HIGH COURT OF MADHYA PRADESH: JABALPUR

(Full Bench)

Arbitration Case No. 40 of 2016

Shri Gouri Ganesh Shri Balaji Constructions .... PETITIONER
"C" Class Contractor

- V/s -

Executive Engineer, PWD .... RESPONDENT

CORAM :

Hon'ble Shri Justice Hemant Gupta, Chief Justice
Hon'ble Shri Justice Vijay Kumar Shukla, Judge
Hon'ble Shri Justice Subodh Abhyankar, Judge

Present:

Shri Shekhar Sharma, Advocate for the Petitioner.

Shri P.K. Kaurav, Advocate General with Shri Pushpendra Yadav, Deputy Advocate General and Shri Amit Seth, Government Advocate for the respondents/State.

Whether Approved for Reporting : **Yes**

Law Laid Down:

- The expression "ascertained amount" appearing in Section 2(1)(d) of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (for short "the State Act") includes the amount of consequential relief.

- Mere declaration of termination of contract is not the substantial relief and in the guise of mere declaration an aggrieved person cannot be permitted to omit the consequential relief which the party may be entitled to claim in a reference under the M.P. Madhyastham Adhikaran Adhiniyam, 1983.

- It is held that reading of Sub-section (2) of Section 7-A of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 makes it abundantly clear that if a consequential relief was available to an aggrieved person before the date of making reference under Sub-section (1) of Section 7-A of the State Act yet he failed to include the claim of

consequential relief, such person will not be entitled to claim such relief in any subsequent proceedings.

- As regards the second question framed, challenge to revenue recovery certificate under the guise of challenge to only termination of agreement is not tenable because the consequential relief is to that of challenge to recovery certificate.

- The view expressed in Single Bench decisions of this Court reported as 2003 (1) M.P.H.T 205 (M.P. Housing Board vs. Satish Kumar Raizada) and order dated 16.02.2010 passed in M.A. No. 1030/1999 (M.P. Housing Board vs. Satish Kumar Raizada) is not the correct enunciation of law. There cannot be any simpliciter declaration of fixation of rates of work. An aggrieved person has to claim a particular rate of work which the Court may or may not grant but the quantification of rate of work was required to be made. The astuteness in drafting of the reference so as to not to claim any money though ascertainable will not oust the reference before the statutory Arbitral Tribunal under the State Law.

- The finding recorded by a Full Bench of this Court in a judgment reported as **2017 (2) MPLJ 681 (Viva Highways Ltd. vs. Madhya Pradesh Road Development Corporation Ltd.**) to the extent that if the State Act is not applicable and there is arbitration clause, the aggrieved person has the liberty to invoke the Central Act is not tenable. - Orders of the Supreme Court passed in **Civil Appeal No.974/2012 (Madhya Pradesh Rural Road Development Authority and Another vs. M/s L.G. Chaudhary Engineers and Contractors)** and **Civil Appeal No.2615/2018 (State of Madhya Pradesh and others vs. Gammon India Ltd.**) - ***Relied***.

Significant Paragraph Nos.: 1, 3 to 16, 21, 28 to 55

Order Reserved on : 05.04.2018

O R D E R

(Passed on this 3rd day of May, 2018)

Per : Hemant Gupta, Chief Justice:

A learned Single Judge while considering the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the

Central Act") found divergent views between the two Single Bench orders of this Court i.e. order dated 08.02.2016 passed by Indore Bench of this Court in **A.C. No.9/2013 (Rajesh Agrawal vs. Executive Engineer, Public Works Department**) and order dated 21.04.2015 passed by a learned Single Bench of Principal Seat of this Court in **A.C. No.12/2014 (M/s Landlord Infrastructure vs. Engineer in Chief, PWD and others**). Therefore, the following questions were referred for the opinion of the Larger Bench:

> (1) Whether the dispute relating to termination of a contract without claiming any consequential relief is maintainable before the Arbitral Tribunal under the M.P. Madhyastham Adhikaran Adhiniyam, 1983?
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> (2) Whether, under the guise of challenge to an action of termination of contract, the remedy under the MP Act can be said to be not available, when the real challenge is to the Revenue Recovery Certificate issued by the State for recovery of the loss/damages?
>
> (3) Any other question that may arise for adjudication or decision in the dispute involved in the present petition and which the Larger Bench thinks appropriate to decide?

