

(2021) 07 OHC CK 0122

In the Orissa High Court

Case No : Writ Petition (Civil) No. 2472 Of 2021

Odisha State Road Transport Corporation

APPELLANT

Vs

ARSS Bus Terminal Pvt. Ltd

RESPONDENT

Date of Decision : 16-07-2021

Acts Referred:

Constitution of India, 1950 — Article 23(b), 35(a)(v), 226, 227, 299
Arbitration and Conciliation Act, 1996 — Section 5, 7, 7(2), 7(3), 7(4)(a), 7(4)(b), 11, 16, 16(1)(a), 16(1)(b), 16(2), 16(5), 17, 18, 27, 28, 29, 30, 31, 32, 33, 34, 34(2)(a) (ii), 34(2)(b)(i), 34(2), 34(3)
Contract Act, 1872 — Section 2(g), 2(j), 10, 23
Stamp Act, 1899 — Section 35, 40, 42(1), 42(2)
Orissa High Court Rules, 1948 — Rule 5

Citation : (2021) 07 OHC CK 0122

Hon'ble Judges : K.R.Mohapatra, J

Bench : Single Bench

Advocate : Sanjit Mohanty, Subrat Mishra, Naresh Thacker, Manish Panda

Final Decision : Dismissed

Judgement

K.R.Mohapatra, J

1. This writ petition has been filed assailing the order dated 11.12.2020 (Annexure-7) passed by learned Arbitral Tribunal in Arbitration Proceeding No.68 of 2019, whereby it

rejected an application filed under Section 16(2) of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act').

2. Short narration of facts relevant for proper adjudication of this case are that the Government of Odisha in the Department of Commerce and Transport published notice on

14.12.2009 informing about issuance of Request for Proposal (RFP) and inviting tender from reputed Infrastructure Developers for development of the Baramunda Bus

Terminal, Bhubaneswar along with commercial facilities through public private partnership mode. In the said tender process, ARSS Infrastructure Project Limited (ARSS Infra)

was selected as the preferred bidder. Accordingly, on 26.07.2010 Letter of Acceptance was issued by the Secretary to Government of Odisha, Department of Commerce and

Transport in favour of the ARSS Infra. A Concession Agreement was executed between the General Manager of Orissa State Road Transport Corporation (OSRTC) (the

Petitioner) and Opposite Party-ARSS Infra on 16.03.2011 (Annexure-1). Assailing the validity of the execution of such Concession Agreement, Writ Petition (PIL) No.30961 of

2011 (for short 'PIL') was filed before this Court with a prayer to quash the Concession Agreement dated 16.03.2011 along with other reliefs. The Petitioner, Opposite

Party as well as ARSS Infra were arrayed as opposite parties to the said PIL.

3. This Court, vide order dated 20.12.2012 (Annexure-2), holding that the Concession Agreement being in contravention of Article 299 of the Constitution of India is not

sustainable in law, allowed the said PIL with the following orders:

44. Having answered all the points in favour of the petitioner due to non-compliance of statutory and constitutional provisions referred to above by the opposite parties, the impugned

agreement is void ab-initio and accordingly concessionaire cannot have any right or interest over the land in question on the basis of the said void document, which is opposed to the public

policy as provided under Section 23 of the Contract Act. For the reasons stated supra, the writ petition succeeds. The impugned agreement dated 16.03.2012 under Annexure-11 is hereby

quashed.

No order as to costs.

3.1 The judgment and order dated 20.12.2012 remained unchallenged and attained its finality. Subsequently, invoking Clause-16 of the Concession Agreement (Annexure-1) the

Opposite Party filed an application under Section 11 of the Arbitration Act in ARBP No.53 of 2016 before this Court for appointment of Arbitrators. Clause-16 of the

Concession Agreement deals with dispute resolution, which reads as follows:-

16. DISPUTE RESOLUTION

xxx

xxx

16.3. ARBITRATION

(a) Arbitrators

In the event the dispute or difference or claim, as the case may be, is not resolved, as evidenced by the signing of the written terms of settlement by the Parties, within 30 (thirty) days of

reference for amicable settlement and/or settlement with the assistance of Expert, as the case may be, the same shall be finally settled by binding arbitration under the Arbitration and

Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one each to be appointed by the Grantor and the Concessionaire and the third to be appointed by the two

arbitrators so appointed, who shall act as chairperson of the Arbitral tribunal.

Although the plea with regard to sustainability of the arbitration clause after quashing of the Concession Agreement was raised by the Petitioner, this Court vide its order dated

15.11.2019 (Annexure-3), allowed the application under Section 11 of the Arbitration Act appointing arbitrators and leaving open for the parties to raise all issues before the

arbitrators. The order under Annexure-3 passed by this Court was assailed by the petitioner before the Hon'ble Supreme Court in SLP(C) No.10086 of 2020, which was

dismissed vide order dated 10.06.2020 (Annexure-4) confirming the order of this Court. Accordingly, Arbitration Proceeding No.68 of 2019 was registered on the file of the

Arbitral Tribunal at the instance of the Opposite Party. The Petitioner in terms of the liberty granted by this Court, filed an application under Section 16(2) of the Arbitration Act

before the Arbitral Tribunal raising certain grounds with regard to existence of the arbitration clause in the Concession Agreement (Annexure-1) and jurisdiction

of the Arbitral

Tribunal to arbitrate the dispute. The Opposite Party filed its objection to the said application. Considering the rival contentions of the parties, the Arbitral Tribunal passed the

impugned order under Annexure-7. Initially, the Petitioner filed CMP No.690 of 2020 assailing the order under Annexure-7, which was converted to Writ Petition (Civil)

pursuant to order dated 19.01.2021. Accordingly, this Writ Petition (Civil), i.e., W.P.(C) No.2472 of 2021 was registered. The Opposite Party filed its counter affidavit raising

objection with regard to maintainability as well as merit of the Writ Petition.

4. Mr. Mohanty, learned Senior Advocate appearing for the Petitioner contended that when the Concession Agreement dated 16.03.2011 (Annexure-1) has been held to be void

ab initio and unenforceable vide judgment dated 20.12.2012 (Annexure-2), the arbitration clause/agreement, which is a part and parcel of the Concession Agreement itself

perishes with it. OSRTC has no independent relationship with the Opposite Party. It was authorized by the Government of Odisha to execute the Concession Agreement on its

behalf. When the Concession Agreement itself has been declared null and void holding that OSRTC has no authority to execute the Concession Agreement and the execution is

violative of Article 299 of the Constitution of India and Section 23 of the Contract Act, there is no signature or agreement in writing and the document (Concession Agreement)

does not exist at all. The aforesaid findings extends to and impeaches the arbitration clause/agreement contained in the Concession Agreement.

