

.* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: April 2, 2013

+ OMP No.790/2012

NATIONAL HIGHWAYS AUTHORITY INDIA Petitioner
Through Mr.Chetan Sharma, Sr. Adv. with
Mr.Aljo K. Joseph and Mr.Amith
Gupta, Advs.

versus

MECON - GEA ENERGY SYSTEMS INDIA LTD JV
..... Respondent
Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.A.P. Vinod, Adv.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. By this order, I shall dispose of OMP No.790/2012 filed by the petitioner assailing the impugned order dated 20th August, 2011 passed by the Arbitral Tribunal by preferring an appeal under Section 37(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').
2. The brief facts of the case are that the petitioner and the respondent entered into a contract agreement dated 5th January, 2004 for the widening/ four laning and strengthening of the existing 2 lane carriageway of NH-47, including the bridges from Vytilla to Aroor Junction, totaling a distance of 348.382 kms to 358.750 kms of Nh-47 in the state of Kerala.
3. The work under the contract commenced on 9th February, 2004 with

the completion date scheduled on 8th August, 2006. The contract price of the project was Rs. 79.52 crores. The project could not be completed timely and both the parties claimed that there are breach of obligations on either side. Thereafter, the respondent / claimant before the tribunal vide its letter dated 16th June, 2006 requested for extension of time (EOT) upto 31st July, 2007 for completion of the project. In reply to the same, the petitioner replied by stating that the respondent had not submitted any notice regarding the events of compensation and that the details of the revised target program need to be submitted by the claimant in order for the respondent to process the EOT application. The respondent further replied to the said letter on 12th July, 2006 and stated that the updated program had already been submitted by it in March 2005 for the balance works and also furnished all the details of the earlier correspondences to the petitioner.

4. That vide letter dated 7th August, 2006, the petitioner granted the extension of time up to 8th November, 2006 stating that the EOT application of the respondent was under process. Despite several communications between the parties, the issue of EOT could not be resolved. However, the respondent was asked to continue with the execution of works. On 8th March, 2007, the petitioner in reply to the request of the respondent to release the payments for the works done, assured that the payments would be released after verification and implied that the same was not a formal approval of EOT but, was only a facilitating measure to restart the work.

5. Thereafter, some disputes arose between the parties and consequently, the respondent moved the competent court seeking directions for appointment of Dispute Resolution Board (DRB) for resolution of the disputes, as was provided under the agreement.

6. The notice of termination of the contract was issued by M/s Cochin Port Road Co. Ltd alleging fundamental breaches of contract by respondent on 4 counts under clause 59.2(a), 59.2(g), 59.2(h) and item No. 41(a) of the contract data read with clause 9 of the General Conditions of the Contract (GCC). The respondent by its reply dated 8th June, 2007 denied the said allegations of fundamental breaches of contract and contended that it had not committed any breach and on the contrary alleged acts or omissions on the part of the petitioner including the omission to constitute DRB even after acceptance of the letter for the grant of EOT has lead to breaches. The respondent further alleged that despite several requests from the claimant regarding the disputes and differences, it was the employer who was in default and breach of the contract and therefore, it was constrained to invoke the Arbitration clause i.e. clause 24.2 of the contract in view of the Employer to nominate DRB.

7. Thereafter, the parties agreed for constitution of DRB and the claimant filed its statement of the claim before the DRB in April 2008. In addition to the dispute stated above, the respondent also raised a claim regarding the fundamental breach of contract conditions by the Employer in refusing to certify its bill in IPC 18. The claim was filed before the DRB for pending payments and towards loss and damages totaling to a value of Rs. 119.29 crores.

8. The petitioner submitted its reply to the statement of claim before the DRB and prayed for rejection of all the claims of the claimant and sought the reasonable costs for the losses suffered on account of termination of the contract for the default/ breaches and frivolous claims.

9. The DRB after hearing the parties gave its recommendations which

can be summarized as under:

- In accordance with clause 60.2 of the contract conditions read with S.No. 42(b) of the contract data, the contractor is entitled to receive an amount equal to 5% of the value of the work not executed as loss of the profit and other damages, since no fundamental breach of the contractor under clause 59.2(g) and 59.2(a) of the contract has been established. At the same time, notice of termination could not have been held up further due to very slow progress of the work and there was no possibility of completing the work even after 15 months beyond the EOT applied for. Taking into account the above, the DRB agrees with the action of the Employer to terminate the contract for convenience for which he has power vested under clause 59.4 of the contract condition.
- The employer's additional cost for completing the works shall be 20 % of the value of the work not completed in accordance with the clause 60.1 of the contract conditions read with S.No. 42(a) of the contract data since fundamental breach of the contractor under clause 59.2(h) and under S.No. 41(a) of the contract data read with clause 9 of GCC is established based on which the contract has been terminated by the Employer. This amount is recoverable from the contractor as per clause 60.1 of the contract conditions.
- Payments which are due but not received shall carry interest rate of 12% per annum till realization.

10. The respondent feeling aggrieved by the recommendations of DRB to the extent that the same negates the disputes and claimed raised by it challenged the same before Arbitral Tribunal as per the procedure contained in clause 24.1 of the contract. To this effect, the respondent had issued a letter dated 18th January, 2010 of its intention to appeal against the recommendations of the DRB to the respondent within 14 days of the receipt of the DRB recommendation dated 25th September, 2009.

11. Consequent to the aforesaid notice, the Arbitral Tribunal was constituted. The respondent filed its statement of claim and in reply thereto the petitioner filed its statement of defence and also raised a counter claim. In the said statement of defence, the petitioner also raised certain disputes which as per the respondent in the rejoinder fall outside the purview of arbitration as the petitioner did not follow the procedure contained in clause 24.1 which mandated the petitioner to issue notice prior to invoking arbitration which could have entitled the petitioner to arbitrate the said dispute.

12. After the completion of pleadings, issues were framed out of which the two issues were framed as preliminary issues. The said issues related to entitlement of the petitioner to raise the dispute in reply and also the entitlement of the petitioner to raise the counter claim without following the scheme of clause 24.1 of the agreement as it provided that the recommendations of the DRB shall become final unless notice is issued to challenge the same through arbitration within 14 days of the receipt of the said recommendations. The said two issues are reproduced hereinafter:

- Whether the respondents/petitioner herein are entitled to seek settlement of disputes under clause 24.2 before this Arbitral Tribunal in so far as the recommendations of DRB in respect of such disputes have become final and binding under clause 24.1 of the contract data?
- Whether the counter claim by the respondent/ petitioner herein raised for the first time before the tribunal is barred in view of the clause 24.1 of the contract data?

13. The Arbitral Tribunal after hearing the submissions of the parties returned the finding by passing the impugned order dated 20th August, 2011 holding that the recommendations of DRB have attained finality since the respondent/ petitioner herein has failed to challenge the same in time, as per the stipulation of the contract. Therefore, the respondent therein/petitioner herein is not entitled to challenge the said findings at this stage by raising the dispute before the tribunal for re-opening of such recommendations of the DRB. The said finding was given by the Arbitral Tribunal on Issue No.1. As far as Issue No.2 is concerned, the counsel for the petitioner did not press for the same and remained contended with the proposal of the tribunal that the counter claim could not be raised by the petitioner for the first time before the Arbitral Tribunal.

14. Petitioner after being dissatisfied by the impugned order dated 20th August, 2011 passed by the Arbitral Tribunal challenged the same before this court by filing the appeal under Section 37(2) of the Act. The said appeal was earlier registered as FAO (first appeal against orders) and thereafter the said appeal was transferred through to the orders of Hon'ble Chief justice to the Chief justice designate under the roster bench.

15. The respondent herein had filed its reply to the appeal. After the completion of pleadings, the matter was set down for hearing.

16. When the matter came up for hearing Mr. Chetan Sharma, learned Senior counsel appearing on behalf of the petitioner made his submissions which can be outlined as under:

- a) Mr. Sharma, learned Senior counsel firstly argued that the learned Arbitral Tribunal erred in arriving at the conclusion that the claims/ disputes which have been submitted before it fall outside purview of

the arbitration as it does not follow the agreed procedure of providing notice within a stipulated time of 14 days from the receipt of the recommendation of DRB. It has been argued by Mr. Sharma that such a clause setting out a time limit for conferring a right to arbitrate has been declared by this court as against public policy and as such directory in nature. It has been argued by Mr. Sharma that therefore the learned Arbitral Tribunal ought to have entertained the claims of the petitioner even though the said claims were not preferred as per the strict adherence of clause 24.1.

