IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1632 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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BABASAHEB AMBEDKAR OPEN UNIVERSITY
Versus
ABHINAV KNOWLEDGE SERVICES PRIVATE LIMITED

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Appearance:
MR KAMAL B TRIVEDI, SR. ADVOCATE with MR MITUL K. SHELAT with MS DISHA N NANAVATY(2957) for the Appellant(s) No. 1
MR NIRAV C THAKKAR(2206) for the Defendant(s) No. 1

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CORAM:HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

Date : 12/07/2024

CAV JUDGMENT
(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

1. The instant appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (in short as "the Act' 1996") is directed against the judgement and order dated 01.04.2019 passed by the Judge, Commercial Court, in the proceedings under Section 34 of the Act' 1996 wherein the order dated 03.08.2018 passed by the learned Arbitrator in arbitration proceeding between the parties herein, had been challenged.

2. The order impugned dated 03.08.2018 had been passed by the learned Arbitrator under Section 16 of the Act' 1996 wherein the competence of the Arbitrator to enter into the reference to proceed for arbitration was challenged on the ground that the claim of the respondent-claimant, viz. Abhinav Knowledge Services Private Ltd. was barred by the principles of *res judicata* as well as under the provisions of Order 2 Rule 2 CPC.

3. The said application Exhibit 7 was rejected by the learned Arbitrator holding that the issues raised in the arbitral proceedings before it were not subject matter of inquiry in the earlier proceedings. The counter claim filed by the respondent-claimant was not considered on merits in the previous proceedings, inasmuch as, it was not entertained in view of the limited reference made to the learned Arbitrator.

4. The order of rejection of the preliminary objection filed by

the Appellant herein had been subjected to challenge in the proceedings under Section 34 of the Act' 1996 on the premise that the order of rejection of the application under Section 16 of the Act' 1996 being an interim award, is amenable to Section 34 of the Act' 1996. It was argued that the dispute between the parties had been settled with the award dated 02.07.2014 rendered in previous proceedings between the parties pertaining to the same contract. The second proceeding in the same matter is not permissible.

5. The learned Judge, Commercial Court, noticing the contentions of the learned counsels for the parties, had recorded that in view of the judgment of the Apex Court in **SBP & Co. v. Patel Engineering Limited [(2005) 8 SCC 618]**, the order passed under Section 16 is amenable under Section 34 of the Act' 1996, at the time of challenging the final award. In the present case, no final award had been passed. The application challenging the order dated 03.08.2018 is premature and not entertainable.

6. The main issue before us is about the maintainability of the application under Section 34 of the Act' 1996 challenging the order passed under Section 16 of the said Act. The consequential question would be as to whether the learned Commercial Court has erred in holding that the appropriate stage to challenge the order passed under Section 16 pertaining to the jurisdiction of arbitral tribunal would be after passing of the final award by invoking the provisions of

Section 34 of the Act' 1996.

7. We may note that, in the instant case, the jurisdiction of the learned Arbitrator was challenged under Section 16 of the Act' 1996 on the ground that pertaining to the agreement dated 24.10.2011, executed between the parties, the matter was earlier referred to the learned Arbitrator by mutual consent of the parties. The learned Arbitrator made an Award dated 02.07.2014 and the said Award has been implemented. The payment made to the respondent-claimant under the Award had been received by it without demur. No further dispute pertaining to the agreement dated 24.10.2011 would, thus, be maintainable. It was urged that the respondent-claimant ought to have raised all disputes at the relevant point of time in one proceeding before the Arbitrator. Having not done so, the dispute now raised was barred by the principles of *constructive res judicata* and principles of multiplicity of litigation under Order 2 Rule 2 CPC. The respondent-claimant did not raise any dispute pertaining to termination of the agreement and agreed to the said situation. No cause of action, thus, survives for fresh proceedings, inasmuch as, all rights and obligations under the aforesaid agreement had been discharged. The respondent-claimant has no surviving claim against the appellant University.

8. The learned Arbitrator has rejected the preliminary objection raised by the appellant University, noticing that there is nothing on record to even remotely suggest that while

agreeing for termination of agreement under the letter dated 19.06.2014, the respondent-claimant had foregone any claim arising out of the said agreement. The conclusion is that the respondent-claimant is not barred from raising the dispute, inasmuch as, the issues raised before the Arbitrator were not subject matter of inquiry in the earlier proceeding.

