

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Civil Revision No.164 of 2017 (O&M)

Date of Decision: April 12, 2019

M/s S.R. Engineering Construction

...Petitioner

Versus

Union of India

...Respondent

CORAM:- HON'BLE MR.JUSTICE HARINDER SINGH SIDHU

Present: Mr. Ghanshyam Dass Dhiman, petitioner-in-person

Mr. Deepak Malhotra, Advocate
for respondent- Union of India

HARINDER SINGH SIDHU, J.

This revision petition has been filed impugning the order dated 24.03.2015 of the Ld. Additional District Judge, Chandigarh whereby the objections of the petitioner u/s 47 of the Code of Civil Procedure to the Execution Application filed by the respondent have been dismissed. Also impugned is the order dated 5.5.2016 whereby his review has been dismissed.

The petitioner was awarded contract bearing Ca No Cechz-14/90-91 for Provision of Office Accommodation for GEB at AF Chandigarh. The amount of the contract was ` 41,42,295.32. The date of commencement as stipulated in the contract agreement was 8.4.1991. A dispute arose between the parties. The petitioner alleges that he served a notice upon the respondent to appoint an Arbitrator in terms of Condition No.70 of the Contract.

Condition No.70 of the Contract is reproduced below:

“Arbitration- All disputes between the parties to the contract (other than those for which the decision of CWE or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of an Engineer officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Work or termination or determination of the contract under Condition Nos. 55, 56 and 57 hereof

Provided always that commencement of continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration exparte, if either party inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may from time to time with the consent of the parties, enlarge the time upto but not exceeding one year from the date of his entering on the reference for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or

within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final and binding on both parties to the Contract.”

As no action was taken thereon by the respondent the petitioner filed an application under Section 20 of the Arbitration Act, 1940 (for short “1940 Act”) before the Civil Judge, Chandigarh on 4.10.1994 for appointment of an Arbitrator. An application under Section 41(b) read with Schedule II of the 1940 Act was also filed for restraining the respondent from terminating / cancelling or rescinding the contract. During pendency of this application, the respondent cancelled the contract on 22.4.1996. It floated a tender for the balance work at the risk and cost of the petitioner. The petitioner filed an application (Annexure P-2) for pre-ponment of the case and for its withdrawal to file a fresh one in a court of proper jurisdiction. Acting on that application and on a statement made by the petitioner the application under Section 20 of the 1940 Act was dismissed as withdrawn vide order dated 3.4.1998 of the Ld. Sub-Judge 1st Class Chandigarh. During the pendency of that application under Section 20 of the 1940 Act, the petitioner had already filed another application under Section 20 of the Arbitration Act on 1.4.1997 at Una (Himachal Pradesh) seeking directions to the respondent to file the agreement in Court and appoint an Arbitrator for deciding the dispute. The said petition was disposed vide order dated 27.3.2002. The court held that it lacked territorial

jurisdiction to try and decide the dispute between the parties. The petition was ordered to be returned to the petitioner for presentation before the competent court.

Meanwhile the Engineer-in-Chief vide letter dated 1.2.1999 appointed Brig. T.K.Mittal as sole Arbitrator to enter on reference and publish his findings and award in respect of disputes listed in Appendix A to the letter. It was stipulated that the proceedings in the case shall be governed as per the Arbitration and Conciliation Act. 1996 (for short "1996 Act"). Brig. T.K.Mittal resigned his appointment as arbitrator on 8.8.2000. Thereafter, the vide letter dated 28.9.2000 Brig. R.R.Singh was appointed as the sole Arbitrator in his place.

The petitioner filed a petition under Section 5, 11 and 12 of the 1940 Act before the Civil Judge (Sr.Divn), Chandigarh for removal of the Arbitrator. The application was dismissed on 26.4.2002. Thereafter, the Arbitrator passed the Award on 30.4.2002 in favour of the respondent against the petitioner.

The respondent filed an application under Section 36 of the 1996 Act for execution of the Award. The petitioner filed objections under Section 47 of the CPC. In the objections it was inter alia contended that the proceedings before the Arbitrator were without jurisdiction and that the 1940 Act would govern the proceedings. The objections were dismissed by the Ld. Additional District Judge, Chandigarh vide order dated 10.3.2009. The petitioner filed Civil Revision No.3921 of 2010 before this Court. During the pendency of that petition the execution application was withdrawn by the respondent. In view thereof the petition was dismissed as infructuous vide

order dated 13.09.2010. It was however clarified that if a fresh execution application is moved, the petitioner would be at liberty to challenge the applicability of the Arbitration and Conciliation Act, 1996 again before the Executing Court which shall be decided on its own merits. The respondent filed fresh execution application on 16.7.2010 before the Ld. Additional District Judge, Chandigarh. The petitioner filed objections under Section 47 read with Section 151 CPC. The Objection Petition was dismissed by the Ld. Additional District Judge Chandigarh vide order dated 4.5.2013 mainly on the ground that similar objections filed by the petitioner had been dismissed by the then Addl. District Judge vide order dated March 20, 2009. The petitioner challenged the aforesaid order by filing Civil Revision No.6827 of 2013 which was disposed of vide order dated 25.7.2014. The order dated 4.5.2013 of the Ld. Additional District Judge was set aside. It was held that the order suffered from non-application of mind and had been passed without addressing the legal issues raised in the objection which went to the root of the jurisdiction. The matter was remanded to the Ld. Additional District Judge Chandigarh to pass a fresh order in accordance with law keeping in view the liberty granted by this Court in its order dated 13.9.2010 and the law on the subject. Thereafter, the Ld. Additional District Judge has passed the impugned order dismissing the objections filed by the petitioner. The contention of the petitioner that the 1940 Act is applicable to the proceedings was rejected. It was held that the award could only be challenged under Section 34 of the 1996 Act and the objection petition filed by the petitioner under Section 47 read with Section 151 CPC

was not maintainable.

The primary contentions of the petitioner appearing in person are :

- (i) The proceedings are governed by the 1940 Act and not by the 1996 Act.
- (ii) The Award is illegal and null and void as the counter-claim of the petitioner has not been considered.
- (iii) The award being illegal and null and void can be challenged in execution by filing objections under Section 47 CPC.

Ld. Counsel for the respondents has supported the impugned order and argued that the objections of the petitioner have rightly been dismissed.

I now proceed to consider the questions:

- (i) *Whether the proceedings are governed by the 1940 Act or the 1996 Act ?*

The 1996 Act has enforced w.e.f. 22.8.1996. On the coming into force of this Act the 1940 Act and two other enactments were repealed. Section 85 of the 1996 Act is the the Repeal and Saving clause which is as under:

“85. Repeal and savings.—*(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.*

(2) Notwithstanding such repeal,—

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this

Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.”

As per Section 85(2) (a) notwithstanding the repeal, the provisions of the enactments shall apply in relation to arbitral proceedings which commenced before 1996 Act came into force unless otherwise agreed by the parties . The 1996 Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force.

The question as to when can the arbitral proceedings be taken to have commenced for deciding the applicability of the 1940 Act has been considered in detail by Hon'ble Supreme Court in **Milkfood Ltd. v. GMC Ice Cream (P) Ltd., (2004) 7 SCC 288**. It has been held that service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceeding.

The relevant observations are as under:

“70. Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non obstante clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement

of arbitral proceedings for the purpose of the 1996 Act wherefor also necessity of reference to Section 21 would arise. The court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression “commencement of arbitration proceedings” must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from Shetty’s Constructions are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore.

