IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 4524 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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GTPL HATHWAY LTD.
Versus
STRATEGIC MARKERING PVT.LTD.

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Appearance:
MR SUNIT SHAH FOR MR YATIN SONI(868) for the Petitioner(s) No. 1
MR SHIVANG J SHUKLA(2515) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

Date : 20/04/2020

CAV JUDGMENT

1. By this petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged order dated 14th February, 2019 passed by the Arbitration Tribunal consisting of sole arbitrator (Hon'ble Mr. Justice

J.M. Panchal- Former Judge, Supreme Court of India) whereby preliminary objections raised by the petitioner to decide as to whether the disputes between the parties is arbitrable or not is rejected.

2. Facts giving rise to this petition may be summarized as under :

A contract was executed on 5th December, 2014 between the petitioner and the respondent for the period between 15th January, 2015 to 31st March, 2017 for establishing aCustomer Care Center and accordingly, the petitioner had outsourced customer call services to the respondent.

During the inspection checking on 29th September, 2016 carried out by the petitioner in the office of respondent, it was found that the respondent had manipulated its software program namely, "C-Zentrix" to show an exaggerated number of persons logged in at the same time than actually appointed to address calls of the customers and by such manipulation in computer program, the respondent used to claim and raise false and inflated invoices based on exaggerated number of persons employed by the respondent for the petitioner's service call centre. The petitioner on further inquiry came to know that two employees of the petitioner had in connivance with the respondent committed a fraud on the petitioner. A criminal complaint came to be filed against the respondent on 31st March, 2017 being I-CR No.30/2017 for offences punishable under sections 408, 409, 120-B, 34 of the Indian Penal Code and sections 65 and 66(D) of the

Information and Technology Act, 2008. It is the case of the petitioner that the petitioner had already cleared the invoices till the scam came to light and thereafter, the petitioner stopped making monthly payment since the petitioner had paid much more than actually due to the respondent. It is the case of the petitioner that the petitioner continued to avail the services of customer care centre for approximately six weeks from the date of inspection i.e. up to 24th November, 2016. From 24th November, 2016, the petitioner started its own customer care centre.

Pursuant to criminal complaint, charge-sheet came to be filed on 7th September, 2018 before the Court of Ahmedabad Metropolitan Magistrate being Criminal Case No. 83453/2018.

It is the case of the petitioner that with a view to elude the criminal charges, the respondent issued notice on 30th May, 2017 for invoking arbitration clause that too after filing the quashing petition before this Court being Criminal Misc. Application No. 10891/2017. The petitioner gave reply to such notice on 25th July, 2017.

Thereafter, respondent filed petition under section 11 of the Arbitration and Conciliation Act, 1996 ("the Act, 1996" for short) for appointment of an arbitrator. This Court vide order dated 9th February, 2018 appointed retired Judge of this Court, Hon'ble Mr. Justice D.A. Mehta to resolve the disputes between the parties keeping all the contentions open to be considered by the learned arbitrator. Since the

learned arbitrator resigned, this Court appointed Hon'ble Mr. Justice J.M. Panchal, former Judge of Supreme Court of India, as the sole arbitrator.

The respondent thereafter filed his statement of claim and the petitioner filed his counter claim against the same. The petitioner also made an application seeking certain documents from the respondent which is still pending for consideration by the learned arbitrator. The Arbitral Tribunal vide order dated 19th December, 2018 directed to take on record the preliminary statement of defense and counter claim and observed that it would be open for the petitioner to amend the same in accordance with law. After hearing the parties, the Arbitral Tribunal vide order dated 14th February, 2019, dismissed the preliminary objection application filed by the petitioner. Being aggrieved by the said order rejecting the application filed by the petitioner raising preliminary objection, the petitioner has preferred the present petition.

3. Short question which arises for consideration of this Court is whether the any order passed during pendency of arbitration proceedings under the Act-1996 can be challenged by certiorari under Articles 226 and 227 of the Constitution of India or not.

4. Heard learned advocate Mr. Sunit Shah with learned advocate Mr. Yatin Soni for the petitioner and learned advocate Mr. Shivang Shukla for the respondent.

5. Learned advocate for the petitioner submitted that the

order passed by Arbitral Tribunal can be challenged by writ petition under Articles 226 and 227 of the Constitution of India. It was submitted that the provisions of the Act, 1996 provides for an alternative to mechanism of adjudication of disputes under the Code of Civil Procedure, 1908 ("the Code" for short). It was submitted that Supreme Court as well as various other High Courts including this Court have entertained the petition challenging the order passed by the Arbitration Tribunal time and again. In support of above contention, learned advocate for the petitioner placed reliance upon the following decisions :

i) **M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.** reported in (2005) 8 SCC 618.

ii) National Thermal Power Corporation Limited v. Siemens Atkeingesellschaft reported in 2007(4) SCC 451, wherein it is held as under :

> "13 The expression 'jurisdiction' is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. SBP & Co. Vs. Patel Engineering Ltd. & Anr. [(2005) 8 S.C.C. 618] in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract, without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including

the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub- section(6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression 'jurisdiction' and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37 (2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of

excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly."

iii) **Punjab Agro Industries Corpn Ltd v. Kewal Singh Dhillon** reported in 2008(10) SCC 128, wherein it is held as under :

"8. We have already noticed that though the order under section 11(4) is a judicial order, having regard to section 11(7) relating to finality of such orders, and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP does not bar such a writ petition. The observations of this Court in SBP that against an order under section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as Designate of the Chief Justice. This Court has repeatedly stressed that Article 136 is not intended to permit direct access to this Court where other equally efficacious remedy is available and the question involved is not of any public importance; and that this Court will not ordinarily exercise its jurisdiction under Article 136, unless the appellant has exhausted all other remedies open to him. Therefore the contention that the order of the Civil Judge, Sr. Division rejecting a petition under section 11 of the Act could only be challenged, by recourse to Article 136 is untenable. The decision in SBP did not affect the maintainability of the writ petition filed by Appellant before the High Court."

iv) Vidya Drolia v. Durga Trading Corporation

reported in 2019 SCC Online SC 358, wherein it is held as under :

> "8. It will be noticed that "validity" of an arbitration agreement is, therefore, apart from its "existence". One moot question that therefore, arises, and which needs to be authoritatively decided by a Bench of three learned Judges, is whether the word "existence" would include weeding-out arbitration clauses in agreements which indicate that the subject- matter is incapable of arbitration. A Division Bench of this Court, through one of the learned Judges, Kurian Joseph, J., has stated, in Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729, that the scope of Section 11(6A) is limited to the following:
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> > "59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.""
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> 17. So far so good on principle. However, we have now to refer to certain decisions of this Court. The basic decision in cases of this kind

is the judgment contained in Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others, (2011) 5 SCC 532. This judgment has laid down in great detail what is the meaning of the expression "arbitrability" [see paragraph 34]. Paragraph 35 is important and reads as follows:

> "35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes."

18. Paragraph 36 then goes on to give certain well recognized examples of non-arbitrable disputes as follows:

> "36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which

give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

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34. Insofar as the Transfer of Property Act or the Specific Relief Act, no such thing exists, as has been held by Olympus Superstructures (supra) and by Booz Allen (supra).

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37. Given the facts of this case and the fact that 18 hearings have been held, the stay that has been granted to the arbitral proceedings by our order dated 13.08.2018 is lifted, and the proceedings may go on and culminate in an award. The award cannot be executed without applying to this Court. The appeal is disposed of accordingly."

v) **M/s. Mayavti Trading Pvt. Ltd v. Pradyuat Deb Burman** (order dated 5th September, 2019 in Civil Appeal No.7023/2019), wherein it is held as under :

"10) This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been

legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) – see paras 48 & 59."

vi) **Duro Felguera SA v. Gangavaram Port Limited** reported in (2017) 9 Supreme Court Cases 729, wherein it is held as under :

"48 Section 11(6A) added by the 2015 Amendment, reads as follows:

"11(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub- section (4) or sub-section (5) or sub- section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement." (Emphasis Supplied)

From a reading of Section 11(6A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect- the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple - it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

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56. Having said that, this being one of the first

cases on Section 11(6A) of the 1996 Act before this Court, I feel it appropriate to briefly outline the scope and extent of the power of the High Court and the Supreme Court under Sections 11(6) and 11(6A).

57. This Court in S.B.P & Co v. Patel Engineering Ltd and Another overruled Konkan Railway Corpn. Ltd. and others v. Mehul Construction Co. and Konkan Railway Corpn. Ltd. & another. v. Rani Construction Pvt. Ltd. to hold that the power to appoint an arbitrator under Section 11 is a judicial power and not a mere administrative function. The conclusion in the decision as summarized by Balasubramanyan, J. speaking for the majority reads as follows:

"47. We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be

his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal

has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. and orders under Section 11(6) of the Act have been made based onthe position adopted inthat decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are tobe treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd is overruled." (Emphasis Supplied)

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59.The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing

more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected."

vii) **State of Rajasthan v. Lord Northbrook** reported in 2019 SCC Online SCC 1117, wherein it is held as under :

"60. Under Article 226 of the Constitution of India, the High Court having regard to the facts of the case has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions; one of which is an effective and efficacious remedy available. When efficacious alternative remedy is available, the High Court would not normally exercise the jurisdiction. However, alternative remedy will not be a bar at least in three instances:-

(i) where writ petition is filed for enforcement of any of the fundamental rights;

(ii) where there is a violation of the fundamental right or principles of natural justice; and

(iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged; [vide Harbanslal Sahnia and Another v. Indian Oil Corpn. Ltd. and Others (2003) 2 SCC 107].

61. Notwithstanding the availability of alternative remedy, having regard to the facts of the case, the High Court has a discretion to entertain or not to entertain a writ petition. But in the present case, while considering correctness of the communications/orders issued way back in 1987, the High Court should have taken into consideration the subsequent events viz., the judgment passed by the High Court of Delhi in Testamentary Case and the order passed by the

District Collector under Section 6 of the Act and the pendency of appeals before the High Court and Board of Revenue. Challenge to the initiation of the proceedings under the Rajasthan Escheats Regulation Act, 1956 is already a subject matter of appeal before the Board of Revenue. Based on the Will, whether the Trust has a right to claim the properties of Sh. Raja Sardar Singh is also a subject matter of appeal before the Delhi High Court. While so, exercising jurisdiction under Article 226 of the Constitution of India, the High Court ought not to have gone into the correctness of three notices issued on 03.07.1987, 22.07.1987 and 03.08.1987 which themselves culminated into various final orders. The impugned order takes away the very foundation of the order passed by the District Collector which is subject matter of the appeal pending before the Board of Revenue. There are serious disputed questions of facts especially whether there was contravention of Proviso to Section 4 and in such view of the matter, the High Court ought not to have gone into the correctness of three communications/orders dated 03.07.1987, 22.07.1987 and 03.08.1987. The High
Court, in my considered view, ought to have directed the parties to work out the remedy before the competent court/authority.

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134. Where the jurisdiction of an authority depends upon a preliminary finding of fact, the High Court is entitled, in an application under Article 226, to determine upon its own independent judgment, whether or not that finding is correct, as held by this Court in State of Madhya Pradesh & Ors. vs. Sardar D.K. Jadav reported in AIR 1968 SC 1186 and Ujjambai vs. State of U.P. reported in AIR 1962 SC 1621.

135. I am unable to persuade myself to agree with my esteemed sister that the issuance of notices informing those interested in the properties left by late Raja Bahadur, that if they did not appear and produce documents, it would be presumed that the properties were lawaris, satisfies the

conditions precedent for initiation of proceedings under the Escheats Act.

136. The District Collector clearly erred in rejecting the claims of agnates on the ground that they had withdrawn their objections in the probate proceedings. Withdrawal of objections to the probate proceedings does not estop the agnates and/or cognates from claiming the property upon failure of the probate application.

137. As observed by my esteemed sister, under Article 226 of the Constitution of India, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition.

138. The power of the High Court to issue prerogative writs is wide. The Constitution does not place any limitation on such power. However, the Courts have, through judicial pronouncements, evolved self imposed restrictions on the exercise of power by the writ Court. When an efficacious alternative remedy is available, the High Court does not normally exercise jurisdiction. However, when a writ petition has been entertained and kept pending for years, it would not be appropriate to reject the writ petition only on the ground of existence of an alternative remedy.

139. It would also be relevant to note that the remedy of appeal availed by the Trustees was against the order of the Collector passed in 2016 almost two decades after the writ petition had been filed. The supervening circumstance of the order of the Collector and the appeal therefrom, would not in my view, justify the dismissal of the writ petition on the ground of existence of alternative remedy.

140. As noted by my esteemed sister, the writ petition filed in 1987 had been pending in the High Court for about three decades. Once the writ petition had been entertained and kept pending, it should not be rejected on the ground of existence of alternative remedy of appeal before the Board of

Revenue.

141. In deciding the question of maintainability of a writ petition in view of existence of alternative remedy, this Court cannot forget that the power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature. The High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. The existence or even invocation of alternative remedy has nothing to do with the jurisdiction of the writ court. Even if a party has already availed of the alternative remedy by invoking the appellate jurisdiction, as also the jurisdiction under Article 226, the party could elect to prosecute proceedings under Article 226 for the same relief.

142. There are certain well-recognised exceptions where the bar of alternative remedy does not apply. Where the authority has acted without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of an alternative remedy, as held by this Court, inter alia, in Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur, U.P. & Ors. reported in (1987) 4 SCC 525. Complete lack of jurisdiction of an authority to take the impugned action, as in this case, is always a good ground to entertain a writ petition.

143. Moreover, as held by this Court in Municipal Council, Khurai and Anr. vs. Kamal Kumar & Anr. reported in AIR 1965 SC 1321, M.G. Abrol, Addl. Collector of Customs, Bombay & Anr. vs. Shantilal Chhotelal & Co. reported in AIR 1966 SC 197 and in State of U.P and Others vs. Indian Hume Pipe Co. Ltd reported in (1977) 2 SCC 724, there is no rule of law that the High Court should not entertain a writ petition when an alternative remedy is available to a party. It is always a matter of discretion with the Court and if the discretion has been exercised by the High Court not unreasonably or perversely, it is settled practice of this Court not to interfere with the exercise of

discretion by the High Court. The High Court in the present case has entertained the writ petition and decided the question of law arising in it and in my opinion rightly. In my view, we would not be justified in interfering in our jurisdiction under Article 136 of the Constitution to quash the order of the High Court, merely on the ground of existence of an alternative remedy. As held by this Court, inter alia,in Kanak vs. U.P. Avas Evam Vikas Parishad & Ors. reported in (2003) 7 SCC 693 (701), once a writ petition is entertained, and the matter is argued at length on merit, it would be too late in the day to contend that the writ petitioner should avail the alternative remedy.

