that the settlement was reached in conciliation was erroneous and also that on 6th November, 2013, no decree could have been passed. Mr. Sibal submits that this court has no jurisdiction under Sections 151 and 152 of the CPC to correct the errors in the present appeal.

88. This contention of Mr. Batra is contested by Mr. Sibal who submits that as a result, this court has been called upon to correct not only the order dated 14th November, 2014 but also the order dated 6th November, 2013.

Mr. Sibal also disputes the applicability of Section 152 CPC and the jurisdiction of this court to correct the orders.

89. In view of the respondent's reliance on Section 152 of the CPC, we propose to examine its scope. The legislature has

anticipated the possibility of mistakes in judgments, decrees or orders as well as errors which may arise from accidental slips or omissions and has empowered the courts to correct the same in Section 152 of the CPC which reads as follows :

“152. Amendment of judgments, decrees or orders.- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

90. The statutory prescription is explicit and enables courts to correct “*at any time*”, in judgments and orders, which are “*clerical or arithmetical mistakes*” as well as “*accidental slip or omission*”. The legislature enables the court to do so on its “*own motion*” or “*on the application by the parties*”. The exercise of this power has come up for judicial scrutiny and we hereafter note some authoritative precedents which set out the parameters within which such powers shall be exercised.

91. In the judgment of the Supreme Court reported at **(2001) 4 SCC 181, Jayalakshmi Coelho v. Oswald Joseph Coelho**, the parties had moved a petition seeking divorce by mutual consent under Section 28 of the Special Marriages Act, 1954. In the petition, reference was made to a memo of agreement executed earlier regarding a flat which was jointly purchased in the wife’s name, who “*shall relinquish*” her rights therein in favour of her husband upon receipt of ₹1,60,000/- within four months of the execution of the agreement. However, in the prayer clause, only

the relief of dissolution of marriage by the decree of divorce was sought. After the Family Court passed the consent decree of divorce, the husband filed an application under Section 152 of the CPC, as aforesaid, seeking modification of the decree to incorporate a mandatory injunction against her wife directing her to transfer the flat in his name. The application was opposed by the wife who submitted that the required payment had not been made by the husband. This application was allowed by the Family Court which modified the decree incorporating in it eleven clauses of the said memo of agreement. The wife's writ petition as well as the letters patent appeal against the order of the Family Court were dismissed. She assailed these orders in the proceedings before the Supreme Court. The principle on which the power under Section 152 rests was authoritatively stated by the Supreme Court in para 13 of the judgment which reads as follows :

“13. xxx xxx The principle behind the provision is that no party should suffer due to mistake of the court and whatever is intended by the court while passing the order or decree must be properly reflected therein, otherwise it would only be destructive to the principle of advancing the cause of justice. ...”

(Emphasis by us)

92. In ***Coelho***, the Supreme Court adverted to judicial pronouncements setting out the parameters of the exercise of jurisdiction further noting as follows :

“13. ... A reference to the following cases on the point may be made:

*The basis of the provision under Section 152 CPC is found on the maxim actus curiae neminem gravabit i.e. an act of court shall prejudice no man (Jenk Cent-118) as observed in a case reported in Assam Tea Corpn. Ltd. v. Narayan Singh [AIR 1981 Gau 41]. Hence, **an unintentional mistake of the court which may prejudice the cause of any party must be rectified.** In another case reported in L. Janakirama Iyer v. P.M. Nilakanta Iyer [AIR 1962 SC 633] it was found that by mistake the words “net profit” were written in the decree in place of “mesne profit”. This mistake was found to be clear by looking to the earlier part of the judgment. The mistake was held to be inadvertent. In Bhikhi Lal v. Tribeni [AIR 1965 SC 1935] it was held that a **decree which was in conformity with the judgment was not liable to be corrected.** In another case reported in Master Construction Co. (P) Ltd. v. State of Orissa [AIR 1966 SC 1047 : (1966) 17 STC 360] it has been observed that **arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the court liable to be corrected.** To illustrate the point, it has been indicated as an example that in a case where the order may contain something which is not mentioned in the decree would be a case of unintentional omission or mistake. Such omissions are attributable to the court which may say something or omit to say something which it did not intend to say or omit. **No new arguments or rearguments on merits are required for such rectification of mistake.** In a case reported in Dwaraka Das v. State of M.P. [(1999) 3 SCC 500] this Court has held that the **correction in the order or decree should be of the mistake or omission which is accidental and not intentional without going into the merits of the case.** It is further observed that the **provisions cannot be invoked to modify, alter or add to the terms of the***

*original decree so as to in effect pass an effective judicial order after the judgment in the case. The trial court had not granted the interest pendente lite though such a prayer was made in the plaint but on an application moved under Section 152 CPC the interest pendente lite was awarded by correcting the judgment and the decree on the ground that non-awarding of the interest pendente lite was an accidental omission. It was held that the High Court was right in setting aside the order. **Liberal use of the provisions under Section 152 CPC by the courts beyond its scope has been deprecated.** While taking the above view this Court had approved the judgment of the Madras High Court in *Thirugnanavalli Ammal v. P. Venugopala Pillai* [AIR 1940 Mad 29 : (1939) 2 MLJ 751] and relied on *Maharaj Puttu Lal v. Sripal Singh* [AIR 1937 Oudh 191 : ILR 12 Luck 759] . Similar view is found to have been taken by this Court in a case reported in *State of Bihar v. Nilmani Sahu* [(1996) 11 SCC 528] where the Court in the **guise of arithmetical mistake on reconsideration of the matter came to a fresh conclusion** as to the number of trees and the valuations thereof in the matter which had already been finally decided. Similarly in the case of *Bai Shakriben v. Special Land Acquisition Officer* [(1996) 4 SCC 533] this Court found **omission of award of additional amount under Section 23(1-A), enhanced interest under Section 28 and solatium etc. could not be treated as clerical or arithmetical error in the order.** The application for amendment of the decree in awarding of the amount as indicated above was held to be bad in law.”*

