SUPREME COURT OF INDIA

M/s. P. Dasaratharama Reddy Complex

Vs.

Government of Karnataka

C.A.No.1586 of 2004

(G.S.Singhvi, V.Gopala Gowda and C.Nagappan JJ.)

25.10.2013

JUDGMENT

G. S. SINGHVI, J.

1. Leave granted in SLP (C) Nos. 16117 of 2004, 17147 of 2004, 24655 of 2004, 26073 of 2004, 5951 of 2006, 12552 of 2006, 12553 of 2006, 8597 of 2009, 28087-28088 of 2011, 28089 of 2011, 29227-29330 of 2011, 31975 of 2011 and 13528 of 2012.

2. Of the above noted 23 appeals, 17 have been filed by those who had been awarded contracts by the Government of Karnataka and/or its agencies/instrumentalities for execution of the particular project/works. They have challenged the orders passed by the Designated Judge/Division Benches of the Karnataka High Court rejecting their prayer for appointment of Arbitrator in terms of the clauses relating to settlement of disputes. One appeal has been filed by the contractor who was awarded construction contract by Nagarika Yogbakashema Mathu Gruha Nirmana Sahakara Sangha. The remaining 5 appeals have been filed by Karnataka Neeravari Nigam Limited and Kirshna Bhagya Jala Nigam Limited for setting aside the orders passed by the learned Designated Judge whereby he directed the concerned Chief Engineer to act as an Arbitrator.

3. For the sake of convenience, we shall notice the facts from the record of Civil Appeal No.1586 of 2004 - M/s. P. Dasaratharama Reddy Complex v. The Government of Karnataka and another because arguments were advanced with reference to that case.

4. The appellant is a contractor engaged in executing work contracts awarded by the Government of Karnataka and its instrumentalities. In 1996, the appellant was awarded contract for construction of bridge between Yethabadi-Buyyanadoddi across Shimsha river in Malavalli. The appellant did not complete the work by alleging lack of cooperation on the part of Chief Engineer, Communication and Building (South), Bangalore (respondent No.2) and then lodged claim for payment of the amount allegedly due to him. After some time, the appellant filed an application under Section 11(6) and (8) of the Arbitration and Conciliation Act, 1996 (for short, 'the 1996 Act') for appointment of an Arbitrator for adjudication of all the disputes pertaining to Contract No.5/96-97 dated 8.5.1996. The Chief Justice of the High Court assigned the application to the Designated Judge, who dismissed the same vide order dated 14.9.2001 by relying upon the judgment in Mysore Construction Company v. Karnataka Power Corporation Ltd. ILR 2000 KAR 4953. Paragraphs 5 and 6 of that order read as under:

> "5. The above clause requires the contractor specifically to approach the civil court, if he is not satisfied with the decision of the Chief Engineer. It does not provide for reference to arbitration. But contrary to the specific term of clause 29, the petitioner has sought appointment of Arbitrator instead of approaching the Civil Court.
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> 6. I had occasion to consider the question whether such a clause is an arbitration agreement in Mysore Construction Company Vs. Karnataka Power Corporation Ltd. [ILR 2000 KAR 4953] and held that the said clause is not an arbitration agreement. Following the said decision and for the reasons stated therein, it has to be held that clause 29 relied on by petitioner is not an arbitration agreement."

5. The writ petition filed by the appellant questioning the order of the Designated Judge was dismissed by the Division Bench of the High Court by observing that Clause 29 of the Contract cannot be construed as an Arbitration Agreement or an Arbitration Clause for settlement of disputes.

6. In some of the other appeals, the appellants have challenged the orders passed by the Designated Judge rejecting their applications for appointment of Arbitrator under the relevant clause of their respective agreements.

7. In the 5 appeals, Karnataka Neeravari Nigam Limited and Krishna Bhagya Jala Nigam Limited have challenged the orders passed by the Designated Judge for

appointment of the Chief Engineer as an Arbitrator and directed him to adjudicate the matter in dispute.

THE ARGUMENTS

8. Mrs. Kiran Suri, Senior Advocate and other learned counsel appearing for the contractors argued that the impugned orders are liable to be set aside because the learned Designated Judge and the Division Bench of the High Court misconstrued the relevant clauses of the agreements. She further argued that in view of the judgment of the Division Bench of the High Court in Karnataka State Road Transport Corporation and another v. M. Keshava Raju 2004 (1) Arb. LR 507 and of this Court in Smt. Rukmanibai Gupta v. Collector, Jabalpur and others (1980) 4 SCC 556, Krishna Bhagya Jala Nigam Limited v. G. Harishchandra Reddy and another (2007) 2 SCC 720, Punjab State and others v. Dina Nath (2007) 5 SCC 28, State of Orissa and others v. Bhagyadhar Dash (2011) 7 SCC 406, Bharat Bhushan Bansal v. U. P. Small Industries Corporation Ltd., Kanpur (1999) 2 SCC 166 and K. K. Modi v. K. N. Modi and others (1998) 3CC 573, the judgment in Mysore Construction Company v. Karnataka Power Corporation Limited (supra) cannot be treated as laying down correct law. Mrs. Suri also relied upon Section 20 of the Arbitration Act, 1940 (for short, 'the 1940 Act') and argued that Clause 29 of the agreement executed between appellant P. Dasaratharama Reddy Complex and the Government of Karnataka and similar clauses contained in other agreements provide for resolution of disputes by arbitration and the High Court committed serious error by refusing to appoint an Arbitrator.

