IN THE HIGH COURT OF JHARKHAND AT RANCHI
Arbitration Appeal No.06 of 2015

(Against the order dated 20.03.2015 passed by the Civil Judge, Senior Division-I, Koderma in Arbitration Case No.01 of 2014)

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1. Executive Engineer, Rural Works Department, Work Division, Koderma at P.O. & P.S.- Koderma, Distt. Koderma
2. Superintending Engineer, Rural Works Department, Works Divison, Hazaribagh Anchal at P.O. P.S. & District- Hazaribagh
3. Chief Engineer, Jharkhand State Rural Works Division, Ranchi, P.O. P.S. & District- Ranchi
4. Deputy Commissioner, Koderma, P.O. & P.S.- Koderma, Dist.- Koderma .... …. Appellants/ Plaintiffs

Versus

M/s Anil Sharma, Proprietary represented by its Proprietor Sri Anil Sharma, R/o North Office Para, P.O. P.S. Doranda, District- Ranchi
.... Respondent/Defendant

For the Appellants : Mr. Atanu Banerjee, Advocate
Ms. Pooja Kumari
For the Respondent : Mr. Indrajit Sinha, Advocate

PRESENT

HON'BLE MR. JUSTICE ANIL KUMAR CHOUDHARY

C.A.V. ON 17.06.2020 PRONOUNCED ON 19/08/2020

Per Anil Kumar Choudhary, J. Heard the parties through video conferencing.

2. This Arbitration Appeal invoking the jurisdiction of this court under Section 37 of the Arbitration and Conciliation Act, 1996 has been preferred against the order dated 20.03.2015 passed by the Civil Judge, Senior Division-I, Koderma in Arbitration Case No.01 of 2014 registered upon an application filed by the appellant herein under Section 34 of the Arbitration and Conciliation Act, 1996, with a prayer for setting aside the

final arbitral award dated 16.02.2014 passed by the arbitral tribunal.

3. The brief fact of the case is that the claimant-respondent was awarded work by the appellant-department for improvement of roads, construction of drains and embankments of road etc. An agreement was entered into between the parties in this respect. The work allotted was to be completed within nine months. It is the contention of the claimant that the progress of the work used to be interrupted because of land dispute, seasonal crops, heavy rain and lack of labourers. Because of the disturbances in the smooth progress of work, the work allotted was not likely to be completed within the stipulated period and the same was within the knowledge of the representatives of the appellant-department who were deputed at the work site to supervise the work. Upon the request of the claimant-respondent and on the recommendations of the Superintending Engineer of the appellant-department, extension of time of completion of the said work was allowed by the appellant-department. The claimant-respondent investing his own money, purchased required bitumen and completed the work allotted to him within the extended period. Though it is admitted by both the parties that the measurement of the work done by the claimant was taken and recorded in the measurement book by the concerned officer of the appellant-department but the appellant-department did not issue the completion certificate and did not release the payment on the basis of the final bills raised by the claimant-respondent. The claimant-respondent filed an application under Section 11(6) of the Arbitration Conciliation Act, 1996 before this Court and the designated bench of this Court vide order dated 14.10.2011 appointed the sole arbitrator for the purpose of adjudication of the dispute between the parties. The appellant-department admitted before the arbitral tribunal that the work was interrupted on account of land dispute, seasonal crops, local hindrance, heavy rain and lack of labourers.

4. The arbitral tribunal considering the rival contentions made in the written statement filed before it framed ten different issues. The arbitral tribunal considering that the issue Nos.2 and 3 do not involve any disputed facts, passed an interim award on the said issues. The dispute in

respect of the issue Nos.2 and 3 are not the subject matter of the impugned arbitral award of the arbitral tribunal, in respect of which the application under Section 34 of the Arbitration and Conciliation Act, 1996 was filed before the court below, the order passed in respect of which application is impugned in this appeal. The arbitral tribunal in respect of issue No.1 concluded that the work was halted for a total period of about 347 days and the work suffered apparently on account of lack of promptness on the part of the concerned officers of the respondent to resolve the dispute. Hence, the claimant cannot be held to have committed breach of contract since the performance on his part of the contract was entirely dependent on the performance of the contract by the respondents before the arbitral tribunal, on their part. The issue No.5 was answered by the arbitral tribunal by holding that the appellant-department cannot claim any right to deduct any amount of the bills for the claimant for extension of time and the appellant-department is liable to refund all such amounts which they may have deducted from the bills of the claimant on the ground of extension of time and that the appellant-department is liable to refund all such deducted amount. The issue No.6 was answered by the arbitral tribunal by holding that the claimant-respondent is not entitled to the claim of Rs.3,26,614.26 towards extra work purportedly performed by him. In respect of issue No.7, the arbitral tribunal, considering that the slackness of the officers of the appellant-department in not taking prompt decision regarding the dispute and the interruption which were created and also the delay in issuing requisition for purchase of bitumen, which were also the causes of the delay in execution of the work, held that the claimant's claim for compensation in respect of loss and damages suffered by him during the idle period is legitimate and in this respect, awarded a sum of Rs.12,26,645/- as compensation amount paid by him to another contractor for hire and purchase of tools, machineries and equipment and a further sum of Rs.17,13,673.71 towards the escalation of price of bitumen and further held that the claimant-respondent is entitled to refund of Rs.3,41,252/-. In respect of issue No.9, which was regarding the entitlement of the claimant to receive interest on the total amount payable,

the arbitral tribunal held that the claimant would be entitled to receive interest on the aforesaid amount under each head @ 12% per annum commencing from the date of his submission of the detailed claim statement on 20.05.2010 till the date of reference made by the High Court on 14.10.2011 and also held the claimant is entitled to receive pendent-lite interest @ 6% per annum calculated on the total payable amount to the claimant from the appellant-department from the date of commencement of the proceeding till the date of the arbitral award which included interest component of the awarded amount from 20.05.2010 to 14.10.2011 amounting to Rs.10,40,105/- and the arbitral tribunal quantified the total amount payable to the claimant excluding the interest to be Rs.61,79,055/- .