71. While interpreting a judgment this Court must pinpoint its attention to the ratio thereof. A court of law must not lose sight of the doctrine of “stare decisis”. A view which has been holding the field for a long time should not be disturbed only because another view is possible.

72. Keeping in view the fact that in all the decisions, referred to hereinbefore, this Court has applied the meaning given to the expression “commencement of the arbitral proceeding” as contained in Section 21 of the 1996 Act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof, we have no hesitation in holding that in this case also, service of a notice for appointment of an arbitrator would be the relevant date for the purpose of

commencement of the arbitration proceeding.

73. In this case, the learned Munsif by an order dated 3-8-1995 i.e. before the 1996 Act came into force not only stayed further proceedings of the suit but also directed that in the meanwhile the matter be referred to arbitration. The matter was referred to arbitration as soon as the notice dated 14-9-1995 was issued and served on the other side.”

In the present case though the petitioner alleges that he served a notice on the respondent for appointment of arbitrator in 1994, but no such notice has been placed on record before the Ld. Additional District Judge or even in this Court. This fact has been recorded in the impugned order and not controverted by the petitioner. The petitioner had filed an application under Section 20 of the 1940 Act on 4.10.1994 for appointment of Arbitrator. However the same was dismissed as withdrawn on 3.4.1998.

It may be necessary to reproduce the application of the petitioner on which the order has been passed and the order of the Court. The same have been annexed as Annexure P-2 and P-1 with this petition.

Annexure P-2:

“In the Court of Sh. Jagnagar Singh, SJIC, U.T.Chandigarh

Next Date: 29.7.98

In Re:-

S.R.Engg.

vs.

UOI

Application for pre-ponement of the case

Respectfully Prayeth,

- 1. That the above said case is fixed for evidence for 29.7.98.*
- 2. That the Applicant/ Plaintiff wishes to withdraw the said*

case for filing it afresh on other Court of proper jurisdiction.

3. *That the said pre-poning of the case is necessary to avoid further delay in filing it afresh, and attain the ends of justice.*

It is therefore respectfully prayed that the case may kindly be preponed for its withdrawal.

Chandigarh
3.4.98

Applicant/Plaintiff

*Through counsel
sd/-
A.K.Maleri*

*Put up file today on 3.4.98.
sd/- ”*

Annexure P-1 :

“In the Court of Sh.Jagnahar Singh, SJIC, Chandigarh

*...
S.R. Engineering Construction, House No.2543/A, Sector-47/C,
Chandigarh through Shri Ghanshyam Dass, its attorney.
... Petitioner*

vs.

- 1. Union of India through its Secretary, Ministry of Defence, Government of India, New Delhi*
- 2. Engineer in chief, Army headquarters, Kashmir House, New Delhi*
- 3. Chief Engineer, CHZ Chandigarh, Now as Chief Engineer, Air Force, Western Air Command, Jalandhar Cantt.*
- 4. Garrison Engineer, Air Force, Chandigarh*

... Respondents

APPLICATION

Under Section 20 of the Indian Arbitration Act, 1940 for appointment of an Arbitrator

*....
Statement of Sh.Ghan Shyam Dass, G.P.A. alongwith
Sh.A.K.Maleri, Advocate*

....

I withdraw the present petition as the same has been rendered infructuous.

*Sd/-
Ghanshyam Dass*

*sd/-
SJIC
3/9*

....

Present: Counsel for the parties

File taken up today on the application of the petitioner.

Statement of the petitioner as well as his counsel recorded. In view of their statement, the present application under Section 20 of the Indian Arbitration Act is dismissed as withdrawn. File be consigned to the record room.

*Announced.
3.4.98*

*sd/-
Sub Judge Ist Class
Chandigarh”*

It is clear that the petitioner had moved the application for withdrawal of the case for filing it afresh in another Court of proper jurisdiction. However in the order dated 3.4.1998 it is only mentioned that the application under Section 20 of the 1940 Act is dismissed as withdrawn. Though it is well settled that when an application/suit filed in Court is withdrawn without permission to file a fresh one, it signifies that the petitioner is not interested in prosecuting or continuing the proceedings and that he has abandoned the claim. But the question is can the present case be taken as one of a simplicitor withdrawal without permission to file a fresh suit and hence as an abandonment of claim by the petitioner?

A Division Bench of the Allahabad High Court in **Bharat v. Ram**

a plaintiff for withdrawal of a suit with liberty to file a fresh suit is allowed by the Court without expressly passing an order granting permission to file a fresh suit, the order would be construed to be one granting withdrawal of the suit with the liberty to file fresh suit.

The Court considered the question as under:

“11. It is, thus, clear that where the plaintiff moves an application for withdrawal simpliciter under Order 23 Rule 1(1) of the Code, the suit would stand withdrawn because the plaintiff cannot, after moving the application for withdrawal under Order 23 Rule 1(1) withdraw such an application. But where the plaintiff moves an application under Order 23 Rule 1(2) of the Code (old) for withdrawal of the suit seeking permission to institute fresh suit in respect of the same subject matter and on the same cause of action, the question which would require consideration is whether the Court can split up the prayer and while refusing to grant permission to file fresh suit pass an order striking off the suit having withdrawn. In Marudachala Nadar v. Chinna Mathu Nadar AIR 1932 Madras 155 (1) it was held that :-

"An application under Order 23 Rule 1(2) for permission to withdraw from suit with liberty to institute a fresh suit on the same subject-matter must be treated as an indivisible whole, and if a party is not allowed liberty to institute a fresh suit, his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained on the file"

12. Similar view was taken in Thadi Konda Veeraswami v. Thulium Peda Lakshmudu AIR 1951 Madras 715. The learned single Judge of Calcutta High Court in Kamini Kumar Roy v. Rajendra Nath Roy AIR 1926 Calcutta 233 also took similar view.

13. *In the case of Balbir Singh v. Smt. Sulochana Devi AIR 1970 Allahabad 382, H.C.P. Tripathi, J. held that the prayer in the application could not be split up. The Court could either accept the application or reject it in toto. In Lala Dodraj v. Gayan Prakash (1932) 135 IC 160, the learned single Judge of this High Court held that "where a party applies under Order 23 Rule 1(2), Civil Procedure Code for leave to withdraw a suit with liberty to bring a fresh suit it is for the Court either to allow the application as a whole or to dismiss it as a whole. If the application is refused the plaintiff is entitled to proceed with the suit"*

14. *In this view of the matter it appears to us to be well settled that where an application is moved by the plaintiff to withdraw the suit with liberty to bring a fresh suit under Order 23 Rule 1(2) of the Code, the Court may either allow the application as a whole or dismiss it as a whole. It has no jurisdiction to consign the suit as withdrawn while refusing to grant permission to the plaintiff to bring fresh suit in respect of the same subject matter and on the same cause of action. If liberty to bring fresh suit is not to be granted by the court, it has to dismiss the application requiring the plaintiff to prosecute the suit on merits as it stands. The court while refusing to grant permission to institute fresh suit cannot treat the application to be one under Order 23 Rule 1(1) of the Code (old) for withdrawal of the suit simpliciter. Thus, if the application moved by the plaintiff under Order 23 Rule 1(2) of the Code (old) for withdrawal of the suit with liberty to file a fresh suit is allowed by the court even without expressly passing an order granting permission to file fresh suit, the order would be construed to be one granting withdrawal of the suit with liberty to institute fresh suit The order allowing the application moved under Order 23 Rule 1(2) of the Code (old) cannot be construed to be one passed under sub-Clause (1) of Rule 1 Order 23*

because the prayer in the application could not be split up by the Court. The order passed by the court, unless otherwise expressly expressed, would be construed to be one which it could validly pass in exercise of jurisdiction so vested in it and with reference to the provision under which such an order could be passed. Thus, there is no escape from the conclusion that the order dated 28-9-1967 passed in earlier suit on the application of withdrawal of suit with liberty to file fresh suit cannot be construed to have been passed under sub-Clause (1) of Rule 1 Order 23 of the Code when the application was in fact not moved under said provision, but it was moved under sub-Clause (2) of Rule 1 Order 23 of the Code and, therefore, the same could not be treated by the Court under sub-Clause (1) of Rule 1 Order 23 of the Code by splitting up the prayer or rejecting the prayer seeking liberty to file fresh suit. The court in that event would have no option but to reject the application in toto.

