THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extraordinary Jurisdiction)

D.B. : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, ACTING CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.A. No. 01 of 2018

The Principal Secretary,
Department of Commerce & Industries,
Government of Sikkim,
Gangtok, East Sikkim.

.... Appellant.

versus

M/s Snowlion Automobile Pvt. Ltd.
A Company having its registered office at
Tadong, P.O. Tadong & P.S. Gangtok,
East Sikkim.

.... Respondent.

An Appeal under Rule 148 of the Sikkim High Court (Practice and Procedure) Rules, 2011.

Appearance:

Mr. Tarun Johri, Additional Advocate General with Mr. Ankur Gupta, Ms. Sabina Chettri and Ms. Sachina P. Y. Subba, Advocates for the Appellant.

Mr. Pabitra Pal Chowdhury and Mr. B. K. Gupta, Advocates for the Respondent.

J U D G M E N T

(28.08.2018)

Bhaskar Raj Pradhan, J.

1. This is a Writ Appeal preferred by the Appellant under Rule 148 of the Sikkim High Court (Practice and Procedure) Rules, 2011 (the said Rules) against the judgment dated 26.02.2018 (the impugned judgment) passed by the learned

Single Judge in W.P. (C) No. 69 of 2016 (the Writ Petition). The impugned judgment dismissed the Writ Petition filed by the Petitioner under Article 226/227 of the Constitution of India wherein the Appellant had *inter-alia* prayed for setting aside the order dated 10.06.2016 passed by the learned District Judge in Petition bearing No.01 of 2015 in Arbitration Case No. 01 of 2015 (the said order) as well as the award dated 12.05.2015 passed by the learned Arbitrator (the arbitral award).

2. Mr. Pabitra Pal Chowdhury, learned Advocate for the Respondent would raise a preliminary objection on the maintainability of the present Writ Appeal and thus we propose to deal with it before examining its merits. It is his contention that the present Writ Appeal does not fall within the boundaries of Rule 148 of the said Rules.

3. Rule 148 of the said Rules prescribes:

> ***"148. Letter Patent Appeals****: (1) An appeal shall lie to the Division Bench from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court, and not being an order made in the exercise of revisional jurisdiction, and not being sentence or order passed or made in exercise of Criminal jurisdiction) of a Judge of the High Court sitting singly.*
>
> *(2) The period of limitation for an appeal under this rule shall be thirty days from the date of the Judgment, decree or final order, as the case may be.***"**

4. Mr. Pabitra Pal Chowdhury, would submit that the Appellant had preferred the Writ Petition invoking Article 226 as well as Article 227 of the Constitution of India. It is submitted that Article 227 of the Constitution of India is the power of superintendence of the High Court. The Writ Petition having been preferred under Article 227 of the Constitution of India and dismissed as not maintainable vide the impugned judgment it is submitted that the present Writ Appeal falls within the exception to the Rule 148 of the said Rules. It is also submitted that the perusal of the record of orders passed in the Writ Petition would reflect that the said Writ Petition was not even admitted and therefore the rejection of the Writ Petition as not maintainable would take the impugned judgment beyond the purview of Rule 148 of the said Rules.

5. A perusal of the order dated 23.02.2017 passed by the learned Single Judge in the Writ Petition reflects that the learned Single Judge had framed a singular question to be answered in this manner:

> ***"5.*** *Mr. J. B. Pradhan, learned Additional Advocate General appearing for the petitioner canvassed that this Court is competent to entertain a petition under Article 226 of the Constitution of India, if there is miscarriage of justice or erroneous application of law while passing the award. Thus, the question which arise for consideration is as to whether the High Court is competent to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India, when the alternate*

*statutory remedy as provide is availed by the party, however, belatedly and the case could not be considered on merit.***"**

6. Thereafter, on 06.07.2017 the learned Single Judge directed the matter to be listed for final hearing. On 22.09.2017 the learned Single Judge recorded that the matter was listed for admission. On a request made, 11.10.2017 was fixed for admission hearing. On 11.10.2017 the learned Counsel appearing for the Respondent was given two weeks time to file a reply and two weeks thereafter to the Petitioner to file rejoinder if any after recording that this Court had framed the afore-quoted question of law while taking cognizance of the matter. On 23.02.2018 the matter was heard and judgment reserved. On 26.02.2018 the impugned judgment was pronounced by which the Writ Petition was dismissed as not maintainable.