9. It was argued by Mr. Kamal B. Trivedi, learned Senior Advocate appearing for the appellant that the dispute arose between the parties as a result of Public Private Partnership Agreement (PPP Agreement) which was executed between the appellant University and the respondent Company wherein the respondent Company had agreed for providing Globally Competitive Information and Communication Technology (ICT) enabled educational courses to be offered to the students within the State of Gujarat through a centralised establishment and run by the appellant University. As per clause 9 of the Agreement, providing for "shared arrangement", the respondent Company was to be paid at the rate of 35% of basic fee of Rs. 4,000/- per student, i.e. Rs. 1,400/- per student as under:-

Sr. No.	Particulars	Percentage
1.	University Fees	25%
2.	University Fee for payment to Centre	40%
3.	AKS i.e. Respondent Company	35%

10. The appellant University paid the share of fees agreed for the services rendered by the respondent Company under the PPP Agreement for the period of 24.10.2011 till 15.02.2014. The submission is that the said Agreement was discharged by mutual consent on account of the objections raised by the faculties of Computer department of the appellant University that the study material supplied by the respondent University was plagiarized.

11. On 12.03.2014, an undertaking was given by the respondent Company taking responsibility of liabilities arising in connection with usage of plagiarized study material and for meeting the financial liability, if any, resulting from the use of Microsoft material, while reserving its right to claim for ICT-U, if needed.

12. On 18.06.2014, the appellant University addressed a communication to the respondent Company terminating the PPP Agreement for the above-noted reasons. It was expressed therein that once the respondent Company accepts the discontinuance of PPP Agreement, the appellant University wished to resolve the issue of the share of fees of the respondent Company through arbitration.

13. Vide communication dated 19.06.2014, the respondent Company gave consent for discontinuance of the PPP Agreement and reference of the matter pertaining to the fee payment to the Arbitrator. A proposal was given by the

appellant University to initiate arbitration proceedings recommending the name of the Arbitrator, which was accepted by the respondent Company. The arbitration proceedings initiated on 26.06.2014 had been brought to its logical conclusion with the making of the Award dated 02.07.2014 by the sole arbitrator wherein a direction was given to the appellant University to make payment of Rs. 1,200/- per student to the respondent Company (after deduction of Rs.200/- per student) for the term of February, 2014, as against the demand of the respondent Company for full share, i.e. Rs.1,400/- per student supported by execution of an undertaking/indemnity bond against any apprehended action against the appellant University. The submission is that the aforesaid award virtually granted full claim of the respondent Company, while rejecting the counter claim of the respondent Company holding that it was not subject matter of reference.

14. Pursuant to the said Award, payment of the awarded amount, had been duly made by the appellant University which was accepted by the respondent Company without protest while submitting the requisite undertaking/indemnity bond.

15. It was urged that after two years of the aforesaid award, a legal notice dated 09.03.2016 was served upon the appellant University, as an afterthought by the respondent Company demanding the reference of the issue of its claim of Rs.7.25 crores against the appellant University towards compensation

under the heads of illegal discontinuance, unpaid services for August 2012 batch, damages for loss of business, legal and other expenses.

16. On a petition filed under Section 11 of the Act' 1996, this Court passed an order dated 07.07.2017 for appointment of Arbitrator observing that the principle of *res judicata* which would apply to arbitration proceedings, essentially being a question of fact, was required to be examined by the Arbitrator, as the said task was not envisaged at the stage of Section 11 while deciding the application seeking reference of the dispute to the Arbitrator.

17. Placing the judgment of the Apex Court in **M/s Indian Farmers Fertilizer Co. vs M/S Bhadra Products [(2018) 2 SCC 534]**, it was argued by the learned Senior Counsel for the appellant that the Apex Court has held therein that the issue of limitation decided by the arbitrator is an interim award, and being an arbitral award, can be challenged separately and independently under Section 34 of the Act. The Apex Court has observed that the plea of limitation or the plea of *res judicata* is a plea of law, which concerns the jurisdiction of the Court which tries the proceeding. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and hence an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction. The submission is that the issue of limitation framed by the Arbitrator therein having been decided

separately as a preliminary issue first, on the basis of evidence of the parties, was held to be an interim award, the challenge to which has been held maintainable under Section 34 of the Arbitration Act, 1996.