02. In view of the above, when the matter was placed before this Bench, another argument was raised by the learned counsel for the petitioner on 15.03.2018 that in case the remedy under Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (for short "the State Act") is not available, then the aggrieved person would have a remedy under the Arbitration and Conciliation Act, 1996 (for short "the Central Act") if there is an arbitration clause in a works contract. Whereas, learned counsel for the respondent-State argued that in view of the judgment of the Supreme Court reported as **(2012) 3 SCC 495 (Madhya Pradesh Rural Road Development Authority and**

Another vs. L.G. Chaudhary Engineers and Contractors (for short referred to as **"L.G. Chaudhary-I")** and also the order of the Supreme Court dated 08.03.2018 rendered in **Civil Appeal No.974/2012 (Madhya Pradesh Rural Road Development Authority and Another vs. M/s L.G. Chaudhary Engineers and Contractors)** (for short referred to as **"L.G. Chaudhary-II"**) and **Civil Appeal No.2615/2018 (State of Madhya Pradesh and others vs. Gammon India Ltd.**), the State law will prevail in terms of Section 2(4) of the Central Act. Thus, if the dispute in relation to works contract is not arbitrable under the State Act, the parties need to seek their remedy from the Civil Court and not under the Central Act.

03. In view of the arguments raised, this Court framed another question for the opinion, which would now be Question No. (2A). The same is reproduced as under:-

> "(2A) If the dispute is not arbitrable by the Arbitral Tribunal under the State Act, the remedy of the aggrieved person is before the Civil Court or under the Arbitration and Conciliation Act, 1996?"

04. The above said question arises out of the fact that the petitioner herein sought appointment of an Arbitrator in terms of Section 11 of the Central Act arising out of a dispute pursuant to the work order given to the petitioner for the construction of road from Bhogiteda to Bhadus Rondha Jod road on 09.07.2012. The contract value was Rs.1,08,21,000/- and the rate of tender being 2.80% below the SOR (Schedule of Rates).

05. The grievance of the petitioner is that a show cause notice was served on it to terminate the contract agreement but even before delivery of the notice,

the contract was terminated on 29.01.2014. The petitioner has raised a dispute before the Superintending Engineer, who has affirmed the order of termination of contract. The petitioner filed an appeal before the Chief Engineer, who has dismissed the appeal on 14.06.2016. Thereafter, the petitioner is said to have served a notice on 24.06.2016 for appointment of an Arbitrator under the Central Act. The assertion of the petitioner is that the petitioner is seeking appointment of an Arbitrator to challenge the order of termination simpliciter and not seeking relief for ascertained amount of Rs.50,000/- or more, therefore, the Tribunal constituted under the State Act will not have the jurisdiction and thus, the disputes are to be resolved only under the Central Act.

06. Learned counsel for the petitioner relies upon an order dated 08.02.2016 passed in **Rajesh Agrawal**'s case (**supra**) wherein a learned Single Judge of Indore Bench of this Court held as under:-

> ".......Since in the present case the applicant is not raising dispute relating to the claim of ascertained money valued at Rs.50,000/- or more, hence the matter cannot be referred under Section 7 to the Madhyastham Tribunal. Counsel for both the parties have referred to various judgments in support of their respective plea; whether it is a works contract or not, but those judgments are not relevant and this Court need not go into that aspect of the matter since even if the contract is held to be a works contract but since the dispute itself is not covered under Section 2(d), hence it is not arbitrable under the Madhyastham Act.
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> Thus, I am of the opinion that the applicant has rightly approached this Court under the Arbitration and Conciliation Act, 1996. The arbitration agreement is also not in dispute.
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> In the aforesaid circumstances, the provisions of the Arbitration and Conciliation Act, 1996 are clearly attracted in the matter, therefore,

considering the dispute between the parties, I am of the opinion that an independent Arbitration is required to be appointed to resolve the same."