7. The aforesaid orders make it evident that the learned Single Judge had decided to examine whether the Writ Petition was maintainable before delving upon its merits. Ultimately vide the impugned judgment the learned Single Judge held the Writ Petition as not maintainable.

8. A perusal of Rule 148 of the said Rules makes it clear that an Appeal would lie to the Division Bench from the judgment of a Judge of the High Court sitting singly. The exception to this Rules are:

(i) Judgments not being judgment passed in the exercise of Appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court.

(ii) Not being an order made in the exercise of revisional jurisdiction.

(iii) Not being sentence or order made in exercise of criminal jurisdiction

9. The impugned judgment passed by the learned Single Judge is not a judgment passed in exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court. The contention raised by Mr. Pabitra Pal Chowdhury that the exceptions to those judgments appealable under Rule 148 would include a judgment passed by the High Court in exercise of the Article 227 of the Constitution of India emphasizing only on the words "*superintendence of the High Court*" therein must be straightaway rejected. The said words cannot be read in isolation and must necessarily be read in the context of the sentence it is used in. It is also not a sentence or order made in exercise of Criminal Jurisdiction. An order made in the exercise of revisional jurisdiction also falls within the exception of Rule 148 of the said Rules and therefore, no Appeal would lie from such orders.

10. Article 226 of the Constitution of India relates to the power of High Court to issue certain writs. Article 227 of the

Constitution of India however, relates to the power of superintendence over all Courts by the High Court in relation to which it exercised jurisdiction. As quoted in paragraph 20 of the impugned judgment of the learned Single Judge the scope of Article 227 of the Constitution of India has been succinctly enunciated by the Supreme Court in re: ***Surya Dev Rai v. Ram Chander Rai & Ors.***[1]**.** It has been held that supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the Subordinate Court within the bounds of their jurisdiction. When the Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasion thereby, the High Court may step in to exercise its supervisory jurisdiction.

11. Section 115 of the Code of Civil Procedure, 1908 provides for revisional jurisdiction of the High Court in Civil matters. Section 397 of the Code of Criminal Procedure, 1973 on the other hand deals with the revisional jurisdiction of the High Court in criminal matters. The Writ Petition sought to challenge the arbitral award passed by the learned Arbitrator as well as the said order passed by the learned District Judge. The arbitral

[1] **(2003) 6 SCC 675**

award determined the dispute between the Appellant and the Respondent referred by this Court vide order dated 25.02.2014 appointing the Sole Arbitrator with consent of the parties in terms of Arbitration clause 8 of the Lease Agreement dated 15.02.1989 on the question of valuation of the development made on the leasehold land by the Respondent. Against the arbitral award the Appellant preferred an application under Section 34 of the Arbitration and Conciliation Act, 1996 (the said Act). A preliminary objection was taken by the Respondent that the said application was barred by time. The said order passed by the learned District Judge without going into the merits of the case would hold that time cannot be extended beyond the permissible limit provided under Section 34(3) of the said Act and consequently the Court would not have jurisdiction to entertain the application preferred by the Appellant as it had been filed beyond the period of limitation.

12. It is quite clear that the Appellant while preferring the Writ Petition sought to invoke both Article 226 as well as Article 227 of the Constitution of India. However, the learned Single Judge did not exercise the power of superintendence under Article 227 of the Constitution of India while passing the impugned judgment. The learned Single Judge examined the law relating to exercise of the extraordinary jurisdiction of the High Court and in the facts and circumstances of the case declined to

exercise its writ jurisdiction under Article 226 of the Constitution of India. In such circumstances, it is quite evident that the impugned judgment does not fall within the exception carved out for the exercise of Letter Patent Appeals under Rule 148 of the said Rules as it is not an order made in exercise of revisional jurisdiction also.

13. In view of the aforesaid the preliminary objection raised by Mr. Pabitra Pal Chowdhury on behalf of the Respondent is rejected. Consequently the Writ Appeal is being considered on merits.