15. An application under Order 23, Rule 1 (2) of the Code for permission to withdraw the suit with liberty to institute a fresh suit on the same subject matter has got to be treated as an indivisible whole and the court cannot split up the prayer while refusing permission to institute a fresh suit and that it could not treat the application to be one under Order 23 Rule 1(1) of the Code (old) for withdrawal of the suit simpliciter and, as such, the order allowing the application without expressly granting or refusing permission to institute a fresh suit is to be taken to have been passed granting the composite prayer made in the application under Order 23 Rule 1(2) of the Code, under which an order either allowing the application in toto or rejecting it in toto, could alone be legally passed by the Court. Therefore, when an application moved under Order 23 Rule 1(2) is allowed there is no escape from the conclusion that the prayer made in the application has been allowed in toto although no

specific order is passed granting permission to institute fresh suit in respect of same subject matter and on the same cause of action.

16. In Lallu's case (supra) AIR 1973 Allahabad 195, the learned single Judge has not considered the aforesaid aspect of the matter and we are unable to subscribe to the view taken in the said decision. Although we have no hesitation in accepting the view expressed by the learned single Judge in said decision to the effect that: "The court is empowered to grant liberty to institute a fresh suit only after finding that the suit must fail by reason of some formal defect or that there are other sufficient grounds for granting liberty," but we find it difficult to hold that the Court must pass specific order granting liberty to institute fresh suit and that if no specific order is passed granting liberty to institute fresh suit, it would not be permissible to infer from such an order by constructive interpretation that permission to institute fresh suit has been granted. In our opinion if the Court passed an order allowing the application containing the composite prayer to the effect that the plaintiff be permitted to withdraw the suit with liberty to file fresh suit, then no other inference can be drawn than the one that the composite prayer as it stands has been granted in toto because the court could not split up the prayers and accept only one of the prayers and reject the other. Since the Court would have no jurisdiction to pass an order by splitting up the prayers contained in an application moved under Order 23 Rule 1(2) of the Code, and, as such, no such inference can be drawn that the second prayer was refused, although not said so expressly in the order. Thus, in this view of the matter, we find it difficult to persuade ourselves to take the view expressed in Lallu's case (supra) to the effect that where the order permitting withdrawal of the suit was silent about granting permission to institute fresh suit, it must be taken that the court in earlier suit refused to grant

permission to file fresh suit. With due respect to the learned Judge we are unable to subscribe to said view taken in Lallu's case (supra).

17. It is well settled rule of construction with regard to construction of the judgment that the real intention of the Judge not expressed in the judgment may be irrelevant. It may also be irrelevant if the expressed intention is opposed to the real intention. (See Raja Sahib of Poonch v. Kripa Ram, AIR 1954 Jammu and Kashmir 23). It is equally well settled that a suit or an application would stand disposed of in terms of the operative part of the order passed thereon. The Court might have intended to dispose the matter in the manner not so expressed in the operative part of the order, but it is the operative part of the order alone that would be decisive in the matter. The intention of the Judge, not expressed in the operative part of the order, would be altogether irrelevant while interpreting the order, even if it be taken to be an error on the part of the court in not passing the operative part of the order in consonance with the observations made in the body of the order because it is well settled principle of law that no party will suffer for the mistake of the court (see Srinivas Prasad Singh v. S. D. O. (Compensation Officer) Sadar Tahsil, Mirzapur, 1960 Rev Dec 251 . if the Court has not correctly expressed in the operative part of the order what it intended to pass on the application or in the final judgment in the suit, the party cannot be blamed for the error nor it would be made to suffer for it. It is the operative part of the order that disposes of the suit or application and is decisive in the matter.

If the order is open to appeal or revision, it would lie only against the operative part of the order. Thus, in the present case, if the court was not inclined to grant the permission to the plaintiff to bring fresh suit in respect of the same subject matter and on the same cause of action, it should have expressly

passed orders to that effect and should have rejected the application moved by the plaintiff. It could not permit to withdraw the suit by treating the application to be one under Order 23 Rule 1(1) of the Code (old) for the withdrawal of the suit simpliciter. If the prayer for permission to file fresh suit was intended to be refused, the court should have passed express order and rejected the application so that the plaintiff could file revision against that order. Since the application was allowed without any reservation, the plaintiff could very well take it that the prayer as a whole has been allowed and there was no occasion for him to challenge that order merely on the observations made in the body of the judgment, which too did not support such an inference.....”

In the light of the above it cannot be held that the petitioner had abandoned his claim for appointment of Arbitrator under the 1940 Act as through his application he had prayed that he wished to withdraw the case for filing a fresh one in other court of competent jurisdiction.

During the pendency of the aforesaid application under Section 20 of the 1940 Act before the Court at Chandigarh the petitioner had filed another application under Section 20 of the Arbitration Act on 1.4.1997 at Una (Himachal Pradesh) seeking directions to the respondent to file the agreement in Court and appoint an Arbitrator for deciding the dispute. The said petition was disposed vide order dated 27.3.2002 (Annexure P-3). Before the Court the respondent had raised the issue of the pendency of the petition under Section 20 of the 1940 Act before the Sub-Judge 1st Class, Chandigarh. The Court had framed the following issues.

“1. Whether there is an arbitration clause in the contract and the case is liable to be referred to the arbitrator? OPP

2. *Whether this Court has no jurisdiction to try the suit? OPR*
3. *Whether the petitioner had filed an application under Section 20 of the Arbitration Act in the Court of Sub Judge Ist Class, Chandigarh if so, its effect? OPR*
4. *Relief.”*

However the Court returned its findings only on issue No.2 and held that it had no territorial jurisdiction to try and decide the dispute between the parties. The petition was ordered to be returned to the petitioner for presentation before the competent court. Thus the question of maintainability of the petition was not addressed.

