IN THE HIGH COURT OF JHARKHAND AT RANCHI

Arbitration Appeal No. 12 of 2016

1. The State of Jharkhand, Minor Irrigation Division at present through Secretary, Water Resources Department, having its office at Nepal House, P.O. and P.S. Doranda, District Ranchi
2. The Chief Engineer, Jamshedpur, Swarnrekha Multipurpose Project Icha Galudih Complex, P.O. and P.S. Adityapur, Jamshedpur at present Chief Engineer, Swarnrekha Multipurpose Project, Chandil Complex, Chandil, P.O. and P.S. Adityapur, Jamshedpur
3. The Executive Engineer, Minor Distribution Division No. 9, Ghatshila Camp, Galudih, District East Singhbhum at present Executive Engineer, Minor Distribution Division No. 12, Mango, Jamshedpur
4. The Superintending Engineer, Kharkhai Dam Circle Icha Chaliyama, District East Singhbhum at present Superintending Engineer, Chandil Dam Circle, Chandil, District Saraikela-Kharsawan

… … … Plaintiff/Applicants/Appellants

Versus

M/s. Shahi Construction, having its local office at Devi Mandap Road, Hesal, P.O. and P.S. Sukhdeonagar, District Ranchi and site office at Kumharpara, New Baradwari, Jamshedpur at present C/o Shri Sheo Narayan Prasad (Kabijee) Vir Kunwar Singh Colony, Airport Road, Hinoo, Ranchi-834002 … … Defendant/Respondent

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CORAM: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Appellants : Ms. Shristi Sinha, Advocate
Mr. Vikash Kumar, Advocate
For the Respondents : Mr. Deepak Sinha, Advocate

14/18.01.2019

1. Heard Ms. Shristi Sinha, Advocate and Mr. Vikash Kumar, Advocate appearing on behalf of the appellants.
2. Heard Mr. Deepak Sinha, Advocate appearing on behalf of the respondent assisted by Mr. Tarun Kumar, Advocate.
3. Instant Arbitration Appeal has been filed for setting aside the judgment dated 15.06.2016, passed in Misc. Case No. 2/2012 by learned Civil Judge, Sr. Division-I, Ghatshila, East Singhbhum, whereby award dated 24.12.2011, passed by the learned Arbitrator has been affirmed and the petition under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellants has been dismissed.

Arguments of the appellants

4. The brief facts and submissions by the counsel appearing on behalf

of the appellants are as under:-

a. In the year 2004, the appellants had come up with two Notice Inviting Tenders bearing No. 2/2003-04 and No. 3/2003-04 for total value of Rs. 30,48,228.85 and Rs. 78,06,649.80 respectively. The period of completion of work was 12 months and 6 months respectively from the date of agreement. Counsel submits that the work related to earth work, lining and construction of structure in Minor Distribution Division No. 2, Ghatsila Camp, Galudih under Irrigation Department, State of Jharkhand. The respondent herein issued work order dated 29.01.2004 and 25.03.2004 respectively against which the respondent deposited security amount and entered into agreement dated 10.02.2004 and 04.08.2004. The specific case of the appellants is that both the agreements were executed at the office of Minor Distribution Division No. 2, Ghatsila Camp, Galudih, within the jurisdiction of the learned court and the agreement was executed on behalf of the State by the then Executive Engineer, Minor Distribution Division No. 9, Ghatsila Camp, Galudih, who was authorize to Act on behalf of the State of Jharkhand.

b. He submits that in the notice inviting tender it was indicated that clause-23 of the F 2 agreement was excluded and all other terms contained therein would remain as it is. He further submits that in view of such clear cut exclusion of clause-23 of the F 2 agreement in the notice inviting tender itself, there was no arbitration clause in the agreement and accordingly the matter could not have been referred to the Arbitrator.

c. He further submits that the respondent herein had filed an application being Arbitration Application No. 6/2010 annexing the copy of the F 2 agreement, where clause-23 was not struck off and the matter was referred to the Arbitrator vide order dated 10.12.2010 passed in Arbitration Case No. 6/2010. He submits that specific condition/terms of the notice inviting tender was not brought to the notice of this

Hon'ble Court at the time of hearing of Arbitration Application No. 6/2010 and the lawyer who represented the appellant, without instruction of the concerned department, consented for appointment of the Arbitrator and the matter was referred to Arbitrator vide order dated 10.12.2010 passed in Arbitration Application No. 6/2010.

d. He further submits that on receipt of notice from the learned sole Arbitrator, Sri Sanat Kumar Chattopadhyay, former Judge, Jharkhand High Court, the appellants along with officers of the Division appeared before the learned Arbitrator and prayed for time for want of approval.

e. He further submits that since the respondent without disclosing the terms of notice inviting tender obtained order dated 10.12.2010 passed in Arbitration Application No. 6/2010, the appellants herein filed Special Leave Petition against the aforesaid order dated 10.12.2010 which was S.L.P. No. 16942/2011 and later on the said S.L.P. was withdrawn with a view to move before the Hon'ble High Court for review of the order dated 10.12.2010.

f. He also submits that aforesaid order of the Special Leave Petition was communicated to the learned Arbitrator vide letter dated 23.12.2011 with a prayer to defer and adjourn the pronouncement of award for at least two months, but in spite of service of said letter, the learned Arbitrator passed the award on 24.12.2011.

g. In such circumstances, the appellants challenged the award dated 24.12.2011 under Section 34 of the Arbitration and Conciliation Act, 1996, as after passing of the award, there was no question of filing any review application in Arbitration Application Case No. 6/2010.

h. He submits that award was challenged before the learned court below on the following grounds:-

(i) *For that the appointment of sole learned Arbitrator by the Hon'ble Chief Justice is beyond the purview of the Agreement, as after detection of exclusion of Clause 23 of the Agreement, the Opp. Party had no occasion to move before the Hon'ble Court for appointment of Arbitrator and thus on*

the basis of order dated 10.02.2010 all the arbitration proceeding adopted by the learned Arbitrator is vitiated and not sustainable.