5. Elaborating his submission Mr. Mohanty, learned Senior Advocate submitted that Clause 16 is an integral part of the Concession Agreement. Though arbitration clause

contained in the Concession Agreement is regarded as a separate agreement notionally, but it has no independent and separate existence as it is contained in one document. It

exists during the life time of the Concession Agreement. Quashing of the Concession Agreement by this Court affects the existence of the arbitration clause as it perishes along

with the Concession Agreement itself. An arbitration agreement must satisfy the requirements of Section 7 of the Arbitration Act and Sections 2(g), (j), 10 and 23 of the

Contract Act. The arbitration clause being a part of the Concession Agreement itself comes under first part of Section 7(2) of the Arbitration Act. Therefore, it must satisfy the

requirement of Sections 7(3) and 7(4)(a), which requires that the arbitration agreement shall be in writing and signed by the parties. In view of the categorical finding of this

Court to the effect that there is no execution of the agreement dated 16.03.2011 (Annexure-1) there remains no signature/signing of the Concession Agreement which contained

the Arbitration Agreement in it. Thus, apart from the fact that the arbitration clause has perished with the quashing of the Concession Agreement (Annexure-1), it also does not

satisfy the requirements of Section 7(3) read with Section 7(4)(a) of the Arbitration Act. In support of his submission, Mr. Mohanty, learned Senior Advocate relied upon the

case of *Fili Shipping Co. Ltd. and others v Premium Nafta Products Ltd. and others* reported in (2007) UKHL 40, which reads thus:

“17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration

agreement. The arbitration agreement must be treated as a “distinct agreement” and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of

course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the

main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was

forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration

agreement, as a “distinct agreement”, was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any

agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.Â (emphasis supplied)

18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper

reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded

it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement

remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of

whether there was a concluded main agreement to be decided by arbitration.

xx xx xx

35. That is not this case, however. The owners' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement

because the contract was induced by bribery. Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration

agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must

be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in

this case, the agreement to go to arbitration must be given effect.â??

He also relied upon the case of N.N. Global Mercantile Pvt. Ltd -V- Indo Unique Flame Ltd. and Other s, reported in 2021 SCC Online SC 13, wherein, it is held that if an

arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes.

5.1 He further contended that the arbitration agreement must satisfy the provisions of the Contract Act specifically Sections 2(g), 2(j), 10 and 23 of the Contract Act. It cannot

be bereft of the provisions of Contract act. In support of his case, he relied upon the case of Vidya Drolia and Others v- Durga Trading Corporation, reported in (2021)

2 SCC 1 in which it is held that "Agreement" is not defined in the Arbitration Act, albeit it is defined under Section 10 of the Contract Act. It is also held therein that

Arbitration Agreement must satisfy the objective mandates of the Law of Contract to qualify as an agreement. Clause (g) and (h) of Section 2 of the Contract Act states that an

agreement not enforceable by law is void and an agreement enforceable by law is a contract.

5.2 He also relied upon the decision of the Hon'ble Supreme Court in the case of Swiss Timing Limited v-Commonwealth Games 2010 Organising Committee, reported

in (2014) 6 SCC 677, which laid down that undoubtedly, in cases where the Court can come to a conclusion that the contract is void without receiving evidence, it would be

justified in declining reference to arbitration but such cases would be few and isolated.

5.3 He further relied upon the case of Uttarakhand Purv Sainik Kalyan Nigam Limited v- Northern Coal Field Limited, reported in (2020) 2 SCC 455 in which relying

upon recommendation of the 246th report of the Law Commission, Hon'ble Supreme Court held that the judicial intervention is only restricted to situations where the Court

finds that the arbitration agreement does not exist or is null and void. However, if the Judicial Authority is of the opinion that prima facie the arbitration agreement exists then it

can refer the dispute to arbitration and leave the existence of arbitration agreement to be finally determined by the Arbitral Tribunal.

6. It is his contention that the Concession Agreement under Annexure-1 itself being violative of Section 23 of the Contract Act and there is no valid contract in the eyes of law.

Thus, the findings in the PIL are also applicable and extend to the arbitration clause contained in the main agreement under Annexure-1. As such, the arbitration agreement is

void and not enforceable being in contravention of Sections 2(g), 2(j) as well as Sections 10 and 23 of the Contract Act. The invalidity of the arbitration

agreement is governed

under the principle of *ex nihilo nil fit*, which means "nothing comes out of nothing". When there is no signing of the contract (Concession Agreement) and there is no

agreement in writing, the arbitration clause/agreement does not satisfy the requirements of Section 7 of the Arbitration Act.

7. Relying upon the decision in the case of *Union of India v- Kishorilal Gupta & Bros.*, reported in AIR 1959 SC 1362, he submitted that when an arbitration clause is a

collateral term of contract and an integral part of the contract, in such a case, howsoever comprehensive the terms of the arbitration clause may be, the existence of the contract

is a necessary condition for its operation. In other words, it perishes along with the contract. Since the Concession Agreement has been declared null and void *ab initio*, the

necessary inference would be that it had never legally come into existence. Thus, there cannot be any existence of arbitration clause in absence of the main contract itself. He

also relied upon the case of *Jaikishan Dass Mull -v-Luchhimirain Kanoria & Co.*, reported in AIR 1974 SC 1579 and *Andritz Oy. rep. through Power of Attorney*

Agent, Mr. Siraj Ahmad, New Delhi v- Enmas Engineering Pvt. Ltd., rep. by its Director and Principal Officer, Chennai and another, reported in (2007) 3 Arb LR

545. He, therefore, contended that if a contract is void *ab initio*, the arbitration clause, which is an integral part of the said agreement, could not be a life boat in a sinking ship but

a lifeless boat in a ship which never commenced its voyage.

8. Section 16 (1)(b) of the Arbitration Act is an enabling provision, which, unlike Section 33 of the Arbitration Act, 1940, now permits the Arbitral Tribunal to decide the question

relating to existence of the arbitration clause. The principle of separability of Arbitration Agreement empowers an Arbitral Tribunal to rule and decide on its existence, validity or

rescission before delving into adjudication of the questions referred by the Court. It is his submission that in the case of *A. Ayyasamy v- A. Paramasivam & Others*,

reported in (2016) 10 SCC 386, it is held in paragraph 33 that the severability of

an Arbitration Agreement is a doctrinal development of crucial significance, for it leaves the

adjudicatory power of the Arbitral Tribunal unaffected over any objection that the main contract between the parties is affected by fraud or undue influence. The doctrine of

severability and separability of the arbitration agreement is only applicable when a determination is required by the Arbitral Tribunal, save and except where there is already a

prior decision by the High Court quashing the agreement itself as in the present case. Validity of a contract under Section 7 of the Act as well as under the provision of the

Contract Act is necessary for operation of such doctrine/concept. A concept cannot operate in vacuum, where there is no contract at all. Therefore, the Arbitral Tribunal is

required to consider whether the invalidity of the Concession Agreement (Annexure-1) upon its quashing by this Court makes the arbitration clause/agreement non-est in the

eyes of law. That having not been considered, the impugned order under Annexure-7 is not sustainable. He, further challenged the impugned order under Annexure-7 contending

that when the Arbitral Tribunal accepted the Concession Agreement (Annexure-1) to have been quashed by this Court holding it to be void ab initio and unenforceable and it

could not have held that "notwithstanding the fact that the Concession Agreement is not in existence, the arbitration clause remained unaffected". He, however,

distinguished the applicability of the case law in National Insurance Company Limited v-Boghara Polyfab Private Limited reported in (2009) 1 SCC 267, A.

Ayyasamy (supra) and Sasan Power Limited -v-North American Coal Corporation (India) Private Ltd, reported in (2016) 10 SCC 81.3 When it is categorically held by

this Court that the Petitioner had no authority to execute the agreement dated 16.03.2011 (Annexure-1) and held it to be violative of Article 299 of the Constitution of India and

Section 23 of the Contract Act, the Arbitral Tribunal ought to have taken note of the same and adjudicated as to whether the invalidity of the main agreement extends to

arbitration clause or not. Thus, the Arbitral Tribunal has not exercised the

jurisdiction conferred on it while adjudicating the application under Section 16 of the Arbitration Act.

