

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.**

JUDGMENT

(1) S.B. Civil Misc. Appeal No.1124/2005

State of Rajasthan Vs. M/s Chandi & Company
through District
Collector, Banswara
& anr.

(2) S.B. Civil Misc. Appeal No.1187/2005

State of Rajasthan Vs. M/s Chandi & Company
through District
Collector, Banswara
& anr.

Under Section 39 of the Arbitration
Act, 1940 against the order dated 23.2.2005 passed
by the learned District Judge, Banswara in Civil
Misc. Cases No.15/1997 & 16/1997.

Date of Judgment: October 25 ,2005.

PRESENT

HON'BLE MR. PRAKASH TATIA,J

REPORTABLE

Mr. N.M. Lodha, Addl. Advocate General with Mr. H.R.Soni, Addl.
Govt.Advocate for the appellants.

Mr. L.R. Mehta, Senior Advocate with Mr. M.Trivedi and Mr. M.R.Mehta
for the respondent.

BY THE COURT:

In view of the fact that the facts are not in dispute and only point
of law is involved, facts in short will serve the purpose.

The works contract was awarded to the respondent-Company by the Department of Mahi Bajaj Sagar Project, Banswara, a wing of the Irrigation Department of the State of Rajasthan. Because of some dispute, the contractor submitted two separate petitions under Section 20 of the Arbitration Act, 1940 (for short 'the Act of 1940') on 16.12.1989 and 14.3.1990 before the court of District Judge. By the order of the court, arbitrator was appointed and the learned arbitrator passed the two separate awards on 12.3.1997. The said awards were submitted by the learned arbitrator before the court of learned District Judge, Banswara on 13.3.1997. The learned District Judge issued notices to the contractor as well as to the State. The notices were served upon the State on 29.3.1997. The contractor submitted an application under Section 17 of the Act of 1940 and prayed that the award be made rule of the court, whereas the State submitted objections under Sections 30 and 33 of the Act of 1940 with application under Section 5 of the Limitation Act. In reply to the contractor's application under Section 17 of the Act of 1940 as well as in the application under Section 5 Limitation Act, the State submitted that proceedings of arbitration completed under the Act of 1940 but since the award was passed after coming into force of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996'), therefore, the proceedings after the award are governed by the Act of 1996 and in view of the fact that under the Act

of 1996, objection can be filed within period of 90 days instead of within 30 days as provided under the Act of 1940, therefore, the State's objection against the award is within period of limitation. The State also pleaded that in case the court reaches to the conclusion that the proceedings will be governed by the Act of 1940 then the delay in filing the objection may be condoned. The trial court vide order dated 31.7.1997, proceeded to decide the State's applications filed under Section 5 Limitation Act and while deciding the applications, the trial court observed in its order dated 31.7.1997 that it is not in dispute that the arbitration proceedings were completed and the award was passed under the old Act, therefore, amended Arbitration Act (New Act) will not apply. After recording this position, the trial court in its order dated 31.7.1997 held that State has filed the objection petition after expiry of the limitation for filing the objection petition under the old Act of 1940 and the State failed to disclose sufficient cause for not filing the objection within limitation, therefore, delay in filing the objection cannot be condoned. The trial court, therefore, dismissed the State's application under Section 5 Limitation Act vide order dated 31.7.1997.

Against this order of rejection of the application under Section 5 Limitation Act, the State preferred two separate appeals in both the matters which were registered as S.B.Civil Misc. Appeals No.597/97 and

598/97. Both these appeals were allowed by the order of this Court dated 30.7.2002 and this Court condoned the delay in filing the objection petition by the State. The matter was remanded back to the learned District Judge.