(Emphasis by us)

93. It was further held by the Supreme Court in *Coelho* that the power to make such corrections under Section 152 was inherent in all courts and authorities, observing thus :

“14. As a matter of fact such inherent powers would generally be available to all courts and authorities irrespective of the fact whether the provisions contained under Section 152 CPC may or may not strictly apply to any particular proceeding. In a matter where it is clear that something which the court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the court to rectify such mistake. But before exercise of such power the court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise, that is to say, while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the court but unintentionally the same does not find mention in the order or the judgment or something which was not intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed. There should not be reconsideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought the court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of the court's inherent powers as contained under Section 152 CPC. It is to be confined to something initially intended but left out or added against such intention.”

(Emphasis by us)

No reconsideration of the matter on its merits is permissible under Section 152 of the CPC.

94. We may also advert to the pronouncement of the Supreme Court reported at (2003) 1 SCC 197, *Lakshmi Ram Bhuyan v. Hari Prasad Bhuyan & Ors.* wherein a question was raised as to the relief granted by a judgment and the preparation of the decree thereon. In order to resolve the conundrum which had resulted, the Supreme Court referred to the power of the court under Section 152 to vary its judgment so as to give effect to its meaning and intention, which observations authoritatively explained the scope of the power under Section 152 in the following terms :

*“14. How to solve this riddle? In our opinion, the successful party has no other option but to have recourse to Section 152 CPC which provides for clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission being corrected at any time by the court either on its own motion or on the application of any of the parties. A reading of the judgment of the High Court shows that in its opinion the plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding in the suit. Section 152 enables the court to vary its judgment so as to give effect to its meaning and intention. Power of the court to amend its orders so as to carry out the intention and express the meaning of the Court at the time when the order was made was upheld by Bowen, L.J. in *Swire, Re, Mellor v. Swire*[(1885) 30 Ch D 239 : 53 LT 205 (CA)] subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice. Lindley, L.J. observed that if the*

order of the court, though drawn up, did not express the order as intended to be made then

“there is no such magic in passing and entering an order as to deprive the court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal”.”

(Emphasis by us)

95. Placing reliance on the pronouncement reported at (2004) 1 SCC 328, *State of Punjab v. Darshan Singh*, Mr. Akhil Sibal, learned counsel for the appellant vehemently opposes the above submission of the respondents. The following observations of the court have been placed before us:

“12. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate passing of effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot and, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court

concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party, if at all, is to file an appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of the Code even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this Court in Dwaraka Das v. State of M.P. [(1999) 3 SCC 500] and Jayalakshmi Coelho v. Oswald Joseph Coelho [(2001) 4 SCC 181].”

(Emphasis by us)

96. These observations are relied upon in support of the proposition that the order dated 14th November, 2014 cannot be corrected by this court in exercise of power under Section 152 of the CPC. It is trite that Section 152 cannot be invoked to modify, alter or add to the terms of the original order or decree so as to pass an effective judicial order after the judgment in the case [Ref. : **(2004) 1 SCC 328, State of Punjab v. Darshan Singh (para 13)**]

97. Our attention has also been drawn to a Single Bench

pronouncement of the Patna High Court reported at **(2004) 2 PLJR 254, Gorakh Giri v. Surendra Giri & Ors.** This judgment was rendered in a petition filed by the plaintiff whose suit was allowed by the appellate court. The operative part of the appellate court judgment was that the appeal succeeds and the order of the trial court dismissing the suit was thereby set aside. As a result, the suit prayer stood granted. The plaintiff's execution for delivery of possession in terms of the suit prayer was opposed by the defendant who contended that the decree was inexecutable. The petitioner's revision to the High Court was dismissed with the observation that the order would not stand in his way to proceed in accordance with law. Thereafter, the petitioner/plaintiff filed an application under Sections 151, 152 and 153 of the CPC for amendment of the judgment and the decree contending that though the appeal had been allowed, but there was a mistake in the judgment and the decree as reliefs in the plaint including delivery of possession had not been incorporated therein. This application was unfortunately rejected by the trial court holding that there was no accidental slip by the omission. In para 7 of the judgment, the High Court observed that the courts are meant for administration of justice and as such "*it is inherent in the Constitution to have a power to achieve that end and to undo the wrong*". After advertent to the powers under Sections 151, 152 and 153 of the CPC, it was further observed that "*these powers have been vested in the Court with the sole purpose to see that no party should suffer due to mistake of the Court and ends of justice*".

or administration of justice is not defeated by clerical or arithmetical mistakes, omissions or such similar errors.”

