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IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.238 of 2021

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1. The State of Bihar.
2. The Chief Secretary, Government of Bihar.
3. The Principal Secretary, Finance Department, Government of Bihar having office at Old Secretariat, P.S.- Sachvalay, Patna.
4. The Principal Secretary, Minor Irrigation Department, Government of Bihar.
5. The Principal Secretary, Cooperative Department, Government of Bihar.
6. The Registrar Cooperative Societies, Bihar, Patna.

... ... Appellant/s

Versus

The Bihar Rajya Bhumi Vikas Bank Samiti, Bihar- Jharkhand, Now known as Multi State Cooperative Land Development Bank Ltd. Bihar and Jharkhand, having office at Budha Marg, P.S.- Budha Colony, District- Patna.

... ... Respondent/s

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Appearance :

For the Petitioners : Mr. Pushkar Narain Shahi, Sr. Advocate
Mr. Patanjali Rishi, Advocate

For the Respondents : Mr. Y.V.Giri, Sr. Advocate
Mr. Rajesh Prasad Choudhary, Advocate
Mr. Ashutosh Kumar Upadhyaya, Advocate

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CORAM: HONOURABLE MR. JUSTICE PARTHA SARTHY

C.A.V. JUDGMENT

Date : 08-01-2024

1. The instant appeal has been preferred under section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (‘the Act’ in short) praying for setting aside the judgment dated 9.10.2020 passed in Miscellaneous Case no.32 of 2016 whereby the learned Additional District Judge-X, Patna was pleased to dismiss the petition under section 34 of the Act filed by the appellants.

2. The relevant facts for the purpose of the instant

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appeal are that the Multi-State Cooperative Land Development Bank (herein after referred to as 'the Bank') filed CWJC no. 1730 of 2010 in the Patna High Court for commanding the State of Bihar to release a sum of Rs. 570.79 crores which according to the Bank stood as dues under different heads along with the interest accrued there upon. The case of the Bank was that it had advanced loans for agricultural purposes at the instance of the State of Bihar, on its assurance that it will make good the loss suffered by the Bank. Taking note of the fact that adjudication of the issues involved examining of conflicting claims and documents which would be difficult for this Court to decide in its writ jurisdiction, this Court disposed of CWJC no. 1730 of 2010 by order dated 19.10.2012 ordering that the petitioner Bank would to take steps for appointment of an Arbitrator in terms of section 11 of the Act for settling the disputes or may request the State Government to appoint a committee consisting of senior officials, one of which must be serving with the Central Government.

3. Pursuant to the directions of this Court as contained in order dated 19.10.2012, the Bank filed Request Case no. 4 of 2013.

4. By order dated 7.3.2014, this Court was pleased to

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dispose of the Request Case no.4 of 2013 appointing Hon'ble Mr. Justice Shubash Chandra Jha (Retd.) as the sole-Arbitrator with a direction to the Arbitrator to decide the same at the earliest but not later than six months from the day statement of claim is received by him.

5. The State of Bihar preferred L.P.A. no. 748 of 2013 against the order dated 19.10.2012 passed in CWJC no.1730 of 2010. The State of Bihar also preferred S.L.A (Civil) no. 15552 of 2014 against the order dated 7.3.2014 passed in Request Case no.4 of 2013, appointing an Arbitrator in the case. The Hon'ble Supreme Court by its order dated 14.7.2014 was pleased to dismiss S.L.A (Civil) no.15552 of 2014. Subsequently, taking note of submission of learned counsel for the State that he did not intend to press the appeal (L.P.A no.748 of 2013), this Court by its order dated 10.11.2016 dismissed L.P.A no.748 of 2013 as not pressed.

6. On the advocate for the Bank appearing, the sole Arbitrator issued notice to all the respondents on which objections were filed by the State of Bihar, the Department of Finance as also the Minor Irrigation Department of Government of Bihar. A rejoinder to the objection of the State of Bihar was filed by the Bank.

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7. A preliminary objection was raised on behalf of the Department of Finance and the State Government on the question of jurisdiction of the arbitration proceeding, the main objection being that in absence of any arbitration agreement the matter could not have been referred for arbitration. It was further contended that even if it had been referred for arbitration, the question of maintainability of the arbitration proceeding should be decided first by the Arbitrator in view of provisions of the Act.

8. The sole Arbitrator having heard learned counsels for the parties, by his order dated 24.5.2015, taking note of the dismissal of S.L.A (Civil) no.15552 of 2014 by the Hon'ble Supreme Court was pleased to hold the objection raised by the State Government to be barred by principle of *res judicata*/constructive *res judicata*, rejected the preliminary objection and held the arbitration reference to be valid and entertainable. The appellants did not challenge the order dated 24.5.2015 of the sole-Arbitrator before any Court, separately.

9. The sole Arbitrator proceeded with the arbitration proceeding and was pleased to pass an award dated 6.1.2016 directing the State of Bihar to pay a total sum of Rs.493,70,36,000/- ie Rs.493.7 crores (approx). The award

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further provided that in case the amount is paid within six months ie by 30.6.2016 the State Government will be exonerated from paying any interest at the rate of 8% per annum from April, 2014, failing which the Bank will be entitled to realise the interest at the rate of 8% with effect from April, 2014 which comes to Rs.39,49,62,880 [Rs.39.50 crores (approx.)].

10. The appellants challenged the award in an application under section 34 of the Act before the learned District Judge, Patna, which was registered as Miscellaneous Case no. 32 of 2016. By judgment dated 9.10.2020, the learned Additional District Judge-X, Patna was pleased to dismiss the Miscellaneous Case no.32 of 2016 against which the instant appeal has been preferred.

11. Sri Pushkar Narain Shahi, Senior Advocate assisted by Sri Patanjali Rishi, Advocate appeared for the appellant-State of Bihar and made the following submissions :-

(I) There being no arbitration agreement and the dispute raised by the respondent Bank being barred by limitation, the claim of the Bank was not liable to be adjudicated in the arbitration proceeding. In reference to the order dated 7.3.2014 passed in Request Case no. 4 of 2013, it was submitted that while appointing the sole Arbitrator, the learned Single

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Judge had left it open for the State appellants that if they dispute the claims or have any other objection, they could raise the same before the Arbitrator. It was submitted that the plea challenging the jurisdiction of the arbitral tribunal could be raised in view of section 16(2) of the Act as also the doctrine of *kompetenz-kompetenz*. Learned Senior Counsel in support of his contentions relied upon the judgments of the Hon'ble Supreme Court in the cases of **Mohammed Masroor Shaikh vs. Bharat Bhushan Gupta and others [(2022) 4 SCC 116], Indian Oil Corporation Limited vs. NCC Limited [(2023) 2 SCC 539]** and **State of Goa vs. Praveen Enterprises [(2012) 12 SCC 581]**.

