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MYSORE CEMENTS LTD.

v.

SVEDALA BARMAC LTD.

MARCH 12, 2003

B

[DORAISWAMY RAJU AND SHIVARAJ V. PATIL, JJ.]

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Arbitration and Conciliation Act, 1996—Sections 30, 36, 73 and 74—Agreement between two contracting parties in dispute—During pendency of conciliation proceedings—Facts still disputed—Petition for execution of ‘Memorandum of Conciliation’ and ‘Letter of Comfort’—Plea that the conciliation proceeding amounted to settlement agreement and hence enforceable as arbitral award—High Court dismissed the petition—On appeal, held: The agreement cannot be accorded status of settlement agreement as it does not fulfill essential legal pre-requisites of Section 73 and hence not liable to be executed—Every agreement during pendency of conciliation proceeding does not automatically acquire status of settlement agreement within the meaning of Section 73 for being enforced as decree of Court.

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Appellant-company entered into contract with the respondent-company for supply and commissioning of rock crushing machines. On failure of machines to do the required work, appellant served a notice for arbitration on the respondent-company. However, at the request of the respondent, appellant agreed for conciliation. In the first round of conciliation proceeding ‘Memorandum of Conciliation’ was signed by both the parties and authenticated by the conciliators, wherein it was settled that the respondent would modify the working of machine within a stipulated period. The appellant-company was also required to provide some facilities for the modification work. Respondent-Company also issued ‘Letter of Comfort’ on the same date providing therein to compensate the appellant if they failed to complete the modification work within stipulated time. In another round of conciliation further time was granted for modification work. Again the respondent failed to complete the modification work. Parties met but the conciliation proceedings were called off as they did not reach any consensus.

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Appellant issued legal notice demanding refund of the price of the machines and its associated equipments alongwith interest @ 24% per

annum, damages for the loss incurred due to non-functioning of the machines, and for compensation in view of the 'Memorandum of Conciliation' and 'Letter of Comfort'. Thereafter, he filed execution petition for enforcement of 'Memorandum of Conciliation' and 'Letter of Comfort'. High Court dismissed the petition holding that the decision of conciliators was not a decision within the meaning of Section 74 of Arbitration and Conciliation Act, 1996; and that even if the decision is assumed to be decision under Section 74, there was no finding whereby the Conciliators had fixed any compensation to be paid to the appellant in case of failure of completion of work within stipulated period.

Appellant also filed claim before arbitrators on remaining issues not covered within the reference of conciliation. However, the issue of compensation had not been raised in the arbitration proceedings.

In appeal to this Court appellant contended that under Section 74 read with Sections 30 and 36 of the Act, settlement agreements are enforceable as if they are arbitration awards; that in a sense a conciliation settlement is analogous to a compromise agreement or consent order which is enforced by using the machinery of the court; that the settlement agreement in the present case satisfied all the requirements of Section 73 of the Act.

Respondent contended that enforcement of the 'Letter of Comfort' in execution proceedings is not permissible unless there is a conciliation settlement in terms of and as required in Section 73 of the Act; that there was nothing to show that the 'Letter of Comfort' is incorporated in the settlement agreement; that there was no termination of conciliation proceedings under Section 76A by the signing of the settlement agreement by the parties on the date of agreement; that 'Letter of Comfort' is only an interim arrangement; that where statute prescribed a procedure for doing something the same course must be followed and the procedure prescribed must be adhered to; that since the 'Letter of Comfort' and 'Memorandum of Conciliation' do not meet requirements of Section 73, they cannot be given status of settlement agreements under Section 74 to enforce them as an arbitral award under Section 30 so as to enforce them for an execution proceedings straightaway.