(ii) For that the learned Arbitrator at least should have given opportunity to the applicants to move before the Hon'ble High Court for reviewing the order dated 10.02.2010.

(iii) For that the findings of the learned Arbitrator to the effect that applicant/authorities have committed breach of contract is highly erroneous and contrary to materials available.

(iv) For that the findings of the learned Arbitrator below to the effect that concerned opp. party committed gross error and illegality in signing the agreements before acquisition of the land for which claimant is entitled for compensation and order of termination is also illegal and arbitrary are contrary to fact.

(v) For that the findings of the learned Arbitrator that Suptd. Engineer ought to have appointed arbitrator for redressal of the grievances is beyond the purview of terms of Agreement as NIT is the part of Agreement, which clearly speaks of exclusion of arbitration Clause 23 of the agreement.

(vi) For that while the learned Arbitrator opined and observed that claim of the Claimant with regard to claim No. 1 was not genuine and is doubtful even though a sum of Rs. 2,00,000/- awarded being advanced made by the claimant to works using of J.C.B. Machine, Dumper etc.

(vii) For that the award of claim No. 2 allowed by the learned sole Arbitrator amounting to Rs. 3,00,000/- based on mere possibility and presumption of the learned Arbitrator which would be evident from the observations and findings of the learned Arbitrator that the Opp. party is unable to give reasonable explanation for this claim.

(viii) For that the award of Rs. 1,40,000/- of claim No. 3 allowed by the learned Arbitrator is baseless and unfounded which is based on mere opinion which would be crystal clear from the opinion of the learned Arbitrator that claim in this regard is also vague to be considered it seems to be deliberately and intentionally manufactured.

(ix) For that the award of Rs. 5,00,000/- of claim No. 4 on account of loss or profit is beyond the terms of agreement.

(x) For that since there was no arbitration clause in the Agreements and thus the applicants should not have been saddled with the legal expenses and remuneration and Secretarial Charges as allowed in Claim No. 7 by the learned Arbitrator.

(xi) For that all the amounts awarded by the learned Arbitrator beyond the terms of agreement and based on mere conjecture and surmises and also against a wrong person.

(xii) For that the award is in conflict with the public interest.

(xiii) For that the Award is otherwise invalid and bas been improperly procured by the Opp. Party.

(xiv) For that the applicants reserve their right to file additional ground in support of this objection if so require in course of time.

i. Counsel submits that notices were issued pursuant to the petition filed under Section 34 of Arbitration and Conciliation Act, 1996. The case was instituted before the learned court below as Misc. Case No. 2/2012.

j. Learned court below while rejecting the application for setting aside the award under Section 34 of the Arbitration and Conciliation Act, 1996 held that clause-23 of the F 2 agreement is an arbitration clause and was not deleted at the time of signing of the agreement. Moreover, at the time of referring the matter to the learned Arbitrator, in the High Court, said fact was not raised and also before the Arbitral Tribunal it was not raised by the appellants and the appellants intentionally and deliberately remained absent from arbitration proceeding. The learned court held that no ground of challenge was sustainable and accordingly vide order dated 15.06.2016 rejected the petition filed by the appellant for setting aside the award under Section 34 of the Arbitration and Conciliation Act, 1996.

k. Counsel for the appellants while advancing the argument submits that there was no arbitration clause in existence pursuant to the agreement between the parties and

accordingly the learned Arbitrator wrongly assumed jurisdiction. He submits that the various clauses of the notice inviting tender were required to be read into the agreement and therefore clause 23 of the agreement was not applicable and accordingly there was no arbitration clause between the parties.

l. He further submits that even if clause 23 of the agreement is assumed to be there, the same cannot be termed as arbitration agreement.

m. Counsel has referred to the judgment passed by the Hon'ble Supreme Court reported in **2018 SCC On line SC 327 (Lion Engineering Consultants vs. State of M.P.)** paragraph no. 5 and 6 to submit that the plea of jurisdiction by way of objection under Section 34 of the Act can be raised, even if it was not raised under Section 16 of the Act. Accordingly, he submits that it has been held by the Hon'ble Supreme Court that as per the scheme of the Act, all objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence and must be dealt with under Section 16 of the Arbitration Act, 1996 and further once the parties seeks to contend that the subject matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 of the Act by the Court.

n. He further refers to the judgment passed by the Hon'ble Supreme Court reported in (2018) 4 SCC 793 and refers to paragraph no. 35 and 36 to submit that it has been held by the Hon'ble Supreme Court that in the absence of arbitration agreement the court can refer the matter to the Arbitrator only with written consent of the parties by way of joint application, more so, when Government or statutory body like the appellants are involved. He submits that the matter could not have been referred to Arbitrator on oral consent between the parties as has been done in the instant case in Arbitration Application No. 6 of 2010.

o. He has also referred to the judgment passed by the Hon'ble Supreme Court reported in **(2014) 1 SCC 516 (Vishnu**

(DEAD) By LRS. Versus State of Maharashtra and Others) at paragraph no. 11 to submit that similar clause as that of clause 23 of F-2 Agreement was subject matter of interpretation by the Hon'ble Supreme Court and it was held that such clause is not an arbitration agreement. Accordingly, he submits that even if it is assumed that parties would be governed by clause 23 of the agreement the same cannot be termed as arbitration agreement. He further submits that the issues involved in this case are pure question of law which could have been agitated before the learned court below which has a bearing upon the very jurisdiction of the learned Arbitrator who passed the award.

Arguments of the respondent

5. Counsel appearing on behalf of the respondent, on the other hand, submits as under:-

   A. The dispute was referred to learned Arbitrator by virtue of order dated 10.12.2010 by this Court in Arbitration Application No. 6 of 2010. He further refers to the order of this Court to submit that the matter was referred to the Arbitrator with the consent of the parties.