In the backdrop of these facts, the matters came up for consideration on merits before the learned District Judge. The learned District Judge again rejected the State's objections against the award by two separate impugned orders dated 23.2.2005. This time the learned court below reconsidered the issue of applicability of Act of 1940 and Act of 1996 and took a view just contrary to the view taken while deciding application u/s 5 Limitation Act and held that in view of the clause (23)(3) of the contract, the provisions of the Act of 1996 will govern the proceedings and the matter would not be governed by the Act of 1940. The trial court observed that the specific condition no.23 (3) in contract is an agreement of the parties that the parties shall be governed by the enactment which may be in force subsequent to their entering into the agreement and that agreement may be in supersession of the of the Act of 1940. The learned trial court also considered various judgments of the Hon'ble Supreme Court including the judgment delivered in the case of Thyseen v. Steel Authority of India (AIR 1999 SC 3923). The trial court held that the present proceeding shall be

governed by the Act of 1996 and the State failed to prove any ground under any clause of the Section 34 on the basis of which the award can be set aside. Therefore, the court below dismissed the objection petitions filed by the State-appellant by order dated 23.3.2005. Hence these two appeals.

The question involved in these appeals is whether the court below was right in holding that the arbitration proceedings before the court below are governed by the Act of 1996 and not by the Act of 1940.

The learned counsel for the appellants vehemently submitted that it is not in dispute that the arbitration proceedings commenced before coming into force of the Act of 1996 and the award was passed after coming into force of the Act of 1996. Following the procedure as provided in the Act of 1940, the learned arbitrator submitted awards in the District Court and upon which the respondent-contractor itself submitted application under Section 17 of the Act of 1940 and prayed that the award may be made rule of the court. It was never the case of respondent-contractor that the Act of 1996 will govern the procedure, therefore, there is no need for making the award rule of the court. The appellant-State's applications under Section 5 Limitation Act were opposed by the contractor on the ground of limitation under the Act of

1940 only and the respondent-contractor successfully got the rejection of appellant's application under Section 5 Limitation Act by taking a plea that objections filed by the appellant-State are barred by time as per the provisions of the Act of 1940. The District Court also after holding that proceedings are governed by the Act of 1940, rejected appellant's application under Section 5 Limitation Act and rejected the appellant's objection petition itself. Against this, the appeals were preferred by the State which were allowed by the High Court and the applications under Section 5 of the Limitation Act were allowed by the High Court and, therefore, the matter was remanded to the trial court for deciding the case on merit. The High Court condoned the delay simply because the proceedings were under the Act of 1940. In these circumstances, by no stretch of imagination, it can be said that parties agreed for application of Act of 1996 where arbitration proceedings commenced under the Act of 1940 and award was passed under the Act of 1940 and the proceedings were initiated before the District Court under the Act of 1940 and were accepted under the Act of 1940, not only by the respondent-contractor but by the District Court itself under the provisions of the Act of 1940. Not only above but the learned District Judge, relying upon those very applications, rejected the petitioner-State's applications under Section 5 of the Limitation Act, by order dated 31.7.1997 after holding that that the proceedings are

governed by the Act of 1996 but now the same application and reply of petitioner-State have been made basis for holding that there is agreement of parties for application of the Act of 1996, hence the order is illegal and perverse.

The learned counsel for the appellants further vehemently submitted that the appellant-State never gave its consent nor it agreed for application of the Act of 1996. The appellant-State only submitted their contentions in the application based on legal opinion that since the award was passed after coming into force of the Act of 1996, therefore, subsequent proceedings will be governed by the Act of 1996. Since the legal position was not clear, therefore, the appellant-State very specifically pleaded that in case the court reaches to the conclusion that the Act of 1940 would govern the proceeding before the District Court then the delay in filing the objections may be condoned. The court below itself rejected the petitioner's plea that the Act of 1996 will apply and the petitioner did not press his this plea and got the order of condonation of delay in appeal from High Court, then the trial court was wrong in observing that the petitioner agreed for application of the Act of 1996. Therefore, after the order of the District Court on application under Section 5 of the Limitation Act taking a view that proceedings will be governed by the Act of 1940 and after the decision

of this Court dated 30.7.2002, neither the court had jurisdiction to apply the Act of 1996 nor the respondent-contractor was justified in submitting that the provisions of the Act 1940 will not apply and the Act of 1996 will apply.