5. The learned court below after considering the submissions made before it by the rival parties held that the applicants have not brought any fact before it for interfering with the arbitral award in exercise of the jurisdiction under section 34 of the Arbitration and Conciliation Act, 1996 and dismissed the petition under Section 34 of the Arbitration and Conciliation Act**.**

6. It is submitted by Mr. Atanu Banerjee- learned counsel for the appellant that before going to the merit of this appeal the appellant intend to put forth a preliminary objection that learned court below failed to appreciate the fact that the arbitral tribunal must have ruled that it does not have any jurisdiction in the absence of any express terms in the agreement between the parties for referring the matter for arbitration. Mr. Banerjee in support of his contention that the source of the jurisdiction of the arbitral tribunal is the arbitration clause relied upon the judgment of Hon'ble Supreme Court of India in the case of **Wellington Associates Ltd. v. Kirit Mehta** reported in **(2000) 4 SCC 272** wherein the Hon'ble Supreme Court of India has held that if there was no arbitration clause at the time of entry of the arbitrators on their duties, the whole proceedings would be without jurisdiction. The relevant portion of the said judgment in paragraphs-12 and 16 reads as under:-

> ***12.*** *"In Dhanrajamal Gobindram v. Shamji Kalidas & Co. [AIR 1961 SC 1285, 1293 (para 25)] (AIR at p. 1293, para 25) it was held*

that the question as to the existence of arbitration clause was for the court to decide under Section 33 and not for the arbitrators. In Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd. [AIR 1962 SC 1810] and in Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd. [AIR 1963 SC 90, 96 (para 17)] (AIR at p. 96, para 17) it was held that the question as to the validity of the contract was also for the court to decide under Section 33 and not for the arbitrator. If there was no arbitration clause at the time of entry of the arbitrators on their duties, the whole proceedings would be without jurisdiction. In RenusagarPower Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156, 1170 : (1985) 1 SCR 432] (AIR at p. 1170) it was stated that ordinarily, as a rule, an arbitrator had no authority to clothe himself with power to decide the question of his own jurisdiction unless parties expressly conferred such a power on him.

16. *The interpretation put on Section 16 by the petitioner's counsel that only the Arbitral Tribunal can decide about the "existence" of the arbitration clause is not acceptable for other reasons also apart from the result flowing from the use of the word "may" in Section 16. The acceptance of the said contention will, as I shall presently show, create serious problems in practice. As Saville, L.J. stated in a speech at Middle Temple Hall on 8-7-1996:*

"Question of the jurisdiction of the Tribunal cannot be left (unless the parties agreed) to the Tribunal itself, for that would be a classic case of pulling oneself up by one's own bootstraps."

[A Practical Approach to Arbitration Law, Karen Tweeddale & Andrew Tweeddale (1999), Blackstone Press Ltd. (p. 75)]

Let us take this very case. If indeed clause 5 does not amount to an "arbitration agreement", it will, in my view, be anomalous to ask the arbitrator to decide the question whether clause 5 is at all an arbitration clause. It is well settled and has been repeatedly held that the source of the jurisdiction of the arbitrator is the arbitration clause (See Waverly Jute Mills case [AIR 1963 SC 90, 96 (para 17)] above-referred to). When that is the position, the arbitrator cannot, in all situations, be the sole authority to decide upon the "existence" of the arbitration clause. Supposing again, the contract between the parties which contained the arbitration clause remained at the stage of negotiation and there was no concluded contract at all. Then in such a case also, there is no point in appointing an arbitrator and asking him to decide the question as to the existence of the arbitration clause. But I may point out that there can be some other situations where the question as to the "existence" of an arbitration clause can be decided by the arbitrator. Take a case where the matter has gone to the arbitrator without the intervention of an application under Section 11. Obviously, if the question as to the existence of the arbitration clause is raised before the Arbitral Tribunal, it has power to decide the question. Again, in a case where the initial existence of the arbitration clause is not in issue at the time of the Section 11 application but a point is raised before the Arbitral Tribunal that the said clause or the contract in which it is contained has ceased to be in force, then in such a case, the arbitrator can decide whether the arbitration clause has ceased to be in force. A question may be raised before the arbitrator that the whole contract including the arbitration clause is void. Now Section 16 of the new Act permits the Arbitral Tribunal to treat the arbitration clause as an independent clause

and Section 16 says that the arbitration clause does not perish even if the main contract is declared to be null and void. Keeping these latter and other similar situations apart, I am of the view that in cases where – to start with – there is a dispute raised at the stage of the application under Section 11 that there is no arbitration clause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the "existence" of the arbitration clause cannot be doubted and cannot be said to be excluded by Section 16."(Emphasis Supplied)

7. Mr. Banerjee further submitted that the Hon'ble Supreme Court of India referred to its own judgment in the case of **Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd.** reported in **AIR 1963 SC 90** wherein inter alia it was held that if there was no arbitration clause at the time of entry of arbitrators to their duties, the whole proceeding would be without jurisdiction. It is submitted that as in the instant case there was no arbitration clause, hence, the learned court below ought to have held that the whole arbitral proceeding before the arbitral tribunal was without jurisdiction. In this respect, Mr. Banerjee drew the attention of this court to para-15 of the judgment of **Wellington Associates Ltd. v. Kirit Mehta (supra)** which reads as under:-