07. Learned counsel for the petitioner relies upon a Division Bench decision of Indore Bench of this Court rendered on 30.06.1995 in **Civil Revision No.198/1990 (M/s Shree Construction Company vs. The State of Madhya Pradesh and others**) wherein it was held that if the contractor did not claim any ascertained money of more than Rs.50,000/- before the Superintending Engineer or before the Chief Engineer nor in the reference petition before the Tribunal under Section 7 of the State Act, therefore, the dispute was not referable to the Statutory Arbitral Tribunal and that the Statutory Arbitral Tribunal has rightly declined that it has no jurisdiction to entertain the reference. The Court held as under:-

> "**15**. The amount of Rs.96,041.96 p. was never mentioned either before the Superintending Engineer or before the Chief Engineer. Thus, it can reasonably be presumed that the claimant had not claimed ascertained amount before the said authorities earlier. It is indeed necessary to have a dispute which could be referred to the Tribunal so as to enable the Tribunal to resolve the same. The dispute has been defined in the Adhiniyam which reads as under:-
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> > "D. Disputes means any difference relating to any claim valued at Rs.50,000/- or more, arising out of the execution or non-execution of a works contract or part thereof."
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> Connotation of the word 'dispute' has been elaborately dealt with by this Bench in the case reported in P.C. Rajput Vs. State of M.P. (1994 M.P. L.J. 387). It has been held in the aforesaid judgment that the dispute would mean assertion of claim by one side and denial by other and it is an essential condition so as to call it a dispute. Black's Law Dictionary also defines the word dispute in the following manner:
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> > "Dispute: A conflict or controversy-

A conflict of claims or rights an assertion of a right, claim or demand of one side, met by contrary claims or allegations on the other. The subject of litigation; may be for which a suit is brought and open which issue is joint and in relation to which powers are called and witnesses examined."

16. In the aforesaid case when the assertion of the claim itself was not made the question of any denial of the same did not arise.

17. Thus, it is clearly indicative of the fact that fixed and ascertained amounts have got to be claimed and there should be denial of it. But seeking the relief of declaration would not be a dispute which could be granted by the Tribunal. We accordingly hold that the Tribunal has no power or jurisdiction as per the provisions of the Adhiniyam to grant the relief of declaration.

18. A reference to the Tribunal for resolving a dispute can be made by filing a petition u/s 7 of the Adhiniyam. For ready reference sec. 7 of the Adhiniyam is reproduced herein below:

"7. Reference to Tribunal-

(1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.

(2) Such reference shall be drawn up in such form as may be prescribed and shall be supported by an affidavit verifying the averments.

(3) The reference shall be accompanied by such fee as may be prescribed."

The said Adhiniyam came into force w.e.f. 1.3.1985. After coming into force of the said Adhiniyam. Certain proceedings under sec. 20(2) of the Adhiniyam have been saved; but under sec. 20(1) of the Adhiniyam, no civil court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under this Adhiniyam."

08. Learned counsel for the petitioner also refers to a Full Bench judgment of this Court reported as **2017 (2) MPLJ 681 (Viva Highways Ltd. vs. Madhya Pradesh Road Development Corporation Ltd.**). The Full Bench

was examining the maintainability of the petition under Section 11(6) of the Central Act or that the dispute has to be resolved in terms of the State Act. The Full Bench *inter alia* examined the following questions:

> "(i) Whether, any agreement by whatever name called, if it falls within the meaning and definition of works contract as defined under Section 2(1)(i) of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 has to be referred for adjudication before the M.P. Arbitration Tribunal constituted under Section 3 of the 1983 Adhiniyam?
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> (ii) Whether, in view of statutory provisions of Section 7 of the Adhiniyam of 1983, the matter has to be referred to the M.P. Arbitration Tribunal constituted under Section 3 of the 1983 Adhiniyam, even in cases where the parties have incorporated a clause in agreement regarding resolution of dispute by some other forum or under the Arbitration and Conciliation Act, 1996?"