18. Reference has been made to the interim order dated 08.07.2019 passed by the Division Bench in the instant appeal wherein a prima facie opinion has been drawn about the maintainability of the application under Section 34 of the Act' 1996 holding that the order passed on the application Exhibit 7 is an interim award as defined under the Act, as it has concluded the aspect of *res judicata/constructive res judicata* finally.

19. The judgment of the Apex Court in **K.V. George vs. Secretary to Govt., Water And Power Department, Trivandrum [(1989) 4 SCC 595]** has been placed to assert on the question of maintainability of the arbitration claim being barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure, as also on the issues raised in the second claim petition before the Arbitrator, arising out of the same cause of action. The submission is that all the issues including the claim of compensation raised in the second claim petition arose out of the termination of the contract and the action of the appellant in terminating the contract has been adjudicated in the first claim petition filed before the arbitrator.

20. The principle of *res judicata* as provided in Section 11 of the

Civil Procedure Code and the provisions contained in Order 2 Rule 2 of the Code of Civil Procedure are applicable in the arbitral proceedings though the Arbitral Tribunal is not bound by the Code of Civil Procedure, inasmuch as, the principle of *res judicata* and Order 2 Rule 2 CPC are based on the principle that there shall be no multiplicity of the proceedings and there shall be finality of the proceedings.

21. With reference to Section 41 of the Arbitration Act, 1940, it has been held by the Apex Court in **K.V. George (supra)** that the principles of *res judicata* and for that matter, the principles of *constructive res judicata* apply to the arbitration proceedings.

22. Reliance has further been made to the observation of the Apex Court in **National Thermal Power Corp. Vs. Siemens Atkeingesellschaft [(2007) 4 SCC 451]** to reiterate that the plea of limitation or the plea of *res judicata* is a plea of law which concerns jurisdiction of the arbitral tribunal and any erroneous decision on the said plea would go to the root of the arbitral proceedings. Resultantly, the adjudication by the Tribunal on the plea of *res judicata*, being an interim award, the appellant was well within its right to take recourse to Section 34 of the Act' 1996. The Commercial Court has committed an illegality in rejecting the application under Section 34 by holding that the plea regarding as to whether the principle of *res judicata* or the provisions of Order 2 Rule 2 of CPC are applicable or not in the facts of the present

case, can be considered only at the time of challenging the final award.

23. Reference to the judgment of the Apex Court in **SBP & Co. (supra)** has been made to submit that Section 16 is based on the principle of *Kompetenz-Kompetenz.* As per the settled principle, the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, which means that when such issue arises before it, the Tribunal ought to decide the same. The jurisdictional issue of competence of the Tribunal to rule on its own jurisdiction goes to the root of the arbitration proceedings. With the rejection of the application raising the claim being barred by the plea of *res judicata* as well as Order 2 Rule 2 CPC, would result in the arbitral tribunal conferring jurisdiction on its own. The submission is that there is no justification to wait till the outcome of the arbitral proceeding to challenge the order of rejection of the plea of *res judicata* under Order 2 Rule 2 CPC.

24. Mr. Nirav C. Thakkar, learned advocate appearing for the respondent-claimant, in rebuttal, relies on two latest decisions of the Apex Court in **M/s Deep Industries Ltd. vs Oil And Natural Gas Corporation Ltd.[(2020 (15) SCC 706]** and **Chintels India Ltd. v. Bhayana Builders Pvt. Ltd [(2021) 4 SCC 602]** to submit that by reading of Section 16 of the Act' 1996, the Apex Court has held that where a Section 16 application is dismissed, no appeal being provided under the Act, the

challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34. It was held that where a preliminary ground of the arbitrator not having jurisdiction to continue with the proceeding is made out, an appeal lies under Section 37(2)(a) of the Act' 1996 for the reason that the termination is final in nature as it brings the arbitral proceedings to end whereas if converse is held by the Arbitrator, i.e. if the Arbitrator decides having jurisdiction, then the proceedings before the Arbitrator are to carry on and the decision on the preliminary ground is amenable to challenge under Section 34 after the award is made, inasmuch as, no appeal is provided under Section 37 (2)(a) against such orders.