98. Mr. Sudhanshu Batra, learned counsel for respondent no.1 has also placed the pronouncement of the Patna High Court reported at ***AIR 1984 Pat 354, Rajeshwari Singh & Anr. v. Lakhrajo Kunwar***. In this case, the plaintiff no.2 had died and application was filed to seek his expunction and substitution of the name of his widow. Unfortunately, no formal order was passed on this application and the proceedings in this suit culminated in a decree in favour of the plaintiff. The plaintiff's application for amendment in the decree for expunction of the name of plaintiff no.2 from the plaint as well as the decree and substitution of his widow was allowed by the trial court. This order was the subject matter of the revision before the Patna High Court. In para 4 of the judgment, the court observed that the petition had resulted on account of “*failure of the court to do its part of the duty*” and that “*any injustice done by procedure not intended by court to employ must be remedied on principle that act of court shall prejudice none*”. The question which was answered by the court was whether the substitution of the deceased plaintiff could be in these circumstances allowed in exercise of the courts inherent power under Sections 151, 152 and 153 of the CPC or whether the plaintiff was required to ask for setting aside of the decree and seek permission to amend the plaint and have the case retried. The defendant obviously asserted that the court had no jurisdiction to permit the amendment. In para 8, the court concluded as follows :

*“8. It is manifest if the plaintiffs prayer for amendment sought in the Court below allowed by the impugned order is set aside, the plaintiff will be made to suffer grave injustice. This will defeat the ends of justice and perpetrate an abuse of the process of the Court. **Expunction and substitution only needed a formal order.** The prayer for substitution in the suit was not contested by the defendants. The Court noticed the prayer for **expunction and substitution of the name of the wife of plaintiff No. 2** in its order No. 83 dt. 10-7-1981.*

*In my opinion, merely because the Court did not record a formal order and directed “Prarthana Patra Sanchalit Ho” the plaintiff could not be made to suffer this ordeal. The Court took cognizance of the substitution petition. It was uncontested. **I fail to understand why it cannot be held to be an order allowing the prayer of the plaintiff. In the words of Lord Denning in his book, the closing Chapter, “to secure as near as may be, the doing of justice”.** Once I take that view, then in not penning through the name of plaintiff No. 2 in the plaint and inserting the name of his wife is purely a clerical error on the part of the office of the Court. The office while preparing the decree allowed the clerical error to continue. **The provisions of Ss. 151, 152 and 153 of the C.P.C. are in wide terms conferring power upon Court to minimise litigation and avoid multiplicity of proceedings and further to see that the technicalities may not be allowed to stand in the way of substantial justice.** Further the Court is invested with the inherent power under S. 151 of the C.P.C. This “**power has its roots in necessity and its breadth is co-extensive with the necessity**”, as per Krishna Aiyer, J, in the case of. *The Newabganj Sugar Mills Co. Ltd. v. Union of India* (AIR 1976 SC 1152). This, in my opinion, only means that this power is **more for the necessity of the Court to be resorted, to achieve the ends of justice and to prevent abuse of the process of the Court in a given circumstance.** The instant*

case, in my opinion, presents a situation where the Court is called upon to act for the ends of justice.”

(Emphasis by us)

99. We may note that Mr. Akhil Sibal, learned counsel for the appellant has objected that this judgment reinforces his objection that the power under Section 152 could mandatorily be exercised only on an application by the party seeking rectification. This submission is completely misdirected inasmuch as **Bhuyan** relied upon by the court as well as Section 152 of the CPC are explicit that the power can be exercised *suo moto*.

100. Let us also examine the case law on the powers of the appellate court. Mr. Sudhanshu Batra, learned senior counsel for the respondent no.1 has relied upon a Division Bench pronouncement of the Andhra Pradesh High Court reported at **AIR 1959 AP 360, Narkulla Venkayya & Anr. v. Noona Satyanaravana & Anr.** in support of his submission that the appellate court is also empowered to correct mistakes or errors in the decree under appeal. It appears that in this case, the plaintiffs had erred in mentioning the correct acreage of one of the plots by incorrectly describing another one. The appellate court had noted that this was sheer inadvertence as was evident from the gift deed placed on record. On account of this mistake in the plaint schedule, the same mistake had entered into the judgment and decree. The court was of the opinion that the mistakes had crept into the plaint by sheer inadvertence which was responsible for the mistake or error in the decree and held as follows :

*“30. In appropriate cases like this where **mistakes have arisen by reason of inadvertence** in entering the number in the plaint, the Court has ample powers under Section 152 to correct such mistakes. The Court below has discussed this point at length. We do not feel called upon to enter into a detailed discussion on the subject with reference to the authorities on the point. But we feel however, that this power could have been exercised only by the Court that passed the decree in appeal.*

xxx

xxx

xxx

33. In exercising of our powers of appeal in relation to the decree under appeal, it is perfectly open to us to correct the necessary mistakes. We therefore direct corrections be made in the plaint schedule and also in the decree in relation to the acreage of Survey No. 526 and S. No. 529. The petition filed by the plaintiff is therefore allowed. No orders are necessary in the revision petition.”