14. Heard Mr. Tarun Johri, learned Additional Advocate General for the Appellant and Mr. Pabitra Paul Chowdhury for the Respondent.

15. Mr. Tarun Johri would submit that the arbitral award of the learned Arbitrator is patently erroneous and ought to be set aside. As such the said order of the learned District Judge which was also impugned in the Writ Petition filed before this Court was liable to be set aside along with the arbitral award. Mr .Tarun Johri would submit that arbitral award suffered from patent illegality as there was no proof produced evidencing the cost incurred. He would submit that the order dated 25.02.2014 passed by this Court in the Review Petition would make it evident that the learned Arbitrator was directed to

decide the question and differences between the parties on the valuation of the development on the land and that would mean that the question as whether the Respondent was entitled to receive any compensation at all for the development. He would submit that there was patent irregularity in the arbitral award in as much as the learned Arbitrator had awarded a sum of ₹3,34,43,444/- (Rupees three crore thirty four lakhs forty three thousand four hundred forty four) to the Respondent without even appreciating the fact that the Respondent had paid only ₹2,10,119.15/- (Rupees two lakhs ten thousand one hundred nineteen and fifteen paisa) as rent for the entire period of 30 years to the Appellant and further that as per the valuation of the Junior Engineer of the Building & Housing Department of the Government of Sikkim the valuation of the lease property raised by the Respondent in the demised premises was only ₹71,87,891/- (Rupees seventy one lakhs eighty seven thousand eight hundred ninety one) which after deduction worked out to ₹71,87,891/-. He would thus submit that the impugned judgment passed by the learned Single Judge has resulted in huge financial losses to the State. He would seek to rely upon the judgment of the Supreme Court in re: ***Rohtas Industries Staff & Anr. v. Rohtas Industries Staff Union and Ors.***[2] and submit that the arbitral award made by the learned Arbitrator is not only not invulnerable but more sensitively susceptible to the writ

[2] **(1976) 2 SCC 82**

lancet being a quasi-statutory body's decision and that such an award can be upset if an apparent error of law stains its face. Mr. Tarun Johri would take us to the letter of allotment, the lease deed and its various clauses, the award dated 12.06.2015 and its various paragraphs and findings on various issues as well as the order dated 10.06.2016 passed by the learned District Judge dismissing the application filed by the Appellant under Section 34 of the said Act. He would submit that the learned Arbitrator while coming to the conclusion that both the valuation reports filed by the parties were not acceptable had grossly erred in applying the principles embodied in Section 28(2) of the said Act and thereafter toning down the rates applied by the Appellant by not less than 30 to 40 percent and arriving at a figure on his understanding of what is reasonable which however did not have any legal basis.

16. *Per contra* Mr. Pabitra Pal Chowdhury while reiterating the points taken in the counter-affidavit would submit that the application for setting aside the arbitral award was preferred by the Appellant after a lapse of more than 45 days from the prescribed date, on 27.11.2015 before this Court and later withdrawn. The Respondent further states that the Appellant thereafter on 04.12.2015, after a lapse of 54 days beyond the prescribed period of limitation filed an application for setting aside the arbitral award under Section 34 of the said Act before

the learned District Judge. It is also stated that on 19.09.2016 an Appeal under Section 37 of the said Act along with an application under Section 5 of the Limitation Act, 1963 was preferred by the Appellant before this Court. On 25.10.2016 this Court condoned the delay in preferring the Appeal on consent. On 13.12.2016 the Appellant, on instructions, withdrew the Appeal with liberty to take proper recourse and thereafter on 21.12.2016 the Writ Petition was filed. The Respondent would submit that in the circumstances the Learned Single Judge had rightly framed the afore-quoted question of law while taking cognizance of the Writ Petition regarding its maintainability. It was submitted that the Appellant had filed an Appeal on 19.09.2016 as efficacious alternative remedy as per the statutory provisions of Section 37 of the said Act but however, choose to withdraw the same and file the Writ Petition instead which is not maintainable. It is also submitted that the said Act is a special law and that Section 34 thereof provides for a period of limitation different from that prescribed under the Limitation Act, 1963. The use of the words *"but not thereafter*" in the proviso to sub-section 3 of Section 34 of the said Act would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, 1963. The Respondent would rely upon the judgment of the Supreme

