SUPREME COURT OF INDIA

Paramjeet Singh Patheja

Vs.

ICDS Ltd.

C.A.No.4130 of 2006

(Dr. AR. Lakshmanan and Lokeshwar Singh Panta JJ.)

31.10.2006

JUDGMENT

DR. AR. LAKSHMANAN, J.

This appeal was filed against the impugned interlocutory judgment and order dated 19.3.2003 passed in Notice of Motion No. 72/2002 in Notice No. 180 of 2001 by the High Court of Judicature at Bombay whereby the reference made by the learned single Judge with regard to the question of law was answered against the appellant herein.

The appellant herein is Paramjeet Singh Patheja(guarantor), judgment debtor and the respondent is ICDS Ltd, a Company incorporated under the provisions of the Companies Act, 1956.

On 30.10.1998 the said company was registered with the Board of Industrial Financial Reconstruction (BIFR) under the provisions of the Sick Industrial Companies (Special provisions) Act, 1995. The appellant was a party to arbitration proceedings initiated by the respondents to recover amounts alleged to be due and payable from one Patheja Forgings and Auto Parts Manufactures Ltd. (hereinafter referred to as the 'company'). The appellant was sought to be sued in his purported capacity as guarantor of the dues of the said company.

On 09.03.2000, a letter was sent informing the Arbitrators that the company has been registered under section 15 of the Sick Industrial Companies (Special provisions) Act, 1995.

An Award was rendered therein on 26th June 2000 by the Arbitrator awarding Rs.3,81,58,821.47. However, according to the appellant, no copy of the Award was served on the appellant.

On 16.01.2002, Insolvency notice was issued under section 9(2) of the Presidency Town Insolvency Act, 1909 (PTIA) on the basis of the Arbitration Award. Section 9(2) provides that a debtor commits an act of insolvency if a creditor who has obtained a "decree or order" against him for the payment of money issues him a notice in the prescribed form to pay the amount and the debtor fails to do so within the time specified in the notice. The appellant filed a Notice of Motion in the High Court challenging the said notice, inter alia, on the ground that an Award is neither a decree nor an order for the purpose of the provisions of the Insolvency Act and that no notice can be issued under Section 9(2) on the basis of an award. This contention has been upheld in the case of Srivastava v. K.K. Modi Investments and Financial Services, 2002 (4) Mh.L.J.281, by the Bombay High Court

(J.A. Patil,J.).

Order of BIFR rejecting the reference of Company was passed on 05.04.2002. On 14.06.2002, Insolvency notice was served on the appellant.

An appeal filed by the said Company is presently under consideration by the Appellate Authority on Industrial and Financial Reconstruction ('AAIFR').

The appellant filed a Notice of Motion No.72 of 2002 in the High Court challenging the Insolvency Notice dated 16th January, 2002. When the above Notice of Motion came up for hearing the Learned Single Judge (Dr. Chandrachud,J.) hearing the same differed with the view expressed by the High Court (J.A. Patil,J.) in the matter of Srivastava v. K.K. Modi Investments and Financial Services (Supra) on 14.10.2002 and referred the question as to whether an insolvency notice may be issued under Section 9(2) of the Insolvency Act on the basis of an Award for reconsideration by a Division Bench. The Division Bench answered the reference in the affirmative on 19.03.2003 and held that an award is a "decree" for the purpose of section 9 of the Insolvency Act and that an insolvency notice may therefore be issued on the basis of an award passed by an arbitrator.

Against this order of the High Court this Appeal has been filed in this Court.

The substantial questions of law of paramount importance to be decided by this court are: i. Whether an arbitration award is a "decree" for the purpose of section 9 of the Presidency Towns Insolvency Act, 1909?

ii. Whether an insolvency notice can be issued under section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award?

Counsel for both parties submitted their case at length. Mr. V.A. Bobde, learned senior advocate appeared for the appellant and Mr. L. Nageshwar Rao, learned senior counsel appeared for the respondent.

Mr. V.A. Bobde, learned senior advocate, appearing for the appellants submitted that;

a) The Presidency Towns Insolvency Act, 1909 is a statute fraught with the grave consequence of 'civil death' for a person sought to be adjudged an insolvent. The Act has to be construed strictly; it is impermissible to enlarge or restrict the language having regard to supposed notions of convenience, equity or justice.

b) The insolvency law for Presidency-Towns was enacted in 1909 when the Civil Procedure Code, 1908 had recently been put on the statute book. At that time, the Arbitration Act, 1899 was in force. It was clearly known to the law makers what is a 'decree', what is an 'order' and what is an 'award'. It was equally known that there is a fundamental difference between 'Courts' and 'arbitrators' that Courts constitute the judiciary and exercise the judicial power of the State whereas arbitrators are persons chosen by parties to a contract to resolve their disputes.

c) The Indian Arbitration Act, 1899 clearly draws the distinction between Courts and Arbitrators. The preamble of the Act shows that it is an Act for dealing with 'arbitration by agreement without the intervention of a Court of Justice'. Section 4(a) defines 'Court' and various sections deal with the

powers of the Court. Section 11 provides for the making of an 'award'. Section 15 provides for its enforcement. It was submitted that from a plain reading of the provision it is evident that only for the purpose of enforcement of the award, it is treated as if it were a decree of the Court.

