

Case No.	Arbitration Appeal No.79 OF 2021
Parties Name	M/s Gayatri Project Ltd. Vs. Madhya Pradesh Road Development Corporation Limited
Date of order	07/01/2022
Bench Constituted	Division Bench: Justice Sheel Nagu & Justice Purushaindra Kumar Kaurav
Judgement Delivered by	Justice Purushaindra Kumar Kaurav
Whether approved for reporting	Yes
Name of counsel for parties	For Appellant: Shri Kunal Thakre, Advocate For Respondent: Shri Siddharth Sharma, Advocate.
Law laid down	Held: (i) Under the Scheme of the M.P. Madhyastham Adhikaran Adhiniyam, 1983, notwithstanding, there is a written arbitration agreement between the parties, the dispute of 'works contract' could be raised before the Tribunal constituted under the Act of 1983 alone. Arbitration under the Act of 1996 is barred. The Act of 1983 mandates exclusive jurisdiction to the Tribunal. (ii) Section 34(2)(b)(i) of the Arbitration and Conciliation Act 1996, provides that an arbitral award would be liable to be set aside if the subject matter of the dispute is not capable of settlement by arbitration under the law

	<p>for the time being in force. The objection regarding lack of jurisdiction could be raised at any stage even though no such objection was taken before the Arbitral Tribunal under section 16(2) of the Act of 1996.</p> <p>(iii) The legislature has consciously cast a duty on the court to set aside an award even though no specific challenge is made by a party if the court finds that the award is in respect of subject matter incapable of arbitration by operation of law.</p> <p>(iv) It is settled legal position that when a forum lacks inherent jurisdiction with regard to the subject matter then the principles of stopple, waiver and <i>res-judicata</i> do not apply.</p> <p>(v) The provisions of Section 14 of the Limitation Act <i>per se</i> do not apply to the Tribunal. However, the principle of Section 14 can be resorted to by a Tribunal in appropriate cases to advance the cause of justice.</p>
Significant paragraph numbers	8, 10, 11, 12, 16 to19, 23 to 31.

JUDGEMENT

(07/01/2022)

This Arbitration Appeal under Section 37 of the Arbitration and Conciliation Act 1996 (for short, hereinafter referred to as the “Act of 1996”) takes exception to the impugned order dated 20.12.2019, passed by the Commercial Court and 19th Additional Sessions Judge, Bhopal (M.P.) allowing an application under Section 34 of the Act of 1996, preferred by the respondent, whereby, the original award dated 08.07.2011 pronounced by the sole Arbitrator,

appointed under the provisions of the Act of 1996, has been set aside.

2. In view of the law laid down by the Hon'ble Supreme Court in the matter of *Madhya Pradesh Rural Road Development Authority and Another Vs. M/s. L.G. Chaudhary Engineers and Contractors*¹, learned counsel appearing for the appellant does not dispute the applicability of the provisions of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (for short, hereinafter referred to as the "Act of 1983"), over the subject matter of the present dispute. However, his singular grievance is that the award, passed under the provisions of the Act of 1996 by the Arbitral Tribunal before decision of the Hon'ble Supreme Court in the case *L.G.Choudhary*¹, had attained finality and the same cannot be interfered with only on the ground of lack of jurisdiction.

3. The brief facts for adjudication of the present appeal are that on 12.12.2005, an agreement was executed between the appellant and the respondent for the work of rehabilitation and strengthening of Khargone – Barwani road (SH-26) Project Road No.19 and rehabilitation and strengthening of Khargone – Biston road (SH-31) Project Road No.20 for a sum of Rs.58,25,28,228/-. On 31.03.2009, the work was completed. However, on 03.11.2009 a request made by the appellant for reimbursement of the extra cost incurred due to

¹(2018)10 SCC 826

enhancement of entry tax, was rejected which gave rise to him to invoke the arbitration clause. After nomination of Arbitrators by both the parties, the Presiding Arbitrator was appointed by the nominated Arbitrators, and finally, award dated 08.07.2011 was pronounced wherein a sum of Rs.1,03,55,187/- was awarded in favour of the appellant.

4. The respondent preferred an application under Section 34 of the Act of 1996 for setting aside the arbitral award before the Court below, which has been allowed on the ground that the award passed by the Arbitration Tribunal under the provisions of the Act of 1996 is without jurisdiction and the subject matter of the dispute falls within the definition of “Works Contract”, therefore, it is only the statutory Tribunal created under the provisions of the Act of 1983 which has the exclusive jurisdiction to deal with the subject matter.

5. Shri Kunal Thakre, learned counsel for the appellant, has made following submissions to substantiate his arguments as noted in para 2 above:

(i) The respondent has not raised any objection with respect to applicability of the Act of 1983, or the non-applicability of the Act of 1996 before the Arbitration Tribunal, therefore, the objection with respect to lack of jurisdiction, cannot be raised at subsequent stage under Section 34 of the Act of 1996.

(ii) The law laid down by the Hon'ble Supreme Court in the matter of *VA Tech Escher Wyass Floverl Limited Vs. Madhya Pradesh State Electricity Board and Another*² dated 14.01.2020 was applicable on the date of invoking the arbitration clause under the Act of 1996, which clearly says that the Act of 1983 only applies where there is no arbitration clause, but it stands impliedly repealed by the Act of 1996, where, there is an arbitration clause. The said legal position remained in force until 24.01.2012, when the law laid down in the case *VA Tech*² was declared *per incuriam* in the subsequent decision by the Hon'ble Supreme Court in the case of *Madhya Pradesh Rural Development Authority Vs. L.G. Chaudhary Engineers and Contractors*³.

(iii) The larger Bench of the Hon'ble Supreme Court in the matter of *M/s L.G. Choudhary Engineers*¹ in paragraph no. 19 has held that since no objection was raised by the respondents in that case in terms of Section 16(2) of the Act of 1996 at appropriate stage within the time stipulated, the award could not have been annulled. The said principle has been followed in subsequent decision dated 10.01.2020 in the matter of *M/s.*

² (2011) 13 SCC 261

³ (2012) 3 SCC 495

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*JMC Projects (India) Ltd. Vs. Madhya Pradesh Road Development Corporation*⁴ where the Hon'ble Supreme Court has declined to interfere into the award passed on 07.01.2011 on the ground that the award was already passed and therefore, the objection under Section 34 as to applicability of the Act of 1983, cannot be allowed.

(iv) If the impugned order is set aside on the ground of jurisdiction, the appellant would become remediless for the reason that Section 7(b) of the Act of 1983 provides maximum limitation of three years from the date on which the works contracts is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the 'works contracts'. According to him, the provisions of limitation Act for condonation of delay would not be applicable to the Tribunal which would cause immense prejudice to him.

6. Shri Siddharth Sharma, learned counsel appearing for the respondent opposes the appeal and made the following submissions:-

⁴ Civil Appeal No.204/2020

(i) The impugned order is based on the settled legal position that the issue of jurisdiction can be raised at any stage.

(ii) The Hon'ble Supreme Court in the matter of *Lion Engg. Consultants Vs. State of M.P.*⁵ has partly over-ruled the law laid down in the matter of *MSP Infrastructure Ltd. Vs. M.P. Road Development Corporation Ltd.*⁶ and therefore the reliance placed by the appellant on the decision in the case of *M/s. JMC Projects (India) Ltd.*⁴ is misplaced as in the said case the decision of the Hon'ble Supreme Court in the matter *Lion Engg. Consultants*⁵ was not brought to the notice of the Hon'ble Court.

7. Before advertng to the aforesaid submissions, it would be useful to refer the relevant provisions and the decisions of the Hon'ble Supreme Court governing the subject matter.

8. Section 34(2)(b)(i) of the Act of 1996 provides that an arbitral award may be set aside if the Court finds that subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or if the Court finds that the award is in conflict with the public policy of India.

9. Section 34(2)(b)(i) and (ii) read as under:

⁵ (2018) 16 SCC 758

⁶ (2015) 13 SCC 713

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—

(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

10. In the State of Madhya Pradesh, the legislature enacted the Act of 1983. The said Act provides that all disputes relating to “works contract” shall be exclusively decided by the Tribunal created under the Act of 1983.

11. Section 2(i) of the Act of 1983 defines “works contract”. Section 3 of the Act of 1983 provides for constitution of Tribunal to decide all disputes in relation to “works contract”. Section 4 provides that the Tribunal shall be headed by a sitting or retired Judge of the High Court. Section 7 of the Act of 1983 provides that parties to “works contract” whether or not there is an arbitration agreement, shall refer the dispute to Tribunal. In other words, the Act of 1983 provides that whether the parties to a “works contract” incorporate an arbitration agreement or not, any dispute relating to “works contract” shall fall within the

exclusive jurisdiction of the Tribunal. Against the award passed by the Tribunal, a revision lies to the High court under Section 19 of the Act of 1983. Section 20 of the Act of 1983 bars the jurisdiction of the civil Courts.

12. Thus, under the scheme of the Act of 1983, notwithstanding, there is a written arbitration agreement between the parties, the dispute of ‘works contract’ could be raised before the Tribunal alone. Arbitration under the Act of 1996 is barred. The Act of 1983, therefore, mandates exclusive jurisdiction to the Tribunal.

13. The Hon’ble Supreme Court in *VA Tech*² had held that Act of 1983 would apply only if there is no arbitration agreement. But if there is an arbitration agreement then Act of 1983 is impliedly repealed and the 1996 Act would apply.

14. However, the correctness of the decision of the Hon’ble Supreme Court in *VA Tech*² was doubted in *M.P. Rural Development Authority*³. In separate opinions, it was held that *VA Tech*² is per incurium. It was held that Section 2(4) of the Act of 1996 saves other inconsistent legislations and hence in Madhya Pradesh, the Act of 1983 prevails over the Act of 1996 in respect of disputes of “works contract”. It was held that

proceeding could continue only before Tribunal and not before arbitrator. **Gyan Sudha Mishra J.**, however, gave a part dissent to the effect that where the “works contract” is terminated by a party then the Act of 1983 would not apply and Act of 1996 would apply. In view of the partial dissent by Gyan Sudha Mishra J., the matter was referred to a larger bench of three judges.

15. A bench of three Judges of the Hon’ble Supreme Court in ***L.G. Chaudhary***¹ decided the reference and affirmed the opinion of A.K. Ganguly J. It was held that the dissenting opinion of Gyan Sudha Mishra J. does not lay down the correct law.

16. Thus, the legal position, after the aforesaid decision of three judges of Hon’ble Supreme Court is clear that the jurisdiction of arbitral tribunal under the Act of 1996 is barred by operation of law.

17. Further in ***State of Chattisgarh Vs. M/s KMC Contruccion***⁷, the Hon’ble Supreme Court, after referring to aforesaid decision of three-judges’ bench in L.G. Chaudhary,

⁷ (2018) 10 SCC 839(1)

held that the tribunal has “exclusive” jurisdiction to decide disputes of “works contract”.

18. As stated above, Section 34(2)(b)(i) of the Act of 1996, provides that an arbitral award would be liable to be set aside if the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. If this Court applies the requirements of Section 34(2)(b)(i) of the Act of 1996 in the present case, it is apparent that the same are squarely met. Under Section 7 of the Act of 1983 a dispute of “works contract” is not capable of being adjudicated by arbitral tribunal under the Act of 1996.

19. In *Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd*⁸ the Hon’ble Supreme Court held that in view of Section 34(2) (b) of the Act of 1996, an arbitral award will be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Similarly, in *A.Ayyasamy Vs. A.Paramasivam*⁹, the Hon’ble Court reiterated the aforesaid legal position.

8 (2011) 5 SCC 532
9 (2016) 10 SCC 386

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20. In view of the aforesaid legal position, this Court has no hesitation in holding that the learned Court below has rightly found the arbitral award to be without jurisdiction.

21. Now, we shall consider the specific objection of the appellant regarding lack of objection on jurisdiction under Section 16(2) of the Act of 1996 before the arbitral tribunal in view of order dated 13.03.2018 in *C.A.No.2616 of 2018*¹⁰ and in *M/s. JMC Projects (India) Ltd.*⁴.

22. It is true that the Hon'ble Supreme Court in its order dated 13.03.2018 in *C.A.No.2616 of 2018*¹⁰ has held that award cannot be annulled on the ground of lack of jurisdiction if the objection under Section 16(2) was not taken before the arbitral tribunal. This view was based on a decision of two judge bench of the Hon'ble Supreme Court in *MSP Infrastructure Ltd. Vs. M.P. Road Development Corp.Ltd*⁶.

23. However, a bench of three-judges of the Hon'ble Supreme Court in a subsequent decision in *Lion Engg. Consultants Vs. State of M.P*⁵ partly overruled *MSP Infrastructure Ltd*⁶ and held that the objection regarding lack of jurisdiction can be taken under Section 34 of the Act of 1996, even if no objection

10 (2018) 10 SCC 833

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under Section 16(2) was taken before the arbitral tribunal. Thus, in view of the subsequent decision of the larger bench, this Court is of the view that the objection regarding lack of jurisdiction could have been taken before the learned trial Court under Section 34 of the Act of 1996, even though no such objection was taken before the arbitral tribunal under Section 16(2) of the Act. The Hon'ble Supreme Court in the matter of *M/s. JMC Projects (India) Ltd.*⁴ has not referred to the decision in the matter of *Lion Engineers*⁵ which was subsequent to the decision of *C.A.No.2616 of 2018*.¹⁰ Hence, The learned trial Court acted in accordance with law while entertaining the objection under Section 34 of the 1996 Act and setting aside the arbitral award on the ground of lack of jurisdiction.

24. Our aforesaid view is fortified on a different reasoning as well. If we examine Section 34 of the Act of 1996, it has two parts. Part (a) deals with grounds where a “party making an application furnishes proof”. Whereas, part (b) deals with where “the Court finds”. Thus, even if no ground is taken in a petition under Section 34 of the 1996 Act, if the Court finds that the award is in respect of subject matter incapable of arbitration by operation of law; the court is duty bound to set it aside under

Section 34(2)(b)(i) of the 1996 Act. The legislature has consciously cast a duty on the court to set aside an award even though no specific challenge is made by a party.

25. In Fiza Developers & Inter-Trade (P) Ltd Vs. Amci (I) (P) Ltd¹¹ the Hon'ble Supreme Court categorically laid down that an award is liable to be set aside by the Court's own initiative if the subject-matter of the dispute is not arbitrate or the award is in conflict with the public policy of India.

26. Thus, even if a party assailing an arbitral award has not taken a ground in its Section 34 petition, the Court under Section 34 (2)(b)(i) of the Act of 1996 is obligated to set aside an award, which under the law in force, is not capable of arbitration.