15. *"The more important question however is whether Section 16 excludes the jurisdiction of the Chief Justice of India or his designate in this behalf if a question as to the existence of the arbitration clause is raised by the respondent in his reply to the petition filed under Section 11. (I am not concerned with the question of the validity or effect of the arbitration clause, in the present case.) In my view, Section 16 does not take away the jurisdiction of the Chief Justice of India or his designate, if need be, to decide the question of the "existence" of the arbitration agreement. Section 16 does not declare that except the Arbitral Tribunal, none else can determine such a question. Merely because the new Act permits the arbitrator to decide this question, it does not necessarily follow that at the stage of Section 11 the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause."*(Emphasis Supplied)

It is then submitted by Mr. Banerjee that as there was no arbitration clause in the agreement, at the time of entry of the arbitral tribunal on his duties, the whole proceedings would be without jurisdiction hence the impugned arbitral award be set aside on this preliminary objection alone.

8. It is further submitted by Mr. Banerjee- the learned counsel for the appellant that the claimant-respondent did not complete the work as per

the terms of the agreement as the work in the entire area of 2.70 kilometres road from Masmohna to Kundi Dhanwar was not completed as agreed to between the parties. So, it is submitted that the claimant-respondent is not entitled for the payment of incomplete work of Rs.1,08264.06. Mr. Atanu Banerjee further submitted that the learned court below failed to appreciate that the arbitral tribunal while delivering the arbitral award has completely gone beyond the terms and conditions of the agreement in question. Learned counsel for the appellant then submitted that the learned court below failed to consider that in the absence of any clause for price escalation in the agreement entered into between the parties and also in the absence of any clause for compensation for delay, idling charges and hire charges, the awarding of different amount of compensation under such heads were beyond the terms and conditions of the agreement entered into between the parties. Hence, it is submitted that the awarding of compensation under such heads amounts to passing an arbitral award beyond the terms and conditions of the agreement.

9. Mr. Banerjee also assailed the impugned order passed by the learned court below on the ground that the court below failed to come a conclusion that award of interest @ 12% per annum from 20.05.2010 to 14.10.2011 is on the higher side and for awarding pendentelite interest @ 6% per annum on the said interest @ 12% per annum from 20.05.2010 to 14.10.2011. The learned counsel made a assailed the impugned judgment by relying upon Section 3 of the Interest Act which reads as under:-

***3**. Power of court to allow interest.—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,*

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date

mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in sub-section (1), – (a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

2(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,

then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section, – (a) shall apply in relation to –

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall affect –

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) <u>shall empower the court to award interest upon interest</u>.

(Emphasis Supplied)

And submitted that the learned court below ought to have interfered with the part of the arbitral award whereby interest has been awarded upon the interest component of Rs.10,40,105/- which was the interest calculated for the period 20.05.2010 to 14.10.2011.

10. Mr. Banerjee relying upon the judgment of Hon'ble Supreme Court of India in the case of **Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd. (NEEPCO)** reported in **2020 SCC Online SC 466** para-17 of which reads as under:-

> ***17.*** *"In the subsequent judgment of Associate Builders, this Court discussed the ground of patent illegality as a ground under public policy for setting aside a domestic award. The relevant extract of the judgment in Associate Builders case (supra) reads as follows:*
> *"**40. Patent***
> *Illegality We now come to the fourth head of public policy namely, patent illegality. It must be remembered that under the explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator…."*
> *"42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads —*
> *42.1(a) a contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:*
> *28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India, —*
> *(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;*
> *42.2(b) a contravention of the Arbitration Act itself would be regarded as a patent illegality-for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*
> *42.3(c) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
> *28. Rules applicable to substance of dispute. —*
> *(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.*
> *This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do."*(Emphasis supplied)

And Submitted that as the ground of patent illegality is a ground under public policy for setting aside a domestic arbitral award and as in this case the arbitral award suffers from patent illegality hence the learned court below ought to have set aside the same.

11. Mr. Banerjee next relied upon the judgment of Hon'ble Supreme Court of India in the case of **Energy Watchdog v. CERC & others** reported in (2017) 14 SCC 80 para-34 and 42 of which read as under:-

34. *"Force majeure" is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:*

*"**32. Enforcement of contracts contingent on an event happening**.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.*

If the event becomes impossible, such contracts become void.

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56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

***Contract to do act afterwards becoming impossible or unlawful**.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

***Compensation for loss through non-performance of act known to be impossible or unlawful**.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."*

42. *It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company."*

And submitted that as the respondent was very much aware about the risks involved, hence it is not entitled to any compensation. It is then submitted by Mr. Banerjee that the learned court below ought to have held that the arbitral award is bad in law as the arbitral tribunal failed to frame any issue that the respondent government authorities before him were negligent and also did not give any finding in respect of the same. It is next submitted that the arbitral tribunal failed to appreciate the evidence in the record in its proper perspective. It is also submitted that though in page 65 of the arbitral award the claim towards payment of salary is rejected but contrary to the same the amount towards staff salary has been added in the arbitral award at item no.4 at page -77 of the arbitral award.

12. It is lastly submitted by Mr. Banerjee that the impugned judgment being not sustainable in law be set aside and also the arbitral award dated 16.02.2014 passed by the arbitral tribunal in Arbitration Application No.20 of 2010 be also set aside.

13. The preliminary objection regarding the failure on the part of the arbitral tribunal to rule about its jurisdiction and that impugned arbitral award be set aside for being without jurisdiction as there was no arbitration agreement between the parties, was vehemently opposed by Mr. Indrajit Sinha the learned counsel for the respondent. Relying upon the judgment of the seven judge Bench of Hon'ble Supreme Court of India in the case of **SBP & Co. Vs. Patel Engg. Ltd.** reported in (**2005) 8 SCC 618** whose para-44 and 47 reads as under:-

44. *"Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to*

exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.