9. Shri Naveen R. Nath, learned counsel, who appeared on behalf of Krishna Bhagya Jala Nigam Limited and Karnataka Neeravari Nigam Limited, who are the appellants in the five appeals and respondents in some of the other cases argued that Clause 29 of the agreement executed between the appellant and the Government of Karnataka in Civil Appeal No.1586 of 2004 and similar clauses in other agreements are in the nature of departmental dispute resolution mechanism and the same cannot be treated as an arbitration clause. He pointed out that Clause 29 and similar clauses contained in other agreements neither postulate hearing of the parties by the Chief Engineer nor he can adjudicate the dispute. Shri Nath pointed out that the relevant clauses in the agreements entered into between the parties provide for settlement of disputes through Court and, therefore, the decision, if any, taken by the Chief Engineer cannot be treated as an award of the Arbitrator.

10. We have considered the respective submissions. Clause 29 of the Agreement entered into between the parties (the appellant and the respondents in Civil Appeal No.1586/2004) and majority of other cases read as under:

> "Clause-29: (a) If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/Superintending Engineer and the Contractor regarding the following matters namely,
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> (i) The meaning of the specifications designs, drawings and instructions herein before mentioned;
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> (ii) The quality of workmanship or material used on the work and
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> (iii) Any other questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of' the work, or after the completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the Contractor to do so, given written notice of his decision to the contractor.
>
> Chief Engineer's decision final
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> (b) Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor. The said decision shall forthwith be given effect to and contractor shall proceed with the execution of the work with all due diligence.
>
> Remedy when Chief Engineer's decision is not acceptable to Contract
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> (c) In case the decision of the Chief Engineer is not acceptable to the contractor, he may approach the Law Courts at for settlement of dispute after giving due written notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of the written notice of the decision of the Chief Engineer.
>
> Time limit for notice to approach law Court by Contractor

(d) If the Chief Engineer has given written notice of his decision to the Contractor and no written notice to approach the law court has been communicated to him by the Contractor within a period of ninety days from receipt of such notice, the said decision shall be final and binding upon the Contractor.

Time limit for notice to approach law court by contractor when decision is not given by CE as at (b)

(e) If the Chief Engineer fails to give notice of his decision within a period of ninety days from the receipt of the Contractors request in writing for settlement of any dispute or difference as aforesaid, the contractor may within ninety days after the expiry of the first named period of ninety days approach the Law Courts at giving due notice to the Chief Engineer.

Contractor to execute and complete work pending settlement of disputes;

(f) Whether the claim is referred to the Chief Engineer or to the Law Courts, as the case may be, the contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences.

Obligations of the Executive Engineer and Contractor shall remain unsettled during consideration of dispute.

(g) The reference of any dispute or difference to the Chief Engineer or the Law Court may proceed notwithstanding that the works shall then be or be alleged to be complete, provided always that the obligations of the Executive Engineer and the Contractor shall not be altered by reason of the said dispute or difference being referred to the Chief Engineer or the Law Court during the Progress of the works."

(emphasis supplied)

11. Clause 7 of the Agreement, which was subject matter of consideration in Civil Appeal No.4187/2004 – C.C. Kondaiah v. the Secretary, Nagarika Yogbakashema Mathu Gruha Nirmana Sahakara Sangha, reads thus:

"7. In all matters of dispute arising out of this contract agreement regarding the quality of materials, work, etc., the decision of the Board of Directors of the Sangha, shall be final and binding on the part of the Contractor."

12. Clause 66 of the contract, which is subject matter of consideration in the appeals arising out of SLP(C)Nos. 31975/2011 and 13528/2012, reads thus:

"Clause 66: SETTLMENT OF DISPUTES:

66. If any disputes or difference of any kind whatsoever and contractor in connection with, or raising out of the contract or the execution of works, whether during the progress of the works or after their completion and whether before or after the termination abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of forty five days from the date of being requested by the contractor to do so, give written notice of his decision to the contractor.

Subject to other form of settlement hereafter provided, such decision in respect of every dispute or difference so referred shall be final and binding upon the contractor. The said decision shall forthwith be given effect to, and the contractor shall proceed with the execution of the works with all due diligence. In case the decision of the Engineer is not acceptable to the contractor, he may approach the law courts for settlement of dispute after giving due written notice in this regard to the Engineer within a period of forty five days form the date of receipt of the written notice of the decision of the Engineer. If the Engineer has given written notice of his decision to the contractor and no written notice to approach the law courts has been communicated to him by the contractor within a period of forty five days from receipt of such notice, the said decision shall be final and binding upon the contractor. If the Engineer shall fail to give notice of his decision within a period of forty five days form the receipt of the contractor's request in writing for settlement of any dispute or difference as aforesaid, the contractor may within forty five days after the expiration of the first named period of forty five days approach the law courts, giving due notice to the Engineer. Whether the claim is referred to the Engineer or the law courts, as the case may be, the contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences. The reference of any dispute or difference to the engineer or law courts may proceed not withstanding that the works shall then be or be

alleged to be complete, provided always that the obligations of the Engineer and the contractor shall not be altered by reason of the said dispute or difference being referred to the engineer or law courts during the progress of the works.

Neither party is entitled to bring a claim to resolution of disputes if the dispute or differences are not notified in writing within thirty (30) days after expiration of the maintenance period."

