The State Of Jharkhand vs M/S Hindustan Construction Co. Ltd. on 14 December, 2017

Equivalent citations: AIR 2018 SUPREME COURT 1, 2018 (2) SCC 602, (2018) 1 JLJR 120, (2018) 1 CURCC 142, (2017) 14 SCALE 288.2, (2017) 6 ARBILR 321, (2018) 1 ALL WC 821, (2018) 1 WLC(SC)CVL 176, (2018) 182 ALLINDCAS 134 (SC), (2018) 125 CUT LT 801, (2018) 2 BANKCAS 225, (2018) 1 PAT LJR 194, (2018) 1 ANDHLD 171, (2018) 1 RECCIVR 628, 2018 (131) ALR SOC 38 (SC), 2018 (1) KLT SN 47 (SC), 2018 (2) KCCR SN 100 (SC), (2018) 3 BOM CR 80

Author: Dipak Misra

Bench: Ashok Bhushan, D.Y. Chandrachud, A.M. Khanwilkar, A.K. Sikri, Dipak Misra

1

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1093 OF 2006

The State of Jharkhand & Ors. ...Appellant(s)

Versus

M/s Hindustan Construction Co. Ltd. …Respondent(s)

JUDGMENT

Dipak Misra, CJI A two-Judge Bench while hearing the present appeal found that there is difference of opinion in relation to the entertainability of an application by this Court for making an award passed by the arbitral tribunal, when it retains seisin over arbitral proceeding, as Rule of the Court

and, therefore, referred the matter to the larger "Whether this Court can entertain an application for making the award as Rule of the Court, even if it retains seisin over arbitral proceedings?"

2. The narration of the facts in detail is not necessary to answer the reference. Suffice it to state that as disputes had arisen between the parties, the matter was referred to an arbitrator for adjudication of the disputes and during the said period, the respondent had filed a suit in the High Court of Bombay seeking an interim injunction restraining the State from encashing the bank guarantee. As the time for making the award and the period of extension had expired, the proceeding for arbitration was abandoned. The State filed a money suit before the learned Sub-Judge I, Saraikella for realization of certain sum with interest. The respondent after appearing in the suit filed an application under Section 34 of the Arbitration Act, 1940 (for short, "the Act") for stay of the suit. The said prayer was contested and the learned Sub-Judge allowed the application filed by the respondent. However, regard being had to the quantum of the claim, the Sub-Judge expressed the view that it was desirable that the parties should settle their disputes in an arbitration proceeding. Against the said order, an appeal was preferred under Section 39 of the Act before the High Court which dismissed the appeal vide order dated 06.08.2002.

3. Being aggrieved, the State of Jharkhand preferred the appeal which was disposed of by this Court vide order dated 10.01.2013. It is worthy to mention here that the learned counsel appearing for the parties agreed for the following order:-

> "(i) The claim made by the respondent on January 7, 1994 pursuant to the contract dated April 25, 1989 between the parties which was earlier referred to the Arbitral Tribunal which commenced proceedings on February 15, 1995 and which had remained inconclusive is referred for adjudication to Hon'ble Mr. Justice S.B. Sinha, retired Judge of this Court.
>
> (ii) The claim made by the appellant against the respondent in Money Suit No.4 of 1996 – State of Jharkhand and others vs. M/s. Hindustan Construction Company Limited filed by the appellant on April 10, 1996 in the court of Sub-

Judge, Saraikella, Jharkhand is also referred for adjudication to Hon'ble Mr. Justice S.B. Sinha, retired Judge of this Court.

(iii) The terms and conditions shall be settled by the learned Arbitrator in consultation with the parties.

(iv) The parties shall appear before the learned Arbitrator on February 5, 2013. We request the learned Arbitrator to conclude the aforesaid arbitration proceedings expeditiously and further observe that the award shall be filed before this Court." [Underlining is ours]

4. After reproducing settlement, the Court recorded thus:-

> "We record and accept the statement of the learned senior counsel for the parties that learned Arbitrator may be requested to decide the claim on merits. We observe accordingly."

5. Learned arbitrator concluded the arbitration proceedings and passed the award on 16.10.2015 and filed the same before this Court. The appellants challenged the said award by filing its objections before the Civil Court. Per contra, the respondent filed an affidavit dated 16.06.2016 requesting this Court to pronounce the judgment in terms of the award.

6. It was contended before the two-Judge Bench that when this Court had directed to file the award in this Court, an application for making the award Rule of the Court is to be filed in this Court, for this Court alone has the jurisdiction to pronounce the judgment in terms of the award. In this regard, the decisions in Bharat Coking Coal Limited v. Annapurna Construction1 and State of West Bengal and others v. Associated Contractors2 were placed reliance upon. Resisting the said submissions, it was urged by the appellant-State that if the Court decides the objections to the award, the party will lose its right of appeal. It was also contended that by referring the matter to arbitration this Court had not really retained control of the proceedings of the arbitrator. To bolster the said submissions, heavy reliance was placed on State of Rajasthan v. Nav Bharat Construction Company (2)3 .

7. The Court noted the decision in Nav Bharat Construction Company (supra) which had followed the judgment in Mcdermott International INC. v. Burn Standard Co. Ltd. and others4 and further apprised itself of the principles enunciated in Bharat Coking Coal Limited (supra) which has held that right to appeal is a valuable right and unless there exists cogent reasons, a litigant should not be deprived of the same. (2008) 6 SCC 732 (2015) 1 SCC 32 (2010) 2 SCC 182 (2005) 10 SCC 353 The Division Bench referred to the principle enunciated in Associated Contractors (supra) wherein the three- Judge Bench had opined that this Court cannot be considered to be a Court within the meaning of Section 2(i)(e) of the Arbitration and Conciliation Act, 1996 (for brevity, 'the 1996 Act'). The referral judgment noted the view taken in State of Madhya Pradesh v. Saith and Skelton (P) Ltd.5 and Guru Nanak Foundation v. Rattan Singh and Sons6 wherein it has been held that when an arbitrator is appointed by this Court and further directions are issued, it retains seisin over the arbitration proceedings and in such circumstances, the Supreme Court is the only court for the purposes of Section 2(c) of Act.

8. The two-Judge Bench perceived the difference of opinion with regard to the entertainability of the application before this Court and directed the matter to be placed before the Chief Justice of India for appropriate orders. That is how the matter has been placed before us. (1972) 1 SCC 702 (1981) 4 SCC 634

9. We have heard Mr. Ajit Kumar Sinha, learned senior counsel appearing for the appellants and Mr. K.V. Viswanathan, learned senior counsel for the respondent.

10. It is submitted by Mr. Sinha, learned senior counsel appearing for the appellant-State, that the view expressed in Guru Nanak Foundation (supra) does not state the law correctly and it will be

inappropriate to annul the right of appeal of the appellants solely on the ground that this Court, on the consent of the parties, had accepted that the award shall be filed before this Court and, therefore, this Court alone has the jurisdiction to decide the objections for making the award Rule of the Court. According to Mr. Sinha, the definition of the Court under Section 2(c) of the Act has to be appropriately appreciated and on proper construction of the meaning of the word "Court", it cannot be said to include the Supreme Court. It is additionally propounded by Mr. Sinha that under the scheme of the Act, the appellants are entitled under law to file the objections before the Sub-Judge whose order is assailable in an appeal before the High Court under Section 39 of the Act, and, if this Court becomes the original Court for dealing with the objection/s filed by the parties, then the right of appeal would stand nullified without any intervention of the legislature. In this context, reliance has been placed on State of Karnataka v. Union of India and another7, A.R. Antulay v. R.S. Nayak and another8 and Garikapati Veeraya v. N. Subbiah Choudhry and others9. Mr. Sinha, learned senior counsel, has urged that the position has been made clear in Associated Contractors (supra) wherein the Court has expressed the view that the principles enunciated in Saith and Skelton (supra) and Guru Nanak Foundation (supra) are open to doubt and on dealing with the decisions in entirety, it would be clear that it has laid down the principle that the term 'Court' cannot include the Supreme Court.