25. To appreciate the submissions of the learned counsels for the parties, we find it apt to first go to the provisions of Sections 5, 16, 17, 19, 21, 29A, 34 and 37 of the Arbitration Act, 1996, which read as under :-

"**5. Extent of judicial intervention.**—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

16. Competence of arbitral tribunal to rule on its jurisdiction. —(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) 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.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

17. Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of

any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure,1908 (5 of 1908), in the same manner as if it were an order of the Court."

"19. Determination of rules of procedure.—(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in

conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

"**21. Commencement of arbitral proceedings.—**Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

"**29A. Time limit for arbitral award.—** (1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the

period so specified, extended the period: Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application: Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;

or

(b) the Court finds that—

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

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party

making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

"37. Appealable orders.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

26. The Arbitration and Conciliation Act, 1996 has been enacted to consolidate and amend the laws relating to arbitration. The United Nations Commission on International Trade Law (UNCITRAL) was adopted in 1985 on the recommendation of the General Assembly of the United Nations in view of the desirability of uniformity of law of Arbitrator, Arbitral procedures. The Statement of Objects and Reasons of the Arbitration Act, 1996 states that the Bill sought to consolidate and amend the laws relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. One of the main objects of the Bill as provided therein is to minimise the supervisory role of the Courts in the arbitral process.

27. Section 5 of the Act' 1996, which commences with a non-obstante clause restricts the intervention by judicial authority except where it is provided in Part - I of the Act' 1996. Section 16 as contained in Chapter - IV in Part- I empowers the Arbitral Tribunal to rule on its own jurisdiction, including decision on any objections with regard to existence or validity of the arbitration agreement. Sub-section (2) states that the plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the Statement of defence. Sub-section (3) states 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 is raised during the arbitral proceedings. Sub-section (5) states that where arbitral tribunal decides to reject a plea referred to in Sub-section (2) or Sub-Section (3), it shall continue with the arbitral proceedings and make an arbitral award. Section 16(6) further states that a party aggrieved by such an arbitral award may make an application for setting aside the same in accordance with Section 34.

28. It is observed by the Apex Court in **SBP & Co. (supra)** that Section 16 of the Act only makes explicit what is even otherwise implicit, viz. that the arbitral tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Section 16 is said to be the recognition of the principle of *Kompetenz* -

Kompetenz and enable a party to raise the plea of jurisdiction including a plea that the arbitral tribunal is exceeding the scope of its authority. Sub-section (2) of Section 16 clarifies that the party shall not be precluded from raising a plea of jurisdiction merely because he has appointed or participated in the appointment of arbitrator. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. It was further observed that sub-section (5) enjoins that if the arbitral tribunal overrules the objections under sub-sections (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) further provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act' 1996.

29. In **M/s Deep Industries Ltd. (supra),** the Apex Court was dealing with the preliminary objection as to the maintainability of the petition filed under Article 227 of the Constitution of India. The question was about the maintainability of the petition under Article 227 of the Constitution of India challenging the order passed by the City

Civil Court under Section 17 of the Act' 1996, however, an issue with regard to the scope of Section 16 of the Act' 1996 was considered by the Apex Court. It was noted that "serious disputes" as to jurisdiction seem to have cropped up is not the same thing as the Arbitral Tribunal lacked inherent jurisdiction in going into and deciding the Section 17 application. The Arbitral Tribunal was well within its jurisdiction in applying the law and finally issuing the stay order. The issue of infraction of the principles laid down by Section 41(e) of the Specific Relief Act in granting injunction is a mere error of law and not an error of jurisdiction, much less an error of inherent jurisdiction going to the root of the matter.

30. It was further noted that the policy of the Act' 1996 is speedy disposal of the arbitration cases. The Arbitration Act is Special Act and a self contained code dealing with the arbitration. Under the scheme of the Act, in Sections 5, 29A and 37, the time limit is not only set down for disposal of the arbitral proceedings themselves, but also for Section 34 applications by insertion of Section 34(6) by way of amendment. The most significant of all is the non-obstantive clause contained in Section 5, which restricts intervention by the judicial authority except where it is provided in Part I of the Constitution of India.

31. In **Chintels India Ltd. (supra),** the Apex Court was dealing with the question whether the High Court's order refusing to

condone the delay in filing an application under Section 34 of the Arbitration and Conciliation Act, 1996, is an appealable order under Section 37(1) (c) of the Act' 1996. While interpreting the language employed in Section 37(1) (c) "setting aside or refusing to set aside an arbitral award", the Apex Court has applied "effect doctrine" propounded in **Essar Constructions v. N.P. Rama Krishna Reddy [(2000) 6 SCC 94]**. The phrase "refusing to set aside the award" has been considered in light of the observation in **Essar Constructions (supra)** case, wherein it was noted that the outcome of the order in effect was that the prayer for setting aside the award was refused on the ground of delay.

