

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO.245 OF 2009  
IN  
ARBITRATION PETITION NO.347 OF 2005**

M/s. R.S. Jiwani, a proprietorship firm  
and having its office at Narayan Niwas,  
2nd floor, 2nd Khetwadi Lane, Mumbai.

.. Appellant  
(Orig.Respdts./claimants)

versus

Ircon International Ltd., a  
Government of India Undertaking and a  
body corporate having its registered  
address at Palika Bhavan, Sector 13,  
R.K. Puram, New Delhi 400 066 and their  
regional office at 7th floor,  
New Administrative Building,  
Dr. D.N. Road, Mumbai-400 001.

.. Respondent  
(Orig.petitioner/respondent)

**ALONGWITH**

**ARBITRATIN PETITION NO.457 OF 2006**

1. Hathway Cable & Datacom Private Limited  
a company registered under the Companies  
Act, 1956, having its Registered Office at  
"Rahejas", 04th Floor, Corner of Main Avenue &  
V.P. Road, Santa Cruz (West), Mumbai-400054.

2. Vision India Network Private Limited,  
a company registered under the Companies  
Act. 1956, having its Registered Office at  
No.8, "Vinayak Complex", 11th floor,

.. Petitioners

Dinnar Main Road, R.T. Nagar,  
Bangalore-560 032.

versus

Mr. V.G. Selvan,  
Proprietor M/s. Jai Sky Links  
an Indian Inhabitant, residing at  
No.37, Muninanjappa Layout,  
3rd Croxx, Dinnur, R.T. Nagar Post,  
Bangalore -560 032.

.. Respondent

**ALONGWITH**

**ARBITRATIN PETITION NO.370 OF 2008**

Mr. Victor G. Selvan,  
of Bangalore, Indian Inhabitant,  
having his address at No.37, Muninanjappa Layout,  
3rd Cross, Dinnur, R.T. Nagar Post,  
Bangalore -560 032.

.. Petitioner

versus

1. Hathway Cable & Datacom Private Limited  
(formerly known as Chicks Display Services  
Pvt.Ltd.) a company registered under the  
Companies Act, 1956, having its Registered  
Office at "Rahejas", 04th Floor,  
Corner of Main Avenue, V.P. Road,  
Santa Cruz (West), Mumbai-400054.

2. Vision India Network Private Limited,  
a company registered under the Companies  
Act. 1956, having its Registered Office at  
No.8, "Vinayak Complex", 11th floor,

.. Respondents

Dinnar Main Road, R.T. Nagar,  
Bangalore-560 032.

Mr. Nitin Thakkar, Senior Advocate with Mr. Markand Gandhi, Mr. Gaurav Joshi, Mr. Kapil Moye, Ms. Tanvi Gandhi, Mr. Satyen Vora, Mr. Prashant Ghelani and Mr. Rohan Yagnik i/by M/s. M. Gandhi & Co. for the appellants.

Mr. P.K. Samdani, Senior Advocate with Ms. Saumya Srikrishna, Mr. B.R. Palav, Mr. Aditya Mehta and Mr. Arun Siwach i/by M/s. A.M. & S.A. Shroff for the respondent.

Mr. S.U. Kamdar with Mr. Hetal Thakore, Ms. Jyoti Ghag, Ms. Pooja Patil and Mr. Pranav Sampat i/by M/s. Thakore Jariwala & Associates for the petitioner in Arb. Petn. No.457 of 2006 and for respondent No. Arb. Petn. No.370 of 2006.

**CORAM : SWATANTER KUMAR, C.J.**  
**A.M. KHANWILKAR &**  
**S.C. DHARMADHIKARI, JJ.**

**JUDGMENT RESERVED ON : 27TH NOVEMBER, 2009**  
**JUDGMENT PRONOUNCED ON : 16TH DECEMBER, 2009**

**JUDGMENT (Per Swatanter Kumar, C.J.)**

The Law of Arbitration was earlier governed by Indian Arbitration Act, 1899. The Code of Civil Procedure, 1908 also provided for arbitration as Special Proceedings in the following terms:

“89. **Arbitration.**- (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899; or by any other law for the time being in force, all references to arbitration whether by an order in suit or otherwise,

and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.”

The said provision however, was repealed by section 49 and Schedule III of Arbitration Act (10 of 1940). The Arbitration Act of 1940 itself was repealed by section 85 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the `Act'. This Act comprehensively amended the then existing law in relation to arbitration and provided for a complete methodology and mechanism which would govern right from the stage of constitution of the Arbitral Tribunal to enforcement of the Award of the Arbitral Tribunal with least interference of the court.

2. Principal of mutability is equally applicable to the Legislation as well. The Legislature is always expected to examine the needs of the society and amend, modify and enact laws accordingly. Looking into the legislative history, the Law of Arbitration in India was unsatisfactory and, in fact, quite non-existent which persuaded the

Legislature to enact the Arbitration Act, 1899 which was quite similar to the English Arbitration Act, 1899. This probably was the beginning of enforcement of Law of Arbitration in India but at that time, the reference to arbitration was primarily permissible with intervention of the court. The 1899 Act was applicable to presidency towns and its scope was confined to, “arbitration by agreement” without intervention of the court where it was so made applicable by the Provincial Government. Later Law of Arbitration gained momentum in India and need for its application in commercial as well as non-commercial disputes was felt at different quarters. The Act of 1940 was not able to attain effective results and thinkers in the field of arbitration felt that the 1940 Act suffered from number of inadequacies in law as well as in practice. Not only this, the Supreme Court in the case of *Guru Nanak Foundations v. Rattan Singh*, AIR 1981 SC 2057 while referring to the Act of 1940 observed, “the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep” in view of “unending prolixity, at every stage providing a legal trap to the unwary.” Still in another case in *Food Corporation of India v. Joginderpal*, AIR 1981 SC 2075, the Supreme Court observed that, “law

of arbitration must be 'simple, less technical and more responsible to the actual reality of the situations', 'responsive to the canons of justice and fair play'. That being the dictum of law pronounced by the highest court of the land it made the Law Commission as well as Legislature and thinkers ponder over the issues rather seriously to consider amending the law. A proposal was mooted on 27<sup>th</sup> July, 1977 by Secretary, Department of Legal Affairs stating that as Public Accounts Committee had commented adversely on working of the Arbitration Act due to its delay, enormous expenses and long time spent, Government was desirous to have a second look to the provision of Arbitration Act, 1940 with a view to see whether the enormous delay occurring in arbitration proceedings and disproportionate costs incurred therein could be avoided. This resulted into 76<sup>th</sup> Report by the Law Commission of India, November, 1978. 76<sup>th</sup> Report of the Law Commission of India, the above referred observations of Supreme Court and Model UNCITRAL Law were primarily responsible factors leading to enactment of Arbitration and Conciliation Act, 1996. It will be useful for the court to examine the objects and reasons of the Arbitration and Conciliation Act, 1996 which have been stated as under:

### **“3. Statement of Objects and Reasons**

The Statement of Objects and Reasons appended to the Arbitration and Conciliation Bill, 1995, reads as follows:

“1. The law of arbitration in India is at present substantially contained in three enactments, namely, the Arbitration Act, 194, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognized that our economic reforms may not become fully effective if the law dealing with settlement of both the domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important

feature of the said UNCITRAL Model Law and Rules is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under:

- i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
- ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
- iii) to provide that the arbitral tribunal gives reasons for its arbitral award;
- iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
- v) to minimize the supervisory role of court in the arbitral process;
- vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

- vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
- viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and
- ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

5. The Bill seeks to achieve the above objects.”

3. The above objects clearly indicate the legislative intent to make arbitration proceedings more effective, expeditious, result oriented and the arbitral procedure fair, efficient and capable of meeting the specific needs of arbitration. To achieve those objects and to encourage enforcement of Law of Arbitration in all fields of law relating to civil disputes viz. at family, domestic and commercial levels and even at international levels, section 89 was inserted to the Civil Procedure Code, 1908 by the Civil Procedure Code (Amendment) Act, 1999. This section casts an obligation upon the courts to consider, at any stage of

the suit, the possibility of settlement, formulation of terms of possible settlement and reference thereof to arbitration amongst other modes of alternative dispute resolution system. Thus, the object of newly inserted section 89 is to promote alternative methods of dispute resolution. Of course, the enforcement of this provision has still not received complete implementation. There are certain areas which are not quite clear from the language of the section in regard to methodology to be adopted by the courts while enforcing the said section.

4. Another very important part of the 1996 Act is its preamble. The Act was enacted to consolidate and amend the law relating to domestic arbitration and international commercial arbitration as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International and Commercial Arbitration, 1985 and it was recommended by the UN General Assembly that all countries will give due consideration to this Model Law, it was felt expedient to make Law respecting arbitration and conciliation, taking into account Model Law

and Rules and thus, the 1996 Act came to be enacted. This shows the intention to comprehensively enact the new law of arbitration which will be in conformity with the Model Law and Rules and at the same time achieve expeditious results with least intervention of the court. The Legislature besides finding the 1940 Act outdated contemplated the need of enacting more responsive provisions to complete the requirements, to minimize the supervisory role of the courts in arbitral process and to provide that every final award is enforced in the same manner as if it was a decree of the civil court, enacted the law.

5. Section 5 of the 1996 Act opens with non-obstante clause which provides that in the matters governed by Part-I of the Act, no judicial authority shall intervene except where so provided in the part. This Act would take precedence over all other laws which were in force at the relevant point of time. The object appears to be to encourage settlement of disputes by the parties through arbitration but primarily without judicial intervention. In the light of this background, we are required to examine and interpret the provisions of section 34(2) of 1996 Act, the need for which has arisen as a result of the order of reference to a larger Bench made by the Division Bench of this court in

the present case. The Division Bench of this court on 22<sup>nd</sup> July, 2009 passed the following order:

“1. Notice. Learned Counsel for the Respondents accepts notice and waives service. He prays for time.

2. Learned Counsel appearing for the Appellant refers to paragraph-93 and 94 of the impugned Judgment and submits that keeping in view the settled principle of law and the observations made by the learned Single Judge, it would be appropriate that the matter is referred to larger Bench as the learned Judge has made reference to the Division Bench order of the Court. We find substance in this submission and in any case, this question is likely to arise repeatedly before the Courts concerned and would be of some significance. Consequently, we agree that the matter should proceed before the larger Bench.

3. Having perused the pleadings and the impugned Judgment, the Registry is directed to place the matter on 24<sup>th</sup> July, 2009 before the larger Bench.”

We may now notice the facts giving rise to the present appeal and consequential reference made by the Division Bench.

6. M/s. Iacon International Limited, hereinafter to be referred to as “the company”, had been issued a contract by Maharashtra State Road Development Corporation inter alia for constructing a rail over bridge. Upon issuance of this contract, the company floated the tender. Respondent R.S. Jiwani, was the successful tenderer and letter of

acceptance was issued in his favour by the company on 19.1.1999 in furtherance to which the parties entered and executed an agreement dated 29.1.1999. The value of the contract was worth Rs.5 crores and the work was to be completed by 18.11.1999. However, the same was completed, as alleged, after considerable delay, on 27.1.2002. Disputes had arisen between the parties primarily founded on the question of delay. The company had written various letters to the appellant stating reasons solely contributing the delay to the appellant and it also imposed penalty of Rs.75,000/- per month which was required to be deducted from the bills payable to the appellant. The Joint General Manager of the company prepared a final bill which was accepted by the appellant who issued "Qualified No-Claim certificate". This was done on 12<sup>th</sup> March, 2002. However, subsequent thereto, the appellant raised claim of Rs.6,15,87,131/- with interest thereon alleging that this amount was due to him on account of extra expenses incurred and unanticipated loss. While raising this claim, the appellant also made a reference to condition 67.1 of the contract to treat his letter as notice and requested the company to amicably settle the claims as per condition 67.2 of the contract. However, this was not acceded to by the company which termed the claim of the appellant as vague,

arbitrary, false, without any basis and being after thought. It also averred that the appellant had misconstrued the terms of the contract. On 4<sup>th</sup> October, 2002, the appellant issued a notice in terms of clause 29 of the special conditions of the contract praying for invocation of the arbitration between the parties and requesting for reference to the arbitrator. Vide letter dated 20<sup>th</sup> December, 2002, the Managing Director of the respondent appointed Mr. S.R. Tambe, retired Secretary, PWD, to the Government of Maharashtra as arbitrator to adjudicate the disputes between the parties. The Arbitrator entered upon the reference before whom the parties filed their claims. The appellant submitted his claim while the company filed reply as well as raised its counter-claims. The appellant had raised 32 claims before the learned Arbitrator out of which 15 claims with interest were allowed while the remaining claims were rejected. So also all the counter-claims raised by the company were rejected. Aggrieved from the Award of the learned Arbitrator, the company filed petition for setting aside the Award dated 5.5.2005 in terms of sections 34 and 16(6) of 1996 Act. However, the appellant did not challenge the award or any part thereof. The petition was admitted and was finally disposed of by the learned Single Judge vide his judgment dated 11<sup>th</sup>

November, 2008. The learned Single Judge recorded the findings that out of the 15 claims allowed by the learned Arbitrator, 11 claims were sustainable and the appellant was entitled to those claims but while referring to the Division Bench judgment of this court in the case of *Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahiliani*, 2008(7) LJ Soft, 161, the learned Single Judge set aside the entire award. It will be useful to refer to the relevant part of the judgment passed by the learned Single Judge that reads as under:-

“5.....

I have upheld the award in respect of ten claims, the claim for interest and in so far as it rejects the Petitioners counter-claim. I have set aside the award in respect of five claims. I would however have exercised powers under Section 34 in respect of the award in respect of three of these five claims. But for the reason that the award is liable to be set aside as a whole in view of the judgments of this Court I will refer to at the end.

91. In the circumstances, the award is upheld in respect of Claim Nos.7.2, 11, 4.5, 4.6, 5.1, 8.2, 9.1, 9.2, 9.4, 14.1 and 15. The petition is allowed and the award is set aside in respect of Claim Nos.7.3, 10, 12, 4.1 and 13. Interest as granted by the learned arbitrator shall be restricted to the claims in respect whereof the award has been upheld. But for the fact that the petition is allowed and the entire award is set aside for reasons I shall state next, I would have exercised powers under

Section 34 in respect of claim nos.10, 12 and 13 as stated earlier.

92. After the matter was reserved for judgment, my attention was invited in another matter, to the judgments of this Court including in the case of Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahilian, 2008(7) LJ Soft, 161 wherein it is held that under the 1996 Act which applies to the present case also, the power to set aside only part of the award is conferred on the Court only in one contingency which is to be found in Section 34(2)(iv).

The Division Bench held:-

“..... Thus, power to set aside only part of the award is conferred on court by Section 34 only in one contingency which is to be found in Clause (iv) of sub-section (2) of Section 34 of the Act. Section 15 of the Arbitration Act, 1940 in terms conferred power on the court to modify the award. The Arbitration Act, 1996 does not have any provision similar to the provisions of Section 15 of the Act, 1940. But, 1996 Act has the provisions in Section 34(4), which empowers the court to remit the award to the arbitrator to enable him to cure the defect because of which the award may be liable to be set aside. Thus, from perusal of Section 34 of the Aft it appears that while examining the award if the Court finds that the arbitrator in the award has dealt with the matters not submitted to arbitration, then the Court has to make an inquiry to find out whether it is possible to segregate the other part of the award, which was within the jurisdiction of the arbitrator and if the Court finds that it is possible so to do, then

the court can set aside only that part of the award which according to the Court was beyond the jurisdiction of the arbitrator, because it was not submitted to arbitration. In all other cases, if the Court finds that only a part of the award is affected by illegality which is pointed out to the court, the court cannot itself modify the award, but if a party to the petition applies to the court in exercise of its power under Sub-section 4 of Section 34, the Court can direct the arbitral tribunal to resume the proceedings and take such action to eliminate the ground for setting aside the award. In such situation, the arbitral tribunal on resumption may be able to delete that part of the award which the Court finds to be invalid or illegal and make suitable modification in the award. It, thus, appears that while exercising jurisdiction under Section 34, the court can modify the award only in one situation which is to be found in clause (iv) of sub-section 2 of section 34. In all other cases if the Court finds that only part of the award is affected, then in case the party makes an application, the court can adopt the course of action contemplated by sub-section 4 of Section 34 and only option available to it would be to set aside the award. We find that the following observations of the Supreme Court in its judgment in the case of McDermott International Inc. v. Burn Standard Co.Ltd. & ors., JT 2006 (11) SC 376 clearly indicate that this is the course of action sanctioned by law. In paragraph 55 of the above referred judgment the Supreme Court has observed thus:

“55. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness, intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the Arbitrators, violation of natural justice, etc. The court cannot correct errors of the Arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court’s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

26. It is, thus, clear that if the Court finds that the award is vitiated because of violation of principles of natural justice, or such other reasons which cannot be called as “adjudication” on merits, the Court can set aside the award and if the award is set aside for such reasons, it is open to the parties to invoke the arbitration clause again and initiate arbitration proceeding. In our opinion, in this regard reference can be made to the provisions of sub-section 4 of Section 43. They read as under:-

“43(4) Where the Court orders that an arbitral award be set

aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.”

“When the award is set aside for the reasons other than merits, then it is open to the parties to the arbitration agreement, if arbitration agreement survives, to invoke the arbitration agreement and to have the matter referred to arbitration. In other contingencies they can adopt other remedy that may be available to them and in that situation, either for adopting any other remedy or in initiating arbitration, the period spent during the earlier arbitration is liable to be excluded while computing the period of limitation. In our opinion, the decision of various courts either on Arbitration Act, 1940 or the Acts which were in the field before that, while considering whether the Court has the power to modify the award in a petition filed under Section 34 cannot be considered because under those enactments power was positively conferred on the court to modify the award. It is further to be seen here that Arbitration Act, 1996 has repealed the Arbitration Act, 1940. Arbitration Act, 1940 had a specific power conferred on the court to modify the award. While enacting 1996 Act, the Parliament has chosen not enact that provision. In our opinion, the intention of

the Legislature, therefore, was clear not to confer on the court power to modify the award. It is now well settled that scheme of Arbitration Act, 1996 is clear departure from the scheme of 1940 Act. In 1940 Act, power was conferred on the court itself to modify the award. In 1996 Act, as observed above, the scheme is that the power is conferred on the court to modify the award only in one situation found in Clause (iv) of Section 34(2), and in all other situations the court, if an application is made by the party, has to follow the course of action contemplated by sub-section 4 of Section 34 or in the absence of any application set aside the award and leave the parties to their own remedy. In our opinion, one more principle has to be taken into consider. The court before 1996 Act came into force, under the Arbitration Act had power to modify an award. While framing 1996 Act, the Legislature was conscious of the power of the court under 1940 Act to modify the award. While enacting 1996 Act, the Legislature has chosen to confer power on the court to modify the award only in one contingency found in Clause (iv) of Section 34(2), and therefore, in our opinion, it will have to be held that the Legislature has denied power to the court to modify the award in all other situations.”

93. I informed the learned counsel about the judgments and invited their submissions in respect thereof. The award in respect of claim nos.7.3 and 4.1 has also been set aside. They do not fall within the scope of Section 34(2)(iv). I have no option therefore, however reluctantly, but to set aside the award. If the

Respondent is willing to give up the claim with regard to the amounts awarded but in respect whereof the award is set aside, it would be a different matter. The Respondent is at liberty to make such an application even in this petition. If such a claim is given up, the ratio of the judgment would not obviously apply as the award in respect of such a claim requires no consideration in an application under Section 34. The Respondent is also at liberty to make any other application including in the present petition including as indicated in the judgment of the Division Bench in the case of Mrs. Pushpa P. Mulchandani.

94. I do not for a moment suggest that I disagree with Mr. Josh's very persuasive submissions in regard to this point of law. I am however bound by the judgment. Being bound by the judgment, I do not consider it appropriate to consider the matter further. Nor do I disagree with Mr. Joshi that the matter requires to be considered by a Full Bench. However, being a judgment of a Division Bench, I do not consider it appropriate to direct the papers to be placed before the learned Chief Justice for considering whether the matter ought to be referred to a Full Bench. That must be left to be decided by the Division Bench which considers the appeal that will quite obviously and understandably be filed against this judgment.

95. In the result, the petition is made absolute, the award is set aside.”

#### INTERPRETATION :-

7. A bare reading of the impugned judgment and particularly above referred portion shows that though the learned Single Judge upheld the award of the learned Arbitrator in favour of the Appellant and

expressed agreement with the arguments raised on behalf of the Appellant that the principle of severability would be applicable to such award but being bound by discipline and precedent reluctantly set aside the whole award. The sole question of law that thus arise for consideration before this Larger Bench is ; (1) Whether doctrine of severability can be applied to an award while dealing with a Petition under Section 34 of the Arbitration and Conciliation Act, 1996; and (2) What is the scope of proviso to Section 34(2)(iv) and whether its application is restricted to clause (iv) alone or it applies to the whole of Section 34(2) of the Act.

8. It is this provision of Section 34 which falls for interpretation and explanation, before this Bench in the present case, with some emphasis to the impact and effect of proviso to Section 34(2)(iv) of the Act. The process of interpretation is the only way by which the Courts can enforce the law and determine the meaning and expression that is required to be given to the language of the Statute in accordance with the basis rule of interpretation. Salmond, while emphasizing the importance of rule of interpretation as one of the main processes in the judicial interpretation, said as under: -

“By interpretation or construction is meant the process by which the courts seek to ascertain the meaning of the legislative intent through the medium of authoritative forms in which it is expressed”.

Maxwell also said :-

“The will of the legislature is the supreme law of the land and demand perfect obedience.”

While applying the principles of Interpretation of Statute, the Courts find out the intention, purpose and the object of the legislation so as to ensure that the interpretation given makes the statute workable and the words are given their normal meaning. The rule of construction is “to intend the Legislature to have meant what they have actually expressed.” The object of all interpretation is to discover the intention of Parliament, “but the intention of Parliament must be deduced from the language used,” for “it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.” [Maxwell on The Interpretation of Statutes, Twelfth Edition by P. St. J. Langan]

9. In order to examine the basic principles which can be applied to interpretation of provisions of statute, reference can be made to a recent judgment of the Full Bench of this Court in the case of Mohd.

Riyazur Rehman Siddiqui v. Deputy Director of Health Services, 2008(6) Mh.L.J. 941, where the Court held as under:-

"51. A statute is stated to be a will of the Legislature. It expresses a will of the Legislature, and function of the Court is to interpret the document, according to the intent of them that made it. It is a settled rule of construction of statute that the provisions should be interpreted with application of plain rule of construction. The courts normally would not imply anything in them which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is jus dicere, not jus dare. The right of appeal being creation of a statute and being a statutory right does not invite unnecessary liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

52. The Supreme Court in the case of Shiv Shakti Co-op. Housing Society, Nagpur vs Swaraj Developers and Others, reported in **(2003) 6 SCC 659**, while referring to the principles for interpretation of statutory provisions, held as under:

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"19. It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it.

(See Institute of Chartered Accountants of India v. Price Waterhouse.) The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See State of Gujarat v. Dilipbhai Nathjibhai Patel ). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [ See Stock v. Frank Jones (Tipton) Ltd. ] Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of a doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. ( Per Lord Loreburn, L.C. In Vickers Sons and Maxim Ltd. v. Evans, quoted in Jumma Masjid v. Kodimaniandra Deviah.)”

53. The Law Commission of India, in its 183<sup>rd</sup> Report, while dealing with the need for providing principles of interpretation of statute as regards the extrinsic aids of interpretation in General Clauses Act, 1897 expressed the view that a statute is a will of legislature conveyed in the form of text.

Noticing that process of interpretation is as old as language, it says that the rules of interpretation were evolved even at a very early stage of Hindu civilization and culture and the same were given by 'Jaimini', the author of Mimamsat Sutras, originally meant for srutis were employed for the interpretation of Smritis also. While referring to the said historical background, the Commission said thus: -

“It is well settled principle of law that as the statute is an edict of the Legislature, the conventional way of interpreting or construing a statute is to seek the intention of legislature. The intention of legislature assimilates two aspects; one aspect carries the concept of 'meaning', i.e., what the word means and another aspect conveys the concept of 'purpose' and 'object' or the 'reason' or 'spirit' pervading through the statute. The process of construction, therefore, combines both the literal and purposive approaches. However, necessity of interpretation would arise only where the language of a statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute. If the language is clear and unambiguous, no need of interpretation would arise. In this regard, a Constitution Bench of five Judges of the Supreme Court in R.S. Nayak v. A.R. Antulay, AIR 1984 SC 684 has held:

“.....If the words of the Statute are clear and unambiguous, it is the plainest duty of the Court

to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self defeating.”

Recently, again Supreme Court in *Grasim Industries Ltd. v. Collector of Customs, Bombay*, (2002)4 SCC 297 has followed the same principle and observed:

“Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for court to take upon itself the task of amending or altering the statutory provisions.”

54. Above stated principles clearly show that the Court can safely apply rudiments of plain construction to legislative intent and object sought to be achieved by the enactment while interpreting the provision of an Act. It is not necessary for the Court to implant or exclude words or over emphasize the language of a provision where it is plain and simple. We have already noticed that Section 100-A opens with a non obstante clause and clause 44 of the Letters Patent refers to the aspect that the letters patent would be read in community with the legislative enactment. A clause beginning with ‘notwithstanding anything contained in any other law for the time being in force including the Letters Patent’ normally would show the intent and the view of the Legislature enacting part of the section to give overriding effect over the provision of that Act or other laws in case of conflict. The

enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment.”

10. These principles are applicable as general rules of interpretation and they would have to be applied to the language of a particular statute, in the present case to the provisions of Arbitration and Conciliation Act, 1996, while keeping in view the facts of the case in hand. Therefore, we will have to examine what meaning and application can be permitted to the provisions of Section 34 of the Act of 1996, with the help of the legislative intent as gathered from the object and the reasons of the Act, historical background of the legislation, objects sought to be achieved and the purpose for which the law was enacted. While dealing with all these aspects, proviso to Section 34(2)(a)(iv) attains greater relevance. Learned counsel appearing for the parties emphasized on the importance of the proviso and its restricted application to that particular sub-clause of the subsection. It is a settled rule of interpretation and it is fundamental rule of construction that a proviso must be construed in relation to a particular matter to which it stands as a proviso. Therefore, it is to be construed harmoniously with the main enactment. Further, a proviso

is subsidiary to the main section and it must be construed in the light of the said Section itself. While dealing with construction of provisos Maxwell's commentary notes as follows:-

“Difficulties sometimes arising in construing provisos. It will, however, generally be found that inconsistencies can be avoided by applying the general rule that the words of a proviso are not to be taken “absolutely in their strict literal sense,” but that a proviso is “of necessity ... limited in its operation to the ambit of the section which it qualifies.” And, so far as that section itself is concerned, the proviso again receives a restricted construction: where the section confers powers, “it would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those powers beyond what compliance with the proviso renders necessary.”

11. Normal function of a proviso is to except something out of enactment or to qualify something enacted therein which but for the proviso would be within the purview of enactment.

"As stated by LUSH, J. "When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. In the words of LORD MACMILLAN: "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case." The proviso may, as LORD MACNAGHTAN laid down, be "a qualification of the preceding enactment which is expressed in terms too general to be quite accurate". The general rule

has been stated by HIDAYATULLAH, J., in the following words: "As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule". And in the words of KAPUR, J. "The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of proviso to read it as providing something by way of an addendum or dealing."

“It is a fundamental rule of construction that proviso must be considered in relation to the principal matter to which it stands as a proviso.” (Abdul Jabbar Butt v. St. of J & K AIR 1957 SC 281)

“Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of the two or more possible meanings is the right one to attribute to them---. One must, however, read the whole clause before attempting to construe any portion of it, and a perusal of the proviso fixes the meaning of the words which precede it.”

( Ref: Justice G.P. Singh on Principles of Statutory Interpretation, 11<sup>th</sup> Edition 2008, Wadhwa, Nagpur.)

12. While dealing with the proviso, the Court has to keep in mind the clear distinction between the "Proviso", "Exception" and Saving clause. 'Exception' is intended to restrain the enacted clause to particular cases. 'Proviso' is used to remove special cases from the general enactment and provide for them specially and 'Saving Clause' is used to preserve from destroying certain rights, remedies or privileges already in existence.

13. In *Sundaram Pillai v. Pattabiraman* (1985) 1 SCC 591, the Supreme Court summarized the purposes of a proviso as

-"

(1) Qualifying or excepting certain provisions from the main enactment;

(2) It may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) It may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) It may be used merely to act as optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

The above summary cannot however be taken as exhaustive and ultimately a proviso, like any other enactment, ought to be construed upon its terms.

#### DISCUSSION ON LAW :-

14. Having referred to the basic principles of construction applicable to such cases with particular reference to ambit, scope of proviso to section, now we may refer to legislative history of this provision. In the opening part of this judgment, we have made reference, to some extent to the legislative history of the Arbitration and Conciliation Act, 1996 which clearly indicate that with the passage of time this law has developed in various respects. The main object of enacting this Act was

to bring the law of arbitration in conformity with UNCITRAL Model Rules on one hand, while on the other hand also to ensure that newly enacted law was in conformity with the existing Indian Law and Arbitral Tribunals were able to deal with the matters expeditiously and parties were able to receive resolutions of their disputes without much interference from the Courts at different stages of the arbitral proceedings. There is some need to examine at this juncture as to what were the provisions of the Act of 1940 and what are the provisions under the Act of 1996. Under the Act of 1940, there was a specific provision for setting aside an award, provision for correcting the award and even a provision for remitting an award back to the Arbitrator for fresh consideration in accordance with law. While under the Act of 1996, Section 5 controls the extent of judicial intervention. It is only Section 34, which provides for setting aside an arbitral award in terms of language of Section 34. The Act of 1996 also provides for correction of the award in terms of Section 33 thereof. Let us have a comparative look at respective provisions of these two Acts, i.e. Act of 1940 and the Act of 1996.

Arbitration Act, 1940	The Arbitration and Conciliation Act, 1996.
<p>Sec. 15. Power of Courts to modify award.- The Court may by order modify or correct an award -</p> <p>(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or</p> <p>(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or</p> <p>(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.</p> <p>Sec. 16. Power to remit award. - (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit,-</p> <p>(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred: or</p> <p>(b) where the award is so indefinite as to be incapable of execution; or</p> <p>(c) where an objection to the legality</p>	<p>Sec.33. Correction and interpretation of award; additional award</p> <p>(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties--</p> <p>(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;</p> <p>(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.</p> <p>(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.</p> <p>(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.</p> <p>(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional</p>

<p>of the award is apparent upon the face of it.</p> <p>(2) Where an award is remitted under sub-section (1) the Court shall fix the time within the arbitrator or umpire shall submit his decision to the Court :</p> <p style="padding-left: 40px;">PROVIDED THAT any time so fixed may be extended by subsequent order of the Court.</p> <p>(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.</p> <p>Sec. 30. Grounds for setting aside.- An award shall not be set aside except on one or more of the following grounds, namely:</p> <p>(a) that an arbitrator or umpire has misconducted himself or the proceedings:</p> <p>(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec. 35;</p> <p>(c) that an award has been improperly procured or is otherwise invalid.</p> <p>Sec. 33. Arbitration agreement or award to be contested by application.- Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either</p>	<p>arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.</p> <p>(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.</p> <p>(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).</p> <p>(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.</p> <p>Sec. 34. Application for setting aside arbitral award -</p> <p>(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).</p> <p>(2) An arbitral award may be set aside by the Court only if -</p> <p>(a) the party making the application furnishes proof that -</p> <p>(i) a party was under some incapacity; or</p> <p>(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or</p>
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determined shall apply to the Court and the Court shall decide the question on affidavits :

PROVIDED THAT where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or  
 (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

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

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

(b) the Court finds that -

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

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

Explanation. - Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is

in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

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

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

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

15. A comparative study of the above, it is clear that in the Act of 1996, Legislature has not provided provision equivalent to Sections 15 and 16 of the Act of 1940. The power to set aside an award has been

incorporated under the provisions of Section 34, but in some what different language and with different impact.

16. In terms of Section 34(1) recourse to a Court against an arbitral award has been limited by the Legislature which can be made only by one mode that is, by filing an application for setting aside an arbitral award in accordance with provisions of Sub-section (2) and sub-section (3) of the Act. Sub-section (3) primarily prescribes the limitation within which an application for setting aside an award can be made that the Court would entertain such an application only within 3 months from the date on which the party making application received the award and would entertain it after the prescribed limitation of three months only if sufficient cause is shown within a period of 30 days and not thereafter. The ambit and the scope of power setting aside an arbitral award are entirely controlled by Section 34(2). An arbitral award may be set aside by the Court only if the grounds stated in sub-section (2) are satisfied and application to that effect are placed before the Court. The expression 'May' sufficiently indicates that larger discretion is vested in the Court which has to be exercised in accordance with the settled canons of judicial discretion and the

context would require that the expression 'may' should be read as 'may' alone and does not admit or invite any other meaning or interpretation. The other expression which is of significance is 'only if'. The word 'only if' empowers the Court to set aside an award only if conditions of sub-clause (a) and (b) of sub-section (2) are satisfied. In other words, it is for the grounds stated in the said provisions alone that the award can be set aside and not otherwise. Further an obligation is cast upon the applicants to furnish proof thereof. The word "proof" again has some definite value in law and it cannot be equated to the word 'ground' or 'alleged facts'. Thus, the provisions of sub-section (2) of section 34 contemplate a higher degree of deliberation than a mere statement of fact when an award is challenged. It is expected that the documents produced in evidence before the arbitral tribunal would be the proof in support of an objection raised by an applicant. The applicant should be able to demonstrate from the record that his objection is supported by evidence and is not a mere objection for the sake of objecting. The word "proof" need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the

matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word "proved" in the Evidence Act. What is required is production of such materials on which the court can reasonably act to reach the supposition that a fact exists. `Proof' of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. *M. Narsinga Rao v. State of A.P.* (2001)1 SCC 691.

17. The argument raised before us is that sub-clauses (i) to (iii) and (v) of clause (a) of sub-section (2) of Section 34 are the grounds where it is mandatory for the Court to set aside the whole award and there is no other choice before the Court. It is only in the class of cases falling under Section 34(2)(a)(iv) that with the aid of the proviso to that sub-section, the Court can apply principle of severability. In that case, if the matter submitted to the arbitration can be separated from the one not submitted then the Court may set aside that part of the award alone which is not submitted to arbitration. This argument

is founded on the Division Bench judgment of this Court in the case of Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahiliani, 2008(7) LJ Soft, 161, and which was relied upon by the Respondents for inviting the decision against the Appellant. Thus, we have to examine the provision of Section 34 of the 1996 Act to find whether it permit of any other interpretation than the one put forward by the Respondents. Sub-clause (i),(ii),(iii) and (v) of clause (a) of subsection (2) of Section 34 deal with certain situations which may require the Court to set aside an award of the arbitral tribunal. These may be the cases where the party was under incapacity, the agreement is not valid under the law in force, where proper notice was not given to the party or otherwise enable to present his case, and the composition of arbitral tribunal or procedure was not in accordance with the agreement between the parties and lastly the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Explanation to Section 34(2) which is in the nature of a declaration further explains that when an award is in conflict with the public policy of India when the award was induced or affected by (i) fraud or (ii) by corruption; or (iii) was in violation of Section 75 or 81 of the Act. It is difficult for this Court to hold that

under all these categories it would be inevitable for the Court to set aside the entire award. It may not be very true that even under these categories, it would be absolutely essential for the Court to set aside an award. It is true that where a party was under incapacity or was not served with the notice at all and the arbitration agreement itself was not valid that an award may have to be set aside in its entirety. But even within these clauses, there is possibility of a situation where it may not be necessary for the Court to set aside the entire award. Let us take an example that where a party is given a notice has participated in the proceedings before the arbitral tribunal but was unable to lead evidence or present himself or submit his counter claim. Would it be fair for the Court to set aside an award of the arbitral tribunal in its entirety in this situation? A party who participated in the arbitral proceeding even led evidence and cross-examined the witnesses of the claimants in relation to the claims but for any reason was not able to place his evidence on record in relation to the counter claims or he was not granted sufficient opportunity to present his case or for some reason was unable to present his case before the arbitral tribunal, would it not be just, fair, equitable and in line with the object of the Act of 1996 to consider setting aside award only regarding counter

claim. Is such a party which has succeeded in the claims made by it, which are otherwise lawful and not hit by any of the stated circumstances, should be awarded his reliefs while either rejecting or even altering the award with regard to the counter claim filed by the aggrieved party before the Arbitrator. Situation may be different where arbitration agreement is not valid. In other words, where claim is unlawful. The Supreme Court in the case of Karnail Singh v. State of Haryana and another, 1995 Supp (3) SCC 376 held that not valid would mean unlawful and equated it to void.

"8. 'Void' dictionary means, ineffectual, nugatory; having no legal force or binding effect, unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid. In Words and Phrases (American), Vol.44, published by West Publishing Co., at page 319 it is stated thus:

"A 'void' thing is nothing; it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed."

What was declared void was election. That is the process which led to choosing or selecting appellant as a member was invalid. The legal effect of declaration granted by the Tribunal was that the election of the appellant became non-existent resulting automatically in nullifying the earlier declaration. The declaration did not operate from the

date it was granted but it related back to the date when election was held. The legislative provision being clear and the Tribunal being vested only with power of declaring election to be void the entire controversy about voidable and void was unnecessary. The appellant could not therefore, claim any pension under Section 7-A of the 1975 Act."

18. In the event the arbitration agreement between the parties is not valid means where it is unlawful or void, the whole award will have to be set aside as the very root of the matter suffers from a defect of law and is not valid under the law for the time being in force. Severability is an established concept. It is largely applicable to various branches of civil jurisprudence. Where it is possible to sever the bad part from the good part, the good part of the contract can always be enforced and partial relief can be granted. Doctrine of severability has been applied to law of Contract since time immemorial. Of course, it could be said that substantial severability and not textual divisibility is the principle controlling this concept. In the case of *Shin Satellite Public Co. Ltd. V. Jain Studios Ltd.*, 2006(2) SCC 628 where the Supreme Court was dealing with an agreement between the parties for availing broadcasting services in favour of the petitioner therein by the respondent. Because of the dispute between the parties, arbitration

clause was invoked to which defence was taken by the respondent that the claim of the petitioner was not maintainable in as much as clause 20 of the agreement was against the public policy and was not enforceable. The Supreme Court in the light of para 430 of Halsbury Law of England, 4<sup>th</sup> Edition, Volume 9, page 297 finally held as under:

“430. *Severance of illegal and void provisions* – A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or ‘severed’ from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general.

First, as a general rule, severance is probably not possible where the objectionable parts of the contract involve illegality and not mere void promises. In one type of case, however, the courts have adopted what amounts almost to a principle of severance by holding that if a statute allows works to be done up to a financial limit without a licence but requires a licence above that limit, then, where works are done under a contract which does not specify an amount but which in the event exceeds the financial limit permitted without licence, the cost of the works up to that limit is recoverable.

Secondly, where severance is allowed, it must be possible simply to strike out the offending parts but the court will not rewrite or rearrange the contract.

Thirdly, even if the promises can be struck out as aforementioned, the court will not do this if to do

so would alter entirely the scope and intention of the agreement.

Fourthly, the contract, shorn of the offending parts, must retain the characteristics of a valid contract, so that if severance will remove the whole or main consideration given by one party the contract becomes unenforceable. Otherwise, the offending promise simply drops out and the other parts of the contract are enforceable.

Reference may be made to Chitty on Contracts (29<sup>th</sup> Edn. Vol. 1) pp. 1048-49:

“16-188. Introductory.- Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable. The question then arises whether the unobjectionable may be enforced and the objectionable disregarded or ‘severed’. The same question arises in relation to bonds where the condition is partly against the law.

16-189. Partial statutory invalidity. - It was laid down in some of the older cases that there is a distinction between a deed or condition which is void in part at common law. This distinction must now be understood to apply only to cases where the provisions shall be wholly void. Unless that is so, then provided the good part is separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute. The general rule is that ‘where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good’. Thus, a

covenant in a lease that the tenant should pay ‘all parliamentary taxes’, only included such as he might lawfully pay, and a separate covenant to pay the landlord’s property tax, which it was illegal for a tenant to contract to pay, although void, did not affect the validity of the instrument. In some situations where there is a statutory requirement to obtain a licence for work above a stipulated financial limit but up to that limit no licence is required, the courts will enforce a contract up to that limit. There is some doubt whether this applies to a lump sum contract ‘for a single and indivisible work’. Even in this situation if the cost element can be divided into its legal and illegal components, the courts will enforce the former but not the latter.” (emphasis supplied)

15. It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.

16.           xxx           xxx           xxx

17. In several cases, courts have held that partial invalidity in contract will not *ipso facto* make the whole contract void or unenforceable. Wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending parts.”

19. Similar situations also had arisen under section 23 of the Contract Act where a contract was partly lawful and partly unlawful.

The contract where the unlawful parts were severable from lawful parts had been held to be enforceable. [Referred Canbank Financial Services v. Custodian and others, 2004(8) SCC, 355.]

20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good part of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable. In the case of Messrs. Basant Lal Banarsi Lal v. Bansi Lal Dagdulal, AIR 1961 SC 823, though the Supreme Court was dealing with an application for setting aside an award passed by the Bombay City Civil Court, contending that forward contract in groundnuts were illegal as making of such contracts was prohibited by Oil seeds (Forward Contract Prohibition) Order, 1943 and hence arbitration clause contained in the forward contracts in groundnuts between the parties was null and void, where it was found as a matter of fact that it was not possible to segregate the dispute under the

various contracts as there was direct link between them. The Supreme Court held as under:-

“It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts one of which we have found to be void. But as the award was one and is not severable in respect of the different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside. “

21. Even in the case of *BOI Finance Ltd. V. Custodian and others*, (1997)10 SCC 488, the Supreme Court while dealing with the provisions of section 23 of the Contract Act, 1872 took a view that where the contract of reciprocal promises were entered into between the parties, void part of the agreement could be separated from the valid part, the valid part does not become void or invalid.

22. In relation to the provisions of section 30 of the 1940 Act, the law has clearly been stated by the Supreme Court in the case of **J.C.Budhreja versus Chairman, Orissa Mining Corporation Ltd and Another** 2008(2) SCC 444 where while dealing with the award, the

court found that part of the arbitral award was vitiated while the other could be upheld, the court held as under:

“34. Does it mean that the entire award should be set aside? The answer is no. That part of the award which is valid and separable can be upheld. That part relates to the claims which were validly made before the arbitrator, which were part of the existing or pending claims of Rs. 50,15,820/- and which were not barred by limitation. As stated above they were the claims which were existing or pending in 1978, 1979 and 1980 (considered by the committee and payment made by OMC) which were carried before the arbitrator to an extent of Rs. 28,32,128. Only the amounts awarded by the arbitrator against those claims can be considered as award validly made in arbitration, falling within jurisdiction. They are clearly severable from the other portions of the award. The particulars of the claims and corresponding awards are as follows:

Thus, the total amount awarded by the arbitrator against claims which were not barred by limitation was only Rs.13,93,373.50. The award to this extent is not open to challenge. This part of the award does not suffer from any misconduct. There is also no error apparent on the face of the award in respect of the amount. It is not open to challenge.

35. The scope of interference is limited. In *Hindustan Construction Co. Ltd. Governor of Orissa* (1995 (3) SCC 8) this Court held (SCC p.17 para 10):

“10. ... .. It is well known that the court while considering the question whether the award should be set aside, does not examine that question as an appellate court. While exercising the said power, the court cannot re-appreciate all the materials on the record for the

purpose of recording a finding whether in the facts and circumstances of a particular case the award in question could have been made. Such award can be set aside on any of the grounds specified in Section 30 of the Act.”

23. This view was reiterated by the Supreme Court in a very recent judgment in the case of *Kwality Manufacturing Corporation v. Central Warehousing Corporation*, 2009(5) SCC 142.

24. Now a further question that falls for consideration of this court is as to whether there is anything contained in 1996 Act which prohibits in law the court from adopting the approach applicable under the 1940 Act or prohibits applicability of principle of severability to the awards under 1996 Act. We are unable to see any prohibition much less an absolute bar in the provisions of section 34 of 1996 Act to that effect. There could be instances falling under section 34(2)(a), sub-sections (iii) and (v) where the principle of severability can safely be applied. These provisions do not specifically or impliedly convey legislative intent which prohibits the courts from applying this principle to the awards under the 1996 Act. Again for example, an Arbitral Tribunal might have adopted a procedure at a particular stage of proceeding which may be held to be violative of principles of natural justice or

impermissible in law or the procedure was not in accordance with the agreement between the parties but the parties waived such an objection and participate in the arbitration proceedings without protest, in that event it will be difficult for the court to hold that the good part of the award cannot be segregated from the bad part.

25. Section 4 of the 1996 Act has been enacted by the Legislature to control the conduct of the parties during the arbitral proceedings. The purpose appears to be that unnecessary technical objections with regard to the continuation or otherwise of the arbitration proceedings and challenge to an award on that ground at a subsequent stage should be discouraged. This itself is indicative of the legislative intent not to unnecessarily prolong the litigation on such believable objection which may be waived. The language of section 34(2) does not use any specific language which debars the court from exercising its discretion otherwise vested in it by virtue of its very creation to set aside the award wholly or partially as the case may be.

26. Discretionary power is vested with the Court to set aside an award. The ordinary meaning of the words “set aside” is to revoke or

quash, the effect of which is to make the interim order inoperative or non-existent. [ Ref: *Bileshwar Khan Udyog Khedut Sahakari Mandali Ltd. & Ors. v. Union of India & Anr.*, (1999) 2 SCC 518.]

27. The Black's Law Dictionary defines the expression "set aside" as to annul or to vacate a judgment or order. Certainly the expression "set aside" cannot be understood or equatable to void.

28. These are distinct terms. Normally, the power to do an act would include an ancillary power to do that act purposefully, unless a specific language has been used in the provisions of the Statute so as to lead to an irresistible conclusion expressly or by necessary implication that such an act is prohibited or is barred. We have already noticed that in the language of Section 34, no such prohibition can be traced. The attempt of the Legislature in enacting the 1996 Act is to free Arbitral Tribunal from rigours of strict rules of procedure and permit least interference by judicial intervention. It was vehemently argued before us that the Legislature has eliminated Sections 15 and 16 of the Act of 1940 thereby conveying its intent not to permit remand or remitting of the matters to arbitrator. Section 34(2) only vests power,

according to the learned counsel appearing for the Respondents, to set aside the award and thus the Court is powerless from taking any other steps or passing any other appropriate orders. This argument on the face of it, besides being misconceived, cannot stand the test of law inasmuch as under Section 34(4) of the 1996 Act, the Court has been vested with the powers that where it receives application under Sub-section (1), that is for setting aside an arbitral award, it may adjourn the proceedings for a period of time determined by it in order to give arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other actions as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. Thus, the emphasis is on taking all measures as may be permissible in law to ensure that the arbitral award is not set aside on routine grounds or on technical pleas taken and substantive rights of the parties should be determined fully and finally. If the Court has been empowered to adjourn the proceedings and it can lead the arbitral tribunal to take all such actions as may be essential for removing grounds for setting aside the award of the arbitral tribunal that itself substantiates the arguments made before us by the Appellant that the power of the Court under Section 34(2) is wide enough to apply the principle of

severability of award and/or pass such other directions as are contemplated under Section 34(4) of the Act. Of course, the intervention of the Court is permissible under the provisions of this Act in relation to the matters contemplated under the Part-I and subject to the provisions of Section 5. An award can only be set aside under the provisions of Section 34 as there is no other provision except Section 33 which permits the arbitral tribunal to correct or interpret the award or pass additional award, that too, on limited grounds stated in Section 33. Passing of an award certainly vests substantive and enforceable right in the party in whose favour the award is made. Once the Arbitral Tribunal makes an award and terminates the proceedings under Section 32, subject to provisions contained in Part-I. An arbitral award shall be final and binding on the parties and even on the persons claiming under them respectively in terms of Section 35 of the Act. This award attains not only finality but becomes enforceable as a decree of the Civil Court under the Code of Civil Procedure, after the period stated under Section 34 of the Act. Thus, an award which attains finality and becomes enforceable vesting a legal right in the claimants. It will be unjust and unfair to deny statutory rights accrued to the parties even by not applying the doctrine of severability

if some part of the award is unsustainable and where other part of the award is found to be good and enforceable in law by the Court in exercise of its powers vested under Section 34 of the Act.

29. In the case of *State of T.N. and Another v. P. Krishnamurthy and Others*, (2006)4 SCC 517, the Supreme Court held as under: -

“31. If a rule is partly valid and partly invalid, the part that is valid and severable is saved. Even the part which is found to be invalid, can be read down to avoid being declared as invalid. We have already held that premature termination of existing leases, in law, can be only after granting a hearing as required under sub-section (3) of Section 4-A for any of the reasons mentioned in Section 4-A(1) or (2). Therefore, let us examine whether we can save the offending part of Rule 38-A (which terminates quarrying leases/permissions forthwith) by reading it down. Apart from the statutory provision for termination in Section 4-A(3), there is a contractual provision for termination in the mining leases granted by the State Government. This provision enables either party to terminate the lease by six months’ notice. No cause need be shown for such termination nor does such termination entail payment of compensation or other penal consequences. In this case, after considering the High Level Committee Report, has taken a decision that all quarrying by private agencies in pursuance of the quarrying leases granted in regard to

government lands or permissions granted in respect of ryotwari land should be terminated in public interest. If Rule 38-A is read down as terminating all mining leases granted by the Government by six months' notice ( in terms of clause 11 in the lease deeds based on the model form at Appendix I to the Rules ) or for the remainder period of the lease, whichever is less, it can be saved, as it will then terminate the leases after notice, in terms of the lease.”

30. If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability. We are unable to contribute to the view that the power vested in the Court under Section 34(1) and (2) should be construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word “set aside” cannot be construed as to `only to set aside an award wholly’, as it will neither be permissible nor proper for the Court to add these words to the language of Section which had vested discretion in the Court. Absence of a specific

language further supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of Arbitration Act would stand defeated and frustrated.

31. Rival submissions have been made before us with regard to operation and effect of proviso to sub-clause (iv) of clause (a) of section 34. According to the appellants the proviso applies to the entire section while according to the respondent, its operation is limited to sub-clause (iv) alone. There seems to be some merit in the contention of the respondent inasmuch as the language of the proviso is directly referable to the section itself and, thus, must take its colour from the principal section viz. 34(2)(iv). A reading of the proviso shows that where severability is possible, the court in the class of the cases falling under sub-clause (iv) is expected to set aside the award partially. In other words, a greater obligation is placed upon the court to adopt such an approach when the case in hand is covered under the provisions of sub-clause (iv). This contention will not have any adverse effect on the interpretation and scope of section 34 as a whole. It is a settled rule of

interpretation that the statutory provision should be read as a whole to find out the real legislative intent and that provision should be read by keeping in mind the scheme of the Act as well as the object which is sought to be achieved by the Legislation while enacting such a law. There is nothing in the proviso or in the language of section 34 which has an impact or effect to restrict the power of the court as contemplated under section 34(1) read with the opening words of sub-sections (2) and (4) of section 34 the Act. *Est boni judicis ampliare jurisdictionem* is a settled canon of law courts should expand and amplify jurisdiction to achieve the ends of justice and not unnecessarily restrict its discretion particularly when the later approach would lead to frustrate the very object of the Act.

32. The cases or illustrations indicated in the proviso in fact, should be read to construe that in such other cases where it is so necessary the court should exercise its discretion and apply the principle of severability rather than compel the parties to undergo the entire arbitration proceedings all over again or be satisfied with the rejection of their claim despite the fact that the Arbitral Tribunal has upon due appreciation of evidence and in accordance with law has granted relief

to them. It will not only be appropriate but even permissible to read the proviso to add to the discretion and power of the court vested in it by the Legislature by using the expression "may".

33. It must be understood that the scope of judicial intervention under section 34 is very limited and cannot be equated to the powers of a civil appellate court. The award can be set aside on the grounds stated in these provisions and that is what is emphasized by the use of expression 'only'. The Supreme Court in the case of *McDermott International Inc. v. Burnt Standard Co.Ltd. and others*, 2006(11) SCC 181 has discussed in some elaboration the cases where the court can interfere with the awards and/or set aside the award. Mere appreciation of evidence or an error simplicitor in appreciation of fact or law may not essentially fall within the class of cases which may be covered within the ambit and scope of section 34 of the Act. We will shortly proceed to discuss this aspect of law but only in so far as it is relevant for answering the question posed before the larger Bench.

34. Number of cases have been relied upon and referred by the learned counsel appearing for the respective parties. One set of cases

have taken the view that partial setting aside of the award is permissible and the court can exercise its discretion while granting partial relief to the parties. On the other hand, the rival contention is that an award can partially be set aside only if a case falls under proviso to section 34(2)(iv) and the court is bound to set aside the entire award in other cases and leave the parties to such remedy as may be available to them in law. The judgments of this court as well as the other courts which take the former view are *Mt. Amir Begum v. Syed Badr-ud-din Husain & ors.*, AIR 1914 PC 105; *Mattapalli Chelamayya & Anr. v. Mattapalli Venkataratnam Anr.*, (1972)3 SCC 799; *The Upper Ganges Valley Electricity Supply Co. Ltd. v. The U.P. Electricity Board*, (1973)1 SCC 254; *State of Orissa v. Niranjan Swain*, (1989)4 SCC 269; *Union of India v. Jain Associates & Anr.* (1994)4 SCC 665; *J.C. Budhreja v. Orissa Mining Corpn. Ltd.* (2008)2 SCC 445; *Poonam International Co.Pvt.Ltd. v. ONGC*, 1998(1) Arb. LR 28; *Union of India v. M.L. Dalmiya*, AIR 1977 Cal 266; *M/s. Metro Electric Co. v. DDA*, AIR 1976 Del 195; *M/s. Umraosingh & Co., Lucknow v. State of Madhya Pradesh*, AIR 1976 MP 126; *Anandilal Poddar v. Keshavdeo Poddar*, AIR (36) 1949 Cal, 549; *S.B. Garware & Ors. v. D.V. Garware*, AIR 1939 Bom. 296; *Dagdusa Tilakchand v. Bhukan Govind Shet*, 1884

Indian Law Reports Vol. IX 82; Mehta Teja Singh & Co. v. UOI, AIR 1977 DEL 231, Union of India v. M/s. Artic India, Arb.Petn.No. 355/2004 (SJ); and Sanyukt Nrimata v. IIT & Ors. 1986(2) Arb LR 33 (Del); while Rakomder Lrosjam Ljamma v/ IPO. (1998)7 SCC 129; ITDC v. T.P. Sharma, (2002)3 RAJ 360 (Del); Mc Dermott International v. Burns Standard Co.Ltd., (2006)11 SCC 181 cases including the Division Bench judgment of this court take the later view. We have given detailed reasoning as to why the view taken by the Division Bench of this court in the case of Ms. Pushpa Mulchandani (supra) may not be a correct view of law. It will be appropriate to discuss the reasoning given by the Division Bench while taking that view in some detail. In the case of Ms. Pushpa Mulchandani (supra), the court was concerned with a case where the disputes and differences had been referred to the Arbitrator and the Arbitrator had made his award holding that the testator willed the goodwill of his trading concerns to the Trust and other ancillary matters like tenancy and conversion of a partnership concern into a limited company and its winding up of the business. Aggrieved from the award of the Arbitral Tribunal, a petition was filed under section 34 of the 1996 Act on different grounds. The grounds raised were rejected by the learned

Single Judge who declined to interfere with the award. This judgment of the learned Single Judge was challenged before the Division Bench on two grounds; (a) the award had been vitiated on account of non-compliance of provision of sub-section (3) of section 24 of the Act due to non supply of copies of the valuation report on which the award was based and (b) the award had been passed after termination of mandate of the arbitrator. The Division Bench discussed various aspects of the case and it finally allowed the appeal, set aside the award as well as the judgment of the learned Single Judge. In the present case, we are not concerned with the merits of this case as such. The only relevance of the order of the Division Bench for answering the present reference is whether the Division Bench has taken a correct view that the only option with the court was to set aside the whole award and not part thereof. The relevant part of the judgment of the Division Bench we have already reproduced above. The Division Bench while taking that view recorded reasons that it is not permissible for the court to modify the award even if it finds that only part of the award is affected by illegality, the court has to still set aside the entire award unless a party had applied under the provisions of section 34(4) of the Act. While taking this view, the Division Bench entirely relied upon para 52 of the

judgment of the Supreme Court in the case of McDermott International (supra) It must be noticed at the very outset that the Supreme Court in that case was not concerned with the application of principle of severability of award. The court was primarily concerned with the ambit and scope of section 34(2) in its entirety. The contention of severability neither came up for consideration nor has been dealt with by the Supreme Court in the entire judgment as the court was not called upon to decide such an issue. In *stricto sensu* the proviso to section 34(2)(iv) may not literally apply to the entire provision of section 34(2) but can certainly be taken as a yardstick for rest of the provision in so far as exercise of judicial discretion of the court is concerned. The Supreme Court while considering the provisions of section 34(2) discussed in some detail as to which of the cases would fall under those heads and defined the supervisory role of the courts under that provision. Discussion on this topic, in fact, starts at paragraph 45 and goes upto paragraph 66 of the judgment. The Supreme Court in that case has defined in particular principle which may be attracted in relation to setting aside of an award. Paragraph 52 relied upon by the Division Bench. Paras 59, 60 and 65 which can be usefully referred to at this stage which read as under:

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. ( See State of Rajasthan v. Basant Nahata, (2005) 12 SCC 77.

