

(2024) 09 JH CK 0015

In the Jharkhand High Court

Case No : Civil Miscellaneous Petition No. 24 Of 2022

State Highways Authority Of Jharkhand

APPELLANT

Vs

RCM Infrastructure Limited, Banjara Hills, Hyderabad

RESPONDENT

Date of Decision : 30-09-2024

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 227

Code of Civil Procedure, 1908 — Order 8 Rule 1, Order 41 Rule 1(3), Order 41 Rule 1(5)

Arbitration and Conciliation Act, 1996 — Section 14, 17, 34

Contract Act, 1872 — Section 23, 24, 28

Citation : (2024) 09 JH CK 0015

Hon'ble Judges : Dr. S.N.Pathak, J;Navneet Kumar, J

Bench : Division Bench

Advocate : Rajiv Ranjan, Ashutosh Anand, Sharad Kaushal, Bharti Kumari, D. Seshadri Naidu, Prashant Pallav, Parth Jalan, Shivani Jaluka

Final Decision : Allowed

Judgement

1. Heard the parties.

Prayer

2. By way of present Civil Miscellaneous Petition, petitioner has thrown challenge to the order dated 24.02.2020, passed by learned A.J.C.-XIII-cum-P.O. Commercial Court, Ranchi in Commercial Revocation Case No. 10/2019, whereby the petitioner has been directed to make payment of 75% of the awarded amount for admitting the Commercial Revocation Case No. 10/2019 challenging the award u/s. 34 of the Arbitration and Conciliation Act.

Facts of the Case

3. The State Highway Authority of Jharkhand (for short 'SHAJ') entered into an Agreement with RCM Infrastructure Limited, Banjara Hills, Hyderabad for strengthening and widening/ reconstruction of Chattarpur-Japla Road on

Engineering, Procurement and Construction (EPC) mode on 22.05.2015 vide EPC Agreement No. SHAJ/ Proc/EPC/04 of 2015-16 dated 22.05.2015. The contract price for the agreement was Rs.1,15,22,97,900/-. The contract period for completion of the project was 730 days which fell due on 24.06.2017. As per agreement 10% of the financial progress had to be achieved by EPC contractor within 180 days but the RCM failed to produce validly prepared stage payment statements prior to occurrence of project milestone-1. Seeing the slow progress of work several letters were issued to EPC Contractor and matter was highlighted in Minutes of Meeting with Principal Secretary (RCD), Representatives of Authority, EPC Contractor and Authority Engineer several times.

4. As no progress was made till the end of February, 2016, the Authority concerned gave a notice to EPC Contractor about their intention to terminate the EPC agreement according to Clause 23.2 of the Agreement. In spite of issuance of such letters, no work was done in the next two months and thereafter EPC Contractor requested for 15 days' target by letter dated 10.05.2016, which they failed to achieve as none of their works were done as per standard practices, method statements, quality standards. Finally, SHAJ left with no other option terminated the Agreement by order dated 09.06.2016.

5. Against the same, the respondent-RCM moved before this Court in W.P.(C). No. 4964 of 2016 praying therein to quash the termination order dated 09.06.2016 and for a direction upon the SHAJ to return the Bank Guarantee. However, the said writ stood dismissed as withdrawn vide order dated 22.09.2017. It is the further case of petitioner that during the pendency of the aforesaid writ petition, the respondent-RCM invoked Arbitration Clause 26.3 through its letter dated 01.08.2017 and nominated one Arbitrator namely, Hon'ble Mrs. Justice Poonam Srivastava, Former Judge and requested the petitioner-SHAJ to nominate its Arbitrator. In response to the same, petitioner-SHAJ submitted that since W.P.(C). No. 4964 of 2016 is pending, a parallel proceeding for the same relief is not permissible.