(II) The Additional District and Sessions Judge-X, Patna was not a Commercial Court and hence was not entitled to adjudicate the miscellaneous case under section 34 of the Act. The dispute between the parties being a commercial dispute as defined under section 2(c) of the Commercial Courts Act, 2015, since the District Judge has been notified as a Commercial Court vide notification contained in Bihar Gazette (Extraordinary) no. 189 dated 7.3.2017, the Additional District and Sessions Judge-X, Patna was not entitled to adjudicate the miscellaneous case and the same was without jurisdiction. Thus,

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the impugned judgment is not sustainable for lack of jurisdiction of the learned Additional District and Sessions Judge-X, Patna. Reliance is placed on the division bench judgment of this Court in the case of **M/s Vishal Builtech India Pvt. Ltd. vs. The Union of India and others** (dated 3.8.2018 in MJC no.1323 of 2018).

(III) The arbitral award and the impugned judgment suffer from patent illegality since neither the award is a reasoned award nor is the judgment in the miscellaneous case a reasoned judgment. In support of his contention learned Senior Counsel relied on the judgments in the case of **Bibi Tahzibunnisa vs. Dr Syed Azizur Rahman** (**AIR 1980 Pat 89)** and **Reliance Infrastructure Ltd. vs. State of Goa (AIR 2023 SC 2280)**.

(IV) In reply to the arguments made on behalf of the respondents, learned Senior Counsel appearing for the appellants submitted that the challenge to the jurisdiction of the Arbitrator in view of absence of arbitration agreement and on grounds of limitation cannot be barred by the principles of *res judicata* in view of section 16(2) of the Act and the grounds having been raised before the learned Single Judge in the request case.

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12. Sri Y.V. Giri, Senior Advocate assisted by Sri Rajesh Prasad Choudhary, Advocate appeared for the Bank and made the following submissions :-

(I) The ground of the arbitration not being maintainable as there is no agreement between the parties as also the ground of limitation were both taken by the appellants before the learned Single Judge in CWJC no. 1730 of 2010, in Request Case no. 4 of 2013, before the Hon'ble Supreme Court in S.L.A (Civil) no. 15552 of 2014 as also before the Division Bench in L.P.A no. 748 of 2013 and both the grounds raised by the appellants were rejected at all stages. The grounds having been rejected cannot be raised by the appellants in the same *lis*, being barred by the principles of constructive *res judicata*. Learned Senior Counsel in support of his contentions relied on the judgments in the cases of **MSM Sharma vs. Shri Krishna Sinha & Ors. (AIR 1960 SC 1186), Daryaao & Ors. vs. State of Uttar Pradesh & Anr. (AIR 1961 SC 1457)**, **Gulab Chand Chotalal Parikh vs. State of Gujrat (AIR 1965 SC 1153)**, **SC Employees Welfare Association vs. Union of India (AIR 1990 SC 334)**, **Ishwar Dutt vs. Land Acquisition Collector & Anr. [(2005) 7 SCC 190]**, **Bhushan Power and Steel Ltd. vs. Rajesh Verma [(2014) 5 SCC 551]** and **Neelima Shrivastava**

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vs. State of Uttar Pradesh [2021 (5) BLJ 463]. Learned Senior Counsel submitted that in these judgments it has been held that whether the order is good or bad, the inter-party judgment binds the parties and therefore the issue having been set at rest cannot be permitted to be raised by the appellant-State at every stage in the same *lis*.

(II) With respect to the contention of the appellants that the Additional District Judge did not have jurisdiction to decide a dispute of commercial nature as the High Court had notified the District Judge under the Commercial Courts Act and not the Additional District Judge, learned Senior Counsel relied on the judgments in the cases of **Shivam Housing Pvt. Ltd. & Ors. vs. National Highways Authority of India [2015 (3) PLJR 786]**, **West Bengal Housing Infrastructure Development Corporation vs. M/S Impression [AIR 2016 Cal 236 (FB)]** and **Ambalal Shara Bhai Enterprises Ltd. vs. K.S. Infra Space LLP & Anr. [(2020) 15 SCC 585]**. It was submitted that in the above judgments it has been held that the Additional District Judge is the District Judge and the commercial dispute can be decided by him. Further, the dispute in the instant case was not a commercial dispute as per definition given in the Act for the reason that there was no

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commercial transaction between the parties.

(III) The award given by the Arbitrator as also the judgment of the learned Court below passed on the application under section 34 of the Act was a just and proper order assigning adequate reasons for giving the award. The appeal filed by the State was also rightly rejected. The State has not brought on record, in its petition under section 34, any evidence or submission which according to it was not considered either by the Arbitrator or by the learned Court below. The Hon'ble Supreme Court in the case of **MMTC Limited vs. Vedanta Limited [(2019) 4 SCC 163]** has held that the scope of appeal under section 37 is narrow and restricted. Further, relying on the judgments in the case of **UHL Power Company Limited vs. State of Himachal Pradesh [(2022) 4 SCC 116]** and in the case of **Haryana Tourism Limited vs. Kandhari Beverages Limited [(2022) 3 SCC 237]** learned Senior Counsel submitted that in an appeal under section 37 of the Act, the High Court cannot enter into the merits of the claim of the parties and its powers are circumscribed. The scope of interference is very limited and even while considering an application under section 37, the Court cannot travel beyond the restrictions laid down under section 34 of the Act. In reference to **Delhi Airport**

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Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited [(2022) 1 SCC 131], it was submitted that the Courts cannot reappreciate the evidence as the Courts do not sit in appeal against the arbitral award.

(IV) It was thus submitted by learned Senior Counsel appearing for the respondents that there being no merit in the instant appeal, the same be dismissed.

13. Heard Shri Pushkar Narain Shahi, learned Senior Counsel assisted by Sri Patanjali Rishi learned Counsel appearing for the appellants and Sri Y.V. Giri, learned Senior Counsel assisted by Sri Rajesh Prasad Choudhary, learned Counsel appearing for the respondent.

14. It was the case of the Bank/respondent that at the instance of the State Government/State of Bihar/appellants it had advanced loan for agricultural purposes on the assurance that it will make good the loss. The Bank could not recover its loan also for the reason of the Government's policy. Even the loan which was recovered was at a reduced rate of interest in view of the Government's policy which also resulted in further losses. As such, the Bank’s case was that they had sustained a loss of Rs.570 crores and thus they filed CWJC no. 1730 of 2010 in this Court praying for a direction to the State of Bihar to

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release a sum of Rs.570 crores which were due against them under different heads.