It has been held in **M.A. Faiz Khan v. Municipal Corporation of Hyderabad** AIR 1998 A.P. 414 that filing of a second suit during the pendency of the first suit without obtaining permission to file it is only a procedural irregularity which is curable. If subsequently the first suit is withdrawn with liberty to file a fresh suit, the second suit filed shall not fail. The relevant observations are:

“5. Under Order 23, Rule 1, sub-rules (3), Civil Procedure Code it is permissible for the Court, if the suit must fail for reason of some formal defect, to grant permission to withdraw the suit, with liberty to institute a fresh suit. In the present case, the earlier suit should fail for want of statutory notice. Therefore, the petitioner will come within the four corners of sub-rule (3) of Rule 1 Order 23. He is, therefore, entitled to seek the grant of permission to file a fresh suit on the same cause of action. The only defect in the instant case is that before obtaining such a permission, the petitioner filed a fresh suit for the same cause of action. It is the contention of the petitioner that there was an imminent threat of demolition and

statutory notice could not be given before filing the first suit. Hence, he had to file the suit which is now sought to be withdrawn and another suit was filed on the same cause of action. The learned counsel for the petitioner relied on a decision in B. Rizwang Baig v. Municipal Corporation of Hyderabad, 1989(1) APLJ 480, wherein it was held by the learned single Judge of this Court, following the decisions of the Kerala High Court in Ammini Kutty v. George Abraham, AIR 1987 Kerala 246, that merely because a fresh suit has already been instituted, that should not be a ground for not according permission to withdraw the earlier suit and that if the suit was allowed to be withdrawn, it should be recorded as having never been brought. It is the view of the learned Judge of Kerala High Court in the above case supra that (at page 248-249)

"..... It is not really material whether the permission is granted before or after the institution of a fresh suit. Even if the institution of the second suit before obtaining of permission to withdraw the first is not proper, that can at best only be an irregularity, which should be considered as cured at least from the time permission is obtained. It is settled law that grant of permission under the Rule is no guarantee for the maintainability of the second suit; that is a question which will have to be decided separately, as and when it is raised in the subsequent proceedings."

Thus, the only question that should fall for consideration for the Court when an application was filed under Order 23 Rule 1 sub-rule (3), Civil Procedure Code. is whether the suit must fail by reason of some formal defect as stipulated in Clause (a) of sub-rule (3), (we are not concerned now with sub-rule (b)). If the Court is satisfied that the case is covered under Clause (a) of sub-rule (3), then the Court is empowered to grant

permission to file fresh suit in respondent of the same subject-matter. The Court should not really concern itself whether a fresh suit is already filed or not. It is wholly immaterial consideration for exercising the jurisdiction under sub-rule (3) of Rule 1, Order 23, Civil Procedure Code. Whether the second suit was validly filed or whether it was vitiated by the principle of res judicata are matters entirely within the jurisdiction of the said Court where it was filed. It should be made clear that even during such consideration, as has been held by the learned Judge of Kerala High Court in the above decision supra that filing of fresh suit without obtaining permission was "improper and at best only be an irregularity, it should be considered as cured at least from the time permission is obtained." This approach, to my mind, is salutary and services and interests of justice. The procedural rigour cannot be allowed to come in the way of substantive justice. Filing of the second suit without actually obtaining permission to withdraw the first suit should only be treated as a procedural irregularity, which is curable. The permission to withdraw the first suit is only to file a fresh suit and when such permission is granted, the suit already instituted should not fail. The permission takes away the bar of res judicata. Hence the second suit should be held as maintainable."

If the order dated 3.4.1998 of the Court at Chandigarh is interpreted in the manner as indicated earlier, there can be no infirmity in the filing of the second suit which was returned to be filed to the Court of competent jurisdiction vide order dated 27.3.2002.

Meanwhile, the Engineer-in-Chief vide letter dated 1.2.1999 appointed Brig. T.K.Mittal as sole Arbitrator to enter on reference and

publish his findings and award in respect of disputes listed in Appendix A to

the letter. On his resignation Brig. R.R. Singh was appointed Arbitrator on 28.09.2000. After the Arbitrator had been appointed by the respondent the petitioner filed application under Section 5, 11 and 12 of the 1940 Act challenging the appointment which was dismissed on 26.04.2002.

Thus it is clear that the petitioner had filed the application under Section 20 of the 1940 Act much before the coming into force of the 1996 Act. He kept pursuing the application for appointment of Arbitrator. At no stage could he be said to have abandoned his claim to the appointment of the Arbitrator under the 1940 Act. When he was faced with fait accompli of the appointment of the Arbitrator he filed application under Sections 5, 11 and 12 of the 1940 Act challenging the appointment which was dismissed on 26.04.2002.

In these circumstances it has to be held that the arbitral proceedings had commenced on filing of the application under Section 20 of the 1940 Act on 4.10.1994 (*mentioned in the impugned award as 13.9.1993*) i.e., much before the coming into force of the 1996 Act and hence the proceedings would be governed by the 1940 Act and not the 1996 Act.

(ii) *Non-consideration of the Counter-claim of the petitioner.:*

Regarding this contention of the petitioner it may be noted that the letter dated 1.2.1999 for appointment of Brig.T.K.Mittal as Arbitrator is as under:-

“No. 13600/WC/664/E8
Brig T.K. Mittal
Panel of Arbitrator (Chandigarh)
GE Chandimandir Office Complex
Chandimandir -134107

APPOINTMENT OF ARBITRATOR: CA NO. CECHZ-14 OF
90-91 PROVN OF OFFICERS ACCN FOR GEB AT (AF)
CHANDIGARH.

Dear Sir,

WHEREAS the above mentioned contract was entered into between the President of India, represented by Chief Engineer Chandigarh Zone and M/s S.R. Engineering Const 2543-A, Sector 47-C, Chandigarh-160047.

AND WHEREAS the said contract includes an arbitration agreement vide Condition 70 of IAFW-2249 forming part of the contract which, interalia, provides that all disputes between the parties to the contract (other than those for which the decision of the CWE or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the Sole Arbitration of an Engineer Officer to be appointed by Engineer-in-Chief;

AND WHEREAS CE (AF) WAC Jalandhar Cantt has taken over the area of works from CE Chandigarh Zone and will now be representing Union of India.

NOW, THEREFORE, by virtue of the aforesaid , I hereby appoint you as Sole Arbitrator and request you to enter on the reference and publish your findings and the award in respect of the disputes listed at Appendix 'A' to this letter so far these are referable to arbitration in accordance with said agreement;

- 2. Arbitration proceedings in this case shall be governed as per the Arbitration and Conciliation Act, 1996.*
- 3. Please acknowledge.*

Yours faithfully
Sd/
(A.N. Sinha)
Lt. Gen.

Engineer-in-Chief”

Encls: Appendix 'A'

....

*Appendix 'A' to E-in-C's Branch
Letter No.13600/WC/664/E8
Dated 01 Feb 99*

LIST OF DISPUTES

<i>Brief description of claims/items</i>	<i>Approximate amount in Rupees</i>
<u>CLAIMS OF UNION OF INDIA</u>	
<i>Additional expenditure in execution of leftover work through risk and cost contract</i>	7,84,000.00
<i>Various losses suffered due to delay in execution such as engagement of supervisory, staff non-occupancy of the buildings, etc.</i>	15.00,000.00
<i>Cost of reference</i>	20,000.00
<i>Interest @ 18% p.a. On the above amounts (pre-suit, pendentelite and failure)</i>	Not indicated

The letter dated 28.9.2000 appointing Brig.R.R.Singh as Arbitrator is as under:-

“REGISTERED

ACKNOWLEDGMENT DUE

*Army Headquarters
Engineer-in-Chief's Branch
Kashmir House DHQ PO
New Delhi-110011
28 Sep 2000.*

*No.13600/WC/664/E8
Brig R.R. Singh
Panel of Arbitrator (Chandigarh)
C/O GE Chandimandir Office Complex
Chandimandir-134107*

**APPOINTMENT OF ARBITRATOR: CA NO CECHZ-14 OF
90-91: PROVN OF OFFICERS ACCN FOR GEB AT (AF)**

CHANDIGARH.