(Emphasis furnished)

101. Undoubtedly, the exercise to correct the mistakes was undertaken after giving opportunity to the other side to oppose the same and due hearing. Mr. Akhil Sibal, learned counsel for the appellant submits that the principles laid down in this case would have no bearing in the present case wherein the power under Section 152 was exercised on 14th November, 2014 by the executing court, whereas in the case before the Andhra Pradesh High Court, the appeal was against the very decree which was corrected by the appellate court. To our mind, in the present case, nothing turns on this objection. We have found that there was an error in the order dated 6th November, 2013 and there was no prohibition upon the executing court from correcting the same on

14th November, 2014. Therefore, as the appellate court against the order dated 14th November, 2014, this court has the jurisdiction to correct the inadvertent errors.

102. In ***Gorakh Giri***, the court placed reliance on para 14 of the judgment reported at (2003) 1 SCC 197, ***Lakshmi Ram Bhuyan v. Hari Prasad Bhuyan***. It was held as follows :

“11. Thus, it is now well-settled law that such mistake can be corrected by taking recourse to section 152 of the Code. Coming to the facts of the present case, it is clear that the appellate Court accepted the claim of the plaintiff-petitioner and set aside the judgment and decree of the trial Court and allowed the appeal. The intention of the appellate Court was to grant all the reliefs as prayed for by the plaintiff-petitioner in the plaint, but the same was not expressed in the judgment and decree and, thus, there was a total failure on the part of the appellate Court to deliver the judgment in terms of the statutory provisions contained under Order XLI, Rules 31 and 35 of the Code. The appellate Court, thus, committed a jurisdictional error in holding that it has no power to rectify the mistake by taking recourse to section 152 and other sections of the Code as mentioned in the petition. Accordingly, the impugned order is set aside and the appellate Court is directed to make necessary rectification in the judgment and decree clarifying the reliefs, which in the opinion of the appellate Court the plaintiff-petitioner was entitled keeping in view the intention expressed in the judgment.”

(Emphasis by us)

Thus, the appellate court has jurisdiction to effect rectification or correction of inadvertent or accidental errors which do not go to the merits of the case.

103. It needs no further elaboration that in exercise of jurisdiction under Section 152 of the CPC, the court has to ensure that the intention of the court in passing the order under rectification survives.

104. We may usefully sum up the parameters of exercise of the inherent power under Section 152 of the CPC to correct clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission as laid down in the judicial precedents :

- (a) Whatever is intended by the court while passing an order or decree must be properly reflected therein and no party should be permitted to suffer due to mistake of the court.
- (b) An arithmetic mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing while an error arising out of or occurring from accidental slip or omission is an error due to a careless mistake on the part of the court, all of which are liable to be corrected.
- (c) An unintentional mistake which may prejudice the cause of any party must be rectified.
- (d) No new arguments or re-arguments or reconsideration on merits should be required for rectification of such mistakes.
- (e) Liberal use of the provisions under Section 152 of CPC by courts beyond its scope should not be permitted.
- (f) Inherent power under Section 152 of the CPC is generally available to all courts and authorities irrespective of as to whether the provisions under Section 152 of the CPC may or

may not strictly apply to a particular proceeding. Before exercise of the power under Section 152, the court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise.

- (g) The intention of the court that an order or decree should be passed in a particular manner is not translated into the decree or order due to clerical, arithmetical error or accidental slip.
- (h) The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order could have been passed i.e. to say there should not be reconsideration of merits.
- (i) On consideration, the court may find that it may have committed a mistake in passing an order but every such mistake does not permit rectification in exercise of the court's inherent powers. It is to be confined to something initially intended but left out or added against such intention.
- (j) Such errors can be corrected at any time by the court either on its own motion or on the application of any of the parties.
- (k) Power of the court to amend its orders so as to carry out the intentions and express the meaning of the court at the time when the order was made, is subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice.
- (l) In cases where mistakes have arisen by reason or

inadvertence, the court has ample power under Section 152 to correct such mistakes.

- (m) It is perfectly open to an appellate court exercising its power of appeal in relation to decree under appeal to correct the necessary mistakes.
- (n) It is trite that after passing of a judgment, decree or order, the same becomes final subject to further remedies prescribed under law in respect of the same and the very court or a tribunal cannot and, on mere change of view, is not entitled to vary the terms.
- (o) The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review.

(ii) Rules of procedure are only handmaiden to the ends of justice

105. The respondent has urged before us that if the plea of the appellant was accepted and it was held that the respondent was to be diverted to make an application under Section 152 of the CPC, in OMP Nos.378/2013 and 420/2013, to seek the rectification of the order dated 6th of November 2013, the same would result in denial of justice to the respondent for which no fault can be attributed to it.

106. The objection of the appellant to the rectification may be examined from another perspective. The only direction on 6th November, 2013 which is problematic is the passing of a decree

while disposing of the suit in terms of the settlement. Under Section 2(2) of the CPC, a “decree” is the formal expression of an adjudication. Whereas the grounds on which the decree rests, are stated in the judgment (*Section 2(14) CPC*). Decrees are drawn by the administrative side of the courts based on the judgment. It is to be borne in mind that in the present case, we are examining deletion of only a direction in an order that a decree be drawn up.

107. It is well settled that technical objections and grounds cannot be permitted to impede the cause of interests of justice. The court would mould procedure to ensure substantial justice to all parties concerned.