144 The High Court has, in my view, rightly allowed the writ petition. This appeal is, in my view, liable to be dismissed."

viii) **Ameet Lalchand Shah and otrs.v. Rishabh Enterprises and ors.** reported in AIR 2018 SC 3041, wherein it is held as under :

"19. Mr. Sibal, learned senior counsel for the respondents submitted that the High Court rightly relied upon Sukanya Holdings as it relates to Part- I of the Act that the parties who are not signatories to the arbitration agreement (in this case, Astonfield under Sale and Purchase Agreement) cannot be referred to arbitration. It was further submitted that Chloro Controls arises under Part- II of the Act and was rightly distinguished by the High Court and Sukanya Holdings was not overruled by Chloro Controls and hence, the appellants cannot rely upon Chloro Controls. It was contended that the Sale and Purchase Agreement (05.03.2012) under which huge money was parted with, is the main agreement having no arbitration clause cannot be referred to arbitration. It was submitted that the subject matter of the suit cannot be bifurcated between the parties to arbitration agreement and others.

20. In Chloro Controls, this Court was dealing with the scope and interpretation of Section 45 of the Act - Part-II of the Act and in that context, discussed the scope of relevant principles on the basis of which a non-signatory party also could be bound by the arbitration agreement. Under Section 45 of the Act, an applicant seeking reference of disputes to arbitration can either be a party to the arbitration agreement or any person claiming through or under such party. Section 45 uses the expression "….at the request of one of the parties or any person claiming through or under him….." includes non-signatory parties who can be referred to arbitration provided they satisfy the requirements of Sections 44 and 45 read with Schedule I of the Act. In para (73) of Chloro Controls, this Court held as under:-

> "73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non- signatory parties would fall within the exception afore-discussed." (Underlining added)

21. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project namely operating a 2 MWp Photovoltaic

Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement – Equipment Lease Agreement (14.03.2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India:-

(i) Equipment and Material Supply Contract (01.02.2012); and (ii) Engineering, Installation and Commissioning Contract (01.02.2012) and the Rishabh's Sale and Purchase Agreement with Astonfield (05.03.2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (Lessee). Even though, the Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not a party to the suit and even though, Astonfield and appellant No.1 – Ameet Lalchand Shah are not signatories to the main agreement viz. Equipment Lease Agreement (14.03.2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per clause(v) of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (Lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.

22. Parties to the agreements namely Rishabh and Juwi India:- (i) Equipment and Material Supply

Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement namely Equipment Lease Agreement (14.03.2012). All the four agreements are inter- connected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14.03.2012).

23. Since all the three agreements of Rishabh with Juwi India and Astonfield had the purpose of commissioning the Photovoltaic Solar Plant project at Dongri, Raksa, District Jhansi, Uttar Pradesh, the High Court was not right in saying that the Sale and Purchase Agreement (05.03.2012) is the main agreement. The High Court, in our view, erred in not keeping in view the various clauses in all the three agreements which make them as an integral part of the principal agreement namely Equipment Lease Agreement (14.03.2012) and the impugned order of the High Court cannot be sustained.

Amendment to Section 8 of the Arbitration and Conciliation Act, 1996

24. Arbitration and Conciliation (Amendment) Act, 2015 has brought in amendment to Section 8 to make it in line with Section 45 of the Act. In view of the observation made in Sukanya Holdings, Law Commission has made recommendation for amendment to Section 8 of the Act. Consequent to 2015 Amendment Act, Section 8 is amended as under:-

"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 when 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 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 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 along with 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.

25. "Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments - (i) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming "through or under" such a party to the arbitration agreement; (ii) scope of examination by the judicial authority is restricted to a finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "prima facie" basis; (iii) the cut-off date by which an application under Section 8 is to be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and (iv) the amendments are expressed to apply notwithstanding any prior

judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not possess the original or certified copy of the arbitration agreement on account of it being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same." (Ref: Justice R.S. Bachawat's Law of Arbitration and Conciliation, Sixth Edition, Vol. I (Sections 1 to 34) at page 695 published by LexisNexis).

26. Amendment to Section 8 by the Act, 2015 are to be seen in the background of the recommendations set out in the 246 th Law Commission Report. In its 246th Report, Law Commission, while recommending the amendment to Section 8, made the following observation/comment:-

"LC Comment: The words "such of the parties…. to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr. (2003) 5 SCC 531,

- in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary parties to the action – and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral

tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.

(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 or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified thereof in circumstances where the original arbitration agreement or duly certified copy is retained only by the other party.

LC Comment: In many transactions involving Government bodies and smaller market players, the original/duly certified copy of the arbitration agreement is only retained by the former. This amendment would ensure that the latter class is not prejudiced in any manner by virtue of the same" (Ref: 246th Law Commission Report, Government of India)

27. The language of amendment to Section 8 of the Act is clear that the amendment to Section 8(1) of the Act would apply notwithstanding any prayer, judgment, decree or order of the Supreme Court or any other Court. The High Court laid emphasis upon the word ".....unless it finds that prima-facie no valid agreement exists". The High Court observed that there is no arbitration agreement between Astonfield and Rishabh. After referring to Sukanya Holdings and the amended Section 8 and Section 45 of the Act, the High Court pointed out the difference in language of Section 8 and Section 45 of the Act. The High Court distinguished between Sukanya Holdings and Chloro Controls, and observed that Sukanya Holdings was not overruled by Chloro Controls. In para (23) of the impugned judgment, it was held as under:-

"23. .....The change in Section 8 is that the Court is to - in cases where arbitration

agreements are relied on- to refer the disputes in the suit, to arbitration, "notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists". The Court is of opinion that Sukanya is not per se overruled, because the exercise of whether an arbitration agreement exists between the parties, in relation to the disputes that are the subject matter of the suit, has to be carried out. If there are causes of action that cannot be subjected to arbitration, or the suit involves adjudication of the role played by parties who are not signatories to the arbitration agreement, it has to continue because "prima facie no valid arbitration agreement exists" between such non parties and others, who are parties."

28. Re: contention: allegations of fraud disable an arbitration:- Yet another ground based on which the High Court declined to refer the parties to arbitration is the allegations of fraud levelled by respondents/plaintiffs in their plaint against Astonfield and appellant no.1. The High Court held that the respondents levelled allegations of fraud against the appellants which raise serious triable issues of fraud and hence, the matter cannot be referred to arbitration.

29. According to the respondents, it is not a case where “fraud is alleged merely to disable an arbitration”. Mr. Sibal, learned senior counsel for respondents contended that the plaint is based on the averments that from inception, the intention of appellants/defendants was to cheat the respondents and the respondents were made to part with large sums of money on the basis of the misrepresentation made by the appellants. It was submitted that alternative prayer in the plaint will not convert the fraud suit to a regulatory suit because of alternative prayer since alternative prayer – ‘lease rental’ has been projected only as an alternative remedy. Placing reliance upon Arundhati Mishra (Smt) v. Sri Ram Charitra

Pandey (1994) 2 SCC 29, it was submitted that it is settled law that it is open to the parties to raise mutually inconsistent pleas and the relief could be granted on the alternative plea so raised.

30. Refuting the above contentions, Mr. Shanti Bhushan, learned senior counsel for the appellants placed reliance upon Ayyasamy case to contend that there are no serious allegations in the plaint to decline reference of the matter to arbitration. It was submitted that mere allegations of fraud were not sufficient to detract from the performance of the obligation of the parties in terms of the agreement and refer the matter to arbitration.

31. Under the Act, an arbitration agreement means an agreement which is enforceable in law and the jurisdiction of the arbitrator is on the basis of an arbitration clause contained in the arbitration agreement. However, in a case where the parties alleged that the arbitration agreement is vitiated on account of fraud, the Court may refuse to refer the parties to arbitration. In Ayyasamy case, this Court held that mere allegation of fraud is not a ground to nullify the effect of arbitration agreement between the parties and arbitration clause need not be avoided and parties can be relegated to arbitration where merely simple allegations of fraud touched upon internal affairs of parties is levelled. Justice A.K. Sikri observed that it is only in those cases where the Court finds that there are serious allegations of fraud which make a virtual case of criminal offence and where there are complicated allegations of fraud then it becomes necessary that such complex issues can be decided only by the civil court on the appreciation of evidence that needs to be produced. In para (25) of Ayyasamy case, Justice Sikri held as under:-

> "25…..Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is

an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject- matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

ix) **Radhey Shyam and anr. v. Shhabi Natha and ors.** reported in (2015) 5 SCC 423, wherein it is held as under :

9. We have given anxious consideration to the rival submissions. It will be appropriate to refer to some of the leading judgments of this Court on the scope of writ jurisdiction in the present context, including those referred to in Surya Dev Rai and the referring order.

10. In T.C. Basappa v. T. Nagappa, question before this Court was as to the scope of jurisdiction un- der Article 226 in dealing with a writ of certiorari against the order of the Election Tribunal. This Court considered the question in the background of principles followed by the superior courts in England which generally formed the basis of de- cisions of the Indian courts. This Court held that while broad and fundamental norms regulating ex- ercise of writ jurisdiction had to be kept in mind, it was not necessary for Indian courts to look back to the early history or procedural technicalities of the writ jurisdiction in England in view of express constitutional provisions. Certiorari was meant to supervise "judicial acts" which included quasi-ju- dicial functions of administrative bodies. The Court issuing such writ quashed patently erro- neous and without jurisdiction order but the Court did not review the evidence as an appellate court

nor substituted its own finding for that of the in- ferior tribunal. Since the said judgment is followed in all leading judgments, the relevant observations therein may be extracted: (T.C. Basappa case, AIR pp. 443-44, paras 5-11)

"5. The principles upon which the superior courts in England interfere by issuing writs of 'certiorari' are fairly well known and they have generally formed the basis of decisions in our Indian courts. It is true that there is lack of uniformity even in the pronouncements of English Judges, with re- gard to the grounds upon which a writ, or, as it is now said, an order of 'certiorari', could issue, but such differences of opinion are unavoidable in Judge-made law which has developed through a long course of years.

As is well known, the issue of the prerogative writs, within which 'certiorari' is included, had their origin in England in the King's prerogative power of superintendence over the due observance of law by his officials and tribunals. The writ of 'certiorari' is so named because in its original form it required that the King should be 'certified of' the proceedings to be investigated and the object was to secure by the authority of a superior court, that the jurisdiction of the inferior tribunal should be properly exercised, vide Ryots of Garabandho v. Zemindar of Parlakimedi10. These principles were transplanted to other parts of the King's domin- ions.

In India, during the British days, the three chartered High Courts of Calcutta, Bombay and Madras were alone competent to issue writs and that too within specified limits and the power was not exercisable by the other High Courts at all. 'In that situation' as this Court observed in Election Commission v. Saka Venkata Subba Rao: (AIR p. 212, para 6)

'6. … the makers of the Constitution having de- cided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary

to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the courts in England had developed and used whenever urgent neces- sity demanded immediate and decisive interposi- tion, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such direc- tions, etc. 'for any other purpose' being also in- cluded with a view apparently to place all the High Courts in this country in somewhat the same posi- tion as the Court of King's Bench in England.'

6. The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or direc- tions including writs in the nature of 'habeas cor- pus, mandamus, quo warranto, prohibition and certiorari' as may be considered necessary for en- forcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Con- stitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any dif- ference or change of opinion expressed in particu- lar cases by English Judges. We can make an or- der or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.

7. One of the fundamental principles in regard to the issuing of a writ of 'certiorari', is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression 'judicial acts' includes the exercise of quasi-judicial func- tions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministeri- al acts. Atkin, L.J. thus summed up the law on

this point in R. v. Electricity Commissioners: (KB p. 205)

'… Whenever anybody of persons having legal au- thority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are sub- ject to the controlling jurisdiction of the King's Bench Division exercised in these writs.'

The second essential feature of a writ of 'certiorari' is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of 'certiorari' the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The of- fending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person, vide per Lord Cairns in Walsall Overseers v. London and North Western Railway Co., AC at p. 39.

8. The supervision of the superior court exercised through writs of 'certiorari' goes on two points, as has been expressed by Lord Summer in R. v. Nat Bell Liquors Ltd., AC at p. 156. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observ- ance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of 'certiorari' could be demanded. In fact there is little difficulty in the enunciation of the prin- ciples; the difficulty really arises in applying the principles to the facts of a particular case.

9. 'Certiorari' may lie and is generally granted when a court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the pro- ceeding or from the absence of some preliminary proceeding or the court itself may not be legally

constituted or suffer from certain disability by reason of extraneous circumstances, vide Hals- bury, 2 Edn., Vol IX, p. 880. When the jurisdiction of the court depends upon the existence of some collateral fact, it is well settled that the court can- not by a wrong decision of the fact give it jurisdiction which it would not otherwise possess, vide Bunbury v. Fuller; R. v. Income Tax Special Pur- poses Commissioners.

10. A tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of 'certiorari' may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a manifest error apparent on the face of the proceedings, e.g. when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be cor- rected by 'certiorari' but not a mere wrong de- cision.

The essential features of the remedy by way of 'cer- tiorari' have been stated with remarkable brevity and clearness by Morris, L.J. in the recent case of

R. v. Northumberland Compensation Appeal Tribunal, ex p Shaw. The Lord Justice says: (KB p. 357)

'It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction when shown.'

11. In dealing with the powers of the High Court under Article 226 of the Constitution, this Court has expressed itself in almost similar terms, vide

G. Veerappa Pillai v. Raman & Raman Ltd. and said: (AIR pp. 195-96, para 20)

‘20. Such writs as are referred to in Article 226 are obviously intended to enable the High Court to is- sue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error ap- parent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correct- ness of the decisions impugned and decide what is the proper view to be taken or the order to be made.’