Apart from it, according to the learned counsel for the appellants, under the sub-clause (a) if sub-section (2) of Section 85 of the Act of 1996, the parties may agree for application of the Act of 1996 for arbitral proceedings, but according to the learned counsel for the appellants, that agreement of the parties can be before commencement of the arbitral proceedings. The learned counsel for the appellants also submitted that even if for application of the Act of 1996 can be, at any time, even then also agreement of parties for application of the Act of 1996 can be when arbitral proceedings are pending and consent of parties after termination of arbitral proceedings can not make the Act of 1996 applicable and as per Section 32, the arbitration proceeding terminates by when final arbitral award is made. Therefore, the alleged consent for application of the Act of 1996 which in fact is not there, is of no consequence.

Rebutting, the learned counsel for the respondent-contractor vehemently submitted that a specific condition No.23(3) has been

incorporated in the agreement under which both the parties agreed that the dispute between the parties will be referred to the arbitrator. The parties were conscious that in future there may be statutory amendments/modifications and even there may be possibility of re-enactment of law relating to arbitration and, therefore, they agreed that the matter will not only be governed by the Act of 1940 but in case law is amended or even re-enacted then the arbitral proceeding will be taken under amended law or under re-enactment. In view of this clear contract between the parties, the parties are governed by the Act which is in force at the relevant time. In this case, the award was passed after the coming into force the Act of 1996 and the parties agreement for being governed by the Act of 1996 is also the basis on which the Act of 1996 can be applied. Under the Act of 1996, for this purpose, after keeping the provision of the Act of 1940 alive, specific provision has been made in the Act of 1996 by enacting sub-clause (a) of sub-section (2) of Section 85 of the Act of 1996. The learned counsel for the respondent also submitted that the appellant-State in their application under Section 5 Limitation Act as well as in their reply to the respondent-contractor's application under Section 17 of the Act of 1940 clearly admitted that the proceedings shall be governed by the Act of 1996 and not by the Act of 1940. This was taken note of by the trial court (at page 8 of the impugned orders of the trial court dated

23.2.2005) and from the conduct of the respondent also it is clear that they themselves agreed to be governed by the Act of 1996 and the trial court recorded that both the parties are in agreement that the Act of 1996 will apply for deciding the objection of appellant against the award.

I considered the submissions of learned counsel for the parties.

Both the learned counsels relied upon the judgments of the Hon'ble Apex Court, and the law in detail has been considered by the Hon'ble Supreme Court in the cases of (1) N.S. Nayak & Sons vs. State of Goa ((2003) 6 SCC 56), (2) Milkfood Ltd. vs. GMC Ice Cream (P) Ltd. ((2004) 7 SCC 288) and Neeraj Munjal and others (III) vs. Atul Grover and another ((2005) 5 SCC 404).

In the earlier judgment in the case of Thyseen Stahlunion GmbH v. Steel Authority of India Ltd. ((1999) 9 SCC 334), Hon'ble the Apex Court held that the parties can agree to applicability of the 1996 Act even before the 1996 Act came into force and when the 1940 Act was still in force. This view has been reiterated in subsequent judgments of the Hon'ble Supreme Court, therefore, the condition no.23 (3) of the terms and conditions which is agreement of the parties to be governed by the any new law, is a valid condition and both the parties

are bound by this clause of the contract, which is as under:-

“Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.”

While interpreting Section 85(2)(a) of the Act 1996, Hon'ble the Apex Court in the case of Thyssen(supra) held that in view of Section 85 (2)(a) , (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force “unless otherwise agreed by the parties”, and (2) new Act shall apply in relation to arbitral proceeding which commenced on or after the new Act came into force. Hon'ble the Apex Court in Thyssen case held that first limb can further be bifurcated into two; (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. In Thyssen case, the arbitral proceedings commenced on 14.9.1995 under the Arbitration Act, 1940. Award was passed on 24.9.1997 which is after coming into force of the Act of 1996. On 13.10.1997, Thyssen filed a petition in the Delhi High Court under Sections 14 and 17 of the old Act for making the award rule of the court. While above proceeding were

pending in the High Court, Thyseen on 12.2.1998, filed an application under Section 151, C.P.C. for stay of the proceedings. On the following day, Thyseen filed an application in the High Court for execution of the award under the new Act. The ground taken by Thyseen was that arbitral proceedings had been terminated with the making of the award on 24.9.1997 and, therefore, the new Act was applicable for enforcement of the award. This application was opposed by the Steel Authority of India and, therefore, the question arose for consideration was whether the award would be governed by the new Act for its enforcement or whether the provisions of the old Act would apply. The learned Single Judge of the High Court held that proceedings would be governed by the old Act. Thyseen challenged the judgment of the High Court before the Hon'ble Apex Court. Hon'ble Apex Court in above facts situation held that the provisions of the old Arbitration Act, 1940 shall apply in relation to arbitral proceeding which have commenced before the coming into force of the new Act of 1996. So the enforcement of the award has to be examined on the touch stone of the proceedings held under the old Act.