47. *We, therefore, sum up our conclusions as follows:*

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

*(x) [**Ed.**: Paras 47(x) & (xii) corrected vide Official Corrigendum No. F.3/Ed.B.J./103/2005 dated 9-11-2005.] Since all were guided by the decision of this Court in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. [(2002) 2 SCC 388] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.*

(xi) Where District Judges had been designated by the Chief Justice of the High

Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.
*(xii) [**Ed.**: Paras 47(x) & (xii) corrected vide Official Corrigendum No. F.3/Ed.B.J./103/2005 dated 9-11-2005.] The decision in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. [(2002) 2 SCC 388] is overruled."*(Emphasis Supplied)

and submitted that therein per majority judgment it was held by the Hon'ble Supreme Court of India that the power exercised by the Chief Justice of the High Court or the designated judge or the Chief Justice of India under Section 11 (6) of the Arbitration and Conciliation Act, 1996 is not an administrative power rather it is a judicial power and the Chief Justice or the designated Judge will have the right to decide the preliminary aspects including the existence or otherwise of a valid arbitration agreement and such order of the Chief or the designated judge as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution of India.

14. It is then submitted by Mr. Sinha that in its earlier judgment passed in the case of **Konkan Railway Corpn. Ltd. v. Mehul Construction Co.,** reported in (**2000) 7 SCC 201** the Hon'ble Supreme Court of India held that in view of conferment of power on the arbitral tribunal under Section 16 of the Act, the intention of the legislature and its anxiety to see that the arbitral power is set in motion at the earliest, it will be appropriate for the Chief Justice to appoint an arbitrator without wasting any time or without entertaining any contentious issue by a party objecting to the appointment of an arbitrator. This view was also approved by the constitution bench judgment of the Hon'ble Supreme Court of India in the case of ***Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.&Another*** reported in ***(2002) 2 SCC 388*** wherein the Supreme Court of India also considered the judgment of **Wellington Associates Ltd. v. Kirit Mehta (supra).** But the judgment in ***Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. ((2002) 2 SCC 388)*** has been overruled by the Hon'ble Supreme Court of

India in the case of **SBP & Co. Vs. Patel Engg. Ltd.(supra)**.

15. It is further submitted by Mr. Sinha that the plea of the appellant about non-existence of the Arbitration Clause in the agreement between the parties to this appeal, has already been decided by this Court in the application under Section 11 (6) of the Arbitration and Conciliation Act,1996 as well as the review petition filed by the appellant herein challenging the appointment of the said arbitrator and the same having been decided by this Court itself, the same is final and it was not open for the arbitral tribunal to rule upon its jurisdiction under Section 16 of the Arbitration and Conciliation Act, 1996. It is then submitted by Mr. Sinha that there is no dispute that the existence or otherwise of the Arbitration Clause in the agreement entered into between the parties was agitated before this Court in the proceeding relating to the application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 and as overruling contention of the appellant, the designated judge of this Court has ruled in favour of the appointment of the arbitrator obviously on the basis of the Arbitration Clause in the agreement, so, the remedy for the appellant-department was to approach the Hon'ble Supreme Court of India under Article 136 of the Constitution as has been held by the Hon'ble Supreme Court of India in paragraph-44 in the case of **SBP & Co. v. Patel Engg. Ltd. (supra)** but having not done so, it was not open to the arbitral tribunal to rule on its own jurisdiction. It is then submitted that thus there is no plausible reason for this court to find any fault with the arbitral tribunal in following the line of the adjudication made by the designated judge of this court regarding existence of the arbitration clause which without doubt is the condition precedent for appointment of an arbitrator. Hence, it is submitted by Mr. Sinha that there is no merit in this preliminary objection of the appellant and as there is no illegality in the impugned order of the learned court below having not accepted the said contention of the appellant-department before it that the arbitral tribunal was not having a jurisdiction, the impugned arbitral award is not liable to be set aside on this score.

16. Mr. Indrajit Sinha- learned counsel for the respondent-claimant

defended the impugned judgment and relied upon the judgment of Hon'ble Supreme Court of India in the case of **K.N. Sathyapalan (Dead) By LRs v. State of Kerala and Another** reported in (**2007) 13 SCC 43** para-33 and 34 of which reads as under:-

33. *"We have intentionally set out the background in which the arbitrator made his award in order to examine the genuineness and/or validity of the appellant's claim under those heads which had been allowed by the arbitrator. It is quite apparent that the appellant was prevented by unforeseen circumstances from completing the work within the stipulated period of eleven months and that such delay could have been prevented had the State Government stepped in to maintain the law and order problem which had been created at the worksite. It is also clear that the rubble and metal, which should have been available at the departmental quarry at Mannady, had to be obtained from quarries which were situated at double the distance, and even more, resulting in doubling of the transportation charges. Even the space for dumping of excess earth was not provided by the respondents which compelled the appellant to dump the excess earth at a place which was faraway from the worksite entailing extra costs for the same.*

34. *In the aforesaid circumstances, the arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation of costs which was referable to the execution of the work during the extended period. In our judgment, the view taken by the High Court was on a rigid interpretation of the terms of contract and the supplemental agreement executed between the parties, which was not warranted by the turn of events."* (Emphasis supplied)

And submitted that in this case also the delay could have been prevented by the appellant department, but as the officers of the appellant department were slack and adopted a recalcitrant approach and thus failed to timely resolve the reasons for the delay, so the respondent is entitled to compensation.

