

**IN THE HIGH COURT AT CALCUTTA**  
**CIVIL APPELLATE JURISDICTION**  
**APPELLATE SIDE**

**BEFORE:**

**The Hon'ble Justice Soumen Sen**

**And**

**The Hon'ble Justice Uday Kumar**

**C.O. 1981 of 2023**

**Kamal Kishore Mimani**

**Vs.**

**Ajay Mimani**

For the Appellant

: Mr. Partha Pratim Roy, Adv.  
Mr. S.S. Sinha, Adv.  
Mr. Chiranjib Sinha, Adv.  
Mr. Dyutiman Banerjee, Adv.

For the Private Respondent

: Mr. Sudip Deb, Adv.  
Mr. Arun Kr. Sharma, Adv.  
Mr. Riju Ghosh, Adv.  
Mr. Aranyak Saha, Adv.  
Mr. Shovik Chakraborty, Adv.  
Mr. Ipsita Ghosh, Adv.

Hearing Concluded on

: 9<sup>th</sup> February, 2024

Judgment on

: 20<sup>th</sup> February, 2024

***SOUMEN SEN, J:***

1. This revisional application is at the instance of the award holder.

2. The award holder has challenged the order passed by the learned Chief Judge, City Civil Court, Calcutta on 30<sup>th</sup> April, 2019 in an application filed by the award debtors/judgment debtors under Section 47 read with Section 151 of the Code of Civil Procedure being Misc. Case no. 137 of 2018. The learned Judge allowed the Misc Case and the decree holder was directed to remove the defects in the award passed on 24<sup>th</sup> October, 2000 by the arbitrator in accordance with the Section 33 of the Arbitration and Conciliation Act, 1996 and submit a report within two months from the date of the order.

3. The title execution case was kept pending.

4. The said order was not contemporaneously challenged by either parties. The award holder duly communicated the certified copy of this order to the learned Arbitrator by a letter dated 24<sup>th</sup> June, 2019 and requested the arbitrator to include a schedule of the property being one office space (500 sq.ft.) in Second floor of premises no. 2 Digambar Jain Temple Road, Calcutta 700 007 allotted in favour of Sri Jugal Kishore Mimani under the award dated 24<sup>th</sup> October, 2000 in the manner following:

*“On the North : By office room (300 sq. ft. Approx) in occupation legal heirs of Kewal Chand Mimani;*

*On the South: By premises no. 1, Digambar Jain Temple Road, Calcutta 700 007;*

*On the East: Partly by small office room in occupation legal heirs of Kewal Chand Mimani;*

*On the West: By Digambar Jain Temple Road, Calcutta-700 007.”*

5. The arbitrator was requested to incorporate by way of correction the aforesaid schedule in the award dated 24<sup>th</sup> October, 2000. The arbitrator duly forwarded the said letter to the award debtor Ajay Mimani by a letter dated 26<sup>th</sup> June, 2019 seeking response as to the correction indicated by the award holder in its letter dated 24<sup>th</sup> June, 2019 addressed to the arbitrator. In response Ajay Mimani by a letter dated 27<sup>th</sup> June, 2019 raised an objection with regard to the jurisdiction of the learned Arbitrator to alter the consent award after the award was made and published. For convenience the said letter is reproduced below:

*“From  
Ajay Mimani  
66, Parwati Ghosh Lane,  
2<sup>nd</sup> Floor,  
Kolkata 700007*

*To  
Sri Krishna Kumar Phumra  
Space Town Housing Complex  
Block-8, Flat No. 3A  
Raghunathpur, VIP Road  
Kolkata – 700 052*

*Sir,  
In response to the letter addressed to you by Kamal Kishore Mimani dated 24.06.2019 a copy whereof had been forwarded to me, I am to write to you as follows:-*

*It is a matter of record that you had acted as an Arbitrator for deciding certain private disputes and that an Award had been passed by you on consent of the parties. It is also a matter of record that at a subsequent stage*

*you resigned from the post of Arbitrator which has been accepted by the parties.*

*The Award has the force of a Decree and when any Decree is passed or delivered on consent, no proceeding shall lie for altering such consent decree and/or for setting aside the same unless the parties who consented to the grant of such Award do participate once again and agree to such alteration. Since you resigned, there is no scope for Mr. Kamal Kishore Mimani to approach you for amendment or altering the Award passed on consent without my consent and no Order of any Court has been passed thereby directing you to do such alteration of a consent decree as malafide stated in the last line of the letter under reply.*