32. The Apex Court in **Chintels India Ltd. (supra),** has relied on the reasoning in **Essar Constructions (supra)** to hold that the "effect doctrine" referred to in **Essar Constructions (supra)** is statutorily inbuilt in Section 37 of the Act' 1996 itself.

33. Referring to Section 37(1)(a) and 37(2)(a), it was observed that so far as Section 37(1)(a) is concerned, where a party has referred to arbitration under Section 8, no appeal lies. The reason being that the effect of such order is that the parties must go to arbitration. Similarly, it is left to the Arbitrator to decide the preliminary points of its competence or jurisdiction under Section 16 of the Act' 1996, which then becomes the subject matter of appeal under Section 37(2)(a) or the subject matter of grounds to set aside under Section 34 an arbitral award ultimately made depends upon whether the

preliminary points are accepted or rejected by the Arbitrator.

34. It was noted that an order refusing to refer the parties to arbitration under Section 8 may be made on a prima facie finding that no valid arbitration agreement exists, or on the ground that the original arbitration agreement, or a duly certified copy thereof is not annexed with the application under Section 8. In either case, i.e., whether the preliminary ground for moving the Court under Section is not made out, either by not annexing the original arbitration agreement or a duly certified copy or on merits, the Court finding that prima facie no valid agreement exist, an appeal lies under Section 37(1)(a).

35. Further, likewise, under Section 37(2)(a) where a preliminary ground of the arbitrator not having the jurisdiction to continue with the proceedings is made out, an appeal lies under the said provision, as such determination is final in nature as it brings the arbitral proceedings to an end. However, if the converse is held by the Arbitrator, then the proceedings before the Arbitrator is to carry on and the aforesaid decision on the preliminary ground is amenable to challenge under Section 34 after the award is made, no appeal is provided. Reference has further been made to Section 16(5) and (6) of the Arbitration Act, 1996, which clearly provides that where the arbitral tribunal takes a decision rejecting the plea on its own jurisdiction or competence or with respect to the acceptance or validity of

the Arbitration Agreement, it shall continue with the arbitral proceedings and make an award. Sub-section (6) of Section 16 further makes clear that the final arbitral award so made by the Arbitrator may be challenged by a party aggrieved in accordance with Section 34, observing that the "effect doctrine" is part and parcel of the statutory provision for appeal under Section 37 and in view of the express language of Section 37(1) (c), the arguments of the learned counsel for the respondents therein about the maintainability of appeal against under Section 37(1)(c) against the order refusing to condone the delay in filing application under Section 34 of the Act, 1996, has been rejected. The contention that the words employed in Section 37(1)(c) of setting aside or refusing to set aside the arbitral award under Section 34 has to be read in a manner that the refusal to set aside the award can only be on merits and not on some preliminary ground, which would then lead to a refusal to set aside the award, was rejected in light of the observations noted hereinabove. The question of law that an appeal under Section 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone the delay in filing an application under Section 34 of the Arbitration Act, 1996 to set aside the award, has been answered in affirmative.

36. Taking clue from the principles propounded by the Apex Court in **Chintels India Ltd. (supra),** relying on the "effect doctrine" referred to in **Essar Constructions (supra),** we may

further record that against an order passed by the Arbitral Tribunal, accepting the plea referred to in sub-section(2) or sub-section (3) of Section 16, an appeal lies to a Court authorised by law to hear appeals from the original decree of the Court passing the order as per Section 37(2)(a). No appeal has been provided in the statute against the order of rejection of the application under Section 16 raising plea of lack of jurisdiction of the Arbitral Tribunal.

37. Sub-section (5) of Section 16 is categorically providing that the Arbitral Tribunal shall continue with the arbitral proceedings to make the arbitral award, where it takes a decision to reject the plea of lack of its jurisdiction. Meaning thereby, where the arbitral tribunal rules on its competence or jurisdiction or rejects any objection with respect to existence or validity of the arbitration agreement, it shall continue with the arbitral proceeding. Sub-section (6) of Section 16 makes it further clear that any party aggrieved by the arbitral award may challenge it under Section 34.