17. Mr. Sinha then relied upon the judgment of the Hon'ble Supreme Court of India in the case of **Food Corporation of India Vs. A.M. Ahmed & Co. & Another** reported in (**2006) 13 SCC 779** in para-6 of which submissions of the learned counsel has been noted and the same has been responded to by the Hon'ble court in para32 onwards. Paragraph -6 clause (1) of which reads as under:-

"6.Mr K.K. Mohan, learned Senior Counsel appearing for the appellant, made the following submissions:

1. In the absence of an escalation clause in the contract, the arbitrator could not have awarded any amount towards escalation and, therefore, the arbitrator has erred in awarding and the courts below in upholding the escalation awarded by the arbitrator; Xxxxxxxxxxx"

and which has been answered in para-32 of the said judgment as under:-

32. *"Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion."* (Emphasis supplied)

18. Mr. Sinha further relied upon the judgment of the Hon'ble Supreme Court of India in the case of **Assam State Electricity Board & Others v. Buildworth Private Limited** reported in (**2017) 08 SCC 146 para-14, 16 to 18 and 21** of which read as under:-

14. *"The view which has been adopted by the arbitrator is in fact in accord with the principles enunciated in the judgments of this Court. In P.M. Paul v. Union of India [P.M. Paul v. Union of India, 1989 Supp (1) SCC 368] , a Bench of two learned Judges of this Court has held that: (SCC p. 372, para 12)*
"12. … Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. … After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done."
This Court held that the contractor was justified in seeking price escalation on account of an extension of time for the completion of work. Once the arbitrator was held to have the jurisdiction to determine whether there was a delay in the execution of the contract due to the respondent, the latter was liable for the consequence of the delay, namely, an increase in price.

16. *In K.N. Sathyapalan v. State of Kerala [K.N. Sathyapalan v. State of Kerala, (2007) 13 SCC 43] , this Court has held that: (SCC pp. 51-52, para 32)*
"32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad case [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] and also Patel Engg. case [State of U.P. v. Patel Engg. Co. Ltd., (2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was recognised by this Court in P.M. Paul

[P.M. Paul v. Union of India, 1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case [T.P. George v. State of Kerala, (2001) 2 SCC 758] ."

17. *The award comports with principles of law governing price escalation firmly established by the decisions of this Court. For these reasons, we find merit in the contention of the learned counsel appearing on behalf of the claimant that the award does not suffer from any error apparent on the face of the record insofar as the aspect of price escalation is concerned.*

18. *The High Court has also adverted to the decision of this Court in Northern Railway v. Sarvesh Chopra [Northern Railway v. Sarvesh Chopra, (2002) 4 SCC 45] in support of the principle that if a party to a contract does not rescind it by invoking Sections 55 and 56 of the Contract Act, 1872 and accepts the belated performance of reciprocal obligations, the other party would be entitled to make a claim for damages.*

21. *The next aspect of the matter relates to the award of interest for the period from 7-3-1986 to 31-12-1997. The arbitrator awarded a lump sum of Rs 20 lakhs for a period of 11 years. The High Court set aside the award of interest on the ground that Section 29 of the Arbitration Act, 1940 contemplates the award of interest only from the date of the decree. The issue as to whether interest could be awarded for the pre-reference period and pendente lite under the Act of 1940 is not res integra. In Irrigation Deptt., State of Orissa v. G.C. Roy [Irrigation Deptt., State of Orissa v. G.C. Roy, (1992) 1 SCC 508] , a Constitution Bench of this Court held that: (SCC pp. 533-34, para 44)*

"44. … Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view." (Emphasis supplied)

19. Mr. Sinha further submitted that even in the absence of specific provision of escalation charges, when the arbitral tribunal came to a finding that the claimant has not committed breach of conditions of contract rather the performance on his part of the contract was entirely dependent on the performance of the appellant and the delay caused was because of the slackness of the officers of the appellant department, so it was well within the jurisdiction of the arbitral tribunal to award both

escalation charges as well as interest pendente lite for the period from 20.05.2010 to 14.10.2011.

20. Mr. Sinha then relied upon the judgment of Hon'ble Supreme Court of India in the case of **Associate Builders Vs. Delhi Development Authority** reported in (**2015) 3 SCC 49** paragraphs-48, and 60 of which read as under:-

48. *"The Division Bench while considering Claims 9, 10, 11 and 15 found fault with the application of Hudson's formula which was set out by the learned arbitrator in order to arrive at the claim made under these heads. The Division Bench said that it was not possible for an arbitrator to mechanically apply a certain formula however well understood in the trade. This itself is going outside the jurisdiction to set aside an award under Section 34 inasmuch as in McDermott case [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , it was held: (SCC pp. 222-24, paras 104-06)*

"104. It is not in dispute that MII had examined one Mr D.J. Parson to prove the said claim. The said witness calculated the increased overheads and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled 'Change Orders, Overtime, Productivity' commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overheads and loss of profit. Mr D.J. Parson is said to have brought out the additional project management cost at US $1,109,500. We may at this juncture notice the different formulas applicable in this behalf.