11. Mr. Viswanathan, learned senior counsel appearing for the respondent, in his turn, contends that Section 2(c) of the Act defines Court and the definition when read in (1977) 4 SCC 608 (1988) 2 SCC 602 1957 SCR 488 : AIR 1957 SC 540 an apposite manner shows that the word "Court" can be assigned a different meaning depending on the context. For the said purpose, he has commended us to the authorities in Commissioner of Gift Tax, Madras v. N.S. Getty Chettiar10, Commissioner of Sales Tax, State of Gujarat v. Union Medical Agency11, Saith & Skelton (supra) and Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others12. It is urged by the learned senior counsel for the respondent that Section 14(2) of the Act indicates that there may be a case where the Court itself can direct the award to be filed in the court and once the superior court has retained control and passed a specific direction to file an award in terms of Section 14(2) before the Court, then all other courts cease to have jurisdiction for determination of the controversy. Emphasizing on the hierarchical structure, he contends that judicial discipline and respect has to prevail and, therefore, no proceeding can be initiated in any court other than the superior court. It is his submission that when this Court retains control (1971) 2 SCC 741 (1981) 1 SCC 51 (1998) 8 SCC 1 over the arbitration proceedings, any proceeding flowing from the Act has to be initiated before this Court. In this regard, he has drawn inspiration from few passages in Saith & Skelton (supra) and Guru Nanak Foundation (supra). According to him, the submission advanced on behalf of the appellants that they would lose the right of appeal has been squarely rejected in Guru Nanak Foundation (supra) and there is no necessity to dislodge the said principle.

12. Drawing our attention to Section 31(4) of the Act, Mr. Viswanathan would contend that the said provision is intended to deal only with those situations where even after compliance with the first three sub-sections of Section 31, there may be two or more courts wherein proceedings under those sub-sections may be taken. But it has no application in those cases where a superior/higher court has retained control and passed a direction to file the award in that court. The concept of choice as enjoined in Section 31(4) has to be understood as courts of equal status. Learned senior counsel

would further submit that the control of superior courts has to be given primacy. To sustain the said proposition, he has placed reliance upon Kumbha Mawji v. Dominion of India (Now the Union of India)13. He has laid stress that once the superior court retains control which is permissible under the Act, there is no further right to appeal and, therefore, the submission that the right to appeal is extinguished is without merit. To bolster the aforesaid proponement, he has drawn immense support from the decision in Punjab State Electricity Board and others v. Ludhiana Steels Private Ltd.14. Commenting on Associated Contractors (supra), it is contended by Mr. Viswanathan, that the said authority overlooks the main reason in Saith & Skelton (supra) and Guru Nanak Foundation (supra) and the principal reason in the said authority relates to the definition of "Court" under Section 2(1)(e) of the 1996 Act and that makes the decision rendered therein distinguishable. It has also been urged by him that the decisions which have been referred to in Associated Contractors (supra) are factually different and when the factual backdrop 1953 SCR 878 : AIR 1953 SC 313 (1993) 1 SCC 205 differs, the Court has to look at the ratio in the context of the case. He has also urged that the authorities relied on by the learned counsel for the appellants are not relatable to the controversy at hand because in the said cases the court had not retained control of the proceedings with it.

13. To appreciate the controversy, it is crucial to appreciate the scheme of the Act. Section 2 is the dictionary clause. It commences with the words "unless there is anything repugnant in the subject or context". The contention before us is that the use of such words clearly evinces that the term "Court" can be assigned a different meaning depending on the context. In Union Medical Agency (supra), a three-Judge Bench, while dealing with the concept of statutory interpretation when the subject matter or context is different, has held:-

> "14. It is a well-settled principle that when a word or phrase has been defined in the interpretation clause, prima facie that definition governs whenever that word or phrase is used in the body of the statute. But where the context makes the definition clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definitions given in an interpretation clause are, therefore, normally enacted subject to the usual qualification — "unless there is anything repugnant in the subject or context", or "unless the context otherwise requires". Even in the absence of an express qualification to that effect such a qualification is always implied."

14. In the case of Saith and Skelton (supra), the Court was dealing with Section 2(c) and Section 14(2) of the Act and in that context, the three-Judge Bench, keeping in view the language employed in the beginning of Section 2, opined:-

> "18. ... Therefore the expression "Court" will have to be understood as defined in Section 2(c) of the Act, only if there is nothing repugnant in the subject or context. It is in that light that the expression "Court" occurring in Section 14(2) of the Act will have to be understood and interpreted. ..."

15. In the aforesaid case, the Court had appointed the arbitrator on the consent of the parties and had directed him "to make his award". That apart, no further direction was given in the said case. The arbitrator after passing the award had filed the same before this Court and in that context, the Court held:-

> "18. ... Surely the law contemplates further steps to be taken after the Award has been made, and quite naturally the forum for taking the further action is only this Court. There was also direction to the effect that the parties are at liberty to apply for extension of time for making the Award. In the absence of any other court having been invested with such jurisdiction by the order, the only conclusion that is possible is that such a request must be made only to the court which passed that order, namely, this Court." And again:-
>
> "19. That this Court retained complete control over the arbitration proceedings is made clear by its orders, dated February 1, 1971 and April 30, 1971. On the former date, after hearing counsel for both the parties, this Court gave direction that the record of the arbitration proceedings be called for and delivered to the Sole Arbitrator Mr V.S. Desai. On the latter date, again, after hearing the counsel, this Court extended the time for making the Award by four months and further permitted the arbitrator to hold the arbitration proceedings at Bombay. The nature of the order passed on January 29, 1971, and the subsequent proceedings, referred to above, clearly show that this Court retained full control over the arbitration proceedings."

16. Thereafter, the three-Judge Bench referred to the decision in Ct. A. Ct. Nachiappa Chettiar and others v. Ct. A. Ct. Subramaniam Chettiar15 and placing (1960) 2 SCR 209 : AIR 1960 SC 307 reliance on the same, expressed the view that this Court is the "Court" under Section 14(2) of the Act where the arbitration award could be validly filed.

17. In Guru Nanak Foundation (supra) case, since differences arose between the parties, an application was filed before the High Court under Section 20 of the Act which appointed retired Chief Engineer as the sole arbitrator to whom the reference was made. When the reference was pending, an application was moved before the Delhi High Court for removal of the arbitrator and the High Court thought it appropriate to reject the application. Guru Nanak Foundation assailed the soundness of the order passed by the High Court and this Court removed the arbitrator and appointed another arbitrator and directed the arbitrator to commence the proceedings within 15 days and to dispose of the same as expeditiously as possible. After the newly appointed arbitrator commenced the proceedings, it directed the parties to file their pleadings stating that he had desired to begin the arbitration proceedings afresh which impliedly meant that the pleadings filed before the former arbitrator and the evidence led before him were to be ignored. That led the first respondent therein to move an application before this Court seeking the relief that the learned arbitrator should commence the arbitration proceedings from the stage where it was left by the previous arbitrator. After hearing both the parties, the Court directed thus:-

> "CMP No. 1088 of 1977: We have heard counsel on both sides. It is absolutely plain that the new arbitrator in tune with the spirit of the Order passed by this Court should proceed with speed to conclude the arbitration proceedings. In the earlier directions by this Court it had been stated that the proceedings should commence within 15 days and that the arbitrator 'shall try to dispose of the same as expeditiously as possible'. We direct the arbitrator, bearing in mind the concurrence of the counsel on both sides, that he shall conclude the proceedings within four months from today.
>
> A grievance is made that the arbitrator is calling for fresh pleadings which may perhaps be otiose since pleadings have already been filed by both sides before the earlier arbitrator Mr Nanda. If any supplementary statement is to be filed it is certainly open to the parties to persuade the arbitrator to receive them in one week from today. The arbitrator will remember that already some evidence has been collected and he is only to consider and conclude. With this directive we dispose of the application."

18. After the award was passed, the arbitrator approached the Registry of this Court for filing of the award and he was advised by an officer of this Court that the award should be filed before the Delhi High Court. The arbitrator filed the award in Delhi High Court. At that juncture, the respondent therein filed the petition seeking a declaration that the award was required to be filed before the Supreme Court in view of the provisions contained in Section 14(2) read with Section 31(4) of the Act. It was contended before the High Court that as the reference was made to the arbitrator by the Supreme Court and further directions were given, this Court was in seisin of the matter and it alone had the jurisdiction to entertain the award in view of the provisions of Section 31(4) of the Act. The matter came to be challenged before this Court and the proceedings before the High Court were stayed.

19. The two-Judge Bench, after narrating the facts, posed the following question:-

> "The narrow question in this case therefore is:
>
> in view of the circumstances herein delineated, which is the court which would have jurisdiction to entertain the Award; in other words which is the court having jurisdiction in which the Award should be filed by the arbitrator?"

