2026 INSC 591

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2026

(Arising out of SLP (Civil) No. 18146 OF 2025)

ASHOK AND ORS. …**APPELLANTS**

VERSUS

PADAM CHAND AND ORS. …**RESPONDENTS**

J U D G M E N T

J.K. MAHESHWARI, J.

1. Leave Granted.

2. The Appellants herein assail the judgment and final order dated 30.01.2025 passed by the High Court of Madhya Pradesh, Bench at Gwalior *(hereinafter,* ***'High Court'****)*, in First Appeal No. 252/2010. By the impugned judgment, the High Court affirmed the decree of the Xth

Additional District Judge, Gwalior *(hereinafter,* ***'Trial Court'****)*, dated 22.07.2010, which dismissed the Appellants' suit for possession and mesne profits mainly on the premise that an earlier arbitration award in relation to the same suit property had attained finality.

3. For the sake of convenience, the parties shall hereinafter be referred to in accordance with their status before the Trial Court, i.e., the Appellants as the Plaintiffs and the Respondents as the Defendants.

FACTUAL BACKDROP

4. It is the case of the Plaintiffs that the suit property, a three-storey commercial-cum-residential building situated at Sarafa Bazar, Lashkar, Gwalior was sold to one Pandit Krishna Biharilal by Smt. Patto *vide* registered sale deed date d. 24.07.1941. By a Mortgage Deed dated 19.10.1948, Krishna Biharilal mortgaged the suit property in favour of one Baburao Suryavanshi in lieu of certain loan. On the failure of Krishna Biharilal to repay the loan, the suit property was put up for auction sale in Execution Case No. 29/56-1963 in the Court of the Second Additional District Judge, Gwalior

5. On 07.04.1964, the original Plaintiff, i.e., Haridas emerged as the successful bidder and purchased the suit property. As per the recitals in the plaint, the auction was confirmed on 16.08.1973, and a Sale Certificate was issued on 30.08.1973. As the building was occupied by various tenants, symbolic possession was handed over to Haridas on 22.09.1973.

6. As the suit property was in possession of various tenant, Haridas instituted multiple eviction proceedings. In one such proceeding i.e., Eviction Suit No. 274/1975 which was instituted against one Harikishan and Munnalal, it came to light through the written statement of a tenant that Defendant No. 1 had forcefully occupied two rooms, two halls and a courtyard in the rear side of the ground floor, that was otherwise in possession of Harikishan and Munnalal. Thereafter, the Defendants, in connivance with the tenants adopted wrongful means including assault to keep the possession of the said portion of the suit property and also started making claims regarding ownership of upper floors of the suit property. The said instance of assault has been attempted to be

substantiated in the present Appeal by producing a complaint that was filed against Defendants on 15.07.1981 under Sections 147, 148, 149 and 323 read with 34 of Indian Penal Code *(hereinafter,* ***'IPC'****)*. Consequently, Plaintiff Haridas filed Civil Suit No. 3A/1982[1] *(hereinafter,* ***'1982 Suit'****)* seeking recovery of physical possession and mesne profits. Since much has been argued around identification of the suit property, it is to be noted that as per the plaint, the suit property is identified as having three passageways on three sides of the courtyard, inside one passageway there is one room and one square, and having three storey.

7. During the pendency of the Civil Suit No. 3A/1982, the Plaintiffs and the Defendants referred the dispute for arbitration *vide* referral letters dated 28.02.1983, 10.03.1983 and 01.08.1983 wherein the Plaintiffs were party no. 1 and Defendants were party no. 2. This referral culminated in award dated 15.09.1983 whereby the operative part of the award read as follows –

> *"We all Panch together read Plaints of both the parties and discussed with concerned persons. Understood intentions of*

[1] *later renumbered as CS 34A/2010*

both the parties, made valuation of house through brokers persons of market, since both the parties has in written as well as oral has assured that they will accept the decision of Panchayat with goodwill, Panchayat expects from both the parties that for maintaining decorum of Panchayat Panch and their relations they will accept this decision which is expected and believed.

(1) Both the Parties will end civil and criminal litigations pending, against each other.

(2) If Party No. 2 wants registry in four parts then Party No. 1 Shri Haridas will do.

(3) Remaining house tax etc related to the house and registry expenses will be borne by Party No. 2.

(4) Whatever rent till date is of the house, Party No. 2 will have the right to receive the same. The amount which is deposited in court of rent, Party No. 2 will have the right to receive the same and Party No. 1 will facilitate.

(5) Party No. 2 will give 2,75,000/- Two Lakhs Seventy Five Thousand only to the Party No. 1 i.e. Shri Haridas Etc, and Party No. 1 Sri Haridas ji will do registered sale deed in the name of Party No. 2 Shri Padamchand ji etc."

8. On 23.12.1983, Defendants filed Case No. 43A of 1984 (*hereinafter,* ***'1984 Proceedings'***) before the Trial Court praying to direct the umpire to present the award as well as the related documents to the Court, the arbitral award be made the Rule of the Court and on its basis a decree be passed and, expenses for these proceedings be provided.

9. In the *interregnum,* the Defendants had filed an application under Section 34 of the Arbitration Act, 1940 (*hereinafter,* ***'1940 Act'***) in 1982 Suit seeking to stay the

said proceedings. The Trial Court dismissed the said application on 10.02.1984 on the grounds that the date of alleged agreement between the parties was not stated in the application and it was not clear whether the alleged agreement was in writing. Aggrieved by rejection of the said application, Defendants filed Civil Revision No. 412 of 1984 before the High Court which was dismissed summarily. On 23.04.1988, the Trial Court framed 9 issues in the 1982 Suit. Subsequently, original Defendant No. 2-4 in the 1982 Suit moved an application therein seeking to amend their Written Statements and incorporate para 18 and 19 to state that during pendency of the 1984 Proceedings, the 1982 Suit be stayed. This application was allowed by the Trial Court *vide* order dated 08.03.1990. Aggrieved thereof, the Plaintiffs filed Civil Revision No. 105 of 1990 before the High Court. High Court disposed of the said revision *vide* order dated 10.10.1990 with following directions – (a) the Trial Court shall proceed to try the 1982 Suit but shall not pronounce final judgment till the decision of the 1984 Proceedings and; (b) the hearing of the 1984 Proceedings shall be

expedited. Subsequently, on 06.11.1990, the Trial Court framed issue nos. 10 and 11.

10. Later, Plaintiffs filed an objection application in the 1984 Proceedings under section 47 of the 1940 Act. *Vide* order dated 19.12.1990, the Trial Court dismissed the said application on the grounds that, *firstly,* the subject matters of the 1982 Suit and 1984 Proceedings are different and in fact, only a portion of the subject matter of the 1984 Proceedings is the subject matter of the 1982 Suit. *Secondly,* in the 1984 Proceedings, apart from Haridas, who is the Plaintiff in the 1982 Suit, there are other parties as well, hence, a reference of the dispute for arbitration without leave of the Court is not fatal as such.

11. Aggrieved against the dismissal of the objection application under Section 47 of the 1940 Act, the Plaintiffs again knocked the doors of the High Court by filing Civil Revision No. 43 of 1991. High Court *vide* order dated 24.02.1992 disposed of the revision with following directions:

> *"After hearing (sic) Counsel at some length, to take care of the grievances made on both sides, in the interest of justice, the following directions are made to prevent protraction in*

litigation. Accordingly, the impugned order dated 19-12-1990, passed by the Court below, in Civil Suit Ho. 43-A of 1984, stands modified in terms of the directions here in after made:

(1) In the aforesaid suit, application was filed on 21-12-1983 by the non-petitioners for making the award dated 15-9-1983 (sic), rule of the Court. It is submitted that in the application which was filed u/s 47 proviso of the Arbitration Act, 1940, in regard to that award, it has been contended that the arbitration agreement was void, being procured through coercion, accordingly, that objection shall be decided by the trial Court in terms of the provision (sic) 30 (c) of the Act. It shall be open to the parties to adduce evidence and, indeed, it shall to competent for the trial Court to frame specific issues for deciding finally the application of the non-petitioner dated 21-12-1983 in terms of the order to be passed u/s 30 (c) of the Act, within three months, the final order of the court shall be passed in terms of S.30(c) in civil suit no. 43-1/1984.

(2) Between the same parties, in the same court, is pending trial Civil Suit No. 3-A/1982. It is submitted that evidence is being recorded in that suit. However, trial of that suit shall be kept in abeyance for a period of six months and in the face of the decision made u/s 30(c), aforesaid, going in favour of the Plaintiff-Petitioner, the proceedings for trial of the suit would continue and from the stage left and the suit shall be decided in accordance with law without taking into consideration anything that transpired in the proceedings in Civil Suit No. 43-A/1984. However, should the plaintiff-petitioner fail in the other proceedings, in Civil Suit No. 43-A/1984, it would be open to him to press the objection made under the proviso to s. 47 that the compromise which had been entered could be considered only in terms of Order 23 Rule 1 C.P.C. Eventually therefore, the order passed in Civil Suit No - 43/1984 u/s 30(c) of the Act would be subject finally to the order to be passed on the pending application preferred u/s 47 proviso disposed of by the impugned order which shall be dealt with afresh in the pending suit.

12. Thereafter, the original Plaintiff filed review petition bearing MCC No. 155 of 1992 against the order dated

24.02.1992 in Civil Revision No. 34 of 1991 on the ground that he had recently undergone some operation and is gradually losing his voice, hence he wanted to be cross-examined on the next date. High Court allowed the said prayer *vide* order dated 01.05.1992. In the meanwhile, Plaintiffs also filed an objection under Section 30 of the 1940 Act in the 1984 Proceedings on the grounds that the so-called arbitration agreement is a result of coercion and the so-called reference without leave of the Trial Court is illegal.

13. Subsequently, the Trial Court, *vide* judgement dated 02.08.2000 decreed the 1984 Proceedings while also disposing of the objection application filed by the Plaintiff under Sections 30(c) of the 1940 Act and made the award a Rule of the Court primarily on the grounds that – (i) the Defendants were not aware of the pendency of the 1982 Suit and even if it is assumed that they were aware, referring the dispute for arbitration while a suit is pending is not illegal as the subject matter of both the suits are different; (ii) prior consent of the Plaintiff was voluntary and award obtained subsequently is not illegal and; (iii)

the award was communicated to the Plaintiff within limitation period and hence, it is not illegal.

14. Aggrieved against the decree passed in the 1984 Proceedings, Plaintiffs preferred Miscellaneous Appeal No. 674 of 2000 before the High Court.

15. Simultaneously, on 08.10.2001, Plaintiffs also moved an application in the 1982 Suit under Order 6 Rule 17 and Order 14 Rule 5 of Code of Civil Procedure, 1908 (*hereinafter,* ***'CPC'***) seeking amendment of the pleading and framing of additional issues that seems to have been necessitated by the order passed in 1984 Proceedings. Trial Court dismissed the said application *vide* order dated 20.02.2002, with a finding that these applications have been moved with an intent to delay the proceedings and that proposed amendments and additional issues are not necessary for disposal of the 1982 Suit. It is forthcoming from the records that against rejection of these application, Plaintiffs filed Civil Revision No. 267 of 2002 before the High Court but was withdrawn with liberty to seek any appropriate relief before the appropriate forum. Nonetheless, Plaintiffs again approached the High Court

by way of Writ Petition No. 2058 of 2005 seeking to challenge the order rejecting application under Order 6 Rule 17 of CPC. High Court dismissed the said writ petition observing that since the Plaintiffs was to raise pure questions of law by way of amendment, same can be raised at the stage of final arguments even without amendment.

16. In the due course thereafter, Miscellaneous Appeal No. 674 of 2000 preferred by the Plaintiffs challenging the order of the Trial Court in the 1984 Proceedings came to dismissed by the High Court *vide* order dated 05.04.2006 with following observations:

> *"10. This Court with the consent of the parties modified the order dated 19.12.1996 passed in C.S. No.43A/84. From perusal of para 2 of the order dated 24.2.92, it is very clear and specific that the appellants never raised any objection at the time of passing of the order dated 24.2.92 nor the appellants challenged the order passed by this Court on 24.2.92. This Court In this order dated 24.2.92 very specifically directed that if appellants, who were plaintiffs in C.S. No. 3A/82, fall in the proceedings in C.S. No.43A/84, it would be open to them to press the objection made under the Proviso to Section 47 of the Act that the compromise which had been entered could be considered only in terms of the Order 23 Rule I. C.P.C. All the orders passed in C.S. No.43-A/84 would be subject to finality to the order to be passed on the pending application preferred under Section 47 Proviso disposed of by the impugned order which shall be dealt with afresh in the pending suit. Thus, from the aforesaid finding of this Court, it is clear that after the order*

dated 24.2.1992 the pending application under Section 47 shall be dealt with afresh in the pending suit, i.e., in C.S. No.3A/82 (sic). Thus, if the petitioner has any grievance in respect of the impugned order, the said grievance of the petitioner can be decided afresh in the pending suit. Now the petitioner is free to raise the objection made under the proviso to section 47 of the Arbitration Act, 1940, afresh in the pending Civil Suit No. 3A/82. Now at this stage, he cannot raise objection under Section 47 of the Arbitration Act by filing this appeal under Section 39 of the Act. It is well settled that, ordinarily it is not open to the appellate Court to substitute its own opinion unless it is shown that the Court below has acted unreasonably or capriciously or has not adopted the general approach in the matter. Learned counsel for the appellants has failed to show any material for coming to a different conclusion, he also could not make out a case for interference and could not show that how the judgment of the Court below making the judgment as a rule of the Court is unjustifiable. Thus. I do not find any merit or substance in the appeal filed by the appellants and no case is made out by the appellants for Interference by this Court in this appeal in the reasonings adopted by the Court below in making the award a rule of the Court.

11. In the result, the appeal filed by the appellants is accordingly dismissed with no order as to costs."

Subsequently, Special Leave Petition No. 12710 of 2006 filled by the Plaintiffs against the dismissal of the Miscellaneous Appeal No. 674 of 2000 was also dismissed by a division bench of this Court *vide* order dated 14.08.2006.

17. After dismissal of Miscellaneous Appeal No. 674 of 2000, the Defendants filed Execution Petition No. 43A/84/2001 in the 1984 Proceedings. The Plaintiffs filed

an objection as well as an application seeking stay of execution thereto, which came to be dismissed by the Trial Court *vide* order dated 11.01.2008. Aggrieved thereby, the Plaintiffs instituted Writ Petition No. 1518 of 2009, which came to be dismissed by the High Court on 12.08.2008.

18. Plaintiffs again moved an application on 28.08.2008 under Order 6 Rule 17 of CPC seeking amendment of plaint in the 1982 Suit, specifically, insertion of Para 8(A) pertaining to objections regarding the arbitral award. Trial Court allowed the amendment application on 04.11.2008 while noting the necessity of such amendment in light of the liberty granted by the High Court while dismissing Miscellaneous Appeal No. 674 of 2000. Consequently, Trial Court also allowed the application of Defendants seeking to amend their Written Statements in the 1982 Suit. In the meanwhile, *vide* order dated 17.11.2008, the Trial Court granted injunction in favour of the Plaintiffs while adjudicating the application under Order 39 Rules 1 and 2 of CPC which came to be quashed by the High Court on 20.03.2009 in Miscellaneous Appeal No. 1363 of 2008 filed by the Defendants.

19. Plaintiffs again made an application before the Executing Court seeking stay of the proceedings which was rejected as per order sheet dated 16.04.2009. Said rejection was challenged before the High Court in Writ Petition No. 2253 of 2009, only to be dismissed *vide* order dated 21.10.2009.

20. The Trial Court allowed another amendment to the plaint in the 1982 Suit, whereby Para 8(B) was sought to be added pertaining to a sale deed dated 03.11.2009 executed by the Plaintiffs in the favour of the Defendants, which was subject to final outcome of the 1982 Suit.

21. This long-drawn litigation before the Trial Court in 1982 Suit came to its conclusion on 22.07.2010 whereby the Trial Court dismissed the 1982 Suit. Findings of the Trial Court can be summarized as follows:

a) Plaintiff purchased the suit property through court auction and obtained symbolic possession as well.

b) Defendants failed to prove their possession for last 40 years over the suit property. Moreover, the

ancestor of the Defendants i.e., Lakhmichand, was a tenant in the suit property.

c) No agreement proved between the parties that the property would be transferred in the name of the ancestor of the Defendants in lieu of amount of court auction being paid to the original Plaintiff.

d) The Defendants were not aware of pendency of the 1982 Suit on the date when dispute was referred to the arbitrator and in fact the Plaintiffs could have taken the leave of the Trial Court as per mandate of Section 21 of the 1940 Act. Settlement/arbitration proceedings concluded between the parties is not illegal.

e) Subject matter of the 1982 Suit and the arbitral proceedings is different.

f) Both the parties directed to bear their respective costs.

22. Aggrieved by the decision of the Trial Court, Plaintiffs preferred First Appeal No. 252 of 2010 before the High Court. During pendency of the Appeal, the High

Court, *vide* order dated 26.05.2017, directed the parties to maintain *status-quo* regarding the suit property. On 08.01.2019, the application filed by the Defendants seeking vacation of the *status quo* order was dismissed by the High Court. Subsequently, on 21.01.2025, the Plaintiffs moved an IA No. 599 of 2025 before the High Court seeking production of following additional documents – (a) complaint dated 13.07.1981 made by the original Plaintiff to the Superintendent of Police that the Defendants are pressuring and assaulting him to sell the suit property, (b) private complaint no. 4732/82 made by the original Plaintiff before the CJM, Gwalior, (c) copy of notice dated 13.10.1981 issued against original Plaintiff in Case No. 1000/81 which was registered by the Defendant in connivance with the police, (d) judgement in Criminal Case no. 2420 of 1982 arising out of FIR lodged by the Defendants against the original Plaintiff whereby he was acquitted, (e) complaint dated 03.08.1983 made by the original Plaintiff alleging his abduction by the Defendants and having obtained signature of the original Plaintiff on a stamp paper, (f) Case no. 165/1984 under Section 111 of

Criminal Procedure Code, 1973 filed by Defendants against the original Plaintiff, (g) copy of complaint made by Plaintiffs dated 20.12.1983 to the Hon'ble Chief Justice of the High Court and, (h) reminder letter dated 24.02.1984 when no action was taken on complaint dated 20.12.1983.

23. *Vide* impugned order dated 30.01.2025, the High Court dismissed the First Appeal No. 252 of 2010 along with the IA No. 599 of 2025, primarily on the following grounds:

a) Plaintiff did not produce any proper explanation that why the additional documents were not produced before the Trial Court even when the original Plaintiff categorically deposed in his cross-examination that he possess all these documents.

b) It is not open for the Appellate Court to substitute the findings of the Trial Court, unless such findings are unreasoned or capricious.

c) Plaintiffs have not pleaded specifically in the plaint regarding forgery, coercion or misrepresentation and thus, such contention fall in the teeth of Order 6 Rule 4 of CPC.

d) Subject matter of the 1982 Suit and the arbitral proceedings is different and hence, Section 21 of the 1940 Act is not applicable.

24. Plaintiffs have challenged the impugned order by way of the present appeal, with a hope to conclude this long-drawn litigation.

ARGUMENTS ADVANCED

25. Learned Senior Counsel Mr. Dama Seshadri Naidu, appearing for the Plaintiffs submitted that:

a) The 1940 Act contemplates three classes of arbitration: (i) Chapter II i.e., arbitration without intervention of the Court, which presupposes a pre-existing arbitration agreement; (ii) Chapter III i.e., arbitration with intervention of the Court where there is no suit pending (Section 20), which also presupposes a pre-existing arbitration agreement; and (iii) Chapter IV i.e., arbitration in suits (Section 21), which alone applies where, at the time of reference, a suit is pending.

b) Even if any of the alleged referral letters are treated as a valid arbitration agreement under Section 2(a) of the

1940 Act, none is pre-existing in relation to the 1982 Act. The arbitration cannot fall within Chapters II or III. It must, obviously then, fall within Chapter IV; and Section 21 mandates an order of reference by the Court, which was admittedly never obtained.

c) The Defendants had knowledge of the 1982 Suit prior to the Award. By the order sheets of the Trial Court, summons were sent to the Defendants over fifteen times; substituted service by affixation was ordered on 18.10.1982; and service by paper-publication was ordered on 06.08.1983; all prior to the Award dated 15.09.1983.

d) The subject matter of the 1982 Suit and the arbitration was the same. The Trial Court, by its order dated 08.03.1990, accepted this position on an application filed by the Defendants themselves and stayed 1982 Suit on that very ground.

e) The Award could only be acted upon under the proviso to Section 47, which requires the post-award consent of all the parties for treating the award as a compromise under Order XXIII Rule 3 CPC. The Plaintiffs have, throughout, opposed the Award.

26. *Per Contra,* learned Senior counsel Mr. NK Mody, and learned counsel Mr. Divyakant Lahoti, appearing for the Defendants made following contentions:

a) Section 21 of the 1940 Act is not applicable to the facts of the present case. The Defendants had no knowledge of the pendency of the 1982 Suit at the time of the reference to arbitration as they were not served until 21.09.1983, the day on which they entered appearance for the first time.

b) The Plaintiffs failed to file any application under the proviso to Section 47 of the 1940 Act in the 1982 Suit despite repeated opportunities. The order of the High Court dated 24.02.1992 expressly required them to do so, and so did the order dated 05.04.2006. The Trial Court, in paragraph 23 of the impugned judgment, has rightly held that no application was filed and that the proviso to Section 47 cannot be invoked.

c) The parties to the arbitration proceedings and the 1982 Suit are not the same. The Award was made between (i) Haridas, his seven brothers Babulal, Bhagwandas, Radhelal, Prakashchand, Ramswaroop, Chotelal and

Mahendra Kumar (s/o Motilal), all having authorised Haridas to act on their behalf, and (ii) Padam Chand, Satish Kumar, Rakesh Kumar, Mukesh Kumar and Umesh Kumar, all five having authorised Padam Chand to act on their behalf. On the other hand, the 1982 Suit was between Haridas and the four Padam Chand brothers.

d) I.A. No. 599 of 2025 is rightly rejected by the High Court. The documents sought to be brought on record were available with the original Plaintiff during his cross-examination and were neither produced nor proved at the trial. They cannot be produced at the appellate stage after a delay of over four decades.

ANALYSIS

27. Having heard the learned counsel for both the parties and having perused the records, we find that the following questions arise for consideration in the present appeal:

(1) Whether the subject matter of the 1982 Suit and the arbitral proceedings were identical or substantially the same, and whether the courts below erred in holding otherwise?

(2) Whether the Defendants had knowledge of the pendency of the 1982 Suit at the time of reference to arbitration, and what legal consequence flows from such knowledge upon the validity of the Award as pleaded in the 1982 Suit?

(3) Whether the arbitral proceedings culminating in the Award dated 15.09.1983 fell within the ambit of Chapter IV of the 1940 Act, and consequently, whether the absence of a formal order of reference by the Trial Court under Section 21 of the 1940 Act renders the Award legally ineffective with respect to the Plaintiffs' suit for possession and mesne profits in the 1982 Suit?

(4) Whether, the arbitral Award could have been used to non-suit the Plaintiffs in the 1982 Suit, in the absence of post-award consent of all parties as required under the proviso to Section 47 of the 1940 Act?

(5) Whether the High Court, while affirming the dismissal of the 1982 Suit, fell into error by treating the Award as having attained finality so as to

preclude an independent examination of its validity in relation to the 1982 Suit, particularly in light of the liberty expressly reserved to the Plaintiffs by the High Court's own orders dated 24.02.1992 and 05.04.2006?

(6) Whether the 1982 Suit, filed by the Plaintiffs seeking possession and mesne profits, deserves to be decreed?

28. For sake of convenience, all these issues are being examined simultaneously and summarized separately in the latter part of the judgment.

29. Before proceeding to examine the rival contentions, it is necessary to briefly advert to the statutory scheme of the Arbitration Act, 1940, insofar is relevant for purposes of present Appeal. The 1940 Act, as it stood at the relevant time, contained VII chapters. Chapter I contained introductory provisions. Chapter II dealt with arbitration without intervention of a Court. Chapter III was titled as 'Arbitration with intervention of a Court where there is no suit pending', on the other hand, Chapter IV dealt with arbitration in suits. Chapter V contained general

provisions like grounds for setting aside award, effect of legal proceedings on arbitration, etc. Chapter VI dealt with appeals and the last Chapter i.e., Chapter VII contained certain miscellaneous provisions.

30. Therefore, it is apparent that the 1940 Act envisioned three distinct modes of arbitration through Chapters II, III and IV. To be able to understand the mandate of Chapter II, it is necessary to refer to Section 2(a) and Section 3 of the 1940 Act, which are reproduced as thus:

> ***"2.*** *In this Act, unless there is anything repugnant in the subject of context, - (a). "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.*
>
> ***3. Provisions implied in arbitration agreement*** *– An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to reference."*

Thus, read contextually, it is apparent that for an arbitral proceeding to fall within Chapter II, there has to be a written agreement to the effect of submitting present or any future differences.

31. As far as Chapter III is concerned, it contains only one provision, *viz.,* Section 20. For ready reference, said provision is reproduced as thus:

> ***"20. Application to file in Court arbitration agreement****:- (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any or them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.*
>
> *(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.*
>
> *(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.*
>
> *(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by Court.*
>
> *(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."*

As per this section, where parties have entered into an arbitration agreement before the institution of a suit and a dispute has arisen covered by that agreement, they may apply to the relevant Court to have the agreement filed, instead of proceeding under Chapter II. This application must be made in writing and is registered as a suit, with the applicants treated as plaintiffs and the remaining parties as defendants. Once the application is made, the Court issues a notice to all other parties to the agreement, asking them to show cause within a specified time as to why the agreement should not be filed. If no sufficient cause is shown, the Court orders the agreement to be filed and refers the dispute to the arbitrator appointed by the parties, or if they cannot agree on one, to an arbitrator appointed by the Court itself. The arbitration then proceeds in accordance with the other applicable provisions of the Act.

32. Chapter IV of the 1940 Act contain Sections 21 – 25. Section 21 provides that parties to suit may apply for order of reference. Said provision is reproduced as thus:

> ***"21. Parties to suit may apply for order of reference:-*** *Where in any suit all the parties interested agree that any*

matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

The first condition for invoking Section 21 is that the parties to the suit must agree that any matter of difference between them shall be referred to arbitration. All interested parties must agree and apply to the court where the suit is pending to obtain an order of reference to arbitration. The subject-matter of the reference must be any of the matters between the parties to the suit. Entire subject-matter of the suit may not be referred to arbitration. Parties may agree to only refer a part or portion of the dispute to arbitration. In the context of Section 21, the court can refer a dispute/difference subject-matter of a suit when the parties mutually agree to arbitration. There must be a meeting of minds between the parties to go for arbitration in respect of a subject-matter in a pending suit.[2]

33. Section 22 deals with appointment of arbitrator, which is to be done as may be agreed by the parties.

[2] M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit v. Modi Transport Service, (2022) 14 SCC 345

Section 23 explains the manner in which the order of reference is to be made. Section 24 provides that if only some of the parties to the suit have applied for order of reference, in that situation, the suit may proceed *qua* those who have not applied and reference can be made only with respect to parties who have applied, if the subject-matter is separable. Lastly, Section 25 mandates application of other provisions of the 1940 Act for arbitration under Chapter IV except as provided in the proviso therein.

34. The significance of this three-pronged scheme lies in the fact that the three chapters are mutually exclusive. Therefore, a reference to arbitration, depending upon the factual matrix of each case, must necessarily fall within one and only one of these chapters, and the procedural requirements of the applicable chapter cannot be bypassed or circumvented.

35. Yet another important aspect of the 1940 Act is Section 47, particularly, the proviso appended therein. For ready reference, the said provision is reproduced as thus:

> ***"47. Act to apply to all arbitrations:-*** *Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:*
>
> *Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.***"**

36. Section 47 provides that the provisions of the 1940 Act shall apply to all arbitrations and to all proceedings, subject to the provisions of Section 46 and any other law for the time being in force. Nonetheless, the proviso appended therein stipulates an arbitration award that has been obtained without adhering to the mandate of the 1940 Act. In such a situation, it is provided that with consent of all the parties, such an award may be taken into consideration as a compromise of adjustment of a suit by any Court before which the suit is pending. It is in this statutory backdrop, we proceed to adjudicate the present Appeal.

37. It is the first and foremost contention of the Plaintiffs that without following the mandate of Section 21 of 1940 Act, the dispute could not have been referred for arbitration when 1982 Suit was pending with respect to

same suit property. The Defendants countered this argument by contending that the subject-matter of the arbitral proceedings and the 1982 Suit is different. The Trial Court, as well as the High Court, have accepted the contention of the Defendants on the ground that only a part of the subject matter of the arbitral proceedings is subject matter of the 1982 Suit. Hence, Section 21 of the 1940 Act was found to be inapplicable.

38. In this context, identification of the subject-matter of the arbitral proceedings as well as the 1982 Suit becomes necessary. A reference to the plaint of the 1982 Suit is helpful in this regard. Para 1 therein is relevant and hence reproduced:

> *"1. The house in respect of which this claim is made, is situated in Sarafa Bazar Lashkar in the State Bank line behind, towards the lane of Mor Bazar, in which there are three passageways on three sides of courtyard, inside one passageway there is one room and one square, and the house which is shown with diagonal lines of red ink in the attached map, that house three storey, boundaries of which is as under:*
>
> *North: House of Mannu Khan which is now with Deennath Sunar and house of Narayan Das Babulal.*
>
> *South: Large part of Plaintiffs House which is adjacent to the disputed house.*
>
> *East: Mandir Swa Man Saaligram ji ka.*

West: Room of Plaintiffs house and alley leading to Mor Bazar.

And Municipal numbers always keep changing, hence it is not being given."

39. From above-quoted portion, the house number or the municipal number of the suit property is not mentioned. To ascertain the same, we may profitably refer to the court auction certificate issued in favour of the Plaintiffs in Case No. 29/56-1963 on 30.08.1973 forming the basis of their claim in the 1982 Suit, which is undisputed. The relevant portion of the said certificate is reproduced as thus:

"*Specification of properties:-*

House property situated at Sarafa Bazar, Lashkar, specified in the map annexed herewith as moertgaged and sold is bounded as below –

HOUSE MUNICIPAL NO. 03/10 (OLD)

1. To the East – Sarafa Road, Lashkar

2. To the West – Municipal Lane

3. To the North – Mandir Shri Shaligramji & House of Mannu Khan

4. To the South – House of Manoharmal at present Jwala Prasad Das"

40. Similarly, subject-matter of the arbitral proceedings has been provided in referral letter dated 28.02.1983 as follows:

> ***"****(1) That, the dispute is of one house which is situated in Sarafa Bazaar, we in year 1964 purchased it by way of auction. By fighting case uptill Supreme Court we got our rights on the house which is Constitutional, this property is offered by our family for development of Dharamshala.*
>
> *(2) That, Shri. Padamchand Son of Late Shri Gulabchand ji and his brothers has forcibly occupied some part of this house, and by creating disputes without any reason are included for quarrel which is completely inappropriate and irrelevant.****"***

Plaint of the 1984 Proceedings is also germane in this regard, wherein the description of the subject-matter of the arbitration is contained in Para 1-3. Said portion of the plaint is reproduced as thus:

> ***"****(1) That, between the Applicants and the Non-Applicants dispute arose over property situated at Safra Bazar, Lashkar. The disputes arose over the building, description of which is as under:*
>
> *SavikMyu. House No. 3/10 p nya 45/132*
>
> *Boundaries:-*
>
> *East - House of Salagram*
>
> *West- Alley*
>
> *North- House of Deenath Narayan Das Babulal*

South- House of Jawalaprasad Narayandas

Situated at- Sarafa Bazar, Lashkar

Ward no. 10 (Old) New 132

(2) That, the aforesaid house was purchased in auction in the name of Non-Applicant.

(3) That, in respect of the aforesaid building, when the dispute arose, an agreement was made between Applicants and Non- Applicants whereby on 10-3-1983 the aforesaid dispute was handed over to a Punch Nimaya Samiti."

41. On bare perusal of the reproduced portions and looking at the description as provided and the house number as contained in the Plaint of the 1984 Proceedings and Court auction certificate dated 30.08.1973, we are not in a position to come to a conclusion that the subject-matter of the arbitral proceedings and the 1982 Suit was distinct. It is crystal clear from the perusal of the recitals that the dispute in the both the proceedings pertained to the same house. Additionally, it is also to be noted that keeping in mind this commonality of subject-matter, the Trial Court in the 1982 Suit *vide* order dated 08.03.1990 stayed the said suit during pendency of the 1984 Proceedings on the ground that the subject-matter of both the proceedings is one and the same.

42. It has been further contended by the Defendants that they were unaware of the pendency of the 1982 Suit at the time of referring the dispute to arbitration, and therefore had no occasion to seek the permission of the Trial Court for such reference in terms of Section 21 of the 1940 Act. At the outset, it must be noted that knowledge of pendency is not a *sine qua non* for the applicability of Section 21 of the 1940 Act. The provision requires only two conditions to be satisfied: (i) a suit must be pending, and (ii) the parties interested must agree to refer the dispute, or any part thereof, to arbitration. This position is reinforced by a comparison with Section 20 of the 1940 Act, which governs arbitration with court intervention in cases where no suit is pending. The language employed therein *"where any persons have entered into an arbitration agreement before the institution of any suit..."* makes the fact of institution of the suit the determinative factor. Thus, Sections 20 and 21 operate in distinct but complementary fields, together forming a complete code governing arbitration with court intervention, depending on whether a suit is pending or not. A contextual reading

of these provisions makes it clear that the legislature has not treated *'knowledge'* of pendency as a relevant or determinative consideration. Rather, the statutory scheme makes the *'institution'* or *'pendency'* of the suit a determinative factor.

43. Notwithstanding the preceding paragraph, even if we consider this argument to be acceptable on the face of it, it is an admitted fact that the Award was passed on 15.09.1983, while the service of the summons on the Defendants was completed in the 1982 Suit on 06.08.1983. In this view of the fact, it cannot be said that Defendants did not have any occasion to exercise option under Section 21 of the 1940 Act since the arbitral proceedings had still not concluded on the date when summons were served to Defendants. At this juncture, it also to be noted that as per the case of the Plaintiffs, they had never applied for order of reference before the Trial Court as required under Section 21 of 1940 Act. Similar is the situation with respect to Defendants. Even otherwise, as already discussed, the requirement under Section 21 is that *all the parties interested* must agree that the matter

in difference between them in suit shall be referred to arbitration. Therefore, for any valid arbitration referral between the parties during pendency of the 1982 Suit, both the parties had to agree and apply before the Court where the 1982 Suit was pending, which admittedly is not the case herein. In light of foregoing discussion, it is luculent that once a suit was pending between the parties, only option available for referring the matter to arbitration was by way of application under Section 21 of the 1940 Act. Any other route either under Chapter II or Chapter III of the 1940 Act would be improper.

44. Above view is also fortified by the statutory scheme of the 1940 Act, especially, in the face of the dichotomy created by simultaneous existence of Chapter II (Arbitration without Intervention of a Court), Chapter III (Arbitration with intervention of a Court where there is no Suit Pending), Chapter IV (Arbitration in Suits), compliance of Section 21 and Chapter IV of the 1940 Act becomes mandatory as and when the parties come into knowledge of the pendency of a suit prior to pronouncement of judgment therein. To hold otherwise

would mean watering down the legislative intent behind the 1940 Act.

45. One more contention has been raised by the Defendants, *albeit* faintly, that in light of the mandate of Section 21 of the 1940 Act, it is not the obligation of the Defendants solely to apply for a reference to arbitration and the Plaintiffs are equally obligated to do so. Though this argument appears impressive at first blush, however, it is quite self-serving in nature. In our view, Section 21 of the Act doesn't obligate either the Plaintiffs or the Defendants independently, rather, if the parties are interested in referring the dispute to arbitration, such an obligation is mutual and *all the parties interested* must agree that any matter in difference between them in the suit shall be referred to arbitration.

46. Upshot of the above discussion is that arbitral proceedings could not have been initiated or continued without complying Section 21 of the 1940 Act once the parties to the suit had knowledge of the pendency of the Suit. In this view of the matter, any arbitral award passed without the leave of the Trial Court when a suit is already

pending cannot be said to be made in compliance of the provisions of the 1940 Act.

47. Now we will consider the contention of the Defendants that the parties to the arbitral proceedings and the 1982 Suit were different. In this regard, it is to be noted that this Court is not, in this Appeal, required to set aside the Award qua any non-party to 1982 Suit. We are only concerned with the legal effect of the Award qua the parties to the 1982 Suit i.e., the original Plaintiff and his heirs and the four Padam Chand brothers who are the Defendants. In the present factual setting, for the Plaintiffs, the Award, having been rendered without the leave of the Court under Section 21, in any event cannot be effected with respect to them. The fact that the Award also contained directions concerning persons not parties to the 1982 Suit does not save it qua the parties to 1982 Suit.

48. Consequently, at this stage, only route that remains open for the award dated 15.09.1983 to be made workable with respect to the parties of the 1982 Suit is to take it as a compromise or adjustment of a suit by the Trial Court

where the suit is pending in terms of Section 47 of the 1940 Act.

49. As noted above, the proviso to Section 47 carves out a distinct and limited possibility through which an award obtained outside the requirements of the 1940 Act may nonetheless be given effect. It provides that such an award may, *"with the consent of all the parties interested"*, be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending. Therefore, two conditions are envisioned as per the language of the proviso - *first*, the award must be 'otherwise obtained', i.e., obtained without compliance with the 1940 Act; and *second*, all the parties interested must consent to the award being treated as a compromise or adjustment, after the award has been made.

50. In this regard, to understand the scope of the proviso to Section 47 of the 1940 Act, a reference can be made profitably to the judgement of this Court in ***Naraindas v. Vallabhdas & Ors.***[3]**.** This Court while

[3] (1971) 3 SCC 642

considering the arguments of the appellant in the facts of the said case observed as follows:

> ***"****7. It is next argued by Mr Anand that as the reference to arbitrators was made out of court and as all the parties to the arbitration agreement did not sign the award in token of their acceptance, the same could not be made a rule of the court. There is no substance, in our opinion, in the above contention****. It is always open to parties to refer a dispute to arbitration without the intervention of the court. In case, a suit is pending in respect of the subject-matter of the dispute, there can be no valid reference during the pendency of the suit, to arbitration without the order of the court.*** *The underlying reason for that is to avoid conflict of jurisdiction by both the court and the arbitrator dealing concurrently with the same dispute.* ***An award given on a reference during the pendency of a suit relating to dispute which is the subject-matter of reference without obtaining the order of the court cannot be enforced. The only exception to this rule is provided by the proviso to Section 47 of the Arbitration Act (Act 10 of 1940) according to which "an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending". In such an event, the award is enforced as a compromise or adjustment of the suit because all the interested parties give their consent to the award****. Where, however, as in the present case, no suit is pending with respect to the subject-matter of dispute and the parties choose to refer a dispute to arbitrators, it is not essential that the parties should signify their consent to the award before the same can be enforced. Any other view would run counter to the entire scheme and object of arbitration for the settlement of disputes according to which, agreement and consent are imperative only at the stage of referring to dispute to arbitrators but not at the stage of the award. The decision of Bachawat, J. (as he then was) in Jugaldas Damodar Modi and Co. v. Pursottam Umadbhai and Co. [AIR 1953 Cal 690 : 92 CLJ 181] relied*

*upon by the appellant has no bearing as the said case dealt with an arbitration reference during the pendency of a suit.**"***

(emphasis supplied)

A perusal of the aforesaid observations makes it clear that an arbitral award obtained otherwise than in consonance with the provisions of the 1940 Act can be taken on record by the Trial Court as a compromise or adjustment of the suit only if the parties mutually consent to such an award. Hence, a post-award consent is contemplated.

51. Prior to ***Naraindas*** (supra) same view was also endorsed by a Full-Bench of Madras High Court in ***Abdul Rahman Sahib v. Muhammad Siddick***[4] in following words:

"*Examining first the language of the proviso to S. 47, it enacts that an "arbitration award" may be taken into consideration as a compromise or adjustment of a suit only "with the consent of all the parties interested."* ***The consent here referred to must be something other than the consent to refer the dispute for arbitration because without such a consent there can be no arbitration proceedings and in requiring that an*** **arbitration award** ***may be taken into account only with the consent of the parties, the plain intendment of the enactment is that, to do so, there must be something more than a consent to refer to arbitration, that it must be a consent to the arbitration award itself. If this is the correct interpretation of the proviso, the result is that where there is a private reference in***

[4] 1953 SCC OnLine Mad 85

respect of a matter pending in the suit, the award which is given thereon cannot as such be filed as an adjustment under O. 23, R. 3. But if subsequent to the award the parties agree to accept it, that could be recorded as a compromise under O. 23, R. 3.

*** *** ***

We are accordingly of opinion that under the proviso to S. 47, an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit; that no decree can be passed thereon under the provision of O. 23, R. 3; and that the decision in Arumuga *v.* Balambramania*(1), should be overruled. But if, after an award is made, the parties thereto agree to accept it, that will be a compromise and a decree based thereon could be passed under O. 23, R. 3.***"**

(emphasis supplied)

52. Moreover, a Single Judge of Gujarat High Court has also voiced same view in ***Malpati Sevasangh v. Gujarat State Khadi***[5]. While relying upon ***Naraindas*** (supra) in Para 19 therein, following was observed by the learned Single Judge:

"*20. In my view, considering the aforesaid judgment of the Honourable Supreme Court, and considering the provisions of Section 47 of the Arbitration Act, 1940, especially as per the proviso to Section 47 of the Act,* ***such Award can, at the most, be pressed into service in a pending suit only for the purpose of recording the settlement or compromise, as, such Award, on its own, is not enforceable in any manner.*** *Considering the scheme of Section 47 proviso as well as considering the provisions of*

[5] 2003 SCC OnLine Guj 271

Order 23 Rule 3 of the Code of Civil Procedure, such Award can only be treated as a compromise between the parties and the same can be presented before the Court for the purpose of recording the compromise or adjustment of the suit, and not beyond that. It is not in dispute that the plaintiff has, ultimately, taken a stand, by which the plaintiff has not agreed to treat the said Award as a compromise or adjustment of the dispute.

*** *** ***

27. It is, no doubt, true that the Award of the Arbitrators is in the picture. ***However, unless it is agreed by both the sides to abide by the said Award, the said Award cannot be taken as a compromise in a pending suit. Apart from the provisions of Order 23 Rule 3, which clearly provide that such compromise should be signed by the parties, even otherwise, as per the proviso to Section 47 of the Arbitration Act, such Award, which is otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending.*** *If one of the parties to a suit is not agreeable to such consent for accepting such Award for the purpose of settling the dispute pending in the suit, the Court has no option but to proceed with the suit on its own merits…"* ***(emphasis supplied)***

53. We also find ourselves in agreement with the position of law evident from above-mentioned authorities of law. However, we would also like to supplement the reasons thereof. The proviso to Section 47 must be understood as a balanced legislative mechanism that seeks to rescue, subject to the conditions so prescribed, an award that would otherwise be rendered unenforceable

or *non-est* in the eyes of law. The framework of the 1940 Act contains various safeguards such as the requirement of a valid arbitration agreement, superintendence of the court over the reference, and the mechanisms of filing, challenge, and judicial scrutiny of the award under Sections 14 to 17 and 30 to 33 of the 1940 Act. This framework ensures that an award rendered within the framework of the 1940 Act carries with it a presupposition of procedural regularity and legal enforceability. However, an award that falls outside this framework is deprived of these protections by the very circumstance of its creation. It is precisely to address this situation that the proviso to Section 47 has been introduced, and it provides some degree of safeguard by the requirement of post-award consent of all the parties interested. It is this post-award consent that gives the otherwise unenforceable award its only basis for enforceability in the eyes of law. Then also, it is only given effect not as an award but as a compromise. The award serves merely as the instrument around which the said compromise takes shape and can be recorded by the court under Order 23 Rule 3 of the CPC.

54. Adverting to the facts of the present case, the Defendants have contended that the Plaintiffs failed to avail themselves of the liberty expressly reserved to them by the High Court vide orders dated 24.02.1992 and 05.04.2006, insofar as the objection under proviso to Section 47 was concerned. The Trial Court took a view that no application was filed by the Plaintiffs in terms of proviso to Section 47 of the 1940 Act. On the other hand, High Court found that since the subject matter of the arbitral proceedings and the 1982 Suit was distinct, objection under Section 47 of the 1940 was dismissed.

55. A careful reading of the High Court's order dated 24.02.1992 in Civil Revision No. 34 of 1991 is instructive in this regard. The High Court, while directing disposal of the objection under Section 30(c) of the 1940 Act within three months, simultaneously clarified that should the Plaintiffs fail in objection under Section 30(c) of the 1940 Act, it would be open to them to ***press*** the objection under the proviso to Section 47 in the 1982 Suit. The High Court, further in its order dated 05.04.2006 while dismissing

Miscellaneous Appeal No. 674 of 2000, observed in paragraph 10 therein as follows:

> *"10. This Court with the consent of the parties modified the order dated 19.12.1996 passed in C.S. No. 43A/84. From perusal of para 2 of the order dated 24.2.92, it is very clear and specific that the appellants never raised any objection at the time of passing of the order dated 24.2.92 nor the appellants challenged the order passed by this Court on 24.2.92. This Court In its (sic) order dated 24.2.92 very specifically directed that if appellants, who were plaintiffs in C.S. No. 3A/82, fail (sic) in the proceedings in C.S. No.43A/84, it would be open to them to press the objection made under the Proviso to Section 47 of the Act that the compromise which had been entered could be considered only in terms of the Order 23 Rule I. C.P.C. All the orders passed in C.S. No.43-A/84 would be subject to finality to the order to be passed on the pending application preferred under Section 47 Proviso disposed of by the impugned order which shall be dealt with afresh in the pending suit. Thus, from the aforesaid finding of this Court, it is clear that after the order dated 24.2.1992 the pending application under Section 47 shall be dealt with afresh in the pending suit, i.e., in C.S. No.3A/92. Thus, if the petitioner has any grievance in respect of the impugned order, the said grievance of the petitioner can be decided afresh in the pending suit."*

Thus, the High Court itself, on two separate occasions, gave the liberty to the Plaintiffs to press their objections under proviso to Section 47 of the 1940 Act at the time of disposal of the 1982 Suit.

56. In light of the above, there was no need for the Plaintiffs to file a fresh application under proviso to Section 47 of the 1940 Act, as the liberty was given to *press* the

said objection for afresh consideration and not to file the said application afresh.

57. Now coming to the substantive merits of the objection under proviso to Section 47 of the 1940 Act, the Plaintiffs, throughout the litigation, have consistently opposed the Award. From the perusal of the records of this Appeal, it is clear that there is not a single moment in this litigation when the Plaintiffs consented, expressly or by conduct, to the Award being treated as a compromise or adjustment of the 1982 Suit. Thus, the *sine qua non* of the post-award consent is completely missing.

58. In view of the above discussion, it also follows, that the Award dated 15.09.1983 could not have been set up as a defence against the Plaintiffs' suit for possession and mesne profits in the 1982 Suit. It could not have been treated as settling or adjusted the Plaintiffs' rights with respect to the suit property, in the absence of the Plaintiffs' post-award consent to treat it as a compromise under the proviso to Section 47 of the 1940 Act. Hence, the Trial Court, as well as the High Court, committed a manifest error of law in proceeding as though the Award had

attained a finality qua the Plaintiffs and that it was enough for non-suiting the Plaintiffs.

59. At this stage, it is also to be noted that the 1982 Suit was filed seeking possession of the suit property and *mesne profit* from 25 months prior to the filing of the Suit. The Trial Court although non-suited the Plaintiffs on the basis of the Award dated 15.09.1983, also rendered a finding *vide* its order dated 22.07.2010 that the Plaintiff purchased the disputed property through auction by the Court if 2nd Additional District Judge, Gwalior on the date fixed for 07.04.1963 and the Plaintiff obtained symbolic possession on 22.09.1973. The Plaintiffs thereafter challenged the order of the Trial Court in First Appeal No. 252 of 2010 before the High Court which was dismissed on 30.01.2025. However, the findings that were in favour of the Plaintiffs were never challenged in Appeal specifically by the Defendants. Be that as it may, we are cognizant of the law laid down by this Court in ***S. Nazeer Ahmed v. State Bank of Mysore***[6] as followed in ***Saurav Jain v. A.B.P. Design***[7], that a respondent in an appeal

[6] (2007) 11 SCC 75 (Para 7)
[7] (2022) 18 SCC 633 (Para 28)

need not file a memorandum of cross-objection merely to challenge adverse findings of the trial court, so long as the ultimate decree is in their favour; such findings can be contested to support the decree. A cross-objection is necessary only where the respondent seeks to overturn part of the decree or claim additional relief, as clarified by the 1976 amendment to Order 41 Rule 22 CPC.

60. On perusal of the counter affidavit as well as the note of the written submission filed by the Defendants before this Court, we do not find any challenge made by them, either in letter or substance, to the findings of the Trial Court as rendered in favour of the Plaintiff. Therefore, we have no hesitance in holding that once the eclipse of the award *qua* the Plaintiff is removed from the findings of the Trial Court, the 1982 Suit deserves to be decreed in terms of the finding of the Trial Court that the Plaintiff purchased the disputed property through auction by the Court if 2nd Additional District Judge, Gwalior on the date fixed for 07.04.1963 and the Plaintiff obtained symbolic possession on 22.09.1973.

61. In the backdrop of the above discussion, we are of the considered opinion that all the questions framed for consideration must be answered in favour of the Plaintiffs and against the Defendants.

62. On *Question (1)*, we hold that the subject-matter of the 1982 Suit and the arbitral proceedings culminating in the Award dated 15.09.1983 was the same and pertained to the house situated at Sarafa Bazar, Lashkar, bearing Municipal No. 03/10 (Old). The courts below committed a manifest error in holding otherwise, particularly in the face of the unambiguous recitals in the Court auction certificate dated 30.08.1973, the referral letter dated 28.02.1983, and the plaint of the 1984 Proceedings, all of which, when read conjointly, admit of no other conclusion. This finding is further reinforced by the order of the Trial Court itself dated 08.03.1990, whereby the 1982 Suit was stayed during the pendency of the 1984 Proceedings precisely on the ground that the subject-matter of both proceedings was one and the same.

63. On *Question (2)*, we hold that knowledge of pendency of the 1982 Suit is not a condition precedent for

the applicability of Section 21 of the 1940 Act. The determinative factor under the statutory scheme is the fact of pendency of the suit, not the subjective awareness of any party thereof. Nonetheless, even on the Defendants' own case, the arbitral proceedings had not concluded as on 06.08.1983, being the date on which summons in the 1982 Suit were served upon them as per their counter affidavit filed before this Court. Therefore, having come into knowledge of the pendency of the suit prior to the passing of the Award dated 15.09.1983, the Defendants had the opportunity to approach the Trial Court under Section 21 of the 1940 Act, which they failed to avail. The legal consequence flowing therefrom is that the Award arising out of the arbitral proceeding initiated without following the mandate of Section 21, while the 1982 Suit was pending, cannot be permitted to operate as a valid defence against the Plaintiffs' claims in the 1982 Suit.

64. On *Question (3)*, we hold that the arbitral proceedings did not and could not have fallen within the ambit of Chapter II or Chapter III of the 1940 Act, having been initiated and concluded during the pendency of the

1982 Suit between the same parties and in respect of the same subject-matter. The only chapter of the 1940 Act that could have governed such a reference was Chapter IV, and the only permissible route thereunder was an application by all interested parties under Section 21 before the Trial Court where the 1982 Suit was pending. Since no such application was ever made, and no order of reference was ever passed by the Trial Court, the arbitral proceedings were conducted *sans* the mandatory requirements of Section 21 and Chapter IV of the 1940 Act. The Award dated 15.09.1983 is, therefore, legally ineffective as a bar to the Plaintiffs' suit for possession and mesne profits in the 1982 Suit.

65. On *Question (4)*, we hold that the Award dated 15.09.1983, while it may be valid *inter se* the parties to the arbitral proceedings, could not have been set up as a defence or used to non-suit the Plaintiffs in the 1982 Suit. The only saving provision available to the Defendants in the circumstances of the present case was the proviso to Section 47 of the 1940 Act, which permits an award obtained otherwise than in compliance with the provisions

of the 1940 Act to be taken into consideration as a compromise or adjustment of a pending suit, but contingent upon the post-award consent of all the parties interested. The Plaintiffs, as is apparent from the records of this Appeal, have consistently opposed the Award. There is not a single instance in the record where the Plaintiffs consented to the Award being treated as a compromise or adjustment of the 1982 Suit. The *sine qua non* of post-award consent being wholly absent, the Award could not have been given effect as a compromise under the proviso to Section 47.

66. On *Question (5)*, we hold that the High Court committed a manifest error of law in treating the Award as having attained finality so as to preclude an independent examination of its validity in the context of the 1982 Suit. The High Court, by its own orders dated 24.02.1992 in Civil Revision No. 34 of 1991 and 05.04.2006 in Miscellaneous Appeal No. 674 of 2000, had expressly reserved to the Plaintiffs the liberty to press their objections under the proviso to Section 47 of the 1940 Act afresh in the pending 1982 Suit. Having itself carved out

this liberty, the High Court was not, in the subsequent proceedings, at liberty to shut out those very objections by treating the Award as final and binding upon the Plaintiffs.

67. On *Question (6),* we conclude that the 1982 Suit deserves to be decreed in favour of the Plaintiffs, since the Trial Court's findings, which remain unchallenged, establishes that the Plaintiffs had validly purchased the suit property through a court auction on 07.04.1963 and obtained symbolic possession on 22.09.1973, and once the effect of the Award against the Plaintiffs is removed, there is no basis to deny the decree.

68. During the course of hearing, it was informed to this Court that pursuant to the execution proceedings initiated by the Defendants, the Plaintiffs have executed a sale deed in favour of the Defendants on 03.11.2009. However, it is quite evident that the recitals contained therein would indicate that the said sale deed is subject to the decision in the 1982 Suit. Therefore, once the 1982 Suit is decreed in favour of the Plaintiffs, in consequence, the said sale deed falls flat in light of the recitals contained therein.

CONCLUSION

69. Consequent to the discussion made hereinabove, the Appeal is allowed in the following terms:

a) The judgment and final order dated 30.01.2025 passed by the High Court in First Appeal No. 252 of 2010, stands set aside.

b) The judgment and decree dated 22.07.2010 passed by the 10th Additional District Judge, Fast Track Court, Gwalior, in Civil Suit No. 34-A of 2010 (originally Civil Suit No. 3-A of 1982), is set aside to the extent it dismisses the Plaintiffs' suit.

c) The finding of the Trial Court in paragraphs 11, 12 and 32 of the judgment dated 22.07.2010 that the Plaintiffs have been successful in proving ownership of the disputed property described in paragraph 1 of the plaint is affirmed.

d) The arbitration award dated 15.09.1983 is held to be unenforceable in law qua the Plaintiffs for non-compliance with Section 21 of the Arbitration Act,

1940 as well as being in teeth of the proviso to Section 47 of the Arbitration Act, 1940.

e) The sale deed dated 03.11.2009 having, on its face, been made subject to the final outcome of Civil Suit No. 3-A of 1982, is not binding on the Plaintiffs.

f) A decree for recovery of possession of the Suit Property is passed in favour of the Plaintiffs and against the Defendants, in terms of paragraph 1 of the plaint and the site map annexed thereto. The Defendants shall deliver vacant and peaceful possession of the Suit Property to the Plaintiffs within a period of two months from the date of this judgment.

g) The matter is remitted to the Trial Court for the limited purpose of an enquiry into mesne profits. The Trial Court shall conclude the enquiry within nine months of receipt of this Judgement.

h) The Defendants shall deposit the costs of these proceedings, quantified at Rs. 1,00,000/- (Rupees One Lakh Only), with the registry of this Court within four weeks from the date of this judgment.

Thereafter, the registry shall remit the said amount to the bank account of the Plaintiffs.

i) In light of the above, appropriate Decree be drawn by the jurisdictional Trial Court, accordingly.

70. Pending applications, if any, shall stand disposed of in terms of the foregoing.

.....J.
(J.K. MAHESHWARI)

.....J.
(ATUL S. CHANDURKAR)

New Delhi;
May 29, 2026.