09. It was held that the question of termination of an agreement relating to works contract would fall within the exclusive jurisdiction of the Statutory Arbitral Tribunal under the State Act. The Full Bench in respect of the above questions opined as under:-

> "**54**. On the basis of foregoing analysis, it is clear that any agreement by whatever name called, if it falls within the meaning and definition of "works contract" as per Adhiniyam of 1983, it must be treated as a works contract. In that case, the appropriate forum is the Tribunal constituted under section 3 of Adhiniyam of 1983 if differences between the parties are covered under section 2(1)(d) of the Adhiniyam of 1983.
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> **55**. The aforesaid discussion further shows that nomenclature of agreement is immaterial for determining whether it falls within the ambit of 'works contract'. By applying an artistic linguistic engineering, an agreement can be worded in a unique or a different manner. It may have a different nomenclature but these factors will not determine its real nature. In **Ashoka Infraways Ltd. and another vs. State of M.P. and another, 2016 (2) MPLJ 685**, the Division Bench paid much emphasis to the repeated use of word "concession". The Division Bench further relied on

> the judgment of **Jabalpur Corridor (India) Pvt. Ltd. vs. M.P. Road Development Corporation, 2014 (2) MPLJ 276**. We are unable to agree within the reasoning given in **Ashoka Infraways** (supra) for the reasons stated above. In addition, it is well settled that question of jurisdiction goes to very root of the matter and this legal question needs to be examined on the basis of interpretation of enabling provisions. The jurisdiction cannot be assumed by consent of parties. See **AIR 1954 SC 340 (Kiran Singh vs. Chaman Paswan**). For the aforementioned reasons, in **Jabalpur Corridor** (supra) and in **Ashoka Infraways** (supra), the Benches have committed an error in holding that the "concession agreement" is not a "works contract". Hence, these orders to the said extent are overruled."

10. However, the issue: as to whether statutory mandate contained in Section 7(1) of the State Act would apply to a terminated contract, was left open to await the decision of the Supreme Court in the case of **L.G. Chaudhary-II** (**supra**). Further, the Full Bench while examining the question No.(iv) held that the Tribunal can decide only such disputes which are covered by the word "dispute" in the State Act, which means that the dispute must be for an ascertained money. The Court held as under:-

> "**79**. In **C.R. No.136/1988, Progressive Construction Pvt. Ltd. vs. MPSEB** decided on 24.6.1996, this Court expressed its view that if a law prescribes a thing to be done in a particular manner, it has to be done in the same manner and other methods are forbidden. Following the said principles in MP Housing Board vs. Satish Kumar Raizada, 2003 (2) MPLJ 46, this court considered the word "dispute" in the Adhiniyam and opined that the Tribunal can decide only such disputes which are covered by this definition. The "dispute" under this definition must be for "ascertained money". It means the sum which is "known" or "made certain" or "fixed" or "determined" or "quantified". Since in the said case, the reference was relating to fixing the rates of work it was held to be not relating to any "ascertained sum of money". We are in respectful agreement with the view taken by this court in Satish Kumar Raizada (Supra). In absence of claim of ascertained money, the cases of present applicants do not fall within the ambit of dispute and for this reason they

cannot be relegated before the Tribunal constituted under the Adhiniyam of 1983. Thus, even if the concession agreement are works contract, in our view, the remedy before the Tribunal under the Act of 1983 is not available. The parties cannot be left remedyless and hence in our view the applicants'/appellant may pursue their remedy under the Act of 1996.

A conjoint reading of section 2(1)(d) and section 7 of the Adhiniyam makes it clear that a reference to the Tribunal can be made and entertained only when it is in relation to "the dispute". This ancillary issue is answered accordingly."

11. Learned counsel for the petitioner also relies upon a Larger Bench (Five Judges) judgment of this Court reported as **2012 (4) M.P.L.J. 212 (Sanjay Dubey vs. State of M.P. and another**) wherein the Special Bench was considering the question of limitation in filing a reference under the State Act. The Court held as under:-

"**13**. In view of the preceding analysis, we proceed to state our conclusions as under: -

(i) Where the works contract contains a clause like Clause 29, the jurisdiction of the Tribunal can be invoked only after approaching the Authority as provided under the terms of the works contract.

