

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CIVIL REVIEW No.21 of 2019**

**In**  
**Civil Writ Jurisdiction Case No.13292 of 2018**

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Kamladitya Constructions Pvt. Ltd. Thr. its auth. Sign. Vinod kr. Singh Late  
Lalan Singh resident of plot No. 201 Cooperative Colony, Bokaro steel City,  
Bokaro (Jharkhand) and local address at Shivpuri Road No. 23 Patna Bihar

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Water Resources Department, Government of Bihar, Patna
2. The Engineer in Chief (head Quarter) cum Registering Authority, Water resources Department, Government of Bihar, Patna
3. The Chief Engineer Irrigation Creation, water Resources Department Siwan Bihar Siwan
4. The Superintending Engineer, Saran Canal Division Siwan Bihar siwan
5. The Executive Engineer Saran Canal Division Bhore District Gopalganj, Bihar Gopalganj
6. Principal Secretary, Water Resources Department Government of Bihar Patna
7. Engineer in Chief (Head Quarters) Cum Registering Authority, Water Resources Department, Government of Bihar Patna.

... .. Opposite Party/s

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**Appearance :**

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|--------------------------|---|---------------------------------------------------------------------------------------------------------------|
| For the Petitioner/s     | : | Mr. Y.V. Giri, Sr. Adv.<br>Mr. Ashish Giri, Adv.<br>Mr. Rajat Kumar Tiwary, Adv.<br>Mr. Sumit Kumar Jha, Adv. |
| For the Opposite Party/s | : | Mr. Anjani Kumar (Aag4)                                                                                       |

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**CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH**  
**CAV JUDGMENT**

**Date : 13-05-2019**

The present review petition has been filed seeking review of the order dated 30.11.2018 passed in CWJC No. 13292 of 2018 whereby and whereunder the writ petition was disposed of with a direction to the petitioner to move before the Bihar Public Works Contract Disputes Tribunal (hereinafter referred to as the “Tribunal”) within one month for resolution of the disputes, which



has arisen between the parties, arising out of the agreement in question.

2. It appears that thereafter, the petitioner had moved the Tribunal by filing a petition bearing Reference Case No. 341 of 2018 on 21.12.2018, however, the learned Tribunal, during the course of hearing of the said reference case, observed that the said reference case is not maintainable in view of the decision rendered by the Hon'ble Apex Court dated 22.03.2018 passed in Civil Appeal No. 3344 of 2018 (**State of Bihar & Ors. vs. M/S Brahmaputra Infrastructure Ltd.**), paragraphs no.2 to 6 whereof are reproduced herein below:-

“(2) The State is aggrieved by the appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the Central Act) on the ground that the said Act is excluded by the Bihar Public Works Contracts Arbitration Tribunal Act, 2008 (Bihar Act 21 of 2008) (the State Act).

(3) To appreciate the plea raised, it is necessary to refer to the scheme of the State Act as reflected in some of the key provisions. Sections 8, 9 and 22 of the State Act are as follows:

“8. Act to be in addition to Arbitration & Conciliation Act, 1996.- Notwithstanding anything contained in this Act, and of the provisions Shall be in addition to and supplemental to Arbitration & Conciliation Act, 1996 and in case any of the



provision contained herein is construed to be in conflict with Arbitration Act, then the latter Act shall prevail to the extent of conflict.

9. Reference to Tribunal and making of award. –

(1) Where any dispute arises between the parties to the contract, either party shall, irrespective of whether such contract contains an arbitration clause or not refer, within one year from the date on which the dispute has arisen, such dispute in writing to the Tribunal for arbitration in such form and accompanied by such documents or other evidence and by such fees, as may be prescribed.

(2) On receipt of a reference under sub-section (10) the Tribunal may deem fit to make, that the requirements under this Act in relation to the reference are complied with, admit such reference and where the Tribunal is not so satisfied, it may reject the reference summarily.

(3) Where the Tribunal admits the reference under sub-section (2), it shall, after recording evidence if necessary, and after perusal of the material on record and on affording an opportunity to the parties to submit their argument, make an award or an interim award, giving its reasons therefor.