Court in re: ***Union of India v. Popular Construction Co.***[3] which would hold:

> ***"7.*** *There is no dispute that the 1996 Act is a "special law" and that Section 34 provides for a period of limitation different from that prescribed under the Limitation Act. The question then is — is such exclusion expressed in Section 34 of the 1996 Act? The relevant extract of Section 34 reads:*
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> *"34. Application for setting aside arbitral award.—(1)-(2)****
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> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:*
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> *Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*
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> ***8.*** *Had the proviso to Section 34 merely provided for a period within which the court could exercise its discretion, that would not have been sufficient to exclude Sections 4 to 24 of the Limitation Act because "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5" [Mangu Ram v. Municipal Corpn. of Delhi, (1976) 1 SCC 392 at p. 397, para 7 : 1976 SCC (Cri) 10] .*
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> ***9.*** *That was precisely why in construing Section 116-A of the Representation of the People Act, 1951, the Constitution Bench in Vidyacharan Shukla v. Khubchand Baghel [AIR 1964 SC 1099] rejected the argument that Section 5 of the Limitation Act had been excluded: (AIR p. 1112, para 27)*
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> > *"27. It was then said that Section 116-A of the Act provided an exhaustive and exclusive code of limitation for the purpose of appeals against orders of tribunals and reliance is placed on the proviso to sub-section (3) of that section, which reads:*
> >
> > *'Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the Tribunal under Section 98 or Section 99.*
> >
> > *Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.'*

[3] **(2001) 8 SCC 470**

> *The contention is that sub-section (3) of Section 116-A of the Act not only provides a period of limitation for such an appeal, but also the circumstances under which the delay can be excused, indicating thereby that the general provisions of the Limitation Act are excluded. There are two answers to this argument. Firstly, Section 29(2)(a) of the Limitation Act speaks of express exclusion but there is no express exclusion in sub-section (3) of Section 116-A of the Act; secondly, the proviso from which an implied exclusion is sought to be drawn does not lead to any such necessary implication."*

10. *This decision recognises that it is not essential for the special or local law to, in terms, exclude the provisions of the Limitation Act. It is sufficient if on a consideration of the language of its provisions relating to limitation, the intention to exclude can be necessarily implied. As has been said in Hukumdev Narain Yadav v. Lalit Narain Mishra [(1974) 2 SCC 133] : (SCC p. 146, para 17)*

> *"If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act."*

11. *Thus, where the legislature prescribed a special limitation for the purpose of the appeal and the period of limitation of 60 days was to be computed after taking the aid of Sections 4, 5 and 12 of the Limitation Act, the specific inclusion of these sections meant that to that extent only the provisions of the Limitation Act stood extended and the applicability of the other provisions, by necessary implication stood excluded [Patel Naranbhai Marghabhai v. Dhulabhai Galbabhai, (1992) 4 SCC 264] .*

12. *As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.*

13. *Apart from the language, "express exclusion" may follow from the scheme and object of the special or local law:*

> *"[E]ven in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation." [(1974) 2 SCC 133] (SCC p. 146, para 17)*

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16. *Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that*

> *"where the time for making an application to set aside the arbitral award under Section 34 has expired … 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".*

*This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act.***"***

[Emphasis supplied]

17. Section 34 of the said Act provides:-

"34. Application for setting aside arbitral award.—*(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity; or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,

or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

> *(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.*
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> *(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.*
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> *(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]***"**

18. Mr. Pabitra Pal Chowdhury would also submit that the admitted facts reveal that it was on the consent of the parties that the matter was referred to Arbitration by this Court. He would further submit that the mode of valuation adopted by the learned Arbitrator was also on consent of the parties. He would counter the submissions made on behalf of the Appellant that the direction of this Court to the learned Arbitrator to decide the questions and differences between the parties on the valuation of the development on the land would mean that the question as to whether the Respondent was entitled to receive any compensation at all was also open. He would submit that a bare perusal of the lease agreement would reflect that the construction of the building thereon made by the Respondent was acknowledged by the Appellant in the recital to the lease agreement and therefore there was no question that the learned

Arbitrator could decide not to grant any compensation at all for admitted development.

