Orders on maintainability of the execution petition.

The JDR has raised objection that the execution petition filed by the decree holder is not maintainable as the arbitral award dated 09.02.2021 sought to be executed has been partly set aside by the appellate court. It is the contention of the JDRs that they had challenged the arbitral award dated 09.02.2021 by way of filing arbitration petition in AP.No.90/2021 before the Hon'ble Prl. District & Sessions Court. The said Court vide its order dated 21.04.2023 has modified the award passed by the artibtrator. Hence, the present execution petition filed by the DHR to execute the arbitral award dated 09.02.2021 is not maintainable.

2. The decree holder has resisted the said objection raised by the JDRs by submitting that the execution petition is maintainable. It is the contention of the DHR that the execution petition cannot be withdrawn or

dismissed on the ground that the appellate court has modified the award passed by the arbitrator.

3. Heard both the parties on maintainability of the execution petition.

4. The point that would arise for consideration is as under:

"Whether the execution petition filed by the Decree holder is maintainable in view of the award being modified by the appellate court"?

5. My answer to the above point is in the **Affirmative** for the following:

REASONS

6. **Point No.1:** The main contention of the JDRs is that the execution petition is not maintainable as the award sought to be executed has been modified by the appellate court in AP.No.90/2021.

7. It is pertinent to mention here that the Hon'ble Supreme Court in **M/s Gojer Bros**

(PVT) Ltd Vs Rathanlal Singh reported in (1974) 2 SCC 453 has held that when the court of appeal confirms, varies or reverses the decree of the lower court, the decree of the appellate court is the only decree that can be amended. The fundamental reason of the rule that where there has been an appeal, the decree to be executed is the decree of the appellate court, in such cases the decree of the trial court is merged in the decree of the appellate court. In course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is a continuation of the suit, came to be gradually extend to other proceedings like revisions and even though the proceedings before quasi-judicial and executive authorities.

8. Further, in **Kunhayammed and others Vs State of Kerala and another reported in (2000) 6 SCC 359** wherein the Hon'ble Supreme Court has held that where an appeal or revision is provided against an

order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub- ordinate forum merges in the decision by the superior forum and it is the later which subsists, remains operative and is capable of enforcement in the eye of law.

9. In view of the aforesaid judgments, it is clear that the award passed by the arbitrator got merged into the order passed by the appellate court. Now, the order passed by the appellate court is in operation and the same has to be executed. Perusal of the records reveal that the award passed by the arbitrator has been modified by the appellate court in A.P.No.90/2021. The present execution was filed to execute the award dated 09.02.2021 passed by the arbitrator. During the pendency of the execution petition, the award passed by the arbitrator has been modified by the appellate court.

Further, both the parties have submitted the certified copy of the order dated 21.04.2023 passed by the appellate court, wherein the award of the arbitrator has been modified. The decree holder has already filed memo of calculation based on the modified order passed the appellate court. The JDRs have already filed objections to the said memo of calculation filed by the decree holder. In view of the said circumstances, it is not necessary that the decree holder has to withdraw this execution petition and file fresh execution petition to execute the order passed by the appellate court. It is pertinent to mention here that the decree holder cannot be forced to withdraw the petition and file fresh execution petitions as and when there is a modification of the order by the appellate courts. If there is any modification in the impugned award, the decree holder can amend the execution petition as per the order passed by the appellate court and take steps to execute the order passed by the appellate court. Hence,

the point under consideration is answered in affirmative and I proceed to pass the following:

ORDER

The execution petition filed by the DHR is maintainable. The DHR is at liberty to amend the execution petition to execute the order passed by the appellate court in AP.No.90/2021.

VI ADJ