On a plain reading of the above provision, it is apparent that only for the purpose of enforcement of the award, it is treated as if it were a decree of the Court. The only result is that for enforcement, i.e. execution, the provisions of the CPC may be resorted to. Section 15 does not provide that an award shall be deemed to be a decree for all purposes under all laws, past or future, passed by any legislature. Learned senior counsel referred to various decisions of this court in support of this contention.

d) Mr. Bobde, further submitted that, it was decided long ago in 1907 and has never been doubted since then that issuance of a notice under the Insolvency or Bankruptcy statutes is not a mode of enforcement of a decree in the In re A Bankruptcy Notice (1907) 1 KB 478. A judgment obtained in pursuance of an order purporting to be made under the Arbitration Act, 1889, to enforce an award on a submission by entering judgment in accordance therewith, is not a final judgment in an action upon which a bankruptcy notice can be founded within section 4, sub-section 1(g), of the Bankruptcy Act, 1883. Per Vaughan Williams and Fletcher Moulton L.JJ., "the Court has no jurisdiction under Section 12 of the Arbitration Act, 1889 which provides for the enforcement of an award on a submission in the same manner as if it were a judgment, to order judgment to be entered in accordance with the award."

Per Fletcher Moulton L.J., "an application for a bankruptcy notice is not a method of enforcing an award within Section 12 of the Arbitration Act, 1889." e) Section 325 of the CPC of 1859 provides that 'the Court shall proceed to pass judgment according to the awardand upon the judgment which shall be so given, decree shall follow and shall be carried into execution in the same manner as other decrees of the Court. Section 522 of the CPC of 1882 is in almost similar terms. Ghulam Khan vs. Muhammad (1901) 29 Calcutta Series 167 at 173. It will be convenient at the outset to set out the two sections, namely,325 of Act VIII of 1859 and 522 of Act XIV of 1882, in extense, and in juxtaposition:

"325. If the Court shall not see cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application shall have been made to set aside the award, or if the Court shall have refused such application, the Court shall, proceed to pass judgment according to the award or according to its own opinion on the special case, if the award shall have been submitted to it in the form of a special case; and upon the judgment which shall be so given decree shall follow and shall be carried into execution in the same manner as other decrees of the Court. In every case in which judgment shall be given according to the award, the judgment shall be final."

"522. If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to give judgment according to the award, or if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the

decree is in excess of, or not in accordance with the award."

f) Since the Arbitration Act, 1899 made a departure from the above position in the case of arbitration by agreement without the intervention of Court, Section 89 of the CPC of 1908 provided as follows:

"89. Save as otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings shall be governed by the provisions contained in Schedule 2." (Dinkarrai vs. Yeshwantrai AIR 1930 Bombay 98 at 101.)

g) The second Schedule provided for three types of cases: Arbitration in Suit, from Clauses 1 to 16, Order of reference on agreements to refer from Clauses 17 to 19 and Arbitration without the intervention of Court, from Clauses 20 to 23. Clause 16 of the First part and Clause 21 of the Third part provide for the Court to 'pronounce judgment according to the award..decree shall follow'.

h) It is settled law that where the arbitration is governed by the Arbitration Act, 1899, the Second Schedule will not apply thereto Dinkarrai's case(supra). Hence, in the case of arbitration on agreement without the intervention of the Court, Section 15 of the Arbitration Act of 1899 will apply and there is no requirement that a Court must pronounce judgment according to the award and that decree shall follow. Under Section 15, the award itself is enforceable 'as if' it were a decree; it does not become a decree. i) The Act of 1909 does not define 'decree' or 'order' for the simple reason that the meaning of these terms had been well-known since the CPC of 1859 and 1882 and had been again defined about one year ago in CPC of 1908. Learned counsel submitted that there are other indicators to show that an award of arbitrators was never intended to be comprehended in the meaning of the terms 'decree' or 'order'. Thus as understood from 1909, the Insolvency Act dealt only with debtors who had suffered decrees by any Court for the payment of money.

j) When the Bombay Amendment came into force on 19.6.1939 by Bombay Act No. 51 of 1948, clause (i) was added to Section 9. That clause again speaks of a 'decree' and introduces the word 'order'. After so many years of the CPC being in force the Bombay Legislature knew the meaning of 'decree' and 'order' and used those terms as understood under the CPC. The words 'the execution of which is not stayed' point clearly to the fact that decree or order mean those passed by a Court for it is only under CPC that an appellate Court or executing Court can stay the execution of a decree or order. These words are inappropriate for and inapplicable to awards under the Indian Arbitration Act of 1899 or the Arbitration and Conciliation Act, 1996, under which the Awards were straightaway enforceable as if they were decrees of Court. Moreover, so far the Arbitration Act of 1940 is concerned, the award itself acquires force only after the Court pronounces judgment and passes a decree under Section 17. k) The words 'suit or other proceeding in which the decree or order was made' mean a suit in which a decree is made or a proceeding under the CPC which results in an order by a Civil Court which is not a decree. The word 'proceeding' does not refer to arbitrations because they do not result in an 'order' but an 'award', much less an order of a Civil Court as defined in Section 2(14) of the CPC. 'Proceeding' means a proceeding such appellate or execution proceedings or applications under the CPC during the pendency of the suit or appeal.