   B. He submits that admittedly learned Arbitrator served notice upon the appellants and they had appeared before the learned Arbitrator, but in spite of that appellants did not object to the arbitration proceeding conducted by the learned Arbitrator, rather they prayed for time for seeking certain approval from their department.

   C. He submits that from perusal of the award passed by the learned Arbitrator, it is apparent that the learned Arbitrator had taken all pain to ensure appearance of the appellants and has recorded such steps in paragraph no. 9 of the award and had no option but to proceed in the matter of arbitration in absence of the appellants. He further submits that the appellant herein had taken a chance by not appearing before the learned

arbitrator and after having lost before the learned Arbitrator have challenged the award by taking a plea that the Arbitrator had no jurisdiction.

D. Counsel further submits that in the notice inviting tender, clause 23 of the F 2 agreement was indicated to be excluded, but the fact remains that at the time of signing of the agreement, clause 23 of the agreement was existing and the agreement was duly signed by the parties. Clause 27 of the agreement clearly indicates that parties had read contents of the agreement. He submits that there is no indication in the petition filed for setting aside the arbitration award by the appellants as to why and under what circumstances clause 23 of the agreement was retained in the agreement. Accordingly, the parties had agreed to be governed by clause 23 of the agreement. He also submits that every page of the agreement were signed by both the parties. He further submits that even if there was exclusion of clause 23 of F 2 Agreement in notice inviting tender, there was no legal bar in entering into the agreement containing clause 23. He further submits that objection in regard to existence of clause 23 is not a pure question of law and it requires evidence as the appellants were required to explain as to why and how clause 23 of the agreement was retained. He submits that there is no doubt that the point regarding the jurisdiction could also have been raised before the learned Arbitrator, but the same was required to be raised by the appellants before the learned Arbitrator. Having not done so, there was no occasion for the learned Arbitrator to go into the issue as to whether clause 23 of the agreement was existing or not particularly when the same was not challenged and the matter was referred to arbitrator by the order passed by this Court in Arbitration Application No. 6/2010. He further submits that at the stage of referring matter to arbitrator under Section 11

of the Arbitration & Conciliation Act, 1996, the Court is under obligation to at least prima facie examine the existence of arbitration agreement. He submits that the appellants having chosen not to file any objection before the learned arbitrator it was not open to the appellant to raise such question before the learned court below under Section 34 of the Arbitration & Conciliation Act, 1996.

E. He further submits that no element of public policy is involved in this case and such argument of the appellants has been rejected by the learned court below. Counsel also submits that the learned arbitrator was careful enough even to look into the said communication issued by the appellants as contained in letter dated 10.02.2010 and contained in Annexure-7 to the claim petition wherein the Superintending Engineer had rejected the application of the respondent to refer the matter to the arbitrator on two grounds:-

(i) prayer for payment of compensation was rejected by the court below the same could not be allowed.

(ii) with effect from 18.11.1992 clause 23 i.e arbitration clause has been deleted in relation to F-2 Agreement.

6. He further submits that specific issue of point no. 4 was framed by the learned arbitrator and the contention of the appellants as contained in letter dated 10.02.2010 was also rejected, although the appellants never filed any written statement before the learned Arbitrator. He submits that the order of the learned Arbitrator on this aspect is a well reasoned order and rightly not called for any interference by the court below.

7. So far as interpretation of clause 23 is concerned, he submits that judgment which has been relied upon by the appellants reported in **(2014) 1 SCC 516,** in the said judgment, term dispute was totally missing in the so-called arbitration clause. He further submits that clause 29 and 30 of the agreement involved in the said case has been

quoted in the said judgment at paragraph no. 11 and there is no clear indication for referring the dispute to the Arbitrator. Accordingly, the said judgement relied upon by the appellants is clearly distinguishable and does not apply to the facts and circumstances of this case.

8. He further submits that clause 23 of the F-2 Agreement has been duly interpreted by this Hon'ble Court in judgement reported in **Sharda Construction vs. State of Jharkhand reported in (2004) Online Jhar 587** . He submits that in the said judgment the issue involved was consequence of deleting clause 23 of the F-2 Agreement by way of gazette notification dated 18.11.1992 and it was held that in spite of deleting the said clause by way of gazette notification, the clause was not deleted from the agreement. Accordingly, it was held that various questions regarding existence of validity of agreement was required to be adjudicated only by the Arbitration Tribunal and the matter was referred to the then Arbitrator. It was also held that clause 23 of the agreement, which was existing in the contract between the parties and the said contract was not a statutory contract and was signed by both the parties , the same cannot be said to have been deleted merely on account of an executive order issued by the government by notification. Similar view was taken by this Court in the judgment passed in the case of Madan Prasad vs. State of Jharkhand reported in (2016) 3 JLJR 169. He further refers to another judgment passed by this Court decided on 22.11.2018 in Arbitration Application No. 32 of 2017 wherein by relying upon clause 23 of the agreement, the matter was referred for arbitration.

Arguments of the appellants by way of rejoinder

9. In response, counsel for the appellants submits that clause 23, which has been quoted in the judgment relied upon by the respondents, had specific indication that the arbitration can be invoked under the Arbitration & Conciliation Act, 1996. In the instant case, clause 23 of the agreement did not indicate about Arbitration & Conciliation Act, 1996 and therefore it cannot be said that clause 23 of the instant agreement was the arbitration agreement. It is submitted that on this ground the judgments which

has been relied upon by the respondents are clearly distinguishable.

