

1. The
Depart

2. The
Patna.

3. The

4. The
Bandh

5. The
Bandh

6. The
Bandh

.... **Petitioners.**

M/s Komal Construction through its proprietor namely Komal Singh resident of Mohalla - Ward No. 4, Chhawani Mohalla, Post Office and Police Station - Bhabhua, District - Kaimur.

.... **Respondent.**

For the Petitioner/s : Mr. Kundan Bahadur Singh, Adv.
Mr. Neeraj Kumar, Adv.
For the Respondent/s : Mr. T.N.Maitin, Sr.Adv.

5 01-10-2015 Heard Mr. Kundan Bahadur Singh and Mr.
Neeraj Kumar, the learned counsel appearing on behalf of the
petitioners and Mr.T.N.Maitin, the learned senior counsel on
behalf of the respondent.

The writ petitioners have questioned the order passed on 19.04.2014 by Sub Judge I, Kaimur in Execution Case No. 03/2012 whereby the court has determined the liabilities of the judgment debtor-petitioners to pay the amount specified in the order to the decree holder-respondents within the time frame as

mentioned.

In order to appreciate submissions made on behalf of the parties, it would be profitable here to take into notice the facts, not in dispute and appearing from the records, that an award has been passed by the arbitrator on 26.03.2008 upon reference of the dispute between the parties in pursuance to the order dated 10.04.2007 passed by this Court in CWJC No. 14834 of 2006. The award contained the direction to the petitioner-Executive Engineer for preparation and passing of the final bill relating to the claim of the respondent. Accordingly the final bill was prepared whereby certain amount was found recoverable from the respondent itself and the orders for recovery of the said outstanding amount were passed.

The respondent filed CWJC No. 144 of 2009 challenging the abovesaid orders for recovery as passed by the petitioner-Executive Engineer. This Court by order dated 22.02.2012 disposed of the writ application with liberty to the petitioner to approach civil court as the matter related to the award which had attained finality. The respondent, thereafter, filed the Execution Case No.3 of 2012 before the learned court below. By order dated 18.07.2012, the learned court below after hearing the parties and scrutiny of the material on record held the respondent

to be entitled to Rs. 30,72,930/- with interest and directed the petitioners to pay the said amount.

The petitioners, then, challenged the aforesaid order dated 18.07.2012 by filing CWJC No.3711/2013 before this Court. By order dated 16.08.2013 this Court allowed the writ application, set aside the said order dated 18.07.2012 only to the extent of payment of Rs. 30,72,930/- with interest to the petitioners and remitted the matter back to the executing court with following observations and directions:

“...In law the award by the competent arbitrator has to be treated as a decree of a civil court and has to be executed. No party is at liberty to go behind that decree and dispute facts and evidences placed before the trial court or placed before the arbitrator which issued the award. If there was any ambiguity in the award then only the matter could be raised and gone into by the executing court, not otherwise.

In the circumstances, this writ application is allowed and the impugned order is set aside only to the extent the executing court has passed orders for payment of said amount

Rs.30,72,930/- with interest to the petitioner. The matter is remitted back to the executing court which will call upon the writ petitioners-judgment debtor to produce final bill prepared by them in terms of the award and shall thereafter proceed in accordance with law. The executing court shall be at liberty to examine as to whether final bill prepared by the officials of the State of Bihar is strictly in accordance with the arbitration award or not. This is made clear that officials of the State of Bihar are not at liberty to take into account any fresh material or calculation or measurement, not taken and produced before the arbitrator for consideration and not noticed by him in the arbitration award. In case the authorities of the State of Bihar fail to produce final bill before the executing court within three months from the date of receipt/production of a copy of this order, the executing court will be at liberty to examine the documents placed before the arbitrator by the parties and come to its own calculation with

regard to final bill of the petitioner....”

The learned court below considered the matter afresh in view of the above directions and observations of this Court and has passed the impugned order determining the quantum of the amount to which the petitioners are entitled and directing the petitioners to pay the aforesaid amount to the respondent with the specified time frame.

In the aforesaid canvas of facts, the petitioners have again approached this Court by filing the present application questioning the legal validity of the award and the jurisdiction of the learned court below to pass the impugned order. Mr.Singh, the learned counsel appearing for the petitioners has submitted that the executing court has lacked the inherent jurisdiction to pass the impugned order by determining the amount, and in line, it has further been submitted that in fact it was to be so done by the arbitrator who failed to determine the amount and therefore award itself is in the teeth of the provision of Section 28(a) of the Arbitration and Conciliation Act, 1996. Elaborating the submissions, the learned counsel has propounded that the award itself is not a legally valid award and therefore the proceeding for its execution is not maintainable but the learned court below has committed error of jurisdiction in proceeding with the execution

and passing the impugned order.