9. It is contended that the adjudication of the rights and obligation under the Work Order or the substantive commercial contract would however not proceed before complying

with the mandatory provisions of the Stamp Act. In the present case, the Concession Agreement being inadequately stamped, as held by this Court and quashed on the grounds

of non-execution being void ab initio and unenforceable in the eyes of law, the original agreement cannot be made available anymore to be stamped and there cannot be

impounding of the copy of the agreement to enforce the arbitration clause. However, the Opposite Party made a desperate attempt by alleging in paragraph 23 of the counter

affidavit that Rs.100/- being the adequate stamp on which the agreement was executed, the arbitration clause is not suffering from the deficit of stamp duty. Such a contention is

not sustainable as the amount involved being Rs.56.00 crores, the Arbitration Agreement/clause was required to be stamped accordingly. As the agreement was insufficiently

stamped as per Article 35(a)(v) read with 23(b) of Schedule 1A (Stamp Duty on Instruments-Orissa Amendments) of the Stamp Act, the Arbitration Agreement cannot be

given effect to.

10. He, further submitted that in view of the ratio decided in the case of Punjab State Power Corporation Limited v-Emta Coal Limited and Another, reported in 2020

SCC Online SC 1165, Deep Industries Limited v- Oil and Natural Gas Corporation Limited and Another, reported in (2020) 15 SCC 70, 6a writ petition under

Article 227 of the Constitution of India assailing the order under Section 16 of the Arbitration Act by the Arbitral Tribunal is maintainable as it is patently illegal and perverse. He

also relied upon the recent judgment passed by the Honâ??ble Supreme Court in the case of Bhaven Construction Through Authorised Signatory Premjibhai K. Shah -V-

Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Another reported in 2021 SCC Online SC 8 in which it is held that in rare and exceptional

circumstances, the

High Court can interfere with the orders of the Arbitral Tribunal in exercise of power under Article 227 of the Constitution of India. The present case being one of a rare and

exceptional circumstance, this Court has jurisdiction to entertain the Writ Petition (Civil) under Articles 226 and 227 of the Constitution of India.

10.1 Accordingly, he prayed for setting aside the impugned order under Annexure-7 and to declare that the Arbitration Tribunal has no jurisdiction to proceed with the arbitration

proceeding.

11. Mr. Thacker, learned counsel for the opposite party while defending the order under Annexure-7 refuted the contentions raised by Mr. Mohanty, learned Senior Advocate.

He mainly harped on maintainability of the writ petition under Article 227 of the Constitution of India. It was his contention that the writ petition in the guise of an application

under Section 34(2) of the Arbitration Act is not maintainable and should be dismissed at the threshold.

12. It was his submission that after disposal of PIL the Opposite Party was informed by the Petitioner that it was still desirous of implementing the project and was in process of

obtaining legal opinion to challenge the said order under Annexure-2 or to explore other mechanism for regularizing the defect including ratification of the Concession

Agreement. Despite such assurances, the Petitioner unilaterally terminated the Concession Agreement under intimation to the Opposite Party vide letter dated 30.04.2013

(Annexure-5) taking recourse to the provision of force majeure. In that process, the Petitioner dishonored the legal relationship established between the Petitioner and the

Opposite Party by issuance of Letter of Acceptance (LOA) dated 26.07.2010. The Petitioner also refused to compensate the Opposite Party for no fault of the later. As such,

the Opposite Party had no other option than to invoke the Arbitration Clause by issuing notice dated 14.03.2016 (Annexure-3). It subsequently filed an application under Section

11 of the Arbitration Act for appointment of arbitrators (ARBP No.53 of 2016).

The Petitioner contested the said application under Section 11 of the Arbitration Act raising an

objection that the Concession Agreement under Annexure-1 being void ab initio due to non-compliance of Article 299 of the Constitution of India, opposed to the public policy as

well as being improperly stamped, the Arbitration Clause was not enforceable. The Honâ??ble Chief Justice, however, appointed the arbitrators vide its order dated 15.11.2019

(Annexure-3) thereby rejecting the objections raised by the Petitioner. This Court also did not impound the Arbitration Agreement on account of alleged insufficiency of stamp

duty. Although the Petitioner assailed the said order under Annexure-3 before the Honâ??ble Supreme Court, in SLP (C) No.10086 of 2020, the said SLP was dismissed vide

order dated 10.06.2020 (Annexure-4) confirming the order of this Court. After filing of the statement of claim by the Opposite Party before the Arbitral Tribunal on 05.02.2020

(Annexure-5), the Petitioner filed an application under Section 16 of the Arbitration Act raising an issue with regard to the jurisdiction of the Arbitral Tribunal to arbitrate the

dispute. The Opposite Party has also filed its objection (Annexure-6) to the said petition. Considering the rival contentions of the parties and upon hearing the parties at length,

the Arbitral Tribunal vide order dated 11.12.2020 (Annexure-7) rejected the petition under Section 16 of the Arbitration Act, which is under challenge in this writ petition. Both

the petitions under Section 16 of the Arbitration Act as well as the present writ petition are outcome of misuse of law.

13. Since efficacious statutory remedy is available to the Petitioner to challenge the order under Annexure-7, the writ petition is not maintainable. The Arbitration Act is a

complete Code itself and has provided various procedures and fora for the redressal of grievances. Section 5 of the Arbitration Act limits judicial intervention except when

provided for in the Arbitration Act. Section 16(5) of the Arbitration Act stipulates that once a challenge to its jurisdiction is rejected by the Arbitral Tribunal (like the present

one), it can proceed with the Arbitral proceeding and make an Arbitral award.

Section 16(6) of the Arbitration Act is a statutory and efficacious remedy available to a party

aggrieved by the order rejecting a challenge to the Arbitral Tribunal's jurisdiction, which provides that an order rejecting a challenge to an Arbitral Tribunal's jurisdiction,

can be made by filing an application for setting aside the award under Section 34 of the Arbitration Act. Thus, the Petitioner ought to have waited for a final award from the

Arbitral Tribunal to assail the same. In support of his submission, Mr. Thacker, learned counsel for the Opposite Party relied upon the case of Bhaven Construction (supra),

wherein at paragraphs 16 and 17, it is held as follows:

16. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian

Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as '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 subsection (3)'. The use of term 'only' as occurring under

the provision serves two purposes of making the enactment a complete code and lay down the procedure.

17. In any case, the hierarchy in our legal framework mandates that a legislative enactment cannot curtail a Constitutional right. In *Nivedita Sharma v. Cellular Operators Association of*

India, (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

227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue

for ventilating its grievances against the award 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, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the

contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand

adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an

intervention by the High Courts is not permissible.

46. The object of minimising 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 or under Article 226 of the Constitution 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.â??

He further submitted that the present writ petition under Article 227 has been filed in the garb of a petition under Section 34 of the Arbitration Act. It is his submission that in the

present writ petition under Article 227 of the Constitution of India, the Petitioner has sought for setting aside the impugned order on the grounds set forth under Sections 34(2)(a)

(ii) and 34(b)(i), explanation 1(ii) and (iii) of the Arbitration Act. Thus, the Petitioner has essentially filed an application under Section 34 of the Arbitration Act in the garb of an

application under Article 227 of the Constitution. Article 227 of the Constitution

of India provides for discretionary powers of this Court, which ought to be exercised in the

absence of an alternative and efficacious remedy and in exceptional circumstances. The case at hand, does not fall under the aforesaid category. In the application under

Section 16 of the Arbitration Act, the Petitioner has not made out a case of any mala fide or bad faith on the part of the opposite party, which would enable the Court to exercise

jurisdiction under Article 227 of the Constitution of India. The said plea for the first time has been raised before this Court that too in the rejoinder dated 10.02.2021, which needs

no consideration. No case of patent lack of inherent jurisdiction, i.e., a perversity being not made out, the case of the Petitioner warrants no interference under Article 227 of the

Constitution.