(a) Hudson Formula: In Hudson's Building and Engineering Contracts, Hudson Formula is stated in the following terms:

$$\text{Contract head office overhead and profit percentage} \times \frac{\text{Contract sum}}{\text{Contract period}} \times \text{Period of delay'}$$

In the Hudson Formula, the head office overhead percentage is taken from the contract. Although the Hudson Formula has received judicial support in many cases, it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

(b) Emden Formula: In Emden's Building Contracts and Practice, the Emden Formula is stated in the following terms:

$$\text{'Head office overhead and profit } \frac{}{100} \times \frac{\text{Contract sum}}{\text{Contract Period}} \times \text{Period of delay'}$$

Using the Emden Formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organisation as a whole by the total turnover. This formula has the advantage of using the contractor's actual head office overhead and profit percentage rather than those contained in the contract. This formula has been widely applied and has received judicial support in a number of cases including Norwest Holst Construction Ltd.

v. Coop. Wholesale Society Ltd. [Decided on 17-2-1998 : 1998 EWHC Technology 339] , Beechwood Development Co. (Scotland) Ltd. v. Mitchell [Decided on 21-2-2001 : 2001 CILL 1727 : 2001 SLT 1214 (Scot)] and Harvey Shopfitters Ltd. v. Adi Ltd. [(2004) 2 All ER 982 : 2003 EWCA Civ 1757 (CA)]

(c) Eichleay Formula: The Eichleay Formula was evolved in America and derives its name from a case heard by the Armed Services Board of Contract Appeals, Eichleay Corporation. It is applied in the following manner:

'Step 1

'Contract billings X Total overhead for= Overhead allocable to the contract

Total billings for contract period

contract period

Step 2

Allocable overhead = Daily overhead rate

Total days of contract

Step 3

'Daily contract overhead rate x Number of days of delay = Amount of unabsorbed overhead'

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overhead during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.

105. Before us several American decisions have been referred to by Mr Dipankar Gupta in aid of his submission that the Emden Formula has since been widely accepted by the American courts being Nicon Inc. v. United States [331 F 3d 878 (Fed Cir 2003)] , Gladwynne Construction Co. v. Mayor and City Council of Baltimore [807 A 2d 1141 : 147 Md App 149 (2002)] and Charles G. Williams Construction Inc. v. White [271 F 3d 1055 (Fed Cir 2001)] .

106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator."

***60.** Also, so far as Clause 22 is concerned, the DDA did not raise any argument based on this clause before the learned arbitrator. However, it must in*

fairness be stated that it was argued before the learned Single Judge. In para 15 of his judgment, the learned Judge sets the clause out and then follows a judgment of the High Court of Delhi in Kochhar Construction Works v. DDA [(1998) 2 Arb LR 209 : (1998) 74 DLT 118] . Apart from the fact that a learned Single Judge of the same Court is bound by a previous judgment of a Single Judge, the conclusion of the learned Single Judge that if the appellant is at fault and the contract is prolonged for an inordinate period of time, it cannot be said that the respondents cannot be compensated for the same, is correct. Besides, this point was not urged before the Division Bench and must be taken to be given up. Mr Sharan cited Harsha Constructions v. Union of India [(2014) 9 SCC 246 : (2014) 4 SCC (Civ) 803] to say that in respect of excepted matters, no arbitration is possible, and that this being a jurisdictional point, he should be allowed to raise it before us. Unfortunately for Mr Sharan, the clause does not operate automatically. It only operates if an objection is taken stating that part of the site is not available for any reason. Nowhere has the DDA stated which part of the site is not available for any reason. Further, the learned Single Judge's reason for rejecting an argument based on this clause also commends itself to us as the object of this clause is that no claim for extras should be granted only if there is an unavoidable delay. We have seen that the delay was entirely avoidable and caused solely by the DDA itself."(Emphasis Supplied)

And submitted that as admittedly, the time period for the contract was extended obviously being satisfied with the reasons for delay were beyond the control of the claimant for which the officers of the appellant Department are responsible. So, the natural corollary is that the claimant is entitled for idling charges as well.

21. Mr. Sinha further relies upon the judgment of Hon'ble Supreme Court of India in the case of **State of Jharkhand & Others vs. H.S.S. Integrated SDN & Another** reported in (2019) 9 SCC 798 **paragraph- 7.1 and 7.2** of which read as under:-

7.1. *"In the present case, the categorical findings arrived at by the Arbitral Tribunal are to the effect that the termination of the contract was illegal and without following due procedure of the provisions of the contract. The findings are on appreciation of evidence considering the relevant provisions and material on record as well as on interpretation of the relevant provisions of the contract, which are neither perverse nor contrary to the evidence in record. Therefore, as such, the first appellate court and the High Court have rightly not interfered with such findings of fact recorded by the learned Arbitral Tribunal.*

7.2. *Once it is held that the termination was illegal and thereafter when the learned Arbitral Tribunal has considered the claims on merits, which basically were with respect to the unpaid amount in respect of the work executed under the contract and loss of profit. Cogent reasons have been given by the learned Arbitral Tribunal while allowing/partly allowing the respective claims. It is required to be noted that the learned Arbitral Tribunal has partly allowed some of the claims and even disallowed also some of the claims. There is a proper application of mind by the learned Arbitral Tribunal on the respective claims. Therefore, the same is*

not required to be interfered with, more particularly, when in the proceedings under Sections 34 and 37 of the Arbitration Act, the petitioners have failed."(Emphasis Supplied)

And submitted that as in this case in the interim award, which is of course not the subject matter of this arbitral award, the categorical findings arrived at by the arbitral tribunal is that the rescinding of the contract by the Superintending Engineer is not proper and as a consequence thereof, the claimant's amount of security deposit and advance payment would not be forfeited and the rescinding is not binding on the claimant and the arbitral tribunal has considered the claims of the claimant on merit and cogent reasons have been given by the learned arbitral tribunal while partly allowing the respective claims and the arbitral tribunal has even disallowed also some of the claims, hence there is proper application of mind of the arbitral tribunal on the respective claims. Therefore it is submitted that the arbitral award of the arbitral tribunal is not required to be interfered with in the proceedings under Section 34 or 37 of the Arbitration and Conciliation Act, 1996. As the arbitral tribunal has not committed any illegality. It is lastly submitted by Mr. Sinha that this appeal being without any merit be dismissed.

