

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.11026 of 2013

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1. The State of Bihar, through the Secretary, Road Construction Department (National Highway Wing), Visheshwaraiya Bhawan, Patna.
 2. The Chief Engineer, Road Construction Department), (National Highway Wing), Visheshwaraiya Bhawan, Patna.
 3. The Executive Engineer, Road Construction Department, (National Highway), Road Division, Patna West, Patna. Petitioners.

Versus

Surendra Singh, son of Sri Ram Sakal Singh, resident of Mahajan Toli No.1, At & P.O.-Ara, District-Bhojpur, having present address at Veer Kunwar Singh Chawk, Keshari Nagar, P.S.-Shashtri Nagar, Patna. Respondent.

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Appearance :

For the Petitioners : Mr. K.P. Gupta, Adv.
Mr. Binod Kumar, Adv.

For the Respondent : M/s N.K. Singh, Jitendra Kumar and Shashank Shekhar, Advocates.

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

And

HONOURABLE MR. JUSTICE VIKASH JAIN

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 21-02-2017

This writ petition filed by the State under Article-227 of the Constitution assailing the order dated 22.09.2012, as passed by the learned Sub Judge-I, Patna in Execution Case No.01 of 2010/11 of



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2011, whereby the Executing Court rejected the petition of the State of Bihar filed under Section 47 read with Section 151 of the Code of Civil Procedure (hereinafter in short as 'CPC') for dismissal of the execution case filed for enforcement of Arbitral Award, on the ground of lack of jurisdiction of the Arbitrator to decide the matter and pass an award.

2. The primal question to be decided in this writ petition is whether the State having challenged the jurisdiction of the Arbitral Tribunal before the Arbitral Tribunal itself at the stage of reference of dispute to the Arbitral Tribunal and the Arbitral Tribunal having ruled against the State and in favour of its jurisdiction, State not having then challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') could, later at the stage of execution proceedings, raise any objection under Section 47 read with Section 151 of the CPC?

3. The facts are not in dispute. On 13.01.2007, notice inviting tender was issued by the Road Construction Department, Government of Bihar, for repair of part of NH-84, having a length of 14 kilometers between Brahmpur and Dumraon. The sole-responder tendered, and being lowest, was selected and approval was granted at estimated cost of work of about Rs.5,89,16,985.00. The work had to be completed within six months i.e. by 18.09.2007, but the agreement



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itself, being Agreement No.02 of 2007, was executed on 10.07.2007. Agreement is Annexure-3 to the writ petition. The said agreement contained an arbitration clause, which is quoted hereunder:

3. Arbitration (GCC Clause 25.3)

The procedure for arbitration will be as follows:

25.3 (a) In case of Dispute or difference arising between the employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The parties shall make efforts to agree on a sole arbitrator and only if such an attempt does not succeed and the Arbitral Tribunal consisting of 3 arbitrators one each to be appointed by the Employer and the Contractor and the third Arbitrator to be chosen by the two Arbitrators so appointed by the Parties to act as Presiding Arbitrator shall be considered. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Council, Indian Roads Congress.

(b) The Arbitral Tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties, and shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding



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arbitrator shall be appointed by the Council, Indian Roads Congress.

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Council, Indian Roads Congress shall appoint the arbitrator. A certified copy of the order of the Council, Indian Roads Congress, making such an appointment shall be furnished to each of the parties.

(d) Arbitration proceedings shall be held in India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(e) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(f) Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of the arbitration proceedings.

4. The said arbitration clause in the agreement would show that in case of any dispute, efforts had to be made to agree to a sole Arbitrator and on failure, to an Arbitral Tribunal,



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consisting of three Arbitrators, one chosen by each party and the two Arbitrators to select the Presiding Arbitrator within 30 days, and in failure whereof, the Presiding Arbitrator was to be appointed by the Council, Indian Roads Congress.

5. It appears, in course of executing the work, there were certain changes ordered by the officials of the Surface Transport Ministry, Government of India, whose estimates were not immediately sanctioned, the work remained suspended for sometime. After 07.03.2008, soon after sanction for change in specification was accorded, work started in full swing as per the revised specification. There had been considerable delay in executing the work. Accordingly, a show cause notice was issued, which was received on 19.04.2008 by the respondent contractor and replied on 22.04.2008.