These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of ‘certi- orari’ under Article 226 of the Constitution.”

11. It is necessary to clarify that the expression “judicial acts” is not meant to refer to judicial or- ders of civil courts as the matter before this Court arose out of the order of the Election Tribunal and no direct decision of this Court, except Surya Dev Rai2, has been brought to our notice where writ of certiorari may have been issued against an order of a judicial court. In fact, when the question as to scope of jurisdiction arose in subsequent de- cisions, it was clarified that orders of the judicial courts stood on different footing from the quasi-ju- dicial orders of authorities or tribunals.

12. In Ujjam Bai v. State of U.P.19, matter was re- ferred to a Bench of seven Judges on the scope of writ of certiorari against an order of assessment under the provisions of sales tax law passed in vi- olation of a fundamental right. Majority of six Judges took the view that except an order under a void law or an “ultra vires” or “without jurisdic- tion” order, there could be no violation of funda- mental right by a quasi-judicial order or a stat- utory authority and such order could not be chal-

lenged under Article 32. A writ of certiorari could however, lie against a patently erroneous order under Article 226. It was observed that the judicial orders of courts stood on different footing. Ayy- angar, J. observed: (AIR pp. 1679-80, para 155)

"155. Before concluding it is necessary to advert to one matter which was just touched on in the course of the arguments as one which might be re- served for consideration when it actually arose, and this related to the question whether the de- cision or order of a regular ordinary court of law as distinguished from a tribunal or quasi-judicial au- thority constituted or created under particular statutes could be complained of as violating a fun- damental right. It is a salutary principle that this Court should not pronounce on points which are not involved in the questions raised before it and that is the reason why I am not dealing with it in any fullness and am certainly not expressing any decided opinion on it. Without doing either however, I consider it proper to make these obser- vations. There is not any substantial identity between a court of law adjudicating on the rights of parties in the lis before it and designed as the High Courts and this Court are to investigate inter alia whether any fundamental rights are infringed and vested with power to protect them, and quasi- judicial authorities which are created under par- ticular statutes and with a view to implement and administer their provisions. I shall be content to leave the topic at this."

13. In Mirajkar3 a nine-Judge Bench judgment, a judicial order of the High Court was challenged as being violative of fundamental right. This Court by majority held that a judicial order of a competent court could not violate a fundamental right. Even if there was incidental violation, it could not be held to be violative of the fundamental right. Gajendragadkar, C.J., observed: (AIR pp. 11-12, paras 38-39 & 42)

"38. The argument that the impugned order af- fects the fundamental rights of the petitioners un-

der Article 19(1), is based on a complete miscon- ception about the true nature and character of ju- dicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be con- sidered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate court. But it is singularly inappropri- ate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in rela- tion to a matter brought before him for adjudica- tion can affect the fundamental rights of the cit- izens under Article 19(1). What the judicial de- cision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1).

39. … Just as an order passed by the court on the merits of the dispute before it can be challenged only in appeal and cannot be said to contravene the fundamental rights of the litigants before the court so could the impugned order be challenged in appeal under Article 136 of the Constitution, but it cannot be said to affect the fundamental rights of the petitioners. The character of the judi- cial order remains the same whether it is passed in a matter directly in issue between the parties or is passed incidentally to make the adjudication of the dispute between the parties fair and effective. On this view of the matter, it seems to us that the whole attack against the impugned order based on the assumption that it infringes the petitioners' fundamental rights under Article 19(1), must fail.

* * *

42. It is true that the opinion thus expressed by Kania, C.J., in A.K. Gopalan had not received the concurrence of the other learned Judges who heard the said case. Subsequently, however, in Ram Singh v. State of Delhi, AIR at p. 272 the said observations were cited with approval by the Full Court. The same principle has been accepted by this Court in Express Newspaper (P) Ltd. v. Union of India, AIR at p. 618 and by the majority judg- ment in Atiabari Tea Co. Ltd. v. State of Assam, AIR at pp. 255-56."

14. Explaining the observations in the earlier judg- ments in Budhan Choudhry v. State of Bihar and Parbhani Transport Coop. Society Ltd. v. RTA that a judicial order could be violative of Article 14, it was observed: (Mirajkar case, AIR pp. 13-14, paras 46-48)

"46. Naturally, the principal contention which was urged on their behalf before this Court was that Section 30 CrPC, infringed the fundamental right guaranteed by Article 14, and was, therefore, in- valid. This contention was repelled by this Court. Then, alternatively, the appellants argued that though the section itself may not be discriminat- ory, it may lend itself to abuse bringing about a discrimination between persons accused of of- fences of the same kind, for the police may send up a person accused of an offence under Section 366 to a Magistrate and the police may send an- other person accused of an offence under the same section to a Magistrate who can commit the ac- cused to the Court of Session. This alternative contention was examined and it was also rejected. That incidentally raised the question as to whether the judicial decision could itself be said to offend Article 14. S.R. Das, J., as he then was, who spoke for the Court considered this contention, referred with approval to the observations made by Frank- furter, J. and Stone, C.J. of the Supreme Court of the United States in Snowden v. Hughes, and ob- served that the judicial decision must of necessity depend on the facts and circumstances of each

particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimina- tion. Having made this observation which at best may be said to assume that a judicial decision may conceivably contravene Article 14, the learned Judge took the precaution of adding that the dis- cretion of judicial officers is not arbitrary and the law provides for revision by superior courts of or- ders passed by the subordinate courts. In such circumstances, there is hardly any ground for ap- prehending any capricious discrimination by judi- cial tribunals.

47. It is thus clear that though the observations made by Frankfurter, J. and Stone, C.J. in Snowden v. Hughes had been cited with approval, the question as to whether a judicial order can at- tract the jurisdiction of this Court under Articles 32(1) and (2) was not argued and did not fall to be considered at all. That question became only incid- entally relevant in deciding whether the validity of the conviction which was impugned by the appel- lants in Budhan Choudhry could be successfully assailed on the ground that the judicial decision under Section 30 CrPC, was capriciously rendered against the appellants. The scope of the jurisdic- tion of this Court in exercising its writ jurisdiction in relation to orders passed by the High Court was not and could not have been examined, because the matter had come to this Court in appeal under Article 132(1); and whether or not judicial decision can be said to affect any fundamental right merely because it incidentally and indirectly may en- croach upon such right did not, therefore, call for consideration or decision in that case. In fact the closing observations made in the judgment them- selves indicate that this Court was of the view that if any judicial order was sought to be attacked on the ground that it was inconsistent with Article 14, the proper remedy to challenge such an order would be an appeal or revision as may be provided by law. We are, therefore, not prepared to accept

Mr Setalvad's assumption that the observation on which he bases himself support the proposition that according to this Court, judicial decisions rendered by courts of competent jurisdiction in or in relation to matters brought before them can be assailed on the ground that they violate Article 14. It may incidentally be pointed out that the decision of the Supreme Court of the United States in Snowden v. Hughes, was itself not concerned with the validity of any judicial decision at all.

48. On the other hand, in Parbhani Transport Coop. Society Ltd. v. RTA Sarkar, J. speaking for the Court, has observed that the decision of the Regional Transport Authority which was chal- lenged before the Court may have been right or wrong, but that they were unable to see how that decision could offend Article 14 or any other fun- damental right of the petitioner. The learned Judge further observed that the Regional Transport Au- thority was acting as a quasi-judicial body and if it has made any mistake in its decision there are ap- propriate remedies available to the petitioner for obtaining relief. It cannot complain of a breach of Article 14. It is true that in this case also the lar- ger issue as to whether the orders passed by quasi-judicial tribunals can be said to affect Art- icle 14, does not appear to have been fully argued. It is clear that the observations made by this Court in this case unambiguously indicate that it would be inappropriate to suggest that the decision rendered by a judicial tribunal can be described as offending Article 14 at all. It may be a right or wrong decision, and if it is a wrong decision it can be corrected by appeal or revision as may be per- mitted by law, but it cannot be said per se to con- travene Article 14. It is significant that these ob- servations have been made while dealing with a writ petition filed by the petitioner, the Parbhani Transport Cooperative Society Ltd. under Article 32; and insofar as the point has been considered and decided the decision is against Mr Setalvad's contention."

15. Decision of this Court in Prem Chand Garg v. Excise Commr.27, setting aside rule of this Court requiring deposit of security for filing a writ peti- tion, was also explained as not holding that a judi- cial order resulted in violation of the fundamental right: (Mirajkar case3, AIR p. 15, paras 50-51)

"50. It would thus be seen that the main contro- versy in Prem Chand Garg centred round the question as to whether Article 145 conferred powers on this Court to make rules, though they may be inconsistent with the constitutional provi- sions prescribed by Part III. Once it was held that the powers under Article 142 had to be read sub- ject not only to the fundamental rights, but to oth- er binding statutory provisions, it became clear that the rule which authorised the making of the impugned order was invalid. It was in that context that the validity of the order had to be incidentally examined. The petition was made not to challenge the order as such, but to challenge the validity of the rule under which the order was made. Once the rule was struck down as being invalid, the or- der passed under the said rule had to be vacated. It is difficult to see how this decision can be pressed into service by Mr Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdic- tion of this Court itself. What was held by this Court was that rule made by it under its powers conferred by Article 145 which are legislative in character, was invalid; but that is quite another matter.

51. It is plain that if a party desires to challenge any of the rules framed by this Court in exercise of its powers under Article 145 on the ground that they are invalid, because they illegally contravene his fundamental rights, it would be open to the party to move this Court under Article 32. Such a challenge is not against any decision of this Court, but against a rule made by it in pursuance of its rule-making power. If the rule is struck down as it was in Prem Chand Garg, this Court can review or recall its order passed under the said rule. Cases in which initial orders of security passed by the

Court are later reviewed and the amount of secur- ity initially directed is reduced, frequently arise in this Court but they show the exercise of this Court's powers under Article 137 and not under Article 32. Therefore, we are not satisfied that Mr Setalvad is fortified by any judicial decision of this Court in raising the contention that a judicial or- der passed by the High Court in or in relation to proceedings brought before it for its adjudication, can become the subject-matter of writ jurisdiction of this Court under Article 32(2). In fact, no pre- cedent has been cited before us which would sup- port Mr Setalvad's claim that a judicial order of the kind with which we are concerned in the present proceedings has ever been attempted to be chal- lenged or has been set aside under Article 32 of the Constitution."

16. This Court then dealt with the legal position in England on the question of scope of writ of certior- ari against a judicial order. Noting that the writ of certiorari did not lie against a judicial order, it was observed: (Mirajkar case3, AIR pp. 18-19, paras 63-64)

"63. Whilst we are dealing with this aspect of the matter, we may incidentally refer to the relevant observations made by Halsbury on this point. 'In the case of judgments of inferior courts of civil jur- isdiction', says Halsbury in the footnote—

'it has been suggested that certiorari might be granted to quash them for want of jurisdiction (Kemp v. Balne, Dow & L at p. 887), inasmuch as an error did not lie upon that ground. But there appears to be no reported case in which the judg- ment of an inferior court of civil jurisdiction has been quashed on certiorari, either for want of jur- isdiction or on any other ground (Halsbury Laws of England, 3rd Edn., Vol. 11, p. 129)'. The ultimate proposition is set out in the terms: 'Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction'. These observations would indic- ate that in England the judicial orders passed by civil courts of plenary jurisdiction in or in relation

to matters brought before them are not held to be amenable to the jurisdiction to issue writs of certi- orari.

64. In R. v. Chancellor of St. Edmundsbury and Ipswich Diocese, ex p White, the question which arose was whether certiorari would lie from the Court of King's Bench to an ecclesiastical court; and the answer rendered by the court was that certiorari would not lie against the decision of an ecclesiastical court. In dealing with this question, Wrottesley, L.J. has elaborately considered the his- tory of the writ jurisdiction and has dealt with the question about the meaning of the word 'inferior' as applied to courts of law in England in discuss- ing the problem as to the issue of the writ in re- gard to decisions of certain courts. 'The more this matter was investigated', says Wrottesley, L.J.: (KB pp. 205-06)

'… the clearer it became that the word 'inferior' as applied to courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determ- ined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts, but also palatine courts and admiralty courts are inferior courts. But there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, namely, whether in its pro- ceedings, and in particular in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde.'

Mr Sen relied upon this decision to show that even the High Court of Bombay can be said to be an in- ferior court for the purpose of exercising jurisdic- tion by this Court under Article 32(2) to issue a writ of certiorari in respect of the impugned order

passed by it. We are unable to see how this de- cision can support Mr Sen's contentions."

17. In Rupa Ashok Hurra it was held that final or- der of this Court cannot be challenged under Art- icle 32 as violative of a fundamental right. The judgment of this Court in Triveniben v. State of Gujarat was referred to with approval to the effect that a judicial order could not violate a funda- mental right. It was observed: (Rupa Ashok Hurra case4, SCC pp. 402-03, paras 11-15)

"11. In Triveniben v. State of Gujarat speaking for himself and other three learned Judges of the Con- stitution Bench, Oza, J., reiterating the same prin- ciple, observed: (SCC p. 697, para 22)

'22. … It is well settled now that a judgment of court can never be challenged under Articles 14 or 21 and therefore the judgment of the court award- ing the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in Naresh Shridhar Mira- jkar v. State of Maharashtra and also in A.R. An- tulay v. R.S. Nayak, the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of juris- diction under Article 32 to go behind or to examine the final verdict reached by a competent court con- victing and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inor- dinate delay coupled with subsequent circum- stances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper.'

Jagannatha Shetty, J. expressed no opinion on this aspect.

12. We consider it inappropriate to burden this judgment with discussion of the decisions in other cases taking the same view. Suffice it to mention that various Benches of this Court reiterated the same principle in the following cases: A.R. Antulay
v. R.S. Nayak, Krishna Swami v. Union of India, Mohd. Aslam v. Union of India, Khoday Distilleries Ltd. v. Supreme Court of India, Gurbachan Singh
v. Union of India, Babu Singh Bains v. Union of India and P. Ashokan v. Union of India.