(emphasis supplied)

13. Clause 67 of the contract, which is subject matter of consideration in the appeal arising out of SLP(C) No.12553/2006, reads thus:

"SETTLEMENT OF DISPUTES

67) If any dispute or difference of any kind whatsoever shall arise between the Engineer and the Contractor in connection with, or arising out of the Contract, or the execution of works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days from the date of being requested by the Contractor to do so, give written notice of his decision of the Contractor.

Subject to other form of settlement hereafter provided, such decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor. The said decision shall forthwith be given effect to, and the Contractor shall proceed with the execution of the works with all due diligence. In case the decision of the Engineer is not acceptable to the Contractor, he may approach the law Courts at Bangalore for settlement of dispute after giving due written notice in this regard to the Engineer within a period of ninety days from the date of receipt of the written notice of the decision of the Engineer. If the Engineer has given written notice of his decision to the Contractor and no written notice to approach the law courts has been communicated to him by the Contractor within a period of ninety days from receipt of such notice, the said decision shall be final and binding upon the contractor. If the Engineer shall fail to give notice of his decision within a period of ninety days from the receipt of the Contractor's request in writing for settlement of any dispute of difference as aforesaid, the

Contractor may within ninety days after the expiration of the first named period of ninety days approach the law Courts at Bangalore, giving due notice to the Engineer. However the claim is referred to the Engineer or to the law Courts, as the case may be, the Contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences. The reference of any dispute or difference to the Engineer or law Courts may proceed not withstanding that the works shall then be or be alleged to be complete, provided always that the obligations of the Engineer and the Contractor shall not be altered by reason of the said dispute or difference being referred to the Engineer or law Courts during the progress of the works."

(emphasis supplied)

14. In Mysore Construction Company v. Karnataka Power Corporation Limited and others (supra), the learned Designated Judge referred to the passage from Russell on Arbitration (19th Edition, page 59), the judgments of this Court in K. K. Modi v. K. N. Modi and others (supra), Chief Conservator of Forests, Rewa v. Ratan Singh Hans AIR1967 SC 166; Smt. Rukmanibai Gupta v. the Collector, Jabalpur (supra); State of Uttar Pradesh v. Tipper Chand (1980) 2 SCC 341; State of Orissa v. Damodar Das (1996) 2 SCC 216; Bharat Bhushan Bansal v. Uttar Pradesh Small Industries Corporation Limited, Kanpur (1999) 2 SCC 166 and observed:

"The above decisions make it clear that an agreement or a clause in an agreement can be construed as an arbitration agreement, only if,

(i) it provides for or contemplates reference of disputes or difference by either party to a private forum (other than a Court or Tribunal) or decision;

(ii) it provides either expressly or impliedly, for an enquiry by the private forum giving due opportunity to both parties to put forth their cases; and

(iii) it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both would abide by such decision.

Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious enquiry, or for a decision which is final and binding on parties to the dispute, there is no arbitration agreement."

The learned Designated Judge then analysed Clause 29 (old Clause 67) and recorded his observations in the following words:

"(a) The heading of the clause is 'settlement of disputes'. There is no reference to either 'arbitration' or 'Arbitrator'.

(b) Clause (a) provides that if any dispute or difference of any kind whatsoever to arise between the Executive Engineer/Superintending Engineer and the Contractor, regarding the matters mentioned therein, the dispute shall in the first place be referred to Chief Engineer, who has jurisdiction over the work specified in the contract. Thus the reference to the Chief Engineer is only the first phase of the process of settlement of disputes and not the final phase of the settlement of disputes. This is evident from the provision that when a dispute arises, it should in the first place, be referred to the Chief Engineer for decision.

(c) The reference is to a person, who has jurisdiction over the contract work and not to an independent Authority nor to an officer of the Corporation, who has no connection or control over the work. In other words, the decision of Chief Engineer is a decision by a person who has overall supervision and charge of the execution of the work. This gives an indication that the decision of the Chief Engineer is not intended to be an adjudication of the rights of the parties to the dispute, but intended to be a decision of one party in regard to the claim of the other party, to enable the other party to seek relief in a Court of law, if he is not satisfied with the decision.

(d) Sub-clause (b) provides that subject to other form of settlement provided in the ensuing sub-clause, the Chief Engineer's decision in respect of every dispute or difference so referred, shall be final and binding upon the Contractor. This clause makes it clear that the final remedy of the Contractor is to approach the law Court for decision on the dispute. It is also significant that the decision given by the Chief Engineer is made final and binding upon the Contractor (subject to other remedies specified) and not KPC. Any decision, which is made binding only on one party and not on both the parties, cannot be an adjudicatory decision. The very principle of adjudication of a dispute is that it is binding on both the parties.

(e) Clause (c) provides that if the Contractor is not satisfied with the decision of the Chief Engineer, he can approach the law Court at Karwar for

settlement of the dispute The clause requires the Contractor to approach the law Court for settlement of disputes. If as contended by the petitioner, the disputes are to be settled by way of arbitration by the Chief Engineer, acting as Arbitrator, then the question of one of the parties being permitted to approach the law Courts for settlement of the disputes does not arise. If the Chief Engineer is the Arbitrator and his decision is an award, then a party can approach the Civil Court only for setting aside the award and not for settlement of the disputes. This provision makes it clear that the decision of the Chief Engineer is not intended to be a decision by way of adjudication of the disputes/differences between the parties by way of arbitration but is intended to be merely a decision of the party (employer) which, when intimated to the other side, gives rise to a cause of action to the other party (Contractor) to approach the Civil Court for adjudication of its dispute/claim.

(f) Similarly, sub-clause (d) which provides that if the Chief Engineer does not give his decision within a particular period, the Contractor can approach the Civil Court for settlement of the dispute, again demonstrates that no finality is intended to be attached to the decision of the Chief Engineer and the final adjudication should be by the Civil Court and not by the Chief Engineer.

The scheme of Clause 29 (or old Clause 67) therefore is, whenever the Contractor has a claim which is not settled by the Executive Engineer or Superintending Engineer, he has to make the claim before the Chief Engineer. If the Chief Engineer examines the matter and gives his decision which is not acceptable to the Contractor, or if the Chief Engineer does not give his decision within the time specified, the Contractor has to approach the Civil Court, by filing a civil suit and get his disputes/claims adjudicated, on merits. Use of words 'to approach the Civil Court for settlement of disputes' makes it clear that final adjudicating authority in the case of a dispute is the Civil Court and not the Chief Engineer. Thus, the Intention of the parties is not to refer any dispute for adjudication by way of arbitration but to get adjudicated the dispute only through the normal procedure of approaching law Courts. The said clause does not also contemplate or require the Chief Engineer to hold any enquiry or hear the parties before deciding the matter. On the other hand, the clause merely requires the Chief Engineer to consider the claim of the Contractor and give his decision thereon. Such decision being on behalf of KPC, the Contractor can either accept it or approach the Civil Court for adjudication. Thus the petitioner has

failed to make out two of the three ingredients -- requirement of enquiry by the named Authority and requirement of finality by a binding decision."

15. The distinction between an expert determination and arbitration has been spelt out in Russell on Arbitration, 21st Edn., in the following words:

> "Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive…. Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; …. An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion...."

A clause substantially similar to the clauses referred to hereinabove was interpreted by a three Judge Bench in State of U.P v. Tipper Chand (supra) and it was held that the same cannot be construed as an arbitration clause. Paragraphs 2 and 3 of the judgment which contain the reasons for the aforesaid conclusion are reproduced below:

> "2. The suit out of which this appeal has arisen was filed by the respondent before us for recovery of Rs. 2000 on account of dues recoverable from the Irrigation Department of the petitioner State for work done by the plaintiff in pursuance of an agreement, clause 22 of which runs thus:

"Except where otherwise specified in the contract the decision of the Superintending Engineer 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, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing 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 of the contract by the contractor, shall also be final, conclusive and binding on the contractor."

3. After perusing the contents of the said clause and hearing learned Counsel for the parties we find ourselves in complete agreement with the view taken by the High Court. Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time."

16. In State of Maharashtra v. M/s. Ranjeet Construction (Civil Appeal No.4700 of 1985), a two Judge Bench of this Court interpreted Clause 30 of the agreement entered into between the parties, which is almost identical to the clauses under consideration, relied upon the judgment in State of U.P. v. Tipper Chand (supra) and held that Clause 30 cannot be relied upon for seeking a reference to an Arbitrator of any dispute arising under the contract.

17. In State of Orissa v. Damodar Das (supra), a three Judge Bench interpreted Clause 21 of the contract entered into between the appellant and the respondent for construction of sump and pump chamber etc. for pipes W/S to Village Kentile. The respondent abandoned the work before completion of the project and accepted payment of the fourth running bill. Subsequently, he raised dispute and sent communication to the Chief Engineer, Public Health, Orissa for making a reference to an Arbitrator. The Subordinate Judge, Bhubaneswar allowed the application filed by the respondent under Section 8 of the 1940 Act and the order passed by him was upheld by the High Court. This Court referred to Clause 25 of the agreement, relied upon the judgment in State of U.P. v. Tipper Chand (supra) and held that the said clause cannot be interpreted as providing resolution of dispute by

an Arbitrator. Paragraphs 9 and 10 of the judgment, which contain discussion on the subject, are extracted below:

> "9. The question, therefore, is whether there is any arbitration agreement for the resolution of the disputes. The agreement reads thus:
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> "25. Decision of Public Health Engineer to be final.— Except where otherwise specified in this contract, the decision of the Public Health Engineer 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; 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 in any way arising out of, or relating to, the contract, 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 the sooner determination thereof of the contract."
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> 10. Section 2(a) of the Act defines "arbitration agreement" to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". Indisputably, there is no recital in the above clause of the contract to refer any dispute or difference present or future to arbitration. The learned counsel for the respondent sought to contend from the marginal note, viz., "the decision of Public Health Engineer to be final" and any other the words "claim, right, matter or thing, whatsoever in any way arising out of the contract, 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 the sooner determination thereof of the contract" and contended that this clause is wide enough to encompass within its ambit, any disputes or differences arising in the aforesaid execution of the contract or any question or claim or right arising under the contract during the progress of the work or after the completion or sooner determination thereof for reference to an arbitration. The High Court, therefore, was right in its conclusion that the aforesaid clause gives right to arbitration to the respondent for resolution of the dispute/claims raised by the respondent. In support thereof he relied on Ram Lal Jagan Nath v. Punjab State through Collector AIR 1966 Punj 436. It is further contended that for the decision of

the Public Health Engineer to be final, the contractor must be given an opportunity to submit his case to be heard either in person or through counsel and a decision thereon should be given. It envisages by implication existence of a dispute between the contractor and the Department. In other words, the parties construed that the Public Health Engineer should be the sole arbitrator. When the claim was made in referring the dispute to him, it was not referred to the court. The respondent is entitled to avail of the remedy under Sections 8 and 20 of the Act. We find it difficult to give acceptance to the contention. A reading of the above clause in the contract as a conjoint whole, would give us an indication that during the progress of the work or after the completion or the sooner determination thereof of the contract, the Public Health Engineer has been empowered to decide all questions relating to the meaning of the specifications, drawings, instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to, the contract drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works or the execution or failure to execute the same has been entrusted to the Public Health Engineer and his decision shall be final. In other words, he is nominated only to decide the questions arising in the quality of the work or any other matters enumerated hereinbefore and his decision shall be final and bind the contractor. A clause in the contract cannot be split into two parts so as to consider one part to give rise to difference or dispute and another part relating to execution of work, its workmanship etc. It is settled now that a clause in the contract must be read as a whole. If the construction suggested by the respondent is given effect then the decision of the Public Health Engineer would become final and it is not even necessary to have it made rule of the court under the Arbitration Act. It would be hazardous to the claim of a contractor to give such instruction and give power to the Public Health Engineer to make any dispute final and binding on the contractor. A careful reading of the clause in the contract would give us an indication that the Public Health Engineer is empowered to decide all the questions enumerated therein other than any disputes or differences that have arisen between the contractor and the Government. But for clause 25, there is no other contract to refer any dispute or difference to an arbitrator named or otherwise."
(emphasis supplied)

18. In K.K. Modi v. K.N. Modi (supra), this Court interpreted Clause 9 of the Memorandum of Understanding signed by two groups of Modi family. Group 'A'

consisted of Kedar Nath Modi (younger brother of Seth Gujjar Mal Modi and his three sons) and Group 'B' consisted of five sons of Seth Gujjar Mal Modi. To resolve the disputes and differences between two groups, the financial institutions, which had lent money, got involved. Ultimately, a Memorandum of Understanding was signed by the parties on 24.1.1989, Clause 9 of which reads as under:

> "Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."

> The Chairman, Industrial Finance Corporation of India (IFCI) formed a committee of experts to assist him in deciding various questions. The committee of experts and the Chairman held discussion with both the groups. On 8.12.1995, the Chairman, IFCI gave his detailed report / decision. In his covering letter, the Chairman indicated that the Memorandum of Understanding had been substantially implemented during 1989 to 1995 and with his decisions on the disputes / clarifications given by him, it will be possible to implement the remaining part. The report of the Chairman was neither filed in the competent Court as an award nor any application was submitted for making the report a rule or decree of the Court. However, the Chairman issued series of directions for implementing the report. On 18.5.1996, the appellants filed a petition under Section 33 of the 1940 Act in the Delhi High Court challenging report dated 8.12.1995 by asserting that it was an award in arbitration proceedings. The opposite parties filed civil suit in the High Court to challenge the report of the Chairman.

> One of the questions formulated by this Court was whether Clause 9 of the Memorandum of Understanding constituted an Arbitration Agreement and whether the decision of the Chairman, IFCI constituted an award. The two Judge Bench first culled out the following attributes of an Arbitration Agreement:

> "(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

> (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or

from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."

The Court then referred to several precedents including English cases and held:

"In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. The valuation is to be done by M/s S.B. Billimoria & Co. Three companies which have to be divided between the two groups are to be divided in accordance with a scheme to be prepared by Bansi S. Mehta & Co. In the implementation of the Memorandum of Understanding which is to be done in consultation with the financial institutions, any disputes or clarifications relating to implementation are to be referred to the Chairman, IFCI or his nominees whose decision will be final and binding. The purport

of clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. This clause does not contemplate any judicial determination by the Chairman of the IFCI. He is entitled to nominate another person for deciding any question. His decision has been made final and binding. Thus, clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for a proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated. The decision of the Chairman, IFCI is to be binding on the parties. Moreover, difficulties and disputes in implementation may not be between the parties to the Memorandum of Understanding. It is possible that the valuers nominated in the Memorandum of Understanding or the firm entrusted with the responsibility of splitting some of the companies may require some clarifications or may find difficulties in doing the work. They can also resort to clause 9. Looking to the scheme of the Memorandum of Understanding and the purpose behind clause 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with the valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so."

(emphasis supplied)

19. In Bharat Bhushan Bansal v. U.P. Small Industries Corporation Limited, Kanpur (supra), a two Judge Bench interpreted Clauses 23 and 24 of the agreement entered into between the parties for execution of work of construction of a factory and allied buildings of the respondent at India Complex, Rai Bareli. Those clauses were as under:

"Decision of the Executive Engineer of the UPSIC to be final on certain matters

23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification,

design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders 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 thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

Decision of the MD of the UPSIC on all other matters shall be final

24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein."

It was argued on behalf of the appellant that Clause 24 should be construed as an arbitration clause because the decision of the Managing Director was binding on both the parties. The two Judge Bench analysed Clauses 23 and 24 of the agreement, referred to the judgment in K.K. Modi v. K.N. Modi (supra), State of U.P. v. Tipper Chand (supra), State of Orissa v. Damodar Das (supra) and observed:

"In the present case, the Managing Director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In para 18.067 of Vol. 2 of Hudson on Building and Engineering Contracts. Illustration (8) deals with the case where, by the terms of a contract, it was provided that the engineer

"shall be the exclusive judge upon all matters relating to the construction, incidents, and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the

time being, given under his hand, shall be binding and conclusive on both parties."

It was held that this clause was not an arbitration clause and that the duties of the Engineer were administrative and not judicial.

Since clause 24 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration Act, 1940 was misconceived. The appeal is, therefore, dismissed though for reasons somewhat different from the reasons given by the High Court. there will, however, be no order as to costs."

20. In Civil Appeal No.3680/2005 - Vishnu (dead) by L.Rs. v. State of Maharashtra and others decided on 4.10.2013, this Court considered the question whether Clause 30 of B-1 Agreements entered into between the Government of Maharashtra and the appellant is in the nature of an arbitration clause. That clause was substantially similar to the clauses being considered in these cases. After noticing precedents on the subject, the Court observed:

"In terms of Clause 29 of B-1 Agreement, the Superintending Engineer of the Circle was invested with the authority to approve all works to be executed under the contract. In other words, the Superintending Engineer was to supervise execution of all works. The power conferred upon him to take decision on the matters enumerated in Clause 30 did not involve adjudication of any dispute or lis between the State Government and the contractor. It would have been extremely anomalous to appoint him as Arbitrator to decide any dispute or difference between the parties and pass an award. How could he pass an award on any of the issues already decided by him under Clause 30? Suppose, he was to decline approval to the designs, drawings etc. or was to object to the quality of materials etc. and the contractor had a grievance against his decision, the task of deciding the dispute could not have been assigned to the Superintending Engineer. He could not be expected to make adjudication with an un-biased mind. Even if he may not be actually biased, the contractor will always have a lurking apprehension that his decision will not be free from bias. Therefore, there is an inherent danger in treating the Superintending Engineer as an Arbitrator. This facet of the problem was highlighted in the judgment of the two Judge Bench in Bihar State Mineral Development Corporation and another v. Encon Builders (I)(P) Limited (2003) 7 SCC 418. In that case, the agreement entered into between the parties contained a clause that any dispute arising

out of the agreement shall be referred to the Managing Director of the Corporation and his decision shall be final and binding on both the parties. After noticing several precedents, the two Judge Bench observed:

"There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well-settled principle of law that a person cannot be a judge of his own cause. It is further well settled that justice should not only be done but manifestly seen to be done.

Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.

As the acts of bias on the part of the second appellant arose during execution of the agreement, the question as to whether the respondent herein entered into the agreement with his eyes wide open or not takes a back seat. An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation.

It will bear repetition to state that the action of the second appellant itself was in question and, thus, indisputably, he could not have adjudicated thereupon in terms of the principle that nobody can be a judge of his own cause." "

21. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. The Chief Engineer or the Designated Officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the

parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a Court of Law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate Court. The use of the expression 'in the first place' unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy. Therefore, Clause 29 which is subject matter of consideration in most of the appeals and similar clauses cannot be treated as an Arbitration Clause.

22. As a corollary to the above, we hold that the judgment of the Designated Judge in Mysore Construction Company v. Karnataka Power Corporation Ltd. (supra) lays down the correct law.

23. Before parting with the case, we may notice the judgments relied upon by the learned counsel for the contractors and find out whether the proposition laid down therein supports their argument that Clause 29 and other similar clauses in the agreements entered into between the parties should be treated as arbitration clause.

24. The facts of Mallikarjun v. Gulbarga University case (2004) 1 SCC 372 were that the respondent-University had accepted the tender submitted by the appellant for construction of an indoor stadium. In pursuance of the work order issued by the competent authority, the appellant completed the construction. Thereafter, he invoked the arbitration clause for resolution of the disputes which arose from the execution of the project. Superintending Engineer, PWD, Gulbarga Circle was entrusted with the task of deciding the disputes. The parties filed their respective claims before the Superintending Engineer. He considered the same and passed an award. The appellant filed execution petition in the Court of Principal Civil Judge (Senior Division), Gulbarga. The respondent filed an objection petition under Section 47 of the CPC. The Executing Court rejected the objection. The University challenged the decision of the Executing Court and pleaded that the agreement on the basis of which the dispute was referred to the Superintending Engineer was not an arbitration agreement and, as such, award made by him cannot be treated as one made under the 1940 Act. The High Court accepted the plea of the University and set aside the order of the trial Court. Clause 30 of the agreement which came up for interpretation by this Court was as under:

> "The decision of the Superintending Engineer of Gulbarga 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 material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders or those 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 in case of dispute arising between the contractor and Gulbarga University."

After analyzing the aforesaid clause and making a reference to essential elements of arbitration agreement enumerated inBihar State Mineral Development Corporation v. Encon Builders (I)(P) Limited (supra), a three Judge Bench held:

"Applying the aforesaid principle to the present case, clause 30 requires the Superintending Engineer, Gulbarga Circle, Gulbarga, to give his decision on any dispute that may arise out of the contract. Further, we also find that the agreement postulates present or future differences in connection with some contemplated affairs inasmuch as there also was an agreement between the parties to settle such difference by a private tribunal, namely, the Superintending Engineer, Gulbarga Circle, Gulbarga. It was also agreed between the parties that they would be bound by the decision of the Tribunal. The parties were also ad idem.

In the aforesaid view of the matter, it must be held that the agreement did contain an arbitration clause."

The Bench distinguished the judgment in Bharat Bhushan Bansal's case by making the following observations:

"A bare comparison of clause 30 of the contract agreement involved in the present matter and clauses 23 and 24 involved in Bharat Bhushan Bansal case would show that they are not identical. Whereas clause 30 of the agreement in question provides for resolution of the dispute arising out of the contract by persons named therein; in terms of clause 24, there was no question of decision by a named person in the dispute raised by the parties to the agreement. The matters which are specified under clauses 23 and 24 in Bharat Bhushan Bansal case were necessarily not required to arise out of the contract, but merely claims arising during performance of the contract.

Clause 30 of the agreement in the present case did provide for resolution of the dispute arising out of the contract by the Superintending Engineer, Gulbarga Circle, Gulbarga. For that reason, the case relied upon by the learned counsel for the respondent is distinguishable.

Once clause 30 is constituted to be a valid arbitration agreement, it would necessarily follow that the decision of the arbitrator named therein would be rendered only upon allowing the parties to adduce evidence in support of their respective claims and counter-claims as also upon hearing the parties to the dispute. For the purpose of constituting the valid arbitration agreement, it is not necessary that the conditions as regards adduction of evidence by the parties or giving an opportunity of hearing to them must specifically be mentioned therein. Such conditions, it is trite, are implicit in the decision-making process in the arbitration proceedings. Compliance with the principles of natural justice inheres in an arbitration process. They, irrespective of the fact as to whether recorded specifically in the arbitration agreement or not are required to be followed. Once the principles of natural justice are not complied with, the award made by the arbitrator would be rendered invalid. We, therefore, are of the opinion that the arbitration clause does not necessitate spelling out of a duty on the part of the arbitrator to hear both parties before deciding the question before him. The expression "decision" subsumes adjudication of the dispute. Here in the instant case, it will bear repetition to state, that the disputes between the parties arose out of a contract and in relation to matters specified therein and, thus, were required to be decided and such decisions are not only final and binding on the parties, but they are conclusive which clearly spells out the finality of such decisions as also their binding nature.

A clause which is inserted in a contract agreement for the purpose of prevention of dispute will not be an arbitration agreement. Such a provision has been made in the agreement itself by conferring power upon the Engineer-in-Charge to take a decision thereupon in relation to the matters envisaged under clauses 31 and 32 of the said agreement. Clauses 31 and 32 of the said agreement provide for a decision of the Engineer-in- Charge in relation to the matters specified therein. The jurisdiction of the Engineer-in-Charge in relation to such matters are limited and they cannot be equated with an arbitration agreement. Despite such clauses meant for prevention of dispute arising out of a contract, significantly, clause 30 has been inserted in the contract agreement by the parties.

The Superintending Engineer, Gulbarga Circle, Gulbarga, is an officer of the Public Works Department in the Government of Karnataka. He is not an officer of the University. He did not have any authority or jurisdiction under the agreement or otherwise either to supervise the construction works or issue any direction(s) upon the contractor in relation to the contract job. He might be an ex officio member of the Building Committee, but thereby or by reason thereof, he could not have been given nor in fact had been given an authority to supervise the contract job or for that matter issue any direction upon the contractor as regards performance of the contract."

(emphasis supplied)

25. In Punjab State v. Dina Nath (supra), a two Judge Bench was called upon to consider whether clause 4 of work order No.114 dated 16.5.1985 constituted an arbitration agreement. The clause in question was as under:

"Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1, Chandigarh for orders and his decision will be final and acceptable/binding on both the parties."

After noticing the judgment in K.K. Modi v. K.N. Modi, the Court observed: "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 specific 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.

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 our, or enforced and which is a conclusion of a body (in this case Superintending engineer, Hydel Circle No.1, Chandigarh). Then again the conclusion and decision of the Superintending Engineer will be final and binding on both the 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 a binding arbitration agreement."

The Bench distinguished the judgment in State of Orissa v. Damodar Das (supra) by making the following observations:

"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."

26. Krishna Bhagya Jala Nigam Ltd. v. G.Harishchandra Reddy (supra) was decided on the peculiar facts of that case. The contract which was subject matter of interpretation in that case contained Clause 29. When the respondent raised disputes and called upon the Chief Engineer to act as an Arbitrator, the latter refused to do so. The Designated Judge allowed CMP No.26/1999 filed under Section 11 of the 1996 Act and directed the Chief Engineer to act as an Arbitrator. Thereafter, both the parties filed their respective statements before the Arbitrator and produced evidence. The Arbitrator passed award dated 25.6.2000. The appellant – Krishna Bhagya Jala Nigam Ltd. filed a petition under Section 34(2)(v) of the 1996 Act. The Civil Court confirmed the award of the Arbitrator. Appeal filed against the judgment of the Civil Court was dismissed by the High Court. Before this Court, an argument was raised that Clause 29 of the contract was not an arbitration clause. While rejecting the argument, the two Judge Bench observed:

"We do not find any merit in the above arguments. The plea of "no arbitration clause" was not raised in the written statement filed by Jala Nigam before the arbitrator. The said plea was not advanced before the civil court in Arbitration Case No. 1 of 2001. On the contrary, both the courts below on facts have found that Jala Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jala Nigam had participated in the arbitration proceedings. It submitted itself to the authority of the arbitrator. It gave consent to the appointment of the Chief Engineer as an arbitrator. It filed its written statements to the additional claims made by the contractor. The Executive Engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the Arbitral Tribunal. He did not call upon the Arbitral Tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the Arbitral Tribunal. It also filed written arguments. It did not challenge the order of the High Court dated 10-9-1999 passed in CMP No. 26 of 1999. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now be allowed to contend that clause 29 of the contract did not constitute an arbitration agreement."