In order to substantiate his submissions, Mr. Sharma relied upon the judgment passed by this court in the case of ***National Highways Authority of India vs. M/s Backbone Projects Limited*** decided in case of OMP 687/2009 on 6th May, 2011 wherein the learned Single Judge of this court considered the similarly worded clause in the arbitration agreement wherein petitioner was one of the parties and arrived at the conclusion that the said stipulation of 14 days period under the agreement is unreasonably harsh as it restricts the right of the party to arbitrate and as such is directory and not mandatory.

Mr. Sharma also relied upon the judgments passed by other learned Single Judges of this court in the cases of ***Hindustan Construction Corporation vs. Delhi Development Authority***, 77(1999) DLT 165, ***J.K. Anand vs. Delhi Development Authority***, 2001 (59) DRJ 380 and ***National Highway Authority of India vs. Backbone Projects Limited*** (supra) 7 wherein similar views have been taken by the Courts.

Mr. Sharma argued that if the prescription in the agreement to refer the dispute within 14 days is directory and not mandatory, then as a matter of consequence, the Arbitral Tribunal ought to have entertained the claims of the petitioner warranting interference from this court.

- b) Mr. Sharma, learned Senior counsel argued that clause 24.2 of the agreement is broad enough which may enable the Arbitral Tribunal to entertain the challenges to the recommendation of DRB, even if the said recommendations have attained finality.
- c) Mr. Sharma further argued that the learned Arbitral Tribunal ought to have entertained the claims of the petitioner in view of clause 24.3 of the agreement which also enables the tribunal to hear the claims in the form challenges to the recommendations even if said recommendations have attained finality.
- d) Mr. Sharma argued that the procedural laws are always held to be handmaiden to justice and not an obstruction to justice. The said view is prevalent when it comes to dealing the matters involving the procedural laws which seek to curtail the rights of the parties. It has been argued that there is no reason why this court should not adopt the said approach in the cases involving contractual prescription which is also procedural in nature. Therefore, the Arbitral Tribunal has erred in not entertaining the claims of the petitioner on the ground of the mere technicalities which is by declaring that the petitioner has not followed the time period of 14 days to seek reference and thus the claim is not arbitrable.

e) Lastly, Mr. Sharma argued that this court in the ends of the justice should allow the claims of adjudicating by the Arbitral Tribunal. This is due to the reason that even the claims of the petitioner and the respondent which are pending before the Arbitral Tribunal are inter-linked and splitting the claims of the petitioner will cause great hardship to the petitioner and result in injustice.

17. In view of the above submissions, Mr. Sharma prayed that the appeal in the instant matter may be allowed with a direction to the Arbitral Tribunal to entertain the claims of the petitioner.

18. Per Contra, Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of the respondents has strongly refuted the contentions of the petitioner and has made his submissions which can be enumerated as under:

a) Firstly, Mr. Sethi, learned Senior counsel for the respondent argued that the appeal filed by the petitioner is not maintainable in view of the explicit wordings of Section 37 of the Act. It has been argued by Mr. Sethi that none of two eventualities prescribed under Section 37 have arisen in the present case which enable the petitioner to approach this court under Section 37 (2) of the Act. It has been argued that respondent has never raised any plea on jurisdiction of the tribunal under Section 16 of the Act nor such plea has ever been accepted. In fact there is no question of jurisdiction which had ever arisen in the instant case. Therefore, this court should not proceed to entertain the present appeal.

b) Mr. Sethi taking his submission further argued that the learned Arbitral Tribunal has not entertained the claims after interpreting the agreement and clauses contained therein which is a matter of merits. It

has been argued that the said aspects of declining to entertain the claims cannot be construed to be an objection on the jurisdiction but it is a matter on merits. Mr. Sethi contended that the said decision is an interim order which can be challenged by the petitioner along with the final award as per the provisions of Section 34 of the Act. Mr. Sethi in this respect has drawn corollary from the provisions of Code of Civil Procedure, 1908 which provide that the interim order can be challenged along with the final order in certain cases. Mr. Sethi, thus contended that the appeal should be dismissed as not maintainable as the same is outside the scope of Section 37 of the Act.

Mr. Sethi in order to buttress his submission has also relied upon the judgment passed in the case of *National Thermal Power vs. Siemens Atiengesellschaft (Sag)*, 121 (2005) DLT 36 wherein the learned Single Judge of this Court has held the decision on the counter claims on merits is distinct from the jurisdictional objection and the appeal in such a case is not maintainable under Section 37 of the Act.

- c) Mr. Sethi, learned Senior counsel for the respondent urged that in any event the submission that clause 24 of the agreement which provides for the time period in order to raise a challenge against the recommendation of DRB so as to entitle the party to go for arbitration does not violate the public policy. Mr. Sethi argued that there exists a distinction between the clauses which provide time limit which in effect reduces a limitation period prescribed under law as against the clauses which extinguish the remedy itself. It is stated that in the later kind of cases, the clauses cannot be held to be against public policy. Mr. Sethi submitted in the instant case, the clause 24 provides a

mechanism for issuance of notice to raise a challenge against the recommendation of DRB which may entitle the party to go for arbitration and failing which the right to arbitrate may itself extinguish. The said clause 24 of the agreement as per Mr. Sethi does not violate the provisions of law.

- d) Mr. Sethi replied to the submissions of the petitioner by submitting that the clause 24.3 as relied by the petitioner is inapplicable in as much as the said clause is applicable where none of the parties have raised the challenge by issuing notice. Likewise, it has been argued that clause 24.2 is also not applicable as contended by the petitioner due to the reason that the said clause nowhere entitles the party to refer the dispute to the arbitration even if the recommendations of DRB have attained finality. The contention of the petitioner as per Mr. Sethi is completely misplaced.
- e) Mr. Sethi argued that the learned Arbitral Tribunal has rightly ordered that in view of failure to comply with the agreed procedure by the petitioner, the claims raised by the petitioner before the tribunal fall beyond the scope of arbitration.

In view of the afore noted submissions, Mr. Sethi submitted that the appeal filed by the petitioner is also liable to be dismissed on merits as well.

- 19. I have gone through the appeal filed by the petitioner along with the documents filed therewith. I have also read over the impugned order passed by the learned Arbitral Tribunal and have given my careful consideration to submissions advanced by the learned counsel for the parties at the bar and in the written submission. I shall now proceed to discuss the various aspects

arising in the instant appeal one by one.

20. The first question which needs an examination is as to whether the appeal under Section 37 (2) of the Act is maintainable in the case of present nature. The said question needs consideration as in view of the learned counsel for the respondent the impugned order is in the form of award which decides two preliminary issues and thus the same shall be read as decision on merits rather than an order on the plea of lack of jurisdiction. Therefore, I deem it appropriate to first consider the relevant provisions under the Act which are reproduced hereunder:

“16. Competence of arbitral tribunal to rule on its jurisdiction.-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings”.

“37. Appealable orders.-

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

- (a) granting or refusing to grant any measure under Section 9;
- (b) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to the Court from an order of the arbitral tribunal__

- (a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or
- (b) granting or refusing to grant an interim measure under Section 17

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court”.

21. From the conjoint reading of the afore noted provisions, the following propositions can clearly be discerned:

- a) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. It means that either the plea regarding the lack of jurisdiction can be raised separately or in the alternative can be raised along with the filing of the statement of the defence. But, the said plea should be raised not later than the submission of the statement of defence. Thus, there is no requirement as such upon the plain reading of Section 16 (2) of the Act to raise the plea of the lack of jurisdiction separately
- b) Likewise, a plea that the Arbitral Tribunal is exceeding the scope of the authority shall be raised as soon as the matter is alleged to be beyond the scope of the authority as per Section 16 (3).

c) Section 37 (2) (a) provides that the appeal shall lie to the court only under some limited eventualities. The said eventualities are prescribed in the said Section under which clause (a) which has concern with Section 16 clearly states that accepting the plea referred to in sub Section (2) or sub-section (3) of Section 16 is one of such eventualities. Therefore, the immediate sequitur which follows from the reading of Section 37 (2) (a) is that the appeal is maintainable against the orders accepting the plea of lack of jurisdiction of the Arbitral Tribunal as per Section 16 (2) or in the alternative against the acceptance of the plea that the tribunal is exceeding the scope of the authority. If the said pleas under Section 16 (2) or (3) are rejected, the appeal under Section 37 (2) shall not lie as the appeal is necessarily a creature of statute and once it categorically prescribes the eventualities, the appeals shall lie only in those events.