(ii) However, subject to final adjudication of the issue by the Supreme Court as to whether Tribunal under the Act is a Court or not, in case where the dispute has arisen under an agreement prior to coming into force of section 7-B(2-A) of the Act which does not contain a clause like Clause 29, an aggrieved person has to approach the Tribunal within a period of three years from the date of accrual of cause of action.

(iii) Where the works contract does not contain any provision like Clause 29 and the dispute has arisen after coming into force of section 7-B(2-A) of the Act, in such a case, sub-section (2-A) of section 7-B of the Act will apply and an aggrieved person can approach the Tribunal within a period of three years from the date on which the works contract is terminated, foreclosed, abandoned or

comes to an end in any other manner or when a dispute arises during the pendency of the works contract.

(iv) In a case where the agreement is rescinded, two questions may arise for consideration. Firstly, which party to the agreement is at fault and consequently, claim for damages for breach of contract. Secondly, the claim with regard to payment of amount of the final bill before rescission of the contract in accordance with the rates prescribed in the agreement. In the first case, the limitation would commence from the date when the agreement is rescinded whereas in the second case, the limitation would commence from the date when the final bill is prepared.

(v) The dispute under Clause 29 has to be submitted within the time limit which has been prescribed in the clause. The dispute cannot be submitted to the Authorities mentioned in Clause 29 of the Agreement within a period of three years as the provisions of Limitation Act do not apply to the Authorities under the Agreement as they are not the Courts.

(vi) Clause 29 of the Agreement is not violative of section 28(b) of the Indian Contract Act, 1872."

12. Learned counsel for the petitioner also relies upon another Single Bench judgment of this Court reported as **2003 (1) M.P.H.T 205 (M.P. Housing Board and another vs. Satish Kumar Raizada)** (hereinafter referred to as **"Satish Kumar Raizada-I"**) directed against an order in respect of objections filed by the petitioner against enforcement of Award under Section 36 of the Central Act. The Court held as under:-

"21. Point (b):

The word "dispute" is defined in Section 2(1)(d) of the M.P. Arbitration Tribunal Act, 1983, and the Tribunal constituted under this Act can decide under Section 7 of the Act such disputes only which are covered by this definition. The "dispute" under this definition must be for "ascertained money". It means the sum which is "known" or "made certain" or "fixed" or "determined" or "quantified". In this case the

> reference of the dispute before the Deputy Housing Commissioner was to fix the rates of the works already done by the contractor. His claim was not for any ascertained sum of money. Therefore, it could not be submitted before the Arbitration Tribunal for its decision. It has been held by a Division Bench of this Court in *Progressive Constructions Private Ltd. Vs. M.P. State Electricity Board* (C.R. No.136 of 1988, decided on 24-6-1996) that the jurisdiction of the Tribunal can only be invoked on a "dispute" as defined in Section 2(1)(d) of the Act by making a reference to the Tribunal under Section 7 of the Act. Therefore, it follows that the Tribunal could not entertain claim for fixation of rates and by the "arbitration agreement" between the parties this work has been assigned to the authority named therein."

13. The **SLP (Civil) No. 712/2003 (M.P. Housing Board and Another vs. Satish Kumar Raizada)** filed before the Supreme Court against the said order of the learned Single Bench stands dismissed on 22.09.2003.

14. Learned counsel for the petitioner further relies upon an order dated 16.02.2010 passed by a learned Single Bench of this Court in **M.A. No. 1030/1999 (M.P. Housing Board vs. Satish Kumar Raizada)** (hereinafter referred to as "**Satish Kumar Raizada-II**") and other connected appeals under Section 37 of the Arbitration Act, 1940 (for short "the 1940 Act") affirming an order passed by the Fifth Additional District Judge, Bhopal in arbitration cases whereby, while overruling the objections raised, the Award passed by an Arbitrator was made rule of the Court. The relevant extracts of the said order are reproduced as under:-

> "**13**. Thus for invoking the jurisdiction of Tribunal three essentials are necessary, viz., (i) Works Contract (ii) such works contract must be of the State Government or Public Undertaking wholly or substantially owned or controlled by the State Government, and (iii) the claim is for ascertained money valued at Rupees 50,000 or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof.