14. Patent lack of inherent jurisdiction is understood to mean that the Court could not have seisin of the case because the subject matter is wholly foreign to its jurisdiction or

such other grounds which could have the effect of rendering the Court entirely lack of jurisdiction in respect of the subject matter of the suit or the parties to it. In support of his

case, he relied upon the case of Hira Lal Patni v- Sri Kali Nath, reported in (1962) 2 SCR 747.

14.1 He also relied upon the case of Gopinath Deb v-Budhia Swain and others, reported in AIR 1983 Ori 31 at paragraph-9 it is held as follows:

“9. Inherent lack of jurisdiction means a power or jurisdiction which does not at all exist or vest in a Court. To put it otherwise, a Court can be said to lack inherent jurisdiction when the

subject-matter before it is wholly foreign to its ambit and is totally unconnected with its recognised jurisdiction. Competence of a Court to try a case goes to the very root of jurisdiction and

where it is lacking, it is a case of inherent lack of jurisdiction. For example, if a suit for declaration of title has been filed in a criminal Court all proceedings relating thereto in that Court are

null and void. In this connection, we may usefully refer to the case of Hira Lal Patni v. Kali Nath, AIR 1962 SC 199 where it was observed as follows:” (at p. 200)

The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense

that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree

passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to

it?

14.2 The ground taken by the Petitioner that the Arbitral Tribunal had no jurisdiction since the Concession Agreement has been quashed in the PIL and therefore, the arbitration

clause also perished with it, cannot be termed as patent lack of inherent jurisdiction as the Arbitration Agreement is separable from the substantive contract in which it is

contained. Even if the substantive contract is null and void, that does not automatically render the arbitration agreement as null and void. Thus, the Arbitral Tribunal has acted

well within its bounds in passing the impugned order taking into consideration the provision under Section 16(1)(b) of the Arbitration Act.

15. The argument of the Petitioner that the principle of separability does not save the Arbitration Clause when a party alleges that the main agreement was executed by a person

with no authority, is factually incorrect as the Arbitration Clause was signed by the person having due authority to bind the Petitioner. An Arbitration Clause does not require

execution/signature as long as parties are consensus ad idem regarding the same. Even if the signatory did not have authority to execute the Concession Agreement that does

not ipso facto disentitle him to enter into an Arbitration Agreement. Thus, the arbitration agreement clause remains unaffected.

16. Assuming though not conceding that if this Court takes a view that the arbitration clause is improperly stamped, the remedy would be to impound the document and not to

declare the Arbitral proceedings a nullity. Thus, no patent lack of inherent jurisdiction exists, as alleged.

17. In addition to the above, the argument of learned counsel for the Petitioner to the effect that the impugned order is perverse as it is unreasonable, which is evident from the

order itself, is not correct. The learned Arbitral Tribunal after hearing the parties, passed the impugned order referring to the arguments and principle of law involved in it and

came to a conclusion. Thus, there is no patent lack of inherent jurisdiction for this Court to exercise its power under Article 227 of the Constitution of India. In the case of Emta

Coal Ltd. (supra), the Honâ??ble Supreme Court at paragraph-4 laid down the following principle:-

â??4. We are of the view that a foray to the writ Court from a section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse that the only possible

conclusion is that there is a patent lack in inherent jurisdiction. A patent lack of inherent jurisdiction requires no argument whatsoever

- it must be the perversity of the order that must stare one in the face.â??

Thus, this Court should only interfere when the perversity stares on the face of the impugned order and no argument is required to be advanced to establish such perversity,

which constitutes patent lack of inherent jurisdiction. In the case at hand, the Petitioner in order to challenge the impugned order has advanced a lengthy argument on its merits

and has also relied upon several case laws. Thus, it has miserably failed to establish its case on the parameters set out by the Honâ??ble Supreme Court in Emta Coal Ltd.

(supra). Thus, Mr. Thacker, learned counsel for the Opposite Party urged before this Court that before delving into judicial review of the impugned order the issue of

maintainability of the petition is to be decided on the touch stone of established parameters as laid down by the Honâ??ble Supreme Court in Bhaven Construction (supra),

Deep Industries (supra) and Emta Coal Ltd. (supra).

18. In addition to the issue of maintainability, Mr. Thacker, learned counsel for the Opposite Party defended the impugned order also on its merit.

19. It is his submission that the order passed in PIL does not render any finding regarding validity of the arbitration clause, which is admittedly an agreement

separate from

Concession Agreement. A conspectus of the pleadings of the PIL and final order dated 20.12.2012, it can very well be inferred that no issue with regard to validity of the

arbitration clause was raised in the PIL. The validity of the arbitration clause was also not the subject matter in dispute in the said writ petition. Thus, the arbitration

clause/agreement which is admittedly a separate agreement and independent of Concession Agreement can be in no manner rendered invalid and/or not enforceable because of

the finding in order dated 20.12.2021. In order to elaborate the position of law on separability of the arbitration agreement, Mr. Thacker, learned counsel for the Opposite Party

submitted that Section 7 of the Arbitration Act defines an arbitration agreement. It provides that an arbitration agreement is required to be in writing. However, it is settled law

that the arbitration agreement need not be signed. It is the requirement of an arbitration agreement to be in writing that distinguishes it from an oral contract, which (in addition to

a written contract) is also permitted under the Contract Act. Further, Section 7 provides for arbitration of disputes in respect of defined legal relationship â?? whether

contractual or notâ??. Under the principle of kompetenz kompetenz, which is recognized under the Indian law, the Arbitration Clause is an agreement independent and

separate from the Concession Agreement, as would be evident from the Section 16(1)(a) of the Arbitration Act. Section 16(1)(b) of the Arbitration Act provides that a decision

to the effect that the Concession Agreement is only null and void shall not entail ipso jure, the invalidity of the arbitration clause. Thus, quashing of the Concession Agreement in

the PIL rendering it to be void ab initio and opposed to public policy is to be read in the light of Section 16(1)(b) of the Arbitration Act and thus does not render the arbitration

clause invalid and unenforceable. Distinguishing the ratio decided in Kishorilal Gupta (supra), Mr. Thacker, learned counsel submitted that the ratio laid down therein was by

interpreting the provisions of the Arbitration Act 1940, which did not have any

provision akin to Section 16(1)(b) of the Arbitration Act. Thus, the ratio decided in Boghara

Polyfab Private Limited (supra) is squarely applicable to the case at hand. In support of his case, with regard to the separability of the arbitration clause from the Concession

Agreement, Mr. Thacker, learned counsel relied upon the case of M/s. N.N. Global Mercantile Private Limited (supra), Boghara Polyfab Private Limited (supra) and

SMS Tea Estates Private Limited v- Chandmari Tea Company Private Limited, reported in (2011) 14 SCC 66, A. Ayyasamy (supra), Sasan Power Limited (supra) and

Fili Shipping Co. Limited (supra). Thus, he submitted that an arbitration clause is separable from the substantive agreement although it forms part of it and remains unaffected

albeit quashing of Concession Agreement.

