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Court No. - 19

Case :- WRIT - C No. - 16753 of 2010

Petitioner :- M/S. Magma Leasing Ltd.

Respondent :- Badri Vishal And Ors.

Counsel for Petitioner :- C.K. Parekh

Counsel for Respondent :- S.C.,Shri Prakash Dwivedi

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri C.K. Parekh, learned Senior Counsel assisted by Sri Kumar Ankit Srivastava, learned counsel for the petitioner, and Sri Amit Manohar, learned Additional Chief Standing Counsel.

2. The present petition filed under Article 226 of the Constitution of India principally seeks a writ of certiorari for quashing of the order dated 01.02.2010 passed by the Special Judge, SC/ST Act, Mirzapur in Misc. Case No. 103 of 2008 arising out of Execution Case No. 02 of 2006 (M/s Magma Leasing Limited Vs. Badri Vishal and others.

3. Pleadings of the case indicate that an award dated 30.12.2005 was passed in favour of the petitioner and for enforcement of the said award, an application under Section 36 of the Arbitration and Conciliation Act, 1996 was moved. The aforesaid application came to be dismissed by the Special Judge, SC/ST Act, Mirzapur on 23.02.2008 due to non-appearance on behalf of the applicant. An application for restoration was moved which was also rejected on 01.02.2010 on the ground of being barred by limitation. It is at this stage that the present writ petition was filed.

4. A point at issue, raised at the threshold, is as to whether an order passed by the executing court during the course of

enforcement of an arbitral award would be amenable to a writ of certiorari under Article 226 of the Constitution of India.

5. In order to appreciate the controversy, the relevant provisions under the Arbitration and Conciliation Act, 1996[1], would be required to be adverted to.

6. The Act, 1996 (Act 26 of 1996) was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation. The Act which is based on the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL) applies to both international as well as to domestic arbitration.

7. The procedure for enforcement of arbitral awards under the Act, 1996 is provided for under Chapter VIII of the said Act. The relevant provisions for the purpose, as contained under Section 36 of the Act, 1996 are as follows:

> **"36. Enforcement**.—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.
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> (2) Where an application to set aside the arbitral award has been filed in the court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.
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> (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:
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> Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

1 Act, 1996

8. In terms of sub-section (1) of Section 36 where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

9. It may be worthwhile to notice that under the preceding Act of 1940 (Arbitration Act, 1940), an award had to be filed in the court for making it rule of the court. Objections from the parties were invited, and only when no objection was filed or was sustainable could the court pass a judgement in terms of the award and it was then converted into a decree for enforcement.

10. Under the Act 1996, the aforesaid procedure has been substituted by a simpler procedure of giving affect to the award as a decree. In terms of Section 36 of the Act, 1996, when the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), the award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908[2], in the same manner as if it were a decree of the court.

11. It would, therefore, be seen that the enforcement of an arbitral award under the 1996 Act, is to be made as per the terms of Section 36 and, unlike the 1940 Act, there is no requirement of filing an application to make the award a rule of the court. Under the scheme of the 1996 Act, it would not be possible to resist the enforcement of an award by contending that the award has not been converted into a decree for the reason that the award has now to be enforced as per the procedure under the CPC in the same manner as if it were a court decree.

2 CPC

12. The question as to whether the award of the arbitrator under the 1996 Act tantamounts to a decree or not was considered in **Leela Hotels Limited vs. Housing and Urban Development Corporation Limited[3],** and it was held that the language used in Section 36 makes it clear that such an award has to be enforced under the CPC, in the same manner as if it were a decree of the court. It was observed that the language of the section leaves no room for doubt as to the manner in which the award of the arbitrator was to be accepted.

13. Section 36 of the 1996 Act makes the arbitral award capable of being enforced in a like manner as a decree without any further judicial intervention. The words "as if" occurring in sub-section (1) has been held to create legal fiction for the purpose of enforcement of the award treating the same to be a decree of the court. The aforesaid view was taken in **Paramjeet Singh Patheja Vs. ICDS Ltd.[4].**

14. The provision for enforcement of an award, as per terms of Section 36, having been provided for in the same manner as if it were a decree of the court, it would follow that the court enforcing the award would exercise powers under the CPC which are available to a court executing a decree. This power would not be limited or trammelled by any other provision of the Act, 1996.

15. It would be relevant to notice that the CPC contains elaborate and exhaustive provisions for dealing with the execution of a decree in all its aspects. The numerous rules under Order 21 of the CPC take care of different situations providing effective remedies not only to judgement-debtors and decree-holders but also to claimant-objectors, as the case may be. As per the settled legal position, all questions relating to execution of a decree are to be determined only by the

3 (2012) 1 SCC 302
4 (2006) 13 SCC 322

executing court. Section 47 of the CPC mandates that it is the executing court alone which is to determine all questions relating to execution, discharge or satisfaction of the decree – exclusive jurisdiction having been conferred on the executing court in respect of all such matters.

16. Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realise the fruits of the decree in his favour. The enforcement of an award having been provided for as per terms of Section 36 to be in the same manner, as if, it were a decree of the court, the provisions of the CPC would be applicable to execution proceedings. The court enforcing the award would be a civil court exercising judicial powers and the orders to be passed in these proceedings would be judicial orders.