13. It is, however, true that in Supreme Court Bar Assn. v. Union of India a Constitution Bench and in M.S. Ahlawat v. State of Haryana a three-Judge Bench, and in other cases different Benches quashed the earlier judgments/orders of this Court in an application filed under Article 32 of the Constitution. But in those cases no one joined issue with regard to the maintainability of the writ petition under Article 32 of the Constitution. Therefore, those cases cannot be read as authority for the proposition that a writ of certiorari under Article 32 would lie to challenge an earlier final judgment of this Court.

14. On the analysis of the ratio laid down in the aforementioned cases, we reaffirm our considered view that a final judgment/order passed by this Court cannot be assailed in an application under Article 32 of the Constitution of India by an ag- grieved person, whether he was a party to the case or not.

15. In fairness to the learned counsel for the parties, we record that all of them at the close of the hearing of these cases conceded that the juris- diction of this Court under Article 32 of the Con- stitution cannot be invoked to challenge the valid- ity of a final judgment/order passed by this Court after exhausting the remedy of review under Art- icle 137 of the Constitution read with Order 40 Rule 1 of the Supreme Court Rules, 1966."

18. While the above judgments dealt with the question whether judicial order could violate a fundamental right, it was clearly laid down that

challenge to judicial orders could lie by way of ap- peal or revision or under Article 227 and not by way of a writ under Articles 226 and 32.

19. Another Bench of three Judges in Sadhana Lodh v. National Insurance Co. Ltd. considered the question whether remedy of writ will be available when remedy of appeal was on limited grounds. This Court held: (SCC p. 527, para 6)

"6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge can- not be enlarged by filing a petition under Articles 226/227 of the Constitution on the premise that the insurer has limited grounds available for chal- lenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal be- ing a product of the statute it is not open to an in- surer to take any plea other than those provided under Section 149(2) of the Act (see National In- surance Co. Ltd. v. Nicolletta Rohtagi). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Sec- tion 115 CPC has been expressly barred by a State enactment, only in such case a petition under Art- icle 227 of the Constitution would lie and not un- der Article 226 of the Constitution. As a matter of illustration, where a trial court in a civil suit re- fused to grant temporary injunction and an appeal against refusal to grant injunction has been rejec- ted, and a State enactment has barred the remedy of filing revision under Section 115 CPC, in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution.

Thus, where the State Legislature has barred a remedy of filing a revision petition before the High Court under Section 115 CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without any- thing more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitu- tion."

20. This Court in judgment dated 6-2-1989 in Qamruddin v. Rasul Baksh which has been quoted in the Allahabad High Court judgment in Ganga Saran v. Civil Judge, Hapur considered the issue of writ of certiorari and mandamus against interim order of the civil court and held: (Qamruddin case, AWC p. 309, para 4)

"4. … If the order of injunction is passed by a com- petent court having jurisdiction in the matter, it is not permissible for the High Court under Article 226 of the Constitution to quash the same by issu- ing a writ of certiorari. In the instant case the learned Single Judge of the High Court further failed to realise that a writ of mandamus could not be issued in this case. A writ of mandamus cannot be issued to a private individual unless he is un- der a statutory duty to perform a public duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject-matter of writ of mandamus under Article 226 of the Constitution. The learned Single Judge ignored this basic principle of writ jurisdiction conferred on the High Court under Article 226 of the Constitution. There was no occasion or justi- fication for issue of a writ of certiorari or manda- mus. The High Court committed serious error of jurisdiction in interfering with the order of the Dis- trict Judge."

21. Thus, it has been clearly laid down by this Court that an order of the civil court could be challenged under Article 227 and not under Article 226.

22. We may now come to the judgment in Surya Dev Rai2. Therein, the appellant was aggrieved by

the denial of interim injunction in a pending suit and preferred a writ petition in the High Court stating that after the CPC amendment by Act 46 of 1999 w.e.f. 1-7-2002, remedy of revision under Section 115 was no longer available. The High Court dismissed the petition following its Full Bench judgment in Ganga Saran to the effect that a writ was not maintainable as no mandamus could issue to a private person. The Bench con- sidered the question of the impact of the CPC amendment on power and jurisdiction of the High Court to entertain a writ of certiorari under Article 226 or a petition under Article 227 to involve power of superintendence. The Bench noted the legal position that after CPC amendment revisional jurisdiction of the High Court against interlocutory order was curtailed.

23. The Bench then referred to the history of writ of certiorari and its scope and concluded thus: (Surya Dev Rai case2, SCC pp. 687-90, paras 18- 19 & 24-25)

"18. Naresh Shridhar Mirajkar case3 was cited be- fore the Constitution Bench in Rupa Ashok Hurra case4 and considered. It has been clearly held: (i) that it is a well-settled principle that the technical- ities associated with the prerogative writs in Eng- lish law have no role to play under our constitu- tional scheme; (ii) that a writ of certiorari to call for records and examine the same for passing appro- priate orders, is issued by a superior court to an inferior court which certifies its records for exam- ination; and (iii) that a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the High Court; much less can the writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. The High Courts are not constituted as inferior courts in our constitutional scheme.

19. Thus, there is no manner of doubt that the or- ders and proceedings of a judicial court subordin- ate to the High Court are amenable to writ juris-

diction of the High Court under Article 226 of the Constitution.

* * *

24. The difference between Articles 226 and 227 of the Constitution was well brought out in Umaji Keshao Meshram v. Radhikabai44. Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substan- tially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though the power is akin to that of an ordinary court of ap- peal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a fail- ure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdic- tion.

25. Upon a review of decided cases and a survey of the occasions, wherein the High Courts have exer- cised jurisdiction to command a writ of certiorari or to exercise supervisory jurisdiction under Art- icle 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronounce- ment. Without entering into niceties and technical- ity of the subject, we venture to state the broad

general difference between the two jurisdictions. Firstly, the writ of certiorari is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdic- tion and in this sense it is akin to appellate, revi- sional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if in- clined to exercise its jurisdiction, may simply an- nul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, maybe, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the im- pugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well."

24. It is the above holding, correctness of which was doubted in the referring order already men- tioned above.

25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our consti- tutional scheme. There is no parallel system of King's Court in India and of all the other courts having limited jurisdiction subject to the supervi- sion of the King's Court. Courts are set up under the Constitution or the laws. All the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all the High Courts. Broad principles

of writ jurisdiction followed in England are applic- able to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than ju- dicial courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts. Control of working of the subordinate courts in dealing with their judicial orders is exer- cised by way of appellate or revisional powers or power of superintendence under Article 227. Or- ders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While ap- pellate or revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to the judicial courts, as rightly observed in the referring order1 in paras 26 and 27 quoted above.

26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observa- tion that scope of Articles 226 and 227 was oblit- erated was not correct as rightly observed1 by the referring Bench in para 32 quoted above. We make it clear that though despite the curtailment of revi- sional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions in- cluding Waryam Singh v. Amarnath, Ouseph Mathai v. M. Abdul Khadir, Shalini Shyam Shetty v. Rajendra Shankar Patil and Sameer Suresh Gupta v. Rahul Kumar Agarwal. In Shalini Shyam Shetty this Court observed: (SCC p. 352, paras 64- 67)

"64. However, this Court unfortunately discerns that of late there is a growing trend amongst sever- al High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to parti-

tion suits, matters relating to execution of a de- cree, in cases of dispute between landlord and ten- ant and also in a case of money decree and in vari- ous other cases where disputed questions of prop- erty are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a stat- utory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev2 and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Pro- cedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Sec- tion 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exer- cising its power either under Article 226 or 227, the Hon'ble High Court will follow the time-hon- oured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts

of justice within their jurisdiction will adhere to them strictly."

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view1 of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

28. We may also deal with the submission made on behalf of the respondent that the view in Surya Dev Rai stands approved by larger Benches in Shail, Mahendra Saree Emporium (2) and Salem Advocate Bar Assn. (2) and on that ground correct- ness of the said view cannot be gone into by this Bench. In Shail, though reference has been made to Surya Dev Rai, the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no dis- cussion on the issue of maintainability of a peti- tion under Article 226. In Mahendra Saree Em- porium (2)7, reference to Surya Dev Rai2 is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in Salem Advocate Bar Assn. (2) in para 40, reference to Surya Dev Rai is for the same pur- pose. We are, thus, unable to accept the submis- sion of the learned counsel for the respondent.

x) **M/s. Indian Farmers Fertilizers Co-operative Limited v. M/s Bhadra Products** (order dated 23d January, 2018 in Civil Appeal No.824/2018), wherein it is held as under :

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

"30 Competence of tribunal to rule on its own jurisdiction. - (1) Unless otherwise agreed by the

parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

31 Objection to substantive jurisdiction of tribunal. - (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator. (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits. If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly. (5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to

the court under section 32 (determination of preliminary point of jurisdiction).” These sections make it clear that the Kompetenz principle, which is also followed by the English Arbitration Act of 1996, is that the “jurisdiction” mentioned in Section 16 has reference to three things: (1) as to whether there is the existence of a valid arbitration agreement; (2) whether the arbitral tribunal is properly constituted; and (3) matters submitted to arbitration should be in accordance with the arbitration agreement.

21. That “jurisdiction” is a coat of many colours, and that the said word displays a certain colour depending upon the context in which it is mentioned, is well-settled. In the classic sense, in Official Trustee v. Sachindra Nath Chatterjee, (1969) 3 SCR 92 at 99, “jurisdiction” is stated to be:

“In the order of Reference to a Full Bench in the case of Sukhlal v. Tara Chand [(1905) ILR 33 Cal 68] it was stated that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it: in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term ‘jurisdiction’, which has been stated to be ‘the power to hear and determine issues of law and fact’, the authority by which the judicial officer take cognizance of and ‘decide causes’; ‘the authority to hear and decide a legal controversy’, ‘the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them;’ ‘the power to hear, determine and pronounce judgment on the issues before the Court’; ‘the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect’; ‘the power to enquire into the facts, to apply the law, to pronounce the

judgment and to carry it into execution'." (Mukherjee, Acting CJ, speaking for Full Bench of the Calcutta High Court in Hirday Nath Roy v. Ramachandra Barna Sarma ILR 68 Cal."

xi) **State of West Bengal v. Sarkar & Sarkar** reported in 2018 (12) SCC 736, wherein it is held as under :

"10. It was the submission of the learned counsel for the respondent that proceedings could not have been entertained by the arbitrator under Section 16 of the Arbitration Act in the present controversy because by the orders of the High Court dated 24- 5-2002 and 26-9-2002 (extracted above), the appointment of the arbitrator was made in exercise of the powers vested in the High Court under Sec- tion 11 of the Arbitration Act. The factual position depicted hereinabove as also the orders referred to hereinabove, leave no room for doubt that Justice (Retired) S.S. Ganguly was actually appointed as an arbitrator by the High Court in exercise of the powers vested in the High Court under Section 11 of the Arbitration Act. That being the position, the learned counsel for the respondent is fully justified in her submission that the said order could not be tested by the arbitrator while considering the claim raised by the appellant State of West Bengal under Section 16 of the Arbitration Act. Thus viewed, ir- respective of whether Clause 12 extracted herein- above postulated the adjudication of dispute between the parties through an arbitrator, it is now not open to the appellant before this Court to raise a challenge to the order passed by the High Court appointing an arbitrator.

11. There is another reason for us not to accept the prayer made before us on behalf of the appel- lant State of West Bengal for raising a challenge to the order dated 15-1-2004 passed by the arbitrat- or and order dated 16-5-20061 passed by the High Court, and that is, that order dated 26-9-2002 passed by the High Court (extracted above) leaves

> no room for doubt that the appellant before this Court factually requested the High Court to grant liberty to it to prefer a counterclaim before the ar- bitrator. In other words, the appellant's prayer to the High Court (on 24-5-2002) was to permit it to raise its own dispute by granting liberty to it to prefer a counterclaim before the arbitrator. Such being the position, the appellant cannot now wriggle out of the aforesaid voluntary acceptance to have the matter adjudicated before the arbitrat- or. In any case, even Section 7(4)(c) of the Arbitra- tion Act, in such factual circumstances, would lead to the same conclusion. Therefore, in the facts and circumstances of this case, there is also no dispute about the fact that as against the claim raised by the respondent Sarkar & Sarkar before the arbitrator, the appellant State of West Bengal had indeed raised a counterclaim. And having done so, it must be deemed to have submitted be- fore the arbitrator, a request to adjudicate its claims as well. When both the parties had ap- proached the arbitrator and submitted themselves to the arbitrator's jurisdiction, independent of all other factual and legal considerations, the arbit- rability of the disputes was clearly made out under Section 7(4)(c) of the Arbitration Act."

Relying upon the aforesaid dictum of law, it was submitted that the any order passed during arbitration proceeding can be challenged by certiorari before the High Court under Articles 226 and 227 of the Constitution of India. It was submitted that in facts of the case, preliminary objections raised by the petitioner was required to be considered in view of decision of Apex Court in case of **A Ayyasamy v. A Paramasivam and others** reported in AIR 2016 Supreme Court 4675, wherein the Apex Court has considered as to whether the dispute raised in the suit is capable of settlement through arbitration or not. The Apex Court was considering the

issue with regard to question of resorting to arbitration in a suit where serious allegations of fraud were made. It was therefore, submitted by the learned advocate for the petitioner that the petition is maintainable and is also required to be entertained by this Court. It was also submitted that if the impugned order passed by the arbitrator is allowed to remain in existence without any challenge at this stage, then the petitioner would be required to undergo rigors of arbitration proceedings. It was therefore, submitted that when there are serious allegations of fraud, they are to be treated as non arbitrable and it is only the Civil Court which should decide such matters.

Learned advocate for the petitioner thereafter addressed the issues on merits to justify that the reasoning given by the learned arbitrator to reject the application raising preliminary objections filed by the petitioner is required to be considered in this petition and pointed out that learned arbitrator did not consider the disputes between the parties, FIR, charge-sheet and the principle of law laid down by the Apex Court in case of **A Ayyasamy** (supra).

Learned advocate for the petitioner thereafter made submissions that the Arbitration Tribunal was not justified in treating the application filed by the petitioner under section 16 of the Act, 1996 and submitted that the issue of whether dispute between the parties is capable of settlement through arbitration, travels beyond the four corners of section 16 of the Act, 1996 which provides for competence of Arbitration Tribunal to rule on its

jurisdiction. It was submitted that plea of non arbitrable issues can be raised by the petitioner and same cannot be considered under section 16 of the Act, 1996 when the petitioner filed application raising preliminary objections on the basis of decision of Apex Court and not under section 16 of the Act, 1996.