(4) The Tribunal shall use all reasonable dispatch in entering on and proceeding with the reference admitted by it and making the award, and an endeavour shall be made to make an award within



four months from the date on which the Tribunal had admitted the reference.

(5) The award including the interim award made by the Tribunal shall, subject to an order, if any made under Section- 12 or 13, be final and binding on the parties to the dispute.

(6) An award including an interim award as confirmed or varied by an order, if any, made under section- 12 or 13 shall be deemed to be a decree within the meaning of section-2 of the Code of Civil Procedure, 1908 of the Principal Court of original jurisdiction within the local limits whereof the award or the interim award has been made and shall be executed accordingly.

(22). Overriding effect of this Act.- Notwithstanding any thing contained in any other Law, Rule, Order, Scheme, or Contract Agreement entered into before or after commencement of this Act, any dispute as defined in Section 2(e) of this Act shall be regulated under the provisions of this Act, Rules and Regulations framed thereunder, and absence of arbitration clause in any contract agreement shall not have effect excluding any dispute from the purview of this Act.”

(4) It is not in dispute that the parties have executed agreement dated 22<sup>nd</sup> June, 2012, providing for appointment of an arbitrator as per provisions of the Central Act. Relevant portion of Clause 25 of the said Agreement is as follows:-



“ The arbitration shall be conducted in accordance with provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under the clause.”

(5) The scheme of Sections 8, 9 and 22 of the State shows that in the absence of an agreement stipulating the applicability of the Central Act, the State Act applies to works contracts. Since in the present cases, an arbitration agreement exists and stipulates applicability of the Central Act, the State Act will not apply. We, thus, do not find any ground to interfere with the impugned order.

(6) The appeals are dismissed. It will, however, be open to the appellant- State to move the High Court for change of Arbitrator, if a case to this effect is made out on an objection of neutrality, as submitted by learned counsel for the State.”

3. It is in view of the aforesaid judgment rendered by the Hon’ble Apex Court in the case of **M/S Brahmaputra Infrastructure Ltd.** (supra), that the arbitral Tribunal has refused to adjudicate the reference case filed by the petitioner herein, hence, left with no other efficacious remedy, the petitioner has approached this Court for review of the earlier order dated 04.10.2018 passed by this Court and for appointing an



independent Arbitrator for adjudicating the disputes between the parties, arising out of the agreement in question. Nonetheless, the learned Senior Counsel Sri Y.V. Giri, appearing for the petitioner has simultaneously canvassed before this Court that the State Arbitral Tribunal is fully competent to adjudicate the dispute arising in between the petitioner and the State Government, emanating from the agreement in question entered into between them. In this regard, the learned counsel for the petitioner has relied upon two judgments rendered by the Hon'ble Apex Court, which are being discussed herein below.

4. The first judgment is the one rendered by the Hon'ble Apex Court in the case of **Madhya Pradesh Rural Road Development Authority & Anr. vs. L.G. Chaudhary Engineers and Contractor**, reported in (2012) 3 SCC 495. In the said judgment there has been some divergence of views, hence both the views are being reproduced herein below, paragraphs no. 25 to 28, 37, 38, 39, 41 and 42 being the view expressed by Hon'ble A.K. Ganguly, J. and paragraphs no. 53, 54, 55 and 58 being the view expressed by Hon'ble Mrs. Gyan Sudha Mishra, J.:-

“25. In para 28 of the judgment, this Court while referring to the provisions of the M.P. Act held: (*Anshuman Shukla case*<sup>5</sup>, SCC pp. 497-98)

“28. The provisions of the Act referred to hereinbefore clearly postulate that the State of Madhya Pradesh has created a separate forum for the



purpose of determination of disputes arising inter alia out of the works contract. The Tribunal is not one which can be said to be a domestic tribunal. The Members of the Tribunal are not nominated by the parties. The disputants do not have any control over their appointment. The Tribunal may reject a reference at the threshold. It has the power to summon records. It has the power to record evidence. Its functions are not limited to one Bench. The Chairman of the Tribunal can refer the disputes to another Bench. Its decision is final. It can award costs. It can award interests. The finality of the decision is fortified by a legal fiction created by making an award a decree of a civil court. It is executable as a decree of a civil court. The award of the Arbitral Tribunal is not subject to the provisions of the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996. The provisions of the said Acts have no application.”