22. Now, the question which requires further examination is what constitutes a plea that the Arbitral Tribunal does not have jurisdiction. Does it also include the plea of the nature that the claims are beyond the scope of the arbitration and thus barred. Does lack of jurisdiction objection also include the objection that the claims are not arbitrable and thus falls outside the purview of the arbitration. I find that the answer to these questions seem to be in affirmative in view of the settled legal position in the field.

23. The plea that the Arbitral Tribunal “does not have jurisdiction” as provided under Section 16(2) of the Act has to be given meaning of widest amplitude and cannot be considered in a narrow sense. The said objection lack of jurisdiction or does not have jurisdiction is not merely confined to lack of jurisdiction which is ordinarily understood in the civil law which is

but ofcourse included the same. Additionally, the said wordings plea of does not having jurisdiction have to be considered in the context of authority of the arbitrator to entertain the dispute and to rule on his jurisdiction. The said wordings plea of does not have jurisdiction have immediate nexus with the law providing and enabling the arbitrator to rule on its jurisdiction as provided under Section 16 (1). Thus, the factors affecting the authority of the arbitrator to hear the matter and other facets of arbitrability or non arbitrability of the dispute or dispute falling outside the scope of the agreement are all pleas and objections which are of jurisdictional nature. Consequently, the questions affecting the arbitrability which would result in rendering the claims or subject matter presented before the Arbitral Tribunal as non arbitrable either being barred by law or by falling outside the scope of the arbitration due bar created by the agreement and thereby taking away the jurisdiction of the Arbitral Tribunal to rule on the said claims would certainly be included in the “plea of does not have jurisdiction” as prescribed under Section 16 (2) of the Act.

24. Thus, it cannot be said that for the purposes of raising the plea under Section 16 (2), the wordings lack of jurisdiction must be used in order to ascertain whether such plea is actually taken or not. If the plea taken in the statement of the defence is of the nature which raises a question that the agreement prescribes a mode and manner in which the claims are to be considered as arbitrable and beyond the same the claims are not to be considered by the tribunal or shall be treated as barred is thus a sufficient objection going into the root of the matter affecting the jurisdiction of the tribunal to consider and adjudicate the said claim though the word jurisdiction may not be used specifically in the said plea.

25. I have already examined from the plain reading of Section 16 (2) read with Section 37 (2) as to what sort of orders are appealable and what kind of objections can be categorized as jurisdictional in nature. The courts in India have also rendered consistent view that the pleas that the claims would fall outside the scope of arbitration is a kind of jurisdictional objection and is plea under Section 16 (2) and thus the appeal against the said order is maintainable.

26. In the case of *National Institute of Banking Studies and Corporation Management (NIBSCOM) v. Vij Construction Ltd.*, 120 (2005) DLT 563, the learned Single Judge of this Court while hearing an appeal under Section 37 of the Act of 1996 has held that the plea regarding the dispute falling outside the scope of arbitration is a plea under Section 16 (2). In the said case also, the counter claims were ordered to be rejected on the similar counts that the said claims were outside the purview of the dispute due to lack of issuance of prior notice to raise the claim. This can be seen if one goes through the order passed by the arbitrator in the said case and the facts narrated by the learned Single Judge in the said case in the following manner:

“4. Learned Arbitrator vide the impugned order has allowed the application of the respondent under Section 16 of the Act concluding as under:

“ In view of this, I hold that the counter claims raised in the letter dated 8.5.2000 will have to be adjudicated upon by this arbitral tribunal and the rest of the counter-claims cannot be entertained and adjudicated upon, because those are pre-mature claims and are outside the ambit of the expression "dispute". The contention of Mr. Mahesh K. Chaudhary that the claimant had increased the amount of claims, which were filed before the

previous Arbitrator Mr. Pahwa and the claims fled before this arbitral Tribunal. It is within my domain and province to decide this question as to what is the effect of increasing the amount, if Mr. Makesh K. Chaudhary's contention is correct? This point shall be decided by me, if raised in the pleadings.

In the result, the application is allowed to the extent indicated above. The application stands disposed of.”

5. The above finding of the learned Arbitrator is primarily based on the following findings:-

(i) that no notice was given under Clause 24 of the contract before filing the counter claim; and

(ii) consequently, no "disputes" have arisen because until there is a demand and refusal there cannot be said to be a dispute which can be adjudicated upon.

(Emphasis Supplied)”

Thereafter, learned Single Judge proceeds to examine as to what constitutes a plea under Section 16 (2) and arrives at the finding that the plea that the claim or dispute would fall outside the scope of the arbitration is included in the plea of lack of the jurisdiction under Section 16 (2). In the words of the learned Single Judge, it has been observed thus:

“ In this case the foremost question which arises for consideration is whether the arbitrator could have made the impugned order on the application of the respondent under Section 16 of the Act holding that certain counter-claims cannot be entertained and adjudicated upon because those are pre-mature and are outside the ambit of the expression "dispute". **The answer to this will depend on the answer of another question as to whether controversy in regard to the non-entertainability of counter-claims is a jurisdictional issue within the meaning of Section 16 of the Act and if it is not so at what stage the Arbitrator could consider this question?** To find the answer we must refer to the provisions of Section 16 and 37 of the Act which are to the following effect: (Emphasis Supplied)”

“.....Mr. Valmiki Mehta, urged that the application moved by the respondent under Section 16 of the Act which has been disposed of by the impugned order does not fall under the purview of Section 16 of the Act. In this connection he claimed parity between the provisions of Section 16 of the 1996 Act with that of Section 33 of the Arbitration Act 1940 and urged that Section 16 confers power on the arbitral tribunal to decide on its own jurisdiction, including ruling on any objections regarding the existence or validity of the Arbitration Agreement. According to him the Arbitrator could consider only the aforesaid questions and could not go into the question whether the counter-claim filed by the appellant constituted disputes. Mr. Mehta, urged that parties are at liberty to prove their claims and counter-claims by filing documents or otherwise and, therefore, the Arbitrator has the jurisdiction to adjudicate upon the counter-claims filed by the appellant and could not have rejected the same at this stage for want of jurisdiction at the threshold. **In the opinion of this Court, the power conferred on the Arbitrator under Section 16 are of wide amplitude and it includes the power even to rule on the question as to whether any claim/counter claim can be said to be dispute within the meaning of the Arbitration Agreement and whether the Arbitrator has or does not have the jurisdiction to adjudicate on the said claim/counter claim. No doubt it may be open to a party to challenge the Award of the Arbitrator under Section 34 of the Act on the ground that the Award deals with a dispute not contemplated or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission of the arbitration, nevertheless, the power of the Arbitrator to rule on its jurisdiction including on the question of entertainability of a claim/counter claim is elementary in nature and goes to the very root of the matter. It is a well-settled legal position that an Arbitration Agreement is the source of power and authority of the Arbitrator and what is not contemplated to be settled through arbitration by the parties cannot be made subject matter of an arbitration.** I am, therefore, of the considered opinion that the application filed by the respondent under Section 16 was maintainable and has been rightly answered by the learned Arbitrator in exercise of its power under Section 16 of the Act.” (Emphasis Supplied)

From a careful reading of the aforequoted observations of the learned Single Judge of this court, it is clear that the questions of entertainability of the claim or counter claim falls within the jurisdictional question of the Arbitral Tribunal which goes into the root of the matter. The refusal of the tribunal to entertain such claim or counter claim without deciding the claim on merits amounts to refusing to exercise jurisdiction on the subject matter and when done at the behest of the one party to the arbitration, the same may lead to acceptance of plea of lack of the jurisdiction to entertain the claim which squarely falls within the ambit of Section 16 (2) of the Act.

