IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1841 of 2016
IN
Civil Writ Jurisdiction Case No. 746 of 2016

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1. Bihar Rajya Bhumi Vikas Bank Samiti, Bihar-Jharkhand, Now known as Multi-State Co-operative Land Development Bank Ltd., Bihar & Jharkhand, having office at Buddha Marg, P.S.- Budha Colony, District- Patna.

.... Appellant

Versus

1. The State of Bihar.
2. The Chief Secretary, Government of Bihar.
3. The Principal Secretary, Finance Department, Government of Bihar having office at Old Secretariat, P.S. Sachivalay, Patna.
4. The Principal Secretary, Minor Irrigation Department, Government of Bihar.
5. The Principal Secretary, Cooperative Department, Government of Bihar.
6. The Registrar, Cooperative Societies, Bihar, Patna.

All having office at New Secretariat, P.S. Sachivalay, District- Patna.

.... Respondents

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Appearance :
For the Appellant : Mr. Y. V. Giri, Senior Advocate
Mr. Rajesh Prasad Choudhary, Adv.
Mr. Ashish Giri, Advocate
For the Respondents : Mr. Ravi Ranjan, AC to SC 22

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CORAM: HONOURABLE THE CHIEF JUSTICE
AND
HONOURABLE DR. JUSTICE RAVI RANJAN

JUDGMENT AND ORDER
C.A.V.

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 28-10-2016

The core issue, which this appeal has raised, is:

whether issuance of a notice, under sub-Section (5) of Section 34 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as 'the 1996 Act'), is mandatory or directory? **Connected with this core issue is the issue :** ***whether an order, entertaining an application, which is made contrary to the provisions of Section 34 (5) of the 1996 Act, by omitting to serve advance notice on the opposite party by the application, would be amenable to Article 227 or 226 of the Constitution of India?*** **Yet another issue, raised in this appeal, is:** ***whether a District Judge, while exercising power under Section 34 of the 1996 Act functions as a Civil Court or a Court other than a Civil Court?***

BACKGROUND FACTS

2. The brief facts, giving rise to present appeal, may be summed up as follows:

(i) The appellant bank alleges that the State owes to it a sum of Rs. 570.79 crore under different heads. The bank approached this Court for appointment of an Arbitrator by filing Request Case No 4 of 2013, which was allowed, on 07.03.2014, and Mr. Justice S. C. Jha (Retired) was appointed as the Arbitrator.

(ii) The order, appointing the Arbitrator, was challenged by way of Special Leave Petition before the Supreme Court in S.L.P. (C) No. 15552 of 2014. By its order,

dated 14.07.2014, the Supreme Court dismissed the Special Leave Petition aforementioned.

(iii) After dismissal of the Special Leave Petition, the arbitration proceeding commenced. Though the State raised the issue of maintainability of the arbitration proceeding, the same was rejected by the Arbitrator by order, dated 24.05.2015, and this order, dated 24.05.2015, was not challenged. The proceeding, thus, continued and the award was passed on 06.01.2016.

(iv) The State challenged the award, invoking the jurisdiction of the District Judge, by way of an application made under section 34 of the 1996 Act. However, no prior notice was issued to the appellant bank under Section 34 (5) of the 1996 Act. The Shirestedar of the learned Court below pointed out the defect with regard to non-compliance with the provisions of Section 34 (5) of the 1996 Act, which found reference in the margin of the order sheet; yet the learned Court below ignored the same and proceeded to take up the application, made under Section 34 (5) of the 1996 Act, for disposal.

(v) The grievance of the appellant bank is that the provisions of Section 34 (5) of the 1996 Act, requiring a notice to be given is *mandatory* and since no notice had been given, as required by Section 34 (5) of the 1996 Act, to the

appellant bank before making of the application under Section 34 (5) of the 1996 Act, seeking to get the award set aside, the decision of the learned District Judge to proceed with the application, made under Section 34 of the 1996 Act, is untenable in law. It is contended that by the order under appeal, the very purpose of the amendment, brought in to the 1996 Act by the Arbitration and Conciliation (Amendment) Act, 2015, by way of Section 18, with effect from 23.10.2015, has been made redundant.

3. Aggrieved by the order, dated 18.07.2016, aforementioned, the appellant bank impugned the said order in a petition filed under Article 227 of the Constitution of India. A learned single Judge of this Court has, disagreeing with the contention of the appellant bank that the decision of the learned District Judge, Patna, of issuing notice through his order, dated 18.07.2016, was bad since there was non-adherence to the requirement of issuance of a prior notice as per the provisions embodied in Section 34 (5) of the 1996 Act, which, according to learned counsel for the appellant, is mandatory in nature, and held that Section 34 (5) of the 1996 Act is merely *directory* and not being *mandatory*, the order, dated 18.07.2016, passed by the District Judge does not call for any interference and accordingly dismissed the petition.

4. The observations made, conclusions reached

and the decision given by the learned single Judge read as follows :

> *"19. In view of the above settled principles of law and in view of my discussion above I find that Section 34 (5) of the Conciliation Act, 1996 is not mandatory rather it is directory. It was inserted for the purpose of expeditious disposal of the arbitration matter, i.e., the period which was being consumed in issuing the notice is sought to be shortened by providing this provision by amendment but that does not mean that for noncompliance thereof the application is to be dismissed at the very threshold. The courts have the jurisdiction to entertain the application and by inserting sub-section (5) of Section 34, the power of the Court has not been taken away. This does not mean that always this provision should not be complied with. Further by the impugned order no prejudice is caused to the petitioner. Now the petitioner has got the knowledge, therefore, the petitioner may appear and file objection. Huge amount is involved and, therefore, the proceeding cannot be rejected at the very threshold on technical ground, particularly when I have held that the provision is not mandatory rather it is directory"*.

5. Aggrieved by the dismissal of the writ petition made under Article 226 of the Constitution of India, this Letters Patent Appeal has been preferred under Clause X of the Letters patent of High Court of Judicature at Patna.

6. We have heard Mr. Y. V. Giri, learned Senior Counsel, appearing for the appellant, and Mr. Ravi Ranjan, learned Assistant Counsel to Standing Counsel No. 22, appearing for the respondents.

7. While considering the present appeal, it needs to be pointed out that there is, admittedly, no Letters Patent Appeal provided under Clause X of the Letters Patent of High Court of Judicature at Patna against an order made under Article 227. What has, however, been contended, on behalf the appellant-bank, is that the order passed by the learned single Judge, in Civil Misc. No.746 of 2012, was, in fact and in substance, in exercise of power under Article 226 of the Constitution and, therefore, this Letters Patent Appeal is available. Yet another question, which has been raised in the present appeal, as already indicated above, is *whether a notice, under Section 34(5) of the 1996 Act, is mandatory or directory in nature.*

8. The two questions, so posed, bring us to yet another question and the question is: *Whether a District Judge, while exercising power under Section 34(5) of the Act,*

functions as a Civil Court or merely as a Court or a tribunal?

SCOPE OF ARTICLE 226 VIS-À-VIS ARTICLE 227

9. There is no dispute before us that as against an order, made under Article 226 of the Constitution of India, and *intra*-Court appeal, under Clause 10 of the Letters Patent of Patna High Court, lies. There is also no dispute that whereas an order, made under Article 226 of the Constitution of India, is an appealable order under Clause 10 of the Letters Patent of Patna High Court, no intra-Court appeal lies as against an order, which has been passed in exercise of power under Article 227 of the Constitution of India.