Dear Sir,

WHEREAS the above mentioned contract agreement was entered into between the President of India, represented by Chief Engineer Chandigarh Zone and M/s S.R. Engineering Const 2543-A, Sector 47-C, Chandigarh-160047;

AND WHEREAS the said contract includes an arbitration agreement vide Condition 70 of IAFW-2249 forming part of the contract which, inter alia, provides that all disputes between the parties to the contract (other than those for which the decision of the CWE or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the Sole Arbitration of an Engineer Officer to be appointed by Engineer-in-Chief ;

AND WHEREAS certain disputes have arisen and request has been made to me for appointment of an Arbitrator for adjudication of the disputes;

AND WHEREAS Brig T.K. Mittal appointed as sole arbitrator on 01 Feb 99 to adjudicate the said disputes has resigned his appointment as arbitrator on 08 Aug 2000;

AND WHEREAS the disputes are still persisting;

AND WHEREAS CE(AF) WAC Palam Delhi Cantt has taken over the area of work from CE Chandigarh Zone and will now be representing Union of India.

NOW, THEREFORE, by virtue of the aforesaid and provisions contained in Condition 70 of IAFW 2249, I hereby appoint you as Sole Arbitrator to adjudicate upon the disputes pertaining to the above contract and request you to enter on the reference and publish your findings and the award in respect of the disputes listed at Appendix 'A' to this letter so far these are referable to arbitration in accordance with said agreement.

2. Arbitration proceedings in this case shall be

governed as per the Arbitration and Conciliation Act 1996.

3. *Please acknowledge.*

*Yours faithfully
Sd/- (A N SINHA)
Lt. Gen.
Engineer-in-Chief*

Encls: Appendix 'A'

...

Appendix 'A' to E-in-C's Branch

*Letter
No.13600/WC/664/E8
dated 28 Sep 2000*

LIST OF DISPUTES

<i>Sr. No.</i>	<i>Brief description of claims/items</i>	<i>Approximate amount in Rupees</i>
	<u>CLAIMS OF UNION OF INDIA</u>	
<i>1.</i>	<i>Additional expenditure in execution of leftover work through risk and cost contract</i>	<i>7,84,000.00</i>
<i>2.</i>	<i>Various losses suffered due to delay in execution such as engagement of supervisory staff, non-occupancy of the buildings, etc.</i>	<i>15,00,000.00</i>
<i>3.</i>	<i>Overdrawn stores under Schedule 'B'</i>	<i>8,63,186.04</i>
<i>4.</i>	<i>Compensation for delay in completion of work</i>	<i>3,10,672.15</i>
<i>5.</i>	<i>Substandard work detected during technical examination of work</i>	<i>3,460.00</i>
<i>6.</i>	<i>Interest @ 18% p.a. on the above amounts (pre-suit, pendentelite and future)</i>	<i>Not indicated</i>
<i>7.</i>	<i>Cost of reference</i>	<i>20,000/-</i>

Award in regard of the disputes listed as Annexure-A to the said letters. The petitioner vide his communications dated 1.2.2000 and 20.02.2000 requested the Engineer-in-chief to refer the disputes / counter-claim of the petitioner to the Arbitrator. This was followed by another communication dated 26.12.2000 addressed to Brig.R.R.Singh, the sole Arbitrator to consider the claim of the petitioner as well.

These communications which have been annexed as Annexures P-6, P-7 and P-8 to this petition and are reproduced below:

Annexure P-6 :

“Regd. No. *Phone: D.G.S.2384*
S.R. ENGINEERING CONSTRUCTION
Specialist in
SHELLROOF PRESTRESSED CONTRETE, R.C.C. BRIDGES
& BUILDINGS

Head Office P.O. HALESWAR
DURGAPUR-13 TEZPUR
BURDWAN ASSAM
Ref. No.GREC/CA/14/294 Dated 1st February, 2000

To

The Engineer-in-Chief,
Engineer's Branch
Kashmir House, DHQ PO
New Delhi-110011

Sub:- APPOINTMENT OF ARBITRATOR; CA NO
CECHZ-14 OF 90-91: PROVN OF OFFICERS
ACCN FOR GEB AT (AF) CHANDIGARH.

Dear Sir,

Reference your letter no.GREC/CA/14/215 dated 20th
November, 1998 and your letter no.13600/WC/664/E8 dated 1st
February, 99.

2. *We requested your honour to refer the list of disputes*
to the appointed Sole Arbitrator vide above mentioned letter
but nothing is heard so far.

3. *The Arbitration Clause does not specify to adjudication of one sides claims only and under said clause disputes of both the parties will have to be decided by the Arbitrator. If the list of disputes will not be forwarded or no reply to the above effect is received then decision of your honour is considered to the partial.*

4. *Hence, it is requested to look into the matter so that our claims can also be adjudicated upon by the Hon'ble Sole Arbitrator.*

Thanking you.

Yours faithfully

Sd/-

For M/s. S.R. ENGINEERING CONSTRUCTION

Copy to:-

1. *Brig RR Singh
Sole Arbitrator,
Office of the Panel of Arbitrator (Chandigarh)
C/O GE Chandimandir Office Complex
Chandimandir-134107*
2. *The Chief Engineer,
Air Force (WAC)
Palam,
Delhi Cantt.”*

...

Annexure P-7 :

“Regd. No.

Phone:D.G.S.2384

*S.R. ENGINEERING CONSTRUCTION
Specialist in
SHELL ROOF PRESTRESSED CONTRETE R.C.C. BRIDGES
& BUILDINGS*

*Head Office
DURGAPUR-13
BURDWAN
Ref. No.SREC/CH/14/215*

*P.O. HALESWAR
TEZPUR
ASSAM
Dated 20th February, 2000*

To

*The Engineer-in-Chief,
Engineer's Branch*

*Kashmir House-DHQ PO
New Delhi-110011*

*Sub: APPOINTMENT OF ARBITRATOR: CA NO
CECHZ-14 OF 90-91: PROVN OF OFFICERS
ACCN FOR GEB AT (AF) CHANDIGARH*

Dear Sir,

*Reference your letter no.13600/WC/664/E8 dated 30th
October, 2000.*

*2. This brings to your kind notice that we already
approached the Civil Court for appointment of Arbitrator under
Section 20 of the Arbitration Act, 1940 where under we
submitted our claims and the same were in receipt of the
Department. Inspite of the facts, our claims were not forwarded
to your honour by the Chief Engineer which is not understood.*

*3. When the Chief Engineer recommended for the
appointment of the Sole Arbitrator under terms of the Contract,
they should have sent our claim also for further forwarding to
the Sole Arbitrator by your honour for adjudication but this
was not done for the reasons best known to the Chief Engineer.*

*4. However, it is requested to send our claims to the
Sole Arbitrator for adjudication.*

Thanking you.