17. The question as to whether judicial orders of a civil court would be amenable to writ jurisdiction under Article 226 came up for consideration in the case of **Radhey Shyam vs. Chhabi Nath**[5]**,** upon a reference made by a two-Judge Bench of the Supreme Court in terms of an order dated April 15, 2009 in **Radhey Shyam and Another vs. Chhabi Nath and Others**[6]**.**

18. The two-Judge Bench in the case of **Radhey Shyam** (supra) took notice of an earlier Constitution Bench decision in the case of **Sohan Lal vs. Union of India**[7]**,** wherein it was held that a writ of mandamus or an order in the nature of mandamus is not to be made against a private individual and also a subsequent three-Judge Bench decision in **Mohd. Hanif vs. State of Assam**[8]**,** expressing the general principle that the jurisdiction of the High Court under Article 226 is extraordinary in nature and is not to be exercised for the purpose of declaring private rights of the parties. Reference was also made to the

5 (2015) 5 SCC 423
6 (2009) 5 SCC 616
7 AIR 1957 SC 529
8 (1969) 2 SCC 782

decision in **Hindustan Steel Ltd. vs. Kalyani Banerjee**[9]**,** wherein it was held that proceedings by way of writ were not appropriate in a case where the decision of the court would amount to a decree declaring a party's title and ordering restoration of possession.

19. The law laid down in the nine-Judge Constitution Bench in the case of **Naresh Shridhar Mirajkar vs. State of Maharashtra**[10]**,** was also referred, wherein after considering the history of writ of certiorari and various English and Indian decisions, a conclusion was drawn that *"certiorari does not lie to quash the judgements of inferior courts of civil jurisdiction"*. The decision in the case of **Naresh Shridhar Mirajkar** was also seen to have drawn a distinction between judicial orders of inferior courts of civil jurisdiction and orders of inferior tribunals or courts which are not civil courts and which cannot pass judicial orders.

20. Expressing inability to agree with the legal proposition laid down by a two-Judge Bench in the earlier decision in the case of **Surya Dev Rai vs. Ram Chander Rai**[11]**,** to the effect that judicial orders passed by civil courts can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari, the two-Judge Bench in the case of **Radhey Shyam** (supra) made a reference by observing as follows:

> **"26.** The two-Judge Bench in *Surya Dev Rai* did not, as obviously it could not overrule the ratio in *Mirajkar*, a Constitution Bench decision of a nine-Judge Bench. But the learned Judges justified their different view in *Surya Dev Rai*, inter alia on the ground that the law relating to certiorari changed both in England and in India. In support of that opinion, the learned Judges held that the statement of law in *Halsbury*, on which the ratio in *Mirajkar* is based, has been changed and in support of that quoted paras 103 and 109 from *Halsbury's Laws of England*, 4th Edn. (Reissue), Vol. 1(1). Those paras are set out below:

9 (1973) 1 SCC 273
10 AIR 1967 SC 1
11 (2003) 6 SCC 675

> "103. *The prerogative remedies of certiorari, prohibition and mandamus: historical development*.—Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs; …
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> 109. *The nature of certiorari and prohibition*.—Certiorari lies to bring decisions of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, tribunals and public authorities."

The aforesaid paragraphs are based on general principles which are older than the time when *Mirajkar* was decided are still good. Those principles nowhere indicate that judgments of an inferior civil court of plenary jurisdiction are amenable to correction by a writ of certiorari. In any event, change of law in England cannot dilute the binding nature of the ratio in *Mirajkar* and which has not been overruled and is holding the field for decades.

27. It is clear from the law laid down in *Mirajkar* in para 63 that a distinction has been made between judicial orders of inferior courts of civil jurisdiction and orders of inferior tribunals or court which are not civil courts and which cannot pass judicial orders. Therefore, judicial orders passed by civil courts of plenary jurisdiction stand on a different footing in view of the law pronounced in para 63 in *Mirajkar*. The passage in the subsequent edition of *Halsbury* (4th Edn.) which has been quoted in *Surya Dev Rai* does not show at all that there has been any change in law on the points in issue pointed out above.

30. … this Court unfortunately is in disagreement with the view which has been expressed in *Surya Dev Rai* insofar as correction of or any interference with judicial orders of civil court by a writ of certiorari is concerned.

31. Under Article 227 of the Constitution, the High Court does not issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and of law.

32. The essential distinctions in the exercise of power

> between Articles 226 and 227 are well known and pointed out in *Surya Dev Rai* and with that we have no disagreement. But we are unable to agree with the legal proposition laid down in *Surya Dev Rai* that judicial orders passed by a civil court can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari. We are of the view that the aforesaid proposition laid down in *Surya Dev Rai*, is contrary to the ratio in *Mirajkar* and the ratio in *Mirajkar* has not been overruled in *Rupa Ashok Hurra v. Ashok Hurra*[12].
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> **33.** In view of our difference of opinion with the views expressed in *Surya Dev Rai*, matter may be placed before His Lordship the Hon'ble the Chief Justice of India for constituting a larger Bench, to consider the correctness or otherwise of the law laid down in *Surya Dev Rai* on the question discussed above."