20. He further submitted that parties were in consensus ad idem regarding the Arbitration Clause and the Arbitration Clause also satisfies the requirements of the Arbitration

Act. Elaborating his submission, Mr. Thacker, learned counsel for the Opposite Party, submitted that the Arbitration Clause as in the Concession Agreement was available in

RFP issued by the Petitioner and it was accepted by the Opposite Party without any negotiation. The Arbitration Clause does not necessarily have to be signed. Assuming

though not conceding that the Arbitration Clause was required to be signed, it does not require the signature as per Article 299 of the Constitution of India. Hence, signing the

agreement by the General Manager, (Admn.) OSRTC on behalf of the Petitioner does satisfy the requirement of signing the arbitration agreement. The requirements of

Contract Act are satisfied in respect of the Arbitration Clause, inasmuch as there was offer, unconditional acceptance, consensus ad idem, valid and lawful consideration, valid

and lawful object etc. The only additional requirement under Section 7 of the Arbitration Act is that the agreement should be in writing which is also satisfied/accepted. The

Petitioner claims that the Arbitration Clause was not signed by a person duly authorized in this regard, which is factually incorrect. An arbitration agreement need not be signed

to be binding on the party as held in the case of Govind Rubber Limited v- Louis Dreyfus Commodities Asia Private Limited, reported in (2015) 13 SCC 477, wherein it is

held as follows:

17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it.

On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be

construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned

author also said that the agreement has to be interpreted in order to effectuate the immediate intention of the parties. Similarly, Russell on Arbitration (21st Edn.) opined, relying on

Astro Vencedor Compania Naviera S.A. v. Mabanafit GmbH [(1970) 2 Lloyd's Rep 267], that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration

clause to which the parties have agreed. The learned author has also referred to another judgment in Paul Smith Ltd. v. H and S International Holdings Inc. [(1991) 2 Lloyd's Rep 127] in

order to emphasise that in construing an arbitration agreement the court should seek to give effect to the intentions of the parties. (See p. 28 of the book.)

In the case of Caravel Shipping Services Private Limited v-Premier Sea Foods Exim Private Limited reported in (2019) 11 SCC 461, paragraph -8 of which reads as

follows:

8. In addition, we may indicate that the law in this behalf, in Jugal Kishore Rameshwardas v. Goolbai Hormusji [Jugal Kishore Rameshwardas v. Goolbai Hormusji, AIR 1955 SC 812] , is

that an arbitration agreement needs to be in writing though it need not be signed. The fact that the arbitration agreement shall be in writing is continued in the 1996 Act in Section 7(3)

thereof. Section 7(4) only further adds that an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This does not mean

that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it be in writing, as has been pointed out in Section 7(3).â??

20.1 Thus, the argument raised by learned counsel for the Petitioner is fallacious. Although the Concession Agreement is held to be in violation of Article 299 of Constitution,

public policy as well as Section 23 of the Contract Act, the same does not affect the arbitration agreement at all.

21. So far as the contentions with regard to adequacy of stamp duty on the arbitration agreement is concerned, it is submitted by Mr. Thacker, learned counsel for the Opposite

Party that the Stamp Act (Orissa Amendment) does not provide for payment of stamp duty on an arbitration agreement. The said issue was also raised in the petition under

Section 11 of the Arbitration Act. The law, as it then was, enjoined upon this Court to impound the agreement, if it found the same to be insufficiently stamped. This Court being

satisfied with the objection raised by the Opposite Party although granted liberty to the Petitioner to raise all issues before the Arbitral Tribunal, but proceeded to appoint the

arbitrators without impounding the arbitration agreement. Thus, this Court while appointing arbitrators was satisfied that the arbitration agreement did not require impounding.

Mr. Thacker, learned counsel for the Opposite Party also relied upon the case of N.N. Global Mercantile Private Limited (supra) wherein it has been held as follows:-

â??6. xxx xxx xxx

6.4 The arbitration agreement contained in the Work Order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which provides

the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of Stamp Duty, unlike various other agreements enlisted in the

Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration.

On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the

19 of the Indian Contract Act, 1872.

We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the

commercial contract, would not invalidate the arbitration clause, or render it unenforceable, since it has an independent existence of its own. The view taken by the Court on the issue of

separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the Stamp Act. The non-payment of stamp duty on the

substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite Stamp Duty.

6.9 The second issue in SMS Tea Estates that avoidable contract would not be arbitrable as it affects the validity of the arbitration agreement, is in our view not the correct position in law.

The allegations made by a party that the substantive contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue. These issues can

certainly be adjudicated through arbitration. We overrule the judgment in SMS Tea Estates with respect to the aforesaid two issues as not laying down the correct position in law.

6.10 The Garware judgment has followed the judgment in SMS Tea Estates. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration

clause would be non-existent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract.

We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying

substantive

commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.

6.11 We notice that the judgment in Garware Wall Ropes Limited has been cited with approval by a co-ordinate bench of this Court in Vidya Drolia & Ors. v. Durga Trading Corporation.

(Delivered on 14.12.2020 in C.A. No. 2402/2019.) Paragraph 92 of the judgment

reads thus:

xxx

xxx

6.12 We doubt the correctness of the view taken in paragraph 92 of the three-judge bench in Vidya Drolia. We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall

Ropes Limited, which has been affirmed in paragraph 92 of Vidya Drolia, to a Constitution Bench of five judges.

22. It is further submitted that the Concession Agreement was executed on an Indian non-judicial stamp paper of Rs.100/- value. Thus, for the sake of argument, if it is held that

the arbitration agreement is chargeable with stamp duty, then it can be said that sufficient stamp duty has been paid on the Arbitration Agreement itself.

23. In that view of the matter, learned counsel for the Opposite Party contended that the writ petition having failed both on the count of maintainability as well as merit is liable to

be dismissed.

24. Taking into consideration the rival contentions of the parties, following questions are required to be considered in this writ petition.

(i) Whether the writ petition under Article 227 is maintainable?

(ii) Whether in view of the judgment dated 20.12.2012 (Annexure-2) in the PIL the arbitration clause/agreement which forms part of Concession Agreement (Annexure-1), perishes with it?

(iii) Whether the arbitration agreement/clause is chargeable with stamp duty and if so whether sufficient stamp duty has been paid?

24.1 Although Mr. Thacker, learned counsel for the Opposite Party submitted that the issue of maintainability of this petition is to be decided at the threshold before considering

the merits of the case, this Court in order to avoid piecemeal adjudication of this writ petition feels it proper to consider all the issues one after another.

QUESTION NO. (ii) ;

25. Taking into consideration the facts and circumstances of this case Issue No.

(ii) is taken up first for adjudication.

26. Chapter-II of the Arbitration Act deals with "arbitration agreement". Section 7 describes that an agreement which enables 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, is called an arbitration

agreement. Sub-section (2) of Section 7 prescribes that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

In the case at hand, there is no separate arbitration agreement, but Clause-16 of the Concession Agreement contains the provision of arbitration. Sub-section (3) of Section 7

provides that an arbitration agreement shall be in writing. Sub-section (4) further makes it clear that an agreement shall be treated to be in writing if it is contained in a document

signed by the parties or an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means which provides a

record of the agreement. Thus, in all cases, an arbitration agreement need not be signed separately, if it otherwise satisfies the Clause (b) of Section 7(4) of the Arbitration Act.

27. Mr. Mohanty, learned Senior Advocate appearing for the Petitioner placed much stress on the signing of the arbitration agreement. It is his contention that since the

Concession Agreement has been declared to be null and void and it is held that the Petitioner, namely, General Manager, OSRTC, had no authority to sign the Concession

Agreement, it cannot be said that the arbitration agreement was signed by the parties.