22. Having heard the rival submissions made at the bar and after going through the materials in the record the following points for determination crop up for consideration in this appeal.

(i) Whether the impugned arbitral award is liable to be set aside on the basis of the preliminary objection that in the absence of any arbitration clause in the agreement, the arbitral tribunal acted without jurisdiction?

(ii) Whether in the absence of any clause for price escalation in the agreement entered into between the parties and also in the absence of any clause for compensation for delay, idling charges and hire charges, the awarding of different amount of compensation under such heads were beyond the terms and conditions of the agreement entered into between the parties?

(iii) Whether award of interest @ 12% per annum from 20.05.2010 to 14.10.2011 is on the higher side and is liable to be reduced?

(iv) Whether the interest that has been awarded upon the interest

component of Rs.10,40,105/- which was the interest calculated for the period 20.05.2010 to 14.10.2011 is illegal?

23. So far as the first point for determination is concerned, the principle of law settled by the Hon'ble Supreme Court of India in the case of **S.B.P. & Co v. Patel Engg. Ltd. (supra)** decided by a seven judge bench of the Hon'ble court holds the field. It has inter alia been decided therein that the Chief Justice or the designated Judge will have the right to decide the preliminary aspects as to his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power. In this case undisputedly the objections of the appellant against the prayer for appointment of arbitrator in the matter of the application under section 11(6) of the Arbitration and Conciliation Act, 1996 were not accepted by the designated judge of this court. The appellant even remained unsuccessful in the review application filed by it challenging the said order of the designated judge appointing the present arbitrator. For reasons best known to the appellant the said order appointing the arbitrator was not challenged before the Hon'ble Supreme Court of India. In this backdrop certainly it was not open to the arbitral tribunal to rule that he has no jurisdiction to proceed with the arbitration. Thus there is no merit in the preliminary objection of the appellant and the impugned arbitral award cannot be set aside on the ground of non-existence of the arbitration clause in the agreement between the parties. The first point for determination is answered accordingly in the negative against the appellant.

24. So far as the second point for determination is concerned, it is a settled principle of law as has been held in the case of **K.N. Sathyapalan (Dead) By LRs v. State of Kerala and Another (supra)** that though ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitral tribunal is vested with the authority to compensate the second party for the extra costs incurred by

him as a result of the failure of the first party to live up to its obligations, even in the absence of any clause for escalation in the agreement entered into by the parties and thus the arbitral tribunal is well within his jurisdiction in allowing some of the claims on account of escalation of costs which are referable to the execution of the work during the extended period if the claimant is prevented by unforeseen circumstances from completing the work within the stipulated period if such delay could have been prevented by the State by its diligent action and the hardships to the claimant in completing the work in time could have been taken care of by eradicating the hurdles which forced the delay in completion of work by the claimant.

25. As has been held in the case of **Food Corporation of India Vs. A.M. Ahmed & Co. & Another(supra)** that even in the absence of an escalation clause in the contract, once it is found that the arbitral tribunal has jurisdiction to find that there was delay in execution of the contract due to the conduct of the organization who has awarded the work to the claimant, such organization is liable for the consequences of the delay, hence escalation, being normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type, the arbitral tribunal has jurisdiction to go into the question of escalation.

26. In the case of **Genral Manager, Northern Railway and Another v. Sarvesh Chopra, (2002) 4 SCC 45** it has been held by the Hon'ble Supreme Court of India that if a party to a contract does not rescind it by invoking Sections 55 and 56 of the Contract Act, 1872 and accepts the belated performance of reciprocal obligations, the other party would be entitled to make a claim for damages.

27. Now coming to the facts of this case the arbitral tribunal in respect of issue No.1 concluded that the work was halted for a total period of about 347 days and the work suffered apparently on account of lack of promptness on the part of the concerned officers of the respondent to resolve the dispute, hence, the claimant cannot be held to have committed breach of contract since the performance on his part of the contract was entirely dependent on the performance of the contract by the respondent

before him who is the appellant of this appeal, on their part.

28. So far as the contention of the appellant regarding the failure of the arbitral tribunal to frame specific issue that the government authorities before it were negligent is concerned it is a settled principle of law that where in spite of the omission to frame issue the parties have produced evidence without any objection and from the evidence it is clear that the parties knew what case they had to meet no injustice is caused by non-framing of the issue. In the case of **Kunju Kesavan v. M. M. Philip and others (AIR 1964 SC 164)** the Hon'ble Supreme Court of India held as under in paragraph -17

> *"17.Xxxxxxxxxx The parties went to trial, fully understanding the central fact whether the succession as laid down in the Ezhava Act applied to Bhagavathi Valli or not. The absence of an issue, therefore, did not lead to a mis-trial sufficient to vitiate the decision. Xxxxxxxxx."*

Coming to the facts of this case it is crystal clear from the pleading of the parties and the evidence produced that the appellant herein was very much aware that it was the case of the claimant that the delay resulted from the negligence of the government authorities. So the appellants herein were aware that they had to meet that case. Under such circumstances of this case, non-framing of separate issue that the government authorities before it were negligent does not lead to a mis-trial sufficient to vitiate the decision in exercise of the jurisdiction under section 37 of the Arbitration and Conciliation Act, 1996.

29. In view of the settled principles of law as discussed above and the facts of this case, this court is of the considered view that as arbitral tribunal on appreciation of the evidence in the record has reasonably held that the work suffered apparently on account of lack of promptness on the part of the concerned officers of the respondent to resolve the dispute, hence the arbitral tribunal was well within his jurisdiction to award compensation for delay, idling charges and hire charges even though there was no specific term in this respect in the agreement entered into by the parties. Thus the second point for determination is answered in the negative and against the appellant.