10. Articles 226 and 227 of the Constitution of India stand on distinctly different footing. Every High Court has been conferred with the power to issue *writs* under Article 226 of the Constitution of India and these are original proceedings, (***State of U.P.* v. *Dr. Vijay Anand Maharaj (AIR 1963 SC 946)*** (See also ***Shalini Shyam Shetty v. Rajendra Shankar Patil,*** *reported in* ***(2010) 8 SCC 329);*** whereas the power exercisable, under Article 227 of the Constitution of India, is neither original nor is it appellate. Clearly held the Supreme Court, in ***Umaji Keshao Meshram v, Radhikabai***, reported in, ***1986 (Supp) SCC 401***, that *a proceeding, under Article 226 of the Constitution of India, is an original proceeding, while a proceeding, under Article 227*

of the Constitution of India, is not an original proceeding."

11. Article 227 of the Constitution of India vests in every High Court the power of *superintendence* over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. This jurisdiction of *superintendence*, under Article 227 of the Constitution of India, is for both, *administrative* and *judicial superintendence*.

12. Therefore, the powers, conferred under Articles 226 and 227 of the Constitution of India, are separate and distinct and operate naturally in different fields.

13. Another distinction between Article 226 of the Constitution of India and Article 227 of the Constitution of India jurisdictions is that under Article 226 of the Constitution of India, the High Court normally *annuls* or *quashes* an order or proceeding; but in exercise of its jurisdiction under Article 227 of the Constitution of India, the High Court, apart from annulling a proceeding, in question, can also substitute the impugned order by the order, which the inferior Tribunal should have made.

14. With regard to the above, one may gainfully refer to the decision, in ***Hari Vishnu Kamath* v. *Ahmad Ishaque* (AIR 1955 SC 233),** wherein the Constitution Bench of the Supreme Court, observed, " *… while a "certiorari" under Article 226 the High Court can only annul*

the decision of the Tribunal, it can, under Article 227, do that, and also issue further directions in the matter."

15. The jurisdiction, under Article 226 of the Constitution of India, is, normally, exercised, where a party is affected; but power under Article 227 of the Constitution of India can be exercised by the High Court *suo motu* as a custodian of justice.

16. In fact, the power under Article 226 of the Constitution of India is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. The jurisdiction, under Article 227 of the Constitution of India, is exercised by the High Court for vindication of its position as the highest judicial authority in the State.

17. In certain cases, where there is infringement of fundamental right, the relief, under Article 226 of the Constitution, can be claimed *ex debito justitiae* or as a matter of right. But, in the cases, where the High Court exercises its jurisdiction under Article 227 of the Constitution of India, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a single Judge passed under Article 226 of the Constitution of India, a letters patent appeal or an *intra Court* appeal is maintainable; but no such appeal is maintainable from an order passed by a

Single Judge of a High Court in exercise of power under Article 227 of the Constitution of India. (See ***Shalini Shyam Shetty v. Rajendra Shankar Patil,*** *reported in* ***(2010) 8 SCC 329).***

18. Having analyzed a number of its decisions, the Supreme Court in ***Shalini Shyam Shetty v. Rajendra Shankar Patil,*** *reported in* ***(2010) 8 SCC 329),*** has culled out following principles with regard to exercise of power under Article 227 of the Constitution of India :

(a) A petition, under Article 227 of the Constitution of India, cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of *superintendence* on the High Courts under Article 227 of the Constitution of India;

(b) High Courts cannot, at the drop of a hat, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it in exercise of its power of *superintendence* under Article 227 of the Constitution of India. In the cases, where an alternative statutory mode of redressal has been provided, such alternative remedy would also operate as a restrain on the exercise of this power by the High Court.

(*c*) While laying down the principle, on the basis

of which power of *superintendence*, embodied, under Article 227 of the Constitution of India, is exercised by the High Court, a Constitution Bench of the Supreme Court has pointed out, in ***Waryam Singh v. Amarnath (AIR 1954 SC 215)***, that a High Court, in exercise of its jurisdiction of *superintendence*, can interfere with an order only to keep the tribunals and courts subordinate to it —*within the bounds of their authority*. This power of *superintendence* cannot be equated with appellate jurisdiction.

(d) Merely, therefore, the fact that an order is incorrect, the High Court may not exercise its power of *superintendence* under Article 227 of the Constitution of India. However, the power of *superintendence* vested in a High Court, under Article 227 of the Constitution of India, can be invoked to remove a patent perversity in an order of the tribunal or court subordinate to the High Court or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(e) In exercise of its power of *superintendence*, High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it is a possible view. In other words, the supervisory jurisdiction, under Article 227 of the Constitution of India, has to be very sparingly exercised.

(f) The main object of Article 227 of the Constitution of India is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(g) The power of interference, under Article 227 of the Constitution of India, is to be kept to the minimum to ensure that the wheels of justice do not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court.

19. This power of *superintendence*, therefore, under Article 227 of the Constitution of India, is not to be exercised just for grant of relief in individual cases, but should be directed for promotion of public confidence in the administration of justice in the larger public interest; whereas Article 226 of the Constitution of India is meant for protection of individual grievance.

20. Thus, though the power, under Article 227 of the Constitution of India, may be unfettered, its exercise is subject to high degree of judicial discipline pointed out above. An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality. (See, ***Shalini Shyam Shetty v. Rajendra Shankar Patil,*** *reported in* ***(2010) 8 SCC 329).***

21. In ***Lokmat Newspapers (P) Ltd.*** **v.** ***Shankar Prasad****,* reported in **(1999) 6 SCC 275**, the Supreme Court clearly laid down that if a single Judge exercises jurisdiction, under Article 226 of Constitution of India,, letters patent appeal would be maintainable;, but if the jurisdiction is exercised under Article 227 of the Constitution of India, *intra*-Court appeal will not be maintainable. It was, however, made clear in ***Lokmat Newpapers (P) Ltd.*** (supra), that if a single Judge of a High Court, while considering the petition under Article 226 or Article 227 of the Constitution of India, does not state under which provision he has decided the matter and where the facts justify filing of petition, both under Article 226 and Article 227 of the Constitution of India, and a petition so filed is dismissed by the Single Judge on merits, the matter may be considered in its proper perspective in an appeal. (See, ***Umaji Keshao Meshram*** **v.** ***Radhikabai****,* reported in **1986 Supp SCC 401**, ***Ratnagiri Distt. Central Coop. Bank Ltd.*** **v.** ***Dinkar Kashinath Watve****,* reported in **1993 Supp (1) SCC 9**, and ***Sushilabai Laxminarayan Mudliyar*** **v.** ***Nihalchand Waghajibhai Shaha****,* reported in **1993 Supp (1) SCC 11**. See also, ***Kanhaiyalal Agrawal v. Factory Manager, Gwalior Sugar Co. Ltd., (2001) 9 SCC 609).***

22. What nomenclature has been used by a

party, while seeking intervention by Court is not so material as the contents of the order, which is challenged, as well as the contents of the order, which has been passed by the High Court. (See ***State of M.P. v. Visan Kumar Shiv Charan Lal,*** *reported in* ***(2008) 15 SCC 233).***

23. If the judgment under appeal falls squarely within four corners of Article 227 of the Constitution of India, it goes without saying that *intra*-Court appeal from such judgment would not be maintainable. On the other hand, if the petitioner has invoked the jurisdiction of the High Court for issuance of certain writ under Article 226 of the Constitution of India, although Article 227 of the Constitution of India is also mentioned, and, principally, the judgment appealed against falls under Article 226 of the Constitution of India, appeal would be maintainable.