19. The said order passed by the learned District Judge would decide the fate of the application under Section 34 of the said Act filed by the Appellant herein on the preliminary point of limitation raised by the Respondent herein. The learned District Judge would record a finding that the arbitral award was dated 12.06.2015 which was signed and pronounced in the presence of the learned Counsel for both the parties. It was also recorded that the matter was listed on 13.06.2015 for making over signed copies of the arbitral award to them on the plea of the learned Counsel for the parties that the parties could not be present on 12.06.2015 because of their preoccupation. The learned District Judge has further extracted the record of proceedings dated 13.06.2015 of the learned Arbitrator in which the presence of the respective Counsels along with the respective representatives of the parties would be shown. In view of the aforesaid the learned District Judge would come to a categorical finding that the signed copy of the award was received by the Appellant on 13.06.2015. There is no quarrel with regard to this fact. The learned District Judge would hold that since the arbitral award was received by the Appellant on 13.06.2015 the application under Section 34 of the said Act ought to have been filed within 13.09.2015 and that even

considering the extended period of 30 days thereafter the Appellant was required to file the application within 13.10.2015. The learned District Judge would further hold that even presuming that the Appellant had been contesting the case in the wrong forum the filing of the application on 04.12.2015 was beyond the stipulated period provided under Section 34(3) of the said Act. Accordingly the application under Section 34 of the said Act would be rejected by the learned District Judge as being filed beyond the period of limitation. In doing so the learned District Judge would rely upon the ratio in ***State of Goa v. Western Builders*** [4], ***State of West Bengal v. Afcons Infrastructure Limited***[5]. In re: ***Western Builders (supra)*** the Supreme Court would hold:

> ***"10.*** *We are primarily concerned with sub-section (3) of Section 34 read with the proviso. Reading of sub-section (3) along with the proviso of Section 34, it clearly transpires that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 should be made within 3 months and the period can be further extended on sufficient cause by another period of 30 days and not thereafter that means so far as application for making or setting aside the award is concerned the period of limitation has been prescribed in sub-section (3) i.e. 3 months but it can be extended for another period of 30 days on sufficient cause being shown to the satisfaction of the court. Therefore, the applicability of Section 5 of the Limitation Act stands excluded and the application for condonation of delay up to a period of 30 days can be made by the court and not beyond that. Therefore, it was submitted that there is no scope for applicability of Section 14 of the Limitation Act in these proceedings by virtue of sub-section (2) of Section 29 of the Limitation Act.*
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> ***15.*** *Therefore, general proposition is by virtue of Section 43 of the Act of 1996 the Limitation Act, 1963 applies to the Act of 1996 but by virtue of sub-section (2) of Section 29 of the Limitation Act, if any other period has been prescribed under the special enactment for*

[4] **(2006) 6 SCC 239**
[5] **AIR 2008 Cal 6**

moving the application or otherwise then that period of limitation will govern the proceedings under that Act, and not the provisions of the Limitation Act. In the present case under the Act of 1996 for setting aside the award on any of the grounds mentioned in sub-section (2) of Section 34 the period of limitation has been prescribed and that will govern. Likewise, the period of condonation of delay i.e. 30 days in the proviso.

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17. *Therefore, by virtue of sub-section (2) of Section 29 of the Limitation Act what is excluded is the applicability of Section 5 of the Limitation Act and under Section 3 read with the Schedule which prescribes the period for moving application.*

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19. *There is no provision in the whole of the Act which prohibits discretion of the court. Under Section 14 of the Limitation Act if the party has been bona fidely prosecuting his remedy before the court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub-sections (4), (6), (9) and sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section 41, sub-section (2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid sections that wherever the legislature wanted to give power to the court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the statute for curtailing the power of the court under Section 14 of the Limitation Act. Much depends upon the words used in the statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act of 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act should not be read in the Act of 1996, which will advance the cause of justice. If the statute is silent and there is no specific prohibition then the statute should be interpreted which advances the cause of justice. Our attention was invited to various decisions of this Court but we shall refer to a few of them which have some relevance.*