108. In this regard, we may advert to the authoritative pronouncement of the Supreme Court reported at **(2000) 9 SCC 94, *State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr.*** This judgment was rendered in service jurisprudence and involved promotions of the respondents. The Special Leave Petition was filed by the appellants after a delay of 679 days in challenging the Division Bench decision dated 22nd March, 1996 whereby the High Court had issued directions for reckoning the seniority position and consequential benefits of the respondent on different dates. The appellants were pressing before the court that condonation of delay in the case would enable the court to do substantial justice to the parties. We may borrow from the words of the Supreme Court on this objection. It was held as follows :

“11. Power to condone the delay in approaching the court has been conferred upon the courts to enable them to do

substantial justice to parties by disposing of matters on merits. This Court in Collector, Land Acquisition v. Katiji [(1987) 2 SCC 107 : 1989 SCC (Tax) 172 : (1987) 2 SCR 387] held that the expression “sufficient cause” employed by the legislature in the Limitation Act is adequately elastic to enable the courts to **apply the law in a meaningful manner which subserves the ends of justice — that being the life-purpose for the existence of the institution of courts.** It was further observed that a liberal approach is adopted on principle as it is realised that: (SCC p. 108, para 3)

xxx

xxx

xxx

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

(Emphasis by us)

109. The court finally condoned the delay with the following observations which are also of import so far as the present consideration is concerned :

“14. Looking into the facts and circumstances of the case, as noticed earlier and with the object of doing substantial justice to all the parties concerned, we are of the opinion that sufficient cause has been made out by the petitioners which has persuaded us to condone the

*delay in filing the petitions. Dismissing the appeals on technical grounds of limitation would not, in any way, advance the interests of justice but admittedly, result in failure of justice as the impugned judgments are likely to affect not only the parties before us, but hundreds of other persons who are stated to be senior than the respondents. The technicalities of law cannot prevent us from doing substantial justice and undoing the illegalities perpetuated on the basis of the impugned judgments. However, while deciding the petitions, the reliefs in the case can appropriately be moulded which may not amount to unsettle the settled rights of the parties on the basis of judicial pronouncements made by the courts regarding which the State is shown to have been careless and negligent. It is the paramount consideration of this Court to safeguard the interests of all the litigants and persons serving the Police Department of the State of Bihar by ensuring the security of their tenure and non-disturbance of accrual of rights upon them under the prevalent law and the rules made in that behalf. Accordingly **delay in filing the petitions is condoned.***”

(Emphasis by us)

The consideration which weighed with the court was advancing the interests of justice over and above technical objections and that reliefs in the case could be moulded which may “*not amount to unsettling settled rights*”. These are material considerations while ruling in favour of or against a technical objection.

110. The impact of exercise of the court’s inherent power is best elucidated by the Supreme Court in the judgment reported at **(1976) 1 SCC 120, Newabganj Sugar Mills Co. Ltd. & Ors. v. Union of India & Ors.** In this case, on account of a stay order

against controlled price, the petitioning sugar mill owners were allowed to overprice sugar sale during the court's stay order. The petitions were finally rejected. In this judgment, the Supreme Court was concerned with reclamation of the excess sums from the mill owners and distribution of the amounts amongst the earlier buyers after vindication of controlled prices. Calling the excess price, extracted by the mill owners a public injury, the Supreme Court considered the extent of its jurisdiction and the nature of the process which it must evolve in the following terms :

“3. ... A public injury perpetrated by calling in aid court process must quicken judicial conscience to improvise an ad hoc procedure to restore through the court's authority what has been nibbled from the numerous buyers. Innovative realism is obligated on the court on the broad basis actus curiae neminem gravabit. Why did the buyers pay higher prices for levy sugar? Because, they respected the High Court's order.”

(Emphasis by us)

111. Commenting on the limitations of the court to device measures, while rejecting the solution advocated by the mill owners, the court in *Newabganj* observed thus :

“6. ...The difficulty we face here cannot force us to abandon the inherent powers of the Court to do. “The inherent power has its roots in necessity and its breadth is coextensive with the necessity.” [Theoretical Basis of Inherent Powers Doctrine — Text material prepared by Jim R. Carrigan — Publication of National College of the State Judiciary, USA.] Certainly, we cannot go against any statutory prescription. ...”

These are the principles which have to guide our consideration.

112. In the present case, on the 6th of November 2013, the settlement between the parties was placed before the court. The court perused the terms thereof and observed that they were lawful. On the prayer of the parties, both the petitions under Section 9 were “*disposed of in terms of the settlement agreement dated 30th October, 2013*”. A direction was given to the parties to abide by the terms thereof. The intention of the court was therefore, to close the pending litigation between the parties in terms of the settlement which intention stands reflected by the disposal of the petition. It is after this disposal that the court also directed that “*a decree be passed in terms of the settlement agreement*”. The direction that a decree be passed in terms of the settlement was clearly a surplusage inasmuch as, as intended by the court, the petition stood disposed of in terms of the settlement.

113. Unmindful of the position that no decree could have been passed in law in the petitions under Section 9 of the Arbitration and Conciliation Act, 1996, the court has passed the decree unintentionally. Clearly, the same was a completely inadvertent mistake in law. Neither a fresh petition is required for correction of such mistake nor does it require any rehearing.

114. We may also note that the respondent has not contributed to the erroneous direction made by the court on 6th November, 2013, that a decree was being passed. The respondent-decree holder was therefore, not at fault.

