

Ravi Sawhney & Ors vs Ramesh Kohli & Ors on 31 January, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI

EX.P. 22/2021, EX.APPL.(OS) 461/2021, EX.APPL.(OS)
2934/2022(Objection), EX.APPL.(OS) 2988/2022
(Clarification), EX.APPL.(OS) 3531/2022(Delay in Reply),
EX.APPL.(OS) 3733/2022(Objection), EX.APPL.(OS)
3793/2022, EX.APPL.(OS) 51/2023

RAVI SAWHNEY & ORS.

Through:

..... Decree Holders

Mr. A. S. Chandhiok, Sr. Adv.
with Mr. Vineet Jhanji, Ms.
Monika Tyagi, Mr. Imran
Mouley, Simran Kohli, Mr.
Vidushi Keshan, Advs.

versus

RAMESH KOHLI & ORS.

Through:

..... Judgement Debtors

Mr. M.S. Khan, Ms. Pallavi
Chopra, Mr. M. Avshyan and
Ms. Neha Khan, Advs. for JD-
1.
Mr. Gaurav Duggal, Adv. for
JD-2.
Mr. Vidur Bhatia, Adv. for JD-
3 to 5.
Mr. Abhimanyu Mahajan, Ms.
Anubha Goel, Mr. Mayank
Joshi, Ms. Shabhavi Kala,
Advs. for JD-6.
Mr. Akshay Makhija, Sr. Adv.
with Ms. Roshni Namboodiry,
Adv. for JD-7.
Mr. Sanjeev Mahajan, Ms.
Ruchira Gupta, Ms. Harshita
Sharma, Ms. Urvi Kapoor and
Mr. Utsav Magotra, Advs. for
Objector.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 31.01.2023

1. The present execution petition had been preferred seeking issuance of appropriate orders for attachment of property at 31, Golf Links, New Delhi - 110003 and 7&7A Cross Road, Dehradun, Uttarakhand - 248001. A further prayer is made for the appointment of a Court Receiver who may take vacant possession of the subject properties and for the said Receiver taking requisite steps for the sale thereof and disbursements of proceeds obtained therefrom amongst parties. The aforesaid prayers are addressed in the backdrop of an award dated 31 July 2014 read with the interim award dated 18 October 2012. Since the litigation inter partes has had a chequered history, it would be necessary to notice the following essential facts.

2. The disputes and differences essentially arise amongst the heirs of late Shri B. C. Kohli who died intestate on 15 April 1978. The disputes led to Judgment Debtor No.2 instituting a suit for injunction in this Court bearing CS(OS)No. 73/2005 titled as Shri J.B. Kohli vs. Shri Ramesh Kohli and Ors. During the pendency of those proceedings and with the consent of parties, the Court by an order of 27 April 2007 referred all disputes to arbitration to be presided over by the late Hon ble Mr. Justice S. K. Mahajan. During the course of the arbitral proceedings, the Arbitrator rendered an interim award dated 18 October 2012 holding that all parties to the proceedings would be entitled to 1/8th share in the subject properties. On 31 July 2014, the Arbitrator came to conclude that the subject properties cannot be partitioned by metes and bounds and have to necessarily be sold. Proceedings thereafter appear to have continued before the Tribunal in which JD No.1 appears to have raised the issue of his sisters, namely, Smt. Usha Chatrath, Smt. Vidyawati Sawhney and Dr. Indira Kohli Bhatia represented by JD Nos.3 to 5, 7 and 8 having relinquished their shares in the subject properties in his favour. On 25 October 2018, JD No.7 is stated Subject Properties JD to have moved an application before the Arbitrator for termination of arbitral proceedings in light of the interim award dated 18 October 2012 and the order of 31 July 2014. The said application came to be dismissed by the Tribunal on 19 December 2018.

3. The aforesaid order of the Tribunal was assailed by JD No.7 by way of a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 which came to be numbered as OMP No. 1 /2019. The order of the Tribunal aforesaid came to be questioned on the ground that once it had come to conclude that the subject properties are to be sold separately and proceeds of the sale distributed amongst co-owners in accordance with the shares determined by the Tribunal in its interim award of 18 October 2012, the same would clearly amount to a final decree of partition and consequently the Tribunal should have terminated all proceedings thereafter. The said challenge found favour with the Court which ultimately allowed the petition preferred under Section 34 of the Act on 15 May 2019. It would be pertinent to extract the following findings as duly recorded in that order:-

"19. As submitted by the counsel for respondent no. 2 itself, the present arbitration proceedings were akin to a suit of partition. Therefore, with the passing of the order dated 31.07.2014 wherein the Sole Arbitrator held that the properties in question cannot be partitioned by metes and bounds and have to be put to sale, the Arbitrator is deemed to have passed the Final Award for the rights inter se between the parties,

thereafter to be determined in an enforcement proceeding under Section 36 of the Act.

20. Reliance of the Arbitrator and the counsel for the respondent no. 2 on the judgment of the Supreme Court in GanduriKoteshwaramma (Supra) is ill-founded inasmuch as in the said case the report of the Commissioner appointed for division of the properties in question therein was yet to be considered by the Court and Final Decree was yet to be passed. It was in that factual background that the Supreme Court held that before passing of the Final Decree the court has the power to revise the Preliminary Decree or pass another Preliminary Decree if the situation or the change in the circumstances so demand. The Court was not considering the question as to whether the preliminary decree can be modified by the Court even after the Final Decree has been passed in the suit.

21. As far as the admission of the petitioner to the execution of the Relinquishment Deed is concerned, in light of my finding that the Arbitrator had become functus officio and his mandate had terminated on the passing of the Final Award in form of his order dated 31.07.2014, the Arbitrator had no jurisdiction to consider this question any further.