6. It appears that as per the show cause notice, the reply was solicited by 21.04.2008 and, as no reply of the respondent contractor was received by 21.04.2008 (Annexure-4 to the writ petition), the agreement was rescinded for inordinate delay in execution of the work by the Executive Engineer concerned and immediately on 25.04.2008 (Annexure-5 to the writ petition) fresh tender notice was published for the same remaining work. On or about 28.04.2008, on behalf of the respondent-contractor detailed representation was filed against the cancellation but no action was



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taken. In the meantime, the respondent contractor was informed that on 29.04.2008, the bank guarantees had been invoked.

7. It is not in dispute that on 29.04.2008, the respondent contractor wrote to the Executive Engineer, Road Construction, National Highway, Patna West Division, Patna and gave explanation for the delay and demanded various payments due for the work done. It clearly pointed out that this representation be treated as raising a contractual dispute under Clause-24 of the agreement and requested arbitration in terms of Clause-25 of the agreement. This is Annexure-R-1 to the supplementary counter affidavit of the sole-respondent.

8. As the respondent-contractor was put to loss by invocation of bank guarantee and non-payment of substantial dues, on advice, the respondent contractor filed a writ petition on 02.05.2008, being C.W.J.C. No.7234 of 2008, assailing the action of the State, which writ petition was dismissed by judgment and order dated 29.05.2008 (Annexure-6 to the writ petition). The Writ Court held that there was efficacious, alternative remedy available to the writ petitioner-contractor, by virtue of the arbitration clause and the same had not been invoked by the writ petitioner, the writ petition was held, thus, not maintainable. Thereafter, immediately the respondent contractor wrote to the Executive Engineer drawing his attention to



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the earlier representation dated 29.04.2008, invoking arbitration and pointing out that the writ petition was also disposed of for taking recourse of arbitral proceedings.

9. In view of the arbitration clause, which emphasized on arbitration by a sole Arbitrator, the respondent contractor proposed the name of Hon'ble Mr. Justice U.P. Singh, retired Chief Justice of the Kerala High Court, as the sole Arbitrator and suggested that, if there was any objection, steps may be taken under Section 11 (6) of the Arbitration and Conciliation Act, 1996. It was also pointed out that in case, no communication was received within two weeks, it would be presumed that State had no objection to the proposed Arbitrator and reference would be made according to the claims as mentioned in the said letter dated 29.05.2008 (Annexure-R-2 to the supplementary counter affidavit of the respondent-contractor). Apparently, as there was no response coming from the State authorities, the respondent-contractor, on advice, filed a petition in terms of Section-9 of the Arbitration and Conciliation Act, 1996 before the District Judge, Patna, which was registered as Miscellaneous Arbitration Case No.99 of 2008, on or about 30.05.2008, for certain interim orders of stay.

10. On 17.07.2008, the petition filed by the respondent contractor in terms of Section-9 of the Arbitration and



Conciliation Act, 1996, as aforesaid, was rejected by the Court on the ground that it could invoke arbitration clause in the agreement. The order of the Court is Annexure-7 to the writ petition. Accordingly, on 30.07.2008 a formal reference under Section 3 of the Arbitration and Conciliation Act was filed before the named sole-Arbitrator, as earlier proposed, to which writ petitioners State had raised no objection. The reference application is Annexure-R-4 to the supplementary counter affidavit of the respondent contractor. Upon the reference being served and notice being issued by the Arbitrator to the State through the concerned Executive Engineer, it is not in dispute that on 07.08.2008, vide letter no.1066 (Annexure-A to the writ petition), the concerned Executive Engineer acknowledged the reference as made as also the appointment of Arbitrator in respect of the dispute arising from the said agreement. It informed the sole Arbitrator that the matter of appointment of Arbitrator was under consideration in the Department and the office had preliminary objection in the nomination of the Arbitrator by the agreement without the consent of the Department and as such the Department would not appear in the proceedings as aforesaid. A copy of the said letter having been made available to the respondent-contractor, the respondent-contractor replied by a letter dated 07.09.2008 to the Executive Engineer pointing out that the arbitration clause was invoked on 29.04.2008



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and, there being no response, the sole Arbitrator was proposed on 30.05.2008, clearly pointing out that if there was no objection within two weeks, reference would be made for resolution of the dispute by the sole Arbitrator. There being no objection, reference had been made on 30.07.2008, as such request was made to participate in the arbitral proceedings.