In above case, there was no claim of consent of both the parties to be governed by the Act of 1996 and it was plain and simple case of dispute about the applicability of the Act of 1940 or Act of 1996 in a

matter where the arbitral proceedings commenced when the Act of 1940 was in force terminated by making the award after coming into force of the Act of 1996. Ratio decidendi in Thyseen case is that if award is made under the Act of 1940 even after repeal of the Act of 1940 and when the Act of 1996 came into force then award can be enforced under the provisions of the Act of 1940 only and cannot be enforced in terms of provisions of the Act of 1996. In this case there was no plea that the parties ever agreed for application of Act of 1996, therefore, the case is of no help for deciding the controversy though it is relevant because it declared that provisions of old Act of 1940 can be applied to cases decided under old Act for the purpose of giving effect to the award passed after coming into force of Act of 1996.

Thyseen case was considered by the Hon'ble in the case of N.S.Nayak (supra). In N.S. Nayak case also, Section 85(2)(a) was under consideration. In S.N. Nayak's case, Hon'ble Apex Court in para no.8 held that it nowhere provides that once the arbitral proceedings have commenced under the old Act, they should be conducted under the new Act as soon as the new Act comes into operation. Therefore, it is clear that in the pending arbitral proceedings, the Act of 1996 cannot be made applicable automatically on or from coming into force of the Act of 1996. In N.S. Nayak case, thereafter, in the same para, Hon'ble Apex

Court held as under:-

“Hence, in the proceedings where the award is passed under the old Act, the remedy of filing appeal or petition for setting aside the said award would be as per the provisions of the old Act.”

Thereby, the Hon'ble Apex Court finally declared that when the award is passed under the old Act, remedy of filing appeal or petition will be governed by the Act of 1940.

In para no.9, in N.S.Nayak case, Hon'ble the Apex Court noticed that in Thyseen case the Hon'ble Apex Court has specifically held that once the arbitral proceedings commenced under the old Act then the award can be enforced only under the old Act. The relevant portion from Thyseen case quoted in the N.S.Nayak case is also relevant to decide the controversy in these appeals, which reads:-

“To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act through given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act.”

Therefore, in view of the above, once the award is passed under the old Act, it can be enforced under the old Act. The same provision came up for consideration before the Hon'ble Apex Court in the case of Milk Food Ltd. (supra), wherein again Thyseen case and large number of judgments of the Hon'ble Supreme Court were considered. In para 66 of the judgment of Milk Food Ltd., Hon'ble the Apex Court considered the question of applicability of the Act of 1940 and the Act of 1996. Hon'ble the Apex Court held as under:-

“So far as the arbitral proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set the ball in motion where after only the arbitration proceeding commences. Such commencement of arbitration proceeding although in terms of Section 37 of the Act is for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply.”

In view of the above also, it is clear that the commencement of the arbitral proceedings initially govern the applicability of the Act of 1940 and exception is under Section 85(1) of the Act of 1996. In this case also applicability of Act of 1996 upon consent of the parties was not the issue involved and, therefore, in the Milk Food Ltd. case also the question about time by which the parties can agree for applicability of the Act of 1996 was also not decided by the Apex Court which is

clear from the observations of the Hon'ble Apex Court in para no.83 of the Milk Food Ltd. case, which reads as under:-

“The Court proceeded on the basis that such a change in the procedure before the arbitrator is permissible if the parties agree that the new Act be applicable to the arbitral proceeding when the same is pending before the arbitrator. We are not concerned in the present case with the situation where the parties agree to change in the procedure before the arbitrator. In fact, they did not and, as noticed at the first opportunity, the appellant filed an application for a direction or clarification that the proceeding under the 1940 Act would apply.”

In the recent judgment of the Hon'ble Supreme Court delivered in the case of Neeraj Munjal(supra), again the same question was under consideration, whether the 1996 Act or 1940 Act, on facts, applicable. In this case also, the dispute referred to the arbitrator was of before coming into force of 1996 Act and the award was made subsequent to the date of commencement of the Act of 1996. In Neeraj Nunjal case, in fact even the parties did not proceed on the basis that the 1996 Act will govern the arbitral proceedings. In such circumstances the court held that the proceedings arising out of the award would be governed by the provisions of the 1940 Act and not by the provisions of 1996 Act. Hon'ble the Apex Court in case of Neeraj Nunjal also held to the extent that even the Supreme Court did not have any jurisdiction to direct that

the award should be enforced in terms of the provisions of the 1996 Act which was not applicable and also held that it also could not have deprived the parties from a remedy which is otherwise available to them under the law. In Neeraj Nunjal case, Hon'ble the Apex Court declared that a court of law has no jurisdiction to direct a matter to be governed by one statute when provisions of another statute are applicable.

It is clear from the case law discussed above that in none of the case there was plea of consent of parties for application of the Act of 1996. Therefore, the question survives for determination is that whether the parties can give consent for applicability of the Act of 1996 for arbitral proceedings commenced before the Act of 1996 came into force and if the parties can give consent for applicability of the Act of 1996, upto what time that consent can be given.

Though the issues referred above were not involved in the cases referred above but the judgments referred above helped this Court in deciding the issues involved in these appeals. The arbitral proceeding commences, as held by the Hon'ble Supreme Court in the case of Milk Food Ltd.(supra), under the Act of 1940 when a notice requiring appointment of an arbitrator is sent by one party to other, while under

the Act of 1996, unless otherwise agreed by the parties, the arbitral proceedings commence when a request for referring a dispute for arbitration is received by the respondent. Hon'ble Supreme Court held that service of notice and/or issuance of request for appointment of arbitrator in terms of the arbitration agreement thus determinative of the commencement of arbitral proceeding. In this case, admittedly, arbitral proceedings commenced before the commencement of the Act of 1996, therefore, is under the Act of 1940. Hon'ble the Apex Court held that such commencement of arbitral proceedings relevant not only for the purpose of limitation but also for determining the applicability of the relevant Act. Therefore, in the case where there is no case of parties agreeing for applicability of the Act of 1996, all proceedings relating to arbitration initiated under the Act of 1940 including its enforcement and challenge to it will be governed by the Act of 1940 only. There is no question of automatic applicability of the Act of 1996 on its coming into force.

But by Section 85 of the Act of 1996, the Act of 1996 has been made applicable when the parties though entered into agreement for settlement of dispute when the Act of 1940 was in force and arbitration proceedings commenced before coming into force of the Act of 1996 still parties agree for applicability of the Act of 1996. Language of sub-

clause (a) of sub-section (1) of Section 85 clearly provides that “unless otherwise agreed by the parties” the “arbitral proceedings which commenced before this Act came into force, provisions of repealed Act (Act of 1940) shall apply”. This provision clearly permits parties to agree for applicability of the Act of 1996 in the cases where arbitration proceedings have commenced under the Act of 1940 and in all cases where the parties did not agree for applicability of the Act of 1996, neither one party nor arbitrator nor court can make the Act of 1996 applicable for arbitral proceedings which commenced before coming into force of the Act of 1996. This is clear from the language used in the said sub-section. Therefore, it is necessary to see the facts whether the parties agreed for application of the Act of 1996. If it is found that there was such consent then it will be necessary to determine that upto what time such consent of parties can make the Act of 1996 applicable over proceedings started under the old Act of 1940.

In this case, the arbitration proceedings were started under the Act of 1940 and award was passed under the old Act of 1940. The proceeding before the District Court was initiated under the Act of 1940. The plea of consent of the parties has been set up by the respondent-contractor for the first time after the decision of this Court dated 30.7.2002. Apart from above the respondent-contractor himself

submitted an application before the court below under Section 17 of the Act of 1940 with a prayer that the award may be made rule of the court, therefore, even after commencement of the proceedings before the civil court, after passing of the award by the arbitrator, the respondent-contractor himself was willing for applicability of the provisions of the Act of 1940. It is clear from the law laid down by the Hon'ble Apex Court and in all above judgments that once the arbitral proceedings commenced under the old Act of 1940, its challenge can be under the old Act and its enforcement also can be under the old Act. Therefore, in the fact of this case, the date when the contractor-respondent submitted his application for making the award rule of the court, he accepted that the provisions of the Act of 1940 would govern the proceedings for enforcement of the award (or for setting aside of the award). Once it has been expressed unequivocally by one of the parties that the proceedings are governed by the Act of 1940, the subsequent change in the stand that too after getting rejection of plea of the State about applicability of new Act of 1996 would not govern the arbitral proceedings and even both the parties could not have changed the applicability of the Act of 1940. This view finds support from the reasoning given by the Hon'ble Apex Court in the case of Neeraj Munjal (supra) which declared that not only parties but even the courts have no jurisdiction to direct that award should be enforced or can be

challenged in terms of the provisions of a different Act and in this case, under the Act of 1996. In case one party is willing to take benefit of applicability of the Act of 1996 in a case where the arbitral proceedings already commenced before coming into force of the Act of 1996, then he can do so by making the request to the other party in unequivocally terms so that the other party may agree or may reject the request about the applicability of the Act of 1996. The agreement cannot be forced upon the parties even by the court and no one can compel other party to give consent for applicability of the Act of 1996 when the arbitral proceedings have already commenced under the Act of 1940.

The consent for applicability of the Act of 1996 is required to be prior to passing of the award itself and it cannot be beyond the outer limit, the termination of the arbitral proceedings under Section 32(1) of the Act of 1996. The other view will lead to the situation that the Act of 1996 will apply to terminated proceedings of the arbitration whereas the language of the Section 85(2)(a) provides only that the provisions of the repealed enactment Act 1940 can be applied to “arbitral proceedings”. It nowhere provides that by agreement, the parties may agree that the enforcement of the award or challenge to the award will be under the Act of 1996. That position would be quite contrary to law laid down by the Hon'ble Apex Court in the case referred above, in

which it has been held that the award passed in a proceedings under a particular Act, can be enforced only under the same Act and in the same manner can be challenged under the same Act in which the award was passed.

Apart from above, in this case, as a matter of fact, the trial court proceeded absolutely erroneously in re-considering the matter again because the issue of applicability of the Act of 1940 has already been decided by the District Court and that order was not set aside by any court, rather was not even challenged by the respondent-contractor. The trial court also ignored that the trial court itself after rejecting the appellant-State's application under Section 5 of the Limitation Act by the same order dated 31.7.1997, made the award rule of the court. The order of the trial court was set aside by order dated 31.7.1997 by this High Court only after condoning the delay in filing the objection petition, which condonation is also because of the reason of the applicability of the Act of 1940. The application of the appellant-State under Section 5 of the Limitation Act was opposed by the respondent-contractor himself and he obtained the order of the rejection of the appellant-State's application under Section 5 Limitation Act under the Act of 1940 and still he could raise and not only was successful in raising the objection before the trial court, but the court below ignoring all

these facts, held that the case is governed by the Act of 1996 and rejected the objection petition after considering objections under Section 34 of the Act of 1940.

This Court has no hesitation in holding that the State-appellant never gave consent for applicability of the Act of 1996 before the trial court. In view of the judgments referred above, even when there is clause like 23(3) even then the proceedings under the Act of 1940 can be made applicable when arbitral proceeding already commenced under the Act of 1940 when the parties agreed to apply the Act of 1996, but no consent of the parties can make the provisions of the Act 1996 applicable to the court proceedings after the award passed under the Act of 1940.

In view of the above discussion, both the appeals deserve to be allowed and hence allowed. The orders passed by the court below in both the cases, dated 23.2.2005 are set aside and the matter is remanded back to the trial court for deciding the objections of the appellants on merit.

(PRAKASH TATIA),J.

mlt.