24. What is important to be ascertained is, therefore, the true nature of the order passed by the Single Judge and not what provision he mentions, while exercising such powers. (See ***Ashok K. Jha v. Garden Silk Mills Ltd.,*** *reported in* ***(2009) 10 SCC 584****).*

25. In ***Ramesh Chandra Sankla v. Vikram Cement****, reported in* ***(2008) 14 SCC 58,*** the Supreme Court has held that a statement, made by a learned Single Judge, that he has exercised power under Article 227 of the

Constitution of India, cannot take away right of appeal against such a judgment if power is, otherwise, found to have been exercised under Article 226 of the Constitution of India.

26. Clarified the Supreme Court, in ***MMTC v. CCT***, reported in, ***(2009) 1 SCC 8***, that a High Court shall consider the nature of the controversy, the nature of relief, which is sought for, and the nature of the order, which might have been passed by a single Judge of the High Court in order to decide if the order has been made under Article 226 or 227 of the Constitution of India.

27. Let us, first, consider the question as to whether the petition, in the present case, filed under Article 227 of the Constitution of India, was essentially an application under Article 227 of the Constitution of India or was an application essentially made under Article 226 of the Constitution of India. This can be culled out from the nature of jurisdiction sought to be invoked and the nature of jurisdiction by the principal Civil Court, under the provisions Section 2(e) of the 1996 Act, with particular reference to Section 34 thereof.

28. Section 2(e) of the 1996 Act defines the *'Court'* to mean the *'principal Civil Court'* of original jurisdiction, in a district, in an arbitration case other than international commercial arbitration, and includes the High

Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

29. The definition of Court, as given in Section 2(e) of the 1996 Act, take us to decide as to whether a principal Civil Court, as mentioned in Section 34 of the 1996 Act, is a Civil Court of ordinary jurisdiction as is understood under the Bengal, Agra and Assam Civil Courts Act, 1887 (hereinafter referred to as 'the 1887 Act'), with plenary power and authority to decide suits of any nature under Section 9 of the Code of Civil Procedure.

30. We have considered the rival submissions.

31. Thus, the principal questions, which arise, in the present case, may be set out as follows;

- Whether, while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, the principal civil Court is a Court or a tribunal?
- If the principal civil Court is a tribunal, whether a writ of *certiorari* can be issued and if so, under what circumstances?

- Whether the provisions of Section 34(5) are *mandatory* or *directory*?
- *Whether, while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, the principal civil Court acts as a Civil Court of ordinary jurisdiction or as a mere Court or as a tribunal?*

32. While considering the question posed above, one needs to bear in mind the distinction between Courts and Tribunals.

33. In the case of ***Harinagar Sugar Mills Ltd.*** **v.** ***Shyam Sundar Jhunjhunwala (*****AIR 1961 SC 669),** the issue before the Supreme Court was whether Company Law Board is a tribunal within the meaning of Section 9A of Special Court (Trial of Offences Relating to Transactions in Securities) Amendment Ordinance, 1994

34. Justice Hidayatullah, (as his Lordship then was) delivered a separate, but concurring judgment. He observed that all tribunals were not courts, though all courts were tribunals. The expression *'courts'* was used to designate those tribunals, which were set up in an organized State for the administration of justice. By administration of justice was meant the exercise of the judicial power of the State to

maintain and uphold rights and to punish wrongs. Whenever there was an infringement of a right or an injury, the courts were there to restore the "*vinculum juris*". When rights were infringed or invaded, the aggrieved party could go and commence a '*querela*' before the ordinary civil courts. These courts were invested with the judicial power of the State and their authority was derived from the Constitution or some Act of legislature constituting them. Their number was ordinarily fixed and they were ordinarily permanent and could try any suit or cause within their jurisdiction. Their numbers might be increased or decreased, but they were almost always permanent and went under the compendious name of "Courts of Civil Judicature". There could be no doubt that the Central Government did not come within this class. With the growth of civilization and the problems of modern life, a large number of administrative tribunals had come into existence. These tribunals had the authority of law to pronounce upon valuable rights. They acted in a judicial manner and even on evidence on oath, but they were not part of the ordinary courts of civil judicature. They shared the exercise of the judicial power of the State, but were brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They were very similar to courts, but were not courts. When the Constitution spoke of 'courts'

in Articles 136, 227 and 228 and in Articles 233 to 237 and the Lists, it contemplated courts of civil judicature but not tribunals other than such courts. This was the reason for using both the expressions in Articles 136 and 227. By 'courts' was meant courts of civil judicature and by 'tribunals' those bodies of men who were appointed to decide controversies arising under certain special laws. Among the powers of the State was included the power to decide such controversies. This was undoubtedly one of the attributes of the State and was aptly called the judicial power of the State. In the exercise of this power, a clear division was noticeable. Broadly speaking, certain special matters went before tribunals and the residue went before the ordinary courts of civil judicature. What distinguished them had never been successfully established. A court in the strict sense was a tribunal which was a part of the ordinary hierarchy of courts of civil judicature maintained by the State under its Constitution to exercise the judicial power of the State. These courts performed all the judicial functions of the State except those that were excluded by law from their jurisdiction. The word 'judicial' was itself capable of two meanings. It might refer to the discharge of duties exercisable by a judge or by justices in court or to administrative duties which need not be performed in court but in respect of which it was necessary to

bring to bear a judicial mind to determine what was fair and just in respect of the matters under consideration. That an officer was required to decide matters before him judicially in the second sense did not make him a court or even a tribunal because that only established that he was following a standard of conduct and was free from bias or interest. Courts and tribunals acted judicially in both senses and in the term 'courts' were included the ordinary and permanent tribunals and in the term 'tribunals' were included all others which were not so included. The matter would have been simple if the Companies Act had designated a person or persons, whether by name or by office, for the purpose of hearing an appeal under Section 111. It would then have been clear that though such person or persons were not 'courts' in the sense explained, they were clearly 'tribunals'. The Companies Act said that an appeal would lie to the Central Government. The court was, therefore, faced with the question whether the Central Government could be said to be a tribunal. The function that the Central Government performed under the Companies Act and Rules was to hear an appeal against the action of the directors. For that purpose a memorandum of appeal setting out the grounds had to be filed and the company, on notice, was required to make representations, if any, and so also the other side, and both sides were allowed

to tender evidence to support their representations. The Central Government by its order then directed that the shares be registered or need not be registered. The Central Government was also empowered to include in its orders directions as to payment of costs or otherwise. The function of the Central Government was curial and not executive. There was provision for a hearing and a decision on evidence, and that was indubitably a curial function. In its functions the Central Government often reached decisions but all its decisions could not be regarded as those of a tribunal. Resolutions of Government might affect rights of parties and yet they might not be in the exercise of judicial power. Resolutions of Government might be amenable to writs under Articles 32 and 226 in appropriate cases but might not be subject to a direct appeal under Article 136 as the decisions of a tribunal. The position, however, changed when Government embarked upon curial functions and proceeded to exercise judicial power and decide disputes. In these circumstances, it was legitimate to regard the officer who dealt with the matter and even Government itself as a tribunal. The word 'tribunal' was a word of wide import and the words 'court' and 'tribunal' embraced within them the exercise of judicial power in all its forms. The decision of the Central Government thus fell within the powers of the Supreme Court under Article 136.