l) The words 'or other proceedings' were added not for covering arbitrations but by way of abundant caution to make it clear that other proceedings in relation to or arising out of suits were to be included. This Court has held that: ".the word 'suit' cannot be construed in the narrow sense of

meaning only the suit and not appeal . and the word 'suit' will include such appellate proceedings ."

m) The words 'litigant', 'money decree', judgment- debtor', 'decretal amount' and 'decree-holder' plainly show that Parliament intended to deal with litigants who do not pay amounts decreed by Civil Courts. There is no reference at all to arbitrations and awards in the Statement of Objects and Reasons and in sub-sections (2) to (5) of Section 9, which were introduced in 1978 by Parliament.

n) "Litigation" has been held to mean "a legal action, including all proceedings therein, initiated in a court of law". Obviously therefore Parliament had in mind debts due to 'litigants' i.e. debts due by reason of decrees of Courts. It is well settled that Courts, unlike arbitrators or arbitral tribunals, are the third great organ under the Constitution: legislative, executive and judicial. Courts are institutions set up by the State in the exercise of the judicial power of the State will be seen from the cases mentioned hereinbelow: o) Arbitrators are persons chosen by disputants to be their judges. Arbitrators are not tribunals set up by the State to deal with special matters. They are not set up by the State at all but by the parties to a contract. They do not deal with special matters; they deal with any matter referred to them under the arbitration clause. They are not part of the judiciary exercising the judicial power of the State. In this connection, learned senior counsel referred to the following observation of Anthony Walton in his Preface to Russell on Arbitration, 20th Ed."

"Arbitration has its center the stone that the builders of the Courts rejected. You can choose your own judge." p) It is, therefore, abundantly clear that the legislative intendment was that only if a debt found due by the Courts in an action contested according to the rules and principles that govern Courts, was not paid in spite of notice; it would amount to an act of insolvency. The Legislatures never contemplated that a mere award given by persons chosen by parties to resolve their disputes i.e. persons, who are outside the ordinary hierarchy of courts of civil judicature, should lead to an act of insolvency.

q) It is noteworthy that Section 112 of the Bombay Insolvency Rules, 1910, empowers the three Presidency-Town High Courts to frame Rules. In the exercise of this power Rules were framed by the Bombay High Court in 1910. After the Bombay Amendment to the act w.e.f. 1939 by introduction of clause (i) in Section 9, Rule 52A and Form 1-B were added by the Bombay High Court.

r) Rule 52 A(1) uses the words 'certified copy of the decree or order'. It is plain that certified copies are given only by Courts or statutory authorities. Arbitrators only submit their award and are not empowered under any law to furnish certified copies of the award.

Sub-rule (2) mandates that the Insolvency Notice shall be in Form No. 1-B with such variations as the circumstances may require. The variations are according to circumstances; it is impermissible to substitute the word 'Court' with 'arbitrators and the words 'decree' or 'order'. Form 1-B unambiguously points to the fact that the decree or order has been obtained from a Court in a suit or proceeding. s) Now, that Parliament has amended the Act of 1909 in 1978 on the lines of the Bombay Amendment, it has expressly provided by Section 9(3) that the Notice 'shall' be in the prescribed form i.e. prescribed by the Rules. There is no room left for the argument that variations according to circumstances can bring in arbitrators and awards when the form uses the words Court, decree and order. In reply to the submissions made by the appellants, learned senior advocate, Mr. L. Nageshwar Rao, appearing for the respondents submitted:

? If an Award rendered under the Arbitration and Conciliation Act, 1996 is not challenged within the requisite period, the same becomes final and binding as provided under Section 35. Thereafter the same can be enforced as a Decree as it is as binding and conclusive as provided under Section 36. There is no distinction between an Award and a Decree. In view thereof, there is no impediment in taking out Insolvency Notice as contemplated under Section 9(2) of the Presidency Towns Insolvency Act.

? Section 9(1)(a) to (h) of the Presidency Towns Insolvency Act, 1909 set out the different acts of Insolvency committed by a Debtor which acts of Insolvency would form the ground or basis for filing an Insolvency Petition against the Debtor under Section 12 of the PTIA for having him adjudicated Insolvent. The 1978 Central Amendment introduced Section 9(2) to (5). The statement of objects and reasons of amending Act of 1978, inter alia, reads as follows:

"The main defect of the existing law lies in the absence of any adequate powers to compel the production of assets. The primary object of the Act of 1948 was the protection of debtors; the provision it makes for the discovery of the property of Insolvents is treated as of secondary importance and has long since been found insufficient to prevent fraud. The protection of honest debtors should be one of the objects of every Insolvency Law, although it is of less importance now than it was in 1948, when imprisonment for debt was more frequent. But it is equally important in the interests of commerce that creditors should not be defrauded and that dishonest debtors should not be able to make use of insolvency proceedings merely to free themselves from their liabilities while preserving their assets more or less intact."