20. Analysing the meaning of the expression "Court" as engrafted under Section 2(c) and keeping in view the words occurring in the beginning of Section 2, the Court stated thus:-

> "13. The dictionary meaning of expression "court" in Section 2(c) has to be applied wherever that word occurs in the Act, but with this limitation that if there is anything repugnant in the subject or context, the dictionary meaning may not be applied to the expression "court". Assuming that there is nothing repugnant in the subject or context the expression "court" in the Act would mean that civil court which would

> have jurisdiction to decide the question forming the subject- matter of the reference if the same had been the subject-matter of a suit but does not include a Small Cause Court though it is a civil court except for the arbitration proceedings under Section 21. Section 14, sub-section (2) provides for filing of the Award in the court and in view of the definition of the expression "court" the arbitrator will have to file the Award in that court which would have jurisdiction to entertain the suit forming the subject-matter of reference."

21. As the discussion in the judgment would show, the Court observed that there was some controversy between the High Courts whether the expression "Court" would comprehend appellate court in which the award can be filed but it was finally resolved in the decision in CT. A. CT. Nachiappa Chettiar (supra) which held that the expressions "suit" and "Court" in Section 21 of the Act would also comprehend proceedings in "appeal" and "appellate court" respectively because the expression "Court" in Section 21 includes the appellate court proceedings which are generally recognized as continuation of the suit, and the word "suit" would include such appellate proceedings.

22. After so stating, Guru Nanak Foundation (supra) proceeded to advert to Section 31(4) of the Act and, in that context, held that the non-obstante clause excludes anything anywhere contained in the whole Act or in any other law for the time being in force if it is contrary to or inconsistent with the substantive provision contained in sub-section (4). It further ruled that to that extent it carves out an exception to the general question of jurisdiction of the court in which Award may be filed elsewhere provided in the Act in respect of the proceedings referred to in sub-section (4). The provision contained in sub-section (4) will have an overriding effect in relation to the filing of the Award if the conditions therein prescribed are satisfied. If those conditions are satisfied, the court other than the one envisaged in Section 14(2) or Section 31(1) will be the court in which Award will have to be filed. Elaborating the effect of the non-obstante clause in sub-section (4) of Section 31, it has been opined that Sub-section (4) invests exclusive jurisdiction in the court, to which an application has been made in any reference and that court is competent to entertain as the court having jurisdiction over the arbitration proceedings and all subsequent applications arising out of reference and the arbitration proceedings shall have to be made in that court and in no other court. Therefore, sub-section (4) not only confers exclusive jurisdiction on the court to which an application is made in any reference but simultaneously ousts the jurisdiction of any other court which may as well have jurisdiction in this behalf. Illustrating further, the Court held that if an Award was required to be filed under Section 14(2) read with Section 31(1) in any particular court as being the court in which a suit touching the subject-matter of Award would have been required to be filed, but if any application in the reference under the Act has been filed in some other court which was competent to entertain that application, then to the exclusion of the first mentioned court the latter court alone, in view of the overriding effect of the provision contained in Section 31(4), will have jurisdiction to entertain the Award and the Award will have to be filed in that court alone and no other court will have jurisdiction to entertain the same.

23. After so stating, the Court observed that the provision contained in sub-section (2) of Section 14 will neither be rendered otiose nor stand in disharmony with the construction that has been placed

by it on sub- section (4) of Section 31 because the expression "Court" as defined in Section 2(c) needs to be adhered to unless there is anything repugnant in the subject or context in which it is used. It is further opined that on a pure grammatical construction as well as a harmonious and overall view of the various provisions contained in the Act, it is quite clear that ordinarily the Court will have jurisdiction to deal with the questions arising under the Act, except the one in Chapter IV in which the suit with regard to the dispute involved in the arbitration would be required to be filed under the provisions of the Code of Civil Procedure. Elucidating further, the two-Judge Bench ruled that when an application is made in any reference to a court competent to entertain it, that court will have jurisdiction over the arbitration proceeding and all subsequent applications arising out of the reference and the arbitration proceedings shall be made to that court alone and in no other court. Analysing the facts, the learned Judges expressed that this Court had complete control over the proceedings before the arbitrator. In view of the fact that the reference was made by this Court and further directions were issued with regard to the manner and method of conducting the arbitrations proceedings and fixing the time for completion of the same, this Court alone had the jurisdiction to entertain the award. The two-Judge Bench placed reliance on Saith and Skelton (supra) and expressed that both on principle and on authority, this Court alone had the jurisdiction for filing of the award.

24. It is necessary to state here that on behalf of the appellant, reliance was placed on Kumbha Mawji (supra) to bolster the stand that Section 31(4) is not confined to application made after the reference is made or during the pendency of the reference but may take within its sweep an application made earlier to the reference being made and if such an application has been made to a court, that court would have the jurisdiction to entertain such an application. Explaining Kumbha Mawji's case, the two-Judge Bench stated that in the said case a contention was raised before this Court that Section 31(4) is merely confined to applications during the course of pendency of a reference to arbitration and this Court after analysing the scheme of Section 31, held that there is no conceivable reason why the legislature should have intended to confine the operation of sub-section (4) only to applications made during the pendency of an arbitration, if as is contended, the phrase "in any reference" is to be taken as meaning "in the course of a reference". Ultimately this Court held that the phrase "in any reference" used in sub-section (4) of Section 31 means "in the course of any reference", and concluded that Section 31, sub-section (4) would vest exclusive jurisdiction in the court in which an application for the filing of an Award has been first made under Section 14 of the Act. After so stating, the learned Judges proceeded to observe:-

> "22. ... We fail to see how this decision would help in answering the contention canvassed on behalf of the appellant. In fact the decision in Kumbha Mawji case was further explained by this Court in Union of India v. Surjeet Singh Atwal16. The contention in the latter case was whether an application under Section 34 of the Act for stay of the suit was an application made in a reference within the meaning of Section 31(4) of the Act and, therefore, subsequent application can only be made to that court in which stay of the suit was prayed for. In support of this contention reliance was placed on Kumbha Mawji case urging that the expression "in any reference" under Section 31(4) of the Act is comprehensive enough to cover application first made after the arbitration is completed and a final Award made and

> the sub-section is not confined to applications made during the pendency of the arbitration proceedings. Negativing this contention this Court held that accepting the wider meaning given to the phrase "in any reference" as implying "in the course of a reference" an application under Section 34 is not 1969 (2) SCC 211 an application in a reference within the meaning of the phrase as elaborated in Kumbha Mawji case. The Court took notice of various sections under which an application can be made before a reference has been made. Therefore, the decision in Kumbha Mawji case would not mean that a proceeding earlier to the reference in a court would clothe that court with such jurisdiction as to render the provision contained in Section 31(4) otiose." The aforesaid analysis only shows that the two-
>
> Judge Bench expressed the opinion that the principles stated in Kumbha Mawji would not help in answering the contention canvassed on behalf of the appellant therein and further stated that the said authority would not mean that a proceeding earlier to the reference in a court would clothe that court with such jurisdiction as to render the provision contained in Section 31(4) otiose.

25. A further contention was also advanced that if this Court were to arrogate the jurisdiction to itself by putting such a construction of sub-section (4) of Section 31, it would deprive the grieved party of its valuable right to prefer an appeal and approach the Court under Article 136 of the Constitution. Repelling the said submission, the Court referred to Saith & Skelton (P) Ltd. case and opined that in an identical situation this Court held that the award has to be filed in this Court alone which would certainly negative an opportunity to appeal because this is the final court. The two-Judge Bench further opined that conceding as held by this Court in Garikapati Veeraya (supra) that the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences, right is not denied or defeated because the highest court to which one can come by way of appeal will entertain all contentions that may have to be canvassed on behalf of the appellant. Thereafter it has been stated:-

> "23. ... The door of this Court is not being closed to the appellant. In fact the door is being held wide ajar for him to raise all contentions which one can raise in a proceeding in an originating summons. Therefore, we see no merit in this contention and it must be rejected."
>
> 26. We have extracted the aforesaid passage to highlight how the principle laid down in Kumbha Mawji has been distinguished in the case of Guru Nanak Foundation (supra). To appreciate the reasoning, it is necessary to analyse the facts and the principles stated in Kumbha Mawji (supra). In the said case, the Court stated that the three questions which arose for consideration were:-
>
> "(1) Whether the appellant had the authority of the umpire to file the awards on his behalf into court in terms of Section 14(2) of the Arbitration Act;

(2) Whether in view of sub-section (3) of Section 31 of the Act can it be said that the awards were filed in the Calcutta High Court earlier than in the Gauhati court; and
(3) Whether the scope of Section 31 sub-

section (4) of the Act is limited to applications under the Act during the pendency of the arbitration proceedings only."