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25. *Therefore, in the present context also it is very clear to us that there are no two opinions in the matter that the Arbitration and Conciliation Act, 1996 does not expressly exclude the applicability of Section 14 of the Limitation Act. The prohibitory provision has to be construed strictly. It is true that the Arbitration and Conciliation Act, 1996 intended to expedite commercial issues expeditiously. It is also clear in the Statement of Objects and Reasons that in order to recognise economic reforms the settlement of both domestic and*

international commercial disputes should be disposed of quickly so that the country's economic progress be expedited. The Statement of Objects and Reasons also nowhere indicates that Section 14 of the Limitation Act shall be excluded. But on the contrary, intendment of the legislature is apparent in the present case as Section 43 of the Arbitration and Conciliation Act, 1996 applies the Limitation Act, 1963 as a whole. It is only by virtue of sub-section (2) of Section 29 of the Limitation Act that its operation is excluded to that extent of the area which is covered under the Arbitration and Conciliation Act, 1996. Our attention was also invited to the various decisions of this Court interpreting sub-section (2) of Section 29 of the Limitation Act with reference to other Acts like the Representation of the People Act or the provisions of the Criminal Procedure Code where separate period of limitation has been prescribed. We need not overburden the judgment with reference to those cases because it is very clear to us by virtue of sub-section (2) of Section 29 of the Limitation Act that the provisions of the Limitation Act shall stand excluded in the Act of 1996 to the extent of area which is covered by the Act of 1996. In the present case under Section 34 by virtue of sub-section (3) only the application for filing and setting aside the award a period has been prescribed as 3 months and delay can be condoned to the extent of 30 days. To this extent the applicability of Section 5 of the Limitation Act will stand excluded but there is no provision in the Act of 1996 which excludes operation of Section 14 of the Limitation Act. If two Acts can be read harmoniously without doing violation to the words used therein, then there is no prohibition in doing so.

26. *As a result of the above discussion we are of the opinion that the view taken by the court below excluding the applicability of Section 14 in this proceeding is not correct. We hold that Section 14 of the Limitation Act, 1963 is applicable in (sic to) the Arbitration and Conciliation Act, 1996. We set aside all the judgments/orders and remand all these cases back to the trial court/District Court for deciding the application under Section 14 of the Limitation Act on merit after hearing both the parties and in case the delay is condoned then the case should be decided on merits after hearing all the parties concerned. All the appeals are allowed. No order as to costs.***"**

[Emphasis supplied]

20. The Appellant preferred the Writ Petition before this Court on 15.12.2016. The Writ Petition sought to challenge the arbitral award as well as the said order passed by the learned District Judge on merits of the matter without even a solitary explanation on the evident delay in filing the application before the learned District Judge under Section 34 of the said Act. The

said Writ Petition was contested by the Respondent by filing a counter-affidavit taking various pleas as enumerated above.

21. The pleading in the Writ Petition however, discloses that being aggrieved by the said order of the learned District Judge the Appellant had filed an appeal under Section 37 of the said Act before this Court.

22. Section 37 of the said Act provides:

> ***"37. Appealable orders***.—*(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*
>
> *(a) refusing to refer the parties to arbitration under section 8;*
> *(b) granting or refusing to grant any measure under section 9;*
> *(c) setting aside or refusing to set aside an arbitral award under section 34.]*
>
> *(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—*
>
> *(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or*
>
> *(b) granting or refusing to grant an interim measure under section 17.*
>
> *(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."*

23. Section 37 of the said Act thus makes it evident that an appeal shall lie from an order setting aside or refusing to set aside an arbitral award under Section 34 of the said Act. The said order passed by the learned District Judge had in effect refused to set aside the arbitral award passed by the learned Arbitrator. However, the Appeal was subsequently withdrawn on 13.12.2016 with liberty to take recourse to an appropriate forum, if so advised. In re: ***Chief Engineer of BPDP/REO, Ranchi v.***

Scoot Wilson Kirpatrick India (P) Ltd.[6] the Supreme Court relying upon its judgment in re: ***Essar Constructions v. N.P. Rama Krishna Reddy***[7]; ***Union of India v. Manager Jain and Associates***[8] would hold that an Appeal under Section 37 of the said Act from an order refusing to condone delay is maintainable.