28. On 14.12.2009, the Petitioner published a notice informing about issuance of RFP and inviting tender from the reputed Infrastructure Developers for development of

Baramunda Bus Terminal, Bhubaneswar along with commercial facilities through PPP mode. The Opposite Party, namely, ARSS Infra, being the successful bidder, Letter of

Acceptance (LoA) was issued by the Petitioner in its favour on 26.07.2010. Thus, a legal relationship between the Petitioner and ARSS Infra was created.

Consequently, the

Concession Agreement between them was executed on 16.03.2011 containing the arbitration clause/agreement. Subsequently, vide judgment in PIL, observing that the General

Manager, OSRTC was not authorized under law to execute such agreement and transferring the interest over the Government property in favour of a third party as envisaged

under Article 299 of the Constitution, came to a conclusion that the concessionaire cannot have any right or interest over the land in question on the basis of the said void

agreement and any right over the land in question on the basis of the said agreement is opposed to the public policy as provided under Section 23 of the Contract Act.

Accordingly, the Concession Agreement dated 16.03.2011 was quashed.

29. An arbitration agreement though forms part of a substantive contract has its separate legal entity. There cannot be any quarrel over the position of law on it. As held in

Boghara Polyfab Private Limited (supra), A.Ayyasamy (supra), Sasan Power Ltd. (supra), Fili Shipping Co. Limited (supra) as well as M/s. N.N. Global Mercantile

Private Limited (supra), it is made clear that the arbitration clause/agreement even forms part of a substantive contract does not automatically perish with the substantive

contract itself. In Fili Shipping Co. Limited (supra), it is held in no ambiguous terms that the principle of separability enacted in Section 7 means that the invalidity or rescission

of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a distinct agreement

and can be void or voidable only on grounds which relate directly to the arbitration agreement. Thus, the matter is to be examined accordingly, keeping the aforesaid position of

law in mind.

30. The judgment in PIL (Annexure-2) does not spell out a single word with regard to validity of the arbitration clause/agreement. It is contended by the Petitioner that when it is

held that the General Manager, OSRTC had no authority to sign the Concession Agreement, it can be said that the arbitration agreement was not signed. Thus, it

is hit by

Section 7(4)(a) of the Arbitration Act. Signing of the Concession Agreement under Annexure-1 was held to be unauthorized as it did not qualify the requirements of Article 299

of the Constitution, but that is not so in the case of arbitration agreement. It was well within the authority of the General Manager, OSRTC-Petitioner to sign an arbitration

agreement with ARSS Infra. It is not the case of the Petitioner that arbitration clause/agreement was never signed by the Petitioner, but it was his submission that on quashing

of the main agreement for non-execution and no authority to execute the agreement, the signing of the Concession Agreement as well as arbitration agreement gets wiped off.

In view of the discussions made above, it is very difficult to accept the same more particularly in absence of any contention/argument to the effect that the General Manager,

OSRTC had no authority to sign an arbitration agreement with ARSS Infra. Further, Section 7(4)(b) of the Arbitration Act makes it clear that when parties were consensus ad

idem regarding arbitration clause and the arbitration clause was available in the RFP issued by the Petitioner, which was accepted by the Opposite Party without any negotiation,

signing of the arbitration agreement becomes insignificant and is not required under law. In view of the above, the contention raised by Mr. Mohanty, learned Senior Advocate

sans merit.

31. Relying upon the decision in the case of Fili Shipping Co. Limited (supra), Mr. Mohanty, learned Senior Advocate submitted that if a party alleges that someone who

purported to sign as agent on behalf the principal had no authority whatsoever to conclude any agreement on his behalf, it is an attack both on the main agreement and the

arbitration agreement. It is further argued that it would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he

would have/had no authority to enter into an arbitration agreement. He also relied upon the decision in the case of M/s. N.N. Global Mercantile Private Limited (supra) and

submitted that if an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes.

32. As discussed above, there is no material on record to show that the Petitioner had no authority to sign an arbitration agreement with ARSS Infra which is separate from the

substantive agreement/concession agreement. In the case of Fili Shipping Co. Limited (supra), the Principal had raised an objection with regard to authority of the agent to

sign the substantive as well as arbitration agreement. It was done by practising fraud, which is not the case here. Thus, the aforesaid observation in Fili Shipping Co. Limited

(supra) is distinguishable from the case at hand. Further, the law laid down in M/s. N.N. Global Mercantile Private Limited (supra) is also not applicable to the case at hand

as it cannot be said that the arbitration clause is not valid or non-existent in absence of any material in support of the same.

33. An argument is advanced on behalf of the Petitioner that the arbitration agreement must satisfy the provisions of the Contract Act, namely, Section 2(g), Section 2(j), Section

10 and Section 23 of the Contract Act. Relying upon the decision in the case of Vidya Drolia (supra), Mr. Mohanty, learned Senior Advocate submitted that “an agreement”

is not defined in the Arbitration Act. However, it is defined in Section 10 of the Contract Act. The arbitration agreement must satisfy the objective mandates of the law of

contract for being enforced under law. Clauses (g) and (h) of Section 2 of the Contract Act prescribe that an agreement not enforceable by law is void and an agreement

enforceable by law is a contract. There is, however, no material on record save and except the argument on behalf of the Petitioner that the arbitration agreement perishes with

the concession agreement itself, as it does not qualify the aforesaid provisions of the Contract Act. Although it is held in the judgment in PIL that the concession agreement is

void ab initio and it is opposed to the public policy of Section 23 of the Contract Act, but there is nothing on record to show that the arbitration clause is void ab initio in view of

the said observation of this Court.

34. Mr. Mohanty, learned Senior Advocate further relying upon the decision in the case of Swiss Timing Limited (supra) submitted that undoubtedly, in cases, where the Court

comes to a conclusion that the contract is void without receiving any evidence, it would be justified in declining reference to arbitration but such cases would be few and isolated.

He further relied upon the decision in the case of Uttarakhand Purv Sainik (supra) and submitted that the Law Commission in the 246th Report recommended that the scope

of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or 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. Although it is vehemently argued by Mr. Mohanty, learned Senior Counsel, that arbitration clause/agreement perishes with the

concession agreement itself, but no material is placed to persuade the Court to accept such contention. Taking into consideration the ratio decided in the cases of Swiss Timing

Limited (supra) and Uttarakhand Purv Sainik (supra), it can be safely said that when the matter has been referred to the Arbitration Tribunal by this Court in exercise of

power under Section 11 of the Arbitration Act, it can be safely said that prima facie the arbitration agreement exists. So far as validity of the agreement is concerned, it can only

be finally determined by the Arbitral Tribunal after receiving evidence to that effect. Thus, it will be unsafe at this stage to hold that the arbitration agreement does not exist.

35. Mr. Mohanty, learned Senior Advocate relying upon the decisions in the cases of Kishorilal Gupta (supra) and Jaikishan Dass Mull (supra) submitted that when the

arbitration clause forms an integral part of the concession agreement, it perishes along with the main agreement. In the instant case, the arbitration agreement being an integral

part of the concession agreement, the former has no existence de hors the main agreement. Even if the arbitration agreement is a separate agreement notionally the existence of

the main agreement is a pre-condition for operation of the arbitration clause. If the contract is non-est in the sense that it never came legally into existence or void ab initio (being

quashed by this Court in PIL), the arbitration agreement perishes with the main contract dated 16.03.2011.