It was submitted that the decision of the Apex Court in case of **M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.** (supra) cannot be read as a blanket bar against the remedy of challenging those orders of Arbitral Tribunal which are inconsistent with the judgment of the Supreme Court. It was therefore, prayed that impugned order can be challenged Article 226 and/or 227 of the Constitution of India because Arbitration Tribunal cannot be permitted to continue with arbitration proceedings when dispute is non arbitrable as there are serious allegations of fraud leveled by the petitioner which requires evidence for deciding the issue pertaining to criminal offences for which criminal proceedings are pending before the appropriate Court.

Learned advocate for the petitioner invited the attention of the Court to the charge-sheet produced at pages 97 and
98 of the paper book to contend that the criminal proceedings are pending with regard to offence under sections 408, 409, 120-B, 34 of the Indian Penal Code and sections 65 and 66(D) of the Information and Technology Act, 2008 and therefore, the order passed by the Arbitral Tribunal rejecting the preliminary objections of non arbitrable issue is required to be considered by this Court

under Articles 226 and/or 227 of the Constitution.

In view of above submissions, learned advocate for the petitioner submitted that the High Court is not denuded of powers under Articles 226 and/or 227 of the Constitution of India. It was therefore, submitted that in peculiar facts of the case , the impugned order of the Arbitration tribunal can be challenged by certiorari in the petition under Articles 226 and 227 of the Constitution of India.

6. On the other hand, learned advocate Mr. Shivang Shukla for the respondent submitted that section 5 of the Act, 1996 provides for extent of judicial intervention. It was submitted that section 5 of the Act, 1996 provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part. Learned advocate for the respondent thereafter invited the attention of the Court to section 16 of the Act,1996 which provides for competence of Arbitration Tribunal to rule on its jurisdiction and sub-section(6) of section 16 of the Act, 1996 which provides that a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34 of the Act, 1996. In view of such provisions, it was submitted that there is a remedy available to the petitioner under section 34 of the Act, 1996 for setting aside the arbitral award. It was therefore, submitted that the impugned order passed by the Tribunal cannot be challenged by petition under Articles 226 and 227 of the Constitution of India.

Learned advocate for the respondent placed reliance on the decision of Supreme Court in case of **M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.**(supra).

Reliance was placed on the decision of Supreme Court in case of **Lalitkumar v. Sanghavi (Dead) through Lrs. Neeta Lalit Kumar Sanghavi and another v. Dharamdas v. Sanghavi and others** reported in (2014) 7 Supreme Court Cases 255. wherein the Apex Court has held as under :

> "8. Within a couple of weeks thereafter, the original applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court in S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618. The relevant portion of the judgment reads as under:
>
> "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 of India. 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 his grievances against the award 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. The arbitral tribunal is after all, the 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 of India.
>
> Such an intervention by the High Courts is not permissible." That need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act."

Learned advocate for the respondent also placed reliance upon the decision of the Apex Court in case of **M/s. Sterling Industries v. Jayprakash Associates Ltd & Ors.** (Order dated 10th July, 2019 in Civil Appeal No. 7117- 7118 of 2017), wherein the Apex Court relying upon the decision of Apex Court in case of **M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.**(supra) has categorically held that writ petition could not have been entertained by the High Court in view of provisions of section 16(6) of the Act, 1996.

It was therefore, submitted that the impugned order passed by the Arbitral Tribunal rejecting the preliminary objections raised by the petitioner is just and proper and such order cannot be challenged before this Court under Articles 226 and 227 of the Constitution of India. It was further submitted that the decision relied upon on behalf of

the petitioner are pertaining to adjudication on merits after the Arbitration award is passed by the Arbitration Tribunal. It was therefore, submitted that when the Supreme Court in case of **M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.**(supra) has categorically held that the very object of the Act, 1996 for minimum judicial intervention would be defeated if the order passed the Arbitration Tribunal during Arbitration proceeding are allowed to be challenged by certiorari under Articles 226 and/or 227 of the Constitution of India.

Learned advocate for the respondent, further relied upon the provision of section 37 of the Act, 1996 and submitted that if the petitioner is aggrieved by order of the Tribunal, the petitioner is required to wait until the award is passed by the Tribunal to challenge the award under section 34 of the Act,1996.. It was also submitted that the Arbitral Tribunal is a forum which is chosen by the parties to the arbitration agreement and therefore, order passed by such forum is required to be challenged as per the provisions of the Act, 1996 and cannot be challenged by certiorari so as to defeat the very purpose of the arbitration.

Learned advocate for the respondent submitted on merits that there is clear finding of the Tribunal that though the charge-sheet is filed against the respondent, the petitioner will have to prove the case beyond reasonable doubt before the Criminal Court. However, the Tribunal has also found that allegations of fraud leveled against the respondent by the petitioner are not complicated at all. It was held by the Tribunal that the

contract was not terminated by the petitioner after noticing the fraud and permitted the respondent to work up to end of November, 2016. The Tribunal therefore, was of the opinion that the disputes between the parties is nothing but the matter of accounts vis-a-vis the work done and service rendered by the respondent and such case can be decided by the Tribunal, more particularly, when the disputes are referred by the High Court under section 11(6) of the Act, 1996 for arbitration.

With regard to the contention raised by the petitioner that the application filed by the petitioner is not under section 16 of the Act, 1996 when the issue is non arbitrable and such application cannot be considered as application under section 16 of the Act, learned Advocate for respondent submitted that such contention is not tenable in law as the petitioner has challenged the competence of the Arbitral Tribunal to proceed with the arbitration on alleged non arbitrable issues and, in the facts of the case, when this Court has referred the matter to arbitration while invoking powers under section 11(6) of the Act,1996, any dispute raised by the petitioner with regard to competence of the Arbitral Tribunal would be covered by section 16 of the Act, 1996. Accordingly, such order passed by the Arbitral Tribunal would be under section 16 of the Act, 1996 and remedy to challenge such order would be under section 34 of the Act,1996.

7. Having heard learned advocate for the respective parties and having gone through the materials on record, it would be germane to refer to various provisions of the Act, 1996

so as to answer the question as to whether the any order passed during arbitration proceedings can be challenged by certiorari under Articles 226 and/or 227 of the Constitution of India or not:

- Section"2(e) "Court" means -

  (i) in the case of an arbitrator other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject- matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes Court

  (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration, if the same had been the subject-matter of a suit and in other cases a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."

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

- Section 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 in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing 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."

- Section 11. " Appointment of arbitrators - xxxxx

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request (the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court) to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

- Section 16. " Competence of arbitral tribunal to rule on its jurisdiction.—

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

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

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

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

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

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

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

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

- Section 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 furnishes proof that—

(i) a party was under some incapacity, or

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

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

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

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

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

(b) the Court finds that—

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

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

Explanation 1 – For the avoidance of any doubt,

it is clarified that an award is in conflict with the public policy of India, only if-

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

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

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

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

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

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

under section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

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

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

eliminate the grounds for setting aside the arbitral award.
(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
(6) An application under this section shall be disposed of expeditiously and in any event, within a period of one year from the date on which the notice referred to in sub-section(5) is served upon the other party."

- Section 37. "Appealable orders.—
(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
(a) refusing to refer the parties to arbitration under section 8
(b) granting or refusing to grant any measure under section 9;
(c) setting aside or refusing to set aside an arbitral award under section 34.
(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—
(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or
(b) granting or refusing to grant an interim measure under section 17.
(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

8. The above provisions of the Act, 1996 provides for complete procedure as an alternative to normal procedure for adjudication of disputes before the Civil Court under the provisions of the Code of Civil procedure,1908.

9. The Supreme Court in case of **M/s. S.B.P. and Co. v. M/s.**

Patel Engineering Ltd. and Anr.(supra) after analyzing provisions of the Act, 1996 has held as under :

> "44. 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 of India. 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 his grievances against the award 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. The arbitral tribunal is after all, the 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 of India. Such an intervention by the High Courts is not permissible.
>
> 45. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at

an earlier stage.

46. We, therefore, sum up our conclusions as follows:

i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.

(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court

only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. (2002) 2 SCC 388 and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending Page 1824 before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.

(xii) The decision in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. (2002) 2 SCC 388 is overruled."

10. It is pertinent to note that in minority judgment of the Apex

Court in case of **M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.**(supra) (Per : C.K. Thakker,J.),while concurring with the majority view for the issue with regard to challenge of any order passed during arbitration proceedings by certiorari under Article 226/227 of the Constitution of India is succinctly discussed as under :

> "95. Section 16 (1) incorporates the well-known doctrine of Kompetenz - Kompetenz or competence de la competence. It recognizes 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.
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> 96. Chitty on Contract (1999 edn.; p. 802) explains the principle thus:
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> English law has always taken the view that the arbitral tribunal cannot be the final adjudication of its own jurisdiction. The final decision as per the substantive jurisdiction of the tribunal rests with the Court. However, there is no reason why the tribunal should not have the power, subject to review by the Court, to rule on its own jurisdiction. Indeed such a power (often referred to as the principle of "Kompetenz - Kompetenz" has been generally recognized in other legal systems. It had also been recognized by English Law before the 1996 Act, but Section 30 of the Act put this on a statutory basis. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its substantive jurisdiction that is, as to

(a) whether there is valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Any such ruling may be challenged by any arbitral process of appeal or review or in accordance with the provisions of Part I of the Act, notably by an application under Section 32 or by a challenge to the award under Section

97. (emphasis supplied) Alan Redfern and Martin Hunter in their work on "Law and Practice of International Commercial Arbitration", (4th edn.), (para 5-34) also said:

> "When any question is raised as to the jurisdiction of the Arbitral Tribunal, a two stage procedure is followed. At the first stage, if one of the parties raises 'one or more pleas concerning the existence, validity or scope of the agreement to arbitrate', the ICC's Court must satisfy itself of the prima facie existence of such an agreement [ICC Arbitration Rules 6(2)]. If it is satisfied that such an agreement exists, the ICC's Court must allow the arbitration to proceed so that, at the second stage, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.
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> 24. To cite Fouchard, Gaillard, Goldman again:
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> > 658. - More fundamentally, although the arbitrators' jurisdiction to rule on their own jurisdiction is indeed one of the effects of the arbitration agreement (or even of a prima facie arbitration agreement, since the question would not arise in the absence of a prima facie arbitration agreement), the basis of that power is neither the arbitration agreement itself, nor the principle of pacta sunt servanda under which the arbitration agreement is Binding.
> >
> > The competence-competence principle enables the arbitral tribunal to continue with the proceedings even where the existence or validity of the arbitration agreement has been challenged by one of the parties for reasons

directly affecting the arbitration agreement, and not simply on the basis of allegations that the main contract is void or otherwise ineffective. The principle that the arbitration agreement is autonomous of the main contract is sufficient to resist a claim that the arbitration agreement is void because the contract containing it is invalid, but it does not enable the arbitrators to proceed with the arbitration where the alleged invalidity directly concerns the arbitration agreement. That is a consequence of the competence-competence principle alone. The competence-competence principle also allows arbitrators to determine that an arbitration agreement is invalid and to make an award declaring that they lack jurisdiction without contradicting themselves.

Of course, neither of those effects results from the arbitration agreement. If that were the case, one would immediately be confronted with the "vicious circle" argument put forward by authors opposed to the competence- competence principle: how can an arbitrator, solely on the basis of an arbitration agreement, declare that agreement to be void or even hear a claim to that effect? The answer is simple: the basis for the competence-competence principle lies not in the arbitration agreement, but in the arbitration laws of the country where the arbitration is held and, more generally, in the laws of all countries liable to recognize an award made by arbitrators concerning their own jurisdiction. For example, an international arbitral tribunal sitting in France can properly make an award declaring that it lacks jurisdiction for want of a valid arbitration agreement, because it does so on the basis of French arbitration law, and not on the basis of the arbitration agreement held to be non- existent or invalid. Similarly, it is perfectly logical for the interested party to rely on that award in other jurisdictions, provided that those other jurisdictions also recognize the

competence-competence principle. As we shall now see, the legal basis for the principle does not prejudice the subsequent review by the courts, in France or in the country where recognition is sought, of the arbitrators' finding that the arbitration agreement is non-existent or invalid.

659. - Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award. Nevertheless, the competence- competence rule ties in with the idea that there are no grounds for the prima facie suspicion that the arbitrators themselves will not be able to reach decisions which are fair and protect the interests of society as well as those of the parties to the dispute. This same philosophy is also found in the context of arbitrability, where it serves as the basis for the case law which entrusts arbitrators with the task of applying rules of public policy (in areas such as antitrust law and the prevention of corruption), subject to subsequent review by the courts.

660. - However, it is important to recognize that the competence-competence rule has a dual function. Like the arbitration agreement, it has or may have both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions. The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, as is widely recognized by international conventions and by recent statutes on international arbitration. However, the negative effect is equally important. It is to

allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award. The principle of competence-competence thus obliges any court hearing a claim concerning the jurisdiction of an arbitral tribunal - regarding, for example, the constitution of the tribunal or the validity of the arbitration agreement - to refrain from hearing substantive argument as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had the opportunity to do so. In that sense, the competence-competence principle is a rule of chronological priority. Taking both of its facets into account, the competence-competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts. From a practical standpoint, the rule is intended to ensure that a party cannot succeed in delaying the arbitral proceedings by alleging that the arbitration agreement is invalid or non-existent. Such delay is avoided by allowing the arbitrators to rule on this issue themselves, subject to subsequent review by the courts, and by inviting the courts to refrain from intervening until the award has been made. Nevertheless, the interests of parties with legitimate claims concerning the invalidity of the arbitration agreement are not unduly prejudiced, because they will be able to bring those claims before the arbitrators themselves and, should the arbitrators choose to reject them, before the courts thereafter.

The competence-competence rule thus concerns not only the positive, but also the negative effects of the arbitration agreement."