Findings of this court

10. After hearing counsel for the parties and after considering the materials on record this Court finds that admittedly two notice inviting tenders were floated bearing no. 2 and 3 of 2003-04 for earth working lining and construction of structures by the Irrigation Department of the state and the time for completion of work was 12 months and 6 months respectively from the date of agreement. Further, the value of the work was Rs. 30,48,228.85 and Rs. 78,06,649.80 respectively. Accordingly, the work order dated 29.01.2004 and 25.03.2004 were issued in connection with aforesaid two notice inviting tenders. After the respondent herein was declared as successful, the respondent deposited the security money against both the work orders and entered into an agreement with the appellant for the purposes of execution of work vide agreement dated 10.02.2004 and 04.08.2004 respectively. However, in the notice inviting tender it was clearly indicated that the agreement will be entered into in Form F 2 as per its terms and conditions except clause 23. This Court also finds that as per the notice inviting tender, the N.I.T. was an integral part of the agreement. This Court further finds that in spite of aforesaid stipulation in the N.I.T., the authorized representative of the appellants and the respondent herein had executed the agreement containing clause 23 which reads as follows:-

> **Clause-23 : "In case any dispute or difference shall arise between the parties or either of there upon any question relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned or as to the quality of workmanship or materials used on the work, or as to the quality of workmanship or materials used on the work, or as be the construction of any of the conditions or any clause or thins there is contained, or as to any question, claim, rights on liabilities of the parties, or any clause or thing whatsoever, in my way arising out of, or relating to the contract, designs drawing, specification, estimates, instructions order, or these**

conditions, or otherwise concerning the work, or the execution, or failure to execute the same whether arising during the progress of the work, or as to the breach or this contract, then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be referred to the Superintending Engineer of the circle and his decision thereon shall be final conclusive and binding on all the parties."

11. This Court finds that the some dispute arose between the parties and accordingly the respondent herein filed application for appointment of arbitrator under Section 11 of the Arbitration & Conciliation Act, 1996 which was numbered as A.A Case No. 6/ 2010. The said arbitration was disposed of vide order dated 10.12.2010 and with the consent of the parties and Hon'ble retired judge of this Court was appointed as Arbitrator in the matter. The order dated 10.12.2010 passed in Arbitration Application No. 6 of 2010 is quoted hereinbelow for ready reference:-

> ***"This case comes up before this Court for appointment of an arbitrator as provided in the arbitration agreement.***
> ***Both the parties agreed that Justice S.K. Chattopadhaya, a retired High Court Judge be appointed as an arbitrator,***
> ***Since the appointment of arbitrator is on the agreed submission of the parties, this Court feels inclined to appoint Justice S.K. Chattopadhaya, a retired High Court Judge. On being noticed, the parties will appear before him. The arbitration application, accordingly, stands disposed of."***

12. S.L.P. was filed against aforesaid order dated 10.12.2010 on the ground that the dispute has been wrongly referred to the learned Arbitrator and that there was no arbitration clause in existence in view of the stipulation in the N.I.T. regarding non-applicability of the clause 23 of Form F-2 and that it was only the counsel for the appellants appearing in Arbitration Application No. 6 of 2010 who had consented for reference to Arbitration by retired judge of this Hon'ble Court without any instruction in the matter. Admittedly, the S.L.P. No. 16942 of 2011 was withdrawn by the appellants vide order dated 21.10.2011. It has been recorded in the order of withdrawal passed by Hon'ble Supreme Court that the appellants intended to move the High Court seeking "view" of the impugned

order. At this stage of dictation of the judgement in the court, the counsel for the appellants submits that the word 'view' has been wrongly mentioned in the order passed by the Hon'ble Supreme court although the same ought to have been "review" and there appears to be a typographical error in the order passed by the Hon'ble Supreme Court to this effect. This court is not inclined to read the order passed by the Hon'ble Supreme Court by substitution the word "review" for the word "view". If there was any typographical mistake, it was for the appellants to move appropriate petition before the Hon'ble Supreme Court which admittedly has not been done. The order dated 21.10.2011 passed by the Hon'ble Supreme Court in the aforesaid S.L.P. is quoted as under :-

> **" Learned counsel for the petitioners seeks withdrawal of the special leave petition as the petitioners intend to move the High Court seeking view of the impugned order.**
>
> **Special leave petition is dismissed as withdrawn."**

13. Admittedly, in the meantime, the learned Arbitrator had commenced the arbitration proceeding pursuant to the order dated 10.12.2010 passed in Arbitration Application No. 6/2010 and the learned Arbitrator had issued notice to the appellants and the appellants had appeared before the learned Arbitrator and had prayed for time on the ground that certain approvals were required. Thereafter, the appellants did not participate in the proceeding before the learned Arbitrator which ultimately led to passing of the award on 24.12.2011. It is the specific case of the appellants that the order dated 21.10.2011 passed in aforesaid S.L.P. was duly communicated to the office of learned Arbitrator on 23.12.2011, with a prayer to adjourn the matter for two months so as to enable them to take appropriate steps in the High Court, but in spite of this, the learned Arbitrator had pronounced the award on 24.12.2011. The fact about filing of letter before the learned Arbitrator on 23.12.2011 is not reflected from the award and admittedly the appellants did not take any steps for more than two months after order of withdrawal of the S.L.P. filed before the Hon'ble Supreme Court. This court is of the considered view that otherwise also, order of withdrawal of the S.L.P could not have

prevented the learned arbitrator from pronouncing the award particularly when the appellants had refused to participate in the arbitral proceedings.