The same view what has been expressed by the learned Single Judge of this court in *National Institute Of Banking* (supra) has been found favour by Division Bench of Bombay High Court in the case of *Ganesh Benzoplast Ltd., a Company registered under the Companies Act Vs. Saf Yeast Company Ltd., a Company registered under the Companies Act*, 2007 (4) ArbLR 385 (Bom.), wherein Division Bench though was deciding the appeal under Section 34 of the Act but also examined the question whether the refusal of the tribunal to entertain a claim by holding that the same is beyond the scope of arbitration is an order under Section 16 of the Act or not. Answering the question in affirmative, the Division Bench observed thus:

“Obviously therefore, even in the course of filing of the pleadings in the form of statement of claim or statement of defence, if the pleas are raised which originate from or relate to the subject-matter of dispute, then such pleas could form part of the dispute for adjudication before the arbitrator, unless in the statement of

either of the parties it is specifically denied or objected to on the ground that the plea sought to be raised by the other party is beyond the scope of the dispute for adjudication by the arbitrator being outside the scope of reference. In other words, in case of enlargement of the scope of dispute in the statement of claim in comparison to the one referred to, and in the absence of any objection by the other party, it could be deemed to have been conceded to form the subject-matter of dispute for adjudication before the arbitral Tribunal. This is abundantly clear from Section 16(2) r/w Section 4 of the said Act. **Undoubtedly, Section 16(2) refers to the point of jurisdiction. However, Section 16(2) r/w Section 16(1) would disclose that the point of jurisdiction thereunder would include any controversy as regards the existence or validity of arbitration agreement which would obviously cover any plea regarding exclusion of the subject-matter from arbitration.** And in terms of Section 4 of the said Act, the party would be deemed to have waived the right to raise objection regarding the exclusion of the subject-matter from arbitration. (Emphasis Supplied).

The aforementioned view of Division Bench of Bombay High Court in *Ganesh Benzoplast* (supra) would make it clear that the objection that the claims presented before the tribunal falls beyond the scope of the arbitration is an objection relating to jurisdiction and the said objection must be present specifically in the pleadings else the same shall be deemed to be waived.

Therefore, what is clear after analyzing the legal position is that the objection of such a nature which calls upon the Arbitral Tribunal to examine that the claims presented before it falls outside the scope of the arbitration is of jurisdictional nature and what is left for examination is as to whether in the facts and circumstances of the instant case, the said objection was raised by the petitioner in the pleadings. As per Mr. Sethi, learned Senior counsel for the

respondent, no such objection relating to jurisdiction was ever raised as noted above in his contentions.

27. Let me now examine as to whether such objection exists in the form of plea or not. This can be seen as under:

- a) The reading of the impugned order reveals that the petitioner before this Court, NHAI which was the respondent before the Arbitral Tribunal has raised some additional claims in reply to the claims of the claimant/respondent herein, the respondent also raised a counter claim. There has been a categorical contention of the counsel for the claimant which has been recorded that the respondent therein/petitioner herein has never issued the notice of intention to commence arbitration as such not complied with the agreed procedure and thus the respondent has been barred from raising the claim or any dispute. It has been argued by the respondent herein and claimant therein that the recommendation of the DRB qua the petitioner herein has become final and thus the petitioner is estopped from making its claims before the Arbitral Tribunal. These contentions were recorded in the preliminary Issue No.1 for which the findings are returned by the learned Arbitral Tribunal. The contentions recorded therein clearly indicate that the objection was raised before the Arbitral Tribunal that the petitioner is barred from raising the said claims before the tribunal.
- b) The respondent in its reply to the claims raised by the respondent before the arbitral has also raised disputes in paragraphs 4, 6 to 9 relating to several losses suffered by the petitioner herein/ respondent therein on account of the failure of the respondent/ claimant to

perform its commitment. Likewise in para 11 of the reply, the breaches committed by the respondents are enumerated. The respondent herein filed a rejoinder to the said reply which is kind of defence to the counter claim and response to the disputes raised by the petitioner herein/ respondent therein. In the said rejoinder, the respondent herein has dealt with the reply on merits to paragraph 4, 6 to 9, paragraph 11 that the petitioner herein is estopped from challenging the said dispute/ raising the said dispute before the Arbitral Tribunal on account of the fact that the recommendation of DRB has attained finality as per the agreement. The collective reading of the reply statement and the rejoinder clearly reveals that the respondent herein has taken such objection at the earnest opportunity and there is no waiver of the same.

- c) It is upon the objection of the respondent herein/claimant before the Arbitral Tribunal that the Arbitral Tribunal has framed the preliminary issues relating to entitlement of the respondents to raise the settlement of dispute as per clause 24 of the contract and proceeded to dispose of the same by the impugned order.

Clearly and plainly, there existed an objection which has been raised by the respondents in the rejoinder to the reply wherein the petitioner has raised the additional disputes, which have been responded by the respondent by contending that the same cannot form subject matter of reference due to operation of clause 24 and that the recommendation of DRB has attained finality. As such, the submission canvassed by the learned Senior counsel Mr. Sethi cannot

be accepted that no such objection has been raised.

Once the said objection that the disputes presented by the petitioner falls outside the scope of arbitration as the petitioner has no entitlement to arbitrate under the agreement existed in the rejoinder to the response which is in the nature of the statement of defence to additional claims raised by the petitioner, the ruling on the same by the Arbitral Tribunal by upholding the said objection and refusal to entertain the claims of the petitioner clearly fulfills the provisions of Section 16 (2) of the Act. Therefore, the impugned order clearly accepts the plea of Section 16 (2) of the Act. The appeal is therefore maintainable under the provisions of Section 37 (2) (a) of the Act.

28. It is now time to examine another submission of learned Senior counsel for the respondent Mr. Sethi which is that the Arbitral Tribunal has decided the preliminary issue and as such it is a partial award being decision on merits which would not fall within the ambit of Section 16 and therefore the appeal is not maintainable. It has been also been argued that the said award can be challenged along with the other decision on other issues under Section 34 of the Act. As per Mr. Sethi the instant case is squarely covered by the judgment passed by the learned Single Judge of this court in *NTPC v. Siemens* (supra). I do not find merit in the contention of Mr. Sethi, learned Senior counsel for the respondent and also find that the judgment of NTPC is distinguishable for manifold following reasons below:

- a) Firstly, it is necessary to reiterate that the learned Arbitral Tribunal while deciding a preliminary issue has found that the claims presented by the petitioner are not arbitral as the procedure under the agreement no where entitles the petitioner to arbitrate. The said objection was

raised by the respondent in the rejoinder and consequently the learned Arbitral Tribunal framed such preliminary issue. In this backdrop, it is noteworthy to mention that for maintainability of the appeal under Section 37 (2) (a) of the Act, the scope of the enquiry is whether the objection/ plea in the nature of Section 16 (2) of the Act has been accepted or not. It is immaterial as to in what manner of decision making, the conclusion is arrived at while upholding the said objection. The Arbitral Tribunal in its wisdom can choose the manner of decision making either by ruling on the application under Section 16 of the Act when preferred by the parties or in the alternative proceeding to frame a preliminary issue and dispose of the same when it is ex-facie clear to the Arbitral Tribunal that the claims are not entertainable. The question is therefore not the manner of the decision making but the real and the moot question is whether the conclusion of the Arbitral Tribunal is such which goes into the root of the matter and takes away the jurisdiction of the tribunal to rule on the claims presented before it. If the answer comes in affirmative, then whether it is in the form of preliminary issue or a ruling on oral plea or an application is totally immaterial. One can find easily such principle analogous to the same in the civil law which is that the question of jurisdiction can be decided on an application or on demurer of the party or in the form of preliminary issue and in any manner if the question of the jurisdiction is decided and upheld, the said decision is an order accepting the objection qua lack of jurisdiction. Therefore, till the time, merits are not decided, the objection on the lack of

jurisdiction would remain the same irrespective of the mode of adjudication.