21. Upon the reference having been made the question which was considered by the three-Judge Bench in the case of **Radhey Shyam vs. Chhabi Nath[5],** was stated as follows :-

> "**5.** Thus, the question to be decided is: whether the view taken in *Surya Dev Rai*, that a writ lies under Article 226 of the Constitution against the order of the civil court, which has been doubted in the reference order, is the correct view?"

22. The decision of the three-Judge Bench in the case of **Radhey Shyam** (supra) took notice of the nine-Judge Constitution Bench judgement in the case of **Naresh Shridhar Mirajkar,** wherein a judicial order of the High Court was challenged as being violative of fundamental rights and the court by majority held that a judicial order of a competent court could not violate a fundamental right, and even if, there was incidental violation it could not be held to be violative of the fundamental right. The following observations were made (*Mirajkar case*[10], AIR p. 11, para 38):

> "38. The argument that the impugned order affects the fundamental rights of the petitioners under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by

12 (2002) 4 SCC 388
5 (2015) 5 SCC 423
10 AIR 1967 SC 1

> the decision of the Judge takes the matter up before the appellate court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1)."

23. Referring to **Halsbury's Laws of England, 3rd Edition, Vol. 11** and also the observations made in **Kemp vs. Balne**[13] and by Wrottesley, L.J. in **Rex vs. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex Parte White**[14]**,** it was observed as follows (***Mirajkar*** *case*[10], AIR p.18-19, paras 63-64):

> "63. Whilst we are dealing with this aspect of the matter, we may incidentally refer to the relevant observations made by Halsbury on this point. "In the case of judgments of inferior courts of civil jurisdiction", says Halsbury in the footnote,
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> "it has been suggested that certiorari might be granted to quash them for want of jurisdiction (Kemp v. Balne, Dow & L at p. 887), inasmuch as an error did not lie upon that ground. But there appears to be no reported case in which the judgment of an inferior Court of civil jurisdiction has been quashed on certiorari, either for want of jurisdiction or on any other ground"[15].
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> The ultimate proposition is set out in the terms: "Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction". These observations would indicate that in England the judicial orders passed by civil courts of plenary jurisdiction in or in relation to matters brought before them are not held to be amenable to the jurisdiction to issue writs of certiorari.
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> 64. In Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White, the question which arose was whether certiorari would lie from the Court of King's Bench to an ecclesiastical court; and the answer rendered by the court was that certiorari would not lie against the decision of an ecclesiastical court. In dealing with this question, Wrottesley, L.J. has elaborately considered the history of the writ jurisdiction and has dealt with the question about the meaning of the word 'inferior' as applied to courts of law in England in discussing the problem as to the issue of the writ in regard to decisions of certain courts. "The more this matter was investigated", says Wrottesley, L.J.,
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> "the clearer it became that the word "inferior" as applied to

13 (1844) 1 Dow & L 885
14 (1948) 1 KB 195, pp. 205-06
10 AIR 1967 SC 1
15 Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 129, 130.

> courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts, but also palatine courts and admiralty courts are inferior courts. But there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, namely, whether in its proceedings, and in particular in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde".
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> Mr Sen relied upon this decision to show that even the High Court of Bombay can be said to be an inferior court for the purpose of exercising jurisdiction by this Court under Article 32(2) to issue a writ of certiorari in respect of the impugned order passed by it. We are unable to see how this decision can support Mr Sen's contentions."

24. The three-Judge Bench in the case of **Radhey Shyam** (supra), extensively referring to the legal position on the scope of writ of certiorari concluded that orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. It held that the expression "inferior court" is not referable to judicial courts and accordingly judicial orders of civil courts are not amenable to a writ of certiorari under Article 226 and a writ of mandamus does not lie against a private person not discharging any public duty. It was also held that the scope of Article 227 is different from Article 226. It was observed as follows:

> **"25.** … Courts are set up under the Constitution or the laws. All the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all the High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts. Control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to

> the judicial courts, ...
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> **27.** Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.
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> **29.** Accordingly, we answer the question referred as follows:
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> **29.1.** Judicial orders of the civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.
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> **29.2.** Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.
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> **29.3.** Contrary view in *Surya Dev Rai*, is overruled."

25. Having regard to the foregoing discussion the legal position which thus emerges is that judicial orders of civil court would not be amenable to writ jurisdiction under Article 226 and that challenge thereagainst can be raised under Article 227.

26. Applying the aforestated legal principles to the facts of the present case, an order passed by the executing court in proceedings for enforcement of an arbitral award under Section 36 of the Act 1996, being a judicial order passed by a civil court of plenary jurisdiction, the same would not be amenable to a writ of certiorari under Article 226 of the Constitution of India.

26. Learned Senior Counsel appearing for the petitioner has not disputed the aforesaid legal position.

27. The petition thus fails the test of being amenable to the writ jurisdiction under Article 226 of the Constitution of India. It stands **dismissed** accordingly.

Order Date :- 18.11.2021

Pratima/Kirti

(Dr.Y.K.Srivastava,J.)