And unless these three elements are present, the Tribunal cannot exercise its jurisdiction under section 7 of the Adhiniyam, 1983.

14. The expression "ascertained money" which we are concerned within the case at hand in its plain dictionary meaning would mean "known" "made certain". In Black's Law Dictionary fourth edition the expression "ascertain" is defined as "to fix; to render certain or definite; to estimate and determine; to clear of doubt or obscurity".

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16. Thus the claim was not for any 'known' amount but for fixing the rate so that the definite amount can be known. In view of this it cannot be said that the claim by the contractor was for "ascertained money" as would have given the jurisdiction to the Tribunal to adjudicate the matter."

15. This Court found that the State Act will not have jurisdiction in view of the definition of the "works contract" in the State Act and consequently did not find any error in the order passed rejecting the objections by the State.

16. The petitioner has also referred to an order passed by a Division Bench of Indore Bench of this Court in **W.P. No.6105/2017 (M/s Suman Infrastructure Private Limited vs. State of Madhya Pradesh and four others**) on 10.10.2017 whereby the petitioner sought direction in a writ petition to the Superintending Engineer to decide an appeal after four years from the date of rescission of the contract. This Court held that there is no arbitration clause in the agreement but the dispute could be raised in terms of the State Act or before the Civil Court. The Court held as under:-

"**10**. As per the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, a mode of settlement of dispute arising from the contract is provided. There is no reason for the petitioner to invoke the aforesaid statutory remedy provided under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983. He, without availing the

> aforesaid remedy, invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.
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> *** *** ***
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> **13**. However, it is open to the petitioner, if it so chooses to either raise a dispute by filing an application under the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, if the same is in time, or to approach Civil Court, according to law, as the case may be. In the circumstances of the case, no order as to costs."

17. On the strength of the above judgments, the argument is that a party to dispute has to claim an ascertained amount in relation to a works contract, only then the Statutory Tribunal under the State Act would have jurisdiction to resolve the disputes. Therefore, in the light of the findings of the Full Bench in **Viva Highways Ltd.** (**supra**) the argument raised by the learned counsel for the petitioner is that only claim of an ascertained amount can be raised before the Tribunal.

18. It is argued that the consequential relief as contemplated under Section 34 of the Specific Relief Act, 1963 is required to be claimed but in certain reliefs such as: on successful challenge to termination of contract, the contractor would be entitled to complete the remaining work, cannot be ascertained in terms of money as also in the cases of blacklisting of the contractor, there cannot be any ascertained amount. Therefore, such disputes will not be covered by the State Act.

19. In the return filed by the respondent-State, the stand taken is that the Arbitral Tribunal constituted under the State Act alone has the jurisdiction to decide the disputes relating to works contract irrespective of the fact whether the agreement contains arbitration clause or not. Therefore, an application

under Section 11(6) of the Central Act is not maintainable. It is also pointed out that pursuant to termination of works contract, a sum of Rs.23,05,514/- is sought to be recovered from the petitioner, for which, Revenue Recovery Certificate (for short "the RRC") has been forwarded to the Collector on 22.04.2014. It is, thus, alleged that the petitioner is not only aggrieved by the termination of his contract but also aggrieved by recovery of a sum of Rs.23,05,514/-. Thus, the petitioner is seeking adjudication in respect of dispute of ascertained amount of more than Rs.50,000/-. Therefore, the jurisdiction is of the Statutory Arbitral Tribunal under the State Act. Reference was made to an order dated 21.04.2015 passed in **M/s Landlord Infrastructure**'s case (**supra**). The relevant extracts of the said order are as under:-