27. One of the questions which arose for consideration in Karnataka State Road Transport Corporation and another v. M. Keshava Raju (supra) was whether the appointment of Arbitrator under Section 11 of the 1996 Act was proper. The facts

of that case show that on an application filed by the respondent under Section 11 of the 1996 Act, the Designated Judge appointed an Arbitrator. After hearing the parties, the Arbitrator passed award dated 15.10.1998 whereby he allowed some claims of the respondent. The objections filed by the appellant under Section 34 of the 1996 Act were rejected by VI Additional City Civil Judge, Bangalore. In the appeal filed against the judgment of the trial Court, the High Court formulated the following points:

> "(1) Whether the appellant can be permitted to raise the ground regarding the alleged want of jurisdiction in this Court to refer the dispute between the parties to an Arbitrator under Section 11 of the Act, for the first time, in this appeal.
>
> (2) Whether the ground regarding the legality and justification on the part of the Arbitrator to Award a sum of Rs. 2,85,000 towards reimbursement of overhead charges and another sum of Rs. 2,85,000 towards compensating the loss of profits was raised before the Court below, and if it was not raised, whether such plea can be allowed to be raised in this appeal for the first time and if the above plea was in fact raised before the Court below, whether the Arbitrator is justified in awarding a sum of Rs. 2,85,000 towards reimbursement of overhead charges and another sum of Rs. 2,85,000 towards compensating loss of profits having regard to Clause 15(a) of the agreement."

The Division Bench referred to Section 16 and held:

> "In our considered opinion, the above plea cannot be entertained for more than one reason. Firstly, one of the objects in enacting the Act is to have early completion of arbitration proceedings minimising the supervisory role of Courts in arbitral process. Sections 4, 5 and 16 of the Act have been enacted to give effect to that object. Secondly, even the method of arbitration as a dispute resolution mechanism and the procedure envisaged for that are intended to reach the finality to resolve the dispute between the parties as quickly as possible. Therefore, it is imperative that the party raising jurisdiction point, should raise such plea at the earliest, that is to say, at the threshold of the proceeding. If that is not insisted, it is trite, the very object in enacting the Act, on the basis of the 'UNCITRAL Modern Law', would be defeated. The jurisdiction plea now raised for the first time in the Memorandum of Appeal was not raised either directly or by necessary implication before this Court in C.M.P. No. 4/1996 or before the Arbitrator

or before the Court below. The appellant having acquiesced in the jurisdiction of the Arbitral Tribunal without any demur and protest, having participated in the proceedings and having suffered an award cannot now turn round and raise the plea that the orders of this Court in C.M.P. No. 4 of 1996, the award of the Arbitrator and the judgment of the Civil Court dated 20-6-2000 in Arbitration Suit No. 6 of 1998 are nullity.

Thirdly, the appellant should be deemed to have waived his right to object to the jurisdiction of the Arbitrator to pass the impugned award in terms of the provisions of Section 4 of the Act. Section 4 reads as follows :-

"(4) Waiver of right to object A party who knows that

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, without that period of time, shall be deemed to have waived his right to so object."

17. Section 4 narrates the circumstances in which the party, who knowingly fails to object the non-compliance of any non-mandatory provisions of Part-I or any requirement under the arbitration agreement by the other party, is deemed to have waived his right to object. This section is based on general principles such as "estoppel" or "venire contra factum proprium". It is intended to help the arbitral process function efficiently and in good faith. If there is non-compliance of any non-mandatory provision of Part I or of any requirement of the arbitration agreement by a party to an arbitration agreement of which the other party to the agreement though has the knowledge of such non-compliance but does not object without undue delay, or if a time limit is provided for stating that objection and no objection is taken within that period of time, such a party later on can neither raise objection about that non-compliance of any provision of Part I nor any requirement of the arbitration agreement since such party shall be deemed to have waived its objection. Though, in order to apply the doctrine of waiver by invoking Section 4, the first condition is that the non-compliance must be of non-mandatory provision of Part I or of any requirement under the arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, sub-

sections (2) and (3) of Section 16 are one of such mandatory provisions. Section 16 (2) of the Act provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 16 (3) of the Act provides that a plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."

28. Thus, none of the judgments relied upon by learned counsel for the contractors is of any help to their cause.

29. In the result, Civil Appeal Nos. 1586, 1587, 1588, 4187, 5496, 6323, 6327 and 6328 of 2004; Civil Appeal Nos. 558-560 of 2006; Civil Appeals arising out of SLP(C) Nos. 16117, 17147, 24655 and 26073 of 2004; Civil Appeals arising out of SLP(C) Nos. 5951, 12552 and 12553 of 2006, Civil Appeal arising out of SLP(C) No. 8597 of 2009 and Civil Appeal arising out of SLP(C) No. 13528 of 2012 are dismissed. However, liberty is given to the appellants to avail appropriate legal remedy for recovery of the amount, if any, due from the respondents.

30. Civil Appeals arising out of SLP(C) Nos. 28087-28088, 28089, 29227- 29230 and 31975 of 2011 and Civil Appeal No.1374 of 2013 are allowed. The orders passed by the Designated Judge, which are subject matter of challenge in the five appeals are set aside. It is, however, made clear that the respondents shall be free to avail appropriate legal remedies for recovery of the amount, if any, payable to them in terms of their respective agreements.