**26.** It is clear, therefore, that in view of the aforesaid finding of a coordinate Bench of this Court on the distinct features of an Arbitral Tribunal under the said M.P. Act in *Anshuman Shukla case*<sup>5</sup> the provisions of the M.P. Act are saved under Section 2(4) of the AC Act, 1996. This Court while rendering the decision in *Va Tech*<sup>1</sup> has not either noticed the previous decision of the coordinate Bench of this Court in *Anshuman Shukla*<sup>5</sup> or the provisions of Section 2(4) of the AC Act, 1996. Therefore, we are constrained to hold that the decision of this Court in *Va Tech*<sup>1</sup> was rendered per incuriam.

**27.** This was the only point argued before us by the learned counsel for the appellant.

**28.** The principle of per incuriam has been very succinctly formulated by the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.*<sup>6</sup> Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered “per incuriam”. The principles are: (KB p. 729)

“... Where the court has construed a statute or a rule having the force of a statute its decision



stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.”

**37.** The said argument cannot be accepted. The provision for repeal under Section 85 of the AC Act, 1996 does not show that there is any express repeal of the M.P. Act. Apart from that, the provision of Section 2(4) of the AC Act clearly militates against the aforesaid submissions.

**38.** The argument of repugnancy is also not tenable. Entry 13 of the Concurrent List in the Seventh Schedule of the Constitution runs as follows:

“**13.** Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.”

In view of the aforesaid entry, the State Government is competent to enact laws in relation to arbitration.

**39.** The M.P. Act of 1983 was made when the previous Arbitration Act of 1940 was in the field. That Act of 1940 was a Central law. Both the Acts operated in view of Section 46 of the 1940 Act. The M.P. Act, 1983 was reserved for the assent of the President and admittedly received the same on 17-10-1983 which was published in the Madhya Pradesh Gazette Extraordinary dated 12-10-1983. Therefore, the requirement of Article 254(2) of the Constitution was satisfied. Thus, the M.P. Act of 1983 prevails in the State of Madhya Pradesh. Thereafter, the AC Act, 1996 was enacted by Parliament repealing the earlier laws of arbitration of 1940. It has also been noted that



the AC Act, 1996 saves the provisions of the M.P. Act, 1983 under Sections 2(4) and 2(5) thereof. Therefore, there cannot be any repugnancy.

**41.** It is clear from the aforesaid observations that in the instant case the latter Act made by Parliament i.e. the AC Act, 1996 clearly showed an intention to the effect that the State law of arbitration i.e. the M.P. Act should operate in the State of Madhya Pradesh in respect of certain specified types of arbitrations which are under the M.P. Act, 1983. This is clear from Sections 2(4) and 2(5) of the AC Act, 1996. Therefore, there is no substance in the argument of repugnancy and is accordingly rejected.

**42.** Therefore, the appeal is allowed and the judgment of the High Court which is based on the reasoning of *Va Tech*<sup>2</sup> is set aside. This Court holds that the decision in *Va Tech*<sup>1</sup> has been rendered per incuriam. In that view of the matter the arbitration proceeding may proceed under the M.P. Act of 1983 and not under the AC Act, 1996.

**53.** In order to clarify the point further, what needs to be emphasised is that if the nature of dispute referred to the arbitrator like the instant matter, related to a dispute pertaining to construction, repair, maintenance of any building or superstructure, dam or for the reasons stated within the definition of “works contract”, the matter may be referred to the M.P. Tribunal in view of the fact that if there is a dispute in relation to execution of a works contract, then irrespective of the fact whether the agreement contains an arbitration clause or not, the dispute is required to be referred to the M.P. State Arbitration Tribunal for adjudication. But when the contract itself has been terminated, cancelled or repudiated as it has happened in the instant case, then the nature of dispute does not fall within the definition of “works contract” for the sole reason that it does not include any dispute



pertaining to cancellation of a works contract implying that when the works contract itself is not in existence by virtue of its cancellation, the dispute cannot be referred to the M.P. State Arbitration Tribunal but may have to be decided by an arbitrator appointed under the Arbitration and Conciliation Act, 1996.