30. So far as the fourth point for determination the awarding of interest upon the interest is concerned it is pertinent to refer to section 31(7) of the Arbitration and Conciliation Act, 1996 as it stood prior to its amendment by Act 3 of 2016 w.r.e.f 23.10.2015 which reads as under:

> *"**31. (7)(a)** Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*
> ***(b)** A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."*
> ***NOTE:** By the amendment vide section 16 of Act 3 of 2016 w.r.e.f 23.10.2015 the words "eighteen per centum per annum" in section 31(7)(b) of the Arbitration and Conciliation Act, 1996 have been substituted by the words "two per cent higher than the current rate of interest prevalent from the date of the award,"*

The plain reading of the said section reveals that Clause (*a*) of sub-section (7) provides that where an award is made for the payment of money, the Arbitral Tribunal may include interest in the sum for which the award is made. So this provision confers the power upon the Arbitral Tribunal while making an award for payment of money, to include interest in the sum for which the award is made on either the whole or any part of the money and for the whole or any part of the period for the entire pre-award period between the date on which the cause of action arose and the date on which the award is made. The "*sum*" awarded may be the principal amount and such interest as the Arbitral Tribunal deems fit. It is crystal clear that the expression "*the sum for which the award is made*" occurring in clause (*a*) of sub-section (7) of Section 31 of the Act refers to the *total amount* or *sum* for the payment for which the award is made, that is if no interest is awarded the 'sum' is only the principal. If both principal and interest is allowed then 'sum' is the principal plus interest and if in any case only interest is allowed, 'sum' is the interest. Section 31(7)(b)of the Arbitration and Conciliation Act, 1996 empowers the arbitral tribunal to award interest on the 'sum' as mentioned in Section 31(7)(a)of the said

Act. So it is the mandate of the Parliament that the arbitral tribunal shall award interest on the 'sum' amount which may include interest also and may even in any particular case be only interest as discussed above. It has been held by Hon'ble Mr. Justice S.A.Bobde (as His Lordship then was) in paragraph- 21,representing the majority view of the three judge bench the Hon'ble Supreme Court of India in the case of ***Hyder Consulting (UK) Ltd. v. Governor,State of Orissa Through Chief Engineer,*** reported in **(2015) 2 SCC 189,** as under

> ***"21.*** *In the result, I am of the view that S.L. Arora case* ***(2010) 3 SCC 690*** *is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the substantive claim does not refer to interest pendente lite awarded on the "sum directed to be paid upon award" and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language."*

It will also be pertinent to quote paragraph- 31 of the said judgment whereby Hon'ble Mr. Justice Abay Manohar Sapre, is his separate judgment concurring with Hon'ble Mr. Justice S.A.Bobde (as His Lordship then was) held as under

> ***"31.*** *Coming now to the post-award interest, Section 31(7)(b) of the Act employs the words, "A sum directed to be paid by an arbitral award…". Clause (b) uses the words "arbitral award" and not the "Arbitral Tribunal". The arbitral award, as held above, is made in respect of a "sum" which includes the interest. It is, therefore, obvious that what carries under Section 31(7)(b) of the Act is the "sum directed to be paid by an arbitral award" and not any other amount much less by or under the name "interest". In such situation, it cannot be said that what is being granted under Section 31(7)(b) of the Act is "interest on interest". Interest under clause (b) is granted on the "sum" directed to be paid by an arbitral award wherein the "sum" is nothing more than what is arrived at under clause (a)."*(Emphasis Supplied)

In view of the principle of law discussed above this court has no hesitation in holding that there is no merit in the submission of the

appellant in respect of the interest that has been awarded upon the interest component of Rs.10,40,105/- which was the interest calculated for the period 20.05.2010 to 14.10.2011 is illegal, as the Parliament itself mandates the same. Accordingly the fourth point for determination is also answered in the negative against the appellant.

31. So far as the third point for determination as to whether award of interest @ 12% per annum from 20.05.2010 to 14.10.2011 is on the higher side is concerned, the arbitral tribunal has not assigned any reason for awarding the said interest. The pendentelite interest awarded by the arbitral tribunal is at the rate of 6% per annum. By the amendment vide section 16 of Act 3 of 2016 w.r.e.f 23.10.2015 the future interest in case the award does not otherwise direct which was earlier at eighteen per centum per annum as provided for in section 31(7)(b) of the Arbitration and Conciliation Act, 1996 have been substituted with two per cent higher than the current rate of interest prevalent from the date of the award which is no doubt much less than 12% per annum. In the case of **National Aluminium Co. Ltd. v. Varun Shipping Co. Ltd. , 2001(6) Supreme 305,** of course in the facts of that case the Hon'ble Supreme Court of India reduced the interest from 15% to 9% per annum. Under such facts of this case this court is of the considered view that award of interest @ 12% per annum from 20.05.2010 to 14.10.2011 is on the higher side accordingly the same is reduced to 9% per annum. The third point for consideration is answered accordingly.

32. Consequently, the arbitral award shall stand modified to the extent that interest @ 12% per annum from 20.05.2010 to 14.10.2011 upon the amount of Rs. 61,79,055/-, which is the sum of the claims under various heads approved by the arbitral tribunal is reduced to 9% per annum. Accordingly the interest from 20.05.2010 to 14.10.2011 upon the claims under various heads approved by the arbitral tribunal which has been worked out to be Rs. 10,40,105/- be substituted by Rs. 7,80,084/-.The appeal is disposed of accordingly. Parties to bear their own costs of litigation all throughout.

33. Let the lower court record with a copy of this judgment be sent to the learned court below forthwith.

(Anil Kumar Choudhary, J.)

In the High Court of Jharkhand, Ranchi
Dated 19/08/2020
AFR/ Animesh