6. When the SHAJ failed to appoint 2nd Arbitrator, the petitioner approached this Court and this Court appointed Hon'ble Mr. Justice Narendra Nath Tiwari, Former Judge, as 2nd Arbitrator with the observations that both the Arbitrators would appoint the Presiding Arbitrator as per Clause 26.3 of the EPC Agreement. Accordingly, Hon'ble Mr. Justice Dharnidhar Jha, Former Judge was appointed as the Presiding Arbitrator. The 1st meeting of Arbitral Tribunal was held on 22.07.2018 at BNR Chanakya. However, no notice of the said proceeding was sent to the present petitioner. In course of the said meeting it was stated by the Claimant's Advocate (respondent herein) that notice of 1st meeting was given to SHAJ through email. Learned counsel further submitted that communication about the date, time and venue of the sitting of Arbitral Tribunal was given to one Advocate Mr. Arun Kumar Singh. Thereafter, dasti notice along with copy of the order dated 22.07.2018 was directed to be served upon the SHAJ by the Claimant/ Respondents. Thereafter, on 1st September, 2018 the petitioner-SHAJ

appeared on the scheduled time. During course of discussions, it was agreed by the Arbitral Tribunal and both the parties that the fees shall be charged in accordance with the fourth schedule of Arbitration and Conciliation Act, 1996 after the pleadings of the parties are complete.

7. Thereafter, the Arbitral Tribunal in its 3rd meeting dated 07.10.2018 decided that it would charge the fee as per the claim and counter-claim and since the claim was for more than Rs.115 crores and the counter-claim is for more than Rs.70 crores, the Tribunal decided that it is entitled to a total fees of Rs.1.80 crores i.e Rs.60 lakhs to each of the Arbitrators. It was further decided that the amount of fees shall be payable in three equal tranches and the 1st tranche would be an amount of Rs.60 lakhs i.e. Rs.20 lakhs to each of the Arbitrators. The first tranche of arbitrator fees was payable by 15.11.2018. However, on 25.11.2018, the Claimant made part payment of Rs.9.00 lakhs (Rs.3.00 lakhs to each arbitrators). No payment was made on behalf of present petitioner as it had sought for necessary direction in this regard. The present petitioner on 25.11.2018 also filed an I.A. before the Tribunal praying therein that they could not process the 1st tranche of fees as the same has been sent to Law Department to seek opinion whether the fees quoted by the Arbitral Tribunal is in accordance with the 4th schedule of the Act or not since ceiling limit given in the 4th schedule is Rs.30.00 lakhs. The Tribunal however declined the prayers of the petitioner and proceeded to continue with arbitration and by way of last indulgence directed both the parties to fully pay the 1st tranche of fees by 15.12.2018 fixing 19.12.2018 as the next date of hearing.

8. Being aggrieved by the fixation of fees, the present petitioner filed a writ application numbered as W.P.(C). No. 6368 of 2018 before this Court for setting aside the order dated 07.10.2018 and 25.11.2018, passed by the Arbitral Tribunal. The petitioner also filed an application before the Tribunal praying therein for an adjournment since the said writ petition is pending before this Court and next date is fixed on 19.12.2018. However, the Tribunal refused to adjourn the hearing of the Arbitration Case and without reconsidering the arbitrary fees fixed by them extended the date for payment of fees by 21.01.2018. Thereafter, the Tribunal proceeded to record the evidences of the Claimant and close the same by fixing the date for final hearing on 20.04.2019.

9. It is the further case of petitioner that W.P.(C). No. 6368 of 2018 was heard at length on back to back date and finally, the writ petition was disposed of vide order dated 14.03.2019. Subsequently, the respondent filed C.M.P. No. 217 of 2019 for modification of order dated 14.03.2019. However, the said CMP stood dismissed as withdrawn on 11.04.2019. The petitioner being dissatisfied with the manner the Arbitral Tribunal was proceeding in the matter, filed Commercial Case No. 9 of 2019 which was admitted for hearing and notices were issued to opposite party. During the pendency of the said Commercial Case, the Tribunal proceeded in haste and passed the Arbitral Award against the respondent (petitioner herein). Being aggrieved, petitioner filed a Commercial Revocation

Case No. 10 of 2019 u/s. 34 of the Arbitration and Conciliation Act, 1996 challenging the Award dt. 10.06.2019. The Commercial Case No. 9 of 2019 for termination of mandate of the Arbitral Tribunal was dismissed as infructuous on 28.02.2020 without going into merits of the case or any adjudication.