15. The respondent contended in the writ application that it was under supersession from 1982 to 2003 and was managed by the Administrator appointed under the relevant Act. The Board of Directors was elected in 2003 and since then it is governed by the Managing Committee/Board of Directors. In the said writ application, the Bank relied on the order dated 29.10.2010 passed in CWJC no.16653 of 2010 wherein the Court directed the Bank to request the State Government to release the amount under loan waiver scheme as early as possible. It further observed that the State Government shall be obliged to pass appropriate order on the request of the Bank to release Rs.300.76 crores. The case of the Bank was that the State Government owns more than 90 percent share in the Bank, and it was on the directives of the Government that the Bank stopped recovery of loan in certain regions while in other regions it was asked to recover loan at a reduced rate of interest. The State of Bihar contested the case of the Bank in the said writ application on the ground that the figures claimed by the Bank were mere figment of its imagination and without any basis. It was observed that if the Bank substantiates its claim,

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they were willing to consider the claim for payment.

16. It was at this stage that this Court while disposing the writ application (CWJC no. 1730 of 2010), in its order dated 19.10.2012 observed that Mr. Y.V. Giri, learned Senior Counsel appearing for the Bank, made an alternative submission that the matter may be referred to a retired Judge or to an official of the Central Government, to which the Counsel for the State expressed apprehension as to whether the matter can be referred for arbitration in absence of any agreement.

17. This Court disposed of CWJC no.1730 of 2010 by its order dated 19.10.2012, relevant portion of which is reproduced herein below :-

> *"Mr. Y.V. Giri, learned Senior Counsel for the petitioner lastly made an alternative submissions that the matter may be referred to a retired Judge or to an official of the Central Government as the latter squarely shares the burden of State Government by granting aid.*
>
> *Counsel for the State expresses apprehension whether the matter can be referred directly for arbitration in absence of any agreement to the same effect.*
>
> *I have heard counsel for the parties.*
>
> *The case of the petitioner bank is that it advanced loan for agricultural purposes at the instance and assurance of the State Government that it will make the good the loss. At times, the*

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Bank had to waive its recovery fully as well as partially in view of the Government's policies. In some cases the Bank was obliged to recover the loss at a reduced rate of interest in view of the government policy. The petitioner thus claims that up till now a sum of Rs. 570 crores is due to the Government. On the other hand, the State had disputed the claim of the petitioner and had alleged mis-management of funds. Both sides have referred to large number of documents in support of their respective claims.

The matter relates to accounting, advancement of loan, waiver of loan, payment of loan etc. The adjudication of these issues involve examination of conflicting claims and documents. It would be difficult for this court in writ jurisdiction to decide the disputed question of facts. However, this court passes the following order:

(i) The petitioner would take steps for appointment of an Arbitrator in terms of section 11 of the Arbitration and Conciliation Act for settling the disputes

Or

May request the State Government to appoint a Committee consisting of senior officials, one of which must be serving with the Central Government. In case such request is made the State Government would constitute such Committee;

(ii) The aforesaid direction would not come in the way of the respondents in settling the claim of the petitioner.

With the aforesaid observations and directions,

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this writ application stands disposed of.”

18. It would be relevant to note here itself that though the issue as to whether a matter could be referred to arbitration in absence of any agreement was raised at the very first instance by the counsel appearing for the State, there was no adjudication on the same in the order dated 19.10.2012. The learned Single Judge, by way of one option had observed that the petitioner ‘would’ take steps for appointment of an Arbitrator in terms of section 11 of the Act but had also given the option that the petitioner may request the State Government to appoint a committee consisting of senior officials, one of which must be serving with the Central Government. Neither the question as to whether the matter could be referred for arbitration in absence of an agreement nor the question of jurisdiction of an Arbitrator to decide the dispute was decided in the said writ application.

19. The Bank filed an application under section 11 of the Act for appointment of an Arbitrator which was registered as Request Case no. 4 of 2013. A perusal of the order sheet of the request case would show that in its order dated 11.2.2014, the learned Single Judge takes note of the submission made by learned counsel appearing for the State of Bihar that the request case itself is not maintainable as there is no agreement and thus

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section 11 of the Act cannot be invoked. Relevant portion of the said order dated 11.2.2014 is quoted herein below:

> *"Mr. Anil Kumar Sinha appearing for the State submits that this Request Case itself is not maintainable inasmuch as there being no agreement, Section 11 of the Arbitration and Conciliation Act cannot be invoked. I regret I am not in a position to exceed to that submission for two simple reasons. Firstly, I cannot go behind the order of the Writ Court which has directed for settlement of dispute through arbitration. Secondly, in terms of Article 226 of the Constitution, this Court, under writ jurisdiction, has the jurisdiction to issue such other "order or orders" for "any other purpose……………"*

20. The learned Single Judge observed that the writ court had directed for settlement of dispute through arbitration, and it could not go behind the order passed by the writ court. It disposed of Request Case no. 4 of 2013 by order dated 7.3.2014 appointing Hon'ble Mr. Justice Subash Chandra Jha, a retired Judge of this Court as the sole Arbitrator. The order dated 7.3.2014, disposing of the Request Case no.4 of 2013 is reproduced herein below:-

> *"Today again, Mr. Anil Kumar Sinha, learned counsel appearing for the State states that he has no instructions in the matter. On earlier occasion also this case was adjourned for the State to*

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propose the name of the Arbitrator. For this matter, this case is being adjourned again and again.

In my view, no further adjournment is due. In view of the attitude of the State, this Court can wait no longer. Three names of retired Judges had been suggested by the petitioner. I appoint Hon'ble Mr. Justice Subhash Chandra Jha (Ret.) of this Court as the sole-Arbitrator. The petitioner-Multi State Co-operative Land Development Bank Ltd. would file its statement of claim in respect of the disputes along with all accompanying documents on which they base their claims before the Arbitrator within four weeks from today. A copy thereof would be served upon the Legal Remembrance, Government of Bihar, Patna along with copy of an order of this Court passed in these proceedings. State, if deny the dispute, dispute the claims or have any other objection, would file their objection within four weeks thereafter along with all necessary documents within four weeks with a copy to the petitioner. Thereafter, the Arbitrator would set a date for settling the issues with notice to the parties. State would have to disclose as to who would be the competent authority to receive notice on their behalf. Arbitrator so appointed shall thereafter be at liberty to set dates, hear the matter and decide the same as early as possible but not later than six months from the day statement of claim is received by him. Upon completion of the proceedings, he shall be entitled to a consolidated remuneration of Rs.3 lakhs, which shall be shared half and half by the two parties, but the award can

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make provision for either of the parties or any one of them to pay in such proportion as may be placed. The arbitration proceedings would be conducted at the place made available by the petitioner-Multi State Co-operative Land Development Bank Ltd.

With these directions, this request case is disposed of."

21. It would be important to note here that in the above order dated 7.3.2014 also, disposing of the request case, the issue as to whether a matter could be referred for arbitration in absence of any agreement between the parties was not adjudicated. Liberty was granted to the State that if they deny the dispute, dispute the claims 'or have any other objection', they would file their objection within a period of four weeks along with documents which would be decided by the Arbitrator. Thus in the opinion of this Court, by order dated 7.3.2014 only an Arbitrator was appointed on the application under section 11 filed by the Bank, however, all the objections with the respect to the same which the State was having was left open to be decided by the Arbitrator.