**54.** Hence, if the nature of the dispute is such which falls within the definition of “works contract” under Section 2(i) of the M.P. Act, 1983 and one of the contracting parties to the agreement is the State of M.P., then irrespective of an arbitration agreement the dispute will have to be referred to the Tribunal in terms of Section 7 of the Act of 1983. But if the works contract itself has been repudiated and hence not in existence at all by virtue of its cancellation/termination, then in my considered view, the dispute will have to be referred to an independent arbitrator to be appointed under the Arbitration and Conciliation Act, 1996 since the M.P. Act, 1983 envisages reference of a dispute to the State Tribunal only in respect of certain specified types of arbitration enumerated under Section 2(i) of the M.P. Act, 1983.

**55.** As a consequence and fallout of the aforesaid discussion, the impugned order of the High Court by which the dispute relating to termination of works contract by the M.P. Rural Road Development Authority itself was referred to an independent arbitrator appointed by the High Court under the Arbitration and Conciliation Act, 1996 needs to be sustained and there is no need for a de novo reference of the dispute to the M.P. State Arbitration Tribunal. In the alternative, the consequence would have been otherwise and the matter could have been referred to the State Arbitration Tribunal if the dispute between the parties related to any dispute emerging out of execution of works contract which could fall within the definition of “works contract” given out within the definition of “works contract” under Section 2(i) of the M.P. Act of 1983.



**58.** Thus, while holding that the M.P. Act, 1983 should operate in the State of M.P. in respect of certain specified types of arbitration, the appointment of an independent arbitrator by the High Court under the Arbitration and Conciliation Act, 1996 needs to be sustained since the works contract itself is not in existence by virtue of its cancellation and hence this part of the dispute could not have been referred to the M.P. State Tribunal.”

5. By referring to the aforesaid judgment rendered in the case of **L.G. Chaudhary Engineers and Contractors** (supra), the learned Senior Counsel has submitted that more or less similar provisions, as contained in Bihar Public Works Contracts Arbitration Tribunal Act, 2008 (hereinafter referred to as the “Bihar Act, 2008” also exist in the M.P. Madhyastham Adhikaran Adhiniyam, 1983 and the Hon’ble Supreme Court, by virtue of the aforesaid judgment rendered in the case of **L.G. Chaudhary Engineers and Contractor** (supra) has held that the State Government is competent to enact laws in relation to arbitration and the disputes can very well be referred to the State Arbitration Tribunal, if the disputes between the parties relate to any dispute emerging out of execution of works contract which could fall within the definition of “works contract”, as defined in the M.P. Madhyastham Adhikaran Adhiniyam, 1983 and the said



Adhiniyam, 1983 would not be hit by the principles of repugnancy despite the existence of Arbitration and Conciliation Act, 1996.

6. On account of two separate judgments being rendered by the two Members of the Division Bench and there being some divergence of view in the aforesaid judgments rendered in the case of **L.G. Chaudhary Engineers and Contractors** (supra), the matter was directed to be placed before the Hon'ble Chief Justice of India for constituting a larger Bench to resolve the divergence whereupon the matter was placed before the larger Bench to resolve the divergence, which had then delivered its own judgments, reported in (2018) 2 SCC 826 at 833.

7. The larger Bench by a judgment dated 8.3.2018 reported in (2018) 10 SCC 826 at 833 has held that the view expressed by Hon'ble A.K. Gaguly, J. in the aforesaid judgment rendered in the case of **L.G. Chaudhary Engineers and Contractors** (supra) is the correct interpretation and not the contra view of the other Hon'ble Judge of the said Bench. It has also been held that M.P. Madhyastham Adhikaran Adhiniyam, 1983 i.e. the State Act will prevail in terms of Section 2(4) of the Arbitration and Conciliation Act, 1996 and reference to the M.P. Arbitration Tribunal under the said law is valid. It would be apt to



reproduce paragraphs no. 5,8, 10, 12, 14 and 37 of the said judgment rendered by the larger Bench herein below:-

“5. We find from the definition under Section 2(d) of the Arbitration and Conciliation Act, 1996 that even after a contract is terminated, the subject matter of dispute is covered by the said definition. The said provision has not been even referred to in the judgment rendered by Hon’ble Gran Sudha Mishra, J.