27. So far as the first question is concerned, we need not dwell upon the same. What is important to note is how the Court dealt with the third question and for the said purpose, it is necessary to apprise ourselves about the facts involved in the said case. The respondent in the said case had filed an application under Section 14(2) of the Act before the Subordinate Court of Gauhati in Assam to the effect that the umpire be directed to file both the awards in the Court. A week after the respondent made the first application in the Gauhati Court, the solicitors for the appellant therein sent a letter to the Registrar of the High Court of Calcutta with the two awards and requested for issue of notices thereon. After some correspondence between the Deputy Registrar and solicitors, a direction was issued to serve the awards on the parties and fix a date for determination upon the said awards by the Commercial Judge of the Court. The three-Judge Bench took note of the fact that in respect of the same awards, proceedings were initiated purporting to be one under Section 14(2) of the Act simultaneously filed in the Subordinate Court of Gauhati in Assam as well as on the original side of the High Court of Calcutta. The contention was raised by the respondent objecting to the jurisdiction of the Calcutta Court and to the validity of the awards. Learned single Judge of the High Court overruled the objection raised by the respondent and passed judgment on the awards. On appeal therefrom to the Division Bench, the learned Judges differed with the judgment of the learned single Judge by opining that there had been no proper application under Section 14(2) of the Act before the High Court of Calcutta and, consequently, it had no jurisdiction to deal with the matter.

28. While dealing with the appeals, this Court opined that under Section 31(1) of the Act an award may be filed in any court having jurisdiction in the matter to which the reference relates and in the said case, reference arose out of a contract which was entered into at Calcutta and had to be performed in Assam and, therefore, Gauhati Court as well as Calcutta Court admittedly had jurisdiction over the subject matter of the reference. It took note of the submission raised by the Union of India that an application to Gauhati Court was made earlier than the application preferred to Calcutta High Court and, therefore, the Calcutta High Court had no jurisdiction. Learned single Judge was of the opinion that Section 31(4) related only to applications made during the pendency of a reference to arbitration and not to applications made subsequent to the making of an award. According to the learned single Judge, irrespective of applications for filing an award, the exclusive jurisdiction was determined with reference to the question as to which was the competent court in which the award was, in fact, first filed under sub-section (2) of Section 14, (as distinct from when the application for the filing of the award was first presented). In this background, interpreting Section 31(3) of the Act, the Court held that the Gauhati Court alone had the jurisdiction. In respect of the third question which pertains to sub-section (4) of Section 31 of the Act, the Court, after reproducing the provisions, opined:-

> "11. Sub-section (1) relates to the question as to where a completed award has to be filed, and prescribes the local jurisdiction for that purpose. Sub-section (2) deals with the ambit of the exercise of that jurisdiction, and declares it to be exclusive by saying that "all questions regarding the validity, effect or existence of an award or arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the court in which the award under the agreement has been, or may be, filed and by no other court". Sub-section (3) is intended to provide that all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings are to be made only in one court, and lays on the concerned party the obligation to do so. Then comes sub-section (4), the object of which apparently is to go further than sub-section (3), that is, not merely casting on the party concerned an obligation to file all applications in one court but vesting exclusive jurisdiction for such applications in the court in which the first application has been already made.

12. Thus it will be seen on a comprehensive view of Section 31 that while the first sub- section determines the jurisdiction of the court in which an award can be filed, sub-sections (2), (3) and (4) are intended to make that jurisdiction effective in three different ways, (1) by vesting in one court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement, (2) by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one court, and (3) by vesting exclusive jurisdiction in the court in which the first application relating to the matter is filed. The context, therefore, of sub-section (4) would seem to indicate that the sub-section was not meant to be confined to applications made during the pendency of an arbitration. The necessity for clothing a single court with effective and exclusive jurisdiction, and to bring about by the combined operation of these three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced. There is no conceivable reason why the legislature should have intended to confine the operation of sub-section (4) only to applications made during the pendency of an arbitration, if as is contended, the phrase "in any reference" is to be taken as meaning "in the course of a reference"." [Underlining is ours]

29. Further analyzing the scheme of the Act and various categories of arbitration, the Court held:-

> "13. ... Indeed, having regard to the wide language employed in these sub-sections it has been assumed that sub-sections (2) and (3) cover all three classes in all their stages. If so, is there any sufficient reason to think that sub-section (4) was meant to have a very restricted operation? On the view of this sub-

section suggested for the appellant, not only would an application made after the award was pronounced be excluded from sub-section (4) but also an application made before the commencement of the arbitration i.e. for the filing of an agreement of reference and for a direction thereupon. It must be remembered that Section 31 is one of the group of sections headed "General" which by virtue of Section 26 are applicable to all arbitrations. Unless therefore the wording in

sub-section (4) of Section 31 is so compelling as to confine the scope thereof to applications during the pendency of an arbitration, such a limited construction must be rejected."

30. Explicating further, the three-Judge Bench stated:-

> "14. As already stated, the entire basis of the limited construction is the meaning of the phrase "in any reference" used in sub-section (4) as meaning "in the course of any reference". But such a connotation thereof is not in any ordinary sense compelling. The preposition "in" is used in various contexts and is capable of conveying various shades of meaning. In the Oxford English Dictionary one of the shades of meaning of this preposition is "Expressing reference or relation to something; in reference or regard to; in the case of, in the matter, affair, or province of.

Used especially with the sphere or department in relation or reference to which an attribute or quality is predicated." In the context of Section 31 sub-section (4), it is reasonable to think that the phrase "in any reference" means "in the matter of a reference". The word "reference" having been defined in the Act as "reference to arbitration", the phrase "in a reference" would mean "in the matter of a reference to arbitration". The phrase "in a reference" is, therefore, comprehensive enough to cover also an application first made after the arbitration is completed and a final award is made, and in our opinion that is the correct construction thereof in the context. We are, therefore, of the opinion that Section 31(4) would vest exclusive jurisdiction in the court in which an application for the filing of an award has been first made under Section 14 of the Act." [Emphasis Supplied]

31. Before we proceed to analyze the ratio of Kumbha Mawji, it is necessary to refer to what has been held in Surjeet Singh Atwal (supra). In the said case, the three-Judge Bench was dealing with the issue whether the application made by the appellant therein under Section 34 of the Act was an application in a reference within the meaning of Section 31(4) of the Act. Placing reliance on Kumbha Mawji, the Court held:-

> "5. ... There are different sections in the Arbitration Act whereby an application is to be made even before any reference has been made. Section 8 for instance, provides for an application to invoke the power of the Court, when the parties fail to concur in the appointment of an arbitrator to whom the reference can be made. So also Section 20 provides for an application to file the arbitration agreement in court so that an order of reference to an arbitrator can be made. These are clearly applications anterior to the reference but they lead to a reference. Such applications are undoubtedly applications "in the matter of a reference" and may fall within the purview of Section 31(4) of the Act even though these applications are made before any reference has taken place. But an application under Section 34 is clearly not an application belonging to the same category. It has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private tribunal." And again:-

> "6. We do not, therefore, consider that an application for stay of suit under Section 34 is an application in a reference even within the wider meaning given to that phrase by this Court in Kumbha Mawji case. The second condition imposed by Section 31(4) is that the application for stay must be made to a Court competent to entertain it. It should be noticed that in Section 34 the expression "judicial authority" is used. The section provides for an application to a judicial authority before whom a legal proceeding is pending for the stay of that proceeding. An application for stay of legal proceeding to a judicial authority before whom it is pending is an application under the Arbitration Act to a judicial authority competent to entertain it. But the judicial authority need not necessarily be a court competent under Section 2(c) to decide the question forming the subject-matter of the reference. A party to an arbitration agreement may choose to file a suit in a court which has no jurisdiction to go into the matter at all and merely because the defendant in such a suit has to make an application to that Court under Section 34 of the Act for the stay of the suit it cannot be said that the Court which otherwise has no jurisdiction in the matter becomes a Court within the meaning of Section 2(c) of the Act. The view that we have expressed is borne out by the decisions of the Calcutta High Court in Choteylal Shamlal v. Cooch Behar Oil Mills Ltd.17; Brittannia Building & Iron Co. Ltd. v. Gobinda Chandra Bhattacharya18 and Basanti Cotton Mills Ltd. v. Dhingra Brothers19."