27. Other than challenge to an arbitral award under the scheme of the Act of 1996, this Court finds that when there is a challenge to lack of inherent jurisdiction the same can be raised at any stage and decree by a forum lacking inherent jurisdiction on the subject matter is a nullity. The Hon'ble Supreme Court in **Kiran Singh Vs. Chaman Paswan**¹² categorically laid down that lack of inherent jurisdiction over the subject matter would

¹¹ (2009) 17 SCC 796

¹² (1995) 1 SCR 117

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render a decree nullity. Such an objection can be raised at any state, even in execution and collateral proceeding. The aforesaid principle of law was reiterated in *Dhirendra Kumar Vs. Superintendent and Remembrancer of Legal Affairs, Govt. of W.B.*¹³, *Sushil Kumar Mehta Vs. Gobind Ram Bohra*¹⁴; *Chiranjilal Shrilal Goenka vs. Jasjit Singh*,¹⁵ *Harshad Chiman Lal Modi Vs. DLF Universal Ltd.*,¹⁶; *Jagmittar Sain Bhagat Vs. Health Services, Haryana*¹⁷ *Zuari Cement Ltd. Vs. ESI Corpn.*¹⁸

28. It is further settled legal position that when a forum lacks inherent jurisdiction with regard to the subject matter, then the principles of estoppel; waiver and res judicata do not apply as held in *Chief Justice of A.P. Vs. L.V.A. Dixitulu*¹⁹; *Isabella Johnson (Smt.) Vs. M.A.Susai*²⁰; *Bihar State Mineral Development Corpn. Vs. Encon Builders (I) (P) Ltd.*²¹ and *Union of India Vs. Assn. Of Unified Telecom Service Providers of India*²². The upshot of this line of decisions is

13 (1995) 1 SCR 224

14 (1990) 1 SCC 193

15 (1993) 2 SCC 507

16 (2005) 7 SCC 791

17 (2013) 10 SCC 136

18 (2015) 7 SCC 690

19 (1979) 2 SCC 34

20 (1991) 1 SCC 494

21 (2003) 7 SCC 418

22 (2011) 10 SCC 543

supportive of the view taken by the Hon'ble Supreme Court in *Lion Engg.*⁵ that even if an objection under Section 16(2) is not taken, the objection on lack of jurisdiction can be taken at the stage of Section 34 of the 1996 Act.

29. In view of the aforesaid legal position, we are of the view that the learned Court below did not commit any error in setting aside the arbitral award on the ground of lack of jurisdiction. We see no reason to interfere with the order passed by the learned Court below under Section 34 of the 1996 Act. This appeal under Section 37 of the 1996 Act is accordingly dismissed.

30. We are, however, conscious of the fact that the appellant cannot be rendered remediless. It would, therefore be open for the appellant to raise a dispute before the Tribunal under the Act of 1983. We are also conscious that the issue of limitation may apply in approaching the Tribunal. However, since the Appellant was pursuing a wrong remedy, it would be open for the Tribunal under the Act of 1983 to condone the delay on the principle propounded in Section 14 of the Limitation Act. The Hon'ble Supreme Court in *M.P. Steel Corp. v. CCE*,²³ and *A.P. Power Corp. Committee vs. Lanco Kondapalli Power Ltd.*²⁴ has held

23 (2015) 7 SCC 58

24 (2016) 3 SCC 468

that even if Section 14 of the Limitation Act *per se* does not apply to Tribunal, the principles of Section 14 can be restored to by a Tribunal, in appropriate cases, to advance the cause of justice.

31. Thus, if a dispute under Section 7 of the Act of 1983 is raised by the appellant along with an application seeking condonation of delay on the principles of Section 14 of the Limitation Act, we direct the Tribunal to consider the same in the light of the law laid down by the Hon'ble Supreme Court in *M.P. Steel Corp.*²³ and *A.P. Power Corp. Committee*²⁴ and decide the matter in accordance with law. On account of lapse of time, since the dispute first arose, we request the Tribunal to decide the dispute, if so raised by the Appellant, expeditiously and preferably within 9 months from the date of filing of the petition.

32. With the aforesaid observations, the present appeal under Section 37 of the 1996 Act stands **dismissed** leaving the parties to bear their respective costs.

(SHEEL NAGU)
JUDGE

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

Jasleen