The objects thus sought to be achieved is to widen the scope for adopting Insolvency proceedings. The provisions of Section 9(2) to 9(5) which are brought in by the amending Act of 1978 have to be viewed in the light of the statement of objects and reasons. Therefore, it is evident that what was contemplated was to permit Insolvency Notice being issued even on the basis of the Arbitral Tribunal provided the same has become final, binding and enforceable. ? The amendment added a new act of Insolvency and in effect provided that a Debtor commits an act of Insolvency if he fails to comply with the requisitions of an Insolvency Notice served upon him by a creditor demanding from him (the Debtor) the amounts due under the Decree or Order for payment of money, which Decree or Order has attained finality and the execution whereof has not been stayed. An Insolvency Notice by itself does not lead to the adjudication of the Debtor as Insolvent but the non-compliance thereof only results in an act of Insolvency, which enable the creditor to file an Insolvency Petition against the Debtor for having him adjudicated Insolvent. An Insolvency Notice is thus only a step in aid for filing the Insolvency Petition and the Debtor has opportunity to contest the Insolvency Petition by taking up all available defenses. ? Section 9(1) (e) and (h) of the PTIA use the phrase "in execution of the Decree of any Court for the payment of money". Sections 9(1) (e) and (h) have been in the PTIA since originally enacted in the year 1909 and enable a Creditor to directly file Insolvency Petition against a debtor. When the Legislature enacted the Bombay Amendment (in 1948) and the Central Amendment in 1979, it had before it the express wordings of Sections 9(1) (e) and (h), however a conscious departure was made while enacting Sections 9(i) and 9A (introduced by the Bombay Amendment). The same constitute a complete code and provide for complete machinery. The phraseology used therein is: "Decree or Order for the payment of money being a Decree or Order which has become final and the execution whereof has not been stayed."

Thus by the amendments, the words "or order" have been added, so that even an Order can sustain an Insolvency Notice. Similarly the words "of any Court" figuring in Section 9(1) (e) and (h) are

omitted. Thereby the qualification that Decree should be "of any Court" has been consciously removed and/or omitted. The expression "Decree or Order" in Sections 9(2) to (5) brought in by the 1978 Central Amendment is not restricted to a Decree or Order of any Court. Moreover, Section 9(5), which provides for setting aside of Insolvency Notice, in sub-clause (a) thereof, again uses the phraseology "decree or order", without making it conditional that the same should be of the Court. Similarly the said sub-clause also uses the words "suit or proceeding" in which the Decree or Order was passed. Thus any Decree or Order can sustain an Insolvency Notice, irrespective of whether they are of Court or any other Authority or Tribunal.

It was further submitted that, "Decree" in clauses (e) and (h) has a different connotation from a "Decree or Order" in Section 9(2), and,

(i) Even if an Award is held not to be a Decree, it is still an Order within the meaning of Section 9(2) of the PTIA, which can sustain an Insolvency Notice. (ii) It is clear from the statement of Objects and Reasons behind the PTIA and the Central Amendments thereto as also from the decisions reported in AIR 1977 Bombay 305, 1994(3) B.C.R. 223 that the provisions relating to issuance of Insolvency Notice (Sections 9(2) to (5) of the PTIA) are an equitable mode of execution of a Decree or Order to enable a creditor to recover from a Debtor the dues under a Decree or Order and upon failure of the Debtor to make payment of the amount demanded by the Insolvency Notice within the prescribed period, to present an Insolvency Notice within the prescribed period, to present an Insolvency Petition against the Debtor for having him adjudicated Insolvent.

Mr. L.N. Rao invited our attention to the provisions of P.T.I. Act, Rules, C.P.C., Arbitration Act of 1899 and 1996 and also relied on the following judgments reported in AIR 1956 SC 35 [The Member, Board of Revenue vs. Arthur Paul Benthall] followed in T.B. Guddalli vs. Registrar or Co-op. Societies, AIR 1994 Kar. 66 (FB), Oriental Insurance Co. Ltd. vs. Hansrajbhai V. Kodala, AIR 2001 SC 1832, Commissioner of Income-tax, New Delhi vs. M/s East West Import & Export (P) Ltd., Jaipur, AIR 1989 SC 836, M/s B.R. Enterprises vs. State of U.P. and Ors., AIR 1999 SC 1867. The above decisions were cited for the proposition that the use of different words in the two provisions is for a purpose and if the field of two provisions are to be the same the same words would have been used and when two provisions use different words the different words used could only be to convey different meaning. Arguing further Mr. L.N. Rao submitted that the Presidency Towns Insolvency Act does not define the term "Decree" or "Order". Therefore, any order, which has become final and enforceable, irrespective of whether passed by any Court, judicial authority, quasi-judicial authority, Tribunal etc. could be the basis of an Insolvency Notice under Section 9(2) of the said Act. Since the said Act does not define the word "Decree" or "Order", it will be offending the legislative intent to borrow the definition of "Decree" or "Order" from any other Act or Code. In Section 9(1) clauses (c) and (h), the legislature has used the phraseology "Decree of any Court" in Section 9(2), the legislature has consciously omitted the prefix "of Court" and has added the words "or Order". Thus the legislative intent being to make it necessary to have a Decree of Court for the purpose of conferring Act of Insolvency under Clause (e) and (h) of Sections 9(1) of the said Act, whereas Section 9(2) brought in by the Amendment Act does not mandate that the Decree should be of any Court.