8. We are, thus, in agreement with the proposed opinion of Hon’ble Ganguly, J. in para 42 of the reported judgment which reads as follows: (M.P. Rural Road Development case, SCC p. 509, para 42.).

“42. Therefore, appeal is allowed and the judgment of the High Court which is based on the reasoning of VA Tech Escher Wyass Flovel Ltd. vs. M.P. SEB is set aside. This Court holds the decision in VA Tech Escher Wayss Flovel Ltd. v. M.P. SEB has been rendered in per incuriam. In that view of the matter the arbitration proceeding may proceed under the M.P. Act of 1983 and not under the Arbitration and Conciliation Act, 1996”.

10. Proceedings under the M.P. Madhyastham Adhikaran Adhiniyam, 1983 ( the State Act) were pending before the M.P. Arbitration Tribunal at Bhopal. The respondent raised an objection that in view of VA Tech Escher Wyass Flovel Ltd. v. M.P. SEB, the Arbitration and Conciliation Act, 1996 will



apply and the State Act will not apply. This objection was rejected. The respondent preferred a writ petition. The High Court has upheld the objection and quashed the proceedings under the State Act.

11. The learned counsel for the State has drawn our attention to Section 2(4) of the Central Act, which is as follows:-

“2(4) This Part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except insofar as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.”

12. It was pointed out that the above provision was in pari materia with Section 46 of the Arbitration Act, 1940 which was interpreted by this Court in *Dhanrajamal Gobindram v. Shamji Kalidas & Co.* This Court held: (FIR p 1293, para 24).

“24.... Section 46 makes the provisions of any other enactment or any rules made thereunder to prevail over the Arbitration Act, if inconsistent with the latter. In view of these several provisions, it is clear that the Arbitration Act applies to all Arbitrations and Chapter II makes it applicable also to arbitrations, in which the arbitration agreement



is asked to be filed in Court under Section 20 subject, however, to this that the provisions of any other enactment or rules made thereunder, if inconsistent with the Arbitration Act, are to prevail.

14. In view of the above, we are of the view that the State law will prevail in terms of Section 2(4) of the Central Act. The reference under the State law was valid and could be decided in accordance with the State. Accordingly, we set aside the impugned order and restore the proceedings before the Tribunal. The appeal is accordingly, allowed in above terms.

37. In the circumstances, pending arbitration proceedings shall stand transferred to the M.P. Arbitration Tribunal under the M.P. Act, to be dealt with as per provisions of the M.P. Act in accordance with law. The proceedings may be carried out in continuation of earlier proceedings. The parties may take steps by moving the High Court or any other forum for transfer of records to the transferee courts in the light of this order. The appeal is accordingly disposed of. The parties may appear before the High Court/ Tribunal for further proceedings on 0.7.2018.”

8. Having regard to the aforesaid judgment rendered by a three Judges Bench of the Hon’ble Supreme Court dated 8.3.2018, as reported in 2018(10) SCC 826 at 833, it is contended that the judgment rendered by the Hon’ble Apex Court in the case



of **M/S Brahmaputra Infrastructure Ltd.** (supra) dated 22.3.2018 is per incuriam. It is further pointed out by the learned Senior counsel for the petitioner that the three Judges Bench rendering the aforesaid judgment dated 8.3.2018, though comprise of the same Hon'ble Judges, but surprisingly two contradictory judgments have been passed. Reference has been made by the learned Senior counsel for the petitioner to a judgment reported in 2013(3) PLJR (SC) 225 (**Rattiram & Ors. v. State of M.P. & Ors.**), (2014) 16 SCC 623 ( **Sundeep Kumar Bafna vs. State of Maharashtra & Anr.**) and the one reported in (2004) 1 SCC681 (**Babu Parasu Kaikadi (dead) by LRS Vs. Babu (dead) through L.**).