35. In ***Kihoto Hollohan v. Zachillhu****, reported in* ***1992 Supp (2) SCC 651,*** the observations, made in the case of ***Harinagar Sugar Mills Ltd***. (supra), were quoted with approval and it was held that where there was a *lis*, an affirmation by one party and denial by another, the dispute involved the rights and obligations of the parties to it and when an authority was called upon to decide it, there was an exercise of judicial power. That authority was called a tribunal if it did not have all the trappings of a court.

36. What is clearly noticeable, from the decisions of ***Harinagar Sugar Mills Ltd***. (supra) and ***Kihoto Hollohan*** *(supra),* is that a *court,* in the strict sense, was a tribunal, which was a part of the ordinary hierarchy of courts of civil judicature maintained by the State under its Constitution to exercise the judicial power of the State. Secondly, a body, which performs curial functions or which decides a *lis* — an affirmation by one party and denial by another, it is called a tribunal if it did not have all the trappings of a court. In other words, certain special matters go to tribunals and the residue goes to the ordinary courts of civil judicature.

37. Mr. Y. V. Giri, learned Senior counsel, for the appellant has argued that the *'principal Civil Court'*, under Section 2(e) of the 1996 Act, is not a *Civil Court* in real sense.

He has relied upon the decision of the Supreme Court, in ***Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation and others***, reported in **(2009) 8 SCC 646**, to support his contention. In ***Nahar Industrial Enterprises Limited*** (supra), the Supreme Court has pointed out the essentials of a *civil court* by indicating that the court must be able to pass a decree as also must be capable of undertaking a full-fledged trial in terms of the provisions of the Code of Civil Procedure and/or the Evidence Act. Only because a court is competent to adjudicate an issue of *civil nature* does not necessarily lead to the inference, nor can it be held, that the court, so dealing with a case, is a *civil court*.

38. Learned Counsel for the State, on the other hand, argues that the District Judge, exercising jurisdiction under the provisions of the 1996 Act, discharges functions of a *civil court* inasmuch as the District Judge has the power to make orders requiring emergent actions, such as, appointment of a receiver, where the situation so warrants, or to pass any other necessary order taking interim measures, such as, granting of an injunction, etc. The District Judge also enforces the award of the Arbitral Tribunal as a decree exercising, by virtue of the provisions of Section 36 of the 1996 Act, the powers conferred by Order 21 of the Code

of Civil Procedure.

39. In ***Nahar Industrial Enterprises Limited****(supra)*, the Supreme Court has pointed out the essentials of a *civil court* by indicating that the court must be able to pass a decree as also must be capable of undertaking a full-fledged trial in terms of the provisions of the Code of Civil Procedure and/or the Evidence Act. Only because a court is competent to adjudicate an issue of *civil nature* does not, according to the decision, in ***Nahar Industrial Enterprises Limited*** (supra), necessarily lead to the inference that the court, so dealing with a case, is a *civil court*. It is apposite to point out, in this regard, the relevant observations, made in ***Nahar Industrial Enterprises Limited*** (supra), which read as follows:

> *"69. Civil court is a body established by law for administration of justice. Different kinds of law, however exist, constituting different kinds of courts. Which courts would come within the definition of the civil court has been laid down under the Code of Civil Procedure find mention in Section 4 and 5 thereof. Some suits may lie before the Revenue Court, some suits may lie before the presidency Small Cause Courts. The Code of Civil Procedure itself lays down that the Revenue Courts would not be courts subordinate to the High Court.*

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87. Should we adopt the principle of purposive interpretation so as to hold that the DRT would be a civil court?

88. We have noticed hereinbefore that civil courts are created under different acts. They have their own hierarchy. They necessarily are subordinate to the high court. The appeals from their judgment will lie before a superior court. The high court is entitled to exercise its power of revision as also superintendence over the said courts. For the aforementioned purpose, we must bear in mind the distinction between two types of courts trying disputes of civil nature. Only because a court or tribunal is entitled to determine an issue involving civil nature, the same by itself would not lead to the conclusion that it is a civil court. For the said purpose, as noticed hereinbefore a legal fiction is required to be created before it would have all attributes of a civil court.

89. The tribunal could have been treated to be a civil court provided it would pass a decree and it had all the attributes of a civil court including undertaking of a full-fledged trial in terms of the provisions if the Code of Civil Procedure/ or the Evidence Act. It is now trite law that jurisdiction of a court must

be determined having regard to the purpose and object of the Act. If parliament, keeping in view the purpose and object there of thought it fit to create separate Tribunal so as to enable the banks and the financial contained in the code of Civil Procedure as also the Evidence Act need not necessarily be restored to, in our opinion, by taking recourse to the doctrine of purposive construction, in another jurisdiction account be conferred upon it so as to enable this court to transfer the case from the civil court to a Tribunal."

40. Viewed from the above perspective, the principal civil court, while exercising powers under Section 34 of Arbitration and Conciliation Act, 1996, cannot be described to be or held a Court of civil judicature; but since it decides the validity of an award made by an arbitrator, which has consequences on the rights and liabilities of parties, it assumes the character of a Court, which is effectively, in the light of the decision, in ***Harinagar Sugar Mills Ltd.*** (supra), a tribunal.

NATURE OF JURISDICTION UNDER ARTICLE 226 VIS-À-VIS ARTICLE 227

41. The next question would be what is the nature of jurisdiction vested in High Court under Article 226 and 227 *vis-à-vis* orders of Courts and Tribunals? This

question assumes importance, because of the fact that if the application, preferred by the appellant before the learned single Judge, is, in effect, an application under Article 226, then, a *letters patent appeal* would lie. However, if the application, preferred by the appellant before the learned single Judge, is, in effect, an application under Article 227, this *letters patent appeal* would not lie.

42. As has been held in the case of ***Anil Kumar Shrivasatava v. Shaurya Sunil (CWJC 718 of 2016),*** all the powers, which are given to the High Court under sub-Clauses (a), (b) and (c) of Clause 2 of Article 227, are in respect of courts and tribunals, which are subordinate to the territorial jurisdiction of a High Court. A single Judge or a single Bench of a High Court is not a court subordinate to the Division Bench of the High Court and, therefore, the power of superintendence, which is vested in a High Court by Article 227, is not exercisable against order or decision of its own single Bench.

43. Coming, now, to the scope and ambit of jurisdiction vested in the High Court under Article 226, the Supreme Court, in the case of ***G. Veerappa Pillai v. Raman & Raman Ltd. (AIR 1952 SC 192),*** has observed that writs, as are referred to in Article 226, are obviously intended to enable the High Court to issue them in grave cases, where the

subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice.

44. Cautioning that jurisdiction under Article 226 is not in the nature of appellate jurisdiction, the Supreme Court, in ***G. Veerappa Pillai (supra)***, held that however extensive the jurisdiction under Article 226 may be, it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made.