24. The impugned judgment passed by the learned Single Judge dated 26.02.2018 examined the contours of Article 226 of the Constitution of India and dismissed the Writ Petition as not maintainable.

25. A perusal of the impugned judgment in the Writ Petition makes it evident that the Appellant did not even seek to justify the apparent delay in approaching the Court of the learned District Judge against the award of the learned Arbitrator and instead sought to cleverly focus on the merits of the matter which had not been examined by the learned District Judge. The present Writ Appeal also seeks to focus entirely on the merits of the matter without a semblance of explanation on the delay.

26. Apparently and admittedly the Appellant received a certified copy of the arbitral award dated 12.06.2015 on 13.06.2015. Section 34(3) of the said Act permits the making of

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[6] **(2006) 13 SCC 622**
[7] **(2000) 6 SCC 94**
[8] **(2001) 3 SCC 277**

an application for setting aside an arbitral award within three months from the date on which the party making the application had received the arbitral award. The proviso to Section 34(3) of the said Act allows the Court to condone the delay beyond the three months if it is satisfied that the Applicant was prevented by *"sufficient cause"* from making the application within the said period of three months. However, the said proviso also mandates that this power cannot be used to condone the delay thereafter. The judgments of the Supreme Court in re: ***Western Builders (supra)*** and ***Popular Construction Co. (supra)*** would settle the issue. The records reveal that the Appellant had initially approached this Court under Section 34 of the said Act on 27.11.2015 only after expiry of 166 days from the receipt of the certified copy of the arbitral award on 13.06.2015. The application before the learned District Judge for setting aside the arbitral award under Section 34 of the said Act was made on 04.12.2015 after expiry of 173 days from the receipt of the certified copy of the arbitral award on 13.06.2015. The maximum time condonable by the Court as per the provision of Section 34(3) of the said Act is 120 days. In such circumstances, the learned District Judge had rightly rejected the application under Section 34 of the said Act as being barred by limitation. The Supreme Court has held that Section 14 but not Section 5 of the Limitation Act, 1963 would apply in proceedings under the said Act. Although it is neither pleaded

nor argued even if we were to exclude the time during which the Appellant had sought to prosecute another proceeding it is quite evident that the Appellant had approached this Court under Section 34 of the said Act beyond the period of 120 days as prescribed by Section 34(3) of the said Act and thus even Section 14 of the Limitation Act, 1963 would not come to the Appellant's rescue.

27. The power of the High Court under Article 226 of the Constitution of India is extraordinary, equitable and discretionary. The Supreme Court in re: ***K.D. Sharma v. Steel Authority of India Limited & Ors.*** [9] would examine the scope of Article 32 and 226 of the Constitution of India and hold:

> ***"34.*** *The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim.*
>
> *xxxxxxxxxxxx*
>
> ***"36.*** *A prerogative remedy is not a matter of course. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the court.*

[9] **(2008) 12 SCC 481**

> *If the applicant makes a false statement or suppresses material fact or attempts to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating, "We will not listen to your application because of what you have done." The rule has been evolved in the larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it.***"**

28. The fact that Section 34(3) of the said Act prohibited the Court to condone delay beyond the prescribed period as well as the judgment of the Supreme Court in re: ***Western Builders (supra)*** would be known to the Appellant at least on receipt of the impugned order passed by the learned District Judge. The act of the Appellant thereafter does not reflect its bonafides. The withdrawal of the Appeal filed under Section 37 of the said Act, the filing of the Writ Petition without even attempting to explain the apparent delay in approaching the District Court under Section 34 of the said Act and completely skirting the issue, the failure to do so even in the present Writ Appeal and in fact not even attempting to explain the delay beyond prescribed period does not reflect that the Appellant had approached this Court under Article 226/227 of the Constitution of India with clean hands and had put forward all the facts before the Court without concealing or suppressing anything and sought appropriate relief. The impugned judgment records that an application was filed for condonation of delay before the learned District Judge along with the application under Section 34 of the said Act. The fact was that an application for condonation of