38. The effect is that the challenge to the order passed by the Arbitral Tribunal on its competence or jurisdiction or the preliminary point as to the existence or validity of the arbitration agreement, which goes to the root of the matter, can very well be raised at the time of challenge to the final arbitral award. At the interim stage, where the Arbitral Tribunal or the Arbitrator decides that it has jurisdiction to proceed with the arbitration, no application under Section 34

can be maintained.

39. The submission of the appellant is that the order under Section 16 of the Act' 1996 is an interim award within the meaning of Section 2(1)(c) of the Act' 1996, and being subsumed with the expression "arbitral award could be challenged under Section 34 of the Act' 1996", is a result of misreading and misinterpretation of the judgment of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra).**

40. Having exhaustively read the judgment in **M/s Indian Farmers Fertilizer Co. (supra),** we may note that the Apex Court has dealt with two issues; first one is whether an award on the issue of limitation can be said to be an interim award and, second, as to whether a decision on the point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the Act' 1996. It was noted by the Apex Court that Section 2(c) and Section 31(6), except for stating that an arbitral award includes an interim award, the Act is silent and does not define what an interim award is. Section 31(6), which delineates the scope of interim arbitral awards, states that the Arbitral Tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. In the facts of the said case, it was noted that the Arbitral Tribunal had framed several issues, but thought it fit to take up the issue of limitation first, inasmuch as, the counsels appearing for both the parties submitted that the

said issue could be decided on the basis of documentary evidence alone. The issue of limitation was then decided in favour of the claimant stating that their claims had not become time barred.

41. This has resulted in filing application under Section 34 stating the aforesaid award as interim award or the "First Partial Award". The application under Section 34 was rejected by the Court stating that the aforesaid award could not be said to be an interim award and that therefore, the Court lacked jurisdiction to proceed further under Section 34 of the Act. The matter travelled to the High Court, which has concurred with the order of the competent court in rejecting the application under Section 34. The occasion for filing the appeal before the Apex Court had then arisen.

42. In this factual context of the matter, the argument of the learned counsel for the respondent therein was that the award on the issue of limitation being a ruling on the arbitral tribunal's jurisdiction would fall within Section 16 of the Act and, inasmuch as, the plea taken on the point of limitation was rejected, the drill of Section 16 must be followed. Resultantly, it is only after all other issues have been decided by the Arbitral Tribunal that such an award can be challenged under Section 34 of the Act' 1996.

43. Dealing with the above submission of the learned counsel for the respondent, the Apex Court has considered the principle

on which Section 16 has been formulated. It was noted that at one point of time, the law was that the arbitrator, being a creature of the contract, could not rule on the existence or validity of the arbitration clause contained in the contract. This, however, gave way to the Kompetenz principle which was adopted by the UNCITRAL Model Law. Section 16 of the Act' 1996 is based on UNCITRAL Model Law, which lays down that an arbitral tribunal may rule on its own jurisdiction, often stated to be *Kompetenz-Kompetenz* principle. It was further noted that the Kompetenz principle deals with the arbitral tribunal's jurisdiction in the narrow sense of ruling on objections with respect to the existence or validity of the arbitration agreement. The Court has further proceeded to examine whether in light of the language of Section 16 (1), the arbitral tribunal which is required to rule on its own jurisdiction, may embark upon an inquiry upon the issues framed by the parties to the dispute. It was, thus, observed in paragraphs '18 to 20' as under :-

> "18. It may be noticed that Section 16(1) to (4) are based on Article 16 of the UNCITRAL Model Law. The Kompetenz principle deals with the arbitral tribunal's jurisdiction in the narrow sense of ruling on objections with respect to the existence or validity of the arbitration agreement. What is important to notice in the language of Section 16(1) is the fact that the arbitral tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the arbitral tribunal may embark upon an inquiry into the issues raised by parties to the dispute.