32. From the aforesaid two judgments, it is crystal clear that "reference" has been given a wider meaning in Kumbha Mawji and the same has been followed in Surjeet Singh Atwal (supra). In Guru Nanak Foundation (supra), the two-Judge Bench distinguished ILR (1951) Cal 418 64 CWN 325 AIR 1949 Cal 684 the decision in Kumbha Mawji stating that the ratio in the earlier case would not mean that a proceeding earlier to the reference in a court would clothe that court with such jurisdiction as to render the provision contained in Section 31(4) otiose. We shall refer to the aforesaid principle slightly at a later stage. Prior to that, we would like to refer to certain other pronouncements wherein it has been held that the Supreme Court alone has jurisdiction if it had control over the proceedings. We have earlier referred to Saith and Skelton (supra). Mr. Viswanathan, learned senior counsel, has drawn inspiration from Nav Bharat Construction Company (supra) and Burn Standard Co. Ltd. (supra). In Burn Standard Co. Ltd., the three-Judge Bench referred to the order passed by this Court wherein directions were issued that the arbitrator shall file the award in this Court and any application which may become necessary to be filed during or after the conclusion of the arbitration proceedings shall be filed only in this Court and, accordingly, it directed that the objection petition under Section 34 could have been filed only in this Court. This order was passed in the context of Section 34 of the 1996 Act. As we notice from the said order, no independent reasons have been ascribed but the order has been passed solely on the basis of an earlier order.

33. At this juncture, we think it apt to immediately refer to the recent decision in Associated Contractors (supra). The three-Judge Bench was dealing with the meaning of "Court" under Section 2(1)(e) of the 1996 Act. Answering the reference, the three-Judge Bench referred to Section 2(1)(e) and Section 42 of the 1996 Act and in that context, it has held:-

> "20. As noted above, the definition of "court" in Section 2(1)(e) is materially different from its predecessor contained in Section 2(c) of the 1940 Act. There are a variety of reasons as to why the Supreme Court cannot possibly be considered to be "court" within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings. Firstly, as noted above, the definition is exhaustive and recognizes only one of two possible courts that could be "court" for the purpose of Section 2(1)(e). Secondly, under the 1940 Act, the expression "civil court" has been held to be wide enough to include an appellate court and, therefore would include the Supreme Court as was held in the two judgments aforementioned under the 1940 Act. Even though this proposition itself is open to doubt, as the Supreme Court exercising jurisdiction under Article 136 is not an ordinary appellate court, suffice it to say that even this reason does not obtain under the present definition, which speaks of either the Principal Civil Court or the High Court exercising original jurisdiction. Thirdly, if an application would have to be preferred to the Supreme Court directly, the appeal that is available so far as applications under Sections 9 and 34 are concerned, provided for under Section 37 of the Act, would not be available.

Any further appeal to the Supreme Court under Article 136 would also not be available. The only other argument that could possibly be made is that all definition sections are subject to context to the contrary. The context of Section 42 does not in any manner lead to a conclusion that the word "court" in Section 42 should be construed otherwise than as defined. The context of Section 42 is merely to see that one court alone shall have jurisdiction over all applications with respect to arbitration agreements which context does not in any manner enable the Supreme Court to become a "court" within the meaning of Section 42. It has aptly been stated that the rule of forum conveniens is expressly excluded by Section 42 see JSW Steel Ltd. v. Jindal Praxair Oxygen Co. Ltd.20, SCC at p. 542, para 59). Section 42 is also markedly different from Section 31(4) of the 1940 Act in that the expression "has been made in a court competent to entertain it" does not find place in Section 42. This is for the reason that, under Section 2(1)(e), the competent court is fixed as the Principal Civil Court exercising original jurisdiction or a High Court exercising original civil jurisdiction, and no other court. For all these reasons, we hold that the decisions under the 1940 Act would not obtain under the 1996 Act, and the (2006) 11 SCC 521 Supreme Court cannot be "court" for the purposes of Section 42.

21. One other question that may arise is as to whether Section 42 applies after the arbitral proceedings come to an end. It has already been held by us that the expression "with respect to an arbitration agreement" are words of wide import and would take in all applications made before during or after the arbitral proceedings are over. In an earlier judgment, Kumbha Mawji v. Dominion of India, the question which arose before the Supreme Court was whether the expression used in Section 31(4) of the 1940 Act "in any reference" would include matters that are after the arbitral proceedings are over and have culminated in an award. It was held that the words "in any reference" cannot be taken to mean "in the course of a reference", but mean "in the matter of a reference" and that such phrase is wide enough and comprehensive enough to cover an application made after the arbitration is completed and the final award is made (see SCR pp. 891-93 : AIR pp. 317-18, paras 13-16). As has been noticed above, the expression used in Section 42 is wider being

"with respect to an arbitration agreement" and would certainly include such applications." We have extensively referred to the said judgment as we agree with the principle stated therein and there is no reason to accept what has been stated in Burn Standard Co. Ltd. (supra).

34. In Nav Bharat Construction Company (supra), this Court had appointed a retired Judge of this Court as umpire and had also held that the reference was not a new one but a continuation of the earlier proceedings under the Act. Further, the Court directed the award to be filed in this Court. After the award was passed by the learned arbitrator, the State of Rajasthan filed an application for making the award Rule of the court and at the same time, the respondent filed petition under Sections 30 and 33 of the Act and interlocutory application was filed by the respondent challenging the jurisdiction of this Court to make the award absolute and also to consider the objection raised by the respondent against the award passed by the umpire in pursuance of the order passed by this Court. Repelling the stand of the respondent, the Court held:-

> "11. From the judgment of this Court dated 4-10-2005, it has been made clear by this Court in the operative part of the same, as noted hereinearlier, that the award that would be passed by the umpire must be filed in this Court and secondly, it was clarified in the judgment itself that this was not a case of a new reference but a continuation of the earlier proceeding and thus the Act shall continue to apply. In McDermott International Inc., the three-Judge Bench decision of this Court clearly observed that since the arbitrator was directed to file his award in this Court, the objections as well as the entertainability of the application of the appellant for making the award a rule of the court must be filed in this Court alone and, therefore, this Court has the jurisdiction to entertain the application of the appellant and also the objections filed by the respondent."

35. After so stating, the Court ruled that it had the jurisdiction to deal with the objections filed under Sections 30 and 33 of the Act.

36. We may immediately make it clear that in Nav Bharat Construction Company (supra), the matter related to reference under Section 20 of the Act.

37. Presently, we may proceed to analyze the reasoning given by the three-Judge Bench in Saith and Skelton (supra). The Court in the said case expressed the view that the directions contained in the order passed by the Court and the further proceedings indicated the retention of full control by this Court over the arbitration proceeding. Placing reliance on CT. A. CT. Nachiappa Chettiar (supra), the Court held thus:-

> "21. In Ct. A. Ct. Nachiappa Chettiar v. Ct. A. Ct. Subramaniam Chettiar the question arose whether the trial court had jurisdiction to refer the subject-matter of a suit to an arbitrator when the decree passed in the suit was pending appeal before the High Court. Based upon Section 21, it was urged before this Court that the reference made by the trial court, when the appeal was pending, and the award made in consequence of such reference, were both invalid as the trial court was not competent to make the

> order of reference. This Court rejected the said contention and after a reference to Sections 2(c) and 21 of the Act held that the expression "Court" occurring in Section 21 includes also the appellate court, proceedings before which are a continuance of the suit. It was further held that the word "suit" in Section 21 includes also appellate proceedings. In our opinion, applying the analogy of the above decision, the expression "Court" occurring in Section 14(2) of the Act will have to be understood in the context in which it occurs. So understood, it follows that this Court is the Court under Section 14(2) where the arbitration Award could be validly filed."