11. It is not in dispute that the proceedings before the Arbitrator were duly being informed to the concerned Executive Engineer. In view of the objection having been raised by the State as to the jurisdiction of the sole Arbitrator so appointed, the Arbitrator ruled upon his jurisdiction and held that the objection was untenable and if State did not participate in the proceeding, the Arbitrator would proceed in the matter. They were given further opportunity to appear and oppose the claims. It is also not in dispute that this order of the Arbitrator, being ruling upon his jurisdiction, was duly communicated to both the parties but State or its Officers refused to participate in the proceedings, which proceeded *ex parte* as against them. Ultimately, on or about 30.07.2009, award was published (Annexure-10 to the writ petition) and copies were served on the parties.

12. It appears that the award having been served on the parties, under Memo No.3929 (E) dated 15.10.2009 the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Road



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Construction Department, Government of Bihar, Patna wrote to the Arbitrator that it would not take cognizance of the award as State had objected to the unilateral appointment of the Arbitrator earlier. This clearly shows that State was fully aware of the arbitral award but chose to ignore the same. The said letter is Annexure-A to the counter affidavit in the writ proceedings. The arbitral award, having been made in favour of respondent-contractor, but not having been acted upon by the State, an execution case was filed in the Court of learned Sub Judge, Patna, which was registered as Execution Case No.01 of 2010 for execution of the award.

13. Upon notice being issued by the Court in this regard on behalf of the writ petitioners, State appeared and filed a petition under Section-47 read with Section-151 of the CPC, objecting to the execution proceedings as a whole, substantially on the ground that as the State had not agreed to the Arbitrator, the entire arbitral proceedings, was void and not binding, hence it could not be executed. This objection was filed on 19.09.2011 and is Annexure-11 to the writ petition.

14. Upon hearing the parties, the learned Sub Judge-I, Patna passed the order on 22.09.2012, rejecting the objection petition of the State, which is the impugned order. Being aggrieved by the judgment and order of the learned Sub Judge-I, Patna, the



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present writ petition has been filed by the State under Article-227 of the Constitution.

15. In substance, the argument of the writ petitioners-State is that the Arbitrator acted without jurisdiction in entering upon the reference as an Arbitrator, State not having expressly consented to his appointment, which objection was also raised before him. State also submitted that as it had not agreed to the sole Arbitrator, the respondent contractor should have then agreed to refer the matter to a three man Arbitral Tribunal as per arbitration clause itself or sought a reference/request under Section 11 (6) of the Act for appointment of Arbitrator. That being so, State had not submitted to his jurisdiction and, consequently, the award passed was without jurisdiction and could not be enforced. Accordingly, in the execution proceeding objection under Section-47 of the CPC was rightly raised to the validity of the execution of the award and the execution proceeding itself, which was wrongly rejected by the learned Sub Judge, which need to be set aside in the power and superintendence under Article-227 of the Constitution by this Court.

16. To the contra, it is submitted on behalf of the sole respondent-contractor that the objection to the jurisdiction of the Arbitrator, having been rejected by the Arbitrator, who had jurisdiction to decide the issue in terms of Section 16 (1) of the Act,



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the Arbitrator had legislative mandate to continue with the proceedings and make an award in terms of Section-16 (5) of the Act. The award having been made, under such circumstances, could be challenged only in accordance with Section-34 of the Act, but in spite of being aware of these proceedings, orders and award, no challenge was made to the award in terms of Section-34 of the Act, as such they were precluded from invoking Section-47 of the CPC, which even otherwise does not apply to arbitral proceedings when the award is put to execution.

17. Before advertizing to the law, it would be better to refer to the legislation. Repealing, *inter alia*, the Arbitration Act, 1940, the Arbitration and Conciliation Act, 1996 was published in the Gazette of India on 19.08.1996, having received the assent of the President of India on 16.08.1996 and by notification dated 22.08.1996 issued in terms of Section 1 (3) of the Act it was brought in force. The Act consists of four parts. Part-I deals with arbitration. Part-II deals with enforcement of certain foreign awards. Part-III deals with conciliation and Part-IV contains supplementary provisions. We are concerned with Part-I arbitration and provisions contained therein.