*The learned Court virtually accepted my contention about the act of fraud committed by the said Kamal Kishore Mimani for obtaining Order from the learned executing Court and accordingly the proceeding started by me had been allowed by the Court by acknowledging the legal aspects canvassed by the learned Advocate representing me before the learned Chief Judge.*

*In the aforesaid background, you have no right to assume your office once again and make an attempt to alter the award passed on consent and that too in spite of my objection. The correction proposed to be carried out by you on the prayer of Mr. Kamal Kishore Mimani of the consent award is also not tenable at law.*

*Thanking you,*

*Yours faithfully*

*(AJAY MIMANI)*

*(emphasis supplied)*

6. The arbitrator upon consideration of the said objection corrected the award by incorporating the schedule of the property in question as Ajay did not dispute the correctness of the schedule of the property as furnished by Kamal Kishore. A supplementary award was published on 31<sup>st</sup> July, 2019. On the basis of the supplementary award the petitioner/award holder proceeded with the pending execution proceeding.

7. However, this supplementary award was challenged by Misc. Case no. 2208 of 2019 and the said application for setting aside of the award was dismissed on 30<sup>th</sup> June, 2023. This order of the learned Chief Judge, City Civil Court was challenged under Section 37 of the Arbitration and Conciliation Act.

8. In the meantime, the decree holder has also challenged the order initially passed by the learned Chief Judge, City Civil Court on 30<sup>th</sup> April, 2019 in connection with Misc case no. 137 of 2018. The basis of the application appears to be that there was no need for the learned executing court to give a direction for correction of the schedule of the property in question as the property has been adequately described in the award and there was no necessity for the learned Chief Judge to direct the decree holder to remove the defects in the award passed on 24<sup>th</sup> October, 2000. This application was filed at a point of time when the award debtor Ajay had filed an application under Section 37 of the Arbitration and Conciliation Act challenging the order passed by the learned Chief Judge, City Civil Court, Calcutta on 30<sup>th</sup> June, 2023 in Misc case no. 2280 of 2009.

9. During hearing of the appeal it was agreed by the parties that the appeal and the revisional application may be heard together for convenience and a prayer would be made before the learned Single Judge before whom the civil revisional application being CO 1981 of 2023 is pending for release and assignment.

10. On 29<sup>th</sup> June, 2023 the learned Single Judge passed an order recording that the award holder seeks release of the revisional application in order to make an endeavour to get the matter assigned before the Hon'ble Division Bench. Subsequently the revisional application has been assigned to this Bench by the Hon'ble the Chief Justice.

11. The appeal preferred by Ajay was heard and disposed of on 5<sup>th</sup> January, 2024 by recording that the award holder has submitted that the executing court has misconstrued the original award and has erroneously held that the said award is inexecutable as there was no requirement for correction of the said award by the learned Arbitrator in exercise of power under Section 33 of the Arbitration and Conciliation Act, 1996. In view of the aforesaid stand taken by the award holder we allowed the application for setting aside of the supplementary award as would be reflected from paragraphs 2 and 3 of the order passed by this Bench on 5<sup>th</sup> January, 2024, which is reproduced below:

*“2. The learned Advocate for the award-holder submits that the learned Trial Court has misconstrued the award and had erroneously held that the said award is inexecutable as there is no requirement for correction of the said award by the learned Arbitrator in exercise of power under Section 33 of the Arbitration and Conciliation Act, 1996.*

*3. In view of the stand taken by the awardholder in this proceeding, we feel that the supplementary award passed by the learned Arbitrator on 31st July, 2019 is liable to be set aside as the learned Arbitrator did not have the mandate to*

*correct the said award. Moreover, the appellant had objected to the correction being carried out by the arbitrator as it was beyond the time stipulated under Section 33 of the Arbitration and Conciliation Act, 1996.”*

12. Mr. Partha Pratim Roy, learned Counsel appearing on behalf of the appellant has submitted that once the original award has attained finality it is not open for the award debtor to raise the issue of inexecutability of the award in a proceeding under Section 47 of the Code of Civil Procedure. It is submitted that the Code of Civil Procedure has limited application with regard to the enforceability of the award and does not give any absolute power to the award debtor who had raised the same issue unsuccessfully in the application for setting aside of the award. Moreover, the property has been sufficiently described in the award itself. It is a consent award. All the parties precisely knew the properties that are to be exchanged under the consent award. In the event any question is raised about the executability of the said award the court is required to construe the award upon taking into consideration the pleadings. Upon construction of the said award it would be clear that the 500 square feet has been sufficiently described in Clause 3(4) of the consent award. It is one of the properties and business allotted exclusively to Jugal Kishore Mimani in which Mool Chand Mimani and Kewal Chand Mimani would have not claimed.