38. In this backdrop, it is necessary to delve into what precisely has been stated in CT. A. CT. Nachiappa Chettiar (supra). The facts as narrated in the decision are that a partition suit was filed by the respondent therein. The question that emerged for consideration pertained to the validity of the award made by the arbitrators to whom the matters in dispute between the parties were referred pending the present litigation. The suit was fixed for hearing. An application was filed by the appellant therein under Order VIII Rule 9 of the Code of Civil Procedure for permission to file an additional written statement. The said application was dismissed by the trial Judge on the ground that it sought to raise a new and inconsistent plea. Against the said decision, appeals were filed before the High Court. The High Court ordered that there was no need to stay all proceedings before the Commissioner and that it would be enough if the passing of the final decree alone was stayed. After the said order was passed, the Commissioner commenced his enquiry but before the enquiry could make any progress, the parties decided to refer their disputes for arbitration. As other proceedings in the suit were not stayed, an application was filed by the parties before the trial Judge requesting to refer the matter to arbitration. The trial court allowed the said application and certified that the proposed reference was for the benefit of the minors and so referred "the matters in dispute in the suit and all matters and proceedings connected therewith" for determination by the two arbitrators named by the parties. The arbitrators began their proceedings and passed an interim award which was filed before the trial court. An objection was filed to set aside the award on the ground that the reference was bad and the arbitrators were guilty of misconduct. That apart, many other grounds were also raised. The said objections were traversed by the other side and a prayer was made to pass decree in terms of the award. The trial Judge rejected the stand of the objector with regard to the alleged misconduct of the arbitrators and further found that there was no substance in the contention that the reference was a result of undue influence or coercion. The trial Judge, however, held that reference to the arbitrators which included matters in dispute in the suit comprised questions of title in relation to immoveable properties in Burma and so it was without jurisdiction and invalid. On appeal being preferred, the High Court allowed the appeal of the respondent (respondent before this Court) and confirmed the findings of the trial court in respect of the pleas raised by the appellants before the High Court as to the misconduct of the arbitrators and invalidity of the reference on the ground that it was the result of coercion and undue influence. It further reversed the conclusions of the trial court that the reference and the award were invalid inasmuch as they related to immovable properties in Burma and contravened the stay order passed by the High Court. It is worthy to note that it was urged before the High Court that the order of reference was invalid under Section 21 of the Act and that the trial court was not competent to make the reference but the said contention was negatived by the High Court. Consequently, the High Court found that the reference and the award were valid and, accordingly, it directed that a decree

should be passed in terms of the award.

39. This Court, in the course of analysis, considered the objection against the validity of the reference as that was seriously pressed before it. It took note of the submission that the reference and award were invalid because the trial court was not competent to make the order of reference under Section 21 of the Act. The Court referred to Section 21 and observed that two conditions must be satisfied before an application in writing for reference is made, namely, (i) all the interested parties to the suit must agree to obtain a reference, and (ii) the subject matter of the reference must be any matter in difference between the parties to the suit. The three-Judge Bench observed that the construction of the Section presents no difficulty but to analyse the implication of the two conditions and to seek to determine the denotation of the word "Court" difficulties arise. It posed the question, what does the word "Court" mean in relevant provision. According to the appellants therein, "Court" means court as defined by Section 2(c) of the Act. The argument on behalf of the appellants therein was that the order of reference could be made only by the trial court and not by the appellate court and so, there could be no reference after the suit was decided and a decree had been drawn up in accordance with the judgment of the trial court. As in the said case, the judgment had been delivered by the trial court and a preliminary decree had been drawn in accordance with it, there was no scope for making any order of reference. Dealing with the submission, the Court held:-

> "35. Does the "court" in the context mean the trial court? This construction cannot be easily reconciled with one of the conditions prescribed by the section. After a decree is drawn up in the trial court and an appeal is presented against it, proceedings in appeal are a continuation of the suit; and speaking generally, as prescribed by Section 107 of the Code of Civil Procedure the appellate court has all the powers of the trial court and can perform as nearly as may be the same duties as are conferred and imposed on the trial court. If that be so, during the pendency of the appeal, can it not be said that matters in difference between the parties in suit continue to be matters in dispute in appeal? The decision of the appeal can materially affect the nature and effect of the decree under appeal; and there is no doubt that all the points raised for the decision of the appellate court can be and often are points in difference between them in the suit; and, in that sense, despite the decision of the trial court the same points of difference in suit continue between the parties before the appellate court. If during the pendency of such an appeal parties interested agree that any matter in difference between them in the appeal should be referred to arbitration the first two conditions of the section are satisfied. When Section 21 was enacted did Legislature intend that during the pendency of the appeal no reference should be made even if the parties satisfied the first two conditions prescribed by the section?"

40. Further analyzing the object of enacting Section 21 and the intention behind the said Section, the Court ruled:-

> "36. Having regard to the fact that the words used in Section 21 are substantially the same as those used in Schedule II, para 1, of the earlier Code, it would be difficult to sustain the plea that the enactment of Section 21 was intended to bring about such a

> violent departure from the existing practice. If that had been the intention of the Legislature it would have made appropriate changes in the words used in Section 21. Therefore, the word "court" cannot be interpreted to mean only the trial court as contended by the appellants. Similarly, the word "suit" cannot be construed in the narrow sense of meaning only the suit and not an appeal. In our opinion, "court" in Section 21 includes the appellate court proceedings before which are generally recognised as continuation of the suit; and the word "suit" will include such appellate proceedings. We may add that whereas Section

41 of the Act is consistent with this view no other section militates against it."

41. Proceeding further, the three-Judge Bench expressed thus:-

> "37. ... In our opinion the scheme of the section does not permit the addition of any words qualifying the word "judgment" used in it. The expression "at any time before the judgment is pronounced" is only intended to show the limit of time beyond which no reference can be made, and that limit is reached when a final judgment is pronounced. The provision that "any matter in difference between the parties in the suit can be referred to arbitration" cannot be subjected to the further limitation that the said matter can be referred to arbitration if it is not covered by the judgment of the court. The effect of the section appears to be that so long as the final judgment is not pronounced by the court any matter — i.e., some or all the matters — in difference between the parties can be referred to arbitration provided they are agreed about it. If a reference can be made even at the appellate stage when all matters in difference between the parties are covered by the final judgment of the trial court, it is difficult to understand why in allowing reference to be made during the pendency of the suit in the trial court any further conditions should be imposed that only such matters of difference can be referred to as are not covered by an interlocutory judgment of the court. We would accordingly hold that it is open to the trial court to refer to arbitration any matters of difference between the parties to the suit provided they agree and apply at any time before the court pronounces its final judgment in the suit."

42. We may also note with profit that the Court addressed to another complication as the appeals were pending before the High Court at the material time. The issue that arose was which is the court that had jurisdiction in such a case to make the order of reference. The Court opined that there is no difficulty in holding that if the suit is pending in the trial court and a final judgment has not been pronounced by it, it is the trial court which is competent to make the order of reference. Similarly, if a suit has been decided, a final judgment has been delivered and a decree has been drawn up by the trial court and no appeal has been preferred against it, the matter is concluded and there is no scope for applying Section 21 at all. Proceeding further, the Court stated that if a decree determining the suit has been drawn up by the trial court and it is taken to the appellate court, during the pendency of the appeal, it is the appellate court that is competent to act under Section 21. It further observed that these categories of cases do not present any difficulty but where a preliminary decree has been

drawn up and an appeal has been filed against it, the complication arises by reason of the fact that the disputes between the parties are legally pending before two courts. Proceedings which would have to be taken between the parties in pursuance of, and consequent upon, the preliminary decree are pending before the trial court whereas matters in difference between the parties which are covered by the preliminary judgment and decree are pending before the appellate court. In that context, the Court held:-

> "39. ... In such a case it may perhaps be logically possible to take the view that the arbitration in respect of the disputes in relation to proceedings subsequent to the preliminary decree can be directed by the trial court, whereas arbitration in respect of all the matters concluded by the trial court's preliminary judgment which are pending before the appellate court can be made by the appellate court; but such a logical approach is not wholly consistent with Section 21; and rather than help to solve any difficulty it may in practice create unnecessary complications. In most cases matters in dispute before the trial court in final decree proceedings are so inextricably connected with the matters in dispute in appeal that effective arbitration can be ordered only by one reference and not by two. We are, therefore, inclined to hold that in a case of this kind where both the courts are possessed of the matters in dispute in part it would be open to either court to make an order of reference in respect of all the matters in dispute between the parties. It is argued that on such a construction conflict of decisions may arise if two sets of arbitrators may be appointed. We do not think that such a conflict is likely to occur. If the parties move the trial court and obtain an order of reference they would inevitably ask for appropriate orders of withdrawal or stay of the appellate proceedings; if, on the other hand, they obtain a similar order of reference from the appellate court they would for similar reasons apply for stay of the proceedings before the trial court. In the present case proceedings subsequent to the preliminary decree were pending before the trial court and so we must hold that the trial court was competent to act under Section 21. On that view the objection against the validity of the reference based on the provisions of Section 21 cannot succeed."