18. The first provision that I would like to note is Section-5 of the Act which reads as follows:

5. Extent of judicial intervention-
Notwithstanding anything contained
in any other law for the time being



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in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

19. This section is of some importance because this Act is an Act to consolidate and amend the law relating to, *inter alia*, domestic arbitration and this section restricts the right of any judicial authority to intervene, except in accordance with the provisions of this Part. Meaning thereby that it is this Act that creates certain rights, duties and obligations, provides for its enforcement and remedies. This Act is a composite code/scheme complete in itself and aid to other Acts, except where permissible, cannot be taken for any purpose. In other words, being Special Act, the provisions of other Act, especially general Acts would have no application.

20. I may then refer to Section-4 of the Act which deals with waiver of rights to object and, *inter alia*, provides that participation in any proceedings, without objection taken within the time prescribed, would amount to waiver of his right to object. This section in its applicability would be so irrespective of any other remedy available under any other Act.

21. Section-7 of the Act then defines arbitration agreement. A reference to Section-10 of the Act and more specifically Sub-section (2) thereof would show that ordinarily and subject to agreement between the parties, the Arbitral Tribunal shall consists of



a sole Arbitrator. Section-11(2) of the Act shows that parties are free to agree to procedure for appointing Arbitrator, subject to Sub-section (6) thereof, where when the parties fail to act, as required under that procedure, the matter is then taken up on request by the Chief Justice for appointment of Arbitral Tribunal. Sections-12 and 13 of the Act then deal with grounds on which the challenge is to be made and the procedure for such challenge to the appointment of the person as an Arbitrator.

22. We may then refer to Section-16 of the Act, which is of some importance and is one of the major deviations from the Arbitration Act, 1940. Under the Arbitration Act, 1940 if a person has to challenge the jurisdiction of the Arbitrator, the objection had to be raised immediately before the Civil Court of competent jurisdiction, but, here departing from the said, the jurisdiction has been conferred on the Arbitral Tribunal itself to rule upon its own jurisdiction as well by virtue of Sub-section (1) of the said section. Sub-section (1) of the said section uses the expression “including” which shows that the jurisdiction is to decide competence both with regard to its own jurisdiction as well as the very existence or validity of the arbitration agreement. Sub-section (2) thereof provides the stage at which such objection has to be raised and is in a peremptory terms. The objection has to be raised not later than the submission of



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statement of defence. Thus, if a party has any grievance as to the jurisdiction of the Arbitrator or the arbitration agreement or its validity, he must raise such objection at the earliest as provided.

23. Now, we may refer to Section-16(5) of the Act. This is again an important departure from earlier procedure in the Arbitration Act, 1940. Here, upon objection being taken as to the jurisdiction of the Tribunal or the validity of the agreement or the existence thereof, and where the objection is not sustained, then the legislative mandate is that the arbitral proceedings would continue and the Arbitral Tribunal would conclude the proceedings by making an award, notwithstanding the objection raised earlier. This is so because Sub-section (6) of the Act then, in such an eventuality, gives a right to a person who has challenged the jurisdiction, a right to challenge the award, then in accordance with Section-34 of the Act.

24. Here, I may notice if the objection is overruled the arbitral proceedings do not stay but move to its logical conclusion, but if the objection is sustained then the aggrieved party has a remedy under Section-37 (2) (a) of the Act to approach competent Court against the said decision.

25. Thus seen, there are specific remedies provided to the aggrieved parties in both the contingencies i.e. when an objection is not sustained and when objection is sustained.



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26. We may then come to Section-34 of the Act. Section-34 of the Act, *inter alia*, provides that an arbitral award can only be set aside in accordance with Sub-section (2) and Sub-section (3) thereof. Meaning thereby that it cannot be set aside on any other ground other than as provided in Sub-sections (2) and (3) thereof. Sub-section (3) of Section-34 of the Act provides for the period of limitation, being three months, for laying a challenge to the arbitral award, the proviso thereto restricts the power of the Court to condone delay, by only a period of 30 days. Thus, this limitation is a complete peremptory code prescribing period in which challenge can be laid. Section-35 of the Act then provides that an arbitral award shall be final and binding subject to the provisions contained in this Part, meaning thereby in Part-I of the Act. We may then refer to Section-37 of the Act, which provides certain appellate remedy against certain orders. As noticed earlier Section-37 (1) (c) of the Act gives a right to appeal against order refusing to set aside arbitral award being order passed under Section-34 of the Act. Similarly, by virtue of Sub-section (2) of Section-37 of the Act an appeal is provided against order accepting the plea against jurisdiction of the Arbitral Tribunal or acting in excess thereof. Sub-section (3) of the Act provides that there shall be no second appeal against such order except appeal to the Apex Court.