45. In this context, it would be pertinent to mention that in ***Radhey Shyam v. Chhabi Nath,*** reported in ***(2015) 5 SCC 423,*** the Supreme Court, while dealing with the validity of the *ratio,* laid down in the case of ***Surya Dev Rai v. Ram Chander Rai,*** reported in ***(2003) 6 SCC 675*** whether a writ of *certiorari* would lie against an order of the civil court observed as follows;

> ***"11.*** *It is necessary to clarify that the expression "judicial acts" is not meant to refer to judicial orders of civil courts as the matter before this Court arose out of the order of the Election*

Tribunal and no direct decision of this Court, except Surya Dev Rai, has been brought to our notice where writ of certiorari may have been issued against an order of a judicial court. In fact, when the question as to scope of jurisdiction arose in subsequent decisions, it was clarified that orders of the judicial courts stood on different footing from the quasi-judicial orders of authorities or tribunals."

46. It will be seen that the powers of the High Court, as conferred by Articles 226 and 227 of the Constitution of India, operate in two separate fields. Such exercise, on occasions, intermeddles and crosses each other. However, the two powers are different in nature.

47. The power of superintendence under Article 227, though wide, is supervisory in nature. The power under Article 227 cannot, therefore, be exercised to interfere with an order if the order, made by a subordinate court or tribunal, is within the bounds of, or in conformity with, law. What is, however, extremely important to note is that while exercising supervisory jurisdiction under Article 227, the High Court not only acts as a court of law, but also as a court of equity.

48. It is, therefore, not only the power, but also the duty of the court to ensure that the power of

superintendence is exercised in order to advance the cause of justice and uproot injustice. This power cannot, however, be exercised to interfere with an order of a subordinate court or tribunal if the order, made by the subordinate court or the tribunal, is, otherwise, within the bounds of law. If, therefore, a subordinate court or tribunal does not have a particular power and refuses, therefore, to pass an order, such an order cannot be interfered with by invoking Article 227, though such an order, if otherwise unjust, may be interfered with, in an appropriate case, by the High Court under Article 226. (See, ***Ramesh Chandra Sankla and other v. Vikram Cement and other,*** reported in ***(2008) 14 SCC 58***)."

49. It is of immense importance to note that the nomenclature, as mentioned in an application, as to whether the application is under Article 227 or Article 226, is not final. What is relevant is the power, which is sought to invoked and the nature of power, which is, eventually, exercised. No wonder, therefore, that in ***Rana Sinha @ Sujit Sinha*** (supra), (in which one of us was a party), the Court has, referring to the case of ***Pepsi Foods Ltd. Vs. Special Judicial Magsitrate (AIR 1998 SC 128),*** pointed out that in the case of ***Pepsi Foods Ltd. v. Special Judicial Magistrate*** **(AIR 1998 SC 128),** too, the Supreme Court has made it clear that "*....nomenclature under which petition is filed is not*

quite relevant and that does not debar the court from exercising its jurisdiction, which, otherwise, it possesses unless there is special procedure prescribed, which procedure is mandatory".

50. If a judgment under appeal falls squarely within the four corners of Article 227, an *'intra* court' appeal from such a judgment would not, under the rules of the High Court, be maintainable. If, on the other hand, the petitioner has invoked the jurisdiction of the High Court for issuing a writ under Article 226, although Article 227, too, is mentioned, and, principally, the judgment, appealed against, falls under Article 226, the appeal would be maintainable. What is important to be ascertained is the true nature of the order and not what provisions have been mentioned, while passing the order by a learned Single Judge. (See ***Ashok K. Jha and other v. Garden Silk Mills Limited and another,*** reported in **(2009) 10 SCC 584**. This apart, what must also be borne in mind is that exercise of power, under Article 226 or even under Article 227, depends upon what facts have been brought on record or what has surfaced on record. If the facts emerging, therefore, on record, warrant or justify invoking of jurisdiction under Article 226 or 227, the Court must exercise its appropriate jurisdiction and would not deny to a person the relief, which he is, otherwise, entitled to receive, merely on

the ground that the relief, which the person is entitled to receive, has not been sought for or correct constitutional provisions have not been mentioned in the application.

51. In fact, in ***Ramesh Chandra Sankla and Ors. v. Vikram Cement Ltd.***, reported in **(2008) 14 SCC 58**, it has been held that a statement, made by a learned single Judge, that he has exercised power under Article 227, cannot take away the right of appeal against such an order if the power is, otherwise, found to have been exercised under, or traceable to, Article 226. The vital factor for determination of maintainability of an 'intra court' appeal, arising out of a writ proceeding, is the nature of jurisdiction invoked by the party, the true nature of order passed by a Single Judge and the nature of relief, which a party may be entitled to.

52. Let us, now, take into account as to the basics of the two powers. One of us had an occasion to deal with the powers of the High Court under Article 226 *vis-à-vis* Article 227 of the Constitution of India, in ***Rana Sinha @ Sujit Sinha Vs State of Tripura,*** reported in ***(2011) 2 GLT 610***, and pointed out that the question of issuance of writ of *certiorari*, in an appropriate case, is not circumscribed and is available provided the situation so demands. However, the supervisory jurisdiction, under Article 227 of the Constitution of India, has its own limitations. This power cannot be

exercised as a Court of appeal, but only with a view to keeping the subordinate court within the bounds of law so that there is adherence to the prescribed law. Supervisory jurisdiction has its own limitations, which, otherwise, are not found in the case of invoking of extra-ordinary jurisdiction available under Article 226 of the Constitution of India.

53. What crystallizes from the above discussion is that a statement, made by a learned single Judge or the applicant that he has exercised or invoked the power under Article 227, cannot take away the right of appeal against such an order if the power is, otherwise, found to have been exercised under, or traceable to, Article 226. The vital factor for determination of maintainability of an *'intra court'* appeal, arising out of a writ proceeding, is the nature of jurisdiction invoked by the party, the true nature of order passed by a Single Judge and the nature of relief, which a party may be entitled to.

54. The discussions undertaken so far lead us to following conclusions;

a) That the principal civil court, while exercising powers under Section 34 of the Arbitration and Conciliation Act, 1996, is not a Court of civil judicature; rather, it only a tribunal with the trappings of Court.

b) Orders of the judicial courts stand on a

different footing from the quasi-judicial orders of authorities or tribunals.

c) A writ of *certiorari* can be issued, under Article 226, in grave cases, where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice.

d) A statement, made by a learned single Judge or the applicant that he has exercised or invoked power under Article 227, cannot take away the right of appeal against such an order if the power is, otherwise, found to have been exercised under, or traceable to, Article 226. The vital factor for determination of maintainability of an *'intra court'* appeal, arising out of a writ proceeding, is the nature of jurisdiction invoked by the party, the true nature of order passed by a Single Judge and the nature of relief, which a party may be entitled to.

55. Thus, in the present case, as would be seen from the averments made in the original application, the appellant approached the Court stating that a mandatory provision of law, as contained in the Arbitration and Conciliation Act, 1996, has not been complied with by the

principal Civil Court, which is in the context of the facts of the present case, is a tribunal or court, but not a civil court of ordinary jurisdiction.