- b) Secondly, it would also be wrong to say that the fact that the petitioner itself would call it an award would make any difference. I find that the impugned order cannot be termed as an award in whatsoever manner it is couched. It is well settled principle of law that the order cannot be termed as an award unless there are findings which are returned on merits of the controversy. In the instant case, preliminary issue No. 1 has been decided wherein on the fair reading of the clause 24 of the agreement, it has been observed by the tribunal that as the petitioner has been unable to raise the dispute timely before the tribunal as such not entitle to raise the said disputes and claims before the Tribunal by operation of clause 24. The said finding of the Arbitral Tribunal is only confined to aspect that the disputes referred to it are not arbitrable and cannot be termed as final adjudication of the disputes between the parties. Therefore, the mere fact that the said impugned order is termed as an award would really not make any difference unless in substance, the said decision making is an award within the meaning of the Act.
- c) Thirdly, it is also not correct to say that the said order can be challenged under the provisions of Section 34 of the Act. This is due to the reason that Section 34 (2) (iv) of the Act only provides a ground that the award passed by the Tribunal decides disputes which are not falling within the terms of submissions of arbitration or contains matters outside the scope of the arbitration. This necessarily implies that for a Court seized of the objections under Section 34 of the Act

challenging the award, the said award must contain a decision making relating to the matters outside the scope of the arbitration, only then it is permissible for the court to entertain the objection under Section 34 on the grounds envisaged under sub-section (2) clause (iv). Thus, the permissible extent of entertainment of the objection under Section 34 (2) (iv) is limited in cases where the Arbitral Tribunal decides the matter outside the scope of the arbitration. The said ground under Section 34 (2) (iv) does not extend to the cases where the Arbitral Tribunal refuses to exercise jurisdiction on the subject matter or refuses to entertain the claims being outside the purview of arbitration. There is no ground under Section 34 which permits such enquiry by the Court under the said provision. This also indicates that the Act of 1996 is a self contained Code and provides for different kind of challenges at different stages of the proceedings. Therefore, the order on lack of jurisdiction can aptly be questioned under the provisions of Section 37 (2) (a) and not under Section 34 of the Act as in the instant case.

- d) The judgment passed by the learned Single Judge in the case of *NTPC v. Siemens* (supra) is distinguishable from the facts and circumstances of the instant case. The said judgment is distinguishable due to following reasons:
- Firstly, the decision of *NTPC* (supra) decided by the learned Single Judge of this court was although concerning the aspects of maintainability of the counter claims raised by NTPC, but, the partial award rendered in the case of NTPC also decides the issues on merits. The learned Single Judge while deciding the said case and accepting

the objection as to non maintainability of the appeal under Section 37 (2) of the Act himself acknowledged that the partial award decided the issues on merits which became the major reason for upholding non maintainability of the appeal and arriving at the finding that it was an award on merits which could have been challenged differently. The said submissions of the learned counsel for the respondent and decision of the learned Single Judge thereon are reproduced herein after:

“A strong plea has been raised on behalf of the respondent/SAG about non-maintainability of the appeal under Section 37(2)(a) of the Act on the premises that by the impugned dispensation the **Arbitral Tribunal has not decided the issue of jurisdiction as envisaged by Section 16 of the Act and not the least in the negative but has, in fact, assumed and exercised the jurisdiction and adjudicated upon the counter-claims of the NTPC finally on merits. Mr. Deepankar Gupta, learned senior counsel representing the respondent/SAG has argued that the pleas which can be taken under Sections 16(2) and 16(3) of the Act are pleas regarding the Arbitral Tribunal's jurisdiction and they do not concern the merits of the controversy between the parties.** There appears to be no quarrel with this proposition because Section 16(2) of the Act stipulates that such a plea shall be taken not later than the submission of the statement of defense (i.e., before the Arbitral Tribunal considers the merits of a dispute. Section 16(3) stipulates that a plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the Arbitral proceedings. In other words, such a plea should be confined to the Arbitral Tribunal's capacity or competence to decide what is placed before it and not the merits of the claims or counter-claims, if there are any. It would, in turn, mean that if the Arbitral Tribunal decides any other plea or a plea on merits, the same cannot be said to be a

plea either under Section 16(2) or Section 16(3) of the Act.”

After recording the aforementioned submission of the counsel for the respondent in the case of NTPC, learned Single Judge proceeds to discuss the observations in the award and then arrives at the finding that the award does not confine itself to the ruling on lack of jurisdiction but also decides the question on merits. In the words of the learned Single Judge, it was observed thus:

“The Arbitral Tribunal then takes stock of the material on record in regard to the question of limitation whether the claim of the SAG for damages was barred by time. The question of admissibility of counter-claims has been discussed towards the end of the Partial Award from para 4.58 onwards and has been answered in the following terms:

4.58 In the Tribunal's view none of these alleged Counterclaims is admissible. The key question which the Claimant has raised is whether the Settlement Agreement reached between the parties in April and May 2000 operates to bar the majority of these Counterclaims on the ground that they are subject to that settlement and therefore there is no dispute. This argument is advanced by the Claimant in respect of the second, third, forth, fifth, sixth, eighth, ninth and tenth Counterclaims.

4.60 As will be seen, the majority of the Counterclaims is said to be caught by the Settlement Agreement of the 6th /7th April, 2000 which was the subject of the exchange of correspondence on the 5th May 2000 and the 10th May 2000 to which reference has already been made above. On the face of it the MOM taken in conjunction with the subsequent correspondence clearly show a binding agreement for good consideration whereby a number of claims were compromised. Thus, paragraphs 2,3 and 4 reflect a discussion about critical components and operational guarantee. Those matters were settled as appears from paragraph 5:

“so as to avoid any arbitration on either side in order to ensure supply of critical components of SAG for the forthcoming overhauls. Accordingly, various issue (sic) were discussed and agreements were reached as per the following paragraphs, as a package deal.”

4.61 What then follows is a series of specific agreements clearly recorded as such and thereby settling the disputes which then existed. And by paragraph 15 there was express confirmation by both parties.

“that there were no other issues to be resolved in first and third contracts.”

4.62 Paragraph 16 made the agreements subject to approval by the NTPC management and as already noted that approval was given by the Respondent's letter of 5th May 2000 and confirmed by the Claimant by its letter of 10th May 2000.

4.63 A number of objections to the binding nature of the Agreement of 6th/7th April, 2000 were taken by the Respondent. None of them have any merit at all. There are no particulars pleaded in support of the contention that the agreement was procured by deception or by duress. It is plain from the terms of the Respondent's letter of 5th May 2000 that the Respondent fully intended that the Agreement, which it no doubt considered to be to its benefit, would be contractually binding. The letter is only explicable on that basis. It is simply not open to the Respondent to argue otherwise.

4.64 In those circumstances it is clear that the Claimant's argument is right that the second, third, fourth, fifth, sixth, eighth, ninth and tenth Counterclaims are caught by the Settlement Agreement. There are therefore no disputes capable of reference to arbitration.

4.65 As regards the seventh Counterclaim, this is as the Respondent rightly alleges, a mere reservation of rights. There is no admissible dispute. That leaves the first Counterclaim to be considered and as to that it is in the Tribunal's opinion plain, that the Claimant's argument is correct. The correspondence makes it clear in relation to the original pleading that five purchase orders were confirmed and supplied and are therefore being complied with, so no dispute can arise.

4.67 In the light of the Tribunal's findings on the nature and effect of the Settlement Agreement of 6th /7th April 2000, it is unnecessary for the Tribunal to consider any additional defenses to the Counterclaims. They are not admissible and no capable of being included in this reference to arbitration."