43. The aforesaid analysis of the Court has to be appositely appreciated. It seems to us, the facts in the said case were quite different and the principle that the Court has laid down lucidly states that the appellate court includes the court of first instance and the power of reference under Section 21 of the Act can still be exercised by the appellate court under certain circumstances. We do not have any difference with the proposition that has been laid down in the said decision. The analogy of the said decision has been applied to understand the expression "Court" occurring in Section 14(2) of the Act. True, in Saith and Skelton (supra), the learned Judges have qualified the same by stating the context in which it occurs. Bestowing our thoughtful consideration, we are disposed to think that the analogy taken from CT. A. CT. Nachiappa Chettiar (supra) and applying to the superior courts attaching condition precedent that should the superior court retain control over the arbitral proceedings, it will have exclusive jurisdiction is neither correct nor acceptable. On a careful reading of the judgment in CT. A. CT. Nachiappa Chettiar, we do not find anything that can be remotely connected to confer power on the superior courts to deal with the award directly. The analogy, if

any, has to stop at a particular level. To explicate, in a given case, the parties may agree for arbitration and the court may think it appropriate to send it for arbitration. But to expand the theory that the court had issued directions after the appointment of arbitrator and was in control of it and, therefore, the award can only be filed before the superior court for the purpose of making it a Rule of Court as has been held in Saith and Skelton does not flow from the correct understanding of the principle stated in CT. A. CT. Nachiappa Chettiar.

44. Guru Nanak Foundation (supra), as we have narrated earlier, refers to the definition of "Court" and analyses sub-section (2) of Section 14 and sub-section (4) of Section 31 and opines that sub-section (4) of Section 31 not only confers exclusive jurisdiction on the court to which an application is made in any reference but also simultaneously ousts the jurisdiction of any other court which may as well have jurisdiction in itself. To illustrate the point further, the Bench has stated:-

> "15. ... if an Award was required to be filed under Section 14(2) read with Section 31(1) in any particular court as being the court in which a suit touching the subject-matter of Award would have been required to be filed, but if any application in the reference under the Act has been filed in some other court which was competent to entertain that application, then to the exclusion of the first mentioned court the latter court alone, in view of the overriding effect of the provision contained in Section 31(4), will have jurisdiction to entertain the Award and the Award will have to be filed in that court alone and no other court will have jurisdiction to entertain the same." And again:-
>
> "16. The provision contained in sub-section (2) of Section 14 will neither be rendered otiose nor stand in disharmony on the construction that we place on sub-section (4) of Section 31 because the expression "court" as defined in Section 2(c) will have to be adhered to unless there is anything repugnant in the subject or context in which it is used. Therefore, the expression "court" as used in Section 14(2) will have to be understood in this background." The aforesaid reasoning, does not really lay the foundation for establishing the proposition that if a superior court keeps control over the arbitral proceeding the award can only be filed before the said Court.
>
> 45. At this juncture, we may refer to the definition of the word 'Court' in Section 2(c) of the Act. It reads as follows:-
>
> "Section 2(c) 'Court' means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court."
>
> 46. Section 14 deals with the award to be signed and filed by the Arbitrator. Section 14(2) refers to the word "Court". Sub-section (2) reads as follows:-

"(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon given notice to the parties of the filing of the award."

47. Section 31 deals with the jurisdiction of the Courts.

Sub-section (1) stipulates that subject to the provisions of this Act, an award may be filed in any court having jurisdiction in the matter to which the reference relates. Sub-section (2) lays down that notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the court in which the award under the agreement has been, or may be, filed, and by no other Court. Sub-section (4) which commences with a non- obstante clause, reads as follows:-

"(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under his Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent application arising out of that reference and the arbitration proceeding shall be made in that court in no other Court."

48. The said provision, as noted earlier, has been interpreted in Kumbha Mawji (supra). Interpreting the said provision, the three-Judge Bench has held that the object of the said sub-section is apparently to go further than sub-section (3), that is, not merely casting on the party concerned an obligation to file all applications in one court for vesting exclusive jurisdiction for such applications in the court in which the first application has been already made. The interpretation placed by the three-Judge Bench is to the effect that on a comprehensive view of Section 31 that while the first sub-section determines the jurisdiction of the court in which an award can be filed, sub-sections (2), (3) and (4) are intended to make that jurisdiction effective in three different ways, (1) by vesting in one court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement, (2) by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one court, and (3) by vesting exclusive jurisdiction in the court in which the first application relating to the matter is filed. The further analysis of the Court is that the context of sub-section (4) would seem to indicate that the sub-section was not meant to be confined to applications made during the pendency of an arbitration.

The necessity for clothing a single court with effective and exclusive jurisdiction, and to bring about by the combined operation of the three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced. There is no conceivable reason that the legislature has intended to confine the operation of sub- section (4) only to applications made during the pendency of arbitration because the phrase "in any reference" is to be taken as meaning "in the course of a reference".

49. As noted earlier, the Court has interpreted the phrase 'in any reference' to connote 'in the matter or course of a reference' which would mean in the matter of a reference to arbitration and also include the stage when the final award is made. This has been distinguished in Guru Nanak Foundation by referring to Section 31(4) of the Act as regards the meaning of the word 'Court' and assuming the premise that the Supreme Court can also become the court of first instance if it has retained control over the proceedings. On a perusal of the definition of the term 'Court' in the dictionary clause and the meaning of the word 'Court' as employed in Section 31(4) of the Act and appreciating the same in the context of the provisions and also taking note of the scheme of the Act, we find that the construction placed in Guru Nanak Foundation (supra) suffers from a fundamental fallacy. The language used in Section 31(4) of the Act commences with the non-obstante clause. The said part of the provision has to be understood in the textual context because primarily the provision is an enabling one and the real intendment that is conveyed through the vehicle of expressive language is that where any application has been made in a reference under the Act as regards the Court which has competence to entertain an application, that court alone shall have the jurisdiction over the arbitration proceedings. The purpose behind the said provision is to avoid conflict in the exercise of jurisdiction and to inject the intention of certainty of the jurisdictional court keeping in view the scheme of the Act which is meant to facilitate the process of arbitration and see the finality of the post award proceedings. Therefore, it is difficult to accept that the Supreme Court can assume original jurisdiction, solely because of control over the proceedings, for original jurisdiction has been conferred upon the Supreme Court under Articles 32 and 131 of the Constitution. It is also worthy to note that the said original jurisdiction is not available to this Court in respect of a dispute that finds mention in Article 262 of the Constitution. In State of Karnataka v. State of Tamil Nadu and others21, the three-Judge Bench, after analysing the width of Article 32 and the concept of original jurisdiction of the Supreme Court as envisaged under Article 131 of the Constitution and analyzing the language employed under Article 262, has held that the authority conferred under Article 32 has its limitations when the lis under Article 262 emerges. The Constitution has not provided machinery for resolution of the disputes in the Constitution but has empowered Parliament to make laws to provide to exclude the power of the Supreme Court or any other court with regard to jurisdiction in respect of complaints (2017) 3 SCC 362 or disputes that find mention in Article 262(1). Thereafter, the Court referred to the authorities in State of Orissa v. Government of India and another22 and Networking of Rivers, In re23. In Networking of Rivers, in re (supra), the Court ruled that Section 11 of the Inter-State River Water Disputes Act, 1956 (for short, "the 1956 Act") uses the expression "use, distribution and control of water in any river" and they are the keywords in determination of the scope of power conferred on a tribunal constituted under Section 3 of the 1956 Act. If a matter fell outside the scope of these three crucial words, the power of Section 11 of the 1956 Act in ousting the jurisdiction of the courts in respect of any water dispute, which is

otherwise to be referred to the tribunal, would not have any manner of application. The test of maintainability of a legal action initiated by a State in a court would thus be, whether the issues raised therein are referable to a tribunal for adjudication of the manner of use, distribution and control of water.