56. The application, in the present case, was, thus, in essence, an application under Article 226 and not under Article 227. We, have, therefore no hesitation in holding that the present *intra Court* appeal is maintainable.

WHETHER THE PROVISIONS OF SECTION 34(5) ARE MANDATORY OR DIRECTORY

57. Before proceeding to look into the rival arguments with regard to the correctness of the order passed by learned District Judge, it is apposite to refer to what has been observed by the Law Commissions of India, while amending Section 34 and 48 of the 1996 Act. Law Commission, in its 246th Report, at paragraph 25, has reported as follows:

> *"25. Similarly, the Commission has found that challenges to arbitration awards under sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of sections 34 (5) and 48 (4) which would require that an application under those sections shall be disposed off expeditiously and in any event within a period of one year from the*

date of service of notice. In the case of applications under section 48 of the Act, the Commission has further provided a time limit under section 48 (3), which mirrors the time limits set out in section 34 (3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthought. In addition, a new Explanation has been proposed to section 23 of the Act in order to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent, provided that the same falls within the scope of the arbitration agreement. The Commission has also recommended mandatory disclosures by the prospective arbitrators in relation to their ability to devote sufficient time to complete the arbitration and render the award expeditiously."

58. It is worth noting that the amendment to Section 34(5) of 1996 Act finds reference, at paragraph 25, in the 246th Report of the Law Commission, which has been brought in as Section 35(6) of 1996 Act. The original proposed amendment to Section 34(4) was, ultimately, brought in the 1996 Act by way of Section 34(5). Things would get clearer

once both the amended Sections 34(5) and (6) of 1996 Act, are reproduced hereinbelow:

> *"Sec 34*
> *(1) xx xx xx*
> *(2) xx xx xx*
> *(3) xx xx xx*
> *(4) xx xx xx*
> *(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.*
> *(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."*

59. Both the above amendments came to be inserted, in the 1996 Act, by the Arbitration and Conciliation (Amendment) Act, 2015, with effect from 23.10.2015. The purpose, as is discernible, for bringing the above amendments, is to shorten the period of litigation *post* arbitral proceeding. The challenge to an *award* should not protract to an indefinite period of time. The life of such a challenge should be controlled and a definite time-frame has been formulated to bring closure to the challenge to an arbitral award. The

246th Report of the Law Commissions of India is explicit as to the objective behind the amendment.

60. As would be noticed the intendment, under Section 34 (5), is to provide a life span to the adjudication of validity of an award made by the Arbitrator. In other words, the date of 1 (one) year period shall be computed from the date of service of notice. Hence, if there is a delay in service of notice, the period of 1 (one) year span automatically gets extended since such a period is to be computed from the date of service of notice under Section 34(5).

61. In order to ascertain whether the provisions of Section 34(5) are *mandatory* or *directory*, there are two words in the expression *"shall be filed by a party only after issuing a prior notice"* needs to be interpreted. The words *"shall"* and expression *"only"* have been subject matter of interpretation in various judgments of Supreme Court.

62. Crawford on *Statutory Construction* 1940 Edn Article 261 which was quoted with approval in ***Govindlal Chagganlal Patel* v. *Agricultural Produce Market Committee, Godhra***, reported in **(1975) 2 SCC 482** and relied on in this decision. The quotation reads as under:

> "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the

legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design, and the consequences which would follow from construing it the one way or the other."

63. It is well settled proposition of law that no universal rule can be formulated as to whether an enactment shall be considered directory or mandatory except that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision, in question, in determining whether it is *mandatory* or *directory*. In an oft-quoted passage, Lord Campbell said "*No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered*". Therefore the question, as to whether the statute is mandatory or directory, depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the

consequences, which would follow from construing it one way or the other.

64. We are reminded of a decision of the Supreme Court, in **Raza *Buland Sugar Co. Ltd. v. Municipal Board*, (AIR 1965 SC 895)**, wherein the Supreme Court had considered the question, as to whether Section 135(3) read with Section 94(3) of the U.P. Municipalities Act, was *mandatory* or *directory*. The facts were that Rampur Municipality, by a special resolution, proposed to levy property tax on persons or a class of persons. Section 131(3) required that the Board shall pass a resolution and have it published in the manner prescribed in Section 94 of such proposed tax. Section 135(3) declared that a notification of the imposition of the tax, under sub-Section (2) thereof, shall be conclusive proof that the tax has been imposed in accordance with the provisions of the Act. Under Section 94(3), every resolution, passed by the Board, shall be published in a local Hindi newspaper or in its absence by general or special order as may be directed by the State Government. The Municipality had contended that it had followed that procedure. The appellants contended that there was infraction in that behalf. While considering that question, per majority, the Supreme held, in ***Raza Buland Sugar Co. Ltd.*** (supra), as follows:

"The question whether a

particular provision of a statute was mandatory or directory cannot be resolved by laying down any general Rule and ***it should depend upon the facts of each case and for that purpose the object of the statute in working out the provision is a determining factor****. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious genera! inconvenience or injustice to persons resulting from the provision or other provisions dealing with the same subject and other considerations which may rise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."*

(Emphasis is added)

65. After exhaustive consideration of the subject, the Supreme Court held, in ***Raza Buland Sugar Co. Ltd.*** (supra), that though there was a technical defect inasmuch as the local paper, in which the publication had been made, was in Urdu and not in Hindi, there was substantial compliance and it was held to be directory and the tax imposed was upheld.

66. Mr. Giri, learned senior counsel for the

appellant, has relied upon the decision of the Supreme Court, in ***Bihari Choudhary and Anr. v. The State of Bihar and Ors.***, reported in **(1984) 2 SCC 627,** to boost his argument that if a provision directs for doing a particular thing in a particular way, the same needs to be done in that way only and no variation in doing of thing can be condoned and accepted. The case relates to a suit with prayer for relief of declaration of title and for delivery of possession of the property with *mesne profits* sought against the State of Bihar. The plaintiffs, in that suit, had issued a notice, under Section 80 of the Code of Civil Procedure, prior to the institution of the suit, but filed the suit before the expiration of the statutory period of two months. The State of Bihar took a plea in that respect. The learned Munsif dismissed the suit, finding the statutory notice defective. The want of proper notice was upheld by both the first appellate court as well as by the second appellate court, i.e., by the High Court of Patna. The matter was carried, in appeal, before the Supreme Court and the Supreme Court has, in ***Bihari Choudhary*** (supra), held, at paragraph Nos. 4 and 6, as follows:

> "4. When the language used in the Statute is clear and unambiguous, it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not *faithfully implementing the mandate of*

the legislature.

5. xx xx xx

6. It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80, C. P. C. is attracted cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."

67. Before the impact of the decision, in ***Bihari Choudhary*** (supra), is considered, a reference to yet another decision of the Supreme Court, in ***Kailash v. Nanhku and Others,*** reported in **(2005) 4 SCC 480,** would not be out of place to mention herein. The learned single Judge has relied on the said judgment in support of his conclusion that the provisions of Section 34(5) of the 1996 Act are not *mandatory,* but a *directory* one. The Supreme Court had, in ***Kailash*** (supra), the occasion to consider and interpret the time period prescribed for submission of a written statement by the defendants, in a civil suit, under the amended proviso to Order 8, Rule 1 of the Code of Civil Procedure. The

Supreme Court had held the time limit prescribed, under Order 8, Rule 1, as directory.

68. The Supreme Court has, while dealing with somewhat similar provision, contained in Section 13(2) of the Consumer Protection Act, fixing the time period for submission of the written statements, in ***Topline Shoes Ltd. v Corporation Bank***, reported in **(2002) 6 SCC 33,** had held the same to be *directory*. The Supreme Court has, upon considering the Statement of Objects and Reasons of the said Act, at paragraph Nos. 8, 9 and 13, in ***Topline Shoes Ltd.*** (supra), held as under:

> *"8. The Statement of Objects and Reasons of the Consumer Protection Act, 1986 indicates that it has been enacted to promote and protect the rights and interests of consumers and to provide them speedy and simple redressal of their grievances. Hence, quasi-judicial machinery has been set up for the purpose, at different levels. These quasi-judicial bodies have to observe the principles of natural justice as per clause (4) of the Statement of Objects and Reasons. Which reads as under:*
>
> > *"To provide speedy and simple redressal to consumer disputes, quasi-judicial machinery is sought to be set up at the district, State and Central levels. These quasi-judicial*

bodies will observe the principles of natural justice and have been empowered to given relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for noncompliance of the orders given by the quasi-judicial bodies have also been provided."

(emphasis supplied)

9. Thus the intention to provide a time frame to file reply, is really meant to expedite the hearing of such matters and to avoid unnecessary adjournments to linger on the proceedings on the pretext of filing reply. The provision however, as framed, does not indicate that it is mandatory in nature. In case the extended time exceeds 15 days, no penal consequences are prescribed therefor. The period of extension of time "not exceeding 15 days," does not prescribe any kind of period of limitation. The provision appears to be directory in nature, which the consumer forums are ordinarily supposed to apply, in the proceedings before them. We do not find force in the submission made by the appellant, in person, that in no event, whatsoever, the reply of the respondent could be taken on record beyond the period of 45 days. The provision is more by way of procedure to achieve the object of speedy disposal of

such disputes. It is an expression of "desirability" in strong terms. But it falls short of creating of any kind of substantive right in favour of the complainant by reason of which the respondent may be debarred from placing his version in defence in any circumstances whatsoever. It is for the Forum or the Commission to consider all facts and circumstances along with the provisions of the Act providing time frame to file reply, as a guideline, and then to exercise its discretion as best it may serve the ends of justice and achieve the object of speedy disposal of such cases -keeping in mind principles of natural justice as well. The Forum may refuse to extend time beyond 15 days, in view of Section 13(2) (a) of the Act but exceeding the period of 15 days of extension, would not cause any fatal illegality in the order.

10. xx xx xx

11. xx xx xx

12. xx xx xx

13. We have already noticed that the provisions as contained under Clause (a) of Sub-section (2) of Section 13 is procedural in nature. It is, also clear that with a view to achieve the object of the enactment, that there may be speedy disposal of such cases, that it has been provided that reply is to be filed within 30 days and the extension of time may not

exceed 15 days. This provision envisages that proceedings may not be prolonged for a very long time without the opposite party having filed his reply. No penal consequences have however been provided in case extension of time exceeds 15 days. Therefore, it could not be said that any substantive right accrued in favour of the appellant or there was any kind of bar of limitation in filing of the reply within extended time though beyond 45 days in all. The reply is not necessarily to be rejected. All facts and circumstances of the case must be taken into account. ***The Statement of Objects and Reasons of the Act also provides that the principles of natural justice have also to be kept in mind****."*

(Emphasis is supplied)

69. Coming now to the expression *"only"* in ***Saru Smelting (P) Ltd. v. CST,*** reported in ***1993 Supp (3) SCC 97*****,** the question before the Supreme Court was regarding interpretation of entry under the U.P. Sales Tax Act for the purpose of taxation and whether the goods prepared by the appellant falls within the particular entry or not. The entry provided that if the goods are prepared by using copper, tin, nickel or zinc or any other alloy containing any of these metals *only* the tax would be assessed at 1% else the

tax would be 3.5 per cent. The Supreme Court, in ***Saru Smelting (P) Ltd.*** (supra), held that the expression *"only"* is very material for understanding the meaning of the entry. Since the alloy, in dispute, contains Phosphorous, may be in a very small quantity, it cannot fall within Entry 2(*a*) of the aforesaid Notification.

70. It could be understood from the decision, in ***Saru Smelting (P) Ltd.*** (supra), that Supreme Court interpreted the expression *"only"* as conveying exclusivity. In other words as opposed to the doctrine of ***ejusdem generis***, the expression *"only"* limits the implantation of the provision in the manner indicated and admits no other exception.

71. One may point out that the dictionary meaning of the word *'only'* is *'no other'*. The word *'only'* is used for the purpose of conveying exclusive nature of the power exercisable by a person or authority. That the use of the word *'only'*, in legislation, reflects exclusiveness is a judicially recognized fact.

72. One may, with regard to the above, readily refer to ***Hari Ram v. Babu Gokul Prasad (AIR 1991 SC 427***), wherein Section 166 of Madhya Pradesh Land Revenue Code, 1954, came up for interpretation. Section 166 of the Code of Madhya Pradesh Land Revenue Code read,

> "166. Any person who holds land for agricultural purposes from a

tenure holder and who is not an occupancy tenant under Section 169 or as protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, shall be ordinary tenant of such land.

Explanation section - For the purposes of this

(i) any person who pays lease money in respect of any land in the form of crop share shall be deemed to hold such land;

(ii) any person who cultivates land in partnership with the tenure holder shall not be deemed to hold such land;

(iii) any person to whom only the right to cut grass or to graze cattle or to grow Singhara (Trapa bispinosa) or to propagate or collect lac is granted in any land shall not be deemed to hold such land for agricultural purposes."

73. In ***Hari Ram (supra)***, Section 166 showed that any person, who holds land for agricultural purposes from a tenure holder and who is not an occupancy tenant under Section 169 or is not a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, shall be ordinary tenant of such a land. Answering the question as to whether a person, who has a mere right to cut grass or to graze cattle or to grow *singhara* (Trapa bispinosa) or to

propagate or collect tax, shall be deemed to hold such a land for agricultural purposes, the Supreme Court observed, "The word *'only'* in Explanation (ii) is significant. It postulates that entire land should have been used for the purposes enumerated. If part of the land was used for cultivation, then, the land could not be deemed to have been granted for cutting grass *only*. It has been found that out of 5 and odd acres of land, 2 acres of land was under cultivation. Therefore, the negative clause in Explanation (iii) did not apply and the appellant became ordinary tenant under Section 166."

74. The decision, in ***Hari Ram*** (supra), makes it clear that the use of the word *'only'* reflects exclusiveness and conveys negativity of the power meaning thereby that had a case, under the new Code, not been made over for trial to an Additional or Assistant Sessions Judge by the Sessions Judge "of the division or had the State Government not directed a case to be tried by an Additional or Assistant Sessions Judge, such a Judge derived no jurisdiction to try such a case, under the old Code, as a Court of Session, for Sub-section (2) of Section 193 used the word *'only'*.