14. From perusal of the award passed by the learned Arbitrator, this court finds that the learned Arbitrator had mentioned about non appearance of the appellants in paragraph no. 9 of the award which clearly indicates that the learned Arbitrator had taken pain to ensure that the appellants should appear in the proceeding. However, in spite of best of efforts, the appellants did not participate in the arbitration proceeding in spite of service of notice and accordingly did not raise any objection in connection with the existence of arbitration clause and/or on the interpretation of clause-23 of the agreement which was never struck off by the parties to the agreement. For ready reference, paragraph no. 9 of the award passed by the learned Arbitrator is quoted below:-

> "***On being noticed, the claimant appeared but surprisingly except one Mr. P.C. Jha, Executive Engineer, Minor Distribution Division No. 9 (respondent no. 3) along with Mr. M.K. Jha, S.D.O. Minor Distribution Division No. 9 appeared on the date fixed i.e. on 27.01.2011 but no other respondents appeared. However, the Chief Engineer (respondent no. 2) and the Superintending Engineer (respondent no. 4) informed Mr. Jha of their inability to appear on the date fixed as they could only receive the notices on the said date. They assured Mr. Jha that they would be present on 28.01.2011 and as such the case was adjourned for 28.01.2011 though Mr. Tarun Kumar, Advocate, appeared on behalf of the claimant and Mr. P.C. Jha (respondent no. 3) along with Mr. M.K. Jha, appeared but respondent no. 2 and 4 did not appear. When enquired by me, Mr. Jha submitted that unless and until approval is given by the concerned Department it was not possible for either respondent no. 2 or 4 to appear before the Tribunal in spite of receiving the notices. He prayed for three months time for taking necessary approval from the Department so that on the next date other two respondents could appear before me. Prayer was allowed and the case was adjourned for three months.***

On 29.04.2011, that is after three months, when the matter was again placed before me, none of the respondents including Mr. Jha appeared before the Tribunal. On the same date Tribunal observed that it will have no option but to hear the claimant exparte on the next date and to pass an exparte Award without hearing any of the respondents above named. In order to facilitate the respondents to appear before me on the next date positively and in order to avoid passing of an exparte Award, I adjourned the matter to 12.05.2011. Mr. Tarun Kumar on behalf of the claimant even could not serve the copy of the claim petition to the respective respondents due to non-appearance of the respondents. The case was ordered to be listed on 12.05.2011 and the copies of this order along with order dated 28.01.2011 were sent to respondent nos. 1 to 4 by Speed-Post. It was expected that at least respondent no. 1, the Secretary, Minor Irrigation Division, would take steps in proper adjudication of the disputes but all my efforts went in vain as even on 12.05.2011 nobody appeared on behalf of the respondents and having found no other alternative the case was listed for hearing exparte. On the prayer made by Mr. Deepak Sinha, learned counsel on behalf of the claimant next date of hearing was fixed on 03.06.2011 and the argument was advanced in part."

15. This court further finds that Arbitrator had framed following issues

(I) Whether the respondents committed a breach of contract by failing to allot lands free from all encumbrances to the claimant for executing the allotted work?

(II) Whether respondent department was obliged to provide encumbrances free land to the contractor for executing the work allotted to him?

(III) Whether termination of contract for no fault of the claimant and forfeiting security amount was an arbitrary and malafide action on part of the Respondents?

(IV) Whether deletion of Clause 23 of the Agreement regarding arbitration with effect from 18.11.1992 will have any bearing on the arbitration clause incorporated in the Agreements entered into in this case?

(V) Whether the Respondent No. 4 deliberately misinterpreted

the findings of the Hon'ble High Court while refusing to appoint an Arbitrator for resolving the disputes?

(VI) Whether due to failure of the respondents, in allotting lands free from all encumbrances to the claimant, the claimant had to suffer a financial loss for sitting idle along with its men and machineries, equipments and materials for almost one year?

(VII) Whether the claimant is entitled to get the amount of compensation as claimed by him?

16. Clause-23 of the agreement was subject matter of consideration under issue no. 4. In spite of non appearance of the appellants before the learned Arbitrator and their non participation, the learned Arbitrator took note of the letter dated 10.02.2010 as contained in Annexure-17 to the claim petition and which was issued by the appellants wherein request for appointment of Arbitrator was turned down by the appellant by specifying following two grounds.

(i) As the prayer for payment of compensation was rejected by the High court the same could not be allowed.

(ii) With effect from 18.11.1992, clause-23 (i.e. Arbitration Clause) has been deleted in relation to F 2 agreement.

17. The learned Arbitrator while discussing issue no. 4 recorded his findings as under:-

"It appears from letter dated 10.02.2010, as contained in Annexure-17 to the claim petition, that when after the High Court's order the claimant filed an application before the Superintending Engineer requesting him to appoint as Arbitrator so that loss and damages suffered by him could be ascertained and he may be compensated accordingly, the Superintending Engineer by his aforesaid letter rejected the said application on two grounds, namely (i) as the prayer for payment of compensation was rejected by the High Court, the same could not be allowed and (ii) with effect from 18.11.1992. Clause-23 (i.e. Arbitration Clause) has been deleted in relation to Agreement F-2.

The second reason assigned by the Superintending Engineer, in my view, cannot be sustained in law as much

as in the present case, deletion of the said clause cannot be hold good. The reason for my conclusion is that so far the present case is concerned, the first Agreement was executed on 10.02.2004 and period expires on 09.02.2005. The Agreement Nos. 2F-2/2003-04 and 4F-2/2004-05 are Annexures-3 & 4 to the claim petition. A bare perusal of conditions of contract of both the Agreements will show that Arbitration Clause, namely Clause 23, is very much in existence n both the Agreements. Therefore, in my view if the Arbitration Clause 23 would have been deleted from the Conditions of Contract w.e.f. 18.01.1992, this Clause would not have been mentioned in the Agreements executed much after the deletion of the said clause, Moreover, the Superintending Engineer has not annexed any notification of the State Government by and under which Clause-23 was deleted with effect from 18.11.1992 as claimed by him. This shows that the Superintending Engineer in order to frustrate the claim of the claimant has refused to refer the matter to Arbitration by taking a non-existent ground of deletion of Clause 23 from the Agreement. Another important aspect of the matter is that when the claimant filed Arbitration Application No. 6 of 2010 before the Jharkahnd High Court, J.C. to G.P. –I appeared for respondents and he also did not take this plea by indicating to the High Court that Arbitration Clause has been deleted with effect from 18.11.1992. On the other hand he also agreed along with the claimant's counsel that an Arbitrator may be appointed. The order of the High court dated 10.12.2010 appointing me as the Arbitrator is Annexure-18 to the claim petition.