22. The State of Bihar preferred an SLP in the Hon'ble Supreme Court against the order dated 7.3.2014 passed in Request Case no. 4 of 2013, which was registered as S.L.A

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(C) no.15552 of 2014. The Hon'ble Supreme Court by its order dated 14.7.2014 was pleased to dismiss the said SLP in the following terms:

> *"We find no reason to entertain this Special Leave Petition, which is, accordingly, dismissed."*

23. It would be relevant to note the contention of learned Senior Counsel for the Bank which was to the effect that the order of the learned Single Judge passed in Request Case no. 4 of 2013 appointing the sole arbitrator having been challenged in the Hon'ble Supreme Court and the same having been dismissed, the same has attained finality and the same *lis* being barred by principles of constructive *res judicata* cannot be raised by the appellant-State of Bihar at every stage. Learned Senior Counsel for the Bank relied upon the judgments referred to in paragraph no. 13(I) above in support of his contention. Having gone through the judgments of the Hon'ble Supreme Court in the cases of **MSM Sharma** (*supra*), **Daryaao** (*supra*), **Gulab Chand Chotalal Parikh** (*supra*), **SC Employees Welfare Association** (*supra*), **Ishwar Dutt** (*supra*), **Bhushan Power and Steel Ltd.** (*supra*) and **Neelima Shrivastava** (*supra*), the law laid down is to the effect that the rule of *res judicata* is meant to give finality to a decision arrived at after

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due contest and after hearing the parties interested in the controversy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice with the same kind of litigation. The Hon'ble Supreme Court held that the decision of the High Court under Article 226 of the Constitution on merits of a matter after contest will operate as *res judicata* in a subsequent regular suit between the same parties with the respect to the same matter. Even an erroneous decision on a question of law may operate as *res judicata* between the parties in a subsequent suit or proceeding if the cause of action is the same. The principle of *res judicata* would apply in different proceedings out of the same cause of action but would also apply in different stages of the same proceedings. Further in reference to the decision in the case of **Uma Devi** it was held that mere overruling of the principles on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the affect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between overruling a principle and reversal of the judgment. It was not permissible for the parties to reopen concluded

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judgments.

24. In response, it was submitted by learned Senior Counsel appearing for the appellant-State of Bihar that by order dated 14.7.2014, the Hon'ble Supreme Court had dismissed the S.L.P *in limine*, without entering into the merits of the case of the parties. It was submitted that on dismissal of the S.L.P., the order impugned dated 7.3.2014 appointing the learned sole-Arbitrator had not been interfered with and thus the liberty granted to the State in the said order, that it may raise any objection before the Arbitrator, also stood affirmed. In that view of the matter as also in view of section 16(2) of the Act which provides that a plea with respect to the Arbitral Tribunal not having jurisdiction can be raised and which shall be decided, the State of Bihar rightly raised the plea of jurisdiction before the Arbitral Tribunal.

25. At this stage, it would be relevant to take note of the judgments of the Hon'ble Supreme Court which deal with the affect of a non-speaking order of the Hon'ble Supreme Court dismissing a case without indicating the grounds or reasons of its dismissal.

26. In the case of **Workmen of Cochin Port Trust vs. Board of Trustees of the Cochin Port Trust and Anr.**

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[(1978) 3 SCC 119] the Hon'ble Supreme Court held as follows:-

> *"**10**. In the instant case the award of the Tribunal, no doubt, was challenged in the special leave petition filed in this Court, on almost all grounds which were in the subsequent writ proceeding agitated in the High Court. There is no question, therefore, of applying the principles of constructive res judicata in this case. What is, however, to be seen is whether from the order dismissing the special leave petition in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award......"*

27. In the case of **Indian Oil Corporation Ltd vs**

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State of Bihar & Ors [(1986) 4 SCC 146] the Hon'ble Supreme Court held as follows:-

> *"**6.** ……As observed by this Court in Workmen v. Board of Trustees of the Cochin Port Trust, the affect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. .... But neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication. It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.*
>
> ***8.** ……..The dismissal of a special leave petition in limine by a non-speaking order does not therefore justify any inference that by necessary implication*

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> *the contentions raised in the special leave petition on the merits of the case have been rejected by this Court. It may also be observed that having regard to the very heavy backlog of work in this Court and the necessity to restrict the intake of fresh cases by strictly following the criteria aforementioned, it has very often been the practice of this Court to grant special leave in cases where the party cannot claim effective relief by approaching the concerned High Court under Article 226 of the Constitution………"*

28. From the material on record it transpires that CWJC no. 1730 of 2010 which was filed by the Bank in this Court praying for a direction to the State of Bihar to release a sum of Rs.570 crores due against the State of Bihar under different heads was disposed of by order dated 19.10.2012 taking note of the fact that as the matter related to accounting, advancement of loan, waiver of loan, payment of loan etc. the adjudication involved examination of conflicting claims and documents which would be difficult for the Court to decide the disputed question of facts in the writ jurisdiction. Accordingly order was passed that the petitioner would take steps for appointment of an arbitrator in terms of section 11 of the Act or may request the State Government to appoint a committee consisting of senior officials, one of which must be serving with the Central Government. Besides the above two alternatives it

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was also observed that the directions would not come in way of the respondent State of Bihar in settling the claim of the petitioner. The LPA no. 748 of 2013 preferred against the said order was dismissed as not pressed by order dated 10.11.2016. Further, the order dated 7.3.2014 disposed of the Request Case no. 4/2013 appointing the sole-Arbitrator but giving liberty to the State that if they dispute the claim or have any other objections, they can file the same before the Arbitrator. As stated above, the S.L.A (C) no. 15552 of 2014 was dismissed *in limine* by the order dated 14.7.2014 by the Hon'ble Supreme Court.

29. On dismissal of LPA no. 748 of 2013 and S.L.A (C) no. 15552 of 2014, the orders passed in CWJC no. 1730 of 2010 and Request Case no. 4 of 2013 came to be affirmed. The order dated 19.10.2012 passed in CWJC no. 1730 of 2010 was only with respect to the options given to the Bank that he would take steps for appointment of an arbitrator or request the State Government to appoint a committee. Neither the question as to whether the matter can be referred for arbitration in absence of an arbitration agreement nor the question of jurisdiction of the Arbitrator was decided. Similarly, in the order dated 7.3.2014 disposing of the request case also none of these two questions was decided and in fact liberty was granted to the State that in

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case they have any other objections, they may file the same with all necessary documents. In none of the two cases did the learned counsels appearing for the State of Bihar consented to appointment of an arbitrator would be evident from perusal of the orders, as quoted above.