The Tribunal has summarized its findings under the heading "IV-Determination" - and concluded as under in para 5.7:-

5.7 Accordingly, the Tribunal rules that Claimant's claim is admissible, there being no limitation bar. The first Counterclaim is not admissible, both in its original form and as amended. **The second, third, fourth, fifth, sixth, eighth and ninth Counterclaims which have been the subject of a prior binding settlement are not admissible and the seventh Counterclaim is not admissible there being no dispute."**

25. A careful perusal of the written submissions and above observations, discussion and conclusions in the Partial Award would show that although to begin with the Arbitral Tribunal took the objections of the SAG against the counter-claim of NTPC as the jurisdictional issues which it had intended to answer as the issues of jurisdiction and limitation, but as it would be apparent from the written submissions filed on behalf of the parties before the Arbitral Tribunal and taken note in the Partial Award, it would appear that the Arbitral Tribunal did not limit its

consideration of the question of entertainability, maintainability and arbitrability of the counter-claims only on the grounds that there were no disputes or they did not fall within the term "disputes/differences" and, therefore, not capable of the arbitration or that they were beyond the terms of arbitral reference or barred by limitation, but also the admissibility of the said counter-claims on merits on the premises that all claims of the NTPC including the counter-claims stood already settled in terms of the MoM dated 6th and 7th April, 2000 and no dispute remained pending between the parties in terms of Clause 15.0 of the said MoM, except in regard to the claim of the SAG for damages on account of delay.” (Emphasis Supplied)

- From the mere reading of the aforequoted observations of the learned Single Judge in the case of *NTPC* (supra), it is manifest that the learned Single Judge in the said case did not entertain the appeal under Section 37 (2) as the decision in the said case was in the nature of the partial award on merits which was not limited to the aspect of decision on the plea of lack of jurisdiction but also rejected the counter claims as non- admissible due to the settlement arrived between the parties which made the same as decision on merits. The decision on merits became the major reason which weighed the mind of the learned Single Judge while not entertaining the appeal under Section 37 and rightly so when as the appeal under Section 37 (2) (a) is confined to the acceptance of plea of Section 16 (2) of the Act. The said case of *NTPC* (supra) is therefore clearly distinguishable than the instance case. In the instant case, the finding returned by the learned Arbitral Tribunal is confined to aspect that the claims submitted by the petitioner could not be arbitrated as the recommendations of DRB

have attained finality and the same were not challenged timely. There is no adjudication of the claims on merits and findings are returned on the basis of the applicability of the clause 24 which as per the Tribunal, disentitled the petitioner to raise such disputes. Therefore, no situation similar to the case of *NTPC* (supra) has arisen in the instant case where the award is merely confined to declaring the disputes of the petitioner as not arbitrable by operation of clause 24 and does not travel beyond the same on merits as in the case of *NTPC* (supra).

- Secondly, In the case of *NTPC* (supra), the award was indeed an award on merits and that is the reason why the learned Single Judge also laid stress on the kind of dispensation rendered in the form of partial award in the said case. In the facts and circumstances of *NTPC*'s case, it was correct approach to say that the partial award is not challengeable under Section 37 (2) after the learned Single Judge arrived at the finding that the partial award travels beyond the contours of Section 16(2) and proceeded to decide admissibility of the claims on merits. On the other hand, in the instant case, where only preliminary issue is decided wherein the disputes were not entertained on the count that the petitioner could not arbitrate the same by operation of clause 24.1 is no decision on merits but takes away the jurisdiction of the tribunal to adjudicate the disputes being outside the purview of arbitration and as such the nomenclature "award" would not make the order passed by the learned Arbitral Tribunal as award.

- Thirdly, in the case of *NTPC* (supra), the learned Single Judge after analyzing the scheme of Section 16 of the Act also arrives at the finding that the decision on merits in addition to the question of the jurisdiction is not an order accepting the plea under Section 16 (2) of the Act and as such the appeal under Section 37(2) in the said case was not maintainable. In the words of the learned Single Judge, it was observed thus:

“The core question, which will, therefore, decide the fate of the present appeal is whether the impugned dispensation dated 31st July, 2002 rendered by the Arbitral Tribunal can be said to be an order passed by the Arbitral Tribunal accepting the plea within the meaning of sub-section (2) or (3) of Section 16 of the Act. Mr. Deepankar Gupta, Senior Counsel representing the SAG has argued, and rightly so, that the pleas, which can be taken under sub-section (2) or (3) of Section 16 of the Act are pleas regarding the Arbitral Tribunal's jurisdiction and they do not concern the merits of the controversy between the parties. A bare reading of sub-sections (2) and (3) of Section 16 of the Act would make it manifest that these provisions are to be invoked when a plea is taken by a party that the Arbitral Tribunal does not have jurisdiction or is exceeding the scope of its authority. Such pleas are required to be considered and answered by the Arbitral Tribunal provided the same have been raised not later than the submissions or the statements of the defense. In other words, such a plea has necessarily to be confined to the Arbitral Tribunal's competence to decide what is placed before it and not the merits of the claim or counter-claims filed by the parties. Conversely it would mean that if a plea other than the pleas of the above nature is taken by a party, the same will not be considered to be a plea envisaged either by Section 16 or Section 16 of the Act. Consequently, an order deciding a claim or counter-claim on merits cannot be termed as an order passed by the Arbitral Tribunal accepting or rejecting the plea referred to in sub-section (2) or sub-section (3) of Section 16. A bare reading of Section 37 of the Act would clearly show that an appeal would lie

only against an order of the Arbitral Tribunal accepting the plea referred to in sub-section (2) or (3) of Section 16, e.g holding that the Arbitral Tribunal does not have the jurisdiction or accepting the plea that the Tribunal was exceeding the scope of its authority. (Emphasis Supplied)

..... “A conjoint reading of Section 5 and Section 37 makes it abundantly clear that the only orders against which appeals would lie are the orders specifically mentioned in Section 37 in case of original decrees passed by a Court and Section 37(2) in respect of orders passed by an Arbitral Tribunal. The contention of the learned counsel for the appellant that the qualifying words used in Sub-section 1 being absent in Sub-section (2) of Section 37 and, therefore, an appeal can also lie from an order of the Arbitral Tribunal even if the said order is strictly not one falling under Clause (a) or (b) has no merits and is liable to rejection because it goes against the very spirit and object of the Act. **This Court is of the clear opinion that a Court will be competent to entertain the appeals from an order of the Arbitral Tribunal falling under Clause (a) or Clause (b) of Sub-section 2 of Section 37 of the Act and from no other orders and least against an award interim, partial or final.**” (Emphasis Supplied)

“This Court on a thorough examination of the material obtaining on record, more particularly on a conjoint reading of the pleadings of the parties filed before the Arbitral Tribunal, the Terms of Reference framed by the International Chamber of Commerce, the written submissions filed by the parties before the Arbitral Tribunal prior and after the closure of the hearing, the tenor of the reasoning and finding recorded by the Arbitral Tribunal in its dispensation titled as "Partial Final Award" and on a true construction and scope of the provisions of Section 16 and Section 37 of the Act, is clearly of the view that the impugned dispensation dated 31.7.2002 rendered by the Arbitral Tribunal cannot by any stretch be said to be an order passed by the Tribunal either under the provisions of Section 16 or Section 16 of the Act and in any case deciding the question of jurisdiction in the negative which will fall within the ambit of appealable orders within the meaning of Section 37 of the Act. In the opinion of this Court, the impugned Partial Award is nothing but an Award or interim Award deciding the counter claims of

the NTPC finally on merits. This Court, therefore, must hold that the present appeal filed by the NTPC against such a Partial Award under the provisions of Section 37 of the Act is misconceived and is not maintainable. (Emphasis Supplied)

From the reading of the above noted observations, it is beyond the cavil of doubt that in NTPC(supra), the learned Single Judge declared that the award rendered on merits is not covered within the ambit of Section 16 (2) of the Act. On the contrary, in the instant case, I have arrived at the finding that the impugned order confines itself to the bounds of accepting the plea of lack of jurisdiction in as much as the order holds that the disputes raised by the petitioner are not arbitrable as the recommendation of DRB has attained finality and the challenge ought to have been raised timely before the arbitrator. Therefore, the said decision is not a decision on merits but, it essentially takes away the jurisdiction of the Arbitral Tribunal to adjudicate such disputes at the threshold. Thus, the NTPC case is clearly distinguishable on facts and circumstances.

- It is equally well settled that the judgments of the superior courts are not to be read as Euclid theorems so as to conduct as arithmetical calculation in the form of decision making and unless they actually fit in the facts and circumstances. The inch of facts here and there makes a lot of difference in applicability of the case and precedential value of the said decision. (*Bharat Petroleum Corporation Ltd. & Another vs. N.R. Vairamani & Anr*, (AIR 2004 SC 4778) and in *Bhavnagar University Vs. Palittana Sugar Mills Pvt. Ltd.*, (2003) 2 SCC 111 (at paragraph 59). Applying the said principle of law to the instant case, it can be safely said that the decision of *NTPC* (supra) is not applicable

to instant case as the facts and circumstances in the said case were entirely different as the award in the case of *NTPC* (supra) was award in strict sense of term deciding the merits of the claims and its admissibility being settled and binding ones as against the instant case where there is no decision on merits of the claims.