10. It is the further case of petitioner that in Commercial Revocation Case No. 10 of 2019, the Court vide order dated 24.02.2020 directed the petitioner-SHAJ to deposit 75% of the awarded amount in terms of Clause 26.3.6 of the Agreement which was to be deposited by next date of hearing i.e. 18.03.2020.

Being aggrieved and dissatisfied with the said order, the petitioner has approached this Court.

Arguments advanced by learned counsel for the petitioner:

11. Mr. Rajiv Ranjan, learned senior counsel assisted by Mr. Ashutosh Anand, learned counsel appearing for the petitioner-SHAJ assiduously urges that learned Commercial Court has erred in interpreting the Clause 26.3.6 of the EPC Agreement as prohibitory provision which bars challenge without pre-deposit which is not the case herein. Clause 26.3.6 of the Agreement cannot be used to deny the rights of the petitioner which is available in law. Moreover, Clause 26.3.6 is itself not a mandatory clause nor a prohibitory clause which in any manner impedes the process of challenge. It has been further argued that impugned order dated 24.02.2020 is bad in law and thus, liable to be quashed and set aside. Learned senior counsel further argues that impugned order is illegal being arbitrary and discriminatory and thereby violative of Articles 14 and 16 of the Constitution of India. Learned Commercial Court has erred in not considering that there is no mandatory statutory obligation upon the petitioner to make pre-deposit as directed by the learned Commercial Court. Learned senior counsel further argues that interim order passed in Commercial Revocation Case No. 10/2019 on 24.02.2020 before deciding the Commercial Case No. 9/2019 shows the clear lack of application of mind in deciding the case.

Arguments advanced by learned counsel for the opposite parties

12. On the other hand, learned senior counsel for the opposite parties placing reliance on the judgment of Hon'ble Apex Court in the case of Deep Industries Ltd. Vs. ONGC, reported in (2020) 15 SCC 706, submits that Hon'ble Apex Court has held that while examining the scope of interference by the Hon'ble High Court under Article 226/227 of the Constitution of India the scheme of the Arbitration and Conciliation Act, 1996 warrants that there should be minimal interference by the Court for the orders passed under Arbitration and Conciliation Act, 1996. The same view was reiterated by the Hon'ble Apex Court in the case of Navayuga Engineering Company Vs. Bangalore Metro Rail Corporation Ltd., reported in (2021) SCC Online SC 469. Learned senior counsel submits that facts of the aforesaid case is identical to the facts of the case in hand. Learned senior counsel submits that in light thereof, it is most humbly submitted that the instant civil miscellaneous petition is not maintainable and is fit to be dismissed. Learned

senior counsel further submits that petitioner has not been able to point-out any fact which would show that the instant case is that of extreme rarity or the impugned order is patently without jurisdiction requiring exercise of the extraordinary jurisdiction by this Court. Learned senior counsel further argues that from perusal of the orders passed by the learned Arbitral Tribunal it is crystal clear that the petitioner repeatedly sought adjournment on one pretext or the other. The major ground for adjournment was pendency of W.P.(C). No. 6368 of 2018. However, the said civil miscellaneous petition was filed during the pendency of the Arbitration Proceeding challenging the order dated 07.11.2018, wherein the learned Tribunal was pleased to fix its fee. The said civil miscellaneous petition was finally disposed of and after disposal of the aforesaid writ, petitioner filed an application under Section 14 of the Act, 1996 before the learned Commercial Court, Ranchi, praying therein to terminate the mandate of Arbitrator as the fee fixed by the Arbitrator was not in accordance with Schedule-IV of the Act, 1996. However, learned Commercial Court after due consideration declined to grant any stay. Learned senior counsel submits that the Award dated 10.06.2019 was passed after considering the complete facts of the case and in complete adherence to the principles of natural justice and fairness. Learned Commercial Court had neither in Commercial Case No. 9 of 2019 or any other case had been pleased to stay the proceeding pending before the learned Tribunal. Learned senior counsel further argues that petitioner has wilfully abstained from participating in the Arbitration Proceeding and now trying to agitate frivolous grounds to delay the execution of the Award. Learned senior counsel lastly submits that issues raised by the petitioner requires this Court to sit in appeal for re-appreciating the Award passed by the learned Arbitral Tribunal. The Hon'ble Apex Court in case of Ssangyong Engineering and Construction Co. Vs. NHAI, reported in (2019) 15 SCC 131 has held that an award could be set aside for violation of 'Public Policy' in exceptional circumstances when the very consciousness of the Court shocks that the Award was passed against the most basic notions of justice. In the instant case, the learned Arbitral Tribunal has passed the Award after meticulous examination of fact and the evidence present and there is no violation of the principles of natural justice and as such the instant civil miscellaneous is fit to be dismissed. Countering the arguments of the petitioner, learned senior counsel for the opposite party has emphatically argues that the author of the documents is the State itself and when it has gone against them, they cannot regal out. Heavy reliance was placed on the judgment of Hon'ble Apex Court in the case of Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd., reported in (2024) 4 SCC 341. Learned senior counsel further argues that there is no such provision in the contract. It has been done as per the spirit so submission of learned senior counsel for the petitioner is not sustainable. It has been argued that Clause is directory and not mandatory and Section-34 of the Act can no longer be a hindrance. Section-14 of the Act will not come in the way. Section 17 is in continuance of the arbitration proceeding. Summing-up his arguments, it has been submitted that a direction be given to the petitioner to deposit the entire