delay was not preferred before the learned District Judge and it was only on the objection raised by the Respondent that the Court examined the delay. This fact was categorically confirmed by the learned Counsel for the Appellant when a specific query was raised by this Court during the hearing. In fact even at the Writ Appeal stage this Court is unable to fathom the reasons for the delay in approaching the District Court under Section 34 of the said Act. Nevertheless since the Appellant sought to press the judgment of the Supreme Court in re: ***Rohtas Industries Staff (supra)*** this Court sought to know from the Appellant as to what was the apparent error of law which stained the face of the impugned award. The learned Counsel would submit that the valuation done by the learned Arbitrator was erroneous. He would rely upon three judgments of the Supreme Court in support of his submission. In re: ***Prabhakar Raghunath Patil & Ors. v. State of Maharashtra***[10] was a case under the Land Acquisition Act, 1894 regarding determination of compensation under Section 23 thereof. Evidence of an expert witness was sought to relied upon which had been considered unreliable by the reference Court. As the Counsel appearing for the Appellant's therein sought to justify the increase as sought for by the Appellant's therein, the Supreme Court looked into the evidence of the expert as also a notification and gave its reasons as to why the expert opinion was not reliable. In re: ***Dr. K. C.***

[10] **(2010) 13 SCC 107**

Nambiar v. Rent Controller, Madras & Ors.[11] was a case in which the Supreme Court would interpret the word *"cost of construction"* and *"market value"* in sub-section (3) (b) (i) and sub-section (3) (b) (2) of the Madras Building (Lease and Rent Control) Act, 1960 in the paragraph sought to be relied upon. In re: ***Commissioner of Income Tax, Ajmer v. Sunita Mansingha***[12] the Supreme Court would examine a judgment passed by the High Court and the Income Tax Appellate Tribunal and hold that in view of the finding recorded by the Tribunal that the local Public Works Department rates are to be applied in place of Central Public Works Department rates there was no good ground to interfere. We are unable to appreciate as to how the aforesaid three judgments would assist the Appellant in their submission that the valuation arrived at by the learned Arbitrator was an error of law which stained the face of the arbitral award to compel this Court to exercise its extraordinary and discretionary powers in the facts of the present case. Admittedly, it was with the consent of the parties that this Court in an earlier proceeding referred the matter for arbitration. The order of this Court passed in the earlier Writ Petition is recorded in the arbitral award. The said order clearly recorded that the Appellant in their counter-affidavit had not denied that the Petitioner was entitled to a reasonable

[11] **1962 (2) SCC 465**
[12] **(2018) 12 SCC 296**

compensation. This order was not assailed by the Appellant. The order dated 25.02.2014 passed by this Court in Review Petition No.01 of 2014 by which the matter was referred to arbitration with the further direction to the learned Arbitrator to draw up an inventory of the developments that had been made by the Respondent on the leasehold property by making a visit personally has also not been assailed by the Appellant. The arbitral award clearly records that the learned Arbitrator examined the valuation put forth by both the parties and found both wanting. The arbitral award clearly records that faced with the situation the learned Arbitrator put the question to the learned Counsel for the parties as to what should be the way out in such an event and both the learned Counsels of the parties submitted that in such an eventuality, it shall be open for the tribunal to decide according to what is just and fair. The arbitral award reveal that the method of valuation thus arrived at by the learned Arbitrator was also on the consent of the parties.

29. The ostensible reason as stated in the Writ Petition is the illegality of the said order and arbitral award. The real hurdle the Appellant seeks to get over by filing the Writ Petition was the mandatory provision contained in Section 34(3) of the said Act which does not permit the Court to condone the delay beyond the prescribed period. The question is whether the Appellant could do so by merely filing a Writ Petition on the

merits without even an attempt to explain the delay and skirting the procedure prescribed under the said Act? The answer, we are certain, is a definite no. The extraordinary and discretionary relief cannot be obtained in this manner. The impugned judgment which holds that there is no gross failure of justice or grave injustice warranting the exercise of the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India, even while appreciating that the scope of jurisdiction of the High Court in exercise of power under Article 226 of the Constitution, is not affected in spite of alternative statutory remedies cannot be faulted.

30. The Writ Appeal is dismissed. No order as to costs.

(Bhaskar Raj Pradhan)
Judge
28.08.2018

(Meenakshi M. Rai)
Acting Chief Justice
28.08.2018

to. Approved for reporting: yes.
Internet: yes.