30. Thus, in view of the above two decisions of the Hon'ble Supreme Court in the cases of **Workmen of Cochin Port Trust** (*supra*) and **Indian Oil Corporation Ltd** (*supra*), this Court is of the opinion that the Special Leave Petition against the order appointing the sole-Arbitrator having been dismissed by the Hon'ble Supreme Court *in limine* by a non-speaking order, the submissions made by learned Senior Counsel appearing for the respondent-Bank cannot be accepted and the appellant-State of Bihar was not barred from raising the plea of maintainability of the arbitration proceeding for lack of jurisdiction because of the absence of an agreement. Liberty of raising the plea of jurisdiction is provided in section 16 of the Act and the same could not be denied on the ground of the same being barred by the principles of *res judicata* or constructive *res judicata*.

31. In the meantime, pursuant to the order passed in the request case the counsel for the Bank appeared before the

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learned sole Arbitrator who proceeded with the arbitration proceedings. An application dated 15.11.2014 was filed on behalf of the State of Bihar before the sole Arbitrator raising a preliminary objection with the respect to jurisdiction of the arbitration proceeding, the main contention being that the arbitration proceeding cannot proceed in absence of an arbitration agreement.

32. Learned counsel for the State of Bihar submitted that by order dated 7.3.2014 passed in request case, the learned Single Judge while appointing the sole Arbitrator had given liberty to the State to raise all objections before the Arbitrator. Accordingly a petition was filed on behalf of the State of Bihar that there being no arbitration agreement between the parties, the Arbitral Tribunal should first decide under section 16 of the Act as it had no jurisdiction to proceed in the matter.

33. In response to the preliminary objection of the State of Bihar, learned counsel appearing for the Bank submitted that the order appointing the sole-Arbitrator having been affirmed by the Hon’ble Supreme Court on dismissal of the Special Leave Petition, the objection is barred by the principles of *res judicata*/constructive *res judicata*. The learned sole Arbitrator, accordingly, decided the preliminary issue by its

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order dated 24.5.2015 holding that the arbitration reference is valid and entertainable.

34. At this stage, it would be relevant to note one of the pleas raised by learned Senior Counsel appearing for the respondent Bank which was to the effect that the order dated 24.5.2015 of the learned sole Arbitrator rejecting the preliminary objection of the State of Bihar with respect to the maintainability of the arbitral proceeding, admittedly not having been challenged separately by the State of Bihar, the same attained finality, and can no longer be raised now. In response, it was submitted by learned Senior Counsel appearing for the State of Bihar that there is no provision under the Act for challenging the said order holding that the sole-Arbitrator has jurisdiction. Section 16(6) of the Act only provides that the party aggrieved may challenge the arbitral award in accordance with section 34 of the Act and accordingly the State of Bihar challenged the award by filing Miscellaneous Case no. 32 of 2016, which was dismissed by judgment dated 9.10.2020, impugned herein.

35. Chapter IV of the Act, which comprises of sections 16 and 17, is titled as ‘Jurisdiction of Arbitral Tribunals’. Section 16 which provides about the competence of

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Arbitral Tribunal to rule on its jurisdiction, is reproduced here in below for ready reference :-

> *“**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*

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> *(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"*

36. Section 16 of the Act quoted here in above provides that the Arbitral Tribunal may rule on its own jurisdiction, including the ruling on any objections with respect to the existence or validity of the arbitration agreement. Section 16(2) provides as to when a party may raise a plea with respect to the Arbitral Tribunal not having jurisdiction, which as per section 16(5) is to be decided by the Arbitral Tribunal. Section 16(5) provides that where a plea is raised that the Arbitral Tribunal does not have jurisdiction and the Tribunal rejects the said plea, as was done in the instant case, it shall continue with the arbitral proceeding and make an arbitral award. Section 16(6) provides that the party aggrieved by such an arbitral award may file an application for setting aside the same in accordance with section 34. Section 34 of the Act deals with application for setting aside arbitral award and section 37 with appealable orders. A conjoint reading of section 16, section 34 and section 37 of the Act leads this Court to the conclusion that

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no provision of appeal has been provided under the Act against an order of the Arbitral Tribunal under section 16(5) of the Act rejecting the plea raised as to whether the Arbitral Tribunal has jurisdiction or not.

37. It may be noted here that while section 37 deals with appealable orders, section 37(2) of the Act provides that an appeal shall lie to a Court from an order of the Arbitral Tribunal accepting the plea referred to in section 16(2) ie that the Arbitral Tribunal does not have jurisdiction. However, if the said plea under section 16(2) is rejected, appeal would not lie under section 37. The only option available to the party affected will be to wait for the award and then to challenge the same under section 34. A reference may be made to paragraph no.45 of the judgment of the Hon'ble Supreme Court in **SBP & Co. vs. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618]**, relevant part of which is quoted herein below :-

> *"**45.** It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award*

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> *including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act."*

38. Thus, in the opinion of the Court the appellant State of Bihar, not having challenged the order dated 24.5.2015 rejecting its plea of the Arbitral Tribunal not having jurisdiction is of little consequence. The learned Arbitral Tribunal proceeded with the arbitration and passed the award dated 6.1.2016 which was challenged by the appellant State of Bihar by filing an application under section 34 of the Act. Thus, the appellant can argue the question of the Arbitral Tribunal not having jurisdiction in its challenge to the award itself.

39. In the case of **SBP & Co.** (*supra*) this Court held that section 16(1) incorporates the well known doctrine of *kompetenz-kompetenz*. It is for the Arbitral Tribunal to decide its own jurisdiction subject to final review by a competent Court of law ie subject to section 34 of the Act. Paragraph no.96 of the judgment in the case of **SBP & Co.** (*supra*) is quoted herein below :-

> *"**96.** Section 16(1) incorporates the well-*

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known doctrine of Kompetenz-Kompetenz or competence de la competence. It recognises and enshrines an important principle that initially and primarily, it is for the Arbitral Tribunal itself to determine whether it has jurisdiction in the matter, subject of course, to ultimate court-control. It is thus a rule of chronological priority. Kompetenz-Kompetenz is a widely accepted feature of modern international arbitration, and allows the Arbitral Tribunal to decide its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement, subject to final review by a competent court of law i.e. subject to Section 34 of the Act."

40. The next question arising for consideration is as to whether in absence of an arbitration agreement between the parties, did the Arbitral Tribunal had jurisdiction to proceed with the arbitral proceedings and make an arbitral award. There is no dispute with the respect to the fact that there is no arbitration agreement between the parties. It is also not the case of the respondent Bank that at any stage the appellant State of Bihar or it's counsel, whether in writing or even orally, agreed that the dispute be referred for arbitration.

41. In view of the above undisputed facts, it is relevant to take note of some of the judgments of the Hon'ble Supreme Court on this aspect.

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42. The Hon'ble Supreme Court in dealing with reference of a dispute to arbitration under section 89 of the Civil Procedure Code ('CPC' in short) in the case of **Kerala State Electricity Board and another versus Korien E. Kalathil and another [(2018) 4 SCC 793]** held that it can be done only when the parties agree for settlement of their dispute through arbitration *in contra* distinction to other methods of alternative dispute resolution mechanism stipulated in section 89 of CPC. It further held that in so far as reference of parties to arbitration, oral consent given by the counsel without a written memo of instruction does not fulfill the requirement under section 89 of CPC. It may be added here that section 89(2)(a) of CPC provides that where a dispute has been referred for arbitration or conciliation the provisions of Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration and conciliation were referred for settlement under the provisions of that Act. Paragraph nos. 35, 36 and 41 of the judgment are quoted herein below for ready reference :-

*"**35.** After pointing out the disputed claims of additional work (Ext. P-59) and on the oral consent of the counsel for the appellant, the High Court has referred the parties to arbitration appointing Justice K. A. Nayar as the arbitrator. Arbitrator/Tribunal is a creature of the contract between the parties. There*

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was no arbitration agreement between the parties. The question falling for consideration is whether the High Court was right in referring the parties to arbitration on the oral consent given by the counsel without written instruction from the party.

36. *Jurisdictional precondition for reference to arbitration under Section 7 of the Arbitration and Conciliation Act is that the parties should seek a reference or submission to arbitration. So far as reference of a dispute to arbitration under Section 89 CPC is concerned, the same can be done only when parties agree for settlement of their dispute through arbitration in contradistinction to other methods of alternative dispute resolution mechanism stipulated in Section 89 CPC. Insofar reference of the parties to arbitration, oral consent given by the counsel without a written memo of instructions does not fulfil the requirement under Section 89 CPC. Since referring the parties to arbitration has serious consequences of taking them away from the stream of civil courts and subject them to the rigour of arbitration proceedings, in the absence of arbitration agreement, the court can refer them to arbitration only with written consent of parties either by way of joint memo or joint application; more so, when Government or statutory body like the appellant Board is involved.*

……………………………………………......

41. *Referring the parties to arbitration has serious civil consequences. Once the parties are referred to arbitration, the proceedings will be in accordance with the provisions of the Arbitration*

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and Conciliation Act and the matter will go outside the stream of the civil court. Under Section 19 of the Arbitration and Conciliation Act, the Arbitral Tribunal shall not be bound by the Code of Civil Procedure and the Evidence Act. Once the award is passed, the award shall be set aside only under limited grounds. Hence, referring the parties to arbitration has serious civil consequences procedurally and substantively. When there was no arbitration agreement between the parties, without a joint memo or a joint application of the parties, the High Court ought not to have referred the parties to arbitration."

43. Section 7 of the Act which deals with arbitration agreement and section 8 which deals with power to refer parties to arbitration where there is an arbitration agreement, is quoted herein below for ready reference:-

*"**7. Arbitration agreement.-**(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*

(2) An arbitration agreement may be in the form of an arbitration clause contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing

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if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

***8. Power to refer parties to arbitration where there is an arbitration agreement**.-[(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that that prima facie no valid arbitration agreement exists.]*

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

[Provided that where the original arbitration agreement or a certified copy thereof is

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not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application alongwith a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub- section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

44. Arbitration agreement, as per section 7 of the Act, means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement, but the same shall be in writing. From the judgments of the Hon'ble Supreme Court, even in absence of an agreement, the parties may enter into an agreement in Court and the matter may be referred for arbitration. However, this agreement also should be in writing. In the case of **SBP & Co.** (*supra*), the Hon'ble Supreme Court in paragraph nos. 38 and 45 held as follows :-

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> *“**38.** …………..But the basic requirement for exercising his power under Section 11(6) is the existence of an arbitration agreement in terms of Section 7 of the Act and the applicant before the Chief Justice being shown to be a party to such an agreement…….*
>
> *…… …… …… …… ……*
>
> ***45**. ………… The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.”*

45. Thus, in view of the facts stated here in above the provisions as contained in sections 7 and 8 of the Act as also the judgments of the Hon’ble Supreme Court refer to herein above, the Court finds that the learned Arbitrator committed an error in holding that even in absence of an arbitration agreement the arbitration proceeding was valid and entertainable. The Court finds substance in contention of learned Senior Counsel

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appearing for the State of Bihar, that in absence of any arbitration agreement there was no occasion for the sole Arbitrator to act as such, he had no jurisdiction and thus the award made by him, which is impugned herein, is not sustainable and fit to be set aside. Further the order passed in Miscellaneous Case filed on an application under section 34 of the Act by the learned ADJ not having taken into consideration the above facts and the settled position in law is also not sustainable and fit to be set aside.

46. It was next contended by learned Senior counsel appearing for the appellant-State of Bihar that the arbitral award not being a reasoned award and the impugned judgment in the miscellaneous case not being a reasoned judgment were patently illegal and are fit to be set aside on this ground also.

47. In response, learned Senior counsel appearing for the respondent-Bank, relying on different judgments of the Hon'ble Supreme Court in the cases of **MMTC Ltd.** (*supra*) and **UHL Power Company Limited** (*supra*) submitted that the scope of an appeal under section 37 of the Act is very narrow and restricted. The High Court cannot enter into the merits of the claim of the parties and the Court cannot re-appreciate the evidence as they do not sit in appeal against the arbitral award.

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48. In reference to the judgment relied on by learned Senior counsel for the respondent Bank there is no dispute with respect to the position in law with respect to the scope of section 34 and section 37 of the Act. In **MMTC Limited** (*supra*) it was held by the Hon'ble Supreme Court that the scope of appeal under section 37 is narrow and restricted as is the case under section 34 of the Act. In the case of **UHL Power Company Limited** (*supra*) Hon'ble Supreme Court held that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view of the relevant clauses of the agreement. Learned Senior counsel referred to various paragraphs of the judgment in which reference was also made to the judgments in the case of **Haryana Tourism Ltd. vs Kandhari Beverages Ltd. [(2022) 3 SCC 237]**, **Associate Builders vs DDA [(2015) 3 SCC 49]**, **Ssangyong Engineering and Construction Company Ltd. vs NHAI [(2019) 15 SCC 131]** and **Delhi Airport Metro Express Private Ltd. vs Delhi Metro Rail Corporation Ltd. [(2022) 1 SCC 131]**. It was submitted that it has also been held that in an appeal under section 37 the power of the appellate Court is narrower than the power of the Court below under section 34. This Court cannot reappreciate and reassess the judgment. If the

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view taken by the learned Court below is a possible view, the appellate Court cannot impose its view. It was submitted that the Arbitrator while mentioning cases of respective parties has already mentioned different annexures brought on record by the parties which shows that even while considering the cases of the parties, the Arbitrator was alive with and has meticulously examined the evidence brought on record by the parties. The submissions made on behalf of the appellant-State of Bihar to the effect that no reason has been assigned by the Arbitrator is baseless and has got no merit.

49. So far as the judgments relied upon on behalf of the respondent-Bank is concerned, there can be no dispute with respect to the law laid down by the Hon'ble Supreme Court. The question which would rise is as to what is scope of interference in an arbitral award in general and in the facts of the instant case. The Court already having dealt with the issue that there is no arbitral agreement between the parties, is not considering the same once again at this stage.

50. Section 34 of the Act deals with application for setting aside arbitral award. Section 34(2)(b)(ii) provides that an arbitral award may be set aside by the Court only if the Court finds that the arbitral award is in conflict with the public policy

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of India. For ready reference, relevant part of section 34 ie section 34(1) and (2) are quoted herein below:-

> *"**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*

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(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.]"

51. Explanation 1 to section 34(2)(b) clarifies that an award is in conflict with the public policy of India only if it is in contravention with the fundamental policy of the Indian law.

52. The Hon'ble Supreme Court in the case of

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ONGC Ltd. vs. Saw Pipes Ltd. [(2003) 5 SCC 705] in paragraph no.31 deals with 'public policy of India' as used in section 34 of the Act. The same reads as follows:-

> *"**31.** Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be*
>
> *-award could be set aside if it is contrary to:*
>
> *(a) fundamental policy of Indian law; or*
>
> *(b) the interest of India; or*
>
> *(c) justice or morality, or*
>
> *(d) in addition, if it is patently illegal.*
>
> *Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be*

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adjudged void.”

53. In the case of **ONGC Limited versus Western Geco International Ltd. [(2014) 9 SCC 263]**, the Hon’ble Supreme Court has dealt with as to what is fundamental to the policy of Indian law and it has held that the Court deciding the matter must apply its mind to the facts and circumstances while taking a view one way or the other. Non- application of mind is fatal to any adjudication and application of mind is best demonstrated by disclosure of the mind, which is best done by recording reasons in support of the decisions. Paragraph no.38 of the judgment is reproduced herein below for ready reference :-

> *“**38.** Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and*

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> *disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law."*

54. Coming to the facts of the instant case the learned Single Judge in his order dated 19.10.2012, passed in CWJC no.1730 of 2010 had observed that adjudication of the issues involved required examining of conflicting claims and documents and it would be difficult for this Court in writ jurisdiction to decide the disputed questions of fact. Learned counsel for the appellant- State of Bihar has taken this Court through the award dated 6.1.2016 and submits that after narrating the facts leading to the arbitration, the sole Arbitrator has referred to the case of the Bank in paragraph nos. 25 to 42 of the award, the objection of the State of Bihar in paragraph nos. 43 to 59 and his conclusion in paragraph nos. 60 to 73.

55. Having gone through the contents of the award, this Court is of the opinion that except for a reference to the documents filed by the parties, there is no consideration of the same except for statement in paragraph no.64 to the effect that 'I have examined all such papers and annexures filed on behalf of

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the respective parties meticulously'. Paragraph nos. 60 to 64 of the award dated 6.12.2016 is quoted herein below for ready reference:-

> *"60. Annexure-1 to 13 series, which are listed here from page-22 to page-156 of the petition filed on behalf of the Petitioner-Bank, which are Photocopy of the order dated 19-10-2012 passed in CWJC No. 1730/2010, photocopy of the order dated 07-03-2010 passed in Request Case No. 4/2013, photocopy of the certificate dated 28-07-2008, photocopies of letter No. 64 dated 06-01-1986, letter No. 2864 dated 29-05-1986, letter No. 3488 dated 23-06-1986, letter No. 6733 dated 24-11-1986, letter No. 680 dated 19-03-1987, letter No. 1406 dated 27-02-1988, letter No. 6219 dated 10-11-1988, letter No. 4303 dated 04-07-1989, minutes dated 23-11-1989 and letter No. 379 dated 19-02-1990, letter No. 276 dated 12-02-1981, letter No. 1356 dated 27-05-1982, letter No. 150 dated 21-05-1986, letter No. 821 dated 11-05-1987, letter No. 1429 dated 27-05-1988, letter No. 19309 dated 29-03-2000, letter No. 11001 dated 26-06-1985, letter No. 797 dated 29-03-1986, letter No. 812 dated 31-03-1990, letter No. 1351 dated 04-07-1995, Bank's letter No. 62 (Adv.) dated 09-11-1990, letter No. 2051 dated 21-11-1987, letter No. 754 dated 18-08-1988, letter No. 5263 dated 04-09-1993, letter No. 6934 dated 25-08-1994, letter No. 2748 dated 10-08-2009, letter No. 3202 dated 09-08-2010, letter No. 3588 dated 26-08-2010, Notification No. 2211 dated 10-08-2001, Balance sheet of the year 1986-87 and 2003-04,*

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copy of daily flood relief status dated 26-10-2007 and statement dated 30-06-2011, copy of summary of claim, Notification No. 4156 dated 18-09-2013, letter No. 4386 dated 29-11-2013, order dated 29-10-2010 passed in CWJC No. 16653/2010 and Memo No. 3128 dated 06-12-2010, are referred and in addition to the documents referred to above.

61. The Minor Irrigation Department, Govt. of Bihar has already filed Annexure-A,B,C & D, which runs from Page-11 to 19 of the petition, which are photocopies of the report of NABARD dated 25-10-1989, letter dated 02-12-1989, letter dated 13-06-1997, letter dated 10-11-1988.

62. The Department of Finance, Govt. of Bihar has also listed Annexure-A,B & C, which runs from Page-11 to 19, which are photocopies of the order dated 09-05-2011, letter No. 3178 dated 04-12-1996 and photocopy of recovery status.

63. The Cooperative Department, Govt. of Bihar has also filed Annexure-C series, which runs from Page-6 to 55 of their petition, which are photocopies of order dated 09-05-2011, photocopy of letter No. 3178 dated 04-12-1996, letter No. 2489 dated 10-06-2009, letter No. 62 dated 09-03-2010, letter No. 192 dated 29-07-2010, letter No. 29 dated 28-01-2011, letter No. 155 dated 31-07-2009, letter o. 76 dated 30-03-2009, letter No. 89 dated 29-03-2007, letter No. 203 dated 02-12-2006, letter No. 273 dated 28-12-2007, letter No. 178 dated 29-07-

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2008, letter No. 208 dated 05-09-2008, letter No. 1041 dated 31-03-2001, letter No. 1539 dated 29-05-2001, letter No. 298 dated 30-01-2002, letter No. 2118 dated 29-07-2002, letter No. 188 dated 03-02-2003, letter o. 1669 dated 17-07-2003, letter No. 2418 dated 23-09-2003 and letter No. 2391 dated 17-08-2004.

64. I have examined all such papers and annexures filed on behalf of the respective parties meticulously. The Department of Finance, Govt. of Bihar has claimed that the State Government has paid in all Rs. 109.18 crores (Rs. One hundred nine crores and eighteen lacs) to NABARD on behalf of the Bank-Petitioner. According to them, on account of drought, the Govt. had stayed recovery of loan for one year, i.e., 2009-10, which was applicable on all Banks but the Bank-Petitioner has never paid the instalments fixed by the NABARD.

56. On further perusal of the contents of the award it transpires that the sole Arbitrator proceeded to make an arbitral award. However this Court finds that besides taking note of the fact that the management of the Bank was superseded and remained under the control of the State Government for about 15 years from July, 1988 to August, 2003, the learned Arbitrator proceeded to observe that the loss sustained by the Bank during the administrative control of the Government had to be borne by

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the Government. The substance of his reasoning leading to making of the award are as follows :-

(i) The loss suffered by the Bank during the administrative control of the Government of Bihar stood at more than Rs.125 crores.

(ii) It is the fundamental and basic duty of different wings of Central and State Government as also the financial institutions to make the Bank functional and effective in future.

(iii) The fact cannot be denied that nationalised Banks or Bank wholly owned by the Government are being compensated for non-performing assets sustained by these Banks so as to make it functional and operational and as such the petitioner Bank's function should not be brought to a grinding halt by withdrawing all such grants and compensation.

(iv) Claim made by the Departments of Government to deny such compensation on account of the same being time barred has no justification.

(v) This is not the stage to examine as to who is responsible for such failure on part of functioning of Bank management.

(vi) It is fundamental duty of the welfare State to continue such grant/aid, subsidy and soft term loan to needy

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people even at the cost of incurring financial loss by the Government/Bank etc.

(vii) A welfare State is not supposed to act and implement draconian law on its loanee for recovery of loans in period of calamities and in such situation the financial loss suffered by the Banks has to be compensated by a welfare State.

57. The learned Tribunal after giving the reasons as stated herein above proceeded to make the arbitral award. On bare perusal of the contents of the award, this Court finds that the learned Tribunal has not dealt with materials/annexures/communications brought on record which find mention in paragraph nos. 60-63 of the award as quoted herein above but has proceeded to make award on it's general opinions with respect to the duties of the government as also that of a welfare State. In the opinion of the Court, the award thus suffers from non-application of mind, non consideration of the documents brought on record by the parties, reasons not having been recorded one way or the other with respect to the documents and thus the award suffers from patent illegality.

58. Learned Senior counsel appearing for the appellant- State of Bihar further raised contentions with respect to the Additional District Judge-X, Patna, not having been

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notified as a Commercial Court, was not entitled to adjudicate the miscellaneous case filed under section 34 of the Act as also the contention that the claim of the respondent-Bank was barred by the law of limitation and on this ground also the claim of the Bank was liable to be rejected. Learned Senior counsel appearing for the respondent- Bank gave his reply to both the contentions. From the discussions made herein above, the Court having come to the conclusion that the arbitral tribunal lacked jurisdiction and erred in proceeding with and making an arbitral award on besides other, the ground of there not being any agreement, it is fit to be set aside on the ground also that it is an unreasoned award. As such, the other points raised by the appellant-State of Bihar do not require to be gone into.

59. The learned Additional District Judge decided the application filed by the appellant- State of Bihar under section 34 of the Act by his judgment dated 9.10.2020. The Court finds that submissions were made on behalf of the appellant-State of Bihar to the effect that the impugned award was bad in law as the Arbitrator had no jurisdiction to proceed in absence of an arbitration agreement. The claim was barred by law of limitation and the necessary parties had also not been impleaded by the respondent- Bank.

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60. Considering the submissions made by the counsel for the respective parties the learned Additional District Judge dealt with the submissions in paragraph nos. 28 to 31 of his order dated 9.10.2020 which is quoted herein below for ready reference :-

> *"28. From the perusal of the record, the impugned award and also after hearing all the parties, it appears that the opposite party Bank had filed CWJC No. 1730 of 2010 in the Hon'ble High Court, Patna against petitioner State claiming a sum of rupees 570.69 crore. It further appears that the writ was disposed of vide order dated 19.10.2013 and as per order of the Hon'ble High Court, Patna the opposite party Bank filed a Request Case No. 04 of 2013, before the Hon'ble Patna High Court for appointment of Arbitrator. It appears that against the order dated 19.10.2013, passed in CWJC No. 1730/10 the State Filed LPA No. 748/13. In the said LPA, after hearing the parties the Division Bench vide order dated 22.01.2014 directed to list the LPA after disposal of Request Case No. 4/13. It further appears that vide order dated 07.3.2014, passed in Request Case No. 04 of 2013 Hon'ble Mr. Justice S.C. Jha (Retd.) was appointed as sole Arbitrator.*
>
> *29. Considering these facts, I am of the opinion that the argument adduced on behalf of the petitioner that Arbitration Proceeding is bad in law as the same was initiated without any agreement between the parties, finds no leg to stand and hence, I am of the considered opinion that the argument of*

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the State petitioner in this regard is not sustainable in the eyes of law.

30. It further appears that the petitioner State moved the Hon'ble Supreme Court in SLP(C) No. 15552 of 2014 against the composite order i.e., the order dated 07.03.2014 passed in Request Case No. 04 of 2013 and the order passed in C.W.J.C. No. 1730/10, it appears that the Said S.L.P. was dismissed by the Hon'ble Apex Court vide order dated 14.07.2014. It also appears that after dismissal of SLP No. 1552/14 the Arbitration proceeding was commenced. It appears that the petitioner State raised objection with regard to maintainability of Arbitration Proceeding, but the same was dismissed by a reasoned order dated 24.05.2015, It appears that the same was not challenged before any Court by the petitioner State. Considering these facts, I am of the opinion that the claim of the opposite party bank is not barred by law of limitation.

31. Considering the facts and circumstances discussed above, I find that there is no illegality or infirmity in the impugned award and it need no interference. Therefore, the petition filed under Section 34 of Arbitration and Conciliation, Act, 1996 by the petitioner- State is hereby dismissed."

61. In the opinion of the Court, the learned Additional District Judge not having dealt with the contentions raised on behalf of the appellant-State of Bihar as also for the reasons given in detail while dealing with the award of the sole

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Arbitrator, this Court is of the opinion that the order passed by the learned Additional District Judge dismissing the petition filed under section 34 of the Act by the appellant is also not sustainable and fit to be set aside.

62. In view of the facts and circumstances stated herein above, the award dated 6.1.2016 made by the learned sole Arbitrator in Arbitration Case no.1 of 2014 as also the judgment dated 9.10.2020 passed in Miscellaneous Case no.32 of 2016 by the learned Additional District Judge-X, Patna are both set aside.

63. The appeal is allowed.

(Partha Sarthy, J)

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CAV DATE	12.09.2023
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Transmission Date	