13. Mr. Roy has drawn our attention to the relevant portion of the award which reads:

*“3. Properties and business allotted exclusively to Jugal Kishore Mimani (in which Mool Chand Mimani and Kewal Chand Mimani shall have no claim):*

.....

*4. One Big Office (500 sq. ft.) in 2<sup>nd</sup> Floor, 2, Digambar Jain Temple Road, Calcutta-700 007 (tenancy in name of Ganesh Produce)”*

14. It is submitted that excepting Ajay, the son of late Kewal Chand Mimani the heirs of Mool Chand has not challenged the award or questioned the executability of the award.

15. Mr. Roy has relied upon the decision of the Delhi High Court in ***Hindustan Zinc Ltd. v. National Research Development Corporation*** in **OMP (ENF.) (COMM.) 135 of 2022 and EX. APPL. (OS) 3203/2022 (stay), EX. APPL. (OS) 3726 of 2022** decided on 24<sup>th</sup> January, 2023 paragraphs 21 and 22 to show the limited application of the Code of Civil Procedure in the matter of enforcement of the award. The decision of the Hon’ble Supreme Court in ***Pratibha Singh & Anr. v. Shanti Devi Prasad & Anr.*** reported in **2003(2) SCC 330** was relied upon to show that the successful plaintiff should not be deprived of the fruits of a decree merely because there is some inadvertent error which is curable either under Section 152 or under Section 47 CPC depending upon on facts and circumstances of each case and to decide which of the two provisions should be more appropriate,

just and convenient to invoke by reason of an inadvertent error not effecting the merits of the case. It could be corrected under Section 152 CPC by the court which had passed a decree by supplying omission alternatively the exact description of decreetal property could be ascertained by the executing court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC.

16. It is submitted that the aforesaid clause in the award has sufficiently described the property by making a definite reference to the tenancy in the name of Ganesh Produce and, thus, it was the duty of the executing court to construe and ascertain the area under the occupation of Ganesh Produce when the award was passed. It is submitted that initially the Registrar refused to issue the writ of execution without a schedule of immovable property and thereafter a schedule was furnished by the award holder which was recorded by the Registrar in its order dated 26<sup>th</sup> November, 2015 and 11<sup>th</sup> December, 2016 respectively. The execution application was produced before us to show that as on 11<sup>th</sup> February, 2016 a schedule of 500 sq. ft. was duly included in the execution application and accepted by the Registrar on the basis of which writ of possession was issued.

17. Mr. Roy has referred to the report of Court bailiff dated 11<sup>th</sup> February, 2016 to show that the court bailiff has found Shri Ajay Mimani in one big office (500 sq. ft.) on the Second floor Premises no. 2 Digambar Jain

Temple Road, Calcutta 700 007 as per schedule of the writ of possession but could not deliver possession as Shri Ajay Mimani refused to vacate the office. The bailiff has recorded that Shri Ajay Mimani has admitted that the office belongs to Kamal Mimani namely the award holder.

18. Mr. Roy has also referred to the deposition of the court bailiff recorded on 10<sup>th</sup> November, 2017 to show that the judgment debtor had refused to vacate the premises and resisted the bailiff in taking possession. The bailiff in his cross examination has clearly stated that the contents of the writ of possession was read over to the judgment debtor and he found that the schedule mentioned in the decree and that of the copy of the award tallied. Mr. Roy has referred to the decision of the Hon'ble Supreme Court in ***Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil*** reported in **2010 (8) SCC 329** to show that the nature and extent of power of the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India and submits that in paragraph 49 of the said report in sub paragraph (g) it has been recognised that when there has been a patent perversity in the orders of the tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice the court in exercise of power under Article 227 can step in and pass appropriate orders in the interest of justice.