When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sequence.

If the intention of the legislature was to provide the same provision, nothing would have been easier

than to say so. When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the two different expressions have different connotations.

If the legislative intention was not to distinguish, there would have been no necessity of expressing the position differently. When the situation has been differently expressed the legislature must be taken to have intended to express a different intention.

The use of different words in the two provisions is for a purpose. If the field of two provisions are to be the same, the same words would have been used. When the two provisions use different words, the different words used could only be to convey different meaning.

Mr. L.N. Rao further submitted that in view of the same, the conclusion must follow that the expression "decree or order for payment of money" found in Section 9(1)(i) (Bombay Amendment of 1948) and also in Section 9(2) (1978 Central Amendment) of the said Act is not restricted to a Decree or Order "of any Court" as found in Section 9(1)(e). Ordinarily, the rule of construction is that the same expression where it appears more than once in the same statute, more so in the same provisions, must receive the same meaning. It lays down that when two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sequence and the conclusion must follow that the expression "decree or order for payment of money" found in Section 9(1)(i) and also in Section 9(2) of the said Act, is not restricted to a decree or order "of any Court" as found in Section 9(1)(e).

In view thereof, it will be doing injury/offence to the legislative intent if even for the purpose of taking out Insolvency Notice under Section 9(2) of the said Act "a Decree of Court" is made necessary.

It will be a misconception to borrow the definition of "Decree" or "Order" from the provisions of Civil Procedure Code, while interpreting and giving effect to the provisions of the said Act, in particular Section 9(2) to (5) which constitute a self contained code and has been specifically brought in by Amending Act of 1978.

We heard both the senior counsel appearing for the appellants and respondents, in extenso. We have carefully perused through in detail all the material placed before us. We are of the view that The Presidency Towns Insolvency Act, 1909 is a statute weighed down with the grave consequence of 'civil death' for a person sought to be adjudged an insolvent and therefore the Act has to be construed strictly. The Arbitration Act was in force when the PTIA came into operation. Therefore there can be seen that the law makers were conscious of what a 'decree', 'order' and an 'award' are. Also the fundamental difference between 'Courts' and 'arbitrators' were also clear as back as in 1909. Further, The Indian Arbitration Act, 1899 clearly draws the distinction between Courts and Arbitrators. The preamble of the Act shows that it is an Act for dealing with 'arbitration by agreement without the intervention of a Court of Justice'. Section 4(a) defines 'Court' and various sections deal with the powers of the Court. Section 11 provides for the making of an 'award'. Section 15 provides for its enforcement. It can therefore be observed that it is only for the purpose of enforcement of the award, the arbitration award is treated as if it were a decree of the Court.

Section 15 reads as under:

"15. Award when filed to be enforceable as a decree (1) An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to for reconsideration to the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court.

(2) An award may be conditional or in the alternative."

Sections 2(2) and 2(14) of the CPC define what 'decree' and 'order' mean. For seeing whether a decision or determination is a decree or order, it must necessarily fall in the language of the definition. Section 2(2) of the CPC defines 'decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation : A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

The words 'Court', 'adjudication' and 'suit' conclusively show that only a Court can pass a decree and that too only in suit commenced by a plaint and after adjudication of a dispute by a judgment pronounced by the Court. It is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree.

Section 2(14) defines 'order' to mean "the formal expression of any decision of a civil court which is not a decree;"

The words 'decision' and 'Civil Court' unambiguously rule out an award by arbitrators.

The above view has been consistently taken in decisions on Section 15 of the Indian Arbitration Act, 1899 viz. Tribhuvandas Kalidas vs. Jiwan Chand 1911(35) Bombay 196, Manilal vs. The Bharat Spinning & Weaving (35) Bom. L.R. 941, Ramshai v. Joylall, AIR 1928 Calcutta 840, Ghulam Hussein vs. Shahban AIR 1938 Sindh 220. In Ramshai v. Joylall(supra), the Calcutta High Court held as follows:

"(a) Presidency Town Insolvency Act, S.9 (e) Attachment in execution of award is not one in executive of a decree.

Attachment in execution of an award is not attachment in the execution of a decree within the meaning of S.9(e) for the purpose of creating an act of insolvency: Re. Bankruptcy Notice, (1907) 1 K.B. 478, Ref.

(b) Arbitration Act, S.15 Award, An award is a decree for the purpose of enforcing that award only."

In Ghulam Hussein vs. Shahban AIR 1938 Sindh 220, the Court observed as follows:

"Section 9(e) must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency law is one of vital importance. Any inconvenience arising out of such a construction is for the Legislature to consider and remedy if they think proper by amendment; it is not for the Court to enlarge the meaning of the words used by the Legislature. An attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of S.9(e) for the purpose of creating an act of Insolvency: AIR 1928 Cal.840 approved and followed; 35 Bom. 196 relied on."

".The words: "In execution of the decree of any Court for the payment of money" cannot be extended by analogy. They must be extended, if at all, by the Legislature and we cannot hold that there has been an act of Insolvency when the definition given by the Legislature has not been complied with.

These are strong words and strong language, and as I have said above the judgment of Rankin C.J. must be treated with the greatest respect. The case of Ramsahai vs. Joylall is referred to by Sir D. Mulla in his Commentary on the Law of Insolvency at P. 94. In para 123 Sir D. Mulla states:

"An award for the payment of money filed in Court under S.11 of I.A.A. 1890 is not a 'decree' within the meaning of the present clause although it is enforceable under that Act as if it were a decree. No Insolvency petition can therefore be founded on an attachment or sale in execution of an award."

In support of this proposition Sir D. Mulla cites the case of Ramasahai v. Joylall (supra). The commentator proceeds:

It is therefore for consideration whether Cl.(e) should not be amended by adding the words 'or in execution of an award for the payment of money.'

Now, it cannot be disputed that Sir D. Mulla as a commentator on the Law of Insolvency is universally regarded as an authority, and in the course of his Commentary on the Law of Insolvency Sir D. Mulla has not hesitated in several places to record his respectful dissent when he has considered that the judgment of any High Court in India is doubtful or incorrect. It is significant that in referring to the case in AIR 1928 Cal. 840, the learned commentator has not recorded any dissent, but on the contrary states that it is for consideration whether Cl.(e) should not be amended by adding the words 'or in execution of an award for the payment of money.' In this part of his commentary Sir D. Mulla has also referred to the case in 35 Bom 196, where it was held by a Bench of the Bombay High Court that an award filed in Court under S.11, Arbitration Act, was nothing more than an award although it was enforceable as if it were a decree. In that case an application had been made under O.21, R.29, for stay of execution of a decree. The application was dismissed on the following grounds set out in the judgment of Sir Basil Scott C.J.:

Now, such an order can only be made by the Court, if there is a suit pending on the part of a person against whom a decree has been passed, against the holder of a decree of the Court. It appears to me that the petitioner is not a holder of a decree of the Courtfor the award, to which the applicants seek to give the force of a decree, is nothing more than an award, although it is enforceable as if it were a

decree."

The same view was taken on Section 36 of the 1996 Act in Sidharth Srivastava v. K.K. Modi Investment & Financial Service P.Ltd. 2002(4) Mah. L.J. 281. It was held thus:

"Where the Award in favour of the petitioning creditor came to be passed on the basis of the consent terms and not on the basis of an adjudication, the Award which has the force of decree does not fulfil the essential conditions of decree as contemplated by Section 2(2) of the Civil Procedure Code. Even though the Award dated 5.9.1997 is enforceable as if it were a decree still it is not a decree within the meaning of the term as defined in section 2(2) of the Civil Procedure Code and, therefore, obtaining of such as Award does not fulfil the requisite conditions contemplated by clause (i) of section 9(1) of the Presidency Towns Insolvency Act. Consequently, on that basis the respondent cannot be said to have committed act of insolvency, either under clause (i) of sub-section 9(1) or sub-section (2) of section 9 of the Act. AIR 1928 Cal.840, AIR 1938 Sind 220, AIR 1975 Cal 169 and AIR 1976 SC 1503, Ref."

It is settled by decisions of this Court that the words 'as if' in fact show the distinction between two things and such words are used for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created.

Section 36 of the Arbitration & Conciliation Act, 1996 which is in pari materia with Section 15 of the 1899 Act, is set out hereinbelow:

"36. Enforcement Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court."

In fact, Section 36 goes further than Section 15 of the 1899 Act and makes it clear beyond doubt that enforceability is only to be under the CPC. It rules out any argument that enforceability as a decree can be sought under any other law or that initiating insolvency proceeding is a manner of enforcing a decree under the CPC.

Therefore the contention of the respondents that, an Award rendered under the Arbitration and Conciliation Act, 1996 if not challenged within the requisite period, the same becomes final and binding as provided under Section 35 and the same can be enforced as a Decree as it is as binding and conclusive as provided under Section 36 and that there is no distinction between an Award and a Decree does not hold water.