36. Relying upon the principle of *ex nihilo nil fit*, Mr. Mohanty, learned Senior Advocate submitted that if a contract is illegal and void, an arbitration clause which forms

part thereof must also perish along with it. When the whole perishes, its parts must also perish. Thus, it must be held that when a contract is invalid, every part of it including the

arbitration clause contained therein, must also be invalid.

37. Mr. Thacker, learned counsel for the Opposite Party refuting such submission contended that Kishorilal Gupta (supra) does not discuss any provision akin to Section 16 (1)

(b) of the Arbitration Act. Thus, in view of the introduction of Section 16 (1)(a) of the Arbitration Act, the position of law has altogether changed and the ratio therein has no

application to the case at hand. In reply, Mr. Mohanty, learned Senior Advocate contended that language employed in Section 16 is only an enabling one which unlike Section 33

of the Old Act, 1940, now permits the Arbitral Tribunal to decide a question relating to the *existence* of the arbitration clause.

38. In view of the discussions made above, Section 16 (1)(a) of the Arbitration Act as well as the ratio decided in A. Ayyasamy (supra), the severability of the arbitration

agreement has become a doctrinal development of crucial significance. The principle of *kompetenz kompetenz* which is recognised under Indian law leaves the adjudicatory

power of the Arbitral Tribunal unaffected over any objection with regard to validity of the arbitration agreement even if the main contract between the parties is affected by

fraud, undue influence or otherwise. Although Mr. Mohanty, learned Senior Advocate contended that severability and separability of the arbitration agreement can be gone into

by the Arbitral Tribunal, but, in the instant case, when there is already a prior decision of this Court quashing the main agreement, it is no more open to the Arbitral Tribunal to

delve into such determination. Although the argument appears to be flowery it has no legal basis at all in view of the discussions made above. Thus, even if the main contract has

been declared as null and void due to lack of authority of the Petitioner to execute the same, it is still within the domain of the Arbitral Tribunal to delve into validity of the

arbitration agreement.

39. It is next contended by Mr. Mohanty, learned Senior Advocate that the learned Tribunal without any discussion recorded the impugned finding that “notwithstanding”

the fact that the concession agreement has been declared null and void, the arbitration clause/agreement subsists and on such misconception proceeded to pass the impugned

order. As such, the impugned finding is perverse and a non-speaking one.

40. Mr. Thacker, learned counsel for the Opposite party, on the other hand, submitted that before recording the finding, as aforesaid, learned Tribunal has discussed the rival

contentions of the parties and case laws cited. On scrutiny of the same, it came to the aforesaid conclusion. Thus, the contention of Mr. Mohanty, learned Senior Advocate is

not sustainable.

41. While passing the judgment in PIL, this Court has not rendered any finding with regard to validity or otherwise of the arbitration clause contained in concession agreement.

The concession agreement was declared null and void as it was in contravention of Article 299 of the Constitution and it was also held therein that the concessionaire cannot

have any right or interest over the “land in question” on the basis of the said void document, which is opposed to public policy as provided under Section 23 of the Contract

Act. Thus, the order passed in PIL only speaks of validity of the concession agreement. In view of the Section 16(1)(a) of the Arbitration Act, which recognized the doctrine of

kompetenz kompetenz, the arbitration clause becomes an independent agreement separate from the concession agreement. The said principle applies with full force to the case

at hand. As discussed above, although Mr. Mohanty, learned Senior Advocate

raised an argument that the General Manager, OSRTC (Petitioner) had no authority to execute

the arbitration agreement, but in view of the discussions made above, the same is not sustainable.

42. On perusal of the impugned order, it appears that learned Tribunal has discussed the matter in detail and recorded the aforesaid impugned finding. As such, the contentions

of Mr. Mohanty, learned Senior Advocate cannot be accepted. As such, this issue is answered accordingly against the Petitioner.

QUESTION NO.(iii);

43. Mr. Mohanty, learned Senior Advocate, vehemently argued that the arbitration clause is not enforceable in law due to non-payment of stamp duty. He referred to the case

law in N M/s. N.N. Global Mercantile Private Limited (supra)in which it is held that non-payment or deficient stamp duty on the work order does not invalidate the main

contract. Section 34 of the Contract Act provides that an unstamped instrument would not be admissible in evidence or acted upon, till the requisite stamp duty is paid. This

would amount only to a deficiency, which can be cured on payment of the requisite stamp duty. He further relied upon the case law in Garware Wall Ropes Ltd. Vs. Coastal

Marine Constructions and Engineering Limited, reported in (2019) 9 SCC 209, in which it is held that a High Court must impound the instrument which did not bear the

requisite stamp duty. As soon as the stamp and penalty is paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then

proceed to expeditiously dispose of the Section 11 application. He thus, contended that till the requisite stamp duty is paid on the arbitration agreement, the same cannot be given

effect to. However, the concession agreement in the instant case has been declared null and void on the ground of non-execution and it was declared void ab initio and

unenforceable by this Court. When the original agreement is no more available to be stamped as per the provisions of Stamp Act, the arbitration agreement cannot be

impounded. However, the opposite party has stated in paragraph No.23 of its counter affidavit that Rs.100/- being the adequate stamp on which the agreement was executed, it

is not suffering from the deficit stamp duty. The said contention of the opposite party is not correct, as the consideration amount is Rs.56.00 crores. As per Clause 1.1 (xviii) of

the agreement, it was required to be stamped with a higher amount, failing which the arbitration proceeding is liable to be dismissed. He also referred to Article 35 (a)(v) read

with Article 23(b) of the Indian Stamp Act and submitted that the arbitration agreement is insufficiently stamped. He, therefore, submitted that the arbitration proceeding should

be dismissed in view of ratio decided in the case of Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and Other Charities and Others vs. Bhaskar

Raju And Brothers and Others, reported in (2020) 4 SCC 612.

44. Mr. Thacker, learned counsel for the Opposite Party, on the other hand, refuting such contention of Mr. Mohanty, learned Senior Advocate contended that the arbitration

agreement is not required to be stamped as per the provisions of the Stamp Act (Orissa Amendment). Article 35(a)(v) of the Stamp Act is not applicable to the case at hand. As

such, the contention of Mr. Mohanty, learned Senior Advocate is not sustainable. He further submitted that such a plea was raised by the Petitioner before this Court in the

proceeding under Section 11 of the Arbitration Act as well as before the Honâ??ble Supreme Court. Having considered the same, this Court acted upon the arbitration clause

and proceeded to appoint the arbitrators without asking for impounding of the agreement. In view of the above, it is deemed that such a contention of the Petitioner has been

overruled by this Court as well as the Honâ??ble Supreme Court. Hence, he prayed for answering this issue in favour of the Opposite Party.

45. Although lengthy argument was made by Mr. Mohanty, learned Senior Advocate stating that the arbitration clause/agreement has been insufficiently stamped, but he could

not show the specific provisions which requires the arbitration clause/agreement to be stamped separately when it is a part of the concession agreement. He also

failed to satisfy

this Court as to whether a stamp duty of Rs.100/-paid on the concession agreement is not adequate stamp duty for the arbitration agreement. As held in the case of M/s. N.N.