19. Per contra Mr. Sudip Deb, the learned Counsel for the opposite party has submitted that the decree holder has committed fraud on court

by furnishing a description of the property which was not mentioned in the award. The award does not contain any schedule. It is submitted that the execution application was filed in the order 2011 and the Registrar refused to issue any writ on the ground that the schedule of immovable properties does not tally with an award dated 24<sup>th</sup> October, 2000. On 27<sup>th</sup> July, 2011 the decree holder was directed to remove the defects by 14<sup>th</sup> September, 2011. Without curing such defects a petition was filed by the decree holder praying for fixing a date for delivery of possession on 25<sup>th</sup> June, 2011 upon recalling of the order dated 27<sup>th</sup> July, 2011 stating inter alia, that the award dated 24<sup>th</sup> October, 2000 deal with twenty different properties and as such it is impossible to include the schedule of each of the properties. The Registrar on perusal of the award and more particularly page 10 item no. 3(4) of the properties and business allotted exclusively to Jugal which inter alia, including one big office (500 sq.ft.) in second floor Digambar Jain Temple Road, Calcutta 700007 refused to issue the writ on the ground that the arbitrator did not furnish the details of the property which form the subject matter of the arbitration. Moreover, under Order 20 Rule 9 of the CPC a complete description of the immovable property is required to be mentioned in the decree. The Registrar rejected the application and fixed the matter on 28<sup>th</sup> February, 2012. The subsequent attempt to recall the said order had failed. Ultimately on 27<sup>th</sup> November, 2015 without disclosing the earlier order by which the award holder was directed to furnish the details of the properties the Registrar passed the order fixing 11<sup>th</sup> February,

2016 for issuance of writ of possession under Order 21 Rule 35 CPC subject to file an affidavit regarding stay. Thereafter on 11<sup>th</sup> February, 2016 on the basis of an affidavit filed by a decree holder stating that no order of stay has granted by any court a writ of possession was issued under order 21 Rule 35 CPC.

20. Mr. Deb submits that the applicant/award holder has altered the award by furnishing a description of a property which was not mentioned in the award knowing fully well that the award does not give any description of the property in question. Mr. Deb submits that the court cannot condone such mischievous act of the award holder misrepresenting the facts and hold the award executable without the award being corrected in accordance with law. Mr. Deb submits that it is a trite law that fraud vitiates a proceeding and any order obtained by fraud is a nullity and it would effect on subsequent proceeding as well as has been laid down by the Hon'ble Supreme Court in ***T. Vijendradas & Anr. v. M. Subramanian & Anr.***, reported in **2007(8) SCC 751** paragraph 19, 27, 28 and ***S.P. Chengalvaraya Naidu (Dead) by L.Rs. vs. Jagannath (Dead) by L.Rs. & Ors.***, reported at **AIR 1994 SC 853** paragraph 7 respectively. It is submitted that executing court has construed the decree and found it to be inexecutable due to lack of description of the property in the schedule of the award as such. The said order cannot be questioned almost after four years in a proceeding under Article 227 of the Constitution of India.

21. Mr. Deb has referred to the decision of the Hon'ble Supreme Court ***Bhavan Vaja & Ors. v. Solanki Hanuji Khodaji Mansang & Anr.***, reported in **AIR 1972 SC 1371** paragraph 19 to demonstrate the duty of the executing court and in ***Bishnu Charan Mohanty v. State of Orissa & Ors.*** reported in **AIR 1973 Ori 199** paragraph 14 to show that in exercise of power under Article 227 the Constitutional court shall take into consideration the laches and delay on the part of the petitioner in approaching the court.

22. Mr. Deb has argued that the award contemplates discharge of reciprocal obligation and the award holder having failed to discharge his obligation under the award cannot put the award to execution. The expression "execution discharge or satisfaction" in Section 47 CPC includes a decision on discharge of reciprocal obligation. It is submitted that the petitioner having not discharged his obligation the decree cannot be put to execution.

23. In the aforesaid backdrop the decision of the learned executing court in directing the award holder to have the award corrected with the schedule of the property in question needs to be considered.

24. Indisputably the award was a result of disputes and differences between the family members of Mimani family. It is a consent award. The award has allotted properties based on the agreement arrived at by the members of the Mimani family namely Jugal Kishore Mimani, Mool Chand

Mimani and Kewal Chand Mimani. Jugal during his life time put the award to execution being Title Execution Case No. 140 of 2003. Jugal died on 26<sup>th</sup> September, 2007 whereupon his legal heirs were substituted Kamal is the son of Jugal. Ajay is the son of Kewal. The consent award shows that the property in question has been exclusively allotted to the award holder. It is true that award does not contain a schedule of properties separately, however, in so far as the present property is concerned it is quite evident that the area under occupation of Ganesh Produce has been allotted in favour of decree holder, to be more precise, the tenanted area in the name of Ganesh Produce. This one big office admittedly at the time of the consent award was under the control of the Kewal Chand Mimani, the father of the judgment debtor. At the time of execution of the writ the bailiff found Ajay to be in possession of the property in question.

25. We have carefully read the application under Section 47 of the CPC. We are unable to find out any averment in the said petition that the property in question is inexecutable either due to lack of description or vagueness.

26. However, in the argument as recorded by the learned executing court it appears that it was contended on behalf of the judgment debtor Ajay that there is a problem of identification of the actual suit property and without specific identification of the suit property mentioned in the award it cannot be executed. It was contended that in spite of the order of the

learned Registrar the award holder did not remove the defects and in suppression of the earlier orders of the Registrar a writ of possession was obtained on 27<sup>th</sup> November, 2015. The executing court has proceeded on the basis that the award does not contain any schedule. The execution petition shows that the schedule property specified in the execution application along with boundary does not tally with the award and for that reason time was given to the decree holder to remove the defects. The decree holder incorporated the boundary of the schedule of the property on their own which is not reflected in the original award and hence the award needs to be rectified. The executing court did not hold that the award holder has practiced fraud on court.

27. The executing court however has failed to take into consideration that the description furnished by the award holder in the schedule of the execution application is based on the description of the property mentioned in Clause 3(4) of the consent award. The award debtor is completely silent about the correctness of the schedule furnished by the award holder in terms of the order of the learned Registrar. It is true that initially Registrar did not accept the execution application in absence of furnishing any schedule and the award does not contain separately the schedule of properties but in the body of the award the properties have been mentioned that were allotted to each of the three brothers. All have accepted the said award with their open eyes. In the said application Ajay has taken a specific point that the said award is inexecutable. This property

was offered as a part of the settlement on behalf of the judgment debtor. It is quite clear from the award that the father of the judgment debtor was in control of the said property. All particulars with regard to the said property is deemed to have known or ought to have been known to the judgment debtor who had offered the said property in lieu of other properties. The details of the property in question is exclusively within the knowledge of the judgment debtor.

28. According to the award holder the schedule gives the description of the tenanted portion under the possession of Ganesh Produce at the time when the consent award was passed. Ajay did not dispute that this property was offered in the arbitration proceeding as a part of settlement of the family disputes. It was thus within the special knowledge of Ajay with regard to the identity and description of the said property. It is the duty of the executing court to find out the true effect of the award. In ***Bhavan Vaja & Ors.*** (*supra*) it has been clearly stated that the executing court can construe a decree and in an appropriate case it ought to take into consideration the pleadings as well as proceeding leading up to the decree. The duty of the executing court is to construe the decree and for that limited purpose it would certainly be entitled to look into the pleadings and the award/judgment if needed. [See ***Topanmal Chhotamal vs. Kundomal Gangaram & Ors.***; AIR 1960 SC 388].

29. The executing court has to see that the award debtor gives the award holder the very thing that the award directs and not something else. Accordingly if there is any dispute about identity or substance nobody but the court executing the award can only determine it as it is a matter distinctly related to execution discharge or satisfaction of the decree.

30. Where there is misdescription or insufficient description of the property in the award the execution court may hold an enquiry to find out the subject matter of the award.