9. I have heard the learned counsel for the parties and I find that earlier also this Court had an occasion to deal with the issue under consideration and had set at rest the issue of maintainability of a request case by a judgment dated 17.10.2014 passed in Request Case No. 1 of 2014 (**M/S Nilkamal Ltd. vs. The State of Bihar & Ors.**), paragraphs No. 25, 26, 27, 31, 39, 40 and 42 whereof are reproduced herein below:-

“25. The second issue has been raised by learned counsel for the State that the present writ petition is not maintainable in view of the State Act petitioner should approach the Tribunal which has been created under the State Act. He has further submitted that there is non-obstante clause in section 22 of the State



Act, the only re-course left to the petitioner, to approach the Tribunal and office has rightly raised the objection about the maintainability of the case. The counter for the petitioner disputed the objection of the office.

26. Part XI of the Constitution of India deals with distribution of legislative power of Union and State. In terms of constitutional scheme Parliament would make legislation with respect to the subjects mentioned in List I of seventh schedule. State legislature has jurisdiction to legislate with respect to the matter of List II of seventh schedule and List III of seventh schedule is the concurrent list where Parliament as well as the State has equal jurisdiction to frame the law with regard to subjects mentioned therein. Article 245 provides that the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 246 provides that notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in Seventh Schedule, Article 246(2) of the Constitution provides that notwithstanding anything in clause (3), Parliament and, subject to clause(1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule and clause (3) of Article 246 provides that subject to clauses (1) and (2), the Legislature of any state has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh schedule. Article 254 of the Constitution deals with inconsistency between the laws made by the Parliament and law made by legislature of State provides that if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament, which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as



the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. But the law made by the Legislature of State if it has been reserved for consideration for President and has received his assent, would prevail in that State even if it is repugnant to the law made by Parliament.

27. In the present case the Arbitration and Conciliation Act, 1996 has been legislated by the Parliament whereas Bihar Public Works Contract Disputes Arbitration Tribunal Act, 2008 has been legislated by the State legislature. The Arbitration Act has been enacted following the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985 and the same was placed before the General Assembly of the United Nations recommended that all countries gave due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. On the recommendation of Law Commission of India and of several bodies, to deal with domestic as well as International Commercial Dispute, the Parliament enacted Arbitration Act, 1996 adopting UNCITRAL Model. This Arbitration Act is complete code which provides in a case of commercial dispute in what manner the arbitrator will be appointed for resolution of Commercial Dispute. This Central Act provides in case of agreement comprises clause for arbitration, in the event of dispute the parties to the dispute would place the demand for appointment of arbitrator, in failure, the aggrieved party would approach the High Court or the Hon'ble Supreme Court in terms of the power conferred under Section 11 of Act, 1996, accordingly independent arbitrator would be appointed by the Court for resolution of commercial dispute. But the State Legislature in its wisdom, for resolution of commercial dispute relating to works contract enacted the State Act where it has been provided that for the works contract in a case of dispute the Tribunal constituted by the State



Legislature will have a jurisdiction to resolve the inter party dispute.

28. For proper consideration it will be relevant to consider certain provisions of the State Act such as Sections 2(e), 2(k). 8, 9, 10, 11, 12, 13, 14 and 22. Section 2(e) of the definition section defines that dispute means any difference relating to any claim arising out of the execution or non-execution of the whole or part of a contract for works or services or both including the rescinding thereof. Section 2(k) as explained very elaborately, not required to be dealt with again. Section 8 of the State Act is very important for this case which is as follows:

“8. Act to be in addition to Arbitration & Conciliation Act, 1996.- Notwithstanding anything contained in this Act, any of the provisions shall be in addition to and supplemental to Arbitration and Conciliation Act, 1996 and in case any of the provision contained herein is construed to be in conflict with Arbitration Act, then the latter Act shall prevail to the extent of conflict.”