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27. We may then refer to Section-36 of the Act, which deals with enforcement of arbitral award and it clearly specifies that upon expiry of the time provided for challenge to arbitral award under Section-34 of the Act or where such challenge is refused, the award shall be enforced under the Code of Civil Procedure *in the same manner as if it were a decree for the Court*. This is of some importance in the present case.

28. Writ petitioners-State contends that enforcement steps having been taken in respect of the arbitral award as a decree of Court, then in terms of Section-47 of the CPC, they had the right to challenge, at the stage of enforcement, the validity of the Arbitral Tribunal or the award. The sole contesting respondent contractor pleads to the contrary that Section-47 CPC would have no application.

29. Having seen the entire scheme and the scope of the Act, we are of the view that the Act is a Special Act and a complete Code in itself. Whenever any action is to be taken or any right conferred to take an action, time and procedure are prescribed. So far as material for this case, where the question of selection of the Arbitral Tribunal is subject matter of challenge not being the Arbitrator himself in person, the right is given by Section-16 (1) of the Act and the stage is prescribed by Section-16 (2) of the Act. The consequences are provided in Section-16 (5) and (6) read with



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Section-34 of the Act, subject to appeals as provided under Section-37 of the Act. This code or scheme is complete in itself and if read with Section-5 of the Act excludes applicability of any other forum or manner of intervention. If that be so then clearly on reading of the provisions and the schemes and treating it to be a code in itself surely Section-47 CPC at the stage of execution of the award would not come into play, for, Section-36 of the Act, as emphasized earlier, does not make an award a decree but only states that it would be enforced under CPC in the same manner *as if* it is a decree, thus, assuming that it is not a decree.

30. Thus, on the plain reading of the provisions, the contention of the State cannot be accepted. The learned Sub Judge who passed the impugned order, rejecting the objection as not maintainable, rightly did so and this Court in exercise of powers of superintendence under Article-227 of the Constitution cannot interfere in the matter.

31. Now, coming to judicial precedence. The question whether an arbitral award is a decree by virtue of Section-36 of the Act has been dealt and ruled by the Apex Court in the judgment of **Paramjeet Singh Patheja Vs. ICDS Limited** since reported in **(2006) 13 Supreme Court Cases 322** wherein after reviewing the case law, their Lordships clearly held thus in paragraph-42 thereof,



which is reproduced herein below:

42. The words “*as if*” demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central.

32. This clearly shows that it is to be executed for its satisfaction as a decree but all that does not make it a decree and if that be so then clearly Section-47 of the CPC would have no application. This is more so because of the finality attached by virtue of Section-35 of the Act and the various remedies, as earlier provided in the Act, to challenge the jurisdiction of the Arbitrator and the arbitral proceedings and then non-applicability of other Acts by virtue of Section-5 of the Act as aforesaid.

33. I may next refer to the case of **Mallikarjun Vs. Gulbarga University** since reported in **(2004) 1 Supreme Court Cases 372**. The facts are noticed in paragraph-1 of the judgment. There was certain dispute as between the contractor and the University in relation to construction of an indoor stadium. Disputes having been arisen, it was referred to the named Arbitrator, being the Superintending Engineer. Parties filed their claims and counter claims, the Superintending Engineer, who acted as an Arbitrator, gave



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award. The award was then put in execution by the contractor-appellant before the Apex Court where in the execution proceedings, the University who were respondents in the appeal before the Apex Court filed objection under Section-47 of the CPC, which was rejected by the Executing Court. The University, being aggrieved by the rejection of its objection by the Court, filed a revision in the High Court under Section-115 of the CPC. In the revision before the High Court, it was argued that there was no arbitration agreement and, accordingly, the award made by the Superintending Engineer was not an award under the Arbitration Act. The High Court accepted the plea taken by the University and set aside the award and the decree. Hence, the contractor was in appeal before the Supreme Court. After considering the matter, the appeal of the contractor was allowed and the judgment of the High Court upholding the objection filed by the University under Section-47 CPC was set aside. While doing so, their Lordships held thus in concluding paragraphs-25 and 26 of the reports, which is quoted herein below:

25. It took the said objection only in its purported objection filed in the execution proceedings under Section 47 of the Code of Civil Procedure. If its contention was that the award made by the Superintending Engineer, Gulbarga Circle, Gulbarga, was without any authority or beyond his jurisdiction, it could have furthermore filed an appropriate application in terms of



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Section 34 of the Arbitration and Conciliation Act, 1996.

26. For the aforesaid reason, the appeal deserves to be allowed. The order under challenge is set aside. We direct the executing court to proceed with the execution of the award. There shall be no order as to costs.

34. Thus seen, it is clear that any objection to the award either on grounds of lack of jurisdiction of the Arbitrator or any other ground has to be taken only with reference to Section-34 of the Act and if such an objection at the opportune moment is not taken then recourse to Section-47 CPC is impermissible. Thus, Section-47 CPC would not be applicable or available.

35. The next issue would be as to what would be the scope of Section-34 of the Act. This question has now been authoritatively decided by the Apex Court in the case of **Associate Builders Vs. Delhi Development Authority** since reported in **(2015) 3 Supreme Court Cases 49** wherein their Lordships have held that Section 34 in conjunction with Section 5 of the Act makes it clear that an arbitral award, that is governed by Part I of Act, can be set aside only on the grounds mentioned under Section-34 (2) and (3) of the Act and not otherwise.

36. Here, we may add what was said in the case of **Hukam Chand Shyam Lal Vs. Union of India and others** since



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reported in **AIR 1976 Supreme Court 789** and, in particular, in paragraph-18 thereof, the relevant part whereof is quoted hereunder:

18. It is well settled that where the power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden.....

37. It was also contended by the State that in any event this Court under Article-227 of the Constitution, under power of superintendence, could interfere in the matter. Our answer to this is to be found in Constitution Bench judgment (seven Hon'ble Judges) in the case of **SBP & Co. Vs. Patel Engineering Ltd. and another** since reported in **(2005) 8 Supreme Court Cases 618** and what has been held in paragraphs-45 and 46 thereof is being quoted hereunder:

45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a



right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

38. Lastly, it was contended by the writ petitioners



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State that parties not having agreed to the arbitration of the dispute by the Arbitrator so appointed by the respondent-contractor, the Arbitrator had no jurisdiction to enter upon reference and pass an award. The absence of jurisdiction of the Arbitral Tribunal, renders the order of the Arbitral Tribunal a nullity and if it is a nullity, then such an issue could be raised at any stage before any authority.

39. To us, the said submission has been aptly dealt with by a recent decision of the Apex Court in the case of **MSP Infrastructure Limited Vs. Madhya Pradesh Road Development Corporation Limited** since reported in **(2015) 13 Supreme Court Cases 713** and this is what their Lordships have held in paragraphs- 14, 15 and 16 of the reports is quoted hereunder:

14. Shri Divan, the learned Senior Counsel for the respondent vehemently submitted that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the court which decided the matter, since the order of such a court is a nullity. It is not necessary to refer to the long line of cases in this regard since, that is the law. **But, it must be remembered that this position of law has been well settled in relation to civil disputes in courts and not in relation to arbitrations under the Arbitration Act, 1996. Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament,**



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in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. In the circumstances, we reject the submission on behalf of the respondent.

15. It was next contended on behalf of the respondent by Shri Divan, that Section 16 undoubtedly empowers the tribunal to rule on its own jurisdiction and any objections to it must be raised not later than the submission of the statement of defence. However, according to the learned Senior Counsel, objections to the jurisdiction of a tribunal may be of several kinds as is well known, and Section 16 does not cover them all. It was further contended that where the objection was of such a nature that it would go to the competence of the Arbitral Tribunal to deal with the subject-matter of arbitration itself and the consequence would be the nullity of the award, such objection may be raised even at the hearing of the petition under Section 34 of the Act. In support, the learned Senior Counsel relied on clause (b) of sub-section (2) of Section 34 which reads as follows:

“34. (2) An arbitral award may be set aside by the Court only if –

(a) * * *

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict



with the public policy of India”.