65. We may consider the submissions of the learned counsel for the parties on the basis of the broad principles which may be attracted in the instant case i.e. (i) whether the award is contrary to the terms of the contract and, therefore, no arbitrable dispute arose between the parties; (ii) whether the award is in any way violative of the public policy; (iii) whether the award is contrary to the substantive law in India viz. Sections 55 and 73 of the Indian Contract Act; (iv) whether the reasons are vitiated by perversity in evidence in contract; (v) whether adjudication of a claim has been made in respect whereof there was no dispute or difference; or (vi) whether the award is vitiated by internal contradictions.”

Thus, the above observations and dictum held in paragraph 52 has to be construed in the context in which it has been referred to and decided. If a issue is not raised before the court, no arguments are addressed on that issue and no reasons on an issue is recorded by the court, such a judgment cannot be treated as a precedent applicable to a subsequent case on the correct application of the principle of *ratio decidendi*. In order for a judgment to apply as a precedent, the relevant laws and earlier judgments should be brought to the notice of the court and they should be correctly applied. Mere observations in a previous judgment may not be binding on a subsequent Bench if they are not applicable to the facts and controversies in a subsequent case as per settled principle of "*ratio decidendi*". The rule of precedent, thus, places an obligation upon the Bench considering such judgments that the Court should discuss the facts and the law of both the cases and then come to a conclusion as to whether the principle enunciated in the previous judgment is actually applicable on facts and in law of the subsequent case. In the case of *Commissioner of Customs (Fort) vs. Toyota Kirloskar Motor (P) Ltd.*, (2007)5 SCC 371, the Supreme Court stated the law relating to precedents and held that a decision, as is well known, is an authority for what it decides and not what can logically

be deduced therefrom. The ratio of a decision must be culled out from the facts involved in a given case and need not be an authority in generality without reference to the reasons, discussions and facts of the case.

35. The Supreme Court was primarily stating the principles which have been kept in mind by the courts while interfering with the award of the Arbitral Tribunal that it was to outline the supervisory role of the courts within the ambit and scope of section 34. It is true that the court like a court of appeal cannot correct the errors of arbitrator. It can set aside the award wholly or partially in its discretion depending on the facts of a given case and can even invoke its power under section 34(4). It is not expected of a party to make a separate application under section 34(4) as the provisions open with the language "on receipt of application under sub-section (1), the court may....." which obviously means that application would be one for setting aside the arbitral award to be made under section 34(1) on the grounds of reasons stated in section 34(2) and has to be filed within the period of limitation as stated as reply under section 34(3). The court may if it deems appropriate can pass orders as required under

section 34(4). In other words, the provisions of section 34(4) have to be read with section 34(1) and 34(2) to enlarge the jurisdiction of the court in order to do justice between the parties and to ensure that the proceedings before the Arbitral Tribunal or before the award are not prolonged for unnecessarily. In our humble view, the Division Bench appears to have placed entire reliance on para 52 by reading the same out of the context and findings which have been recorded by the Supreme Court in subsequent paragraphs. It is also true that there are no *pari materia* provisions like sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of section 34 read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award. We see no reason as to why these powers vested in the court should be construed so strictly which it would practically frustrate the very object of the Act. Thus, in our view, the principle of law stated by the Division Bench is not in line with the legislative intent which seeks to achieve the object of the Act and also not in line with accepted norms of interpretation of statute.

36. We may now revert back to the facts of the present case which itself is a glaring example of what devastating results can be produced by accepting the contention which has been raised on behalf of the respondent in the present appeal. Undisputedly claims were adjudicated upon on merits. Parties led evidence, documentary as well as oral, argued the matter before the Arbitrator whereafter the Arbitral Tribunal allowed some claims of the claimants and rejected all remaining claims of the claimants and the counter-claim filed by the company. The claimant was satisfied with the award. An enforceable right by way of decree accrued to the claimant in terms of sections 32,35 and 36 of the Act. The company approached this court by filing a petition under section 34 which partially allowed in the sense that out of 15 claims allowed by the Arbitrator in favour of the claimant, held that other claims were not payable to the claimants but still did not make any observation that the award in so far as it rejects the remaining claims and the counter-claim were unsustainable. However, to conclude, the learned Single Judge despite having upheld the claims in favour of the claimants, set aside the entire award in view of the Division Bench judgment in the case of Ms. Pushpa Mulchandani

(supra). Could there be a greater perversity of justice to a party which has succeeded before the Arbitral Tribunal as well as in the court of law but still does not get a relief. Is that what is contemplated and was the purpose of introduction of the Act of 1996. An Act which was to provide expeditious effective resolution of disputes free of court interference would merely become ineffective statute. Would not the canon of civil jurisprudence with the very object of the Arbitration Act, 1996 stand undermined by such an approach. The effective and expeditious disposal by recourse to the provisions of the 1996 Act would stand completely frustrated if submissions of the respondent are accepted. Partial challenge to an award is permissible then why not partial setting aside of an award. In a given case, a party may be satisfied with major part of the award but is still entitled to challenge a limited part of the award. It is obligatory on the court to deal with such a petition under section 34(1)(2) of the Act. We may further take an example where the Arbitral Tribunal has allowed more than one claim in favour of the claimant and one of such claim is barred by time while all others are within time and can be lawfully allowed in favour of the claimant. The court while examining the challenge to the award could easily sever the time barred claim which is hit by law of

limitation. To say that it is mandatory for the court without exception to set aside an award as a whole and to restart the arbitral proceeding all over again would be unjust, unfair, inequitable and would not in any way meet the ends of justice.

37. The interpretation put forward by the respondents is bound to cause greater hardship, inconvenience and even injustice to some extent to the parties. The process of arbitration even under 1996 Act encumbersome process which concludes after considerable lapse of time. To compel the parties, particularly a party who had succeeded to undergo the arbitral process all over again does not appear to be in conformity with the scheme of the Act. The provisions of section 34 are quite *pari materia* to the provisions of Article 34 of the Model Law except that the proviso and explanation have been added to section 34(2)(iv). The attempt under the Model Law and the Indian Law appears to circumscribe the jurisdiction of the court to set aside an award. There is nothing in the provisions of the Act and for that matter absolutely nothing in the Model Law which can debar the court from applying the principle of severability provided it is otherwise called for in the facts and circumstances of the case and in accordance with law.

The courts will not get into the merits of the dispute. Thus, the interpretation which should be accepted by the court should be the one which will tilt in favour of the Model Laws, scheme of the Act and the objects sought to be achieved by the Act of 1996.

38. For the reasons afore-recorded, we are of the considered view that the dictum of law stated by the Division Bench in the case of Ms. Pushpa Mulchandani (supra) is not the correct exposition of law. We would predicate the contrary view expressed by different Benches of this court for the reasons stated in those judgments in addition to what we have held hereinabove. It is difficult to prescribe legal panacea which, with regard to the applicability of the principle of severability can be applied uniformly to all cases. We find that the principle of law enunciated by us hereinabove is more in comity to object of the Act, legislative intent, UNCITRAL Model Law and will serve the ends of justice better. Thus, we proceed to record our answers to the questions framed as follows:

1. The judicial discretion vested in the court in terms of the provisions of section 34 of the Arbitration and Conciliation

Act, 1996 takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of the given case. In our view, the provisions of section 34 read as a whole and in particular section 34(2) do not admit of interpretation which will divest the court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal, legality of which is questioned before the court. The Legislature has vested wide discretion in the court to set aside an award wholly or partly, of course, within the strict limitations stated in the said provisions. The scheme of the Act, the language of the provisions and the legislative intent does not support the view that judicial discretion of the court is intended to be whittled down by these provisions.

2. The proviso to section 34(2)(a)(iv) has to be read *ejusdem generis* to the main section, as in cases falling in that category, there would be an absolute duty on the court to invoke the principle of severability where the matter

submitted to arbitration can clearly be separated from the matters not referred to arbitration and decision thereupon by the Arbitral Tribunal.

39. Having answered the questions framed, we direct that this appeal and the arbitration petitions be placed before the appropriate Bench for disposal in accordance with law.

**CHIEF JUSTICE**

**A.M. KHANWILKAR, J.**

**S.C. DHARMADHIKARI, J.**