Thus in my view, it is too late for the Superintending Engineer to suggest that Clause 23 has been deleted and therefore the matter could not be referred for Arbitration. I am of the view that this fact also indicates that the Superintending Engineer also trying to avoid illegalities committed by concerned authority/authorities in signing the Agreements before acquisition of land. In my opinion, in all fairness the Superintending Engineer ought to have

appointed as arbitrator for redressal of the grievances of the claimant."

18. This court finds that the award of the learned Arbitrator was challenged before the learned Civil Judge, Sr. Division at Ghatshila under Section 34 of the Arbitration and Conciliation Act, 1996 which was numbered as Misc. Case No. 2/2012 and the ground of challenge have been quoted above.

19. This court finds from perusal of the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, there is no explanation on behalf of the appellants as to why and under what circumstance, clause-23 of the agreement was not struck off at the time of signing of the agreement by their authorised officer and also their contention that the parties are governed by the conditions of notice inviting tender read with the agreement and accordingly clause-23 stood excluded by virtue of terms of the notice inviting tender. Counsel for the appellants has referred to the judgment passed by the Hon'ble Supreme Court reported in **(2018) 16 SCC 758 and in also (2018) SCC Online 327 (Lion Engineering Consultants v. State of M.P.)** has referred to paragraph no. 5 and 6 of the said judgment. However , it would be useful to refer to para 4 to 6 of the said judgement which reads as follows:-

"4. Learned Advocate General for the State of M.P. submitted that the amendment sought is formal. Legal plea arising on undisputed facts is not precluded by Section 34 (2) (b) of the Act. Even if an objection to jurisdiction is not raised under Section 16 of the Act, the same can be raised under Section 34 of the Act. It is not even necessary to consider the application for amendment as it is a legal plea, on admitted facts, which can be raised in any case. He thus submits the amendment being unnecessary is not pressed. Learned Advocate General also submitted that observations in MSP Infrastructure Ltd. (supra), particularly in Paragraphs 16 and 17 do not laid down correct law.

5. We find merit in the contentions raised on behalf of the State. We proceed on the footing that the amendment being beyond limitation is not to be allowed as the amendment is not pressed.

6. We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was

raised under Section 16."

20. This court is of the considered view that the aforesaid judgement does not apply to the facts and circumstances of this case particularly in view of the fact that the point regarding jurisdiction in the instant case is not a pure question of law but is a mixed question of fact and law. Here admittedly the clause 23 of the agreement was existing in the agreement which was ultimately signed, although as per the case of the appellants, the said clause was to be excluded. It was certainly for the respondents to lead evidence on this point and satisfy the learned arbitrator as to under what circumstances the clause 23 of the agreement was not struck off from the agreement while signing the same. There is no bar for the parties to enter into arbitration agreement at a subsequent stage of signing the agreement even if it was mentioned in the tender that the clause regarding agreement is to be excluded. This court further finds that in the instant case, at the initial stage when the appellants refused to refer the matter for arbitration vide letter dated 10.02.2010, it was mentioned that the dispute cannot be referred to arbitration as clause 23 was deleted with effect from 18.11.1992 by virtue of one notification and no such plea was taken that as per the tender conditions the clause 23 was to be excluded. This court finds that the appellants have consciously chosen not to participate in the arbitration proceedings and accordingly did not raise their point of jurisdiction before the learned arbitrator in-spite of repeated opportunities granted by the learned arbitrator. This court is of a considered view that it was not open to the appellant to raise such point of jurisdiction involving mixed questions of fact and law for the first time in petition under section 34 of Arbitration and Conciliation Act, 1996.

21. This court finds that the appellants having appeared before the learned Arbitrator at one point of time prayed for time and subsequently they abandoned the proceedings and allowed the learned Arbitrator to proceed in the matter and did not file any written statement to dispute the claim. This court also finds that the learned Arbitrator was careful enough to take into consideration objection of the State in connection with existence of arbitration clause on the basis of whatever was available on record including

letter dated 10.02.2010, which was filed by the respondent before the learned Arbitrator, this court finds that the appellants allowed the learned Arbitrator to proceed in the matter and when the Arbitrator was scheduled to pronounce the judgment on 24th December, 2011, they claimed to have filed a petition in the office of the learned Arbitrator regarding dismissal of S.L.P. therefore proposed petition to be filed before the High Court that too after expiry of two months from the date of dismissal of the S.L.P. which was dismissed vide order dated 21.10.2011. Even as per the appellants request to adjourn the case was filed in the office of the learned Arbitrator only on 23.12.2011. From perusal of the lower court records this court finds that receiving copy of the letter dated 23.12.2011 has been filed by the appellants which appears to have been signed by one clerk and there is nothing on record to suggest that the same was brought to the notice of the learned Arbitrator. Even final award which has been passed does not indicate the filing of any such letter before the learned Arbitrator. This court further finds that even if it is assumed that the said letter was brought to the notice of the learned Arbitrator, then also, merely because the party is going to file a petition cannot be a ground for not pronouncing the award.

22. The counsel for the appellant has submitted that objection to jurisdiction can be taken under Section 34 of the Arbitration and Conciliation Act, 1996. He has referred to Para 35 and 36 of another judgment reported in **(2018) 4 SCC 793 (Kerela State Electricity Board and Another vs. Kurien E. Kalathil and Another)** Paragraph no. 35 and 36 of the said judgment reads as follows:-

35. "*After pointing out the disputed claims of additional work (Ext. P-59) and on the oral consent of the counsel for the appellant, the High Court has referred the parties to arbitration appointing Justice K.A. Nayar as the arbitrator. Arbitrator/Tribunal is a creature of the contract between the parties. There was no arbitration agreement between the parties. The question falling for consideration is whether the High Court was right in referring the parties to arbitration on the oral consent given by the counsel without written instruction from the party.*

36. Jurisdictional precondition for reference to arbitration under Section 7

of the Arbitration and Conciliation Act is that the parties should seek a reference or submission to arbitration. So far as reference of a dispute to arbitration under Section 89 CPC is concerned, the same can be done only when parties agree for settlement of their dispute through arbitration in contradistinction to other methods of alternative dispute resolution mechanism stipulated in Section 89 CPC. In so far reference of the parties to arbitration, oral consent given by the counsel without a written memo of instructions does not fulfil the requirement under Section 89 CPC. Since referring the parties to arbitration has serious consequences of taking them away from the stream of civil courts and subject them to the rigour of arbitration proceedings, in the absence of arbitration agreement, the court can refer them to arbitration only with written consent of parties either by way of joint memo or joint application; more so, when Government or statutory body like the appellant Board is involved."