29. In view of the above discussion, I find that the appeal under Section 37 (2) of the Act is maintainable and the objection qua non maintainability is therefore rejected.

30. Now I shall proceed to discuss the challenge in the appeal raised by the petitioner and the response thereto by the respondent.

31. It has been argued by Mr. Sharma, learned Senior counsel for the petitioner that clause 24.1 of the agreement so far as it disentitles the parties to raise the dispute before the arbitrator unless notice to arbitrate is issued by one party to another within 14 days from the receipt of the recommendation of DRB is unreasonable and has been declared directory by this Court. Therefore, as a matter of law which is prevalent, the learned Arbitral Tribunal ought to have entertained the disputes raised by the petitioner before it.

32. Mr. Sharma, learned Senior counsel for the petitioner relied upon the judgments passed by this Court in the case of *Hindustan Construction Corporation v. Delhi Development Authority*, 77(1999) DLT 165, *J.K. Anand v. Delhi Development Authority*, 2001 (59) DRJ 380 and *National Highway Authority of India v. Backbone Projects Limited* (supra) where such views are taken by the court wherein learned Single Judges of this court were of the view that the clause which puts an impediment upon the parties to approach the Arbitral Tribunal by curtailing the time to present

claims which ordinarily is lesser leads to restraint on legal proceedings and as such are unreasonable under the law. Therefore, the said arbitration clauses are directory in nature.

33. Per contra, Mr. Sethi, learned Senior counsel for the respondent argued that the agreed procedure under the agreement ought to have been followed by the petitioner. The said clause 24.1 nowhere puts any limits on the exercise of the right to arbitrate but rather extinguishes the right to arbitrate itself. Thus, the said clause 24.1 is not violative of Section 28 of the Contract Act.

34. Mr. Sethi relied upon the judgment passed in the case of *H.P. State forest Company Limited v. United India Insurance Company*, AIR 2009 SC 1407 and also the case of *United India Insurance Company Limited v. Karam Chand Goel* decided by the learned Single judge in support of the said proposition.

35. I have given my careful consideration to the submissions advanced by the learned counsel for the parties in relation to operation of arbitration clause so far as it disentitles the party from raising the claims before the arbitrator unless the notice is issued within 14 days of receipt of the recommendation of DRB.

36. I am of the opinion that there is no need to reinvent the wheel when the law seems to be well settled and there is a consistent view leaning towards the proposition that the arbitration clauses which put the impediment of time limit to raise the claim before the arbitrator are violative Section 28 of the Contract Act, 1857 and as such required to be read down by the courts. The operation of such clauses to the extent they put restriction on the right to arbitrate should be treated as directory in nature.

37. In the case of *Shri J.K. Anand v. Delhi Development Authority* (supra) the learned Single Judge of this court applied the Section 28 of the Indian contract Act in relation to arbitration clause which restricted the contractor to demand the claim by way of arbitration within 90 days of the intimation from the Engineer in charge that the bill is ready for payment. In such circumstances, learned Single Judge applied the provisions of Section 28 of the Contract Act while affirming the view of another learned Single Judge of this court taken in the case of *Hindustan Construction Corporation v. DDA*, (supra) and observed that the clause of such nature should not be applied strictly and directed the arbitrator to decide the claims on merits. In the words of the learned Single Judge, it was observed thus:

“Perusal of the aforesaid provisions shows that these are applicable to the facts and circumstances of this case in hand. It was observed that clause 25 of the agreement that the contractor’s right to claim arbitration comes to an end after the expiry of 90 days from the date of intimation of the final bill **being ready for payment deprives the contractor of a very valuable right to claim the amount which was due to him from the respondent. (Emphasis Supplied)**

Since the Arbitrator did not decide the claim on merits and clause (b) of Section 28 of the Contract Act keeps the right of the contractor to claim the **amount which was due to him alive irrespective of clause 25 in the agreement, the application is allowed**” (Emphasis Supplied).

38. Besides the views of the two learned Single Judges in the case of *J.K. Anand* (supra) and *Hindustan Construction Company* (supra), another learned Single Judge of this court has taken similar view in the case where National High Authority of India was a party to the proceedings and the arbitration clause contained in the agreement was more or less similarly worded by observing that the operation of the said clause is directory and

not mandatory. In *NHAI v. Backbone Projects Limited* (supra) the learned Single Judge while deciding OMP 687/2009 observed thus after noting the arbitration clause:

“Clauses 24 and 25 of the General Conditions of Contract, and Clause 3 of the Special Conditions of Contract read as follows:-

24. Disputes

24.1 If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Dispute Review Expert within 14 days of the notification of the Engineer’s decision.

25. Procedure for Disputes

25.1 The Dispute Review Expert shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2 He shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Dispute Review Expert. Either party may refer a decision of the Dispute Review Expert to an Arbitrator within 28 days of his written decision. If neither party refers the dispute to arbitration within the above 28 days, the Dispute Review Expert’s decision will be final and binding.

“.....Having heard learned counsel for the parties, I am of the view that there is absolutely no merit in the objection raised by the petitioner founded upon clauses 24 and 25 of the General conditions of the contract. A perusal of clause 24.1 shows that when a contractor is not in agreement with the decision of the engineer, for whatever reasons, the Contractor can seek reference of the said decision/dispute to the DRE within 14 days of the notification of the Engineer’s

decision. The said clause does not purport to prescribe a strict period of limitation and does not say that in case the reference to the DRE is not sought within 14 days of the notification of the engineer's decision, the decision of the Engineer shall become final and binding on the contractor. It does not purport to shut out the right of the contractor to seek reference of the dispute to the DRE even after the expiry of 14 days of the notification of the engineer's decision. Therefore, even if it were to be accepted that the Contractor has not sought a reference against the Engineer's final decision within 14 days, it cannot be said that the right of the contractor under clause 24.1 to seek a reference to the DRE is barred.

The purpose of requiring the contractor to refer decision of the Engineer to the DRE within 14 days is only to ensure that such a reference is sought contemporaneously and is not unduly delayed. There should be proximity between the date when the decision is rendered and the date when the decision is sought to be referred to the DRE. It certainly cannot be said that Clause 24.1 purports to prejudicially affect the rights of the contractor to firstly seek reference of the decision to the DRE and thereafter, if still aggrieved, to arbitration. **In my view, if the prescription of the period of fourteen days under Clause 24.1 is held to be mandatory, the same would be highly unreasonable and opposed to public policy and would be hit by Section 28 of the Contract Act. As no consequence is provided which would result due to delay in seeking reference of the decision of the Engineer to the DRE, the said prescription in any event cannot be held to be mandatory.**" (Emphasis Supplied)

39. From the reading of the aforementioned observation, it is clear that the learned Single Judge in the case of *NHAI v. Backbone* (supra) has observed that the prescription as to reference of dispute within 14 days to the DRE (Dispute Resolution Expert) would be highly unjust and opposed to public policy as it would be hit by provisions of Section 28 of the Contract Act, 1872. No doubt, the observations of the learned Single Judge in *NHAI*

(supra) were concerning the prescription about the Dispute Resolution Expert and not qua arbitration. However, there is no reason why the said principle of law should not be applicable in the cases where right to arbitrate is attempted to be restricted by providing a prescription which is of 14 days which is unreasonably harsh and depriving the party its valuable right to arbitrate. Therefore, I find that it is apt to read down the clause 24.1 of the agreement as it lies in the teeth of Section 28 of the Contract Act, 1872 and also find that the restriction for raising the claim by issuing notice within 14 days of DRB recommendation before the arbitrator is inconsequential in nature as it attempts to restrict the right to parties to arbitrate.