Global Mercantile Private Limited (supra) and Garware Wall Ropes (supra), this Court, while adjudicating the petition under Section 11 of the Arbitration Act, should

examine issue of sufficiency of stamp duty to be paid on the arbitration agreement and only after payment of adequate stamp duty, if any, should proceed to hear and dispose of

application under Section 11 of the Arbitration Act. As it is evident from the order passed by this Court on the application under Section 11, a contention in that regard was

raised by learned counsel for the Petitioner before this Court at the time of adjudication of petition under Section 11 of the Arbitration Act. However, without recording any

finding on the sufficiency of stamp duty, this Court proceeded to appoint arbitrators, which implies that the contention raised by learned counsel for the petitioner therein was

overruled. Although such a contention was also raised before the Honâ??ble Supreme Court, the SLP was dismissed granting liberty to the petitioner to raise all objections

before the Arbitral Tribunal. Sufficiency of stamp duty being an issue to be decided before final adjudication of the petition under Section 11 of the Arbitration Act, it is

presumed to have been overruled while appointing arbitrators and giving finality to the said petition. Be that as it may, Mr. Mohanty, learned Senior Advocate having failed to

show any specific provision requiring an arbitration agreement to be stamped under the Stamp Act when it forms part of the concession agreement, such an objection merits no

consideration. As such, the issue is answered against the Petitioner.

ISSUE NO.(i);

46. Lengthy arguments were advanced by learned counsel for the parties with regard to maintainability of the writ petition before this Court under Articles 226 and 227 of the

Constitution of India as against an order passed under Section 16(2) of the

Arbitration Act. Mr. Mohanty, learned Senior Advocate relying upon Emta Coal Ltd. (supra) and

Deep Industries Limited (supra) contended that order of an Arbitral Tribunal can be challenged under Article 227 of the Constitution, if the order is patently illegal and

perverse. He also relied upon a recent decision of Honâ??ble Supreme Court in the case of Bhaven Construction (supra) and submitted that in rare and exceptional

circumstances, the High Court can interfere with an order of the Arbitral Tribunal in exercise of power under Article 227 of the Constitution. It is his contention that the present

case falls under the category of â??rare and exceptional circumstancesâ?? because Arbitral Tribunal did not at all consider the purport and consequence of order passed in

PIL, wherein this Court in exercise of power under Article 226 of the Constitution in a matter inter-parties, has quashed the agreement dated 16.03.2011 which contained the

arbitration clause/agreement albeit the Arbitral Tribunal proceeded to hold the arbitration clause/agreement to be valid. It is his contention that in view of the argument laid by the

Petitioner as aforesaid, the Arbitral Tribunal has no jurisdiction to proceed with the arbitration proceeding in view of the fact that the arbitration clause/agreement, which was a

part of concession agreement, has been declared void ab initio.

47. On the other hand, Mr. Thacker, learned counsel contended that the writ petition under Article 227 of the Constitution has been filed in the garb of a petition under Section

34 of the Arbitration Act. Referring to the opening paragraph-1 of the writ petition, Mr. Thacker, submitted that all the grounds taken in the writ petition, more particularly,

paragraph-1.9 (G), (I), (J) and (K) spelt out the grounds under Section 34 of the Arbitration Act. Article 227 provides for a discretionary power to this Court, which ought to be

exercised in absence of alternative and efficacious remedy and in exceptional circumstances. In this case, the Petitioner being armed with an efficacious statutory remedy under

Section 34 of the Arbitration Act, can challenge the impugned order along with the arbitration award itself under the said provision. Nowhere in the petition

under Section 16 of

the Arbitration Act, the Petitioner had raised the plea of mala fide or bad faith on the part of the Opposite Party, under which it could have taken shelter to move this Court to

exercise its jurisdiction under Article 227 of the Constitution. Such a plea is taken by the Petitioner before this Court for the first time that too in the rejoinder filed on 10th

February, 2021. As held in the case of Bhaven Construction (supra) and Deep Industries Limited (supra), patent lack of jurisdiction is understood to mean that the Court

could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or on some other grounds which could have the effect of rendering the Court

entirely lacking the jurisdiction in respect of subject matter of the case between the parties. The ground that learned Tribunal has no jurisdiction to proceed with the arbitration as

the concession agreement was quashed by this Court and therefore, the arbitration agreement perished with it, cannot be termed as patent lack of inherent jurisdiction as the

arbitration agreement is separable from the substantive contract. Even if the substantive contract is declared null and void, that does not automatically render the arbitration

agreement void ab initio. It is all the more apparent from the provision under Section 16 (1)(b) of the Arbitration Act. He also relied upon the case law in Emta Coal Limited

(supra), wherein it has been laid down that "foray to the Writ Court from a Section 16 application being dismissed by the Arbitrator can only be, if the order passed

is so perverse; that the only possible conclusion is that there is a patent lack of inherent jurisdiction", this Court can exercise its jurisdiction under Article 227 of

Constitution because "a patent lack of inherent jurisdiction requires no argument whatsoever-it must be the perversity of the order that must stare one in the

face."

48. He, therefore, argued that in the case at hand, learned counsel for the parties made lengthy argument to establish their respective cases. Thus, by no stretch of imagination, it

can be said to be an order suffering from patent lack of inherent jurisdiction. He further reiterated the argument that there is no final order regarding validity of the arbitration

clause/agreement in the order passed in the PIL. Hence, he contended that the writ petition under Article 227 of the Constitution is not maintainable.

49. The Petitioner initially filed CMP No.690 of 2020 under Article 227 of the Constitution assailing the impugned order. But, in view of the order of this Court dated 19.01.2021,

this Court taking into consideration the provision under Rule 5 of Chapter XV of Orissa High Court Rules, 1948, directed the Registry to register the instant petition as W.P.(C).

Accordingly, it is so registered.

50. On perusal of the pleadings of the writ petition, it appears that the Petitioner has assailed the impugned order on the grounds prescribed under Section 34(2) of the Arbitration

Act. It further appears that the plea of mala fide and bad faith was never raised either before the Tribunal or in the writ petition. It was only raised in the rejoinder affidavit filed

by the Petitioner. Thus, such grounds having not raised before the Arbitral Tribunal cannot be taken into consideration in a proceeding under Article 227 of the Constitution.

Moreover, in view of the case law cited above, this Court can only interfere with the impugned order passed under Section 16 (1)(b) of the Arbitration Act in exercise of power

under Article 227 of the Constitution in a rare and exceptional circumstance. All the grounds raised by Mr. Mohanty, learned Senior Advocate squarely fall under the provision

of Section 34(2) of the Arbitration Act. No exceptional circumstance has been shown by the Petitioner to warrant interference in this writ petition. It further appears that in view

of the ratio in the case of Emta Coal Ltd. (supra), a petition under Article 227 of the Constitution would be maintainable only when the impugned order suffers from a patent lack

of inherent jurisdiction, which requires no argument whatsoever to be declared so. The perversity of the order must stare on its face. When lengthy arguments were made in

challenging the impugned order, it cannot be said that the impugned order suffers from patent lack of inherent jurisdiction of learned Tribunal.

51. Entertaining an application under Article 227 of the Constitution at this stage will also result in piecemeal trial of the arbitration proceeding, which is deprecated by the

Honorable Supreme Court time and again. Further, all the arguments raised by the Petitioner could have been raised in a petition under Section 34 of the Arbitration Act after

finality of the arbitration proceeding. Law is well- settled as stated above that when an alternative and efficacious remedy is available to the Petitioner, the writ petition should

not be entertained which would impliedly circumvent the efficacious statutory provision made in the Arbitration Act itself.

52. In view of the above, I have no hesitation to hold that the writ petition is under Article 227 of the Constitution is not maintainable and the issue is answered accordingly.

CONCLUSION

53. In view of the discussions made above, I find no infirmity in view of the impugned order under Annexure-7. Thus, the writ petition being devoid of any merit and the same

being not maintainable in the eyes of law, is dismissed; but in the circumstances, there shall be no order as to costs.

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