75. Let us, now, turn to the case ***Bhatia International v. Bulk Trading S.A.,*** *reported in* ***(2002) 2 SCR 411***, wherein a three Judge Bench considered the effect

of the omission of the word *'only'* used in the UNCITRAL Model Law. Article 1(2) of the UNCITRAL Model Law reads, "*The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State. As against what Section 1(2) aforementioned reads, Sub-section (2) of Section 2 of the Arbitration and Conciliation Act, 1996 states, "This part shall apply where the place of arbitration is in India*."

76. From a bare reading of Section 1(2) of the UNCITRAL *vis-à-vis* Section 2(2) of the Arbitration and Conciliation Act, 1996, it becomes transparent that in Sub-section (2) of the Arbitration and Conciliation Act, 1996, the word *'only'* stands omitted. It was contended, in ***Bhatia International*** (supra), that India had purposely not adopted Article 1 (2), as a whole, of Article 1(2) of UNCITRAL Model Law and, hence, Section 9 would not apply to arbitral proceedings, which took place outside India. Reacting to the submissions so made, the Supreme Court observed and held, "Thus Article 1(2) of the UNCITRAL Model Law uses the word *"only"* to emphasize that the provisions of that law are to apply if the place of Arbitration is in the territory of that State. Significantly, in Section 2(2) the word *'only'* has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word *"only"*

in Section 2(2) indicates that this sub-section is only an inclusive and clarificatory provision. As stated above, it is not providing that provisions of Part I do not apply to arbitrations which take place outside India. Thus there was no necessity of separately providing that Section 9 would apply.

77. The observations made above, in ***Bhatia International*** (supra), clearly show that the omission of the word *'only'*, in sub-section (2) of Section 2, was treated by the Supreme Court to have changed the whole complexion of the sentence. The Supreme Court accordingly pointed out, in ***Bhatia International*** (supra), that with the omission of the word *'only'*, the provisions of Sub-section (2) of Section 2 had become inclusive and clarificatory and had not, therefore, retained its exclusive characteristic.

78. It would be seen that whereas the expression *"shall"* has been held to be an expression of slippery semantics and does not convey with precision whether the provisions of Section 34(5) are *mandatory* or *directory,* the use of expression *"only",* when applied with the expression *"shall",* shows that the legislature, with an intention to provide a definite life span to the proceedings under Section 34, intended to convey that henceforth, no notice needs to be issued at the instance of principal civil Court; rather, the notice is to be issued by the party himself

and only when the notice has been served, the application can be filed in the principal civil Court so that the time spent in serving notice, at the instance of the principal civil Court, is saved and the litigation can be brought to an end at the earliest possible time. If the provisions of Section 34(5) are held to be *directory,* then, the service of notice may also be done at the instance of principal civil Court, which would mean that if in a given case, the notice is served after three months, the length of litigation gets extended by three months more than the period envisaged under Section 34(6).

79. It may be pointed out that Section 34(6) also uses the expression "*and in any event*". This means the period of litigation, in no circumstances, should exceed 1 (one) year. If the contrary view is adopted, then, the entire purpose of amendment would be rendered *otiose*.

80. Coupled with the above, it can be seen that the legislature intended to make Section 34(5) as a condition precedent before an application can be taken up for hearing. An analogy can be drawn with reference to Section 80 of Code of Civil Procedure, which provides that save as otherwise provided in sub-section (2), no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his

official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office.

81. The Privy Council has held, in ***Bhagchand Dagadusa*** **v.** ***Secretary of State****, reported in* ***(1927) LR 54 IA 338****,* that that the terms of Section 80 should be strictly complied with. The *ratio* of ***Bhagchand Dagadusa*** *(supra) has been approved by the Supreme Court in the case of* **Dhian** ***Singh Sobha Singh v. Union of India (AIR 1958 SC 274****)*

82. The right to file an application in Sub-Section (5) of Section 34 of the 1996 Act (since after the 2015 amendment), arises only when a notice has preceded and an affidavit is filed in support of issuance of such notice. The notice ought to have been issued prior to filing of the application and the issuance of notice by the learned District Judge cannot obviate the initial error. The right to proceed with an application, under Section 34 of the 1996 Act, presupposes the sending of a notice under Section 34 of the 1996 Act and, unless the same is issued, there cannot be an inherent right to file the application and, if so filed, to entertain the same by the Court before whom the same has been filed. The present notice, correctly submitted by the learned Counsel for the appellant, is akin to notice under Section 80 of the Code of Civil Procedure. The object, behind

the enactment of Section 34(5) of the 1996 Act, is solely to expedite the process of disposal of the application within the time-frame of one year, but the issuance of notice is a condition precedent before exercising right to challenging an award. The right is unavailable if the notice has not been issued. This is what emanates from a plain reading of Section 34(5) of the 1996 Act. The 246th Report of the Law Commission of India, at least, indicates the desirability of adjudication of the dispute expeditiously and sub-Section (6) of Section 34 of the 1996 Act clearly supports the same. This objective cannot be said to be achieved if the party, challenging the award, for any reason, does not issue notice prior to filing of the application. Once the objective behind the amendment is taken into account, the decisions, relied upon by the learned Counsel for the appellant, are not found misplaced. Unless a notice under Section 80 of the Code of Civil Procedure with sufficient time of two months are served on the Government or its officials, as contemplated, there is no inherent right to file a suit against the Government; so is the case at hand. Unless there is compliance with the statutory need of sending a prior notice, there is no inherent right of filing the application, under Section 34 of the 1996 Act, challenging an award. If there is no right to initiate a proceeding, its continuation, if filed, ignoring the statutory

provision, does not give right to its continuation. It cannot be regularized by subsequent issuance of notice by the learned Court below. The notice, as prescribed by Section 34 of the 1996 Act, is *mandatory* before proceeding with the filing of an application under Section 34 of the 1996 Act.

83. Viewed from another aspect, a party may be prevented for divergent reasons from filing its written statement in time. The reasoning, once put forwarded, and the court finds the same as exceptional, there is ground for accepting the written statement even when the same is found to have been filed beyond the time prescribed under the law. Here, the same analogy does not fit in or can be applied. The State has not cited any exceptional reasons. In fact, no reason has been cited, at all, for not having issued the notice prior to challenging the award under Section 34 of the 1996 Act. Issuance of a previous notice and filing of an affidavit cannot be claimed to be prevented under any situation. The requirement is simple and can always be followed.

84. Now, turning to the next question as to whether the present appeal is maintainable and whether the original petition was under Article 227 or 226 of the Constitution of India, it may be pointed out that since the filing of the proceeding under Section 34 of the 1996 Act before the learned District Judge is against the statute, the

subsequent order, dated 18.07.2016, cannot cure the initial illegality. As it has already been held hereinabove that the Court of the learned District Judge does not exercise jurisdiction of a regular *civil court* but is a Court of limited jurisdiction, the challenge to the order, dated 18.07.2016, was basically under Article 226 of the Constitution of India and the order passed by learned single Judge, dated 06.09.2016, was, indeed, in exercise of the Article 226 of the Constitution of India, which is appealable under Letters Patent Appeal.

85. The present *letters patent appeal* is, therefore, maintainable.

86. In the result, the appeal stands allowed. However, there shall be not order as to cost.

(I. A. Ansari, CJ.)

Dr. Ravi Ranjan, J. : I agree.

(Dr. Ravi Ranjan, J.)

Pawan/-

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