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98. In the instant case, according to the majority,

Section 16(1) only makes explicit what is even otherwise implicit, namely, that the tribunal has the jurisdiction to rule its own jurisdiction, 'including ruling on any objections with respect to the existence or validity of the arbitration agreement.'

99. So far, so good and I am in respectful agreement with these observations. The matter, however, does not rest there. Over and above Sub- section (1), Section 16 contains other sub-sections and in particular, Sub-sections (5) and (6). The former requires the tribunal to continue the proceedings in case it decides that the tribunal has jurisdiction in the matter and the latter provides remedy to the aggrieved party.

100. In my opinion, conjoint reading of Sub- sections (1), (4), (5) and (6) makes it abundantly clear that the provision is 'self-contained' and deals with all cases, even those wherein the plea as to want of jurisdiction has been rejected. As a general rule, such orders are subject to certiorari jurisdiction since a court of limited jurisdiction or an inferior tribunal by wrongly interpreting a statutory provision cannot invest itself with the jurisdiction which it otherwise does not possess. But it is always open to a competent Legislature to invest a tribunal of limited jurisdiction with the power to decide or determine finally the preliminary or jurisdictional facts on which exercise of its jurisdiction depends. In such cases, the finding recorded by the tribunal cannot be challenged by certiorari. (Vide Ujjam Bai v. State of U.P.)

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109. As already indicated by me earlier, Sub- section (1) of Section 16 does not merely enable the Arbitral Tribunal to rule on its own jurisdiction, but requires it to continue arbitral proceedings and pass an arbitral award. [Sub-section (5)] It allows the aggrieved party to make an application for setting aside the award in accordance with Section 34. [Sub-section (6)]. Thus, in my

judgment, Section 16 can be described as 'self- contained Code' as regards the challenge to the jurisdiction of Arbitral Tribunal. As per the scheme envisaged by Parliament, once the Arbitral Tribunal rules that it has jurisdiction, it will proceed to decide the matter on merits and make an award. Parliament has also provided the remedy to the aggrieved party by enacting that he may make an application under Section 34 of the Act. In the circumstances, the proceedings cannot be allowed to be arrested or interference permitted during the pendency of arbitration proceedings."

11. At this stage, the judgments cited by the learned advocate for the petitioner are dealt with as under:

i) The Apex Court in case of **National Thermal Power Corporation Limited v. Siemens Atkeingesellschaft** (supra), while dealing with the proceedings arising out of section 37 of the Act, has considered the aspect of jurisdiction of the Tribunal. The Apex Court was not considering the issue as to whether in writ jurisdiction, the order of Arbitral Tribunal can be challenged rejecting the preliminary objection of the petitioner.

ii) In case of **Punjab Agro Industries Corpn Ltd v. Kewal Singh Dhillon** (supra), the Apex Court was considering the maintainability of writ petition under Articles 226 and 227 of the Constitution of India against the order passed under section 11 of the Act, 1996 and was not considering the order passed in the arbitral proceedings. Therefore, this decision would not be of any assistance to the petitioner.

iii) In the decision in case of **Vidya Drolia v. Durga Trading Corporation** (supra) relied by the petitioner, the Apex Court considered the issue of arbitrability with regard to tenancy agreement in view of specific provisions of Tenancy Act and Transfer of Property Act. The issue before the Apex Court was whether the Act, 1996 stands excluded. The Apex Court was thus considering the judgment of the High Court appointing an arbitrator after rejecting the objection of arbitrability of the disputes between the parties. In the aforesaid decision, the issue as to whether the writ is maintainable against the order of the Tribunal deciding the issue of arbitrability of the agreement was not at large before the Apex Court.

iv) In the decision of the Apex Court in case of **M/s. Mayavti Trading Pvt. Ltd v. Pradyuat Deb Burman** (supra), the issue for consideration was of provisions of sub-section(6A) of section 11 as amended by the Amending Act of 2015. Therefore, this decision would also be of no help to the petitioner as the same was with regard to amendment to section 11 of the Act, 1996.

v) Decision of the Apex Court in case of **Duro Felguera SA v. Gangavaram Port Limited** (supra) relied by the petitioner was also considered in the aforesaid decision in case of **M/s. Mayavti Trading Pvt. Ltd** (supra), more particularly, paragraphs no. 48 and 59 which also deals with the provisions of sub-section(6A) of section 11 added by the Amending

Act, 2015. Therefore, such decision also would not be applicable with regard to maintainability or entertainability of the writ petition under Articles 226 and 227 of the Constitution of India.

vi) Similarly in decision in case of **State of Rajasthan v. Lord Northbrook** (supra), the Apex Court was considering the decision of the High Court quashing the communication/orders passed by the Deputy Secretary, Revenue in the matter of taking over the properties of Sh. Raja Sardar Singh by the State under Rajasthan Escheats Regulation Act, 1956. The Apex Court has considered the discretion of the High Court to entertain the writ petition under Article 226 of the Constitution of India vis-a-vis the availability of efficacious alternative remedy. It was in such facts that the Apex Court has examined the issue of entertaining the writ petition. In such circumstances, whether a writ petition is required to be entertained against the order passed by the Tribunal under the provisions of Act, 1996 was not examined by the Apex Court. Therefore, reliance placed by the petitioner on this decision would be of no assistance to it.

vii) Reliance placed by the petitioner on the decision of **Ameet Lalchand Shah and otrs.v. Rishabh Enterprises and ors.** (supra) of the Apex Court is also not helpful to decide the issue on hand, as in the said case, the Apex Court was considering as to whether the decision of the High Court in affirming

the order dismissing the application under section 9 of the Act, 1996 whereby it was held that agreement between the parties are not interconnected with the principal agreement and therefore, parties cannot be referred to arbitration. The Apex Court was not considering the issue as to whether writ petition challenging the order passed by the Arbitration Tribunal should be entertained or not. Therefore, in facts of the present case when the Arbitration Tribunal has passed the impugned order during the course of arbitration proceedings, whether it can be challenged by writ of certiorari or not was not the issue before the Apex Court.

viii) In case of **Radhey Shyam and anr. v. Shhabi Natha and ors.** (supra) also the Apex Court was considering whether the order of the Civil Court was amenable to writ jurisdiction under Article 226 of the Constitution of India or not. The Apex Court therefore, was not considering as to whether the order passed by the Arbitral Tribunal under the Act, 1996 can be challenged by the writ petition or not.

ix) Similarly in the decision of Apex Court in case of **M/s. Indian Farmers Fertilizers Co-operative Limited v. M/s Bhadra Products** (supra) relied upon by the petitioner, the Apex Court was considering whether the award delivered by the arbitrator which decided the issue of limitation, can be said to be an interim award and whether such interim award can be set aside under Act, 1996 or not. Therefore, the

observations made by the Apex Court in paragraphs no. 20 and 21 relied upon by the petitioner would be of no assistance in the facts of the present case.

x) In case of **State of West Bengal v. Sarkar & Sarkar** (supra), the Apex Court was dealing with the order passed under section 11 of the Act, 1996 to decide the disputes arising in the matter and case of raising counter claim and challenge to the order passed by the High Court appointing the arbitrator was made before the Apex Court. Therefore, the Apex Court was not concerned with the challenge to order passed by the arbitrator allowing the application filed before the Tribunal with regard to issue of arbitrability in the said case.

12. It would be fruitful to take note of the following decisions of various High Courts wherein it is held that order passed by the Arbitration Tribunal cannot be challenged by invoking Article 226/227 of the Constitution of India:

1. The Rajasthan High court in case of **Rajasthan State Mines and Minerals Ltd. v. M/s. R.A.M. Earth Movers Pvt. Ltd. & Anr**, reported in 2010 SCC OnLine Raj 4560 has held as under:

> "18. Thus, the Scheme of the Act reveals that once the arbitrator enters into reference, the challenge to his jurisdiction questioning his independence or impartiality or otherwise has to be made before the arbitrator himself. Even before the arbitrator such challenge cannot be made by the party to the pro-

ceedings belatedly at his whims and fancy. Moreover, if the challenge of the party to the arbit- rator fails then the arbitrator will proceed with the arbitration proceedings and the party aggrieved has to wait till the passing of the award and there- after, the validity of the award can be assailed by the aggrieved party only by invoking the provisions of Section 34 of the Act.

19. In "S.B.P. & Company v. Patel Engineering," (2005) 8 SCC 618, the Hon'ble Apex Court while dealing with the question as to wheth- er any order passed by the arbitral tribunal during the arbitration proceedings would be capable of being challenged before the High Court under Art- icle 226 or 227 of the Constitution of India, held that:… xxxxx

20. Thus, keeping in view the mandate of the pro- visions of Sections 16, 34 and 37 of the Act so also the overall scheme of the Act and the authoritative pronouncement of the Hon'ble Supreme Court in S.B.P.'s case supra, this Court is of the con- sidered opinion that the order passed by the Arbit- ral Tribunal rejecting the petitioner's objection to the jurisdiction of the Arbitral Tribunal to proceed with the arbitration proceedings does not warrant any interference by this Court in exercise of its ex- tra ordinary jurisdiction under Article 226/227 of the Constitution of India."

2. The Delhi High Court in case of **ATV Projects India Ltd. v. Indian Oil Corporation Ltd. & Anr.** reported in, 2013 SCC OnLine Del 1669 has held thus:

"2. The respondent no. 2 was appointed as the Sole Arbitrator vide order dated 07.05.2002 of the Civil Judge (Senior Division) Panipat, Haryana in a petition under Section 11 of the Arbitration & Con- ciliation Act, 1996 preferred by the appellant. The respondent no. 2 Arbitrator entered upon refer- ence and directed the appellant to file its State- ment of Claim with supporting documents. The

appellant failed to file the Statement of Claim in- spite of repeated opportunities and which lead to the respondent no. 2 Arbitrator to, vide order dated 12.03.2003, hold the appellant to have lost its right to file the Statement of Claim. However since the respondent no. 1 IOCL stated that it also had claims against the appellant, the matter was adjourned for the respondent no. 1 IOCL to file its Statement of Claim. The appellant applied for re- call of the order dated 12.03.2003 holding that it had lost its right to file Statement of Claim. The re- spondent no. 2 Arbitrator after hearing, vide order dated 02.06.2003 allowed the said application of the appellant, condoned the delay on the part of the appellant in filing the Statement of Claim and took the Statement of Claim of the appellant on re- cord.

3. It was impugning the aforesaid order of the re- spondent no. 2 Arbitrator that the respondent no. 1 IOCL filed the writ petition from which this ap- peal arises.

xxxx

13. The matter having been dealt with by us ex- haustively in Awasthi Construction Company, we deem it appropriate to set out here in below our reasoning from the said judgment only:

> "8. We have also drawn the attention of the counsel for the appellant to the judgment of the Supreme Court in S.B.P. & Co. v. Patel Engin- eering Ltd., (2005) 8 SCC 618 in paragraphs 45 and 46 whereof it has been held as under…
> xxxxx
>
> In view of the aforesaid dicta of the Supreme Court, the doubts expressed by the learned Single Judge as to the very maintainability of the writ petition against the order of the Arbitral Tribunal are well placed.
>
> 9. As far as the judgment of the High Court of Patna relied upon by the appellant is concerned, the same merely follows the

judgment of a Single Judge of the Bombay High Court in Anuptech Equipments Private Ltd. v. Ganpati Co-operative Housing Society Ltd., AIR 1999 Bombay 219. The reasoning which prevailed with the Bombay High Court, can be analyzed as under:

A. That the Act uses three different expressions i.e. arbitral award, order and decision, with remedies there against provided in Section 11(7), Section 13(3), Section 14(2), Section 16(5), Section 34 and Section 37(2).

B. No remedy had been provided against certain orders of the arbitral tribunal and one instance whereof was an order under Section 25(a) of the Act.

C. Section 5 of the Act prohibits intervention in arbitral process, ruling out approaching the Civil Courts against such orders.

D. The remedy under Section 34 against such order is also not available, being available only against an award or an interim award.

E. That for an order to be an award, it must be akin to a decree.

F. An order under Section 25(a) terminating the proceedings for default in filing a statement of claim could not be treated as an award.

G. That if such orders were to be read as an award, it would create an anomaly inasmuch as termination can happen under Section 32(2) or under Section 16 also and remedy of appeal is provided where against, indicating that order of termination of proceeding is different from an award.

H. That while under Section 31, an award is required to state reasons, an order under Section 25(a) may be without any reason.

I. Finding no remedy available against such an order, it was held that the jurisdiction

under Article 226 available against any person or authority could be invoked against an order under Section 25(a) of the Act.

10. Though the Patna High Court in Senbo Engineering Ltd. (supra) merely followed the Bombay High Court in holding the writ petition to be maintainable but also examined, whether the arbitral tribunal has the power and authority to recall its earlier order terminating the proceedings and following the judgments holding the Adjudicator under the Industrial Disputes Act, 1947 to be having such powers, held that the arbitral tribunal has the power of procedural review and authority to recall, on sufficient cause being shown, an order terminating the proceedings under Section 25(a).

12. We may also notice that the same learned Judge who sitting in Bombay High Court had pronounced the judgment in Anuptech Equipments Private Ltd., sitting as the Chief Justice of High Court of Allahabad, in S.K. Associates v. Indian Farmer and Fertilizers Cooperative Ltd. reiterated that an arbitral tribunal would be such a 'person' to whom a writ could go under Article 226 of the Constitution of India and that due to the non availability of a remedy to an aggrieved person, held the remedy of Article 226 to be available. Though the observations aforesaid of the Supreme Court in S.B.P. & Co. (supra) were noted but were held to not apply to termination of proceedings under Section 25(a). It was further held that, termination of proceedings if does not result in an award, though cannot give rise to a challenge under Section 34 but if the claim is within limitation it is open to a party to apply afresh.

13. Notice may also be taken of the dicta of

another Division Bench of the Bombay High Court in Rashtriya Chemical Fertilizers Ltd. v. J.S. Ocean Liner Pte. Ltd. though holding the writ remedy to be available, but to be confined to minimum and to be exercised in very exceptional and deserving cases.