19. Here again, the English Arbitration Act of 1996 throws some light on the problem before us. Sections 30 and 31 of the said Act read as under:

> "30 Competence of tribunal to rule on its own jurisdiction. - (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
>
> (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.
>
> 31 Objection to substantive jurisdiction of tribunal. - (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.
>
> A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.
>
> (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

> (3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.
>
> (4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may —
>
> (a) rule on the matter in an award as to jurisdiction, or
>
> (b) deal with the objection in its award on the merits. If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.
>
> (5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction)."
>
> 20. These sections make it clear that the Kompetenz principle, which is also followed by the English Arbitration Act of 1996, is that the "jurisdiction" mentioned in Section 16 has reference to three things: (1) as to whether there is the existence of a valid arbitration agreement; (2) whether the arbitral tribunal is properly constituted; and (3) matters submitted to arbitration should be in accordance with the arbitration agreement."

44. A careful reading of the said observation makes it clear that the jurisdiction of the arbitral tribunal in Section 16 is confined to three aspects :-

> (1) As to whether there is a valid arbitration agreement;
>
> (2) Whether the tribunal is properly constituted, and

(3) Matters submitted to arbitration pertain to arbitration agreement.

45. Noticing the above, the Court has further delved upon the meaning of the expression "jurisdiction" and noted that **"jurisdiction"** is a word of many hues. Its colour is to be discerned from the setting in which it is mentioned. The Constitution Bench's decision in **Ittavira Mathai v. Varkey Varkey, (1964) 1 SCR 495** was considered wherein a distinction has been drawn between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction. The observation in paragraph '22' in this regard are relevant to be extracted hereinunder :-

> "22. A Constitution Bench of this Court in Ittavira Mathai v. Varkey Varkey, (1964) 1 SCR 495 at 501-503, made a distinction between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction in the following terms:
>
> > **"**The first point raised by Paikedy for the appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and

therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned counsel, however, referred us to the decision of the Privy Council in Maqbul Ahmad v. Onkar Pratap Narain Singh [AIR (1935) PC 85] and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.”

46. While understanding the sense of the term "jurisdiction" used in Section 16 of the Act' 1996, reliance is placed therein upon the decision of the Apex Court in **National Thermal Power Corp. (supra),** in paragraphs '23' and '24' as under:-

> "23. It is in this sense of the term that "jurisdiction" has been used in Section 16 of the Act. Indeed, in NTPC (supra) at 460-461, a Division Bench of this Court, after setting out Sections 16 and 37 held:
>
> > "10. Now, the only question that remains to be decided in the present case is whether against the order of partial award an appeal is maintainable directly under Section 37 of the Act or not. We have considered the submissions of learned counsel for the appellant and after going through the counterclaim and the partial award, we are of the opinion that no question of jurisdiction arises in the matter so as to enable the appellant to file a direct appeal under Section 37 of the Act before the High Court. As already mentioned above, an appeal under sub-section (2) of Section 37 only lies if there is an order passed under Sections 16(2) and (3) of the Act. Sections 16(2) and (3) deal with the exercise of jurisdiction. The plea of jurisdiction was not taken by the appellant. It was taken by the respondent in order to meet their counterclaim. But it was not in the context of the fact that the Tribunal had no jurisdiction, it was in the context that this question of counterclaim was no more open to be decided for the simple reason that all the issues which had been raised in Counterclaims 1 to 10 had already been settled in the minutes of meeting dated 6-4-2000/7-4-2000 and it was recorded that no other issues were to be resolved in first and third contracts.

24. Interestingly, in a separate concurring judgment, P.K.

Balasubramanyan, J., held (NTPC Case, SCC pp.463-64, paras 17-19):

> "17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In *Pandurang Dhoni Chougule v. Maruti Hari Jadhav* this Court observed that: (SCR p. 107 : AIR p. 155, para 10)
>
> > "10.....It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code."
>
> In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.
>
> 18. The expression "jurisdiction" is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. SBP & Co. v. Patel Engg. Ltd. in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract

without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression "jurisdiction" and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess

> of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.
>
> 19. In a case where a counterclaim is referred to and dealt with and a plea that the counterclaim does not survive in view of the settlement of disputes between the parties earlier arrived at is accepted, it could not be held to be a case of refusal to exercise jurisdiction by the Arbitral Tribunal. Same is the position when an Arbitral Tribunal finds that a claim was dead and was not available to be made at the relevant time or that the claim was not maintainable for other valid reasons or that the claim was barred by limitation. They are all adjudications by the Tribunal on the merits of the claim and in such a case the aggrieved party can have recourse only to Section 34 of the Act and will have to succeed on establishing any of the grounds available under that provision. It would not be open to that party to take up the position that by refusing to go into the merits of his claim, the Arbitral Tribunal had upheld a plea that it does not have jurisdiction to entertain the claim and hence the award or order made by it, comes within the purview of Section 16(2) of the Act and consequently is appealable under Section 37(2) (a) of the Act.”