amount.

Findings of the Court

13. Heard the parties at length.

14. The facts which are not in disputes are as follows:

I) The appellant had filed Revocation Case No. 10 of 2019 under Section 34 of the Arbitration and Conciliation Act praying therein for setting aside the arbitral award.

II) A preliminary objection was filed to dismiss objection application with a note, "petitioner failed to make payment of the amount in terms of the aforesaid condition of the agreement and as such the present application is not maintainable".

III) Clause-26.3.6 of the Agreement prescribed non-obstante provision and thereby directed the appellant to deposit 75% of the awarded amount by its order dated 24.02.2020.

IV) From perusal of the said Clause it is clear that same is not a non-obstante clause as alleged and nowhere limits admission/ hearing of the objection application filed under Section 34 of the Act, 1996. The said clause never mandates deposit of 75% of the awarded amount as pre-condition to hear Section-34 objection petition. Even the Tribunal has not enforced the said clause as mandatory clause in its award and there is no award to this effect directing to deposit 75% of the awarded amount.

15. From the submissions of learned senior counsel for the petitioner it can be inferred that the learned senior counsel has tried to impress upon this Court that it was not open for the Commercial Court to pass such order meaning thereby the order of depositing 75% of the awarded amount under Clause-26.3.6 of the said Agreement and as such, it was argued that the same is totally obnoxious and against the purport of the Statute. It was also submitted by learned senior counsel that Clause-26.3.6 was directory in nature and not mandatory and thus, was not binding. Clause-26.3.6 of the EPC Agreement reads as under:

"26.3.6 In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120% (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance."

It was also brought to the notice that the Company is under liquidation and the Board was suspended.

16. From the rival submissions of the parties it appears that main contention of the learned senior counsel for the petitioner is that without deciding the objection under Section 34 of the Act, deciding the appeal is obnoxious and violative of Article 14 and it cannot be a pre-condition. Countering the same, learned senior counsel for the opposite party taking shelter of plethora of judgments of the Hon'ble Apex Court submits that there should be minimal interference by this Court in arbitration proceedings.

17. Whether the provision is mandatory or directory fell for consideration before the Hon'ble Apex Court in the case of State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti, reported in (2018) 9 SCC 472 and the Court held as under:

12. To similar effect are the observations of this Court in Salem Advocate Bar Assn. v. Union of India [Salem Advocate Bar Assn. v. Union of India, (2005) 6 SCC 344] at para 20, which is reproduced herein below : (SCC p. 364)

"20. The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule of procedure which promotes justice and prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

13. However, a discordant note was struck by a judgment dated 4-12-2015, reported in New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage (P) Ltd. [New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage (P) Ltd., (2015) 16 SCC 20 : (2015) 16 SCC 22 : (2016) 3 SCC (Civ) 587 : (2016) 3 SCC (Civ) 589] A Bench of three learned Judges resurrected the judgment of J.J. Merchant v. Shrinath Chaturvedi [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] . J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] was distinguished in Kailash [Kailash v. Nanhku, (2005) 4 SCC 480] as follows : (SCC p. 498, para 38)