Yours faithfully

Sd/-

*For M/s S.R. ENGINEERING
CONSTRUCTION*

Enclosed: One Sheet

Copy to:-

- 1. Brig R R Singh
Panel of Arbitrators (Chandigarh)
C/O GE Chandimandir Office Complex
Chandimandir-134107*
- 2. CE (WAC) AF Palam, Delhi Cantt.*
- 3. CWE AF Chandigarh.*
- 4. GE AF Chandigarh*

ANNEXURE - 'A'

LIST OF DISPUTES

1. *Extra expenditures incurred in prolongation of Contract due to various breaches on part of the Department resulted work carried out in new rates, idle Tools and Plants, Establishment, Loss of Profits, etc. not contemplated in the contract agreement.*
2. *Extra Work for removal of Tree roots not paid as per actual work done.*
3. *Extra work than the drawing got completed but not been paid.*
4. *Non payment of E/M items, etc.*
5. *Cement base paint to the Building twice in lieu of color wash.*
6. *Non-payment of final bill.*
7. *Non-payment of security deposit and thereby loss of interest, etc.*
8. *Meaning items as found missing due to not permitted to enter at the site/building and many furniture and fixtures are not returned back, etc.*
9. *There are other items in disputes which will be mentioned in the statement of case.*
10. *Interest from the date of cancellation of contract till appointment of Arbitrator @ 12% per annum, pendente lite interest and interest from the date of Award till realization or Court decree, whichever is earlier @ 21% p.a.*

Sd/-
Ghan Shyam Dass”

Annexure P-8:

“Regd. No.

Phone: D.G.S. 2384

S.R. ENGINEERING CONTRUCTION

*Specialist in
SHELL ROOF PRESTRESSED CONTRETE, R.C.C. BRIDGES
& BUILDINGS*

*Head Office
DURGAPUR-13
BURDWAN*

*P.O. HALESWAR
TEZPUR
ASSAM*

Ref. No.SREC/CH/14/290

Dated 26th December, 2000

To,

*Brig R R Singh
Sole Arbitrator,
Office of Panel of Arbitrators (Chnadigarh)
GE Chandimandir Complex
Chandimandir-134107*

*Sub: DISPUTES PERTAINING TO: CA NO CECHZ-14
OF 90-91: PROVN OFFICERS ACCN FOR GEB AT
AF CHANDIGARH*

Dear Sir,

*Reference your letter no.5PA/1833/RRS/06/E8 dated
7 December 2000 received on 23 December, 2000 probably due
to postal strike.*

*2. This brings to your notice that we requested the
Hon'ble Court to appoint the Arbitrator earlier to the
appointment of the then Arbitrator. We requested the then
Arbitrator to allow us to submit our Statement-Of-Case but they
intimated vide their letter no.5PA/1711/TKB/24E8 dated
25.1.2000 that the disputes referred by the appointing authority
shall only be taken up for adjudication in absence of any Court
Order or fresh reference by appointing authority.*

*3. Since, your honour requested us to submit the
Statement-Of-Case by January, 2001, should we submit for
adjudication?*

*4. Apart from the above, we already requested the
Hon'ble Court to send the disputes to your honour but the
Court desire for completion of evidence and then to send the
disputes. However, we also recently requested the Engineer-in-*

Chief vide our letter No.SREC/CH/14/215 dated 20.11.2000 along with a list of our claims for onward forwarding to your honour for adjudication.

Thanking you.

Yours faithfully

Sd/-

*For M/s S.R. ENGINEERING
CONSTRUCTION*

Copy to:-

*The Chief Engineer,
A.F. (WAC), Palam, Delhi Cantt-110010”*

However, the counter-claim of the petitioner has not been considered. This fact is also clear from the perusal of the Award. The Arbitrator has not considered the claims/ counter-claim of the petitioner on the ground that it could consider only the disputes that were referred to it by the Appointing Authority.

Para 18, 19, 59 and 60 of the Award:

“18. AND WHEREAS Shri GD Dhiman vide his letter No.SREC/CH/14/296 dt. 10 Apr. 2001 (presented during the hearing), requested for more time to enable him to get his claims, which were pending in civil court at Una, referred for adjudication and direction to Union of India to supply him copy of final bill and store calculations to enable him to prepare pleading in defence.

19. AND WHEREAS during the hearing on 10 Apr 2001, following time schedule was made for submission of documents, with the consent of both parties:-

(a) Union of India to supply documents required by contractor by 16 Apr 2001

*(b) Contractor to submit their pleading in defence to claims of union of India and **statement of case of their own***

claims, if referred by court or appointing authority by 10 June 2001.

- (c) Union of India to submit their rejoinder/pleading in defence by 10 July 2001.*
- (d) Next hearing of case was scheduled for 16 July 2001 in the office of Panel of Arbitrators (Chandigarh).*

...

59. AND NOW, I BRIGADIER RR SINGH, Sole Arbitrator, having taken upon the burden of reference have heard, examined and considered the Statement of case and Pleading in Defence submitted by and on behalf of the parties and documents and oral evidence produced before me by them as also their oral submissions and arguments.

60. AND NOW, I DO HEREBY make and publish this my FINAL AWARD in writing after considering the matters referred to me.”

Hon'ble the Supreme Court has repeatedly stressed upon the necessity for consideration of a counter-claim by the Arbitrator even without there being an independent reference in regard thereto.

In *State of Goa v. Praveen Enterprises, (2012) 12 SCC 581* it was observed as under:

“30. Section 23 of the Act enables the claimant to file a statement of claim stating the facts supporting his claim, the points at issue and the relief or remedy sought by him and enables the respondent to state his defence in respect of those claims. Section 2(9) provides that if any provision [other than Section 25(a) or Section 32(2)(a)], refers to a “claim”, it shall apply to a “counterclaim” and where it refers to a “defence”, it shall also apply to a defence to that counterclaim. This would mean that a respondent can file a counterclaim giving the facts

supporting the counterclaim, the points at issue and the relief or remedy sought in that behalf and the claimant (who is the respondent in the counterclaim) will be entitled to file his defence to such counterclaim. Once the claims and counterclaims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counterclaims) and if the answer is in the affirmative, proceed to adjudicate upon the same.

31. It is of some relevance to note that even where the arbitration proceedings were initiated in pursuance of a reference under Section 20 of the old Act, this Court held (in Indian Oil Corpn. Ltd. v. Amritsar Gas Service) that the respondent was entitled to raise counterclaims directly before the arbitrator, where all disputes between the parties are referred to arbitration. This Court observed: (SCC p. 544, para 15)

“15. The appellant’s grievance regarding non-consideration of its counterclaim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit under Section 34 of the Arbitration Act and the reference was made of all disputes between the parties in the suit, the occasion to make a counterclaim in the written statement could arise only after the order of reference. The pleadings of the parties were filed before the arbitrator, and the reference covered all disputes between the parties in the suit. Accordingly, the counterclaim could not be made at any earlier stage. Refusal to consider the counterclaim for the only reason given in the award does, therefore, disclose an error of law apparent on the

face of the award.”

(emphasis supplied)

32. A counterclaim by a respondent presupposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject-matter of the counterclaim) by issuing a notice seeking reference to arbitration and follow it by an application under Section 11 of the Act for appointment of arbitrator, instead of raising a counterclaim in the pending arbitration proceedings. The object of providing for counterclaims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a respondent in an arbitration proceeding being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceeding or raise the dispute by way of a counterclaim, in the pending arbitration proceedings.”

It has been held that non-consideration of the counter-claim would render the award illegal and void.

In ***K.V. George v. Secy. to Govt., Water and Power Deptt., (1989) 4 SCC 595*** it was observed as under:

“11. It has been lastly submitted on behalf of the respondents that the arbitrator has misconducted himself and the proceedings by not deciding the counterclaim filed by the Government while considering the claim filed by the appellant and making an award. The High Court has rightly held that the arbitrator misconducted himself and the proceedings and allowed the appeal, setting aside the second award made by the arbitrator in Arbitration Case No.276 of 1980.

12. The first question that falls for consideration in this case is whether the finding of the High Court setting aside the order of review made in IA No. 3780 of 1981 and setting aside the order made in O.P. (Arb.) No. 81 of 1981 dated 18-8-1981 whereby the case was remanded to the arbitrator is sustainable or not. Admittedly, the appellant filed a claim petition being Arbitration Case No. 132 of 1980 making certain claims before the arbitrator. The respondents filed the counterclaims. The arbitrator without considering the counterclaims kept the counterclaims for subsequent consideration and made an award. The trial court set aside the award and remitted the same to the arbitrator for making a fresh award considering the claims and counterclaims filed by the parties. On an application for review, the trial court set aside the order and passed a decree in terms of the award. It is not disputed that the arbitrator did not at all consider the counterclaims and kept the same for consideration subsequently while making award in respect of the claims filed by the appellant. Undoubtedly, this award made by the arbitrator is not sustainable in law and the arbitrator has misconducted himself and in the proceedings by making such an award. It is the duty of the arbitrator while considering the claims of the appellant to consider also the counterclaims made on behalf of the respondents and to make the award after considering both the claims and counterclaims. This has not been done and the arbitrator did not at all consider the counterclaims of the respondents in making the award. As such the first award dated 22-1-1981 made by the arbitrator in Arbitration Case No.132 of 1980 is wholly illegal and unwarranted and the High Court was right in holding that the arbitrator misconducted himself and the proceedings in making such an award and in setting aside the same and directing the arbitrator to dispose of the reference in accordance with law considering the claim of the contractor

and the counterclaim of the respondents. The order allowing the application for review by the trial court is also bad inasmuch as there was no mistake or error apparent on the face of the order dated 18-8-1981 made in O.P. (Arb.) No. 81 of 1981 nor any sufficient reason has been made out for review of the said order. The order dated 18-8-1981 is legal and valid order and the order dated 18-3-1982 allowing the application for review being IA No. 3780 of 1981 and setting aside the order in O.P. (Arb.) 81 of 1981 dated 18-8-1981 is, therefore, bad and unsustainable.”

In Indian Oil Corpn. Ltd. v. Amritsar Gas Service, (1991) 1 SCC

533 Hon'ble the Supreme Court observed as under:

“15. The appellant’s grievance regarding non-consideration of its counter-claim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit under Section 34 of the Arbitration Act and the reference was made of all disputes between the parties in the suit, the occasion to make a counter-claim in the written statement could arise only after the order of reference. The pleadings of the parties were filed before the arbitrator, and the reference covered all disputes between the parties in the suit. Accordingly, the counter-claim could not be made at any earlier stage. Refusal to consider the counter-claim for the only reason given in the award does, therefore, disclose an error of law apparent on the face of the award. However, in the present case, the counter-claim not being pressed at this stage by learned counsel for the appellant, it is unnecessary to examine this matter any further.”

Associates, (1994) 4 SCC 665 :

“7. In K.P. Poulose v. State of Kerala this Court held that misconduct under Section 30(a) does not connote a moral lapse. It comprises legal misconduct which is complete if the arbitrator, on the face of the award, arrives at an inconsistent conclusion even on his own finding, by ignoring material documents which would throw abundant light on the controversy and help in arriving at a just and fair decision. It is in this sense that the arbitrator has misconducted the proceedings in the case. In that case the omission to consider the material documents to resolve the controversy was held to suffer from manifest error apparent ex facie. The award was accordingly quashed. In Dandasi Sahu v. State of Orissa this Court held that the arbitrator need not give any reasons. The award could be impeached only in limited circumstances as provided under Sections 16 and 30 of the Act. If the award is disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case of non-application of mind amounting to legal misconduct and it is not possible to set aside only invalid part while retaining the valid part. In other words the doctrine of severability was held inapplicable in such a situation. It is, therefore, clear that the word ‘misconduct’ in Section 30(a) does not necessarily comprehend or include misconduct of fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result or the like circumstances which tend to show non-application of the mind to the material facts placed before the arbitrator or umpire. In truth it points to fact that the arbitrator or umpire had not applied his mind and not adjudicated upon the matter, although the award professes to determine them.

Such situation would amount to misconduct. In other words, if the arbitrator or umpire is found to have not applied his mind to the matters in controversy and yet, has adjudicated upon those matters in law, there can be no adjudication made on them. The arbitrator/umpire may not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilt of any moral turpitude, that is, in the sense of non-application of the mind to the relevant aspects of the dispute in its adjudication. In K.V. George v. Secretary to Government, Water & Power Department, Trivandrum this Court held that the arbitrator had committed misconduct in the proceedings by making an award without adjudicating the counter-claim made by the respondent. In Indian Oil Corpn. Ltd. v. Amritsar Gas Service the counter-claim was rejected on the ground of delay and non-consideration of the claim, it was held, constituted an error on the face of the award.

8. The question, therefore, is whether the umpire had committed misconduct in making the award. It is seen that claims 11 and 12 for damages and loss of profit are founded on the breach of contract and Section 73 encompasses both the claims as damages. The umpire, it is held by the High Court, awarded mechanically, different amounts on each claim. He also totally failed to consider the counter-claim on the specious plea that it is belated counter-statement. These facts would show, not only the state of mind of the umpire but also non-application of the mind, as is demonstrable from the above facts. It would also show that he did not act in a judicious manner objectively and dispassionately which would go to the root of the competence of the arbitrator to decide the disputes.

xxx xxx xxx

11. It is clear from the above facts and legal position that the

arbitrator committed misconduct in non-application of his mind in deciding claims 11 and 12. It being a non-speaking award, it is difficult to find whether he had applied his judicious mind in deciding which of the two claims the respondent would be entitled to, in particular, on the finding of the High Court in this behalf. Therefore, the award in respect of claims 11 and 12 is set aside. The order of the High Court to award Rs 6,00,000 stands set aside. Since the counter-claim was not considered the matter requires determination. Accordingly the rejection of the counter-claim would be treated as a nil award of the counter-claim and for the above reasons it stands set aside and the matter is remitted to be adjusted afresh. The decree of the High Court granting interest pendente is also set aside.”

In the present case the counter claims of the petitioner have not been considered and hence the award is illegal and liable to be set aside.

(iii) Whether the execution of the award can be challenged by filing objection petition under Section 47 CPC. :

Admittedly, in this case the petitioner has not challenged the award by proceedings either under Section 30 of the 1940 Act or Section 34 of the 1996 Act.

When the respondent filed petition under Section 36 of the 1996 Act for enforcement of the Award he filed the objections under Section 47 CPC which have been dismissed as being non-maintainable.

The petitioner has relied on two decisions, one of the Delhi High Court and the other of the Calcutta High Court to contend that even if the award has not been challenged under the provisions of the 1940 Act, it was

of Civil Procedure to contend that the award is a nullity.

In **Union of India v. M/s. Jagat Ram Trehan & Sons, (Delhi)(D.B.), 1996 AIR (Delhi) 191** it was held as under:

“(3) Whether it was open to the Union of India, as a judgment-debtor, to raise the question that the award and decree were nullifies, in the application under Section 47 Civil Procedure Code ?