The PTIA, 1909 does not define 'decree' or 'order' for the simple reason that the meaning these terms has been well settled since the CPC of 1859 and 1882 and had been again defined in CPC of 1908. The other indicators that an award of arbitrators is not intended to be a 'decree' or 'order' are: i) Section 2(a) and (b) define 'creditor' to include a decree-holder and a 'debt' to include a judgment-debt and 'debtor' to include a judgment-debtor. Secondly ii) It is quite clear from Section 33 of the CPC that a decree, being the formal expression of adjudication by a Court, follows only upon pronouncement of judgment by the Court. It is equally clear that Courts and Judges render judgments; arbitrators only make awards.

iii) Sections 9(e) and (h) put the matter beyond controversy by expressly mentioning 'decree of any Court for the payment of money'. Thus as enacted in 1909, the Insolvency Act dealt only with debtors who had suffered decrees by any Court for the payment of money.

When the Bombay Amendment came into force on 19.6.1939 by Bombay Act No. 51 of 1948, clause (i) was added to Section 9. Section 9 speaks of a 'decree' and introduces the word 'order'. After so many years of the CPC being in force the Bombay Legislature knew that meaning of 'decree' and 'order' and used those terms as understood under the CPC. The fact that the Bombay Amendment and later the Central Amendment intended to refer only to decrees and orders as defined in the CPC is clear from the Statement of Objects and Reasons of the Central Amendment Act No.28 of 1978 which introduced subsections (2) to (5) in Section 9. The SOR gazetted on 18-03-1978 reads, inter-alia, as under: "The difficulties experienced by a litigant in India in executing even a simple money decree have been commented upon by the Privy Council as well as the Law Commission and the Expert Committee on Legal Aid. The law Commission in its Third Report on the Limitation Act, 1908, has recommended that the most effective way of instilling a healthy fear in the minds of dishonest judgment-debtor would be to enable the Court to adjudicate him an insolvent if he does not pay the decretal amount after notice by the decree-holder, by specifying a period within which it should be paid, on the lines of the amendment made to the Presidency-Towns Insolvency Act, 1909 in Bombay. This recommendation was reiterated by the Law Commission in its Twenty Sixth Report on Insolvency Laws.

2. The Expert Committee on Legal Aid was also of the view that the above recommendation of the Law Commission should be implemented immediately without waiting for the enactment of a comprehensive law of insolvency.

3. It is, therefore, proposed to amend the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 to add a new act of insolvency, namely, that a debtor has not complied with the insolvency notice served on him by a creditor, who has obtained a decree or order against him for the payment of money, within the period specified in the notice. If the amount shown in the insolvency notice is not correct, it would be invalidated if the debtor gives notice to the creditor, disputing the amount. The debtor can, however, apply to the Court to have the insolvency notice set aside on the ground, among others, that he is entitled to have the decree re-opened under any law relating to relief of debtedness or that the decree is not executable under any such law."

The words 'litigant', 'money decree', judgment-debtor', 'decretal amount' and 'decree-holder' plainly show that Parliament intended to deal with litigants who do not pay amounts decreed by Civil Courts. There is no reference at all to arbitrations and awards in the Statement of Objects and Reasons and in sub-sections (2) to (5) of Section 9, which were introduced in 1978 by Parliament.

As already noticed, "Litigation" has been held to mean "a legal action, including all proceedings therein, initiated in a court of law". Obviously therefore Parliament had in mind debts due to 'litigants' i.e. debts due by reason of decrees of Courts. It is well settled that Courts, unlike arbitrators or arbitral tribunals, are the third great organ under the Constitution: legislative, executive and judicial. Courts are institutions set up by the State in the exercise of the judicial power of the State will be seen from the cases mentioned hereinbelow:

"The expression 'Court' in the context (of Art.136) denotes a tribunal constituted by the State as a

part of the ordinary hierarchy of Courts which are invested with the State's inherent judicial powers. A sovereign State discharges legislative, executive and judicial function and can legitimately claim corresponding powers which are legislative, executive and judicial. Under our Constitution, the judicial functions and powers of the State are primarily conferred on the ordinary courts which have been constituted under its relevant provisions. The Constitution recognized a hierarchy of Court and to their adjudication are normally entrusted all disputes between citizens as well as between citizens and the State. These courts can be described as ordinary courts of civil judicature. They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which is described as judicial process. The powers which these Courts are judicial powers, the functions they discharge are judicial functions and the decisions they reach are and pronounce are judicial decisions.