23. This court is of the considered view that the aforesaid judgement does not help the appellants in any manner and is clearly distinguishable on facts. In the instant case the reference to learned arbitrator is based on a written agreement containing clause 23 and is not merely on account of consent during disposal of Arbitration Application No. 6/2010. In the aforesaid judgment the reference to arbitrator was solely on the basis of oral consent of counsels.

24. This court further finds that contract herein is not a statutory contract and no element of public policy is involved in this case.

25. So far as contention of the appellants that clause-23 by itself cannot be said to be an arbitration clause is concerned, they have relied upon the judgment passed by the Hon'ble Supreme Court reported in **(2014) 1 SCC 516 (Vishnu versus State of Maharashtra)** paragraph no. 11,12,13 which reads as follows:-

> ***11. We have considered the respective arguments. Clauses 29 and 30 of the B-1 Agreements entered into between the parties read as under:***
>
> ***"29. All works to be executed under the contract shall be executed under the direction and subject to the approval in all respects of the Superintending Engineer of the Circle for the time being, who shall be entitled to direct at what point or points and in what manner they are to be commenced, and from time to time carried on.***

30. Except where otherwise specified in the contract and subject to the powers delegated to him by the Government under the Code Rules then in force the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions, relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter, or thing whatsoever, if any way arising, out of, or relating to the contract designs, drawings, specifications, estimates, instructions, orders, or these conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising, during the progress of the work, or after the completion or abandonment thereof."

12. Para 224 of the Maharashtra Public Works Manual, as amended by Government C.M. No. C.M. No. CAT-1070/460-DSK.2, dated 09.05.1977, reads as under:

"224. Clause 30 of B-1 and B-2 Agreement forms lays down that the decision of the Superintending Engineer in certain matters relating to the contract would be final. The Superintending Engineer's decision taken under this clause should be considered as that taken as an arbitrator and this should be considered as the decision taken under that Arbitration Act. The decisions taken by the Superintending Engineer under the other clauses should be considered different from his decision taken under Clause-30 of B-1 and B-2 tender agreements as an arbitrator."

13.We shall first consider the question whether Clause 30 of the B-1 Agreements can be construed as an arbitration clause:

13.1 A conjoint reading of Clauses 29 and 30 of B-1 Agreements entered into between the parties shows that the appellant had to execute all works subject to the approval in all respects of the Superintending

Engineer of the Circle, who could issue directions from time to time about the manner in which work was to commence and be executed. By virtue of Clause 30, the decision of the Superintending Engineer of the Circle was made final, conclusive and binding on all the parties in respect of all questions relating to the meaning of the specifications, designs, drawings, quality of workmanship or materials used on the work or any other question relating to claim, right, matter or things arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders etc.

13.2 These two clauses by which the Superintending Engineer was given overall supervisory control were incorporated for smooth execution of the works in accordance with the approved designs and specifications and also to ensure that the quality of work is not compromised. The power conferred upon the Superintending Engineer of the Circle was in the nature of a departmental dispute resolution mechanism and was meant for expeditious sorting out of problems which could crop up during execution of the work.

13.3 Since the Superintending Engineer was made overall in-charge of all works to be executed under the contract, he was considered by the parties to be the best person who could provide immediate resolution of any controversy relating to specifications, designs, drawings, quality of workmanship or material used etc. It was felt that if all this was left to be decided by the regular civil courts, the object of expeditious execution of work of the project would be frustrated. This is the primary reason why the Superintending Engineer of the Circle was entrusted with the task of taking decision on various matters.

13.4 However, there is nothing in the language of Clause-30 from which it can be inferred that the parties had agreed to confer the role of arbitrator upon the Superintending Engineer of the Circle."

26. This court finds that the Hon'ble Supreme Court in paragraph no. 19 has referred to the judgement passed in the case of K.K. Modi versus K.N. Modi reported in (1998) 3 SCC 573 wherein the attributes of an arbitration agreement has been culled out. Further vide para 30 and 31 the judgement passed in the case of Punjab State versus Dina Nath has been referred and quoted. Para 30 and 31, of the said judgement reported **(2014) 1 SCC 516** is quoted as follows:-

> 31. *After noticing the judgment in K.K. Modi v. K.N. Modi, the Court observed(Dina Nath case, SCC pp. 33-34, paras 12 & 14)*
>
> ***"12. Keeping the ingredients as indicated by this Court in K.K. Modi in mind for holding a particular agreement as an arbitration agreement, we now proceed to examine the aforesaid ingredients in the context of the present case :***
>
> *(a)* ***Clause 4 of the Work Order categorically states that the decision of the Superintending Engineer shall be binding on the parties.***
>
> *(b)* ***The jurisdiction of the Superintending Engineer to decide the rights of the parties has also been derived from the consent of the parties to the Work Order.***
>
> *(c)* ***The Agreement contemplates that the Superintending Engineer shall determine substantive rights of parties as the Clause encompasses all varieties of disputes that may arise between the parties and does not restrict the jurisdiction of the Superintending Engineer to specify issues only.***
>
> *(d)* ***That the agreement of the parties to refer their disputes to the decision of the Superintending Engineer is intended to be enforceable in law as it is binding in nature.***
>
> * * *
>
> ***14. The words 'any dispute appears in Clause 4 of the Work Order. Therefore, only on the basis of the materials produced by the parties in support of their respective claims a decision can be arrived at in resolving the dispute between the parties. The use of***