115. It is noteworthy that the correction of the error and mistake in the order dated 6th of November 2013 only results in deletion of the completely unnecessary direction to draw up a decree which was also contrary to law. It has no impact on the legality of the settlement at all as held by the court. Even after correction, the impact of the order remains the same, as was the intention of the court on the 6th of November 2013, which was to dispose of the matters in terms of the settlement agreement. We, therefore, have no manner of doubt at all that for all these reasons, the executing court stood empowered to correct such unintentional mistake under Section 152 of the CPC.

116. For the reasons discussed above, there is also no legal prohibition on this court to direct the rectification of the order dated 6th November, 2013 by deletion of the direction that a decree was being passed. Consequently, the direction that a decree is passed in the order dated 6th of November 2013 shall stand deleted.

VI. Legality of the order dated 14th November, 2014

117. The next issue, therefore, which requires to be answered is as to whether having noted the error in the impugned order dated 14th November, 2014 when it found that the settlement agreement morphed into an arbitral award, is open to this court to correct the same?

Violation of principles of natural justice

118. We have discussed above the erroneous finding of learned Single Judge on the 14th of November, 2014 that on 6th November, 2013, the settlement agreement had morphed into an arbitral award on which there is no dispute.

119. Learned counsel for the appellant has additionally contended that the order of 6th November, 2013 was passed in the OMPs in the presence of the appellant. It is objected by Mr. Sibal, that the variation of the order dated 6th November, 2013 by the impugned order dated 14th November, 2014 without notice to the appellant was, thus, neither justified nor appropriate.

120. We, however, do not agree with Mr. Sudhanshu Batra, learned Senior Counsel for the respondents, that such an order could have been passed by the learned Single Judge on 14th November, 2014 without notice to the appellant. The appellant was entitled to a notice of the rectification and was also entitled to due hearing to put forth his contentions. The order dated 14th November, 2014, thus, was also in contravention of the well settled principles of natural justice.

121. In view of the above discussion, the order dated 14th November, 2014 disposing of the execution proceedings is liable to be set aside and quashed. As a result, the execution petition shall stand restored to its original position and would require to be considered in accordance with law.

VII. Whether this court can pass any order in respect of the execution proceedings filed in Gurgaon pursuant to the order dated 14th November, 2014?

122. It has been urged at some length by Mr. Sudhanshu Batra, learned senior counsel for the respondents that courts of justice would not let rules of procedure and technicalities come in the way of rendering substantive justice. It is urged that the respondents have filed execution proceedings in Gurgaon pursuant to the order dated 14th November, 2014 of the learned Single Judge. This order arose in the execution proceedings wherein the respondents had sought transfer of the decree dated 6th November, 2013. It is further submitted by Mr. Sudhanshu Batra, learned Senior Counsel that the respondent has taken several steps in the execution proceedings which are now pending in the courts at Gurgaon for over a year.

123. Learned Senior Counsel would place reliance on Section 36 of CPC to urge that be it a decree (in terms of the order dated 6th November, 2013) or an arbitral award (in terms of the order dated 14th November, 2014) or simply an order under the CPC, the process of its execution remains the same. The contention is that therefore, issuance of the transfer certificate is a mere formality and this court is empowered to do so.

124. It is contended that if the objection of the appellant with regard to the order dated 6th November, 2013 was accepted, the proceedings had to be treated as an order executable under Section 36 of the CPC. As such, the prayer for transfer of the

decree in the execution petition instead of transfer of the order for execution is merely in the nature of a technicality.

125. Mr. Sudhanshu Batra, learned Senior Counsel for the respondent no.1 contends that the issuance of the transfer certificate is really in the nature of a ministerial act. It is submitted that even if the transfer certificate was to be issued by the executing court, the order had to be transferred for execution to the very court where the execution is presently pending.

Learned senior counsel would submit that therefore, Section 152 of the CPC empowers this court also to validate the execution proceedings in Gurgaon and their continuation.

126. Mr. Akhil Sibal, learned counsel contests the submission of the respondents that this court must validate the execution proceedings filed by it in Gurgaon and submits that this court has no jurisdiction to do so.

127. It has been submitted at some length by Ms. Bina Gupta, learned counsel for the appellant also that the respondents did not care to disclose the pendency of the appeal against the order dated 14th November, 2014 in the execution petition at Gurgaon. There is thus, no equity in their favour and the execution proceedings at Gurgaon cannot be preserved by this court inasmuch as the procedure prescribed under Section 39 has to be mandatorily followed.

128. The order dated 14th November, 2014 was assailed by way of present appeal which was filed on 15th December, 2014. This appeal was listed before us for the first time on 6th January, 2015.

On this date, the respondents were represented in court by counsel who accepted notice on their behalf. We are informed by the respondents that the execution petition came to be filed only thereafter on 17th January, 2015 placing reliance on the order dated 14th November, 2014.