In every State there are administrative bodies . But the authority to reach decisions conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on Courts, and the decisions pronounced by administrative bodies are similarly distinct and separate in character from judicial decisions pronounced by Courts. Tribunals occupy a special position of their own under the scheme of our Constitution. Special matters are entrusted to them and in that sense they share with the Courts one common characteristic; both the Courts and the tribunals are 'constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions'. The basic and fundamental feature which is common to both the Courts and tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State." "By 'courts' is meant courts of civil judicature and by 'tribunals' those bodies of men who are appointed to decide controversies arising under certain special laws. Among the power of the State is the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State." "All tribunals are not courts, though all courts are tribunals. The word 'courts' is used to designate those tribunals which are set up in an organized State for the administration of justice"

"It is common knowledge that a 'court' is an agency created by the sovereign for the purpose of administering justice. It is a place where justice is judicially administered. It is a legal entity"

That litigation is therefore very different from arbitration is clear. The former is a legal action in a Court of law where judges are appointed by the State; the latter is the resolution of a dispute between two contracting parties by persons chosen by them to be arbitrators. These persons need not even necessarily be qualified trained judges or lawyers. This distinction is very old and was picturesquely expressed by Edmund Davies, J. in these words:

"Many years age, a top-hatted gentleman used to parade outside these law Courts carrying a placard which bore a stirring injunction 'Arbitrate don't Litigate" Moreover, the position that arbitrators are not Courts is quite obvious and this Court noted the position as under in two decisions:

"But the fact that the arbitrator under Section 10A is not exactly in the same position as a private arbitrator does not mean he is a tribunal under Article 136. Even if some of the trappings of the Court are present in his case, he lacks the basic, essential and fundamental requisite in that behalf because he is not invested with the State's judicial power..he is not a Tribunal because the State has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement between parties.(Engineering Mazdoor Sabha & Anr. Vs. Hind Cycles Ltd., AIR 1963 SC 874.) "

"There was no dispute that the arbitrator appointed under Section 19(1)(b) [of the Defence of India Act, 1939] was not a court.(Collector, Varanasi vs. Gauri Shankar Misra & Ors., AIR 1968 SC 384) "

Thus the thrust of submissions made by both the learned senior counsel can be summarized as under: Courts are institutions invested with the judicial power of the State to finally adjudicate upon disputes between litigants and to make formal and binding orders and decrees. Civil Courts pass decrees and orders for payment of money and the terms 'decree and order' are defined in the CPC. Arbitrators are persons chosen by parties to adjudge their disputes. They are not Courts and they do not pass orders or decrees for the payment of money; they make awards.

The Insolvency Act of 1909 was passed, and amended by the Bombay Amendment of 1939 and also by Parliament in 1978 when two laws were on the statute book: the Arbitration Act, 1899 and the Civil Procedure Code, 1908. Parliament and the Bombay Legislature were well aware of the difference between awards on the one hand and decrees and orders on the other and they chose to eschew the use of the word 'award' for the purposes of the Insolvency Act.

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 realizing the money awarded. However, the award remained an award and did not become a decree either as defined in the CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act.

Section 36 of the Arbitration and Conciliation Act of 1996 brings back the same situation as it existed from 1899 to 1940. Only under the Arbitration Act, 1940, the award was required to be made a rule of Court i.e. required a judgment followed by a decree of Court.

Issuance of a notice under the Insolvency Act is fraught with serious consequences: it is intended to bring about a drastic change in the status of the person against whom a notice is issued viz. to declare him an insolvent with all the attendant disabilities. Therefore, firstly, such a notice was intended to be issued only after a regularly constituted court, a component of judicial organ established for the dispensation of justice, has passed a decree or order for the payment of money. Secondly, a notice under the Insolvency Act is not a mode of enforcing a debt; enforcement is done by taking steps for execution available under the CPC for realizing moneys. The words "as if" 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.

For the foregoing discussions we hold:

i) that no insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an Arbitration Award; ii) that execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay under Section 22 of the SICA Act. As such, no insolvency notice is liable to be issued against the appellant.

iii) Insolvency Notice cannot be issued on an Arbitration Award.

iv) An arbitration award is neither a decree nor an Order for payment within the meaning of Section 9(2). The expression "decree" in the Court Fees Act, 1870 is liable to be construed with reference to its definition in the CPC and held that there are essential conditions for a "decree".

(a) that the adjudication must be given in a suit. (b) That the suit must start with a plaint and culminate in a decree, and

(c) That the adjudication must be formal and final and must be given by a civil or revenue court. An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint. (v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration Act, 1996 cannot be construed to be a "decree" for the purpose of Section 9(2) of the Insolvency Act.

(vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the Rules made thereunder.

(vii) It is a well established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely any proceedings adopted for realization of a right vested in a party by law. This would clearly include arbitration proceedings.

(viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice.

In the light of the above discussion, we further hold that the Insolvency Notice issued under section 9(2) of the P.T.I. Act 1909 cannot be sustained on the basis of arbitral award which has been passed under the Arbitration & Conciliation Act, 1996. We answer the two questions in favour of the appellant.

In view of the above, the following two questions viz., (a) Whether the award dated 26.6.2000 was ever served upon the appellant; and (b) Whether the Arbitration proceedings and resulting award are null and void in view of the Sick Industrial Companies (Special Provisions) Act, 1995 may not have to be decided by the High Court in view of the order passed in civil appeal by this Court. The Civil Appeal stands allowed. The order dated 19.3.2003 passed by the Division Bench of the High Court of Bombay in Notice of Motion No.72/2002, Notice No. N/180/2001 is set aside. No costs.