With the above discussion, it was observed in paragraph '25 that the judgment in **NTPC (supra)** is determinative of the

issue at hand and has the respectful concurrence of the Bench.

47. The answer to the question as to whether a decision on the point of limitation would be covered by Section 16 of the Act' 1996, thus, has been answered in negative.

48. We may reiterate that in the context of Section 16, the specific word of Section 37(2) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

49. On the first issue as to whether the award on the issue of limitation can be said to be an interim award, holding that the decision on the point of *res judicata* and limitation being the question of jurisdiction, is an interim award and being an arbitral award, can be challenged separately and independently under Section 34 of the Act has, thus, been answered in affirmative. However, it was further concluded that such an award, which does not relate to the arbitral tribunal's own jurisdiction under Section 16, does not have to follow the drill of Section 16(5) and (6) of the Act. Meaning thereby, the decision taken on the point of limitation can be challenged under Section 34 as an interim award and the party aggrieved is not required to wait till all issues are decided to challenge the order of the arbitrator on the issue

of limitation under Section 34 of the Act.

50. In view of the above discussion, we do not find substance in the submission of the learned senior advocate for the appellant in challenging the order of rejection of Section 34 application by the competent court stating that the issue pertaining to *res judicata* and bar of Order 2 Rule 2 CPC can be raised by the appellant at the time of challenging the final award.

51. The reliance placed on the decision of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra),** to support the submission that the order under Section 16 of the Act' 1996 is an interim award is, therefore, of no help to the appellant. The order dated 03.08.2018 passed by the arbitral tribunal under Section 16 of the Act' 1996 cannot be said to be an interim award, within the meaning assigned to the said term in the judgment of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra),** heavily relied by the learned Senior Counsel for the appellant.

52. In view of the scheme of Section 16 and Section 37(2)(a), the application under Section 34 of the Act' 1996 was not maintainable against the order of rejection of the application under Section 16, challenging the jurisdiction of the learned Arbitrator on the plea of *res judicata* and bar under Order 2 Rule 2 CPC.

53. We may further clarify that the question of bar under Section 11, Explanation 4 or under Order 2 Rule 2 CPC cannot be permitted to be raised within the scope of Section 16, which has been enacted on the *Kompetenz-Kompetenz* principle to rule on its own jurisdiction and the preliminary issue such as existence or validity of the arbitration agreement and matters submitted to arbitration being within the realm of the arbitration agreement. The issues such as *res judicate* and bar of Order 2 Rule 2 CPC though are the plea of law, which concerns the jurisdiction of the arbitrator, but they can very well be raised in the arbitration proceedings and issues have to be framed on the same by the Arbitrator, which may be decided as preliminary issues, but such plea cannot be said to fall within the scope and context of the expression "jurisdiction" in various sub-sections of Section 16.

54. Taking clue from the decision of the Apex Court in **M/s Indian Farmers Fertilizer Co. (supra),** we hold that the plea of *res judicata* and bar of Order 2 Rule 2 CPC could not have been raised within the scope of Section 16 and the order rejecting the application under Section 16 cannot be said to be an interim award, which can be challenged separately and independently under Section 34 of the Act, being arbitral award within the meaning of Section 2(1)(c) and Section 31(6) of the Act' 1996.

55. In view of the above discussion, no infirmity could be found in the decision of the arbitral tribunal and the Commercial

Court under Section 34 of the Act, 1996. The appeal is dismissed being devoid of merits.

56. As clarified above, the issue of *res judicata* and bar of Order 2 Rule 2 CPC can very well be raised by the appellant before the arbitral tribunal, which would be required to frame issue(s) on the said plea, if so raised, and decide the same in accordance with law, independent of any observations made by the arbitral tribunal in the order impugned.

(SUNITA AGARWAL, CJ)

(ANIRUDDHA P. MAYEE, J.)

BIJOY B. PILLAI

FURTHER ORDER

The prayer made by the learned counsel for the appellant to stay the effect and operation of the judgment is hereby rejected.

(SUNITA AGARWAL, CJ)

(ANIRUDDHA P. MAYEE, J.)

BIJOY B. PILLAI