22. Section 32(1) of the Act provides that the arbitral proceedings shall be terminated by the Final Arbitral Award. Sub-Section (3) to Section 32 further provides that subject to Section 33 and sub-Section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings. Therefore, with the passing of the Final Award, the Arbitrator has no jurisdiction to modify his Final Award, except in exercise of power under Section 33 of the Act or on an order of the Court under sub-Section (4) of Section 34 of the Act. This cannot change merely because the parties, on an incorrect appreciation of the law, continue to appear before the Arbitrator.

23. The respondent no. 2 would, however, be free to agitate its claim on the Relinquishment Deeds in accordance with the law in other appropriate proceedings.

24. In view of the above, the Impugned Order/Award dated 19.12.2018 is set aside. There shall be no order as to cost."

4. Although the aforesaid judgment has been assailed by way of a Special Leave Petition which is pending, no interim order is stated to operate thereon. The instant petition, thereafter, came to be instituted in February 2021.

5. It would also be relevant to take note of some of the significant orders which were passed in these proceedings. On 11 March 2022, the Court examined the report submitted by the Local Commissioner who had been called upon to inspect the subject properties and to take into its possession the original title deeds pertaining thereto. While dealing with the various objections

which had been raised principally at the behest of JD No.1, the Court recorded as follows :-

"3. All the parties to the present execution petition i.e. all the decree holders herein and the judgment debtor Nos.2 to 10 are agreeable that the suit properties be sold so that the shares of each of the parties can be realised, however objection is raised by the judgment debtor No.1-Sh. Ramesh Kohli, who is presently occupying part of 31, Golf Links and entire Dehradun property.

4. According to the judgment debtor No.1, the three sisters, namely, Smt.UshaChatrath, Dr.Indra Kohli Bhatia and Smt.Vidhavati Sawhney executed a relinquishment deed and had issued a letter before the learned Arbitrator that their shares be given to Sh.Ramesh Kohli.

5. The judgment debtor No.1 has not challenged the Award till date by filing a petition under Section 34 of the Arbitration and Conciliation Act (in short „The Act), though learned counsel for the judgment debtor No.1 states that a Special Leave Petition is pending before the Hon ble Supreme Court against the order passed by this Court dated 15th May, 2019.

6. At best, the dispute between the judgment debtor No.1 and other parties to the present petition is as to how much share can be given to the judgment debtor No.1. Even if the judgment debtor No.1 succeeds in the objection raised, the best case in his favour is of an enhanced share, which in any case can be granted only after the two properties are sold. Thus, the parties can identify the appropriate buyers in relation to both the properties and submit the same before this Court in sealed covers, so that in case the properties are sold, the proceeds can be deposited in this Court and thereafter, the proceeds distributed between the parties as per their share.

7. In case the parties are not able to find the appropriate buyers, sale of the properties through auction will be considered on the next date of hearing.

8. List on 18th April, 2022."

6. As would be evident from the aforesaid extract of the order passed on 11 March 2022, the Court had found that the execution petitioners as well as JD Nos.2 to 10 weread idem that the subject properties be sold and the proceeds thereof be distributed amongst parties as per the shares recorded in the award which had been rendered. The Court also took note of the assertion of JD No.1 that the sisters had executed relinquishment deeds and that consequently his share would have to be revised. The learned Judge, however, held that the aforesaid assertion could not be viewed as an obstacle to proceed further for the sale of subject properties since even if JD No.1 were to succeed ultimately in the objections raised, it would only have a bearing on the distribution of the sale proceeds. It accordingly left parties to identify appropriate buyers in relation to both the properties and submit the same before the Court in a sealed cover.

7. On 17 May 2022, the petitioners/Decree Holders placed for the consideration of the Court an offer received by them for the Golf Links property in an amount of Rs.130 crores. On 27 May 2022, when the matter was again taken up for consideration, the Court took on board the stand of respective parties to the extent that they had agreed to explore the possibility of a joint sale of the Dehradun property to a third party which may be mutually identified. On 18 July 2022, the Court took on board a valuation report with respect to the Golf Links property which pegged it at Rs.81,85,58,705/-. It would, however, be pertinent to note that the aforesaid valuation report was based solely upon the minimum circle rate. On 19 September 2022, the Court noted the stand of JD No.1 to the effect that it was not agreeable to the price identified by the DHs for the sale of the Golf Links property. It also noted that JD No.1 did not have any competing offer to present for the consideration of the Court. JD No.1 is also stated to have taken the position that the subject properties should be sold through public auction and after the objections have been disposed of.

8. In the meanwhile and on a challenge which had been mounted by JD No.1 to the order of 11 March 2022 by way of EFA(OS) 6/2012 a Division Bench of the Court passed a detailed order on 22 September 2022 dismissing the appeal and upholding the order passed in these proceedings. It would be pertinent to extract the aforesaid decision hereunder:-

"1. This appeal impugns the order dated 11.03.2022 directing the sale of two properties i.e. Property bearing No. 31, Golf Links, New Delhi and Property No. 7-7A, Cross Road, Dehradun, Uttarakhand, failing which, through public auction, all along ensuring that the said properties fetch the optimal values through sale or other form of disposal of the properties. This order is in execution of award passed on 31.07.2014. Surely, the appellant cannot take more than what he is entitled to. His entitlement is spelt out in the award. He claimed some more shares as having accrued to him through relinquishment deeds from three of his sisters which, in effect, would take his share to about 50% of the two inherited properties.

2. The respondents have, for the moment, humored the said claim and reserve their rights to contest the same at appropriate stage. Nevertheless, to accommodate the appellant's claim to hold on to the Delhi property, which has admittedly been valued at a private bid in the range of Rs. 130 crores, of which the appellant is in joint possession with his two brothers, to the exclusion of the other five siblings.

3. On the previous date i.e. on 16.09.2022, this court had passed the following order:

" 1. An affidavit has been filed by the appellant claiming that he has 50% share on the basis of Relinquishment Deeds executed in his favour by his three sisters. The same is disputed by the learned counsel for the respondents.