"38. The learned counsel for the respondent, on the other hand, invited our attention to a three- Judge Bench decision of this Court in J.J. Merchant v. Shrinath Chaturvedi [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] wherein we find a reference made to Order 8 Rule 1 CPC vide paras 14 and 15 thereof and the Court having said that the mandate of the law is required to be

strictly adhered to. A careful reading of the judgment shows that the provisions of Order 8 Rule 1 CPC did not directly arise for consideration before the Court and to that extent the observations made by the Court are obiter. Also, the attention of the Court was not invited to the earlier decision of this Court in Topline Shoes Ltd. case [Topline Shoes Ltd. v. Corporation Bank, (2002) 6 SCC 33] .”

Despite this observation, New India Assurance Co. Ltd. [New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage (P) Ltd., (2015) 16 SCC 20 : (2015) 16 SCC 22 : (2016) 3 SCC (Civ) 587 : (2016) 3 SCC (Civ) 589] went on to follow

“25. We are, therefore, of the view that the judgment delivered in J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC the judgment in J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] , and stated : (New India Assurance Co. Ltd. case [New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage (P) Ltd., (2015) 16 SCC 20 : (2015) 16 SCC 22 : (2016) 3 SCC (Civ) 587 : (2016) 3 SCC (Civ) 589] , SCC p. 26, paras 25-26) 635] holds the field and therefore, we reiterate the view that the District Forum can grant a further period of 15 days to the opposite party for filing his version or reply and not beyond that.

26. There is one more reason to follow the law laid down in J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635]. J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] was decided in 2002, whereas Kailash [Kailash v. Nanhku, (2005) 4 SCC 480] was decided in 2005. As per law laid down by this Court, while deciding Kailash [Kailash v. Nanhku, (2005) 4 SCC 480] , this Court ought to have respected the view expressed in J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] as the judgment delivered in J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] was earlier in point of time. The aforesaid legal position cannot be ignored by us and therefore, we are of the opinion that the view expressed in J.J. Merchant [J.J. Merchant v. Shrinath Chaturvedi, (2002) 6 SCC 635] should be followed.....”.

18. As is evident from the Clause, it nowhere mandates that non-deposit will render the challenge to the Award as not maintainable nor any penal or negative wording is attributable to the said clause, thereby making the said clause only directory in nature.

19. Further the Hon’ble Apex Court in case of Vijay Narayan Thatte Vrs. State of Maharashtra, reported in (2009) 9 SCC 92, has held as under:

4. In our opinion, the said notification was clearly barred by clause (ii) of the proviso to Section 6 of the Act which reads as under:

“6. Provided that no declaration in respect of any particular land covered by a notification under Section 4 sub-section (1),—

(i)***

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:"

It can be seen from the aforesaid proviso to Section 6 that it is couched in negative language. It is well settled that when a statute is couched in negative language it is ordinarily regarded as peremptory and mandatory in nature. (See Principles of Statutory Interpretation by Justice G.P. Singh, 11th Edn., 2008, pp. 390 to 392.)

5. As stated by Crawford:

"263. Affirmative, negative, prohibitory and exclusive words.—Prohibitive or negative words can rarely, if ever, be directory... And this is so, even though the statute provides no penalty for disobedience."

(See Crawford : Statutory Construction, p. 523; see also in this connection Haridwar Singh v. Bagun Sumbrui [(1973) 3 SCC 889 : AIR 1972 SC 1242] , SCC p. 895, para 13, Lachmi Narain v. Union of India [(1976) 2 SCC 953 : AIR 1976 SC 714] , Mannalal Khetan v. Kedar Nath Khetan [(1977) 2 SCC 424 : AIR 1977 SC 536] , etc.)

Further, the Hon'ble Apex Court in case of Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd., reported in (2003) 2 SCC 111 has held as under:

".....42. We are not oblivious of the law that when a public functionary is required to do a certain thing within a specified time, the same is ordinarily directory but it is equally well settled that when consequence for inaction on the part of the statutory authorities within such specified time is expressly provided, it must be held to be imperative.