129. Reliance has been placed before us on the pronouncement of the Division Bench of the Madras High Court reported at ***AIR 1943 Mad 449, Venkamamidi Balakrishnayya v. Nannapaneni Linga Rao***. Before the Madras High Court, it was contended by the appellant that there was no valid executable decree so far as he was concerned. We extract hereunder paras 11 and 12 of the pronouncement which read as follows :

*“11. We have therefore to see under which class the objection to jurisdiction here raised really falls; and for this purpose we must consider whether the Tenali Sub-Court had jurisdiction over the subject-matter of the execution petition; for, this is the true test. There can be no doubt that after the transfer of territorial jurisdiction to the Tenali Sub-Court, it is that Court that had the jurisdiction over the properties. Section 39 which empowers the Court which passed the decree to send it for execution to another Court, states that this procedure may be adopted if the decree directs the sale or delivery of immovable property outside the local limits of the jurisdiction of the Court which passed it, that is to say, the transfer of the decree for execution to another Court is permitted if Court in which the property directed to be sold or delivered is situate within the territorial jurisdiction of that other Court. We consider that the **true effect of S. 39 is to recognise the transferee Court as having inherent jurisdiction, to sell or deliver properties situate within its territorial limits,***

but only that the jurisdiction is to be invoked by the machinery provided by the section. From this it follows that the absence of an order of transfer is merely an irregularity in the assumption of jurisdiction by the Tenali Sub-Court when proceedings were commenced in it, but that objection not having been taken in the first instance, the judgment-debtor (the appellant) must be held to have waived it. In this connexion an observation in 28 M.L.W. 885 [(‘28) 15 A.I.R. 1928 Mad. 746 : 114 I.C. 545 : 28 M.L.W. 885, Subramania Iyer v. Swaminatha Chettiar.] affirmed by the Full Bench in 55 Mad. 801 [(‘32) 19 A.I.R. 1932 Mad. 418 : 137 I.C. 305 : 55 Mad. 801 : 62 M.L.J. 687 (F.B.), Ramier v. Muthukrishna Ayyar.] is worthy of mention. It will be remembered that under O. 21, R. 5 if the Court to which the decree is to be sent is situate in the same District as the Court which passed the decree, the latter Court can send it directly to the former without the intervention of the District Court of the district in which the decree is to be executed. Adverting to this rule the learned Judges who decided 28 M.L.W. 885 [(‘28) 15 A.I.R. 1928 Mad. 746 : 114 I.C. 545 : 28 M.L.W. 885, Subramania Iyer v. Swaminatha Chettiar.] stated as follows:

If both the Courts are situated in the same district, seeing that the transfer might be made directly from the first Court to the second Court, without the intervention of any superior Court, it may be said that the objection by reason of the language of S. 38 or, in other words, by reason of the irregularity that the decree had not been formally sent to the second Court which has territorial jurisdiction is not fatal to the competency of the second Court to pass the order.

12. *In such a case, in spite of the irregularity, an order directing execution after notice may make the matter res judicata, but where as in this case, **the transfer cannot be made directly to the second Court, and it should***

only be made first to the District Court of Tanjore and the District Court may either execute the decree itself or may send it to the Sub-Court (vide O. 21, R. 5 of the CPC,) the irregularity cannot be overlooked as a mere irregularity.”

(Emphasis supplied)

130. In this judgment, the court has ruled that the absence of an order of transfer was merely an irregularity in the assumption of jurisdiction by the Tenali Sub-Court when proceedings were commenced in it. One of the considerations was that both the courts, the first court which passed the decree and the second court, where the properties were located, were within the same district.

131. In the present case, the order/decreed was passed by the learned Single Judge exercising original jurisdiction of the Delhi High Court. Execution proceedings were filed seeking attachment and sale of properties which are not located within the jurisdiction of the Court but are located in Gurgaon in the State of Haryana. As such, prayer was made in the execution petition that the decree be transferred for execution from this court to Gurgaon. Thus, the pronouncement of ***Venkamamidi Balakrishnayya*** has no application in the present case.

132. We have also noted above the requirements of Sections 36 and 39 of the CPC which requires that if the property which is the subject matter of an execution is located in a jurisdiction other than that exercised by the court, it has to transfer the decree for execution to such court having jurisdiction over the property. Before making the order for such transfer, the executing court has

to be satisfied that the judgment debtor did not have any other property within its jurisdiction.

133. In the instant case, the respondent no. 1 made a prayer on these terms in the execution petition filed by it. However, keeping in view the mandate of the statute, without notice to the judgment debtor, the learned Single Judge held that the settlement agreement, a result of conciliation, had morphed into an arbitral award. As such, the respondents were held entitled to seek execution before the Gurgaon court without a transfer certificate from the court.

134. The respondents before us make a request that the execution be validated without compelling it to make the request to the executing court in accordance with Section 39 of the CPC for a transfer certificate.

135. Our attention is drawn by Mr. Sibal on behalf of the appellant to the pleadings of the respondents in the execution petition in Gurgaon wherein it is stated that it was seeking execution of the award which was executable as a decree by a civil court under Section 36 of the Arbitration Act. We have also held that the order dated 6th November, 2013 was an order accepting a mediation agreement and no decree could be passed.

136. It needs no elaboration that where law prescribes the manner in which an act has to be performed, it has to be performed in that manner or not at all. This principle emerged from the case of *Taylor v. Taylor* reported as (1875) 1 Ch.D 426 (Chancery Division). (Ref: *Nazir Ahmed v. Emperor* AIR 1936 PC 253; *Ballabhadras Agarwala v. J.C. Chakravarty*, AIR 1960 SC 576;

State of Uttar Pradesh v. Singhara Singh & Ors., AIR 1964 SC 358; Gujarat Electricity Board v. Girdharlal Motilal & Ors., AIR 1969 SC 267; Ramachandra Keshav Adke v. Govind Joti Chavare & Ors., Air 1975 SC 915; Sulochna Uppal v. Surinder Sheel Bhakri, 1990 (3) Delhi Lawyer 325; Harnam Singh & Ors. v. Bhagwan Singh & Ors., ILR (1991) 2 Del 625).