14. The High Courts of Bombay, Allahabad and Patna have held the writ remedy to be available only for the reason of no other remedy being available to a party aggrieved from an order under Section 25(a). The Patna High Court however held that, notwithstanding the arbitral proceedings having been closed, the remedy of approaching the arbitral tribunal is available and further held the arbitral tribunal, upon being satisfied with the sufficiency of the cause for default given, is empowered to set aside the dismissal in default. It was however not considered that if such remedy of approaching the arbitral tribunal is available, the writ remedy could not be justified on the ground of 'no remedy'.

15. The first question which thus according to us needs to be answered is, whether the remedy of approaching the arbitral tribunal for review/recall of termination of proceedings is available, inasmuch as the only consideration which has prevailed in the judgements aforesaid for holding the writ remedy to be available is that a party cannot be left remediless. If the remedy of approaching the arbitral tribunal is available, the said reasoning would disappear.

16. Though the remedy of review has in State of Arunachal Pradesh v. Damani Construction Co., (2007) 10 SCC 742 been held to be not available to an arbitral tribunal and it is otherwise a settled principle that the power of review is not an inherent power and must be conferred by law either expressly or by

implication (and of which there is no indication in the Arbitration Act) but the Supreme Court in Grindlays Bank Ltd. v. CGIT, 1980 Supp SCC 420 followed in Kapra Mazdoor Ekta Union v. Birla Cotton Spg. And Wvg. Mills Ltd., (2005) 13 SCC 777 though in the context of Industrial Adjudicator, carved out a difference between a procedural review and a review on merits. It was held that procedural review is inherent or implied in a Court or a Tribunal, to set aside a palpably erroneous order passed by it under a misapprehension. On the contrary, a review on merits is for correction of error of law apparent on the face of the record. The law that there is no power to review unless the statute specifically provides for it, was held to be applicable to review on merits and not to a review sought due to a procedural defect. It was held that such procedural defect or inadvertent error must be corrected ex debito justitiae to prevent the abuse of process and such power inheres in every Court or Tribunal. Cases where a decision is rendered by the Court or a quasi judicial authority without notice to the opposite party or under a mistaken impression that notice had been served upon the opposite party were held to be falling in the category where the power of procedural review may be invoked. It was held that the party seeking such review has to establish that the procedure followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceedings and invalidated the order made therein inasmuch as the opportunity of hearing was denied without the fault of that party. The Supreme Court held that in such cases the matter has to be re-heard in accordance with the law without going into the merits of the order passed and the order is liable to be recalled and reviewed not because it is erroneous but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake. It was yet further held that once it is established that the party was

prevented from appearing at the hearing due to sufficient cause, the matter must be re-heard and decided again. It is important to at this stage highlight that the Supreme Court in Damani Construction Co. (supra) was concerned with review of an award and which power of "review on merit" was held to be not vested in the arbitral tribunal.

17. We may in this regard also notice that the legislature, in Section 25, has not provided for termination of proceedings automatically on default by a party but has vested the discretion in the arbitral tribunal to, on sufficient cause being shown condone such default. We are of the view that no distinction ought to be drawn between showing such sufficient cause before the proceedings are terminated and after the proceedings are terminated. If the arbitral tribunal is empowered to condone default on sufficient cause being shown, it matters not when the same is shown. It may well nigh be possible that the sufficient cause itself is such which prevented the party concerned from showing it before the proceedings terminated. It would be a pedantic reading of the provision to hold that the arbitral tribunal in such cases also stands denuded. Once the legislature has vested the arbitral tribunal with such power, an order of termination cannot be allowed to come in the way of exercise thereof.

18. There is another reason for us to hold so. The emphasis of the Arbitration Act is to provide an alternative dispute resolution mechanism. The provisions of the Act ought to be interpreted in a manner that would make such adjudication effective and not in a manner that would make arbitration proceedings cumbersome. A view that the arbitral tribunal is precluded, even where sufficient cause exists, from reviving the arbitral proceedings and the only remedy available to a party is a writ

petition and which remedy is available only in the High Court often situated at a distance from the place where the parties are located, would be a deterrent to arbitration. It is also worth mentioning that Section 19(2) of the Act permits the parties to agree on the procedure to be followed by the arbitral tribunal. The parties may, while so laying down the procedure, provide for the remedy of review/revival of arbitral proceedings and which agreement would be binding on the arbitral tribunal. If the arbitral tribunal in such a situation would be empowered to, on sufficient cause being, shown, revive the arbitral proceedings, we see no reason to, in the absence of such an agreement hold the arbitral tribunal to be not empowered to do so. If it were to be held that such power of review/recall is not available to an arbitral tribunal, the arbitral tribunal would not be competent to set aside an order under Section 25(b) also, compelling the respondent against whom proceedings have been continued, to file a writ petition, making the continuation of proceedings before the arbitral tribunal a useless exercise.

19. Before parting with the said line of reasoning, the consequences of the arbitral tribunal entertaining such procedural review may also be discussed. If the Arbitral Tribunal finds sufficient cause and restores the arbitral proceedings, the challenge to such order of restoration would lie along with challenge to the award itself if against such aggrieved party. However if the arbitral tribunal does not accept as sufficient, the cause furnished for default, the arbitral tribunal would necessarily give reasons therefor within the meaning of Section 31 and such order of the Arbitral Tribunal would definitely constitute an award remedy where against would be available under Section 34 of the Act. The definition in Section 2(1)(c) of the Act of an “arbitral award” is an inclusive one i.e. of the same including an interim award;

else an arbitration award is not defined. However, sub-Section (1) of Section 32 provides for termination of arbitral proceedings either by an arbitral award or by an Order of the arbitral tribunal under sub-Section (2) of Section 32. An order of dismissal of an application for review/recall of an order under Section 25(a) does not fall under any of the clauses in sub- Section (2) of Section 32. The same thus has to necessarily fall within the meaning of award.

20. We are further of the view that, the proceedings under the Arbitration Act cannot at all times be viewed through the prism of CPC. The Act equates the award to a 'decree' only for the purposes of the enforcement thereof under Section 36 and our concepts and terminology of a suit cannot otherwise be applied to arbitration proceedings. The Supreme Court in Paramjeet Singh Patheja v. ICDS Ltd., (2006) 13 SCC 322 held that the legal fiction of equating the award to a decree is for the limited purpose of enforcement and not intended to make an award a decree for all purposes. Ordinarily even the default termination order under Section 25(a) would be an award, with the remedy however available to the party of approaching the arbitral tribunal with sufficient cause for setting aside of the default termination order. We may in this regard notice that Section 34 allows an arbitral award to be set aside when a party was under some incapacity or when proper notice of the arbitral proceedings was not served or when the party was otherwise unable to present his case. The said grounds for setting aside would be invoked only if orders as under Section 25(a) were to be an award and there would have been no occasion for the legislature to provide such grounds under Section 34 if default orders were not to be an award. The same also follows from sub-Section
(4) of Section 34 whereunder, upon challenge
under Section 34 being made to such termination, the Court has been empowered to

relegate the parties to the arbitral tribunal. We see no reason to not hold an order under Section 25(a) to be an award merely because the remedy of appeal against orders of terminations under Section 16(2) & (3) has been provided. Further, the order under Section 25(a), stating default on the part of the party, would satisfy the requirement of the award to contain reasons. Moreover, merely because the arbitral tribunal fails to give any reasons cannot be a ground for making its orders unassailable under Section 34.

21. It cannot be lost sight of that though in the present case one of the contracting parties is Government but it may not always be so. The law of arbitration in the Act is the same, whether the contracting parties are Government/State within the meaning of Article 12 of the Constitution of India or private parties. What has been held by the Bombay, Patna and the Allahabad High Courts would equally apply to arbitration between the private parties and would tantamount to the jurisdiction under Article 226 being invoked against such private arbitrators and the parties. We are in the present state of affairs not prepared to hold so especially when in our view the remedy within the Act is available. In this regard it may be noticed that the Madras High Court in Mangayarkarasi Apparels P. Ltd. v. Sundaram Finance Ltd. has disagreed with An uptech Equipments Private Ltd. and held that the arbitral tribunal is not "other authority" within the meaning of Article 226 and writ remedy against the orders of the arbitral tribunal is not available."

14. We reiterate the same reasoning and owing whereto, we are unable to agree with the reasoning given by the learned Single Judge in the impugned judgment."

3. The Bombay High Court in case of **Godawari Marath- wada Irrigation Development Corporation v. M/s. S.D. Shinde and Co. Engineers and Contractors** reported in , 2014 SCC OnLine Bom 4033 has held as under:

> "22. Upon a conscious reading of paragraph No. 45 of the SBP & Co. judgment (supra), it is clearly evident that the intention of the Apex Court while looking into the scheme of the Act of 1996 and Section 34 and 37 of the said Act, is that there should be a minimal interference in relation to any orders passed by the Arbitral Tribunal. The Apex Court has observed that the party aggrieved by any order of the Arbitral Tribunal will have to wait until the award is passed by the Tribunal and that appears to be the scheme of the Act.
>
> 23. While drawing such conclusions, the Apex Court has also disapproved of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being correc- ted by the High Court under Article 226 or 227 of the Constitution of India. The Apex Court has, therefore, noted that such an intervention by the High Courts is not permissible.
>
> 24. For assistance, paragraph No. 45 and 46 of the SBP & Co. judgment (supra) is reproduced herein below:-…xxx
>
> 25. I am in respectful agreement with the ratio laid down by the Apex Court in the SBP & Co. judg- ment (supra)."

4. The Bombay High Curt in case of **The Chief Engineer, Public Works Department, Government of Goa v. M/s. Karnatak Cement Pipe Factory** reported in 2018 SCC OnLine Bom 4174 has held as under:

"14. Section 5 of the Act deals with the extent of judicial intervention and opens with the non-ob- stante clause that notwithstanding anything con- tained in any other law for the time being in force, in matter governed by this Part, no judicial au- thority shall intervene except where so provided in this Part. In other words, the extent of judicial in- tervention is very limited and restricted to the areas contained in that part. Moreover, in Ranjit Projects Pvt. Ltd. (supra), an application was made to amend the claim before the Arbitral Tribunal which came to be dismissed by it vide the order dated 13/11/2016 and on the application for re- call, the Tribunal recalled the order by its order dated 27/12/2016 and allowed the amendment. The respondent then applied to the Arbitral Tribunal under Section 16 of the Act stating that the amended claim was beyond the scope of the arbitral proceedings and seeking to set it aside on this ground alone which came to be dismissed by the Tribunal on the premise that the amended claim was within the scope of reference and it had the competence and jurisdiction to decide it.

15. In Ranjit Projects Pvt. Ltd. (supra), the re- spondents in the meantime had challenged the or- der of the Tribunal dated 27/12/2016 in which the High Court stayed the further proceedings in the arbitration and set down the special applica- tion for hearing giving rise to the challenge before the Hon'ble Apex Court. In that context, the Hon'ble Apex Court was of the view that the High Court had erred in interfering with, at this junc- ture, and staying the proceedings under Article 227 of the Constitution of India. Section 5 of the 1996 Act clearly interdicts judicial intervention ex- cept where so provided in this part. No doubt this does not mean that the proceedings under the Constitution can be interdicted, but all the same that the High Court will keep Section 5 in mind while exercising discretion under Article 227 in the midst of an arbitral proceedings. The High Court in their opinion was in error in interdicting the ar- bitral proceeding at this stage and set aside the or-

der. This judgment too substantiates the conten- tion of Shri Kholkar, learned Advocate for the re- spondent that the invocation of the jurisdiction of the High Court under Article 227 of the Constitu- tion of India is not available to the petitioner con- sidering also the extent of judicial intervention as contemplated under Section 5 of the 1996 Act.

19. It would be apparent from a reading of these two provisions that an alternate remedy is avail- able to the petitioner under Section 34 to set aside the arbitral award and to challenge the appealable orders by recourse to Section 37 thereof. The ques- tion is whether these alternate remedies are not adequate and efficacious remedies available to the petitioner as to avail of the remedy under Article 227 of the Constitution of India. No doubt to chal- lenge an award under Section 34 of the 1996 Act, an award must be passed by the learned Arbitrat- or. It may appear at the first flush on a reading of Section 37 of the 1996 Act in particular that the impugned order is not capable of challenge there- under. However considering the Full Bench judg- ment of S.B.P. and Company (supra), it is always available to the petitioner to challenge the im- pugned order while assailing the award under Sec- tion 34 of the 1996 Act. Therefore, the contention of Shri Pravin Faldessai, learned Additional Gov- ernment Advocate that the remedy available under Section 34 and 37 of the 196 Act would not bar his remedy under Article 227 of the Constitution can- not stand the test of scrutiny.

22. In Girish Parekh (supra), another Single Judge of this Court (Anoop V. Mohta, J.) held at para- graph No. 16 that taking an overall view of the scheme of Section 16, one thing is very clear that an Arbitrator has power to decide the application with regard to the existence of an arbitration agreement and objection in respect of jurisdiction. The Arbitrator having once taken decision and re- jected the objection with regard to the jurisdiction and observed further that there is existence of ar- bitration agreement between the parties and pro- ceed accordingly, such order cannot be challenged

except by the remedy as available under Section 34 and or Section 37 of the Arbitration Act. It fur- ther reiterated the well settled proposition culled out in S.B.P. and Company that once the matter reaches the sole arbitrator, the High Court would not interfere with the orders passed by the Arbit- rator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act."

5. The Calcutta High Court in case of **Heiza Boilers (I) Pvt. Ltd. and another v. Union of India and other** reported in 2018 SCC OnLine Cal 5970 has held thus:

"6. The Arbitration and Conciliation Act, 1996 is a consolidating and amending Act, which, by its very nature, implies that it is a Code by itself. Unless there are special provisions in some special stat- utes providing for a different mechanism for arbit- ration or the remedies therefrom, when matters pertaining to arbitration are sought to be ques- tioned in court, they have, per force, to be under the Act of 1996. Section 5 of the Act of 1996 man- dates that the court would interfere in matters pertaining to arbitration only to the extent as per- mitted by the statute. Indeed, areas which were within the exclusive domain of the court under the predecessor statute of 1940 have now been parked exclusively with the arbitral tribunal, particularly the authority of arbitral tribunal to rule on its own jurisdiction. Certain matters can be carried to court only at a certain stage. If, for instance, the arbitral tribunal upholds its jurisdiction to contin- ue with the arbitral reference despite an objection, the objector has to await the outcome of the refer- ence before resuming the challenge in course of proceedings under Section 34 of the Act of 1996.