31. The exercise of power under Section 47 of the Code is microscopic. The executing court can allow objection under section 47 of the Code to the executability of the decree if it is found that the same is found *void ab initio* and nullity apart from the ground that the decree is not capable of execution under law. However, this principle has limited application when enforceability of an award comes up for consideration under a proceeding under Section 36 of the Arbitration and Conciliation Act. The Arbitration and Conciliation Act, 1996 is a self contained code. The grounds on which an award can be challenged under Section 34 cannot be raised in a proceeding under Section 36 of the Arbitration and Conciliation Act, 1996 as it would encourage an award debtor to challenge the award on the self same grounds under Section 34 after the award becomes enforceable in law under Section 36 of the Arbitration and Conciliation Act, 1996. The finality attached to the enforcement of the

award will be defeated and lost if an award debtor is allowed to raise issues at the stage of enforcement of the award to invalidate the award which were available to such judgment debtor under Section 34 of the Arbitration and Conciliation Act, 1996. This indirect challenge to the award would not be permissible in a proceeding for enforcement of an award under Section 36 as it would encourage a procedure and give fillip to an award debtor to adopt a circuitous method and an avenue to challenge the award at the stage of enforcement of an award under Section 36 of the Arbitration and Conciliation Act, 1996 after such right is lost. In other words award debtor cannot be permitted to agitate the grounds on which an award can be invalidated under Section 34 at the stage of enforcement of the award under Section 36 of the 1996 Act. Any other interpretation would clearly frustrate and defeat the object of the 1996 Act as well as the legislative intent and policy underlying Sections 34 and 36 of the Arbitration and Conciliation Act, 1996.

32. Prior to the filing of the application under Section 47 of the CPC Ajay filed an application being Misc. Case no 840 of 2016 before the Learned Chief Judge City Civil Court, Calcutta for setting aside of the award under Section 34 of the Arbitration Conciliation Act, 1996, *inter alia*, on the ground that the purported award is inexecutable and unenforceable and otherwise bad and unsustainable in law. The application for setting aside of the award was filed almost 16 years after the award was published. The said application was dismissed on 10<sup>th</sup> March, 2017 on the ground of

limitation. The other brother Mool chand or his heirs initially filed an application for setting aside of the award in the year 2004 being Misc. Case No. 1410 of 2004. However, subsequently in or about 13<sup>th</sup> May, 2015 filed an application for dismissal of the said application and it was allowed. Interestingly in the said application the legal heirs of Mool Chand, *inter alia*, has stated:

*“4. That during the course of protracted litigations between the parties, the present petitioners have gone through the papers and documents of the arbitration proceedings and its related matters and have been convinced and have realised that there is no irregularity in the Award dated 24<sup>th</sup> October, 2000 as well as in the incidents leading up to the passing of the said Award and that the said Award is binding on the legal heirs of the signatories to the said agreement dated 30/08/2000.*

*5. That the present petitioners are satisfied that the Award was rightly passed and has been passed in the best interests of the parties to the arbitration proceedings and their legal heirs, including the present petitioners, who have thus realised the futility of pursuing with this case.*

*6. That in the wake of their aforesaid realisation, the present petitioners have jointly decided not to proceed with but to withdraw the Misc. Case No.1410 of 2004.*

*7. That in the circumstances stated above, the petitioners pray that Misc. Case No.1410 of 2004 be dismissed for non-prosecution without cost.”*

33. Only thereafter in the year 2016 Ajay, the son of Kewal filed the application for setting aside of the award which was dismissed on 10<sup>th</sup> March, 2017.

34. The said order has attained finality and the award becomes otherwise enforceable and executable on and from 10<sup>th</sup> March, 2017.

35. We are thus in agreement with the observation made in ***Hindustan Zinc Ltd*** (*supra*) with regard to the limited application of the provisions of CPC at the stage of execution of the award. In fact, earlier to this decision Hon'ble Justice D.K. Seth as His Lordship then was in ***Krishna Kumar Mundhra v. Narendra Kumar Anchalia*** reported in **2003 ILR (2) Cal 438: 2004 (2) Arb LR Cal 469** reiterated this principles in paragraph 9 of the said report in which it is stated:

*"9. Be that as it may, the learned counsel has sought to bring in these questions within the scope and ambit of Section 47, CPC and he has contended, if the decree itself is a nullity or without jurisdiction, in that event, the Executing Court can go behind the decree. He relied on the decision of Bhavan Vaja v. Solanki Hanuji Khodaji Mansang, and Kiran Singh v. Chaman Paswan, . The principles laid down therein are accepted proposition with which there is no scope of any doubt. If the decree is a nullity or without jurisdiction, the said question can also be raised in the execution and the Executing Court can go behind the decree. This is a principle which is an exception to the principle that executing Court cannot go behind the decree. This proposition has not been disputed by Mr. Mitra. But the question remains whether these questions can be raised in a proceeding under Section 47 CPC in an execution of an Award in terms of Section 36 of the Act. In fact,*

the provisions contained in Section 34 of the Act of 1996 are somewhat similar to Section 47, CPC. Section 47 CPC renders the scope very wide and includes any and every dispute between the parties to be settled or resolved in the same proceedings and not by separate proceedings in the execution of the decree itself. Whereas Section 34 while providing for similar provision has restricted the grounds of challenge enumerated therein. It has not made the same open to any and every dispute between the parties. Section 34 also prescribes the grounds under which it can be challenged and after the question is decided, the Award becomes final in terms of Section 35. If no application under Section 34 is made, then after the expiration of the period limited the Award becomes enforceable in terms of Section 36, which also does not provide that the provisions of the Code as such would become applicable. Section 36 creates a fiction that it would be enforceable as if it were a decree of the Court within the scope of Order 21 CPC. This enforcement of the Award under Order 21, CPC would not attract the application of Section 47 CPC simply by reason of the expression used in Section 36. Section 36 cannot be read independent of the other provisions contained in the Act itself. All the provisions are to be reconciled with the other provisions of the Act. Section 36 cannot be read out of context and independent of the scheme of the Act. Reference to another statute does not attract application of such other statute to the referring statute unless expressly provided for. A reference in a statute to another statute does not invite inconsistency in the referring statute. Any such reference, if made, has to be interpreted in the context in which the reference is made and not inconsistent with the provisions of the referring statute itself. If it brings inconsistency, then the same is to be avoided. If Section 47, CPC is to be attracted, then the restrictions provided in Section 34 of the Act would be redundant. It cannot be interpreted in the manner inconsistent with the provisions contained in the other part of the Act. That apart the finality of the decree under the Code is reached after the decision under Section 47,

CPC, if raised. But the Legislature in its wisdom thought it fit to incorporate the scope similar to Section 47 CPC in Section 34 of the Act in order to bring finality before the decree becomes executable. Same procedure cannot be expected to be incorporated in a statute twice over. Legislature never intends repetition. At the same time, the object of the Act is directed towards speedy and hazard-free finality with a view to avoid long drawn procedure based on technicalities. Therefore, having regard to the provisions of Sections 4, 5, 12, 13, 16, 34 and 35, Section 36 cannot be interpreted in a manner inconsistent with any of those provisions to attract the provisions contained in the Code in its entirety. Therefore, in the application filed under the provisions of CPC for the purpose of execution of an Award, the Court cannot overlook the scope and ambit within which the Court is to execute the Award taking aid of the provisions for execution contained in the CPC not inconsistent with the provisions contained in the 1996 Act. Therefore, in my view, Section 47, CPC cannot be attracted despite the provisions contained in Section 36 in respect of an Award when the Award is sought to be executed thereunder.”  
(emphasis supplied)

This judgment was delivered prior to the amendment recently made to Section 34 and 36 of the Arbitration and Conciliation Act, 1996.

36. In our view the executing court put a wrong question and thus had arrived at a wrong answer. The execution court has overlooked the fact that the said property was offered by the award debtor and in case of any objection being raised by the award debtor in this regard it is incumbent upon the award debtor to give details of the properties that was offered in the arbitration proceeding and taken into consideration at the time of publication of the final award. We are not convinced with the argument

that the award holder has practiced fraud on the court. The award holder in its own estimation and understanding has given a description of a property which is to be considered by the court in the appropriate proceeding. The award holder has not snatched any order by misrepresentation. The furnishing of a schedule by the award holder on the basis of his own understanding of the property in question is required to be adjudicated upon by the executing court if any objection is raised with regard to the description of the said property. If Ajay is contending now that the description of the property furnished by the award holder is not in consonance with the award or contemplated under the award it was for him to give the description of the property as this property was offered by his predecessor in the arbitration proceeding as part of the settlement. In fact, Ajay has accepted the order passed under Section 47 but refused to furnish particular to the learned arbitrator on the ground that the arbitrator became functus officio. The order passed under Section 47 of the Code of Civil Procedure was not challenged by Ajay. This could induce a firm belief in the mind of the award holder that Ajay is willing to have this issue of identification of the property in question to be corrected in the award by the Arbitrator. It is a fact that the present award holder also did not challenge the order under Section 47 and instead had requested the Arbitrator to incorporate the schedule of the property as provided in the said communication. Ajay even at that stage did not respond to the description of the property suggested by the award holder and forwarded by the

arbitrator to Ajay for his response. Ajay seems to be evasive in his stand. In fact the bailiff report would show that Ajay did not dispute the identity of the property at the time of the visit by the court bailiff on 11<sup>th</sup> February, 2016 to execute the writ of possession. The relevant portion of the report is reproduced below:

*“On reaching there the said son of DHr. Identified the decreetal property being one big office (500 sq. Ft.) on the 2<sup>nd</sup> floor at premises no.2, Digambar Jain Temple Road, Kol – 700 007 as per schedule of this writ of possession. He also identified the JDr. No.2(i) Sri Ajay Mimani.*

*The contents of the writ of possession and copy of decree were read over and explained to the said JDr. No. 2(i) and he was asked to vacate the above decreetal property by removing all the articles therefrom.*

*The said JDr. No.2(i) heard the contents of the writ and copy of decree but he refused to vacate the same. When I was going to remove the articles from the decreetal property the said JDr. No.2(i) became very furious and he told me that it is true that the office is belongs to Kamal Minani but I could not leave this office and he along with his associates became violent and strongly resisted me in executing the writ of possession.”*  
(emphasis supplied)

37. Mr. Deb has argued that the award holder having accepted the order of the Registrar in the execution proceeding due to lack of description of the property and subsequently accepting the order of the executing court under Section 47 of the CPC after almost four years cannot challenge the

order passed under Section 47 of the CPC by the learned court on the ground of approbate and reprobate relying upon the decision of the Hon'ble Supreme court in ***R.N. Gosain v. Yashpal Dhir*** reported in **1992(4) SCC 683**. We are unable to accept the said submission in view of the fact that the request to the learned Arbitrator to furnish a schedule with the description provided by the award holder cannot take away the right of the award holder to question the jurisdiction of the executing court in not deciding the said issue on the basis of the pleadings and the description of the property mentioned in the award itself. It is also significant that the order under Section 47 was accepted by Ajay also and if we accept the submission of Mr. Deb then it was incumbent upon Ajay to cooperate with the arbitrator in providing the schedule and not to question the jurisdiction of the arbitrator to deny such details on the ground that the arbitrator has become functus officio.

38. The argument made by Mr. Deb that the award imposes obligation on both sides which are so conditioned that performance of one is conditional on the performance by the other and that the execution will not be ordered unless the party seeking execution not only offers to perform his side but when objection is raised satisfies the executing court that he is in a position to do so was neither raised nor argued in the proceeding under Section 47 of the Code of Civil Procedure. It was only limited to the issue of non supply of schedule in the award.

39. It reminds us of the observation of the Privy Council in ***General Manager of the Raj Durbhunga v. Coomar Ramaput Sing*** reported in **1872 SCC Online PC 16** in which it was observed that the actual difficulties of a litigant in India begins when he has obtained a decree and the need for a seamless successful execution of a decree has been reiterated by the Hon'ble Supreme Court in ***Shub Karan Bubna vs. Sita Saran Bubna and Ors.***, reported in **2009(9) SCC 689** and in a fairly recent decision ***Rahul S. Shah vs. Jinendra Kumar Gandhi and Ors.***, reported in **2021 (6) SCC 418** in which the observation by the Privy Council was approved.

40. The decree was put to execution within the period of limitation and still not fully satisfied. In the facts and circumstances of the case the question of delay and latches does not arise.

41. In view thereof we set aside the judgment and order dated 30<sup>th</sup> April, 2019 in Misc Case no. 137 of 2018 and direct the executing court to decide the identity and description of the property in question upon taking into consideration the observation made in this order preferably within a period of four months from the date of communication of this order.

42. The revisional application being C.O. 1981 of 2023 is allowed.  
However there shall be no order as to costs.

I agree

**(Soumen Sen, J.)**

**(Uday Kumar, J.)**

Later

After the judgment is delivered Mr. Deb has prayed for stay of  
operation of the judgment. Such prayer is considered and rejected.

**(Soumen Sen, J.)**

**(Uday Kumar, J.)**