Dismissing the appeal, the Court

HELD: 1. The materials on record, particularly the 'Memorandum

A of Conciliation Proceedings' and the 'Letter of Comfort', either taken
individually or even together - they or any one of them cannot legitimately
claim to be entitled to or assigned the status of a settlement agreement
within the meaning of Section 73, for purposes of Arbitration and
Conciliation Act, 1996. They fall short of the essential legal pre-requisites
B to be satisfied for being assigned any such status despite viewing them with
a liberal approach in the background of the objects and purposes
underlying conciliation, arbitration and alternative mode of settlement of
disputes. [1045-H; 1046-A-B]

2. If the Settlement Agreement comes into existence under Section
C 73 satisfying the requirements stated therein, it gets the status and effect
of an arbitral award on agreed terms on the substance of the dispute
rendered by an arbitral tribunal under Section 30 of the Act. In the present
case, looking to the 'Memorandum of Conciliation Proceedings' and
'Letter of Comfort', it is true that parties have agreed to certain terms,
but they cannot be straightaway enforced by taking up execution
D proceedings. On the basis of the 'Letter of Comfort' execution proceedings
could not be taken up under Section 36 of the Act. When the facts are
disputed as to the satisfaction of the modification work and as to the
breach of obligation even in relation to the modification work by either
party, High Court was right in passing the impugned order. At the end of
E 'Memorandum of Conciliation Proceedings', it is stated that the terms of
Conciliation Settlement are agreed to and accepted by both the parties.
Conciliators and both the parties also have signed the same but the
procedure as indicated and various steps contemplated in Section 73 of
the Act were not adhered to. This apart in this Memorandum neither
consequences for not completing the modification work are stated nor any
F amount of compensation is fixed. The 'Letter of Comfort', could not be
accorded the status of Settlement Agreement to bring it within the meaning
of Section 74 of the Act to treat it as an arbitral award under Section 30
of the Act so as to enforce it under Section 36 of the Act. In the present
case, the Conciliation proceedings were not terminated but they were only
G adjourned. Under Section 76 of the Act, the proceedings shall be
terminated as per clauses (a) to (d) of the said Section. If there was
Settlement Agreement under Section 73, Conciliation Proceedings would
have been terminated under Section 76(a) of the Act.

[1044-C; 1044-E; 1045-E]

H 3. It also cannot be said that 'Memorandum of Conciliation' and the

'Letter of Comfort' could be treated as interim award in the absence of any Settlement Agreement. It is not every agreement or arrangement between parties to the disputes, arrived at in whatever manner or form, during the pendency of conciliation proceedings that automatically acquires the status of a settlement agreement within the meaning of Section 73 of the Act so as to have the same status and effect as if it is an arbitral award, for being enforced as if it were a decree of the court. It is only that agreement which has been arrived at in conformity with the manner stipulated and form envisaged and got duly authenticated in accordance with Section 73 of the Act, alone can be assigned the status of a settlement agreement, within the meaning of and for effective purposes of the Act, and not otherwise. If the statute prescribes a procedure for doing a thing in a particular way, it has to be done accordingly. [1045-B-D; 1043-C, D]

Haresh Dayaram Thakur v. State of Maharashtra and Ors., [2000] 6 SCC 179, referred to.

4. As the arbitration proceedings are pending between the parties, it is open to the appellant to avail such remedies as are available in law on the basis of 'Memorandum of Conciliation Agreement' and 'Letter of Comfort' by approaching competent court or raising any arbitration dispute as is permissible in law. As per Section 77 of the Act, the parties shall not initiate, during the conciliation proceedings any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where in his opinion such proceedings are necessary in preserving his rights. [1046-C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2321 of 2003.

From the Judgment and Order dated 4.5.2000 of the Delhi High Court in E.P. No. 264 of 1998.

K.K. Venugopal, Krishnan Venugopal, Sanjiv Jha, Saleem Hasan and Sanjay Kapur for the Appellant.

F.S. Nariman, Anil Malhotra, Ravi Bishoni, Sanjeev Kumar Singh and Bhargava Desai for the Respondent.

The Judgment of the Court was delivered by

SHIVARAJ V. PATIL, J. Leave granted.

- A** The question that arises for consideration in this appeal is whether a Letter of Comfort furnished on the same day of a Settlement arrived at during conciliation signed by both the parties and authenticated by the Conciliators is enforceable in the same manner as an arbitration award under Section 74 read with Sections 30 and 36 of the Arbitration and Conciliation Act, 1996?
- B** The appellant-Mysore Cements Limited contracted by its letters dated April 22, 1994 and July 30, 1994 with the respondent-Svedala Barmac Limited, a company based in New Zealand, for the supply and commissioning of two sets of Barmac 9600 DUOPACTOR rock-crushing machines for its cement plant at Damoh vide two separate letters dated July 30, 1994. Mysore Cements
- C** also contracted with another subsidiary of Barmac Ltd. for the supply and commissioning of four Vibrating Ripo flo Screens. On failure of machinery to crush limestone in accordance with the respondent's assurances, the appellant served a notice for arbitration on the respondent. However, at the respondent's request subsequently, the appellant agreed to conciliation at New Delhi. As a result, a "Memorandum of Conciliation" dated December
- D** 18, 1997 was signed by both the parties and authenticated by the Conciliators, According to the appellant, on the same day, as a part of the same transaction and pursuant to the Clauses 9 and 10 of the said Memorandum to compensate the appellant in case of failure of completion or modification of the work on two lines, a letter was sent to the parties signed by the same. Marketing Director, Mr. Ian Rodger, who had signed the 'Memorandum of Conciliation'.
- E** According to the appellant, this Letter of Comfort, having regard to the stipulations and undertakings contained in the Memorandum of Conciliation, formed part of the said Memorandum and that the parties had finally and conclusively determined the amount of compensation to be paid monthly by the respondent to the appellant until the machinery was set right. The appellant
- F** approached the High Court for enforcement of the same through execution. A learned single Judge of the High Court dismissed the execution petition holding that the alleged decision of the conciliators is not a decision within the meaning of Section 74 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') and further assuming it to be a decision of the Conciliators, there was no finding whereby the Conciliators had fixed any compensation to be paid to the appellant in case the work was not completed within the
- G** situated period. This order of the High Court dated 4th May, 2000 dismissing the execution petition filed by the appellant is under challenge in this appeal.

- H** In addition to the facts stated above, it may be useful to refer to a few more dates and events for proper appreciation of the respective contentions. First round of conciliation proceedings were held from December 15, 1997

to December 18, 1997 and the terms of Settlement between the parties were recorded in the Memorandum of Conciliation. The Letter of Comfort of the same date dated 18.12.1997 was issued in favour of the appellant to compensate at the rate of Rs. 20 lacs per month per line in case they failed to rectify line II by April 30, 1998 and line I by August 30, 1998. According to the appellant, respondent could not complete the modification work of line II by April 30, 1998. Another round of conciliation was called at the request of the respondent and some more time was granted to carry out modifications; the respondent admitted that the best results guaranteed could not be demonstrated/achieved on a consistent basis during trial; the respondent was not able to fulfill any of their assurances. The parties met again on 12-13, August, 1998 but could not reach on any consensus and decided to call off the third conciliation proceedings. The appellant issued a legal notice dated 27th August, 1998 to the respondent demanding refund of the amount of Rs. 937.56 lacs being the price of the Barmac Crushing System and associated equipment required for it alongwith interest @ 24% per annum and also damages amounting to Rs. 567 lacs as on August 22, 1998 for the loss incurred due to non-functioning of Barmac Crushing System. In addition, it called upon the respondent to compensate the appellant @ Rs. 40 lacs per month in view of the Memorandum of Conciliation and Letter of Comfort dated 18.12.1997. Thereafter as already stated above, the appellant filed Execution Petition No. 264/98 before the High Court of Delhi on 30.10.1998 claiming an amount of Rs. 200 lacs from May to September, 1998 and Rs. 40 lacs per month from October, 1998 onwards alongwith interest, @ 18% per annum. The appellant also filed claim before the Arbitrators on remaining issues not covered within the reference of conciliation. It is stated that the issue of compensation as contained in the said Memorandum of Conciliation and the Letter of Comfort has not been raised in the arbitration proceedings.

In order to find answer to the question set out above, the two documents which have material bearing need a closer look. They are extracted below:-

“(1) MEMORANDUM OF CONCILIATION PROCEEDINGS

Reg : Disputes and differences between Mysore Cement Ltd. (Units Diamond Cement) and Svedala Barmac Ltd.

- I. Mysore Cements nominated Mr. D.C. Singhania as Conciliator on its part and Svedala nominated Mr. R. Rajagopalan as Conciliator on its part without prejudice to the rights, obligations, contentions and remedies of the two parties in the matter.

- A II. The Conciliators commenced their proceedings on 15th December, 1997 at 2.30 at Hotel Vasant Continental, New Delhi and continued till 18th December, 1997. The Conciliators feel very glad to record that both the parties were very co-operative and helpful in reaching certain common points of agreement between them. As a result thereof both the parties agreed that Svedala may immediately commence work and take steps to modify the Barmac System and Svedala agreed to complete the modification work of Line II by 30th April, 1998. Modification work on Line I will be completed by 31st August, 1998 by Syedala.
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- C III. Soon after the modification work is completed on Line II by 30th April, 1998, trial runs will start immediately. After the success of the trial run is agreed mutually and provided Line II trials are completed, no later than 30 days from the completion of work on Line II, work on Line I will also start.
- D IV. Svedala is quite confident that after the completion of the modification work, overall objective of installing the Barmac System will be achieved. It is agreed by Mysore Cements Ltd., that they will extend their full co-operation and support in the modification work to be done by Svedala.
- E V. Svedala will take the following steps:-
1. Supply the Electric/Hydraulic Cascade Control Device, which will allow for the control of the cascade and therefore motor power draw from the control room.
 2. Supply the Remote Thermal Model read out meter which will allow the operators to monitor the power draw and with the aid of the Cascade Control Device to avoid motor overload.
 3. Supply the Control Device to integrate the existing feed rate control and closed circuit load measurement equipment. This control device will automatically regulate the new feed rate to the Barmac Circuit based on the Closed Circuit Tonnage being fed into the Barmac Crusher.
 4. Supply Suitable Belt weighner (Belt Scale).
 5. Supply of 2x300 KW, 415 Volts motors and motor control
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equipment to increase capacity of the Barmac Crusher. A

6. Recommend the appropriate screening media to ensure availability for trial. If this media is not already available, Svedala to arrange supply.

7. Provide the Engineering in time, for the installation of a conveyor discharge device that will be activated by a metal detector (supplied by Mysore Cements Ltd.) This discharge device will allow for the removal of the portion of material on the conveyor that contains the metal, detected by the metal detector. B

8. Supply Supervision of all installation and modification work as described in item 1 to 6 above including the engineering documentation required for Mysore Cements to carry out their scope of work. C

VI. Mysore Cements Ltd. is required to do the following :- D

1. Provide, install and connect wiring of a suitable size and specification to connect the devices supplied by Svedala to the power supply and control room.

2. To ensure continuous and adequate power and material supply for a full 5-day trial. E

3. Allow full control and access to the Barmac circuit to Svedala during the period of trial.

4. Provide access to the data required by Svedala to measure the total specific power requirement as it is at present and as the trials proceed. F

5. Provide Engineering drawings and data to enable Svedala to engineer and carry out all the modifications as stipulated above.

6. Carry out the modifications and installation work to complete the installation at the conveyor metal discharge device as engineered by Svedala (Refer to item 7 under Svedala's responsibilities.) G

VII. Any complaint or grievance regarding any kind of non-cooperation H

A by Mysore Cements Ltd. will be brought promptly to the notice of the Conciliators by Svedala.

VIII. Conciliators can also nominate some independent technical expert in consultation and acceptable to both parties, to be present at the site to review the progress and/or at the time of trial runs or performance test, if need be. The cost including expenses of such a technical expert shall be shared equally by Svedala and Mysore Cements.

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IX. To make Mysore Cements Ltd. comfortable, Svedala has agreed to give a Letter of Comfort in favour of Mysore Cements Ltd., ensuring (subject to Mysore Cements Ltd. performing their obligations) that the modification work of Line II will be completed by April 30, 1998 and Line I by 31st August, 1998.

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X. It is further clarified that liabilities undertaken by Svedala to compensate Mysore Cements Ltd. are subject to Mysore Cements performing their part of the work in a timely manner to achieve the target date of completion. In the unlikely event of Mysore Cements not performing their scope of work, as contained in this memorandum, in a timely manner, Svedala reserves the right to perform the same themselves.

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E XI. It is again made clear that the conciliation proceedings and whatever else is said, done and agreed is without prejudice to all rights of the parties.

XII. Nothing contained in this Memorandum shall amount to any admission by either party nor the parties assume any additional liability other than those stipulated in the contract.

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XIII. Now the conciliation proceedings stand adjourned and shall be resumed as and when need arises in future.

Sd/-

R. Rajagopalan

Sd/-

D.C. Singhania

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The terms of the conciliation settlement are agreed to and accepted by us.

For Svedala Barmac Ltd. For Mysore Cements Ltd.”

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“2. LETTER OF COMFORT

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December 18, 1997

M/s. Mysore Cements Ltd.
(Units-Diamond Cements
Diamond II
Damoh, Narasingarh, M.P.
3RD Floor, Tower B-1
Golden Enclave
Airport Road Bangalore-500 107

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Dear Sirs,

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1. In pursuance of our agreement in the conciliation proceedings to undertake the modification work of Line II and - Line I, we hereby assure you that the modification work of Line II shall be completed by 30th April, 1998 and on completion of the trial run of this line, modification work on - Line I shall thereafter also be commenced and which shall be completed by 31st August, 1998. We hereby assure and guarantee that in case the modifications work of Line II is not completed by 30th April, 1998, we shall compensate you at the rate of Rs. 20 lakhs per month (pro rate for part of a month) for the period of delay.
2. Similarly after the trial run of Line II, if we fail to complete the work of Line I by 31st August, 1998, we shall compensate you at the same rate for the delayed period.
3. In the event of any arbitration or court proceedings taking place at any time, between Svedala Barmac and Mysore Cements Ltd. in regard to the contract for the Barmac System supplied to Mysore Cements Ltd. and consequent to which we are required to make any payment to Mysore Cements Ltd., the amount of compensation, if any, already paid by us in terms of Paras 1 and 2 above shall be adjusted/deducted from the payment. If any, to be made by us consequent to the award of the arbitrators/courts.

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Yours faithfully,
Svedala Barmac Ltd.

Ian Rodger
Marketing Director”

Shri K.K. Venugopal, the learned Senior Counsel for the appellant

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A made elaborate submissions taking pains to explain the background facts, the nature, scope, object and purpose of conciliation, arbitration and adjudication by courts to contend that conciliation is a fundamentally different alternative dispute; in conciliation, however, apart from consensual selection of the forum, even the dispute is settled by agreement and not by adjudication. Under

B Section 74 read with Sections 30 and 36 of the Act, settlement agreements are enforceable as if they are arbitration awards : in a sense, a conciliation settlement is analogous to a compromise agreement or consent order which is enforced by using the machinery of the court; remedies in alternative

C dispute resolution modes such as arbitration must be more flexible than in traditional litigation. According to the learned Senior Counsel, in cases such as this, where the aggrieved party has given up its right to go to a binding

D forum such as arbitration or a civil suit in order to go in for conciliation proceedings at the request of the other party, the courts should be extremely reluctant not to enforce a conciliation settlement agreement at the behest of the other party. This is especially so where both the parties have shown by their subsequent conduct that they consider the conciliation settlement

E agreement to be binding and enforceable. It was submitted that to refuse to enforce the settlement agreement, would amount to rewarding bad faith in the conciliation process. He urged that in the present case, the conciliation settlement agreement dated December 18, 1997 entered into by the parties satisfied all of the requirements of Section 73 of Act. In particular the

F Conciliation Settlement was drafted by the conciliators and the parties during conciliation proceedings as provided in Section 73 (2) and bears the signature of the representatives of both parties at the end of the document as required by Section 73(3) of the Act. It has also been authenticated by the conciliators at the end of the document as required by Section 73(4) of the Act. Consequently, the Conciliation Settlement has become final and binding on the parties as set out in Section 73(3) of the 1996; Act. He also submitted that there is no overlap between the current proceedings for execution of the Conciliation Settlement and the arbitration proceedings separately being conducted pursuant to the arbitration clause; the two proceedings are distinct and independent and the Conciliation Settlement cannot be sent to the arbitral

G tribunal. He emphasized that heading of a document cannot determine its binding nature; in case or a contract, it is well-settled that it is really the intent of the parties that will govern whether it is to be construed as a binding agreement and not the heading of the document. Pursuing his submissions, he stated that various clauses of the Conciliation Settlement impose binding obligations on each of the parties and even the subsequent conduct of the

H parties also shows the binding character of the Conciliation Settlement. In the

present case, the Letter of Comfort must be treated as integral part of the Conciliation Settlement and binding on the parties. He added that a reference in an agreement to another document such as Letter of Comfort can result in the Letter of Comfort being incorporated into the agreement as in this case, Settlement Agreement and Letter of Comfort are executed on the same day contemporaneously. In support of his submissions, he drew our attention to relevant clauses in the Memorandum of Conciliation and Letter of Comfort. He read the preamble of the Act which states that one of the objects of the UNCITRAL Conciliation Rules embodied in Part III of the Act is to make "a significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in International commercial relations." He submitted that this Court should ensure that the intention of the Parliament reinforcing the System of Alternative Dispute Resolution in India is not frustrated by the hyper-technical approach taken by the respondent. This Court may see that Part III does not become redundant by accepting technical definition as to enforceability raised by the respondent.

Shri F.S. Nariman learned Senior Counsel on behalf of the respondent submitted that the impugned order is well-justified and the view taken by the High Court is a right view. He contended that the thrust of the submissions in short and substance amount to asking for the enforcement of the Letter of Comfort in execution proceedings which is not permissible unless there is a conciliation settlement in terms of and as required to in Section 73 of the Act; there is nothing to show that the Letter of Comfort is incorporated in the Settlement Agreements; there was no termination of conciliation proceedings under Section 76(a) by the signing of the Settlement Agreement by the parties on the date of Agreement. According to him, Letter of Comfort is only an interim arrangement and the dispute is pending before the Arbitrators. He submitted that where a statute prescribes a procedure for doing something, the same course must be followed and the procedure prescribed must be adhered to. Since the Letter of Comfort and the Memorandum of Conciliation do not meet the requirements of Section 73, they cannot be given status of Settlement Agreement under Section 74 to deem them as an arbitral award under Section 30 so as to enforce them in execution proceedings straightaway,

We have carefully considered the submissions made on behalf of either side.

The relevant Sections of the Act which are required to be kept in view while deciding the appeal are extracted below:

- A “30. Settlement- (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
- B (2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- C (3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.
- (4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.
- D 36. Enforcement- Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.
- E 73. *Settlement agreement*-(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observation after receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.
- F (2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.
- G (3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.
- (4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.
- H 74. *Status and effect of settlement agreement*- The settlement agreement

shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30. A

76. *Termination of conciliation proceedings* - The conciliation proceedings shall be terminated-

- (a) by the signing of the settlement agreement by the parties on the date of the agreement; or B
- (b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or C
- (c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- (d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration." D

The High Court dismissed the petition for enforcement by way of execution under Section 36 of the Act by the impugned order for the reasons that (1) in the decision of the Conciliators, no finding has been given as to what will happen in the event of the respondent not carrying out the modification within the period mentioned therein; (2) there was no settlement agreement within the meaning of Section 74 of the Act; E

(3) assuming it to be a decision of the Conciliators under the provisions of the Act, there was no finding that the Conciliators had fixed any compensation to be paid to the appellant in case the work was not completed within the stipulated period; (4) moreover, there was a dispute as to who was responsible for not completing the work within the period mentioned; and (5) the Letter of Comfort written by the respondent to the appellant agreeing to pay compensation in case the work was not completed within the period mentioned could not be enforced under Section 36 of the Act. F G.

From Clause (IX) of the Memorandum of Conciliation Proceedings, it is clear that the respondent has agreed to give a Letter of Comfort in favour of the appellant ensuring (subject to Mysore Cements Ltd., performing their obligations) that the modification work would be completed within the time mentioned therein. It is not stated in the said Memorandum that the Letter of H

- A Comfort shall be part and parcel of it; the said Clause only indicates that the respondent agreed to give a letter : there is nothing to show that the said letter gets incorporated in the Memorandum: under the Memorandum, quantum of compensation is not mentioned, so also it does not state what follows in case of default of completion of the modification work; the completion of modification of the work was subject to the appellant performing their obligations : there appears to be dispute in regard to satisfactory completion of the work and as to who committed breach of obligation. The Letter of Comfort starts with the sentence that in pursuance of the agreement in the Conciliation Proceedings to undertake the modification work, assurance was given that the modification work of Line II shall be completed by 30th April
- B 1999, and on completion of the trial run, modification work on Line I shall thereafter also be commenced and which shall be completed by 31st August, 1998. Further assurance was given that in case the modification work was not completed within the time, compensation at the rate of Rs. 20 lacs for each line would be given. It is also made clear that in the event of any arbitration or court proceedings taking place between the parties and consequent to which the respondent is required to make any payment to the appellant, the amount of compensation, if any, already paid in terms of paras 1 and 2, shall be adjusted/deducted from the payment, if any, to be made by them consequent to the award of the arbitrators/courts. There is also nothing in the Letter of Comfort as to what happens in case of dispute as to the satisfaction of modification work or otherwise arose. This Letter of Comfort gives an assurance for payment of compensation but it is difficult to say that even in case of dispute as to the satisfactory completion of modification work, still the compensation amount has to be paid, that too in the absence of any adjudication by any authority in that regard. This Letter of Comfort in the beginning itself states that it is pursuant to the agreement in the conciliation proceedings and not that it shall form part of the Memorandum of Conciliation.
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- Section 73 of the Act speaks of Settlement Agreement. Sub-section (1) says that when it appears to the Conciliator that there exist elements of settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observation. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations. In the present case, we do not find there any such formulation and reformulation by the Conciliator Under sub-section (2), if the parties reach a settlement agreement of the dispute on the possible terms of settlement
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- H formulated, they may draw up and sign a written settlement agreement. As

per sub-section (3) when the parties sign the Settlement Agreement, it shall be final and binding on the parties and persons claiming under them respectively. Under sub-section (4), the Conciliator shall authenticate the Settlement Agreement and furnish a copy thereof to each of the parties. From the undisputed facts and looking to the records, it is clear that all the requirements of Section 73 are not complied with.

This Court in *Haresh Dayaram Thakur v. State of Maharashtra and Ors.*, [2000] 6 SCC 179 while dealing with the provisions of Sections 73 and 74 of the Act, in para 19 of the judgment as expressed thus:-

“19. From the statutory provisions noted above the position is manifest that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. For this purpose the conciliator is vested with wide powers to decide the procedure to be followed by him untrammelled by the procedural law like the Code of Civil Procedure or the Indian Evidence Act, 1872. When the parties are able to resolve the dispute between them by mutual agreement and it appears to the conciliator that there exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in Section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it. Under sub-section (3) of Section 73 the settlements agreement signed by the parties is final and binding on the parties and persons claiming under them. It follows therefore that a successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74.”

It is well-settled that if the statute prescribes a procedure for doing a thing in a particular way, it has to be done accordingly. Para 20 of the same judgment in this regard reads thus:-

“20. In the case in hand, as appears from the materials on record, no such procedure as prescribed under Part III of the Act has been followed by the conciliator. The conciliator appears to have held

A some meetings with the parties in which there was discussion and thereafter drew up the so-called settlement agreement by himself in secrecy and sent the same to the court in a sealed cover. Naturally the so-called settlement agreement drawn up by the conciliator does not bear the signatures of the parties. As the impugned order shows, the

B said settlement has been given a status higher than an arbitral award inasmuch as the Court has refused to even entertain any objection against the said settlement agreement reiterating the position that the settlement arrived at by the conciliator will be binding on the parties. The conciliator who is a former judge of the High Court and the learned judge who passed the impugned order failed to take note of

C the provisions of the Act and the clear distinction between an arbitration proceeding and a conciliation proceeding. The learned judge in passing the impugned order failed to notice the apparent illegalities committed by the conciliator in drawing up the so-called settlement agreement, keeping it secret from the parties and sending it to the Court without their signatures on the same. The position is well settled and if the statute prescribes a procedure for doing a thing, a thing has to be done according to that procedure. Thus the order passed by the high Court confirming the settlement agreement received from the conciliator is wholly unsupportable.”

E There is no difficulty in accepting the argument that a Conciliator is a person who is to assist the parties to settle the disputes between them amicably unlike an arbitrator who has an adjudicatory function. But that does not dispense with satisfying the requirements of Section 73 in bringing out a binding Settlement Agreement.

F If the Settlement Agreement comes into existence under Section 73 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Act. The submission that when there was substantial compliance with the requirements of Section 73, as in the present case, when the parties have arrived at a Settlement Agreement like the parties before any civil court filing a compromise petition, there should be no impediment to take up execution based on such a compromise or agreement, cannot be accepted. Even a compromise petition signed by both the parties and filed in the court *per se* cannot be enforced restoring to execution proceedings unless such a compromise petition is accepted by the

H court and the court puts seal of approval for drawing a decree on the basis

of compromise petition. In the present case, looking to the Memorandum of Conciliation Proceedings and Letter of Comfort, it is true that parties have agreed to certain terms, but they cannot be straightaway enforced by taking up execution proceedings. As rightly held by the High court for the reasons stated in the impugned order on the basis of the Letter of Comfort execution proceedings could not be taken up under Section 36 of the Act. When the facts are disputed as to the satisfaction of the modification work and as to the breach of obligations even in relation to the modification work by either party, the High Court was right in passing the impugned order. It may be again stated here that at the end of Memorandum of Conciliation Proceedings, it is stated that the terms of Conciliation Settlement are agreed to and accepted by both the parties. Conciliators and both the parties also have signed the same but the procedure as indicated and various steps contemplated in Section 73 of the Act were not adhered to. This apart, as already stated above, in this Memorandum neither consequences for not completing the modification work are stated nor any amount of compensation is fixed. In this case virtually Letter of Comfort is sought to be enforced. This Letter of Comfort, in our view, could not be accorded the status of Settlement Agreement to bring it within the meaning of Section 74 of the Act to treat it as an arbitral award under Section 30 of the Act so as to enforce it under Section 36 of the Act. In the present case, the Conciliation proceedings were not terminated but they were only adjourned. Under Section 76 of the Act, the proceedings shall be terminated as per clauses (a) to (d) of the said Section. If there was Settlement Agreement under Section 73, Conciliation Proceedings would have been terminated under Section 76(a) of the Act. This is yet another pointer against the appellant's case. It is also not possible to agree with the submission that this Memorandum of Conciliation and the Letter of Comfort could be treated as interim award in the absence of any Settlement Agreement as already discussed above. It is not every agreement or arrangement between parties to the disputes, arrived at in whatever manner or form, during the pendency of conciliation proceedings that automatically acquires the status of a *settlement agreement* within the meaning of Section 73 of the Act so as to have the same status and effect as if it is an *arbitral award*, for being enforced as if it were a decree of the court. It is only that agreement which has been arrived at in conformity with the manner stipulated and form envisaged and got duly authenticated in accordance with Section 73 of the Act, alone can be assigned the status of a settlement agreement, within the meaning of and for effective purposes of the Act, and not otherwise. We find in spite of our careful scrutiny, serious deliberations and analysis of the materials on record, particularly the Memorandum of Conciliation Proceedings and the Letter of

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- A Comfort, that either taken individually or even together - they or any one of them cannot legitimately claim to be entitled to or assigned the status of a settlement agreement within the meaning of Section 73, for purposes of the Act. In our view, they fall short of the essential legal pre requisites to be satisfied for being assigned any such status, despite our endeavour to view them with a liberal approach in the background of the objects and purposes underlying conciliation, arbitration and alternative mode of settlement of disputes.

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- C Shri K.K. Venugopal, learned Senior Counsel cited before us various authorities and decisions including a number of foreign authorities relating to principles of arbitration and conciliation. He took great pains to explain the purpose and object of the Act as to how the courts should look to advance the object and purpose of the Act instead of accepting the technical plea. There may not be dispute on the principles of law contained in the various decisions cited by him. We do not wish to refer to them as we are deciding this appeal on first principles looking to the plain language and content of the various provisions of the Act and applying them to the facts of the present case. We are informed that the arbitration proceedings are pending between the parties. It is open to the appellants to avail such remedies as are available in law on the basis of Memorandum of Conciliation Agreement and Letter of Comfort by approaching competent court or raising any arbitration dispute as is permissible in law. As per section 77 of the Act, the parties shall not initiate, during the conciliation proceedings any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where in his opinion such proceedings are necessary in preserving his rights.

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- F For the reasons stated, discussion made and having regard to the facts and circumstances of the case, we do not find any merit in this appeal. Hence, the same is dismissed but with no order as to costs.

K.K.T.

Appeal dismissed.