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Does Section 37 of the Arbitration and Conciliation Act 1996 - Restrict the Filing of a Revision Petition Before High Courts under Section 115 of the CPC 1908?

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The Arbitration and Conciliation Act 1996 aims to minimize judicial intervention in the arbitration process. However, the Supreme Court's decisions in ITI Ltd. v. Siemens and MTNL v. M/S. Applied Electronics demonstrate conflicting interpretations of this principle concerning Revision by the High Court and Second Appeal to the Supreme Court under Section 37 of the Arbitration and Conciliation Act 1996. In ITI Ltd., the court allowed for a revision petition under the Code of Civil Procedure, potentially expanding judicial interference. Later the MTNL judgment questioned this approach and referred the issue to a larger bench, highlighting inconsistencies in previous judgments and the need for clarity in future arbitration jurisprudence. This article compares all the decisions referred to in the ITI LTD and the MTNL case and tries to establish why the later judgment in MTNL shall be upheld also why the ITI LTD judgment shall not be considered a correct law due to all the issues and inconsistencies involved in it.

Keywords: *arbitration, judicial intervention, second appeal, supreme court.*

INTRODUCTION

The Arbitration and Conciliation Bill 1995, which preceded the 1996 Act, stated as one of its main objectives 'the need to minimise the supervisory role of the courts in the arbitral process'. The objective has found expression in Section 5 of the Act, which prescribes the extent of judicial intervention in the matters of Arbitration. The marginal head of Section 5 reads as 'Extent of Judicial Intervention'[1] and the section speaks of a restrictive provision limiting the judicial intervention in the arbitration process. The 'Part' referred to in Section 5 relates to Part 1 of the 1996 Act, which deals with 'Domestic Arbitrations'. This section establishes the principle of minimal judicial intervention and the limited role of courts in interfering with arbitration proceedings, emphasising the autonomy of the arbitral process.

Recently, the Apex Court, while hearing MTNL v M/S. Applied Electronics[2] has dealt with the issue relating to the extent of judicial intervention in matters of Arbitration and, with the dissenting opinion from its earlier precedent, has referred the problem to be heard by a larger bench. The Apex Court thus has doubted and refused to accept its earlier precedent in the case of ITI Ltd v Siemens Public Communications Network[3] and has reached a different conclusion from its earlier stance.

In this article, the Author has particularly discussed the two conflicting judgments passed by the Apex court in ITI Ltd v Siemens Public Communications Network and MTNL v M/S. Applied Electronics, as well as the judgments relied upon by the Apex Court in those two judgments. By comparing the above authorities, the Author has further discussed whether the Hon'ble Court was correct in relying on the authorities referred to by it in those two judgments. The Author has also discussed how and why the Hon'ble Court in the ITI Ltd. case may have set a wrong precedent and why the Court very recently in the MTNL case was correct in referring the issue of judicial intervention to a larger bench for its reconsideration.

[1] Arbitration and Conciliation Act 1996, s 5
[2] *Mahanagar Telephone Nigam Ltd v Applied Electronics Ltd* (2017) 2 SCC 37
[3] *ITI Ltd v Siemens Public Communications Network Ltd* (2002) 5 SCC 510

THE TWO CONFLICTING JUDGMENTS

One of the questions before the Apex Court in the ITI Ltd. case was, 'Can a Revision Petition under Section 115 of the Code of Civil Procedure be filed before a High Court against an order passed by a Civil Court in an Appeal preferred under Section 37 of the Arbitration and Conciliation Act?'.

On this issue, let us first start with observing the true transcript of the relevant part from the judgment regarding the preliminary contentions made by counsel from both sides:

5. Mr. K. Parasaran, learned senior counsel appearing for the appellants, submitted that the right of second appeal is specifically taken away under Section 37(2) of the Act[4]. Therefore, by implication, it should be held that even a revision is not maintainable under Section 115 of the Code[5]. He pointed out that under Section 5 of the Act[6], there is a bar against judicial intervention by any judicial authority unless the same is specifically provided under Part I of the Act. He contends that since a revision is not specifically provided for and the Code is not being made applicable to proceedings arising under the Act, a revision to the High Court does not lie. Therefore, he contends that the appellant's only remedy is to approach this Court by way of this appeal.

6. Mr. P. Chidambaram, learned counsel appearing for the respondent in reply, contended that under Section 37 of the Act, an appeal is provided to a civil court as defined under Section 2(e) of the Act. He pointed out that though there is no specific reference as to the application of the Code to the proceedings arising under Section 37, there is no express exclusion of the Code either. Therefore, in the absence of any such express exclusion, the appeal being provided to a civil court, the Code should apply to the proceedings before the civil court.

In ITI Ltd., a first appeal was already made before the civil court and as per Section 37(3), no second appeal could be filed before a High Court rather, a second appeal can only be filed before the Apex Court directly. So, the issue for argument was, 'Does Section 37(3) of the Arbitration and Conciliation Act 1996 restrict the application of the Code of Civil Procedure, 1908

[4] Arbitration and Conciliation Act 1996, s 37(2)
[5] Code of Civil Procedure 1908, s 115
[6] Arbitration and Conciliation Act 1996, s 5

(hereinafter referred to as 'Code') to the extent that only a second appeal can be preferred to Supreme Court against an order passed by any civil court in the first appeal and therefore, does no revision petition under Section 115 of the code can be filed before the High court?'.

Mr. Parasaran, for the appellants, contended that Section 37(3) only allows a Second appeal to be filed before the Apex Court, so, in that sense, it automatically also restricts any other petition to be preferred before the High Courts from an order passed by the subordinate court. He also contended that Section 5 restricts any other mode of judicial interference unless expressly provisioned under the Act.

Contrary to this, Counsel for the respondent, Mr. Chidambaram, submitted that Section 37 is only an enabling provision and is not a restricting provision and this section nowhere expressly restricts the application of the Code or the filing of revision petitions before the High Courts.

For deciding the issue, the Apex court in the ITI Ltd has discussed and relied on several judgments, namely, *Bhatia International v Bulk Trading Jurisdiction*[7], *Nirma Ltd v Lurgi Lentjes*[8], *Shyam Sunder Agarwal & Co. v Union of India*[9], *National Telephone Company Ltd. v Postmaster-General*[10], *R.M.A.R.A. Adaikappa Chettiar v S. Ramaraja Thevar*[11], *Shankar Ramchandra Abhyankar v Krishnaji Dattatreya Bapat*[12], *Central Coal Fields Ltd., and Anr. v Jaiswal Coal Co. and Ors.*[13] and *National Sewing Thread Co. Ltd v James Chadwick*.

It is important to mention here that two judgments, *Shankar Ramchandra Abhyankar v Krishnaji Dattatreya Bapat* and *Central Coal Fields Ltd. and Anr. v Jaiswal Coal Co. and Ors.* were referred by Ld. counsel for the appellant, they were not directly related to the Arbitration Act and therefore are not discussed in this article. It is also interesting to note that in the ITI Ltd case, the judgment passed in R.M.A.R.A. Adaikappa Chettiar was referred by the Ld. Counsels for both the parties to support their argument as well as by the court in reaching its decision.

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[7] *Bhatia International v Bulk Trading S A* (2002) 4 SCC 105
[8] *Nirma Ltd v Lurgi Lentjes Energietechnik Gmbh* (2002) 5 SCC 520
[9] *Shyam Sunder Agarwal and Co v Union of India* (1996) 2 SCC 132
[10] *National Telephone Co Ltd v Postmaster General* (1913) AC 546
[11] *R M A R A Adaikappa Chettiar v R Chandrasekhara Thevar* (1948) PC 12
[12] *Shankar Ramchandra Abhyankar v Krishnaji Dattatreya Bapat* (1969) 2 SCC 74
[13] *Central Coal Fields Ltd and Anr v Jaiswal Coal Co and Ors* (1980) 1 SCC 471

The Apex Court in the conflicting judgment of *MTNL v M/S. Applied Electronics* was hearing a Special Leave Petition, which itself had arisen out of the case of *Satpal P. Malhotra v Puneet Malhotra* in which the Delhi High Court had followed the decision passed in *MCD v International Security*[14] and had held that the Code of Civil Procedure, 1908 would apply to the proceedings under the Arbitration and Conciliation Act, 1996. Thus, the Apex court, after referring to several other precedents in the MTNL judgment, has held that 'The judgment passed in ITI Ltd could have been wrong as it has not followed the law laid down in *SBP & Co v Patel Engineering*[15], *Pandey & Co. v State of Bihar*[16] and *Fuerst Day Lawson Ltd v Jindal Exports*[17]'.

The rationale in all the judgments mentioned above and relied upon by the Apex Court in coming to the conclusion it reached in ITI Ltd are discussed in this article to try to understand why the Apex Court in MTNL doubted its earlier reasoning and thus referred the issue to a larger bench for a reconsideration.

THE AUTHORITIES RELIED UPON

The Apex Court in the ITI Ltd case dealt with the question related to the Legality of Exercising Revisional Jurisdiction by the High Courts where an Appeal has already been preferred before a Civil Court and only a Second Appeal to the Supreme Court is expressly allowed. The Court, in this regard, first discussed the judgment passed in ***Nirma Ltd v Lurgi Lentjes*** wherein it was held by the Apex Court that: *This is a Petition under Article 136 of the Constitution of India*[18]*, seeking leave to file a Civil Appeal against an Appellate Order of City Civil Court No. 11 Ahmedabad, passed under Section 37(2)*[19]*. We are not inclined to entertain this special leave petition since, in our opinion, an efficacious alternate remedy is available to the petitioner by way of filing a revision in the High Court under Section 115*[20]*. Merely because a second appeal against an appellate order is barred by the provisions of Section 37(3), the remedy of revision does not cease to be available to the petitioner, for the City Civil Court deciding an appeal under Section 37(2) remains a court subordinate to the High Court within the*

[14] *Municipal Corpn of Delhi and Ors v International Security and Intelligence Agency Ltd* (2004) 3 SCC 250
[15] *SBP and Co v Patel Engineering Ltd and Anr* (2005) 8 SCC 618
[16] *Pandey and Co Builders (P) Ltd v State of Bihar* (2007) 1 SCC 467
[17] *Fuerst Day Lawson Ltd v Jindal Exports Ltd* (2011) 8 SCC 333
[18] Constitution of India 1950, art 136
[19] Arbitration and Conciliation Act 1996, s 37(2)
[20] Code of Civil Procedure 1908, s 115

meaning of Section 115 of the CPC. In taking this view, we find support from a decision of this Court in Shyam Sunder Agarwal and Co. v Union of India[21].

Probably, this was the first case where the Apex Court refused to entertain a Second Appeal from an order passed under Section 37(2) of the 1996 Act wherein the appellant, instead of filing a revision petition before the High Court against the order passed in the first appeal has rather directly preferred a second appeal under Section 37(3) before the Apex Court. The top court directed the appellant to file a revision before the High Court instead of directly filing a second appeal before it.

What is worth noting here is that the Apex Court has not discussed Section 37 of the Arbitration Act in detail and has rather directly instructed the party to proceed under the Code of Civil Procedure and file a revision petition. The court has thus introduced the revisional jurisdiction of High Courts as a general rule and as a mandate necessarily to be followed under the Code into Arbitration proceedings, which is otherwise not expressly available under the 1996 Act.

The court in ITI Ltd further discussed the case of ***Shyam Sunder Agarwal & Co v Union of India,*** but this case was decided when the 1940 Act was applicable, and the question before the court was 'Whether a revision lies against the judgment passed in appeal under Section 39 of the Arbitration Act, 1940'? The Apex court in Shyam Sunder Agarwal has held that, *In our view, a revisional application before the High Court against an appellate order passed under Section 39 of the Arbitration Act is maintainable. There is no express provision in the Arbitration Act putting an embargo against filing a revisional application against an appellate order under Section 39 of the Act. The Arbitration Act has put an embargo on filing any second appeal from an appellate order under Section 39 of the Act. The Arbitration Act is a special statute having limited application relating to matters governed by the said Act. Such a special statute, therefore, must have its application as provided for in the said statute. The revisional jurisdiction of the High Court under the Code or any other statute, therefore, shall not stand superseded under the Arbitration Act if the Act does not contain any express bar against the exercise of revisional power by the High Court provided the exercise of such revisional power does not mitigate against giving effect to the provisions of the Arbitration Act.*

[21] *Shyam Sunder Agarwal and Co. v Union of India* (1996) 2 SCC 132

It may be stated that even if a special statute expressly attaches finality to an appellate order passed under that statute. It has been held by this Court in the case of Hari Shanker that such provision of finality will not take away the revisional powers of the High Court under Section 115 of the Code of Civil Procedure. There is also no such express provision in the Arbitration Act attaching finality to the appellate order under Section 39 of the said Act. As already indicated, the only bar under Section 39(2) is a second appeal from an appellate order under Section 39.

The Court, in this case, has explicitly mentioned that '*The revisional jurisdiction of the High Court under the Code or any other statute therefore shall not stand superseded…… provided exercise of such revisional power does not mitigate against giving effect to the provisions of the Arbitration Act*', still the court in ITI Ltd has not discussed and checked if the exercise of revisional powers by High Court mitigates against giving effect to the provisions of the Arbitration Act or not. The court failed to examine how a statutory right to file a Second appeal before the Apex Court gets affected once the High Court exercises has already exercised its revisional jurisdiction.

Generally, it is the civil appellate jurisdiction that is exercised by Hon'ble the Apex Court under Section 37(3) of the Act as the right to appeal is expressly mentioned under 37(3) and the appellant has to only file a leave to appeal along with the appeal. But if the High Courts are allowed to exercise their Revisional and Supervisory jurisdiction against an order passed under Sections 37(1) & (2), then in such a case, only a special leave to appeal under Extra-ordinary jurisdiction would lie before the Supreme Court from a revisional order passed by the High Court, wherein the Supreme Court has the sole discretion to grant or deny the special leave to appeal. The Supreme Court can grant special leave to appeal from any order passed by the High Court in revision, but it does not remain a matter of right under Section 37(3) of the Arbitration Act, 1996. A 'Leave to Appeal' is a general request to a higher court to hear an appeal from a lower court's decision, while a 'Special Leave to Appeal' is a request where the courts have more discretion, typically only granted in exceptional circumstances where a case raises significant legal issues or public interest concerns, often requiring the applicant to demonstrate why a regular appeal wouldn't suffice. A 'Special Leave' implies a higher bar for approval compared to a 'general leave to appeal'. What is important to consider here is that Section 37(3) of the Act states that nothing in this section shall affect or take away any right to appeal to the Supreme

Court. Therefore, Section 37 of the Act, being an enabling provision, confers the right to appeal to the Supreme Court where a party has reasons and grounds for appeal, whereas Article 136 of the Constitution of India confers an extraordinary jurisdiction and leaves it to the discretionary powers of the Supreme Court to allow or not allow one's appeal before it unless there are special circumstances for allowing the appeal. Therefore, the exercise of revisional jurisdiction by the High courts would not only hinder the appellate jurisdiction of the Supreme Court exclusively mentioned under 37(3) but would also take away the statutory right available to an appellant to file an appeal before the Supreme Court.

In ITI Ltd. judgment under para 9, the court has discussed how Mr. Parasaran, being the counsel for the appellant, has tried to explain that the law laid down in Shyam Sunder Agarwal was wrongly relied upon in Nirma Ltd. and shall not be taken as a precedent. Still, the court in para 10 has mentioned that it was not convinced with his argument. The true transcript from the judgment is reproduced below:

9. But Mr. Parasaran contended that the said order is based on an earlier reported judgment of this Court in the case of Shyam Sunder Agarwal & Co. v Union of India. According to Mr. Parasaran, the Court in the case of Nirma Ltd. has erroneously founded its conclusion on the said judgment in Shyam Sunder Agarwal's case. Learned counsel argued that the case of Shyam Sunder Agarwal arose under the Arbitration Act 1940, which Act had made the provisions of the Code specifically applicable to proceedings arising under the said Act in the civil court, whereas, in the present Act, such provision-making the Code applicable is not found. Therefore, there is a substantial difference in law between the cases of Shyam Sunder Agarwal and Nirma Ltd. Therefore, the order of this Court in Nirma Ltd is not a good law and, hence, requires reconsideration.

10. We do not agree with this submission of the learned counsel. It is true in the present Act, application of the Code is not specifically provided for, but what is to be noted is: Is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. When there is no express exclusion, we cannot, by inference, hold that the Code is not applicable.

11. It has been held by this Court in more than one case that the jurisdiction of the civil court to which a right to decide a law between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section 37(2), we cannot draw an inference that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable. This general principle apart, this issue is now settled by the judgment of a 3-Judge Bench of this Court in the case of Bhatia International v Bulk Trading S.A. and Anr[22] *wherein, while dealing with a similar argument arising out of the present Act, this Court held: "While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is* that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by the inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion."

12. In the said view of the matter, we are in respectful agreement with the view expressed by this Court in the case of Nirma Ltd. and reject the argument of Mr. Parasaran on this question.

So, the court in ITI Ltd., while referring to Shyam Sunder Agarwal, has not dwelled on the point made by it earlier in Bhatia International that the '*court may take inferential conclusions when such a conclusion is the only conclusion*' and thus, apart from Section 5 of the Act, the court has also failed to consider the Statement and object of the Act which later became the idea behind introducing the 2015 Amendment Act i.e. 'To Reduce the Interference by Courts'. The Court failed to take into account because the 'Statement and object of the Act' cannot be taken as an 'inferential conclusion' to conclude that 'Revisional Jurisdiction of a Court is Ousted' as the Act only speaks of a second appeal before the Apex Court. The principle of 'Expressio unius est exclusio alterius' could have been invoked by the court when interpreting the statute to determine the legislative intent. This Latin maxim means that 'the expression of one thing is the exclusion of the other'. The principle states that when something is explicitly mentioned in a

[22] *Bhatia International vs Bulk Trading S A & Anr* AIR 2002 SC 1432

statute, any similar matter that is not mentioned is assumed to have been intentionally omitted. That is to say, the maxim is applied in statutory interpretation to infer that when the legislature explicitly includes one thing in a statute, the intention is to exclude others not mentioned.

The Court has also not considered that the term 'court' under Section 2(e) of the Act only includes '*High Court in exercise of its original ordinary civil jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit*' and not '*High Court in exercise of its appellate or revisional jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of an appeal*. The court has thus made the entire code applicable to arbitral proceedings wherever the Act is silent and therefore has brought in all the delaying procedures available under the Code to the arbitral proceedings.

The court in I.T.I. Ltd case further held:

18. Power conferred on the High Court under Section 115 of the Code of Civil Procedure 1908 over all subordinate courts within its jurisdiction is a supervisory power and has been distinguished from its power of appeal to correct errors of fact and law. The power of revision under Section 115, being like the power of superintendence to keep subordinate courts within the bounds of their jurisdiction, cannot be readily inferred to have been excluded by provisions of a special Act unless such exclusion is clearly expressed in that Act. The Arbitration and Conciliation Act 1996, which is for consideration before us by the provision contained in Section 37(3) of the said Act, only takes away the right of Second Appeal to the High Court. The remedy of revision under Section 115 of the Code of Civil Procedure is neither expressly nor impliedly taken away by the said Act.

19. Revisional jurisdiction of superior court cannot be taken as excluded simply because subordinate courts exercise a special jurisdiction under a special act. The reason is that when a special Act on matters governed by that Act confers jurisdiction on an established court, as distinguished from a 'persona designata', without any words of limitation, then the ordinary incident of procedure of that Court right of appeal or revision against its decision is attracted. The right of Second Appeal to the High Court has been expressly taken away by Section 37(3) of the Act, but for that reason, it cannot be held that the right of revision has also been taken away.

21. Provisions of Section 37 of the Act 1996 bars Second Appeal and not Revision under Section 115 of the Code of Civil Procedure. The Power of Appeal under Section 37(2) of the Act against the order of the arbitral Tribunal granting or refusing to grant an interim measure is conferred on the court. Section 2(e) defines a 'Court' as a 'Principal Civil Court of Original Jurisdiction', which has 'Jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been the subject matter of the suit'. The power of appeal having conferred on a Civil court all procedural provisions contained in the Code would apply to the proceedings in appeal. Such proceedings in appeal are not open to a Second Appeal as the same is barred under Section 37(3). But I agree with the conclusion reached by Brother Hegde J. that the supervisory and revisional jurisdiction of the High Court under Section 115 of the Code of Civil Procedure is neither expressly nor impliedly barred either by the provisions of Section 37 or Section 19(1) of the Act. Section 19(1) under Chapter V of Part I of the Act merely states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure. The said action has no application to the proceedings before a civil court in the exercise of powers in appeal under Section 39(2) of the Act.

22. The supervisory jurisdiction to be exercised by the High Court under Section 115 of the Code is to correct jurisdiction errors, if any, committed by the Sub-ordinate Court in the exercise of power in appeal under Section 37(2) of the Act. The approach made to the Revisional Court under Section 115 of the Code is not a resort to remedy of appeal. In appeal, interference can be made both on facts and law, whereas in revision, only errors relating to jurisdiction can be corrected. Such revisional remedy is not expressly barred by the provisions of the Act. We have also not found any implied exclusion of the same on examination of the scheme and relevant provisions of the Act.

In the I.T.I. Ltd. case under Para 19, the court observed: *19. ...In National Telephone Company's case, Viscount Haldane L.C. observed thus: 'When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches.'*

This means when a question is being referred to any court for adjudication, then all the ordinary procedure of that court to which the question is being referred, as well as all the general rights of appeal available to an appellant from the decision of that court to which the question is being referred shall be considered as attached unless 'such exclusion is clearly expressed' in that Act.

In the National Telephone Company's case, the Railway and Canal Traffic Act was discussed. Section 17(5) of the Act[23], being a general Act, expressly had taken away the right of appeal to the House of Lords from a decision of a superior court of appeal still, it was held that nothing can take away the right of appeal to the House of Lords conferred by Section 3 of the Act,[24] which is a special Act.

Therefore, the House of Lords has rather considered the Appellate Jurisdiction Act 1876 as a special law that shall prevail over the Railway and Canal Traffic Act 1888. It thus held that the right of appeal to the House of Lords given by the Appellate Jurisdiction Act 1876 is not taken away by the provisions of the Railway and Canal Tariff Act 1888 and in case of a conflict, the earlier being a special Act would prevail over the latter.

It is a well-settled principle of law that Courts cannot supply casus omissus, i.e., omission in a statute cannot be supplied by construction. In this regard, reliance can be placed on the decision in the case of ***Shiv Shakti Cooperative Housing Society, Nagpur v Swaraaj Developers and Ors***[25] ***2003 SC*** wherein the Hon'ble court has held: '*The legislative casus omissus cannot be supplied by the judicial interpretative process.*'

Also, the Court in ***Commissioner of Income Tax, Patiala V Shahzada Nand & Sons 1966 SC***, while stating the fundamental rule of construction, had observed that 'the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just and expedient'.

It is a well-recognized maxim that '*generalia specialises nonresonant*', which means that 'general laws do not prevail over special laws and that whenever there is an apparent conflict between two statutes, the provision of a general statute must yield to that of a special statute'. As mentioned above, the Supreme Court itself, in a catena of judgments, has held that the Arbitration Act, being a special law in the matters of arbitration law in cases of conflicts, will

[23] Railway and Canal Traffic Act 1888, s 17(5)
[24] Appellate Jurisdiction Act 1876, s 3
[25] *Shiv Shakti Cooperative Housing Society, Nagpur v Swaraaj Developers and Ors* AIR 2003 SC 2434

prevail over general law, which certainly includes the Code of Civil Procedure 1908. Thus, it can be said that the reliance by the Apex court on the judgment passed by the House of Lords in the case of National Telephone was a flawed one as the Civil Procedure Code is not a special law, unlike the Appellate Jurisdiction Act 1876 and thus the Civil Procedure Code cannot confer any special jurisdiction to the High Court which was impliedly excluded under the Statement and Object of the Arbitration Act 1996 and is also not conferred under the Act despite it being a special law.

The two phrases cited by the Apex court in I.T.I. Ltd from National Telephone Judgment i.e. **1.** '*Ordinary incidents of the procedure of that Court'* and **2.** '*any general right of appeal from its decision likewise attaches'*, were made in the context of the powers conferred to it being the Appellate Court by the Appellate Jurisdiction Act 1876 which was a special law and not by any express or implied exclusion of such a jurisdiction found under the Railway and Canal Traffic Act 1888.

In ITI Ltd, the court held that '*19. Revisional Jurisdiction of Superior Court cannot be taken as excluded simply because subordinate courts exercise a special jurisdiction under a special act*'. However, this reasoning cannot be sustained concerning the Arbitration Act 1996. The supervisory and revisional jurisdiction of the High Court also exists under Article 227 of the Constitution of India, which, for the sake of comparison, can be considered almost on the same footing as the jurisdiction conferred by the Appellate Jurisdiction Act 1876 in the National Telephone case as both being special laws conferring the superior courts with the jurisdiction which otherwise was expressly or impliedly excluded or is not conferred under the Railway and Canal Traffic Act, 1888 being the general law which formed the basis of arbitral proceedings and from which no second appeal or revision lied.

However, it should be kept in mind that the Apex Court has restricted such exercise of jurisdiction under Articles 227 and has rather suggested exercising it very sparingly. Such a view was expressed by the apex court in the case of *Deep Industries Limited v Oil and Natural Gas Corporation Limited and Anr,*[26] wherein it held that because the Act is a self-contained code and provides for the swift resolution of all matters covered by it, the arbitral process would be

[26] *Deep Industries Limited v Oil and Natural Gas Corporation Limited and Anr* AIR 2019 SC 1958

completely derailed if petitions under Articles 226 and 227 of the Constitution are granted. The Supreme Court has held that the High Court should use extreme caution when interfering with such rulings, even if petitions can be filed under Article 227 against orders made in appeal under Section 37 of the Act. It is well settled that the revisional jurisdiction under Section 115 of the CPC is to be exercised to correct jurisdictional errors only.

The same was earlier held in the case of *DLF Housing & Construction Company Pvt Ltd v Sarup Singh and Ors,*[27] wherein the Court held: *"The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself."*

Furthermore, it is worth noticing that in the National Telephone case, it was Section 17[28], which said that the 'decision of the superior court of appeal shall be final', i.e. there shall be no second appeal from the order of the superior court of appeal, and the revisional jurisdiction of the court was derived from the Appellate Jurisdiction Act 1876 to supersede the 1888 Act. The Court in ITI Ltd compared Section 17 of the Railway and Canal Traffic Act 1888 (General law restricting revisional jurisdiction) with Section 5 of the Arbitration and Conciliation Act 1996 (Special law restricting revisional jurisdiction) and then brought The Code of Civil Procedure 1908 (General Law conferring revisional jurisdiction) in equal footing to the Appellate Jurisdiction Act 1876 (Special law conferring revisional jurisdiction) to counter the implied restriction on the exercise of revisional jurisdiction by High Courts. However, in the National Telephone case, there was a conflict between different laws where the Appellate Jurisdiction Act of 1876 was a 'Special Act' in itself while the Telegraph Arbitration Act 1909 and the Railway and Canal Traffic Act 1881 were not, and thus the very comparison of these Acts respectively with the Civil Procedure Code 1908 and the Arbitration and Conciliation Act,1996 by the Superior Court in ITI Ltd case to insert and introduce the revisional jurisdiction of superior courts which otherwise was not available or allowed can ultimately be considered as a wrong and misconceived one.

[27] *DLF Housing & Construction Company Pvt Ltd v Sarup Singh and Ors* (1970) 2 SCR 368
[28] Railway and Canal Traffic Act 1888, s 17

Now, coming to the counter view taken by the Hon'ble Apex court in the case of **MTNL. v M/S. Applied Electronics, 2016,** wherein the Apex court doubted its earlier decision passed in I.T.I. Ltd case and has reached a different conclusion. The excerpts from the MTNL decision are reproduced below:

2. The present appeal, by special leave, calls into question the legal tenability of the order dated 28th July 2014 passed by the High Court of Delhi wherein a Division Bench in CM No. 15530 of 2013 placed reliance on Satpal P. Malhotra & Ors. v Puneet Malhotra & Ors. that has followed the decision in MCD v International Security & Intelligence Agency Ltd. has expressed the view that the Code of Civil Procedure, 1908 (for short 'the CPC') would apply to the proceedings under the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act).

11. On a perusal of the said provision, in juxtaposition with the provisions contained in the 1996 Act, it seems to us that the legislature has intentionally not kept any provision about the applicability of the CPC. On the contrary, Section 5 of the 1996 Act lays the postulate that notwithstanding anything contained in any other law for the time being in force in matters covered by Part I, no judicial authority shall intervene except so provided wherever under this Act.

So, as we can see, Satpal P. Malhotra's judgment followed MCD v International Security & Intelligence Agency Ltd, which itself was related to the Arbitration Act of 1940. In ***MCD v Intnl. Security & Intelligence,*** the court was considering the right of filing cross-objection by a party under Section 39 and thus explained the powers available to a court under the Code of Civil Procedure, 1908 as provided under Section 41. The court in the MCD case thus held: *Clause (a) of Section 41 extends the applicability of all the provisions contained in the Code of Civil Procedure, 1908 to (i) all proceedings before the Court under the Act, and (ii) to all the appeals, under the Act. However, the applicability of such of the provisions of the Code of Civil Procedure shall be excluded as may be inconsistent with the provisions of the Act and/or of rules made thereunder…It is not merely the procedure prescribed by the Code of Civil Procedure which has been made applicable to proceedings under the Arbitration Act by Section 41(a) of the Act; the entire body of the Code of Civil Procedure, 1908 has been made applicable to all proceedings before the Court and to all appeals under the Arbitration Act, 1940. The provision is general and wide in its applicability, which cannot be curtailed; the only exception being where the provisions of the Arbitration Act and/or of rules made thereunder may be inconsistent with the*

provisions of the Code of Civil Procedure 1908, in which case the applicability of the latter shall stand excluded but only to the extent of the inconsistency.

Now, coming back to the MTNL Judgment, it states under para 3 that: *it is submitted by Mr. N.K. Kaul learned Additional Solicitor General, appearing for the appellant, that the scheme of the 1996 Act does not grant any space or make any provision as regards the applicability of CPC, unlike the Arbitration Act, 1940 (for short, 'the 1940 Act') and in the absence of any express provision, the legislative intendment is not to make it applicable. It is his further submission that Sections 5, 34, 37, and 50 of the 1996 Act constitute a complete code and it provides the measures for adjudging or deciding the validity of an award or even to adjudge the defensibility of an interim order. It is urged by him that recourse to any other mode under the CPC to challenge an order or the award passed under the Act would create an anomalous situation and frustrate the intention of the legislature.*

10. In this context, we may usefully refer to Section 41(a) of the 1940 Act. The said provision dealt with the procedure and powers of the court.

The Supreme Court, after reading Section 41(a) of the 1940 Act, moved on to compare the corresponding provision of the 1996 Act and thus explained: *11. On a perusal of the said provision, in juxtaposition with the provisions contained in the 1996 Act, it seems to us that the legislature has intentionally not kept any provision about the applicability of the CPC. On the contrary, Section 5 of the 1996 Act lays the postulate that notwithstanding anything contained in any other law for the time being in force in matters covered by Part I, no judicial authority shall intervene except so provided wherever under this Act.*

The court further cited the opinion of Hedge, J and Dharmadhikari, J in ITI as follows: Hedge, J: *… when the Act under Section 37 provided for an appeal to the civil court and the application of Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar under Section 5 will not be attracted because the conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also.*

Dharmadhikari, J:….*the supervisory and revisional jurisdiction of the High Court under Section 115 of the Code of Civil Procedure is neither expressly nor impliedly barred either by the provisions of Section 37 or Section 19(1) of the Act.*

The court, under para 17, referred Pandey & Co and thus stated:…*Section 37(3) prohibits a second appeal against the appellate order under Sections 37(1) and (2). However, given the provisions of s 5, a second appeal against the appellate order under ss 37(1) and (2) would not be permissible, even if s 37(3) had not been enacted. It was, therefore, not really necessary to enact this provision, and it seems to have been enacted by way of abundant caution.*

The court then referred to Fuerst Day Lawson Limited and cited: *"89. It is, thus, to be seen that the Arbitration Act 1940, from its inception and right through to 2004 (in P.S. Sathappan), was held to be a self-contained code. Now, if the Arbitration Act 1940 was held to be a self-contained code on matters about arbitration, the Arbitration and Conciliation Act 1996, which consolidates, amends, and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carried with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code, the applicability of the general law procedure would be impliedly excluded."*

It is important to mention here that P.S. Sathapan was passed by a 5 Judges Bench and it was related to the 1940 Act. However, it is also important to mention that the view taken by the Supreme Court on Fuerst Day has been re-affirmed by a 3 Judges Bench in ***Noy Vallesina v Jindal Drugs Ltd.***[29]

The Court then proceeded to quote Patel Engineering Ltd and said:

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration would be capable of being challenged under Articles 226 or 227 of the

[29] *Noy Vallesina v Jindal Drugs Ltd.* (2006) 5 BOMCR 155

Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award, including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless it has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is, after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Articles 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act, even at an earlier stage."

The court went on to compare ITI and Fuerst Day and held:

24. In ITI Ltd., it has been held that the jurisdiction of the civil court to which a right to decide a law between the parties has been conferred can only be taken away by a statute in specific terms and exclusion of such right cannot be inferred because there is always a strong presumption, that the civil courts have the jurisdiction to decide all questions of civil nature and on that basis, the court held that it cannot draw inference merely because the Act has not provided CPC to be applicable and thus it should be held that the CPC is inapplicable.

25. In Fuerst Day Lawson Ltd, the two-judge Bench placing reliance on a series of authorities has distinguished the 1940 Act and 1996 Act and has opined that once the 1996 Act is regarded as a self-contained and exhaustive code, it should be held that it carries with it a negative import that only such

acts either mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to do. The 1996 Act, as it manifests, provides restrictions for challenging the award. It also lays the postulate to assail the award and thus, the emphasis is on expeditious disposal. It does not permit a second appeal to be entertained as per the language employed in Section 37(3) and also under Section 5 of the 1996 Act. The two-judge Bench has reproduced a lucid expression of Tulzapurkar, J. to make home the point — "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done".

The court thus concluded by saying: *28. Section 5, which commences with a non-obstante clause, stipulates that no judicial authority shall interfere except where so provided in Part 1 of the 1996 Act. As we perceive, the 1996 Act is a complete Code, and Section 5, in categorical terms, along with other provisions, leads to a definite conclusion that no other provision can be attracted. Thus, the application of CPC is not conceived of and, therefore, as a natural corollary, the cross-objection cannot be entertained. Though we express our view presently, the judgment rendered in ITI Ltd. is a binding precedent. The three-judge Bench decision in International Security & Intelligence Agency Ltd. can be distinguished as is under the 1940 Act, which has Section 41, which clearly states that the procedure of CPC would apply to appeals. The analysis made in ITI Ltd. to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act envisages otherwise and the legislative intendment also so postulates.*

However, the court was wrong to conclude that the ITI Ltd. Judgment was related to the 1996 Act, and the judgment passed therein was only passed keeping in mind the 1996 Act. Rather, the ITI Ltd. Judgment was passed keeping in view the law expounded under various authorities related to the 1940 Act. The court finally concluded the order by stating: *29. As we are unable to follow the view expressed in ITI Ltd, we are of the considered opinion that the said decision deserves to be re-considered by a larger Bench. Let the papers be placed before the Hon'ble Chief Justice of India for the constitution of an appropriate larger Bench.*

THE INTERPLAY BETWEEN ARTICLE 227 AND THE ARBITRATION AND CONCILIATION ACT 1996

The purpose of the Arbitration and Conciliation Act itself is to resolve conflicts outside of court and minimise the amount of intervention by the court. In the SREI Infrastructure Finance Ltd v Tuff Drilling Pvt Ltd Case, the Supreme Court ruled that the arbitral tribunal is covered by Article 227. The Supreme Court has, however, cautioned the high courts about the exercise of its power of superintendence over the arbitral tribunal.

Additionally, the Supreme Court created two tests that courts must apply: the 'Exceptional Rarity Test' and the 'Patently Lacking in Inherent Jurisdiction Test'.

The Supreme Court previously established the law in Deep Industries Ltd. v Oil and Gas Corp Ltd. & Anr case, holding that pending arbitral proceedings invoking Article 227 must be limited to orders issued with a patent lack of inherent jurisdiction and unfair practices that could result in the denial of justice. As a result, the Supreme Court has developed and clarified the 'Patently lacking in inherent Jurisdiction Test'. High Courts should be cautious in interfering with the orders and should be restricted to the orders passed that are patently lacking in inherent jurisdiction, the Supreme Court goes on to say, adding that a patent lack of jurisdiction is only when perversity is found on the face of it.

The Supreme Court developed the 'Exceptional Rarity Test' in the case of Bhaven Construction v Executive Engineer Sardar Sarovar Narmada Nigam case. According to this test, the high court shall only allow a petition if the party demonstrates either that the opposing party has acted in blatant bad faith or that the petition is remediless and that its denial would amount to a denial of justice. Therefore, the Apex Court has greatly restricted the exercise of revisional powers by the court, even under Article 227.

CONCLUSION

The Conflicting Judgments by the Apex Court in ITI Ltd and MTNL cases underscore the evolving understanding of Judicial Intervention in Arbitration Proceedings. While ITI Ltd emphasised and enlarged the scope of judicial interference in arbitration matters under the Act,

the MTNL judgment highlighted inconsistencies in previous judgments and rightly referred the issue for reconsideration. The reliance by the Apex court on past judgments, though, reflects the complexity of balancing judicial oversight and arbitral autonomy and still requires reconsideration. The referral of the issue by the Apex court to a larger bench signifies a critical reevaluation of previous stances, aiming to ensure coherence and clarity in future arbitration jurisprudence.