40. I also do not find merit in the contention of Mr. Sethi, learned Senior counsel for the respondent that clause 24.1 does not put any restriction on the time limit to enforce the right but extinguishes the right itself if no action is commenced within the period stipulated by the agreement and as such the said clause does not offend the provisions of Section 28 of the Contract Act, 1872. The answer to the said submission lies if one carefully sees Section 28 of the Contract Act, 1872 as it stood prior to the amendment of 1997 and post the amendment of 1997. Both the provisions prior to the amendment and post amendment are reproduced hereinafter:

“Section 28. Agreements in restraint of legal proceedings void.-

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1. - Saving of contract to refer to arbitration dispute that may arise - This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2. - Saving of contract to refer questions that have already arisen - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Section 28 was amended by Indian Contract (Amendment) Act, 1996 (Act 1 of 1997) with effect from 8.1.1997 and the amended Section 28 reads as follows:

28. Agreements in restraint of legal proceedings, void.— Every agreement, —

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party -from enforcing his rights, is void to that extent.
(Emphasis supplied)

Exception 1.— Saving of contract to refer to arbitration dispute that may arise - This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.— Saving of contract to refer questions that have already arisen - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

41. A perusal of the amended Section 28 of the Contract Act, 1957 extracted above would show that both kinds of agreements i.e. agreements which restrict the period of limitation within which claims could be referred, as also agreements which extinguish the right of a party to prefer a claim or discharges any party from any liability under a contract on expiry of a specified period, are void to that extent.

42. Before the amendment of Section 28 in 1997, the agreements reducing the period of limitation were distinguished from those which did not limit the time within which a party might enforce his rights, but which provided for a release or forfeiture of rights, if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, being outside the scope of the section, were held to be binding between the parties. Thus, in *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.* (AIR 1997 SC 2049), the Supreme Court drew a clear distinction between an agreement which curtails the period of limitation and an agreement which provides for forfeiture or waiver of the right itself, if no action is commenced within the period stipulated by the agreement. The first was held to be void as offending Section 28 but, the later was held not falling within the mischief of Section 28. Thus, it was held that curtailment of the period of limitation was not permissible in view of Section 28 but extinction of the right itself, unless exercised within the specified time, was permissible and can be enforced.

43. After the 1997 amendment to Section 28 of the Indian Contract Act, 1872, not only the curtailment of the period of limitation is void, but also the extinction of right, if sought to be brought by the agreement within a specific period, which period is less than the period of limitation prescribed for the suit under the Contract in question, is also rendered void. In other words, after the amendment to Section 28 of the Indian Contract Act, 1872 by Act 1 of 1997, the distinction between curtailing of the period of limitation and extinction of the right itself, after the specified period, no longer exists.

44. Therefore, I do not find merit in the submission of Mr. Sethi that there lies a difference in the curtailment of the period of limitation and the extinction of the right itself. The judgment relied by the Mr. Sethi in the case of *H.P. State Forest Company* (Supra) was rendered in the context of the Section 28 of the Contract Act as it stood prior to the amendment. The effect of legislative amendment was never considered in the said judgment. The judgment of *H.P. State Forest Company* (supra) rendered by the Supreme Court merely affirms the view in the case of *Sujir Nayak's* case and the effect of the amendment to the statute was not considered. This has been explained by the Punjab and Haryana High Court in the case of arbitration wherein similar contention was raised and was negated on the count of the amendment. It has been observed by Punjab and Haryana High Court that the statement made by the counsel for the petitioner in the *H.P. State Forest Company* (Supra) on the ground that the amendment to Section 28 has been repealed or scrapped was based on mistaken belief. The said discussion finds mention in the judgment passed in the case of *Sunil Goyal vs. Haryana State Agriculture Marketing Board* [2011(2) Arb.LR 251 (P&H)]

wherein, it was held that Act No.30 of 2001 does not have the effect of repealing the amendment to Section 28 of the Contract Act by Act 1 of 1997. The following observations made in *Sunil Goyal's* case at paras 12 to 15 are relevant:

“12. It appears that in H.P. State Forest Company Ltd. case a statement was made that the amendment has been repealed. **Therefore, the provisions, as it existed prior to the amendment have to be examined. In fact, such statement made by the counsel for the appellant before the Hon'ble Supreme Court was under a mistaken belief. Indian Parliament Act No.1 of 1997 amended Section 28 of the Act. Later by Indian Parliament Act No.30 of 2001, the enactments specified in the first schedule were repealed to the extent mentioned in 4th column thereof. Indian Parliament Act No.1 of 1997 has been repealed, but such repeal does not affect any other enactment in which repealed enactment has been applied, incorporated or referred to in terms of the repealing Act. In terms of Section 6-A of the General Clauses Act, 1897, the amendment in the Act incorporated by the Amending Act does not stand repealed by such Repealing and Amending Act, 2001.** The periodical process of repealing is carried out to prune statutes on the statute book. (Emphasis Supplied)

13. Section 6-A of the General Clauses Act, 1897 has been interpreted in *Jethanand Betab v. State of Delhi*, AIR 1960 SC 89, wherein identical provision of Repealing and Amending Act, 1952 came up for consideration. It was held to the following effect:

“.....The substance of the aforesaid provisions may be stated thus: The Act of 1949 inserted Section 6(1-A) in the Act of 1933. The 1949 Act was repealed by the 1952 Act, but the latter Act saved the operation of other enactments in which the repealed enactment has been applied, incorporated or referred to. The first question that arises for consideration is whether the amendments inserted by the 1949 Act in the 1933 Act were saved by reason of Section 4 of the 1952 Act.

The general object of a Repealing and Amending Act is stated in *Halsbury's Laws of England*, 2nd Edn., Vol. 31, at p. 563, thus:

‘A Statute Law Revision Act does not alter the law, but simply strikes out certain enactments which have become unnecessary. It invariably contains elaborate provisos.’

In *Khuda Bux vs. Manager, Caledonian Press*, AIR 1954 Calcutta 484 Chakravarti, CJ neatly brings out the purpose and scope of such Acts. The learned Chief Justice says at p. 486:

‘Such Acts have no legislative effect, but are designed for editorial revision, being intended only to excise dead matter from the statute book and to reduce its volume. Mostly, they expurgate Amending Acts, because having imparted the amendments to the main Acts, those Acts have served their purpose and have no further reason for their existence. At times, inconsistencies are also removed by Repealing and Amending Acts. The only object of such Acts, which in England are called Statute Law Revision Acts, is legislative spring-cleaning and they are not intended to make any change in the law. Even so, they are guarded by saving clauses drawn with elaborate care,....’

It is, therefore, clear that the main object of the 1952 Act was only to strike out the unnecessary Acts and excise dead matter from the statute book in order to lighten the burden of ever increasing spate of legislation and to remove confusion from the public mind. The object of the Repealing and Amending Act of 1952 was only to expurgate the Amending Act of 1949, along with similar Acts, which had served its purpose.”

14. In *India Tobacco Co. Ltd. vs. CTO*, (1975) 3 SCC 512 the Hon'ble Supreme Court held:

“17. Broadly speaking, the principal object of a Repealing and Amending Act is to "excise dead matter, prune off superfluities and reject clearly inconsistent enactments" – See *Mohinder Singh vs. Harbhajan Kaur*, AIR 1955 Punjab 141.”

15. In view of the above, the Indian Parliament Act No.30 of 2001 does not have the effect of repealing the amendment carried out by Indian Parliament Act No.1 of 1997.....”

(Emphasis supplied)

45. In view of the above discussion, I do not find any reason to depart from the view taken by *Sunil Goyal's* case (supra) by Punjab and Haryana High Court. Therefore, the judgments passed in the case of *H.P. State Forest Corporation* (supra) and *United India Insurance Company Limited v. Karam Chand Goel* are distinguishable as they were rendered under the provisions of unamended Section 28 of the Contract Act. Therefore, I find that clause 24.1 of the Act so far as it puts the restriction on the party either by extinction of right to arbitrate or for its enforcement of the right to arbitrate unless the notice is given within 14 days of the receipt of the recommendations of DRB lies in the teeth of Section 28 of the Contract Act (as amended in the year 1997) and thus the same has to be read down and the effect of such restriction is in consequential.

46. The resultant effect of the aforementioned discussion is that as a matter of law, the restriction prescribed under clause 24.1 of the Contract putting fetters upon the party to arbitrate their claim is inconsequential. Accordingly, the impugned order deciding preliminary issue cannot sustain and the same is set aside. Appeal is allowed. Learned Arbitral Tribunal is requested to entertain the claims of the petitioner and decide the same on merits in accordance with law.

(MANMOHAN SINGH)
JUDGE

APRIL 02, 2013