7. In the present case, it appears that there was an agreement between the appellants and the Union through the office of the DGS&D. Certain disputes

as to a lot of supply arose and an arbitral refer- ence was commenced which culminated in the ref- erence being terminated under Section 32 thereof. As to whether a reference which was terminated under Section 32 of the Act could subsequently be revived or not was not a question of public law that could be addressed in proceedings under Art- icle 226 of the Constitution. Further, there was no public element in the DGS&D acting as the ap- pointing authority since he was only a creature of a contract.

8. In view of the fact that the remedy of the appel- lants lay completely within the four corners of the Act of 1996, the writ petition should never have been entertained, particularly in view of the dictum in SBP & Co. noticed above."

6. The Bombay High Court in case of **Space Wood Office Solution Pvt. Ltd., Nagpur v. Anupam Rai Construc- tion, Nagpur** reported in 2019 SCC OnLine Bom 751 has held as under:

"5… It is not in dispute that pursuant to an agree- ment between the parties an Arbitrator has been appointed to resolve the disputes amongst them. In proceedings before the Arbitrator, the petitioner herein had filed two applications, one seeking pro- duction of certain documents and another seeking framing of certain issues. As noted above, the sole Arbitrator has adjudicated upon those applications and the petitioner has sought to challenge that ad- judication. The final award is yet to be passed and the Arbitrator is seized of the arbitration proceed- ings.

6. In Patel Engineering Ltd. (supra), the Constitu- tion Bench of the Hon'ble Supreme Court has ob- served that interlocutory orders made by the Arbit- rator cannot be subjected to challenge under Art-

icle 226 or 227 of the Constitution of India. Such intervention by the High Courts was held to be not permissible as the object of minimizing judicial in- tervention when the process of arbitration was go- ing on would be defeated by entertaining such challenge at an interlocutory stage. It was further observed that once arbitration proceedings had commenced, the parties would have to wait until the award was pronounced after which the remedy under section 37 of the Arbitration and Concili- ation Act, 1996 could be availed of. Following aforesaid decision, the Hon'ble Supreme Court in Lalitkumar V Sanghavi (Dead) Thr. LR's Neeta Lalit Kumar Sanghavi v. Dharamdas V. Sanghavi, 2015 (1) Mh.L.J. (S.C.) 1 : (2014) 7 SCC 255 reiter-
ated that the scope for interference under Article
227 of the Constitution of India was limited in matters of such nature. In that case, an applica- tion invoking section 11 of the Act of 1996 came to be dismissed holding the same to be not maintain- able. It was observed by the High Court that the remedy was in invoking the jurisdiction under Art- icle 226 of the Constitution of India. The Hon'ble Supreme Court referring to its earlier judgment in Patel Engineering Ltd. held that the aforesaid view of the High Court was not in accordance with law and set aside the same.

7. The ratio of the decision in Patel Engineering Ltd. (supra) has been followed in Amur Tea Dis- tributors (supra) and a writ petition challenging an order passed by the sole Arbitrator with regard to termination of the proceedings was not enter- tained. The Division Bench of the Karnataka High Court in Radiant Infosystems Ltd. has also fol- lowed the aforesaid law and did not entertain the writ petition seeking to challenge an order passed by the Arbitrator in the matter of rejection of an application seeking permission to produce addi- tional documents. It is thus clear that the ratio of the decision in Patel Engineering Ltd. (supra) pre- cludes entertaining a challenge to an interlocutory order by invoking jurisdiction under Article 227 of the Constitution of India. Even though the power

of the High Courts to exercise judicial superin- tendence over decisions of all Courts and Tribunals forms the part of basic structure of the Constitution, same cannot justify interference at an interlocutory stage as sought to be urged. Moreover, the Tribunal referred to in Management Committee of Montfort Senior Secondary School (supra) was the Tribunal constituted under provisions of section 11 of the Delhi School Educa- tion Act, 1973 and not an arbitral Tribunal.

8. The ratio of the decision in Sanwal Coal Carri- ers (supra) wherein a challenge to an interim re- port of the Arbitrator was entertained cannot be applied to the case in hand. The facts of that case indicate that the learned Single Judge therein found that if the error in question that had arisen therein was not corrected at that stage, the same would be to the prejudice of all the parties. The aforesaid decision has been distinguished in Milind Dattatraya Mahajan (supra) by observing that the ratio of the decision in Sanwal Coal Carri- ers Limited (supra) was restricted to the facts of that case in the light of the interim report submit- ted by the Arbitrator therein. It was further ob- served that interlocutory orders cannot be subjec- ted to challenge during pendency of the arbitration proceedings. I am in respectful agreement with the observations of the learned Single Judge in Milind Dattatraya Mahajan (supra). As noted above, the orders under challenge relate merely to production of certain documents and framing of an additional issue. Such challenges are purely of an inter- locutory nature and same can be raised in pro- ceedings under section 37 of the Act of 1996 if the need so arises."

7. The Bombay High Court in case of **Business India Ex- hibition Pvt. Ltd. and Others v. Arvind V. Sawant (Retd. Justice) and Other** reported in 2019 SCC On- Line Bom 5487 has held as under:

> "6. On 11th May 2017, the claimants filed another writ petition No. 1391/2017 seeking to declare that the Tribunal has become functus officio. The matter was heard. By an order dated 18th July 2017 the Division Bench of this Court (Coram: Anoop V. Mohta & Smt. Anuja Prabhudessai, JJ) rejected the petition as not maintainable. Para- graphs 6, 7 and 8 of the said order reads as under:
>
> —
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> > "6. The scope of power under Article 226/227 of the Constitution of India, to interfere with arbit- ral proceedings against any order passed by the Arbitral Tribunal, is well defined. The Himachal Pradesh High Court in case of P.K. Construc- tion Co. v. Shimla Municipal Corporation has observed the same view that Writ is not main- tainable. This Court also in Chhabildas s/o Tukaram Khadke v. Jalgaon Municipal Coun- cil refused to entertain writ petition against the arbitral tribunal order. Even otherwise, once the scheme of Arbitration Act is recognized, ac- cepted and provided all the remedies, there is no question to entertain any writ petition, pending such arbitral proceedings, specifically when, against such order, the remedy is avail- able needs to be invoked. Present Petition, therefore, is rejected, at this stage itself, as not maintainable."

8. The Delhi High Court in case of **Tangirala Srinivasa Gangadhara Baladitya v. Sanjay Aggarwal** reported in 2019 SCC OnLine Del 9112 has held as under:

> "5. It is in the light of the aforesaid provisions that the learned Single Judge has opined that once an application moved under Section 16 of the A&C Act is rejected, the party so aggrieved shall have to await the delivery of the award and only thereafter can the provisions of Section 34 of the A&C Act be invoked for setting aside the arbitral award. We are in complete agreement with the view expressed

in the impugned order. The mandate of Section 16 of the A&C Act is crystal clear. Once the applica- tion filed by him under Section 16 of the A&C Act has been dismissed by the learned Sole Arbitrator, the appellant has no option but to wait for the Ar- bitral Tribunal to deliver an award and if aggrieved thereby, he will have an option to move an applica- tion in the High Court for setting aside the arbitral award in terms of Section 34 of the A&C Act. The said position was clarified by a Constitution Bench of the Supreme Court in the landmark case of SBP & Co. v. Patel Engineering Ltd. reported as (2005)
8 SCC 618. In the aforesaid case, the Supreme Court was required to deliberate upon the nature of functions of the Chief Justice or his designate under Section 11 of the A&C Act. On a careful scrutiny of the provisions of the A&C Act, in a ma- jority judgment authored by Justice P.K. Balasub- ramanyan, it was observed as follows:—

"7. ……Chapter IV deals with the jurisdiction of Arbitral Tribunals. Section 16 deals with the com- petence of an Arbitral Tribunal, to rule on its juris- diction. The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitra- tion agreement. A person aggrieved by the rejec- tion of his objection by the Tribunal on its jurisdic- tion or the other matters referred to in that sec- tion, has to wait until the award is made to chal- lenge that decision in an appeal against the arbit- ral award itself in accordance with Section 34 of the Act. But an acceptance of the objection to jur- isdiction or authority, could be challenged then and there, under Section 37 of the Act "

After distilling the earlier decisions rendered by it on the scope of the powers exercised by the Chief Justice of the High Court and the Chief Justice of India under Section 11(6) of the A&C Act, the Supreme Court summed up its discussion in para 47 of the captioned decision and declared that the said powers are not administrative in nature but are judicial powers. It was also observed that once a matter reaches the 'Arbitral Tribunal' or the 'Sole

Arbitrator', the High Court would not interfere with the orders passed by the Arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

8. Even otherwise, the mandate of Section 5 of the A&C Act, which is a non-obstante clause, is clear. It states in so many words that "notwithstanding anything contained in any other law for the time being in force, in matters governed by the Act, no judicial authority shall intervene except where so provided." The underlying object of the said provi- sion is to ensure that wherever parties have sub- mitted their disputes to an Arbitral Tribunal in terms of the Arbitration Agreement, resolution of the said disputes ought to be expedited without any scope of judicial intervention that may end up delaying the proceedings inordinately. The said view has been reiterated by the Supreme Court and the High Courts in several decisions. In the case of Patel Engineering (supra), the Supreme Court held that:—

> "5. ….. Section 5 indicates the extent of judicial intervention. It says that notwithstanding any- thing contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in Part I. The expression "judicial authority" is not defined. So, it has to be under- stood as taking in the courts or any other judi- cial fora "

13. The following observations made by the Apex Court in recent decision in case of **M/s. Deep Industries Limited v. Oil and Natural Gas Corporation** (order dated 28th November, 2019 in Civil Appeal No.9106/2019) are also relevant :

" 11) Given the aforesaid statutory provision and given the fact that the 1996 Act repealed three previous enactments in order that there be speedy disposal of all matters covered by it, it is clear that the statutory policy of the Act is that not only are time limits set down for disposal of the arbitral proceedings themselves but time limits have also been set down for Section 34 references to be decided. Equally, in Union of India vs. M/s Varindera Const. Ltd., dated 17.09.2018, disposing of SLP (C) No. 23155/2013, this Court has imposed the self- same limitation on first appeals under Section 37 so that there be a timely resolution of all matters which are covered by arbitration awards.

12) Most significant of all is the non-obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)

13) This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are

passed which are patently lacking in inherent jurisdiction.

14) In Nivedita Sharma vs. Cellular Operators Association of India and Others, (2011) 14 SCC 337, this Court referred to several judgments and held:

> "11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
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> 12. In Thansingh Nathmal v. Superintendent of Taxes AIR 1964 SC 1419, this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:
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> "7… The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and

does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa (1983) 2 SCC 433, this court observed:

"11. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford (1859) 6 CBNS 336 : 141 ER 486 in the following passage: '... '… There are three classes of cases in which a liability may be established founded upon a statute .... But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. .... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.' The rule laid down in this passage was approved by the House of Lords in Neville
v. London Express Newspapers Ltd. 1919 AC 368 : (1918-19) 10 All ER Rep. 61 (HL) and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd 1935 AC 532 (PC) and Secy. of State v.Mask and Co. (1939-40) 67 IA 222 : AIR 1940 PC 105.

105. It has also been held to be equally

applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In Mafatlal Industries Ltd. v. Union of India (1997) 5 SCC 536, B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:

"77. … So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction of this Court under Article 32 is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Superintendent of Taxes (supra) and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been

> taken itself contains a mechanism for redressal of grievance still holds the field." In SBP & Co. (supra), this Court while considering interference with an order passed by an arbitral tribunal under Article 226/227 of the Constitution laid down as follows:-
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> xxxx
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> Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage." While the learned Additional Solicitor General is correct in stating that this statement of the law does not directly apply on the facts of the present case, yet it is important to notice that the seven-Judge Bench has referred to the object of the Act being that of minimizing judicial intervention and that this important object should always be kept in the forefront when a 227 petition is being disposed of against proceedings that are decided under the Act."

14. In view of aforesaid conspectus of law, and considering the provisions of the Act, 1996, the order passed by the Arbitration Tribunal during the course of Arbitration cannot be challenged by the petitioner under Articles 226 and/or 227 of the Constitution of India when the constitution bench of the Apex Court in case of **M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd. and Anr.**(supra) has disapproved the stand that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Articles 226 and 227 of the Constitution of India and has categorically held that such intervention by the High Court is not permissible. The Apex Court in case of **M/s. Deep Industries Limited v. Oil and Natural Gas**

Corporation (supra) has held that it is also important to notice that the seven-Judge Bench has referred to the object of the Act being that of minimizing judicial intervention and that this important object should always be kept in the forefront when a 227 petition is being disposed of against proceedings that are decided under the Act,1996 and that the policy of the Act is speedy disposal of arbitration cases as the Act,1996 is 'self-contained' Code and deals with all the cases.

15. In view of aforesaid settled legal proposition, considering the policy, object and the provisions of the Act,1996, an order passed during arbitration proceedings by the Arbitration Tribunal cannot be challenged under Articles 226 and 227 of the Constitution of India as the Act,1996 is a special act and a self-contained code dealing with arbitration. Therefore, the impugned order of the Arbitration Tribunal deciding the preliminary objection raised by the petitioner cannot be challenged under Article 226 or 227 of the Constitution of India.

16. In view of foregoing reasons, the petition fails and is accordingly dismissed. It is, however, made clear that the petition is dismissed without entering into merits of the matter, only on the ground that the order passed during course of arbitration cannot be challenged under Articles 226 and/or 227 of the constitution of India and it would be open for both the sides to raise all the contentions on merits before the appropriate forum in appropriate proceeding at appropriate time in accordance with law. Interim relief, if any stands vacated. Rule is discharged

with no order as to costs.

(BHARGAV D. KARIA, J)

FURTHER ORDER

After the judgement is pronounced, Mr. Yatin Soni, the learned advocate for the petitioner makes a request to stay the operation, implementation and execution of the judgement. Having regard to what has been stated in the judgement and more particularly, having taken the view that the order passed by the Arbitration Tribunal cannot be challenged by the petitioner under Articles 226 and/or 227 of the Constitution of India, request of the learned advocate is rejected.

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR