

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on February 16, 2016

Judgment delivered on February 23, 2016

+ O.M.P. (COMM) 42/2016, IAs 2101-2102/2016
PRACTICAL PROPERTIES PVT LTD Petitioner

Through: Mr. Sanjeev Narula, Adv.
with Mr. Ashish Virmani,
Adv.

versus

COMET OVERSEAS PVT LTD Respondent

Through: Mr. Jagdeep Anand, Adv.
with Mr. Anil Agarwalla,
Adv.

+ O.M.P. (COMM) 43/2016, IAs 2104-2105/2016
PRACTICAL PROPETIES PVT LTD. Petitioner

Through: Mr. Sanjeev Narula, Adv.
with Mr. Ashish Virmani,
Adv.

versus

OLYMPIC OIL INDUSTRIES LTD. Respondent

Through: Mr. Jagdeep Anand, Adv.
with Mr. Anil Agarwalla,
Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

**IA 2101/2016 in O.M.P. (COMM) 42/2016 and IA 2105/2016 in
O.M.P. (COMM) 43/2016 (Under Section 151 CPC seeking
condonation of delay in re-filing the present petitions)**

Pursuant to the directions of the Court on February 12, 2016, the petitioner had filed an affidavit of the authorized representative justifying the delay in re-filing. On a reading of the contents of the

affidavit, the delay in re-filing the petitions, is condoned. The IAs 2101/2016 in O.M.P. (COMM) 42/2016 and IA 2105/20-16 in O.M.P. (COMM) 43/2016 are allowed. Applications stand disposed of.

O.M.P. (COMM) 42/2016 & O.M.P. (COMM) 43/2016

1. The challenge in these two petitions is to the order dated October 23, 2015 passed by the learned Arbitrator dismissing the application filed by the petitioner under Section 12 and 16 of the Arbitration and Conciliation Act, 1996 in two Arbitration Claim Petition no. 1/ 2015 titled *SVOGL Oil Gas and Energy Ltd. vs. M/s Shiv Vani Oil and Gas Exploration Services Ltd.* and Arbitration Claim Petition no.3/2015 titled *Comet Overseas Pvt. Ltd. vs. Shiv Vani Oil and Gas Exploration Services Ltd.* wherein, the petitioner is defendant No.2.

2. There is no dispute that the present petitions have been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act. The learned counsel for the respondent had taken a preliminary objection on the maintainability of the petitions under Section 34 of the Arbitration and Conciliation Act. The learned counsel for the respondent has relied upon the following judgments in support of his submission on the maintainability of the petitions under section 34:-

- i) 94 (2001) DLT 636 titled *Rajnigandha Co-operative Group Housing Society Ltd. vs. Chand Construction Co. & Anr.*
- ii) 76 (1998) DLT 98 titled *Union of India & Anr. Vs. East Coast Boat*

Builders & Engineers Ltd.

iii) (2001) 3 MLJ 820 titled *Tamil Nadu Water Supply & Drainage Board vs. Aban Construction*

iv) 1998 (4) ALLMR 544 titled *Kapal R. Mehra & Ors. vs. BHupendra M. Bheda & Ors.*

v) *Aravali Infrapower Ltd. vs. Michigan Engineers Pvt. Ltd. & Anr.* (Arb. A. (Comm) 3/2015 passed in judgment dated January 27, 2016 by this Court.

vi) *Bharat Vasudev Khater & Ors. vs. Religare Finvest Ltd.* (Aarb. No.A. (Comm) No.5/2016 in judgment dated February 1, 2016.

vii) *Lexicon Finance Ltd. vs. Union of India & Ors.* ILR 2002 Karnataka 2050

3. On the other hand, Mr. Narula would submit that the present petitions under Section 34 of the Act are maintainable inasmuch as by the impugned order, the learned Arbitrator has finally determined an issue of the maintainability of the proceedings qua the petitioner by rejecting its plea. He would point out the agreement dated August 8, 2013 executed between M/s Shiv Vani Oil and Gas Exploration Services Ltd., M/s Comet Overseas Pvt. Ltd. and the petitioner herein to state that the relevant clause of arbitration i.e. clause 13 contemplates reference of dispute between the parties therein. The petitioner herein even though signatory to the agreement is not a party as is clear from the presence of the stipulation “as the context may require, the ‘supplier’ and the “buyer/service, receiver” are hereinafter collectively refer to as parties and individually as party”. The reference as “parties” is to the “supplier” and the “buyer/service receiver” and not the “confirming party” which is

the petitioner herein. According to him the parties have agreed that only in the case of a dispute between the parties, the matter needs to be referred to the Arbitration. He would also state even if there is dispute between the respondent and the petitioner herein, the same needs to be resolved by a Civil Court only. Hence, the proceedings before the learned Arbitrator are *corum-non judice* and need to be rejected. It is his submission that precisely for that reason the petitioner herein had filed an application before the learned Arbitrator challenging his jurisdiction which culminated in the impugned order of the learned Arbitrator. On the issue of maintainability, it is his submission, the issue has finally been decided against the petitioner, which is in the nature of an interim award and the same can be challenged by way of a petition under section 34 of the Act. He relied upon the provisions of Section 16 (2) and 16(3) of the Act to contend, the order under the said provision being appealable under Section 37 of the Act, surely an order whereby the learned Arbitrator has not acceded to the request of the party for deleting the petitioner from the array of party being not appealable under Section 37 is maintainable under section 34 of the Act.

4. Having heard the counsel for the parties, insofar as, plea under Section 12 of the Act is concerned, the learned Arbitrator has said as under:-

“32. At the very outset; with regards to the challenge u/s.12(1) of the Act, I hold that both the Defendants herein have completely misunderstood the provisions of Sections 12(1) of the Act, in-as-much-as the provisions contained therein do not cast any negative onus on the Arbitral Tribunal to keep sending written communications with self certifications about its independence and the non-existence of any circumstances giving rise to justifiable doubts about its independence or partiality. This Tribunal is fully conscious of its duties obligations u/s.12(1) of the Act and shall keep all parties informed in writing, on any occasion when such circumstances arise. In order to clarify this aspect beyond any doubts, the Counsels for the Defendant Nos.1 and 2 were categorically asked by this Tribunal if they were aware of any circumstances contemplated u/s.12(1) of the Act concerning this Tribunal, other than the bald allegations made in their respective Applications. Both the Defendants' Advocates, despite lengthy technical arguments, were unable to pin point any specific instance of any such circumstance within their knowledge which would be a ground for fearing a bias in the mind of the Arbitrator. The Defendant No.2's Counsel relied upon the decision of the Hon'ble Bombay High Court in the matter of UOI v. Tolani Bulk Carriers (2002(2)BomCR256) in support of his contentions about Sec. 12(1) of the Act. After hearing the arguments of the Counsels of both the Claimants opposing the Application, this Tribunal directed them to make categorical averment/s, if this Tribunal; was in- any manner associated with Counsels for both the Claimants or both the Claimants, or either of their Directors / the relatives of the Directors in any personal or professional capacity ever in the past. The Counsels for both the Claimants categorically denied any such relationship or interest. The Counsel for both the Claimants relied upon the Judgement of the Hon'ble Supreme Court in the matter of Secretary v. Munuswamy (AIR1988SC2232) in support of their contentions that a reasonable apprehension of bias must be based upon cogent materials.

33. Before proceeding further, an important point needs to be clarified with regards to para 27 of the rejoinder filed by def. No.2 wherein in the 2nd half of the said paragraph 27, the Defendant. No.2 has stated that this Tribunal and the Claimants have failed to furnish information as requested by the Defendant No.2. During the course of the hearing, this Tribunal called upon the Counsel of M/s. Practical Properties Pvt. Ltd. to explain in detail and justify with documents what has been written in paragraph 27 of the Rejoinder. After going through the contents of para 7 of the Rejoinder the Ld. Counsel clarified that no such request was made to this Tribunal under section 12 but what is stated in para 27 of the rejoinder, only refers to the averments in both the Applications made by the Defendant No.2, Similarly the Counsel for the Defendant No.2 clarifies that no such letter was sent to the Claimant by the Defendant No.2 either. This Tribunal directs M/s. Practical Properties Pvt. Ltd. and its Counsel to clarify by e-mail to both, the Arbitrator and the Claimant in the said regard with copy to all other parties to both the Agreements.

34. It is necessary to place on record that the judgement relied upon by the Defendant No.2's Counsel (UOI v. Tolani) deals with a completely different circumstance wherein the Arbitrator therein was the father of the partner of the Law Firm representing the claimants, which is not even remotely the case in the present matter. As discussed above, the Counsels for both the Defendants could not pin-point any specific circumstance based upon cogent material which would lead to an apprehension of bias on the part of the Arbitrator. This Tribunal also categorically states that it has no personal interest in the proceedings or claim and further states that it has no relationship of any nature whatsoever either, personal or professional with any of the Claimants or any of its directors, associates, shareholder, officers assigns or anyone associated with them. This; Tribunal also clarifies that there are no circumstances which are likely to give rise to any justifiable doubts as to the independence or impartiality of this Tribunal. It is further held that the

disclosure as required under section 12(1) is only to be given if there exists such circumstances about the independence or impartiality of the Tribunal and the same can be given at any stage of the proceedings as per section 12(2) of the Act. In view of the above, and in view of the fact that this Tribunal has no personal/ professional interest with any of the parties herein, the challenge u/s 12 r/w Sec.13 of the Act is rejected.”

5. On the issue, the Arbitration clause is not applicable to the petitioner is concerned, the learned Arbitrator has in para 38 held as under:-

“38. This objection has to be considered in light of the guiding Principles concerning "cause of action". It is well settled that the cause of action in any matter depends upon the averments made in the Complaint/Claim Statement (as the case may be) and not on any defenses put up by the Defendant. The Claimants in both the Claim Petitions have in their notice dated 06.07.2015 (invoking arbitration) have claimed that the Defendant No.2 had agreed to transfer to the Claimant certain immovable properties, and furthermore executed an Agreement to Sell dated 09.08.2013 in their favour. Thus there is, in my opinion, sufficient cause of action made out against the Defendant No.2 to implead them as a party Defendant to these proceedings. It is always possible that the Claimants in their Claim Statement may not be able to sustain any reliefs against the Defendant No.2, which is to be dealt with at the appropriate stage of these proceedings. I am further fortified in my decision by the fact that the guiding clause in the Arbitration Agreement is as follows:

"The Arbitral proceedings shall be conducted by a sole Arbitrator to be appointed by the Lender (Claim Petition No.1 of 2015) / Buyer/ Service Receiver (Claim Petition No.3 of 2015)". In my opinion, in view of the above clauses, the only factor to be considered is that both the Agreements contemplate the resolution of

disputes by a sole Arbitrator to be appointed by the Claimants. There is no negative opt out clause, which precludes the Defendant No.2 from being impleaded as a party Defendant in these proceedings. The objection of the Defendant No.2 with regards to section 2 r/w. section 7 of the Act that it has not been mentioned in the Arbitration clause amounts to splitting hairs. In this respect, I am relying on section 7(2) of the Act which states that "the Arbitration Agreement may be in form of an Arbitration Clause in a Contract". No where does the Act specify that in the Arbitration Clause in a contract, there must be further reference to the parties to the Agreement who shall be subject of Arbitration clause. Of course, if there was a specific mention that the Defendant No.2 was not governed by the Arbitration Clauses in both the Agreements, then in that event, it could be held that they were outside the Arbitration Agreement. However, this is not so and thus the Defendant No.2 is fully bound by the Arbitration Clause in both the Agreements. The judgement in the matter of K.K. Modi (Supra) does not help the Defendant No.2 as in that matter the question before the Hon' Apex Court was whether an MOU could constitute an Arbitration Agreement. The Hon'ble Apex Court in that matter held that: "the MOU could not be termed as an Arbitration Agreement and thus the proceeding before the Chairman of IFCI could not be an Arbitration proceeding or award". The judgement in the matter of Deutsche Post Bank (Supra) does not help Defendant No.2 either, as the question before the Hon'ble Apex Court was whether in a Construction Agreement/Sale Deed entered into solely between the Developer and the Purchaser of an Apartment, and outside party (i.e.) Deutsche Post Bank could be made party to an Arbitration proceedings. The Hon'ble Apex Court therein held that "the Bank was not a party mentioned in the Agreement." This judgement cannot be of any help to the Defendant No.2 as they, in both the present Agreements, are very much a confirming party to both the said Agreements, which they have not denied. The objections in this regard are

thus rejected.”

6. On the plea of Section 16 of the Act, the learned Arbitrator has held as under:-

“39. The Defendant No.2 has further relied upon Sec. 16 of the Act to challenge the competence of the Tribunal. After hearing both the parties and in view of my discussions and findings in the fore-going paragraphs, I hold that both the defendants have failed to show and establish that this Tribunal has no jurisdiction to hear the disputes against them. This Tribunal has been constituted as per the agreement between the parties and has jurisdiction to try and entertain the claims and disputes between the parties. The arbitration agreement executed between the parties is completely valid.”

7. I am afraid the plea of Mr. Narula, on the maintainability of the petition, cannot be accepted for the simple reason that the application filed by the petitioner was under Section 12 and 16 of the Act challenging the jurisdiction of the arbitral tribunal.

8. Section 12 of the Act reads as under:-

12. Grounds for challenge:-

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the

arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

9. For the sake of completeness, it is important to quote Section 13 of the Act as well.

13. Challenge procedure:-

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

A perusal of the aforesaid provisions, it is clear that under Section 12, an arbitrator may be challenged only if;

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality;

(b) he does not possess the qualifications agreed to by the parties.

10. Under Section 13 of the Act, more particularly on a reading of sub section 2, sub section 4, and sub section 5, if, a challenge is made to the Arbitrator, and the challenge is not successful, the arbitral tribunal shall

continue the proceedings, and make an award, and the challenge to the arbitrator shall be in accordance with Section 34. In other words, the challenge to the order shall be only under Section 34, when the Arbitrator continue with the proceeding and make an award. I only note for benefit para 32 of the judgment of the Supreme Court reported as **2013 (7) Scale 216 Antrix Corp. Ltd vs. Devas Multimedia P. Ltd**, which reads as under:-

“32. Sub-Section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-Section (6) may be invoked by any of the parties. Where in terms of the Agreement, the arbitration clause has already been invoked by one of the parties thereto under the I.C.C. Rules, the provisions of Sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an Arbitrator in terms of the Agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.”

11. Similarly, section 16 of the Act empowers the arbitral tribunal to rule its own jurisdiction. Section 16 of the Act reads as under:-

***“16. Competence of arbitral tribunal to rule on its jurisdiction—
(1) The arbitral tribunal may rule on its own jurisdiction, including rulling 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 defence; 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.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

12. A perusal of the provisions of Section 16 of the Act would reveal that the plea that the arbitral tribunal does not have the jurisdiction shall be raised not later than the submission of the statement of defence.

13. A perusal of sub-Section 5 to Section 16 would also reveal that if the tribunal decides a plea referred to in sub-section 2 or 3 rejecting the same, it would continue with the arbitral proceedings and make an arbitral award. Section 37 of the Act, which is a provision contemplating appeals, stipulates appeal from an order of the arbitral tribunal accepting the plea referred in sub-section 2 or sub-section 3 of Section 16. In other words, it does not contemplate appeal against an

order under sub-section 5 of Section 16. Hence no appeal can be filed.

14. Further, the definition of arbitral award in section 2 (i) (c) of the Act includes an interim award. In other words, a rejection of a plea of jurisdiction cannot be construed as an arbitral award, so as to be construed as an interim award, to be amenable to the jurisdiction of this Court under Section 34 of the Act. If that be so, there was no requirement of Section 37 of the Act providing remedy of 'appeal', as every order or interim award can be challenged under Section 34 of the Act. Under section 31(5) of the Act, the Arbitral Tribunal can make an award on any matter in respect of which it can make a final award. Thus, at the interim stage, there can be a decision in respect of a claim for which a final award can be made, which can be enforced under Section 36. A plea of jurisdiction is not a claim of the petitioner before the Arbitrator, for which a final award can be made.

15. Reliance placed by Mr. Narula on the judgment of the Supreme Court reported as (2014) 4 SCC 516 titled *Voltas Limited vs. Rolta India Limited*, more specifically on paras 6, 7 and 32, wherein the issue primarily was with regard to a counter claim filed by the respondent. As an issue of limitation was raised, the arbitrator framed two issues, which were as under:-

(i) Whether the counter claim or a substantial part thereof is barred by

limitation?

(ii) Whether the counter claim is not maintainable and beyond the scope of reference?

16. The learned Arbitrator even though on the issue of limitation has held that the counter claim was beyond the period of limitation of 3 years he overruled the objection with regard to the maintainability of the counter claim beyond the scope of reference after an interim award was passed by the learned Arbitrator. The respondent filed an application under section 34 of the Act for setting aside the decision of the Arbitrator rejecting the counter claim made by it on the ground of limitation. The learned Single Judge has held that the opinion expressed by the learned Arbitrator was not perverse and based on correct appreciation of documents and rejected the application filed under section 34 of the Act.

17. The Division Bench held that the counter claim filed by the respondent was within limitation and the rejection of the counter claim by the learned Arbitrator stood overruled. The Supreme Court held that the counter claim in respect of enhancement is totally barred by limitation. The Supreme Court did not agree with the view of the Division Bench of the High Court that the counter claim as a whole is not barred by limitation.

18. Suffice to state the Supreme Court was not concerned with the

issue whether an order rejecting the plea of maintainability/jurisdiction of the arbitral tribunal is an interim award and as such liable to be challenged under Section 34 of the Act. Further, the counter claim of the respondent was rejected on the ground of limitation. To that extent, there was a final determination of the counter claim, as such amenable to the jurisdiction of the High Court under Section 34, being an interim award. The judgment is not applicable to the facts of this case and is distinguishable. In so far as reliance placed by Mr. Narula on the judgment of Punjab and Haryana High Court reported in *2014 SCC Online P&H 3395 titled Batliboi Ltd. vs. Union of India* is concerned, the same would also not be applicable to the facts of this case, inasmuch as, the High Court has finally held that if an order or interim award amounts to deciding the rights of the parties adversely commented determining the liability albeit prima facie, pending further arbitration proceedings and where the same visited the appellant with civil consequences the impugned order would deserve to be set aside as it may qualify as one deserving intervention of the Court under section 37 i.e. appeal proceedings. The issue therein was not whether the order passed by the learned Arbitrator was an order or an interim award. The High Court had commented on the order of the learned District and Sessions Judge determining the liability pending further arbitration

proceedings which visited with the civil consequences, which can be challenged by way of an appeal under section 37 of the Act.

19. The answer to the issue which arises for consideration has been summed up by this Court in ***Rajnigandha Group Housing Society Ltd (supra)***, wherein this Court in paras 8,9, and 10 has held as under:-

“8) The question whether section 16 of the Act places an embargo upon the petitioner to challenge the interim award under the provisions of Section 34 of the Act came up for consideration before this Court in *Union of India & Anr. Vs. M/s East Coast Boat Builders & Engineers Ltd.* **MANU/DE/0113/1999 : AIR1999Delhi44.**

9) The court went into various relevant provisions in this regard and dealt with the proposition in very lucid and elaborate manner and came to the conclusion that the decision by an arbitral tribunal under section 16(5) holding that it has jurisdiction to entertain the claim petition is not an interim award. The Court in categorical terms held that where the arbitral tribunal decides the question of jurisdiction under Section 16(5) of the Act and rules that the disputes raised in the claim petition are arbitrable, the petition under Section 34 of the Act is not maintainable as no appeal is provided under the Act against such order and since the order is not an interim award it is not challengeable under section 34 of the Act.

10) It was further observed that from the scheme of the Act, it is apparent that the legislature did not provide appeal against the order under section 16(5) whereby the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such case the arbitral tribunal shall continue with the arbitral proceedings and make an award without delay and without being interfered in the arbitral process at that stage by any Court in their supervisory role.”

20. Similarly, in case of *Union of India & Anr. vs. East Coast Boat Builders & Engineers Ltd. (supra)*, this Court in paras 19 and 20 held as

under:-

19) If an order on the point of jurisdiction of the arbitral tribunal was to be an interim award under the Act, Section 37 of the Act would not have provided for appeal against an order whereby the arbitral tribunal holds that it has no jurisdiction. While enacting Section 16 of the Act, the legislature was conscious that the arbitral tribunal could hold in its favour or against itself on the point of jurisdiction. If the legislature had to treat an order under Section 16 to be an interim award, it would not have provided for an appeal under Section 37 where the arbitral tribunal allows the plea that the arbitral tribunal does not have jurisdiction and the legislature would have left challenge to such order as well under Section 34 of the Act. It cannot be accepted that the order under Section 16 would change its nature upon two different contingencies, that is to say, where the order rejects the plea of no jurisdiction it becomes an interim award and where the arbitral tribunal allows the plea of no jurisdiction it is not an interim award and only appealable. Therefore, it can easily be interpreted that in either case it is only an interim order and not an interim award. Analogy of British law on the subject cannot be pressed into service because under the British Arbitration Act such order has been specifically termed as award whereas in the Indian Arbitration Act such order has not been so specifically termed.

20. From the scheme of the Act, it is apparent that the legislature did not provide appeal against the order under Section 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such case, the arbitral tribunal shall continue with the arbitral proceedings and make an award without delay and without being interfered in the arbitral process at that stage by any court in their supervisory role.

21. In Tamil Nadu Water Supply & Drainage Board (supra), it has been held as under:-

18) Under Section 37(2) an appeal is provided against the decision of the arbitral tribunal accepting the plea of not having

jurisdiction made under Section 16. The said provision was added at the time of the Bill was presented before the Parliament which did not find place in the Ordinance. The Parliament, has decided not to provide any appeal or recourse against the order of arbitral tribunal rejecting the challenge to its jurisdiction.”

22. In Lexicon Finance Ltd. (supra), the High Court has held as under:

“A bare reading of the section reveals that if the objection regarding jurisdiction is rejected by the Tribunal, the Tribunal shall continue with the arbitral proceedings and make an arbitral award. If the party is aggrieved by such an arbitral award, he has been provided with a remedy by way of an application under Section 34 of the Act for setting aside such an arbitration award as is clear from Section 16(6) of the Act. Therefore, an arbitral award passed by an Arbitral Tribunal could be challenged under Section 34 of the Act not only on the grounds set out in Section 34(2) of the Act but also on the ground that the Tribunal had no jurisdiction or that the Tribunal has exceeded its authority as contemplated under Section 16(2) and (3) of the Act. If the plea referred to in Sub-section (2) or (3) of Section 16 is accepted by the Tribunal then under Section 37(2) of the Act an appeal is provided against such finding. Therefore, the legislature in its wisdom has provided for appropriate remedies under the Act both when the plea regarding jurisdiction is accepted by the Tribunal and rejected by the Tribunal. The aggrieved party has a statutory remedy. Merely because after the plea is rejected the person raising the said objection is made to contest the proceedings on merits and only when an arbitral award is passed on merits he is permitted to challenge the said award both on the question of jurisdiction and on merits under Section 34, that would not render Section 16(5) of the Act inequitable and violative of principles of natural justice. It does not violate the fundamental right of the petitioner as contended by him. The learned Counsel for the petitioner has not been able to show any other ground to declare Section 16(5) of the Act as ultra vires. Merely because he is expected to be subject to the jurisdiction of the Tribunal and go through the entire trial, it would not render such provision arbitrary or oppressive or unconstitutional. As stated, Section 34 of the Act gives a party adversely affected by an arbitral award the right to approach the

Arbitral Tribunal and any order passed under Section 34 is appealable under Section 37 of the Act. Such being the fact situation, this Court cannot go into the merits of the case. The contentions of the learned Counsel for the petitioner have no substance.”

23. Similarly, in case of *Kapal R.Mehra & Ors. (supra)*, it has been held as under:-

“5. The Arbitration Act, 1996 has sought to remedy various procedural defects in the Arbitration Act, 1940 so as to provide for early resolving of the dispute. The purpose is clear, once the arbitral tribunal enters into reference, the award must be made as early as possible. In fact unlike the Arbitration Act, 1940, Schedule I which provided for a time frame and section 28 which provided for enlargements of time in making the award, no such period is laid down in the new Act. It is made clear that the above construction is based on the provisions of the Arbitration Act, 1940 and it does not refer to other arbitral proceedings protected under sub-section (4) of section 2 of the Arbitration & Conciliation Act, 1996. To that extent also it has put fetters on judicial authorities intervening during the course of the arbitral proceedings by virtue of section 5. Therefore, there are two situations. One where the Arbitral Tribunal accepts the plea regarding want of jurisdiction in which case an appeal is provided under section 37(2)(a). The other situation is when the plea is not accepted, in which case the tribunal will proceed with the reference and pass the final award. Such a final award on that count can be challenged by filing a petition under section 34(2)(a)(v) by challenging the award. Therefore, I am clearly of the opinion that if the plea raised under section 16 is not accepted no appeal is maintainable.

The present petition is filed under section 34 of the Act. Will such a petition lie against a decision refusing to accept the plea of jurisdiction. Arbitral award, includes an interim award, therefore, can a challenge to the award be made on the ground that it is an interim award. If such a plea is upheld it would mean that though appeal is not available under section 37(2)(a) the decision can be challenged under section 34. If section 34 is read to mean to

include every interim order or award the object and purpose behind section 37 would be defeated. Interim award has not been defined. Under sub section (5) of section 31 of the Arbitration Act, 1996, the Arbitral Tribunal can make an interim award on any matter in respect of which it can make a final award. Thus at an interim stage there can be determination of claim in respect of which a final award can be made. An award can be enforced as a decree by virtue of section 36 of the Act. An award is therefore, a final determination of the claim. An interim award will be such determination of a claim at an interim stage. A harmonious construction, therefore, of section 34 and 37 read conjointly would mean only those orders can be challenged in respect of which a statutory remedy by way of appeal is provided under section 37 of the Arbitration and Conciliation Act, 1996. An order under section 16(5) does not constitute an arbitral award either interim or final and hence cannot be challenged under section 34 of the Act. If accepting the contention of want of jurisdiction as an award, there would have been no need to provide an appeal under section 37(2) of the Arbitral Act. In my view, therefore, the petition as filed is not maintainable.”

24. Even this Court in case of Aravali Infrapower Ltd. (supra) has held as under:-

10. It appears from the said provision which has been interpreted by various Courts to the effect that the Section empowers an arbitral tribunal to rule on its own jurisdiction vide sub-section (1). Where the arbitral tribunal decides to reject the plea regarding its jurisdiction, Sub-Section (5) empowers the tribunal to continue with the arbitral proceedings and make an arbitral award. Sub-Section (5) provides for the manner in which such an arbitral award may be challenged. It provides that such an award can only be challenged in accordance with Section 34. On the other hand, if the arbitral tribunal decides to accept the plea that it has no jurisdiction, then such an order is appealable under Section 37(2) of the Act.

11. Thus, in my considered view, the impugned order is not an interim award. It is simply an order passed in the

application for stay of proceedings whereby the request of the appellant has been rejected. The Arbitral Tribunal inclines to continue with the proceedings as mandated under sub Rule 5 and 6 of Section 16 of the Act.

No doubt, Section 37 stipulates the remedy for appeals, however, sub-section (2) of the said Section expressly states that an appeal shall lie against an order accepting the plea referred to in sub-sections (2) and (3) of Section 16, meaning thereby that where the Arbitrator has come to the conclusion that it has no jurisdiction, an appeal would lie, otherwise if Arbitral Tribunal holds that it has jurisdiction, the appeal does not lie. At this stage of appeal, it cannot be concluded that it is illegal or without jurisdiction because Legislature has conferred the power on arbitral tribunal "to rule on its own jurisdiction." Such an order can be challenged only in the manner laid down in Sub-Sections (5) and (6) of Section 16 of the Act, i.e. after the arbitration proceedings are over and the award is made. Such challenge is to be postponed and an aggrieved party would be entitled to raise after the award is passed. On the other hand, if it is held that it has no jurisdiction, an order can be challenged under sub-section (2) of Section 37 of the Act.

25. In view of the above, I am of the view that the present petitions are not maintainable under Section 34 of the Act. The petitions are dismissed. No costs.

IA 2102/2016 in O.M.P. (COMM) 42/2016 and IA 2104/2016 in O.M.P. (COMM) 43/2016(Stay)

In view of the fact that the present petitions have been dismissed, the applications are also dismissed.

**(V.KAMESWAR RAO)
JUDGE**

FEBRUARY 23, 2016
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