(2009) 5 SCC 492 (2012) 4 SCC 51

50. Be it noted, in the said case, the three-Judge Bench opined that the award passed by the Tribunal can be scrutinized under Article 136 of the Constitution and the special leave to appeal would be maintainable. The purpose of referring to the aforesaid judgment in detail is to show that where the original jurisdiction has been conferred by the Constitution upon this Court and where it is barred.

51. In the aforesaid backdrop, the question that is required to be posed is whether this Court by using the expression "keep controls over the arbitral proceeding" can assume original jurisdiction. As indicated earlier, the Court has assumed the jurisdiction by interpreting the word 'Court' as used in Section 31(4) of the Act. We have already held that interpretation is not in accord with the language used in the provision and the intention of the legislature. It is clear to us that the court competent to entertain the reference will have the jurisdiction to deal with the objections to the award or any post award proceeding.

52. Another significant issue that arises for consideration is whether the Court can, by assuming such original jurisdiction, deprive the party to prefer an appeal which is statutorily provided. In Bharat Coking Coal Limited, it has been observed thus:-

> "8. It is now a trite law that whenever a term has been defined under a statute, the same should ordinarily be given effect to. There cannot, however, be any doubt whatsoever that the interpretation clause being prefaced by the words "unless there is anything repugnant in the subject and context" may in given situations lead this Court to opine that the legislature intended a different meaning. (See State of Maharashtra v. Indian Medical Assn.24 and Pandey & Co. Builders (P) Ltd. v. State of Bihar25.)
>
> 9. While determining such a question, the Court ordinarily again must preserve the right of a party to prefer an appeal. A right of appeal is a valuable right and unless there exist cogent reasons, a litigant should not be deprived of the same. It is a statutory right."

53. It is worthy to mention that in the said case, the two-Judge Bench had distinguished Guru Nanak Foundation on facts. But the emphasis has been on the sustenance of the right of a party to prefer an appeal. In this context, Mr. Sinha has drawn our attention to the (2002) 1 SCC 589 (2007)1 SCC 467 Constitution Bench decision in Garikapati Veeraya (supra) that lays down that the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding and

the right of appeal is not a mere matter of procedure but is a substantive right. It has been further held that the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal and the said vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

54. The principle laid down by the Constitution Bench graphically exposits that right to appeal is a vested right and such a right exists on and from the date the lis commences and the said right can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise. In this context, we have also been commended to the authority in A.R. Antulay (supra). In the said case referring to Prem Chand Garg and another v. The Excise Commissioner, U.P and others26 and relying on the same, Sabyasachi Mukharji, J. (as His Lordship then was) stated:-

> "50. ... The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between Article 142(1) and Article 32 arose. Gajendragadkar, J., speaking for the majority of the judges of this Court said that Article 142(1) did not confer any power on this Court to contravene the provisions of Article 32 of the Constitution. Nor did Article 145 confer power upon this Court to make rules, empowering it to contravene the provisions of the fundamental right. At page 899 of the Reports, Gajendragadkar, J., reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be exercised in the interests of justice". But that is not to say that an order can be made by this Court which 1963 Supp. 1 SCR 885 : AIR 1963 SC 996 is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that an order which this Court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws (emphasis supplied). The court therefore, held that it was not possible to hold that Article 142(1) conferred upon this Court powers which could contravene the provisions of Article 32."

55. In paragraph 91 of the said judgment, in the concurring opinion, it has been stated thus:-

> "91. It is the settled position in law that jurisdiction of courts comes solely from the law of the land and cannot be exercised otherwise. So far as the position in this country is concerned conferment of jurisdiction is possible either by the provisions of the Constitution or by specific laws enacted by the legislature. For instance, Article

> 129 confers all the powers of a court of record on the Supreme Court including the power to punish for contempt of itself. Articles 131, 132, 133, 134, 135, 137, 138 and 139 confer different jurisdictions on the Supreme Court while Articles 225, 226, 227, 228 and 230 deal with conferment of jurisdiction on the High Courts. Instances of conferment of jurisdiction by specific law are very common. The laws of procedure both criminal and civil confer jurisdiction on different courts. Special jurisdiction is conferred by special statute. It is thus clear that jurisdiction can be exercised only when provided lower either in the Constitution or in the laws made by the legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. In support of judicial opinion for this view reference may be made to the Permanent Edition of "Words und Phrases" Vol. 23-A at page 164. It would be appropriate to refer to two small passages occurring at pages 174 and 175 of the volume. At page 174, referring to the decision in Carlile v. National Oil & Development Co. it has been stated.

Jurisdiction is the authority to hear and determine, and in order that it may exist the following are essential:

> (1) A court created by law, organized and sitting; (2) authority given to it by law to hear and determine causes of the kind in question; (3) power given to it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment in personam, which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon its being located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision."

56. In Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and others27, it has been expressed that the right of appeal is statutory and when conferred by a statute, it becomes a vested right. Jurisdiction vested in an appellate court in a hierarchical system is to rectify the errors and that is why it is called "error jurisdiction" as has been held in Vikas Yadav v. State of Uttar Pradesh and others28. A similar view has been expressed in Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation29.

57. In Guru Nanak Foundation (supra), as noted earlier, the two-Judge Bench has distinguished the principle laid down in Garikapati Veeraya (supra) by stating that the door of this Court is not closed to the appellant. In fact, as has been stated, the door is being held wide ajar for him to raise all contentions which one can raise in a proceeding in an originating summons. The aforesaid statement of law is not correct because the superior court is not expected in law to assume (2003) 6 SCC 659 (2016) 9 SCC 541 (2009) 8 SCC 646 jurisdiction on the foundation that it is a higher court and further opining that all contentions are open. The legislature, in its wisdom, has provided an appeal under Section 39 of the Act. Solely because a superior court appoints the arbitrator or issues

directions or has retained some control over the arbitrator by requiring him to file the award in this Court, it cannot be regarded as a court of first instance as that would go contrary to the definition of the term 'court' as used in the dictionary clause as well as in Section 31(4). Simply put, the principle is not acceptable because this Court cannot curtail the right of a litigant to prefer an appeal by stating that the doors are open to this Court and to consider it as if it is an original court. Original jurisdiction in this Court has to be vested in law. Unless it is so vested and the Court assumes, the court really scuttles the forum that has been provided by the legislature to a litigant. That apart, as we see, the said principle is also contrary to what has been stated in Kumbha Mawji. It is worthy to note that this Court may make a reference to an arbitrator on consent but to hold it as a legal principle that it can also entertain objections as the original court will invite a fundamental fallacy pertaining to jurisdiction.

58. In Surjit Singh Atwal (supra), a three-Judge Bench had opined that applications under Section 8 and under Section 20, though clearly applications anterior to the reference, lead to a reference. Such applications are undoubtedly applications "in the matter of a reference" and may fall within the purview of Section 31(4) of the Act even though these applications are made before any reference has taken place. The purpose of referring to the said authority is that the principle stated in Kumbha Mawji (supra) has been elaborated in Surjit Singh Atwal (supra). It is to be borne in mind that the Court that has jurisdiction to entertain the first application is determinative by the fact as to which Court has the jurisdiction and retains the jurisdiction. In this regard, an example may be cited. When arbitrator is not appointed under the Act and the matter is challenged before the High Court or, for that matter, the Supreme Court and, eventually, an arbitrator is appointed and some directions are issued, it will be inappropriate and inapposite to say that the superior court has the jurisdiction to deal with the objections filed under Sections 30 and 33 of the Act. The jurisdiction of a Court conferred under a statute cannot be allowed to shift or become flexible because of a superior court's interference in the matter in a different manner.

59. Thus analysed, we arrive at the irresistible conclusion that the decisions rendered in Saith and Skelton (supra) and Guru Nanak Foundation (supra) do not lay the correct position of law and, accordingly, they are overruled. Any other judgment that states the law on the basis of the said judgments also stands overruled.

60. Having so stated, we would have directed the matter to be listed before the appropriate Bench. But it is not necessary as we find the appellant-State has filed the objection before the Civil Court. If the objection of the State is not there on record, liberty is granted to the State as well as the respondent to file their respective objections within thirty days from today. The objections shall be decided on their own merits.

61. Resultantly, the appeal stands disposed of in above terms. There shall be no order as to costs.

.....CJI [Dipak Misra] .....J. [A.K. Sikri] .....J. [A.M. Khanwilkar] .....J. [Dr. D.Y. Chandrachud] .....J. [Ashok Bhushan] New Delhi;

December 14, 2017