2. Be that as it may, the private bid for the Delhi property is said to be in the range of Rs.130 crores whereas for the Dehradun property is said to be Rs.32 crores. Thus, the total value of the properties is Rs.162 crores. Of the 8 siblings only 2 siblings are occupying the Delhi property while the Dehradun property is in exclusive possession

of the appellant.

3. The appellant's case, at best, is that he has 50% share of the same. Since the appellant is in possession of the said properties to the exclusion of all other siblings, it would be logical and prudent that to safeguard the shares of the respondents, he deposit at least 50% of the private bid amount otherwise, the said properties be put to sale, either through auction or on private sale, whichever fetches the highest value for the properties. In the circumstances, it will be open to the appellant to deposit 50% of the aforesaid value, i.e., Rs.81 crores.

4. The learned Senior Advocate for the respondent no.14 submits that the said deposit would be without prejudice to rights and contentions of the parties.

5. The learned counsel for the appellant seeks time to consider the position.

6. Re-notify on 22.09.2022.

7. It will be open to the respondents to file their objections and response apropos the document filed by the appellant."

4. Today, the learned counsel for the appellant says that he is not in a position to pay the said monies. In this regard, the impugned order records as under:

"1. By this petition, the decree holders seek execution of the Award dated 31st July, 2014 read with Interim Award dated 18th October, 2012. As per the Award, shares in the properties at Golf Links and Dehradun were apportioned in favour of all the children of late B.C. Kohli. Parties have already exercised their option of inter se bidding which has not been successful, thus the only course open, to realise the share of each of the parties, is by selling the two properties."

5. The shares of the eight siblings were determined by the interim award of 18.10.2012 and the latter order of 31.07.2014 records that the properties cannot be partitioned. Therefore, the realization of the respective shares would only be by way of disposal of the properties. The respondents went into execution of the said order which has resulted in the impugned order. In any case, the award is not challenged under the Arbitration and Conciliation Act, 1996. The appellant says that his share should personally and exclusively be determined first. It is noted that all the shares have been determined and nothing more can be done except as already directed as that is the most logical and prudent determination in terms of the above.

6. The appeal is without merit and it, along with the pending applications, is accordingly dismissed.
"

9. The Division Bench significantly noted that the shares of parties stood conclusively determined in terms of the interim award dated 18 October 2012 and by the

subsequent and final order of 31 July 2014. It also noted that the award had not been challenged under the Act. It further significantly observed that all shares having already been determined, nothing more could be done except for the sale to proceed further in terms of the directions issued in these proceedings. The aforesaid judgment of the Division Bench dismissing the appeal was questioned by JD No.1 before the Supreme Court by way of SLP (C) No. 20038/2022 which came to be dismissed on 09 December 2022.

10. The position of parties has essentially remained the same before this Court when the petition was called for hearing today. The Court noted that apart from the two private bids which had been placed for the consideration of the Court in these proceedings and totaling to Rs.162 crores [Rs.130 crores for the Golf Links property + Rs.32 crores for the Dehradun property], no better or enhanced offer has been submitted by any of the parties. No effective steps also appear to have been taken for considering the sale of the subject properties by way of public auction or invitation of bids.

11. While concluding the narration of essential facts, it may be additionally noted that Dr. Indira Kohli Bhatia the mother of JD Nos.3,4 and 5 had instituted a suit for injunction being CS(OS) 75/2015 which is stated to be pending before the District Courts at Dehradun. In the aforesaid suit, Dr. Indira Bhatia asserting herself to be a partner of the firm, namely, M/S Lakshmi Finance and Trading Company claimed a right to retain possession of the Dehradun property by virtue of being a partner of the aforesaid firm. On the aforesaid suit, the Court on 19 February 2015 provided that the plaintiff as a working partner of the aforesaid firm would not be dispossessed from the Dehradun property. Ms. Indira Bhatia subsequently passed away on 17 February 2018. JD Nos.3, 4 and 5 her legal heirs are stated to have been impleaded as plaintiffs in the aforesaid suit. Be that as it may, those suit proceedings and the orders passed thereon would have no impact on these proceedings since undisputedly the claim of the original plaintiff itself rested on her being a working partner of the firm and her right to retain possession thereof in such capacity.

12. In the present suit proceedings, objections have also come to be filed by Mr. Suryaveer Kohli the son of JD No.1 who appears to have staked a claim over the Dehradun property on the basis of purported Will alleged to have been executed in his favour by the late Shri B.C. Kohli. In assertion of that claim, a civil suit numbered as CS (OS) 557/2017 titled as Suryaveer Kohli vs. J.B. Kohli and Ors. is stated to have been instituted before the Court of the Senior Civil Judge, Dehradun and which remains pending on the board of that Court. However, no injunction or restraint stands granted in the aforesaid proceedings.

13. The objector, Mr. Suryaveer Kohli, has taken an objection to the maintainability of the execution proceedings before this Court contending that since prayers and reliefs of execution are sought in respect of a property situate in the State of

Uttarakhand, this Court would lack territorial jurisdiction to continue proceedings. It is further asserted that the Court would have to necessarily follow the procedure envisaged in Section 39 of the Code of Civil Procedure, 1908³. The objector contends that a decree Code can be executed either by the Court which had passed and drawn the same or by way of a transfer to a court within whose jurisdiction the assets against which steps are proposed to be taken is situate. It is essentially asserted that an execution in respect of immovable property lying outside the territorial jurisdiction of the executing court is permissible only in accordance with the provisions contained in Order XXI Rules 3 or 48 of the Code. It is further asserted that since the Dehradun property presently forms subject matter of CS (OS) 557/2017, the proceedings in respect of its execution should be placed in abeyance. It is lastly urged by the objector that the Golf Links property formed part of the Hindu Undivided Family [HUF] of the late Shri B. C. Kohli and since he is entitled to be viewed as a coparcener therein, no order for the sale of that property is permissible. Insofar as the Dehradun property is concerned, the objector claims an ownership right in exclusivity in light of the alleged bequest made by the late Shri B. C. Kohli.

14. As was noticed in the preceding parts of this order, the execution petitioners as well as JD Nos.2 to 10 have in unison and harmony prayed that the reliefs as claimed in the execution petition be granted and a quietus thus be lent to the long-winded litigation. JD No.1 has questioned the sufficiency of the private bid which had been obtained by the execution petitioners in respect of the subject properties and had contended that the value thereof should be ascertained independently.

15. Mr. Chandhiok, learned Senior Counsel appearing for the DHs, stated that they would have no objection if the Court were to appoint Receiver who may invite bids for the subject properties to enable this Court to examine whether any party can be identified as being desirous of submitting a bid exceeding Rs.162 crores. According to Mr. Chandhiok, the aforesaid course if adopted would also allay all apprehensions that are harbored by JD No.1 in respect of the sufficiency of the bid which has been obtained by the execution petitioners privately. In the considered opinion of this Court, the appointment of a Receiver would clearly be merited in order to give effect to the significant directions which have been issued in these proceedings and the admitted fact that no progress in furtherance thereof has been made.

16. That takes the Court to essentially deal with the objection which has been raised at the behest of the objector Mr. Suryaveer Kohli. It must, at the outset, be noted that the execution proceedings have come to be drawn in respect of an award rendered inter partes. An award in terms of the provisions contained in Section 36 is to be executed as if it were a decree of a court. The extent to which the legal fiction as incorporated in Section 36 could operate and the principles laid down by the Supreme Court in *State of W.B. vs. Associated Contractors*⁴ and *Sundaram Finance Ltd. vs. Abdul Samad*⁵ as well as the judgment rendered by a learned Judge of this Court in *Daelim Industrial Co. Ltd. vs. Numaligarh Refinery Ltd.*⁶ were issues which

were considered in detail by this Court in Gujarat JHM Hotels LTD vs. Rajasthali Resorts and Studios Limited⁷. While dealing with the concepts of seat and venue of arbitration and the institution of proceedings for execution, the Court in Gujarat JHM had held as follows:-

"32. It becomes apposite to note that Section 2(1)(e) defines the word „Court to mean the principal civil court of original jurisdiction in a district and includes High Courts in exercise of their ordinary original civil jurisdiction having jurisdiction to decide questions forming the subject matter of arbitration as if the same had been the subject matter of a suit. Section 20 confers a right on parties to mutually agree upon a place of arbitration. Sub-Section (3) thereof enables the Arbitral Tribunal to meet at any place it considers appropriate for consultation amongst its members or hearing witnesses, experts, parties or for inspection of documents, goods or other property. The discretion so conferred on the Arbitral Tribunal is subject to parties otherwise agreeing to the venue that may be chosen by the Arbitral Tribunal. It becomes significant to note that sub-

(2015) 1 SCC 32 (2018) 3 SCC 622 2009 SCC OnLine Del 511

⁷ NCN 2023/DHC/000323 section (1) of Section 20 resonates the right of parties to an arbitration agreement to agree on a seat. It is the concept of the juridical seat of arbitral proceedings as promulgated and recognised by the UNCITRAL Model Law and which has been adopted by the Act which was recognised to be of seminal importance in BGS Soma. The Supreme Court noticed that a distinction must be recognized to exist between a seat and a venue of arbitration. This was explained since for the convenience of parties as well as members constituting the tribunal, seating and hearings may possibly be held and conducted at a mutually acceptable place. However, and as was noticed in the BGS Soma, the arbitral award that comes to be rendered under the Act is to not only incorporate a date when it is rendered but also the place where it is pronounced. The confusion appears to have arisen with respect to the issue of seat of arbitration in light of Section 2(1)(e) continuing to incorporate and define the word „court in terms similar and identical to that carried in the Arbitration Act, 1940. As was noticed in BGS Soma, it was this inconsistency between the original understanding of a court under the 1940 Act and the modern concept of arbitration as incorporated in the Act which had constrained courts to undertake the task of a judicial enunciation of the concept of seat and venue. In BGS Soma, the legal position as enunciated by the Constitution Bench in Balco v. Kaiser Aluminium Technical Services Inc. came to be reiterated and affirmed with the seat of arbitration being liable to be recognized as the center of gravity or in one sense acting as the anchor and situs of the arbitration. It was also significantly observed that the term subject matter as appearing in Section 2(1)(e) is no longer connected to the cause of action principles which may be relevant under the Code but to the subject matter of arbitration. It was thus explained that the court as defined in Section 2(1)(e) would be that which would be recognized to have supervisory control over all arbitral proceedings. While explaining the concept of party autonomy which now finds recognition in modern day arbitration, the Supreme Court noted the right inhering in parties to make a conscious decision of designating a seat, primacy being accorded to the choice of parties and the said choice extending to the designation of a seat to which the cause of action principles may

have no application. It thus recognizes the right of parties to select a seat of arbitration which could be one where no obligations under the contract may have been performed or to which the classical concept of a cause of action may have no application.

33. It was further held that once parties agree to designate a seat of arbitration, that constitutes and is liable to be recognized as an exclusive jurisdiction clause. It was observed that once a neutral place of arbitration comes to be designated by parties, it would be liable to be understood to be the seat of all arbitral proceedings and would thus restrict parties to initiate actions arising out of the arbitration only before competent courts situate within the territorial limits of the seat. It was further observed that merely because the venue of arbitration may be different from the designated seat that would clearly not be determinative and it would be the juridical seat which would be entitled to be recognized as governing all conflicts relating to the jurisdiction of courts in respect of the arbitration. It was consequently held that once a seat is designated in an agreement, the courts of that seat alone would have jurisdiction to entertain and rule upon all applications that may be made under Part-I of the Act. While expounding upon the tests for determination of the seat, the Supreme Court in BGS SOMA held that even where the arbitration agreement refers to a venue of proceedings, in the absence of any contrary intention, the stated venue would for all purposes be liable to be understood as being the seat of arbitral proceedings.

34. In light of the aforesaid principles as laid down in BGS SOMA, the Court comes to the irrefutable conclusion that for the purposes of all applications that may be preferred under Part-I, the seat court would continue to be entitled to entertain petitions or applications that may be referable to Part-I of the Act.

35. While dealing with the provisions of Section 42, the Supreme Court in BGS SOMA had explained the legislative policy underlying the said provision by observing that it is essentially meant to avoid conflicts with different courts seeking to assume supervisory control over arbitral proceedings. Their Lordships explained that once an application arising out of an arbitration agreement comes to be made before a particular court, all subsequent applications arising therefrom would necessarily have to be preferred before that court alone. Reference in this context was made to applications that may be made before or during the course of arbitration and for that matter even thereafter as envisaged in Sections 9, 14, 15, 29A, 34, 36 and 37 enshrined in Part-I of the Act. It would be pertinent to bear in mind that out of all the provisions noticed above, petitions preferred under Section 34, 36 or for that matter one referable to Section 37(c) would obviously be applications which would come to be preferred upon conclusion and termination of arbitral proceedings since by that time the award itself would have come to be rendered. The observation of the Supreme Court in Associated Contractors and where their Lordships had an occasion to observe and hold that the phrase "with respect to an arbitration agreement" would cover even applications made after conclusion of arbitration proceedings is to be thus understood and appreciated in the aforesaid light. "

17. The scope of the legal fiction incorporated in Section 36 was explained in the following terms:-

"37. It was significantly observed that Section 36 only provided for an award being liable to be executed as a decree. This obviously since that award is not one which has come to be rendered by a court as understood in the strict legal sense. Sundaram Finance thus appears to recognise the limited extent to which the legal fiction enshrined in Section 36 would extend. The limited extent of the legal fiction which stands engrafted in Section 36 of the Arbitration and Conciliation Act, 1996 was also highlighted by the Supreme Court in *Union of India v. Vedanta Ltd.* in the following terms: "69. Section 36 of the Arbitration Act, 1996 creates a statutory fiction for the limited purpose of enforcement of a "domestic award" as a decree of the court, even though it is otherwise an award in an arbitral proceeding [*Umesh Goel v. H.P. Coop. Group Housing Society Ltd.*, (2016) 11 SCC 313 : (2016) 3 SCC (Civ) 795] . By this deeming fiction, a domestic award is deemed to be a decree of the court [*Sundaram Finance Ltd. v. Abdul Samad*, (2018) 3 SCC 622 : (2018) 2 SCC (Civ) 593] , even though it is as such not a decree passed by a civil court. The Arbitral Tribunal cannot be considered to be a "court", and the arbitral proceedings are not civil proceedings.

The deeming fiction is restricted to treat the award as a decree of the court for the purposes of execution, even though it is, as a matter of fact, only an award in an arbitral proceeding. In *Paramjeet Singh Patheja v. ICDS Ltd.* [*Paramjeet Singh Patheja v. ICDS Ltd.*, (2006) 13 SCC 322] , this Court in the context of a domestic award, held that the fiction is not intended to make an award a decree for all purposes, or under all statutes, whether State or Central. It is a legal fiction which must be limited to the purpose for which it was created. Paras 39 and 42 of the judgment in *Paramjeet Singh Patheja* [*Paramjeet Singh Patheja v. ICDS Ltd.*, (2006) 13 SCC 322] read as : (SCC pp. 345-46) "39. Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus a final award, without actually being followed by a decree (as was later provided by Section 17 of the Arbitration Act of 1940), could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act are concerned.

42. The words "as if [Ed.: The words "as if" have been emphasised in original as well.] " demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central."

(emphasis supplied)"

38. The limited extent of the legal fiction enshrined in Section 36 as noticed in *Vedanta* was reiterated by the Supreme Court in its recent decision in *Amazon.Com NV Investment Holdings LLC v. Future Retail Limited*.⁸ as would be evident from the following passage:-

"77. This judgment in Vedanta [Union of India v. Vedanta Ltd., (2020) 10 SCC 1] is, therefore, authority for the proposition that the fiction created by Section 49 of the Arbitration Act is limited to enforcement of a foreign award, with the important corollary that an application to enforce an award is an application under the Arbitration Act and not an application under Order 21 of the Code of Civil Procedure (in which case, such application would have been governed by Article 136 of the Limitation Act as an execution application under Order 21, and not an application under the residuary Article 137 of the Limitation Act). Mr Salve's attempt to distinguish this judgment on the ground that Section 49 lays down an entirely different procedure from the procedure to be followed for a domestic award qua enforceability does not, in any manner, distinguish the ratio of this judgment which is that an application to enforce a foreign award is not under Order 21 of the Code of Civil Procedure but under the Arbitration Act. Also, the deeming provision in Section 49, having reference to a decree of "that Court", which refers to the court which is satisfied that the foreign award is enforceable, again, makes no difference to the aforesaid ratio of the judgment."

18. The Court also had an occasion to notice the perceived discord between the decisions of the Supreme Court in Associated Contractors and Sundaram Finance. While dealing with the aforesaid issue, it had held as under:-

"44. The principles which stand enunciated in Associated Contractors, Sundaram Finance and BGS SOMA thus clearly lead one to conclude that it would clearly be permissible for a party to initiate enforcement proceedings before the competent court situate in the seat of arbitration. Sundaram Finance further expands the aforesaid position by conferring a choice on a party to initiate proceedings for execution directly before the court within whose territorial jurisdiction the judgment debtor may reside or its assets be situate and thus not be bound by the rigors of first approaching the seat court and thereafter seeking the issuance of a certificate of transfer or precept. It thus reemphasizes the imperative of the party to the arbitration agreement being freed from the rigors of procedure which would otherwise apply.

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45. The Court for the completeness of the discussion on the subject also deems it apposite to notice a decision rendered by a learned Judge of the Bombay High Court in Global Asia Venture Company versus Arup Parimal Deb and Others. In the said decision the Bombay High Court was called upon to consider objections which had been raised to the maintainability of execution applications preferred before it on the ground that the assets against which steps would ultimately have to be drawn and taken were located outside its local limits. While dealing with the aforesaid objection, the learned Judge on noticing the judgment in Sundaram Finance observed as follows:

"13. I do not believe this interpretation is warranted or supported by Sundaram Finance at all. There is, of course, the discussion in Sundaram Finance of Section 42 of the Arbitration Act. The Supreme Court said that this applies to an application under Part I, i.e. jurisdiction over arbitral proceedings, and therefore subsequent applications are to be made to that Court alone. In paragraph 19, the Sundaram Finance Court said that an award under Section 36 is equated to a decree of a court for the limited extent of execution⁴. An arbitral award is deemed to be a decree under Section 36 but

-- and this is crucial -- there is no deeming fiction anywhere that says that the Court within whose jurisdiction the award was passed should be taken to be the court that passed the decree. Then comes the all-important explanation that, in my view, puts the matter beyond all controversy. Sundaram Finance says the Arbitration Act transcends all territorial barriers. This is fundamental. Section 39(4) is a limitation of territoriality. Sundaram Finance tells us that arbitration law transcends territoriality. The matter must end at that. If there was any doubt about this, it is put to rest, I think, by paragraph 20 of Sundaram Finance which has not the slightest ambiguity in its wording. The Court was unhesitant in its view that enforcement of an award (through execution) can be filed wherever in the country a decree can be executed. The claimant need not obtain a transfer of the decree from the 2(1)(e) court, that is to say, the one with jurisdiction over the arbitration proceedings.

14. Sundaram Finance therefore says that an Award Holder has a choice. Its ratio does not operate to strip the 2(1)(e) Court of its jurisdiction. It only says that a successful claimant is not compelled to come to the 2(1)(e) Court only to then have to detour to a local court for enforcement. He may go to that local court directly to execute his award.

15. Conceptually this is significant because I suspect the arguments from the Respondents before me tend to obliterate a fundamental distinction between a civil decree in execution and an arbitral award in enforcement. Arbitration is not a distinct judicial forum like a subordinate Court. It is an alternative dispute resolution mechanism with a standalone statute. It is intended to provide for the speedy resolution of disputes and enforcement with a minimal level of judicial intervention. The essence of arbitration is an agreement unlike a civil proceeding in a law Court. The fact that Section 36 uses a phraseology which equates an award with a decree cannot be divorced from the legislative intent. Section 36(1) is enabling. It was meant to allow for the smooth enforcement of arbitral awards and it, therefore, allows these to be enforced „as decrees. Read as the Respondents would have it Section 36(1), far from being enabling, suddenly becomes disabling, and itself becomes a restriction, wholly contrary to the statutory intent of arbitration law, for rapid and quick enforcement. When, therefore, Section 36(1) says that an award shall be enforced in accordance with the Code in the same manner as if it was a decree of a Court, what this really tells us is not that limitations and ousters of jurisdiction will apply but that

the enabling provisions of the Code must apply to arbitral award as well. Section 36(1) has to be read not in isolation but also as part of the framework of the Arbitration Act. Mr. Jagtiani is correct in pointing out that if this is read in isolation, then Section 9 and its post-award provisions are rendered entirely otiose. That Section allows the Court to take interim steps before the award is enforced. These include several steps in aid of enforcement, such as orders of receivership, injunction, deposit, disclosure and so on.

16. The correct view is, therefore, that while there may be certain restrictions on the enforcement of a decree of a Civil Court, since the Arbitration Act „actually transcends all territorial barriers“ as Sundaram Finance said, those restrictions cannot be made to apply to the enforcement of arbitral awards without resulting in a completely incongruous situation. Award holders have a jurisdictional choice that decree holders do not. The source or provenance of that jurisdictional choice is the fundamental nature of the dispute resolution process. A decree results in a lawsuit brought in a causal court governed by Section 20 of the Code. An award emanates from an arbitration. Arbitral proceeding jurisdiction is wholly independent of Section 20 of the Code, as BALCO tells us. That arbitral proceeding jurisdiction is created by Section 2(1)(e) of the Arbitration Act, not Section 20 of the Code. Therefore the result returned in Sundaram Finance that arbitral proceeding jurisdiction transcends territoriality. There is no warrant at all to drag a now firmly defenestrated territoriality back into arbitration only at the time of enforcement."

46. As was eloquently observed by the Bombay High Court in *Global Asia*, Sundaram Finance is to be understood as holding that the Act transcends territorial barriers and conferring a choice on the party in favour of which the Award may have been rendered to institute proceedings for enforcement in accordance with the choice which was recognized to exist in Sundaram Finance. The learned Judge also held that such a party cannot be compelled to first approach the "2(1)(e) Court" and thereafter be forced to approach the local court for execution of the award. In summation, it may thus be held that the party which seeks to initiate enforcement action could institute proceedings either before the seat court or to proceed further and directly to the court within the territorial limit of which the assets of the judgment debtor may be located. It essentially frees the decree holder from being compelled to first approach the seat court, obtain a certificate of transfer and then initiate proceedings before the court which may by virtue of its geographical location be entitled to take appropriate action against the properties of the judgment debtor.

47. The Court further finds that the decision of the Supreme Court in *Associated Contractors* cannot be read or understood de hors the context in which it came to be rendered. As was noticed hereinabove, the question which stood raised was itself relating to the correctness of petitions under Section 34 of the Act being preferred and instituted before a particular court. The Supreme Court had found that undisputedly prior to the award coming to be delivered, proceedings under Section 9 of the Act had been instituted before the Calcutta High Court. It was in the aforesaid context that it was held that Section 42 of the Act would apply and consequently the Calcutta High Court would have the requisite jurisdiction and authority to entertain the petition under Section 34 of the Act. As

was noted hereinabove, a petition under Section 9 of the Act as also certain others which fall in Part I are those which are made before a court. It is in that backdrop that Section 42 assumes significance and was so recognized to be an answer to the question which stood posited. The Supreme Court then went on to observe that the phrase "with respect to arbitration agreement" widens the scope of Section 42 of the Act to bring within its ambit all matters directly or indirectly relating to an arbitration agreement. It was thus held that all applications which are made to a Court either before, during or after arbitral proceedings and referable to Part I of the Act would stand covered by Section 42 of the Act.

48. In this connection it is important to bear in mind that a petition under Section 34 of the Act would necessarily be dealing with issues and disputes which are asserted to arise out of the arbitration agreement. Since Section 42 of the Act is itself concerned with conferring a centrality with respect to all challenges that may arise either out of the arbitration agreement or the award that ultimately may come to be rendered, it would perhaps be correct to recognize the said provision as thus extending to applications made to a court before, during, or after arbitral proceedings. It may be legitimately argued that a petition for enforcement transcends the arbitration agreement in the sense of those proceedings having travelled beyond the pale of the contract and the rights and obligations of parties flowing therefrom. By the time a petition for enforcement comes to be instituted, the rights and liabilities of parties would be governed by the award which would have come into existence. It is in that context that Daelim as well as Sundaram Finance perhaps referred to the concept of termination of proceedings upon the award being pronounced.

49. However, the Court in the present is called upon to discern the true ratio decidendi of the aforementioned decisions and reconcile the principles that stand enunciated therein. On a careful consideration of the issue that arises and the precedents which govern, the Court is of the considered opinion that the position in law can be safely recognised to be the seat court being the focal point for all challenges that may arise before, during or after the conclusion of arbitral proceedings. The seat court would always be the central pivot in terms of the provisions that may be contained in the arbitration agreement. It would thus clearly be a court which would fall within the ambit and scope of Section 42 of the Act. However, insofar as petitions for enforcement are concerned and as per Sundaram Finance, the decree holder need not and invariably be compelled to institute proceedings before the seat court and thereafter seek a transfer of those proceedings for the purposes of effecting execution of the award. The decree holder stands conferred with the right to exercise an option of either petitioning the seat court or moving directly to the court within whose jurisdiction the judgment debtor or its properties may be situate.

50. In light of the aforesaid discussion, the Court comes to ultimately conclude that there does not appear to be an irreconcilable element or conflict between the principles laid down in Associated Contractors and Sundaram Finance. The ratio of Associated Contractors and Sundaram Finance when harmoniously construed lends credence to the aforesaid conclusion. The perception of the Jaipur Commercial Court that it was imperative for the petitioner here to have first approached the court situate in the juridical seat of arbitration may not, strictly speaking, be a correct reading or understanding of the aforementioned decisions."

19. While ruling on the inter play between the provisions of the Code and the Act, this Court had observed as follows:-

"41. Before proceeding further to notice the provisions for execution contained in the Code, the Court also deems it apposite to reiterate that the designation of a seat of arbitration is wholly unrelated to the cause of action principles which flow from the Code. This is as a necessary corollary to the party autonomy principle as well as the emphasis laid upon the phrase "subject matter" of arbitration in BGS SOMA itself. It would be important to recall that in the said decision it was pertinently observed that the term "subject matter" in Section 2(1)(e) refers and is connected to the process of dispute resolution and identifying the court which would have supervisory control over the arbitration. Turning then to the provisions contained in the Code and which relate to execution of decrees, it would be apposite to notice Sections 36 to 46 of the Code which deal with the subject of execution and stand placed in Part II of the Code. A reading of those provisions would establish that they principally deal with execution of decrees passed by courts. It is for the said reason that Section 37 of the Code proceeds to define the expression "Court which passed a decree". In terms of Section 38 of the Code, a decree may be executed either by the Court which passed it or by one to which it may be sent for the purposes of execution. Section 39 of the Code then proceeds to deal with the concept of the transfer of a decree in a situation where the person against whom the decree is passed resides within the local limits of the jurisdiction of a court other than one before whom execution may have commenced or if the property against which the decree is to be satisfied falls within the local limits of the jurisdiction of any another court. It also contemplates the transfer of a decree where in the course of execution, the court considers it proper to affect the sale or delivery of immovable property situate outside the local limits of its own jurisdiction. Similarly, the concept of issuance of precepts and which is governed by Section 46 of the Code empowers and enables the Courts which passed the decree to issue a precept to any other Court which would be competent to proceed against property belonging to the judgment debtor and is specified therein.

42. The aforesaid provisions as contained in Part II of the Code thus essentially deal with the execution of decrees that are passed by courts constituted under the normal hierarchy of the justice system. The award rendered by an Arbitral Tribunal cannot possibly be equated with a decree passed by a competent court. All that Section 36 of the Act achieves is to enable the party in favour of whom the award may be ultimately rendered to enforce the same as if it were a decree. The Court also notes that BGS SOMA had also noted that the venue as specified in an arbitration agreement may not always be synonymous with the seat of arbitral proceedings. It had, however, pertinently observed that where the agreement prescribes a particular place as the venue, in the absence of any indication that may detract from the said geographical place being treated as a seat also, parties would be bound by the terms thereof.

43. This Court is further of the opinion that the provisions of Section 39(4) of the Code would also not detract from the conclusions recorded hereinabove. The statutory injunction which stands placed in terms of that provision relates to the "Court which passed a decree" and its power to execute the same against a person or decree against a person or property outside the local limits of its jurisdiction. On a clear and ex facie reading of that provision, it is evident that the same would amount to a restriction operating upon a principal civil court which may have drawn the decree. The said provision cannot possibly be read as either constricting or impeding the powers of a court recognised by Sundaram Finance as being entitled to entertain or proceed with an enforcement action. This since that court was clearly not one which had passed the decree. It must be recognised and understood that while the provisions of the Code may act as a guide or a pointer towards a procedure liable to be adopted for the purposes of effectuating the purposes of the Act, they cannot be acknowledged as either shackling or retarding the principal objectives of the statute itself. Section 39(4) of the Code thus cannot be construed as frustrating the process enunciated in Sundaram Finance."

20. In Gujarat JHM, the Court had an occasion to consider the principles as laid down by the Supreme Court in Associated Contractors and which had held that Section 42 of the Act would apply to all three stages of arbitral proceedings, namely, before, during or even after its termination. In Associated Contractors, the Supreme Court had held that the expression "with respect to an arbitration agreement" widens the scope of Section 42 to include all matters which pertain to the arbitration agreement and that the said provision would apply to all applications made to courts before, during or after arbitral proceedings. The seat Court thus was explained to be of seminal importance, and as was found by the Court in Gujarat JHM, entitled to entertain execution petitions as a consequence thereof. Sundaram Finance, on the other hand, had taken note of the provisions made in Sections 39(4) and 46 of the Code and had held that, once arbitral proceedings had come to a conclusion, a petition for enforcement could be preferred and instituted before any court of the country where such a decree can be executed. It had further observed that in such a situation there would be no requirement for obtaining a transfer of the decree from the Court which would otherwise have jurisdiction over arbitral proceedings. The Supreme Court in Sundaram Finance had also approved the judgment of this Court in Daelim wherein it was noted and held that Section 42 would have no application to execution proceedings.

However, the latter decision to the extent that it holds contrary to the observations made by the Supreme Court in Associated Contractors would have to necessarily yield. On a due consideration of the aforesaid issues, this Court in Gujarat JHM came to record its conclusions as under:-

"50. In light of the aforesaid discussion, the Court comes to ultimately conclude that there does not appear to be an irreconcilable element or conflict between the principles laid down in Associated Contractors and Sundaram Finance. The ratio of Associated Contractors and Sundaram Finance when harmoniously construed lends credence to the aforesaid conclusion. The perception of the Jaipur Commercial Court that it was imperative for the petitioner here to have first approached the court

situate in the juridical seat of arbitration may not, strictly speaking, be a correct reading or understanding of the aforesaid decisions.

51. However, and in order to obviate any controversy that may continue to fester and disable the petitioner here from seeking expeditious execution of the award, the ends of justice would warrant the instant order being treated as a certificate of transfer enabling it to reinitiate proceedings for execution before the Jaipur Commercial Court. This would also be in accord with the liberty and the ultimate directions framed by that Court itself.

53. Accordingly, and in the terms of the present order, the award in question be transferred to the appropriate Court at Rajasthan to be duly enforced and executed as a decree in accordance with law. 54 Ex. Appl. (OS) 3699/2022 stands disposed of in the above terms."

21. Consequently and for the aforesaid reasons, this Court finds itself unable to accept the objection taken by the objector to the effect that this Court would lack the territorial jurisdiction to continue the execution petition on the ground that one of the properties is situate in the state of Uttarakhand. To the aforesaid extent, the objections would stand rejected.

22. The Court also notes that, presently and at this stage, it is essentially called upon to consider whether it would be expedient to appoint a Receiver who may take symbolic possession of the subject properties and invite bids in order to ascertain the maximum that could be possibly fetched in respect of the subject properties. The aforesaid steps are necessitated since JD No.1 has doubted the adequacy of the private bids that have been obtained by the private execution petitioners. The aforesaid exercise can be clearly undertaken and this Court fails to countenance any legal impediment to the aforesaid extent. This more so since the directions issued on this petition earlier as well as the judgment of the Division Bench referred above, continue to hold the field. The proposed steps would also expedite the further steps that are liable to be taken for the purposes of execution of the award subject of course to the remainder objections which have been raised at the behest of JD No.1 and the objector Mr. Suryaveer Kohli which would remain for consideration prior to the final disposal of the present execution petition and the disbursement of the sale proceeds that may be obtained.

23. Accordingly, and for the aforesaid reasons, the Court hereby appoints Mr. Santhosh Krishnan, Advocate [Mobile No. +91-9910333257] [email: mail@skrishnan.in] [Official Address: B54A, Lower Ground Floor (Basement), Greater Kailash Part 1, New Delhi 110048] to act as the Receiver of the subject properties. The Receiver shall be entitled to take symbolic position of the subject properties. The Receiver shall not disturb the present and existing occupation of individuals who are found in the subject properties.

24. The Receiver shall take further steps to invite bids with respect to the subject properties. He/she may, in this connection, also publish advertisements and notices in leading newspapers having circulation both in New Delhi and Dehradun for the aforesaid purposes. It shall be open to the

Receiver to permit intending bidders to inspect the premises subject to reasonable notice being provided to the occupants of the subject properties.

25. The Receiver appointed by the Court shall be entitled to a fee of Rs. 2.5 lakhs. The aforesaid remuneration would be subject to review dependent upon the progress that is made in the execution proceedings. The Receiver shall also be entitled to all incidental expenses including those which may occur in connection with the invitation of bids travelling purposes etc. The remuneration and expenses shall be borne equally by the respective parties to this petition except the objector, Mr. Suryaveer Kohli.

The Receiver shall commence the process connected with the implementation of the aforesaid directions subject to parties remitting the remuneration as fixed hereinabove.

26. Let the matter be called again to review progress on 07.03.2023.

27. The date of 28.04.2023 shall stand cancelled.

YASHWANT VARMA, J.

JANUARY 31, 2023/bh