43. In Sutherland's Statutory Construction, 3rd Edn., Vol. 3, at p. 102 the law is stated as follows:

"... unless the nature of the act to be performed, or

the phraseology of the statute is such that the designation of time must be considered a limitation of the power of the officer".

At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. 111 it is stated as follows:

"As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered,

and is by no means conclusive.”

(See also Crawford on Statutory Construction, Article 269 at p. 535.)

44. In *Dattatraya Moreshwar v. State of Bombay* [(1952) 1 SCC 372 : AIR 1952 SC 181] it was held as under: (AIR p. 185, para 7)

“[G]enerally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.”

45. In *Craies on Statute Law*, 8th Edn., at p. 262, it is stated thus:

“ ‘... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.’ ... that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.”

In the case of *Kayamuddin Shamsuddin Khan Vs. State Bank of India*, reported in (1998) 8 SCC 676 the Hon’ble Apex Court has held as under:

“7. The submission of the learned counsel for the respondent is that the High Court was right in giving the direction regarding the deposit of Rs 75,000 as per the aforesaid provision and since the appellant has failed to comply with the same the appeal has been rightly directed to be dismissed. We, however, find that the only consequence for non-compliance with the direction given under sub-rule (3) of Rule 1 of Order XLI is as provided in sub-rule (5) of Rule 5 of Order XLI which reads as under:

“(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree.”

8. This would mean that non-compliance with the direction given regarding deposit under sub-rule (3) of Rule 1 of Order XLI would result in the Court refusing to stay the execution of the decree. In other words, the application for stay of the execution of the decree could be dismissed for such non-compliance but the Court could not give a direction for the dismissal of the appeal itself for such non-compliance.”

20. Further, there is no clause of pre-deposit under the Arbitration and

Conciliation Act, 1996. If the clauses are read as a condition of pre-deposit, the same will be hit by Sections 23, 24 and 28 of the Indian Contract Act. The relevant provisions of the said Acts read as under:

"23. What considerations and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless—

it is forbidden by law ; or

is of such a nature that if permitted, it would defeat the provisions of any law; or

is fraudulent ; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

28. Agreements in restraint of legal proceedings, void.

Every agreement,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.

Exception 1.—Saving of contract to refer to arbitration dispute that may arise.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.—Saving of contract to refer questions that have already arisen.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to

references to arbitration.”

21. Having heard the parties and upon perusal of the documents brought on record as well as the judgments cited by the parties, this Court is of the considered view that the reliance of learned senior counsel for the opposite party in the case of *Deep Industries Ltd. Vs. ONGC*, reported in (2020) 15 SCC 706 is not attracted in this case and is of no assistance to the opposite party, as from the fact of it, it appears that without deciding the objection under Section 34 of the Act, 1996, the order for pre-deposit cannot be made as a pre-condition to deposit 75% of the awarded amount, which though have been countered by the opposite party, is not acceptable to this Court as the same is in clear violation of the Rules as well as the Act and the very interpretation of the learned senior counsel for the opposite party is not acceptable to this Court for the reasons that the said Clause of the Agreement cannot be imposed in view of the EPC Agreement inasmuch as such clause of agreement is directly hit by Sections 23, 24 and 28 of the Indian Contract Act in view of nature of pre-condition i.e. deposit of 75% of the awarded amount if permitted would defeat the provisions of Section 34 of the Act, 1996 and as such, the Court cannot pass an order to deposit 75% of the awarded amount in guise of the agreement and moreover, the said clause is directory in nature and not mandatory.

22. In totality of the facts and circumstances as mentioned above, this Court is in full agreement with the arguments advanced by learned senior counsel for the petitioner and accordingly, the order dated 24.02.2020, passed by learned A.J.C.-XIII-cum-P.O. Commercial Court, Ranchi in Commercial Revocation Case No. 10/2019 is hereby quashed and set aside, with direction to the learned Commercial Court to hear the Commercial Revocation Case No. 10/2019 without insisting the petitioner to deposit 75% of the awarded amount.

23. Accordingly, the instant C.M.P. stands allowed.

24. Pending I.As., if any, stand closed.