29. The section starts with the word, notwithstanding anything in the State Act any of the provisions shall be in addition to and supplemental to Arbitration and Conciliation Act, 1996 and in case of any provision is in conflict with the Arbitration Act, 1996 to the extent of conflict Arbitration Act, 1996 the Central Act, would prevail. This Section itself denotes that State Act is supplemental not supplanting the Arbitration and Conciliation Act, 1996 and to the extent of repugnancy, Central Act will prevail over State Act. So in this situation, certainly, either in terms of the constitution, formulation and mechanism of the State Act can not prevail upon Central Act and to the extent of repugnancy the Central Act will prevail over the State Act. Legislature with its full knowledge has enacted Section 8 where specifically mentioned that the State Act is supplemental and in case of repugnancy Central Act will prevail and as such the argument of the State that in view of Section 22 of the State Act to the extent of nature of work falls under the category of works contract excluded is very hard to be accepted.



30. Sections 9, 10, 11, 12 and 13 of the State Act provide, the establishment of the Tribunal, its practice and procedure. Section 11 of the Act deals with the power of Tribunal. Section 12 provides that Tribunal has power to review its award and revision lies to the High Court. Another important section is Section 22 of the State Act which is as follows:

“22. Overriding effect of this Act.- Notwithstanding any thing contained in any other Law, Rule, Order, Scheme, or Contract Agreement entered into before or after commencement of this Act, any dispute as defined in Section 2(e) of this Act shall be regulated under the provisions of this Act, Rules and Regulations framed thereunder, and absence of arbitration clause in any contract agreement shall not have effect of excluding any dispute from the purview of this Act.”

31. Section 22 of the State Act starts with non-obstante clause and on that strength counsel for the State has submitted that to the extent of agreement related to the works contract only the State Tribunal has a jurisdiction to resolve the dispute. If it will so read as has suggested by the State then provisions of section 8 of the State Act will be nugatory and in that circumstances Sections 8 and 22 of the State Act will incoherent to each other and for giving harmonious construction of the whole statute it has to be read in such a manner that provisions of Sections 8 and 22 of the State Act must operate cumulatively to achieve the object for which the statute has been framed. This Court is of the view that if the agreement is silent or if there is specific stipulation about the resolution of dispute through the State Tribunal in that circumstances the parties will have a forum of Tribunal under the Act for resolution of the dispute.

39. In view of the judgments aforesaid it is apparently clear from the State Act and Central Act both are supplemental to each other and State Act is no derogation to the Central Act. In this situation it is very difficult to arrive to the conclusion of excluding the jurisdiction of this Court in



entertaining the application for appointment of arbitrator when the agreement provides that the dispute will be resolved through Arbitration Act, 1996.

40. In support of his contention learned counsel for the respondent has relied on the judgment of the Hon<sup>ble</sup> Supreme Court in the case of Madhya Pradesh Rural Road Development Authority (supra) where similar Arbitration Act has been enacted by the State of Madhya Pradesh. The question arose about the applicability of the State Act vis-à-vis Central Act. The two Judges Bench of Hon<sup>ble</sup> Supreme Court could not arrive to a conclusion, matter referred to larger Bench, there the State Act received the assent of the President of India as provided under Article 254 of the Constitution of India but in the present case the State Act was not reserved for assent of President of India and so much so Section 8 of the State Act makes it clear that in case of conflict Central Act will prevail.

41. Let the case be tested from another angle, if the agreement to contract provides a clause of international arbitration relates to work contract, provides the place of arbitration outside India and the law of Britain would apply, directing the party to move to Tribunal under the State Act will be highly inappropriate against the terms of agreement.

42. In this view of the matter, the objection raised by the office about the maintainability of the petition is not sustainable and this Court will proceed with the matter in terms of the provisions of Central Act.”

**10.** Thus, from a bare reading of the aforesaid judgment rendered in the case of **Nilkamal Ltd.** (supra), it is apparent that firstly in the present case pertaining to the State of Bihar, the Bihar Public Works Contract Dispute Arbitration Act, 2008 was not reserved for the assent of a President of India, hence, the same has



not received the asset of the President of India, as provided for under Article 254 of the Constitution of India, secondly it is clear that in case of conflict between the State Act and the Central Act, Central Act would prevail in view of Section 8 of the Bihar Public Works Contract Dispute Arbitration Act, 2008, thirdly, only in cases where the agreement in between the parties is silent with regard to the arbitration being conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996 or in case there is specific stipulation of resolution of the dispute by reference to the State Tribunal, the parties would have a forum of Tribunal under the Bihar State Act, 2008 for resolution of the dispute.