137. As noted above, before directing transfer of the certificate, the executing court has to be satisfied that the conditions prescribed under Section 38 of the CPC are satisfied. The court would have to conclude that there was no property sufficient to satisfy the decree within its jurisdiction and also that the judgment debtor had property within the jurisdiction of the court to whom transfer of the decree was being sought. Without compliance thereof, there can be no transfer of the decree.

138. It is also urged by Mr. Akhil Sibal, learned counsel for the appellant that in the present case, the appellant is also objecting to the executability of the settlement agreement.

139. Mr. Sudhanshu Batra, learned Senior Counsel for the respondents would dispute the jurisdiction of the executing court to examine this submission.

140. In support of the contention that the objections of the appellant with regard to executability of the judgment would be required to be considered by the court to which the decree/order would be transferred for execution, Mr. Sudhanshu Batra, learned counsel for respondent no.1 has placed the pronouncement of the Supreme Court reported at *AIR 1956 SC 359, Jai Narain Ram*

Lundia v. Kedar Nath Khetan & Ors.

141. In this case, the defendants were opposing the execution inter alia on the objection that they were not in a position to implement the conditions imposed on the decree. This objection was opposed by the decree holder. We extract the following portion of the judgment placed before us :

*“25. Then it was argued that this objection to execution should have been taken by the plaintiff in the Calcutta High Court when the defendant asked for transfer of the decree to Motihari and that as that was not done it is too late now. But here also the answer is the same. **The only question before the Calcutta High Court on the application made to it was whether the decree should be transferred or not.** Whether the plaintiff might or could have taken the objection in the High Court is beside the point because it is evident that he need not have done so on the **only issue which the application for transfer raised**, namely, whether the decree should be transferred or not; at best it could only be said that the plaintiff had a choice of two forums. But normally this sort of question which involves an enquiry into fact would not be tried by an appellate court. It would be more appropriate for an original court to which the decree is transferred for execution to enquire into it. In any case, if the appellant's contention is pushed to its logical conclusion it would mean that whenever a decree is transferred all objection to execution must cease unless the order of the court directing the transfer expressly enumerates the issues that the transferring court is at liberty to determine. In our opinion Section 42 of the Civil Procedure Code is a complete answer to this contention.”*

142. In para 23 of ***Jai Narain Ram Lundia***, the Supreme Court

also considered the scope of the powers of the court to which a decree stands transferred in the following terms :

“23. The only question that remains is whether the executing court can consider whether the defendant is in a position to perform his part of the decree. But of course it can. If the executing court cannot consider this question who can? The executing court has to see that the defendant gives the plaintiff the very thing that the decree directs and not something else, so if there is any dispute about its identity or substance nobody but the court executing the decree can determine it. It is a matter distinctly relating to the execution, discharge and satisfaction of the decree and so under Section 47 of the Civil Procedure Code, it can only be determined by the court executing the decree. And as for the first court's conclusion that it could not decide these matters because it was not the court that passed the decree, it is enough to say, as the High Court did, that Section 42 of the Code expressly gives the court executing a decree sent to it the same powers in executing such decree as if it had been passed by itself.”

143. For the view we are taking, we refrain from expressing any opinion on this objection which would be required to be placed in the appropriate proceedings.

144. We have also noted above that in the present case, the execution was filed after the respondent had accepted notice in the present appeal. It cannot be contended that the consideration by the court and its satisfaction under Section 38 and 39 of CPC is an idle formality. The transferring court has to be satisfied that the requirements thereof are met.

145. The present case has raised no difficult issues of law.

Except a dilemma as to the extent of the jurisdiction of this court to correct judicial errors, even if they do not impact substantive rights. We have been compelled to ponder over this aspect of the matter which has really troubled us at length and hence we have expounded the law on rules of procedure and the court's duty to ensure the interests of justice. While we empathise with the submission of Mr. Sudhanshu Batra, learned Senior Counsel for the respondent no.1 that not passing orders qua the execution proceedings would result in unwarranted delays, however judicial discipline and the established parameters of appellate jurisdiction require that we refrain from doing so.

146. As noted above, the respondent has sought execution of an arbitral award before the district court at Gurgaon. In view thereof, we are unable to agree with learned Senior Counsel for the respondent and are not inclined to pass any orders with regard to the pending proceedings in the district court at Gurgaon.

VIII. Result

147. The order dated 14th November, 2014 cannot be legally sustained and is therefore, set aside and quashed. As a result, the Execution Petition No.405/2014 on the original side of this court would stand revived and be dealt with in the light of the above enunciation of law.

Inasmuch as, corrections may be necessary because of exercise of jurisdiction under section 152 of the CPC, for reasons of expediency, it shall be open for the learned Single Judge to

permit the necessary corrections in hand, in the execution petition under the initials of the respondent(s) duly initialled and stating the date when made.

This appeal is allowed in the above terms. All pending applications are also disposed of.

GITA MITTAL, J

I.S.MEHTA, J

MARCH 09, 2016

aj