(4) Whether the fact that the Union of India did not file objections to the award nor filed an appeal nor an application under Sections 17, 30 or 33 is a bar to this application filed under Section 47 ?

Before advertng to the above points, we have to mention that Mr. Chandwani is stated to have passed more than 60 awards after 30.11.1990 the date on which he ceased to be an arbitrator. The question raised is, therefore, very important so far as the Union of India is concerned.

Points 3, 4 :

16. *That question is whether a plea that the award is void can be raised in execution proceedings. On this question respondent contended that the award must have been objected to under Sections 17, 30 and 33 or by appeal against the order rejecting objections and if that was not done, it was not open to raise the question in execution proceedings. This contention, in our view, is not correct. That Section 47 applies to execution proceedings taken pursuant to a decree making an award a rule of Court cannot be doubted. The decided cases, referred to below, also hold that it is open to the executing court under Section 47 to declare that the award is passed without jurisdiction and that therefore the decree passed thereupon is also null and void and not executable. (See in this connection: Ran Singh v. G.A. Coop. Service Society, 1984 RRR 415 : AIR 1976 Punjab and Haryana 94 (F.B.), Sabawwa Hanmappa v.*

Basappa Andanappa, ILR 1955 Bombay 386; E.D. Sasson and Co. Ltd. v. Shivji Ram Devi Das-Judgment-debtors, AIR 1929 Lahore 228; Gopi Ram Jaithu Ram v. Rami Das Sri Kishan, AIR 1934 Lahore 49 and Donald Graham and Co. v. Kewalram and others, AIR 1921 Sind 132. We have therefore no hesitation in holding that this EA is maintainable under Section 47 to declare the award and the consequent decree as nullifies.

17. *Learned counsel for the respondent has cited certain rulings Madan Lal v. Sunder Lal, AIR 1967 Supreme Court 1233; Guntupalli Rama Subbayya v. Guntupalli Rajamma, AIR 1988 Andhra Pradesh 226; Masomat Narmada Devi and another v. Ram Nandan Singh and others, AIR 1987 Patna 33; Mohammad Aleem v. Maqsood Alam and others, AIR 1989 Rajasthan 43; Ram Sarup v. Food Corporation of India, Patiala and another, AIR 1979 Punjab 116; and Union of India v. M/s Ajit Mehta and Associates, Pune and others, AIR 1990 Bombay 45 but we find that they do not deal with this question. The rulings relied upon by us, on the other hand, are direct.*

18. *The other objection that there was a remedy for direct attack by means of objections under Sections 17, 30 or 33 is or by an appeal against the order rejection objecting, in our view, is not tenable. A judgment and decree can be directly attacked by the procedure prescribed, namely, by filing objection thereto or by appealing against the order rejecting the objections. But that does not preclude a collateral attack of the award and decree in execution proceedings. The preposition that a Judgment-debtor may claim the decree to be a nullity in execution proceedings and that the decree is void is too well settled. A collateral attack is not barred because an opportunity to raise the same question by direct attack was not availed. This is a well settled principle applicable to civil Courts executing decrees..”*

In Saraswat Trading Agency, M/s. v. Union of India (Calcutta), 2004

AIR (Calcutta) 267 the same view was reiterated as under:

“7. Mr. Ghosh, learned counsel for decree-holder, contends that the judgment-debtor should not be permitted to raise the question of validity of the decree at this belated stage. It is his contention that the arbitrator was appointed by the competent authority, and not only the judgment-debtor participated in the arbitral proceeding, but it also complied with the award by making substantial payment; and hence it should not now be permitted to raise the question of jurisdiction of the arbitrator to make the award. He relies on the decision in Prasun Roy v. Calcutta Metropolitan Development Authority, AIR 1988 SC 205. His further contention is that the decree-holder was not prevented from seeking arbitration of the disputes and differences under the contract, simply because he had taken refund of the security deposit after giving a no claim certificate.

8. On the basis of the authorities cited at the bar, I find substantial force in Mr. Chatterjee's submission. It was held in Prabartak Commercial Corporation's case (AIR 1991 SC 957) that an award made by the arbitrator on the basis of an invalid reference would be null and void. That means, if the reference is bad, then the award also becomes bad, irrespective of whether the parties participate in the arbitral proceeding or not. The validity of Cls. 24(b) and 32(a) of the contract have not been questioned before me. It is true that in M/s. A. K. Pals case (unreported decision) Aloke Chakrabarti, J. was pleased to sustain the validity of an identical clause in a contract. But then, in the present case, in the absence of any challenge to the validity of the two clauses, I find no necessity to examine their validity. The decree-holder has accepted the terms and conditions in the contract to be correct. In Popular Builder's case (AIR 2000 SC 3185), the Supreme Court allowed the

Union of India (that suffered the award made by the arbitrator) to raise the question of validity of the reference for the first time in the Supreme Court. It was held that since existence of an arbitrable dispute was the condition precedent for exercise of power for appointment of an arbitrator under the relevant clause, and the reference was made in violation of the terms and conditions of the relevant arbitrator clause, the award was to be set aside. In Om Prakash's case (AIR 1976 SC 1745) it was clearly held by the Supreme Court that an award on an invalid reference would be a nullity. There can be no dispute regarding the proposition that in an application under Section 47 of the C.P.C., the question that a decree is not executable being a nullity can be raised, and the executing Court can decide the question I find that in Jagat Ram Trehan's case (AIR 1996 Delhi 191) in an almost similar situation the Section 47 application filed by the Union of India which had suffered the award was allowed by the Division Bench of the Delhi High Court.

9. The question of acquiescence, in my considered view, will not be relevant in a case where the challenge is that the decree sought to be executed is a nullity. A decree which is a nullity in the eye of law is no decree, and hence even by consent of the parties such a decree cannot be executed by the Court. True that the judgment-debtor did not raise the question before, but for this reason it cannot be denied the remedy available to it under Section 47 of the Civil Procedure Code. If this Court finds that the decree is a nullity, as contended by the judgment-debtor this Court cannot proceed to execute it, and it is the duty of this Court to hold that the decree is not executable. Hence, in my view, the principles of waiver, acquiescence and estoppel cannot be applied to take away the legal right of the judgment-debtor available under Section 47 of the Civil Procedure Code.”

The position under the 1996 Act may be otherwise. It has been held in **Rajendra Kamal v. A.B.M. Developers (P) Ltd.** AIR 2016 (Patna) 202 and **Fingertips Solutions Pvt. Ltd. v. Dhanashree Electronics Limited** 2016 (4) WBLR 470 that the provisions of Section 47 or Order 21, Rule 97 to 101 C.P.C. have no application to a proceeding under Section 36 of the Act, 1996 instituted for enforcement of an arbitral award which can only be challenged in the manner contemplated under the 1996 Act.

However as I have held that the present proceedings would be governed by the 1940 Act, it has to be held that even though the petitioner has not challenged the Award under the Section 14 of the 1940 Act, the objections under Section 47 would be maintainable.

Accordingly this petition is allowed. The impugned order dated 24.3.2015 of the Ld. Additional District Judge dismissing the objections and order dated 5.5.2016 dismissing the review of the petitioner are set aside. The award passed by the Arbitrator is declared to be null and void. It would be open to the competent authority to refer the matters in dispute along with the counter claims of the petitioner for arbitration as per the conditions of the contract.

April 12, 2019
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(HARINDER SINGH SIDHU)
JUDGE

Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No