*II.* The aforesaid view expressed by the judgment dated 17.10.2014 rendered by this Court in the case of **Nilkamal Ltd.** (supra) was also expressed in a judgment dated 29.3.2017 passed in Request Case No. 45 of 2017 ( M/S Brahmaputra Infrastructure Ltd. Vs. The State of Bihar & Ors.), following the law laid down in the case of Nilkamal Ltd. (supra), however, the State Government had challenged the aforesaid judgment dated 29.3.2017 before the Hon'ble Apex Court and the Hon'ble Apex Court, by the aforesaid judgment dated 22.3.2018 has upheld the view taken by this Court in the case of Nilkamal Ltd. (supra) as also has upheld the



judgment dated 29.3.2017 passed in the case of M/S Brahmaputra Infrastruture Ltd. (supra) by a co-ordinate Bench of this Court and has held that in cases where arbitration agreement exists and stipulates applicability of the Central Act, the Bihar Act, 2008 will not apply, however, in absence of an agreement stipulating the applicability of the Central Act, the Bihar Act, 2008 will apply to the works contract. This Court finds that there is no inconsistency in the judgment rendered by the Hon'ble Apex Court dated 22.3.2018 passed in the case of **Brahmaputra Infrastructure Ltd.** (supra) and the one dated 8.3.2018 passed in the case of M.P. Rural Road Development Authority & Anr. vs. L.G. Chaudhary Engineers and Contractors, inasmuch as both the judgments are based on the provisions of the State Act of both the respective States as also have been rendered considering the fact that the M.P. Madhyastham Adhikaran Adhiniyam, 1983 has received the presidential assent whereas the Bihar Public Works Contract Dispute Arbitration Act, 2008 has not received presidential assent.

**12.** In any view of the matter, judicial propriety and judicial discipline requires this Court to follow the decision rendered by the Hon'ble Apex Court in identical matters and since the Hon'ble Apex Court by the aforesaid judgment dated 22.3.2018, rendered in the case of M/s Brahmaputra Infrastructure



Ltd. (supra) has authoritatively laid down the law to be followed with regard to the recourse to be taken in case such as the present one, especially in paragraph-5 thereof, which has already been reproduced herein above in the preceding paragraph, the same is required to be followed in the present case as well.

**13.** Having regard to the facts and circumstances of the case and the law laid down by the Hon'ble Apex Court in the case of M/S Brahmputra Infrastructure Ltd. (supra), it is held that since the agreement in question dated 26.2.2015, governed by the provisions of the Standard Bidding document and Clause-25 of the General Condition of contract, provides for settlement of dispute and arbitration to be conducted in terms of the provisions of the Arbitration and Conciliation Act, 1996, the Bihar Public Works Contract Dispute Arbitration Act, 2008 will not apply and the provisions of the Arbitration and Conciliation Act, 1996 will apply. Therefore, since the parties have agreed to resolve the disputes amongst them by taking recourse to the remedy available under Clause-25 of the agreement, i.e in terms of the provisions of the Arbitration and Conciliation Act, 1996, this Court deems it fit and proper to recall the order dated 4.10.2018 passed in CWJC No. 13292 of 2018, whereby and whereunder the petitioner was directed to move the Bihar Public Works Contract Disputes



Arbitration Tribunal, and grants liberty to the petitioner to take recourse to appropriate remedy available under the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator for resolving the dispute, which has arisen in between the parties. It is directed accordingly.

**14.** In view of the fact that interim protection had been granted by this Court not only in the order dated 30.11.2018 passed in CWJC No. 13292 of 2018, but also by an order dated 10.4.2019 passed in the present case, this Court deems it fit and proper to extend the same protection to the petitioner herein for a period of eight weeks from today, so that in the meantime, the petitioner can take recourse to the appropriate remedies available to it under the law, without any prejudice being caused to it.

**15.** The review petition stands allowed on the aforesaid terms.

**(Mohit Kumar Shah, J)**

Tiwary/-

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