Per contra, Mr.T.N.Maitin, the learned senior counsel has supported the impugned order and has placed before this Court the previous orders passed between the parties and has submitted that the entire objection of the writ petitioners is barred the principle of constructive res judicata and also by the principles settled by the apex court in the case of *State of West Bengal Vs. Hemant Kumar Bhattacharjee, A.I.R. 1996 S.C. 1061*. It has been canvassed that the petitioners never raised such objection challenging the validity of the award and questioning its executability and after the order passed by this Court on 16.08.2013 in CWJC No. 3711/2013, which was, in fact, filed by the petitioners themselves, the challenge now to the award and jurisdiction of the learned court below is also barred by the principle of estoppel, waiver and acquiescence as well. It has also been submitted that the petitioners' sole purpose is to delay the payment to the respondent to which it is legally entitled.

After considering the materials on record and submissions on behalf of the parties, it is manifest that after reference of the dispute to the sole arbitrator, the parties joined the arbitration proceeding which has culminated in the award. The petitioners did not challenge the award before the competent court



under Section 34 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as 1996 Act). The award has, thus, attained finality as envisaged in Section 35 of 1996 Act. The present proceeding before the learned court below has been instituted under Section 36 of the enforcement of the said award. The scheme of the 1996 Act does not envisage any objection to the legality and validity of the award at the stage of its enforcement under Section 36 when no such objection has been raised under Section 34. As has been laid down by the apex court in *Fuerst Das Lawson Ltd Vs. Jindal Exports Ltd, 2011 (8) SCC 333*, the 1996 Act is a self-contained code and exhaustive and carries with it a negative import that acts and things not mentioned therein are not permissible to be done. Their lordships have further held that the applicability of general law procedure is also impliedly excluded in the scheme of 1996 Act. The petitioners, therefore, now stand precluded from raising objection to the legal validity of the award.

But more significant is also the aspect, apparent from the impugned order, that the petitioners have not raised such objection before the learned court below. It also does not appear from the orders passed in the previous writ applications between the parties in this matter that such objection was ever raised by the

petitioners. To the contrary the petitioners accepted the order dated 16.08.2013 passed in CWJC No. 3711/2013 by which this court had remitted the matter back to the learned court below for determination afresh of the quantum of the amount to which the respondent was entitled and had also issued further directions in that regard. Even in the present writ application also, there is no averment at all supporting the objection to legal validity of the award or inherent lack of jurisdiction of the learned court below, as submitted by the learned counsel for the petitioners. Section 28(a) of the 1996, Act, which has been strongly relied by the learned counsel for the petitioners, also does not substantiate the submissions on behalf of the petitioners in the backdrop of the aforesaid facts. If the petitioners were at all aggrieved by the award, they were required to challenge the same as provided in 1996 Act itself. After having allowed the award to attain finality and joining the proceedings for the enforcement of the award after the order of this Court, the petitioners are now precluded under the scheme of the Act, 1996 or even under general law to assail the validity of the award or question the jurisdiction of the court below, for the first time in this application under Article 227 of the Constitution. The apex court in *M. Nagabhushana Vs. State of Karnatka, A.I.R. 2011 S.C. 1113*, under similar circumstances,

has applied the doctrine of constructive res judicata.

The next submission on behalf of the petitioners that the proceeding before the learned court below was not maintainable as the learned court below has lacked the inherent jurisdiction to entertain the petition for enforcement of the award, is equally devoid of merit and misconceived also. By virtue of Section 36 of the 1996 Act, the learned court below was well within its jurisdiction to entertain the petition filed by the respondent for enforcement of award. If according to the petitioners, the impugned order suffers from error of jurisdiction, that cannot be the reason to support the submission that there was inherent lack of jurisdiction in the learned court below. The distinction between inherent lack of jurisdiction and wrong exercise of jurisdiction by a court is well defined and distinguished. The apex court in the case of ***State of West Bengal Vs. Hemant Kumar Bhattacharjee, A.I.R. 1966 S.C. 1061*** has emphasized this principle and held as follows:

“...A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review

which the law provides. The learned Judges of the High Court who rendered the decision on 04.04.1952 had ample jurisdiction to decide the case and the fact that their decision was on the merits erroneous as seen from the later judgment of this Court, does not render it any the less final and binding between the parties before the Court... ”

Tested on the anvil of the above dictum, this Court is not inclined to accept the submission made on behalf of the petitioners.

The impugned order has been passed after the matter has been remitted back by this Court by order passed in C.W.J.C.No.3711/2013. As no other submission has been made on behalf of the petitioners to assail the impugned order, it is held that this writ application has no merit.

The writ application is, accordingly, dismissed.

(V. Nath, J)

Nitesh/-

U			
---	--	--	--