16. It is not possible to accept this submission. In the first place, there is nothing to warrant the inference that all objections to the jurisdiction of the tribunal cannot be raised under Section 16 and that the tribunal does not have power to rule on its own jurisdiction. Secondly, Parliament has employed a different phraseology in clause (b) of Section 34. That phraseology is “the subject-matter of the dispute is not capable of settlement by arbitration”. This phrase does not necessarily refer to an objection to “jurisdiction” as the term is well known. In fact, it refers to a situation where the dispute referred for arbitration, by reason of its subject-matter is not capable of settlement by arbitration at all. Examples of such cases have been referred to by the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* This Court observed as follows:

“36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grants of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against



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eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

The scheme of the Act is thus clear. All objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that the subject-matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 by the Court. (emphasis supplied)

40. Now, coming to the application of law to the facts of the case. It would be seen that the respondent-contractor first noticed the State as to existence of a dispute, which needed resolution and requested for arbitration. There being no response they then proposed the name of the sole Arbitrator, giving an option to the State either to accept or reject the same. In case, they chose to reject the same, parties were to proceed under Section 11 (6) of the Act State did not object or reject but, at the same time, did not also accept the proposed name. Respondent-contractor then noticed the State that in absence of any objection, it would be deemed that they had accepted the arbitration to be conducted by the sole Arbitrator and it referred the dispute and its claim to the Arbitrator. The Arbitrator noticed the party. It is not in dispute that State received the notice of arbitration



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and filed their objection as to the jurisdiction of the Arbitrator and went further to say that they would not be participating in the proceeding. The Arbitrator then ruled upon its jurisdiction to deal with the matter and rejected the objection of the State. Once that was done, then as commended by Section-16 (5) of the Act, the Arbitral Tribunal continued with the hearing and passed an award. State was duly communicated about this. They did nothing. They took no steps to challenge the same in terms of Section 34 of the Act, the right they had. In fact, they wrote to the Arbitral Tribunal that they considered the award to be bad in law, being without jurisdiction and as such were ignoring the award. Thus, clearly they were aware of the award but took no steps to avoid the same. They let the opportunity of Section-34 of the Act go by. Needless to mention that Section 34 (3) of the Act provides a strict time schedule beyond which no Court can condone the delay in challenging the award. Had State challenged the award within time fixed and then it was decided against them, they had opportunity to appeal in terms of Section 37 (1) (b) of the Act. Thus, in terms of Section 35 of the Act, the award attained finality and then when it was sought to be enforced, through execution proceedings in terms of Section 36 of the Act, for the first time objection under Section 47 read with Section 151 CPC was filed by the State. Thus seen, the State abandoned the remedies, as was



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available to it under the Act and sought to resort to a remedy as provided under the CPC.

41. In view of the judgments and binding precedent noted above, surely that was impermissible. Having abandoned the remedy under Section 34 of the Act, resort to Section 47 CPC was clearly impermissible, in view of the decision of the Apex Court in the case of **Mallikarjun (supra)**. Having thus forfeited their rights, in view of the judgment of the Apex Court in the case of **SBP & Co. (supra)**, they cannot expect this Court to exercise powers of superintendence under Article-227 to come to their rescue. The question that even if the award was a nullity, as understood in common civil law, absence of jurisdiction rendering the order nullity could set up the defence at any stage, such a principle would not govern the present dispute, inasmuch as what was said by the Apex Court recently in the case of **MSP Infrastructure Limited (supra)** that common civil law principle would not apply to the special law governing arbitration.

42. Thus, on all counts, the objection on behalf of the writ petitioners State must fail. The learned Sub Judge rightly rejected the objection petition and the impugned order cannot be interfered with. Accordingly, this writ petition is dismissed. The ad interim stay granted would stand vacated and money deposited by the



State in the High Court is permitted to be withdrawn forthwith by the respondent contractor and for the balance, if any, he may continue with the execution proceedings. In the facts and circumstances, no order as to costs.

(Navaniti Prasad Singh, J.)

Vikash Jain, J. I agree.

(Vikash Jain, J.)

Trivedi/-

AFR/NAFR	AFR
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