the words 'any dispute' in Clause 4 of the Work Order is wide enough to include all disputes relating to the said Work Order. Therefore, when a party raises a dispute for non-payment of money after completion of the work, which is denied by the other party, such a dispute would come within the meaning of 'arbitration agreement' between the parties. Clause 4 of the Work Order also clearly provides that any dispute between the department and the contractor shall be referred to the Superintending Engineer, Hydel Circle No. 1, Chandigarh for orders. The word 'orders' would indicate some expression of opinion, which is to be carried out, on enforced and which is to be carried out, or enforced and which is a conclusion of a body (in this case Superintending Engineer, Hydel Cirlce No. 1, Chandigarh). Then again the conclusion and decision of the Superintending Engineer will be final and binding on both he parties. This being the position in the present case and in view of the fact that Clause 4 of the Work Order is not under challenge before us, the decision that would be arrived at by Superintending Engineer, Hydel Circle No 1, Chandigarh must also be binding on the parties as a result whereof Clause-4 must be held to be binding arbitration agreement."

32. The Bench distinguished the judgment in State of Orissa v. Damodar Das by making the following observations : (Dina Nath case, SCC pp. 35-36 para 17)

17. ***"From a plain reading of this clause in Damodar Das it is evident that the powers of the Public Health Engineer were essentially to supervise and inspect. His powers were limited to the questions relating to the meaning of the specifications, drawings and instructions, quality of workmanship or materials used on the work, or as to any other question, claim, right, matter, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same. However, in the case before us, the Superintending Engineer was given full***

> ***power to resolve any dispute arising between the parties which power in our view is wide enough to cover any nature of dispute raised by the parties. The clause in the instant case categorically mentions the word 'dispute' which would be referred to him and states 'his decision would be final and acceptable/binding on both the parties."***
>
> 33. *In our opinion, neither of the judgments relied upon by Shri Mukherjee help the cause of his client. In Mallikarjun case this Court noted that the Superintending Engineer, Gulbarga Circle, Gulbarga was not an officer of the University and he did not have any authority or jurisdiction either to supervise the construction work or issue any direction to be contractor in relation to the project. The Court also emphasised that the parties had agreed that any dispute arising from the contract would be referred to the decision of the Superintending Engineer. These factors are missing in the instant case. Likewise, Clause 4 of the Work Order which came up for interpretation in Punjab State v. Dina Nath contemplated resolution by the Superintending Engineer of any dispute arising between the department and the contractor. Therefore, the relevant clause of the Work Order was rightly treated as an arbitration agreement."*

27. Ultimately, the Hon'ble Supreme court in **(2014) 1 SCC 516** found that the agreement involved in the said case was not an arbitration agreement.

28. Applying the same test as has been considered by the Hon'ble supreme court, this court finds, that clause 23 of the agreement involved in this case clearly uses the term "any dispute" and provides that the decision of the Superintending engineer of the circle shall be final, conclusive and binding upon all the parties; the jurisdiction to decide the dispute by the said authority has been derived as per the agreement executed with the consent of the parties; the Agreement contemplates that the Superintending Engineer shall determine substantive rights of parties as the Clause encompasses all varieties of disputes that may arise between the parties and does not restrict the jurisdiction of the Superintending Engineer to specific issues only AND the agreement of the parties to refer their disputes to the decision of the Superintending Engineer is intended to be enforceable in law as it is binding in

nature.

Accordingly, this court finds that clause 23 of the agreement involved in this case, upon its bare perusal, is certainly an arbitration agreement when seen in the light of the ratio of aforesaid judgment passed by Hon'ble Supreme Court.

29. This court further finds that number of judgments has been relied upon by the respondent as mentioned above wherein matters have been referred to the Arbitrator resorting to the similar clause-23 of the F 2 agreement. The counsel for the appellants in response to this statement of the respondent has tried to draw the distinction between the clause which were under consideration by this court in other judgments and clause 23 involved in this case by submitting that Arbitration and Conciliation Act, 1996 was specifically mentioned in the arbitration clause involved in the other judgment, but in the instant case, there is no such reference. This court finds that reference or non reference of Arbitration and Conciliation Act, 1996 in the arbitration clause itself has no bearing and it is the clause as such which is to be examined to see as to whether there is any provision for getting the dispute resolved through arbitration. Accordingly, the distinction which has been sought to be drawn by the counsel appearing on behalf of the appellants has no merits and accordingly such argument is hereby rejected.

30. This court finds that learned court below has passed a detailed judgment considering all the points raised by the appellants and every point has been rejected while considering the ground for setting aside of the award as mentioned in the application under Section 34 of the Arbitration and Conciliation Act, 1996 and has taken note of the fact that the appellants never participated in the proceedings before the learned Arbitrator and it was not open to them to raise such point now. Further the learned court below has also considered that challenge to award is permissible on the grounds under Section 34 of the Arbitration and Conciliation Act, 1996 and the court does not sit in appeal over the award. Learned court below also held that appropriate reasoning has been assigned in deciding the claim. Although the appellants did not appear before the learned Arbitrator, even then due care was taken while

deciding the claim. The learned court below also held that the appellants had failed to prove that any element of public policy is involved in this case so as to assail the award passed by the learned Arbitrator.

31. This court finds that the impugned order passed by the learned court below is itself well reasoned order dealing with all the points raised by the appellant before the learned court. The scope of Section 34 of the Arbitration and Conciliation Act, 1996 is very limited and the court does not sit in appeal against the award passed by the learned Arbitrator.

32. This court finds that none of the grounds as pointed out by the appellants call for any interference in the award passed by the learned Arbitrator or in the impugned order passed by the learned court below. Accordingly, this appeal is hereby dismissed.

33. Pending I.A., if any, stands dismissed as not pressed.

(Anubha Rawat Choudhary, J.)

Binit/A.F.R.