> "**5**. I have considered the submissions made by learned counsel for the parties. Admittedly, the 1983 Act, which received the assent of the President on 7.10.1983 is an Act to provide for establishment of the Tribunal to arbitrate the dispute to which the State Government or a public undertaking wholly or substantially controlled by the State Government is a party and for matter incidental thereto or connected therewith. The Supreme Court has dealt with the provisions of 1983 Act in the case of State of M.P. Vs. Anshuman Shukla, (2008) 7 SCC 487, wherein, it has been held that the 1983 Act is a special Act and the State of M.P. has created a separate forum for the purpose of determination of dispute arising out of the works contract.
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> **6.** In the case of Va Tech Escher Wyass Flovel Ltd., vs. M.P. SEB, (2011) 13 SCC 261, the Supreme Court held that the provisions of 1983 Act would apply to a case where there is no arbitration agreement and in case where the agreement contains an arbitration clause, the provisions of 1996 Act would apply. Reliance was placed in Va Tech's case (supra) by the Supreme Court in the case of A.P.S. Kushwaha (SSI Unit) vs. The Municipal Corporation, Gwalior and others, (2011) 13 SCC 258 and similar view was taken. However, the Division Bench of the Supreme

Court in the case of M.P.R.R.D.A. vs. L.G. Choudhary (2012) 3 SCC 495 in para 42 held that the decision in Va Tech is *per incurium.* Hon'ble Justice Gyan Sudha Mishra concurred with the view taken by Hon'ble Justice A.K. Ganguly and has held that dispute arising out of execution of works' contract has to be referred to the M.P. State Arbitration Tribunal and not under the 1996 Act.........

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7. Section 7(1) of the 1983 Act reads as under:-

> "**Reference to Tribunal** (1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal."

8. Thus, from perusal of Section 7(1) of the Act, it is evident that irrespective of the fact whether the agreement contains an arbitration clause or not, the dispute has to be referred to the Tribunal constituted under the 1986 Act. It is trite law that statutory provision would prevail over provisions of the agreement. Therefore, the contention of the petitioner that since the agreement contains an arbitration clause, therefore, the provisions of 1996 Act would apply, cannot be accepted.

9. So far as reliance placed by the petitioner on the decision rendered in the case of Jabalpur Corridor (India) Pvt. Ltd. vs. M.P. Road Development Corporation, 2014 (2) MPLJ 276 is concerned, this Court on the basis of interpretation of the agreement held the same to be a concession agreement and not a works contract. Therefore, in the facts of that case, it was held that the dispute between the parties has to be resolved in accordance with the 1996 Act. Alternatively, it was held that even if the contract in question is considered to be a work contract, then also, in view of the decision laid down by the Supreme Court in the case of A.P.S. Kushwaha (supra), the dispute has to be resolved as per the provisions of 1996 Act. However, in the case of Jabalpur Corridor (supra), it has not been noticed that the decision in the case of A.P.S. Kushwaha is based on the view taken in Va Tech (supra), which was held to be *per incurium* in L.G. Choudhary's case, and the submission pertaining to works contract has been dealt with by way of alternative submission only. Therefore, the decision in the case of Jabalpur Corridor (supra) is of no assistance to the

> petitioner in the facts of the case, as admittedly, in the instant case, the agreement in question is a works contract.
>
> **9**. In view of preceding analysis, the inevitable conclusion is that the application under Section 11(6) of the Act, is not maintainable. However, the petitioner is granted the liberty to approach the Madhya Pradesh Arbitration Tribunal for redressal of his grievance in accordance with law. With the aforesaid liberty, the case is disposed of."

20. On behalf of the respondent-State, learned Advocate General submitted that there cannot be any dispute simpliciter disputing the termination of contract without claiming any consequential relief. The consequential relief in terms of the agreement is forfeiture of security amount and/or recovery of the amount of the work done by the Department and/or of the work got done by the State at the risk and cost of the contractor. The consequential relief can also include challenge to the revenue recovery certificate issued under the M.P. Land Revenue Code, 1959 or even black-listing of the Firm. In case of black-listing of the Firm, the contractor has to compute the damages which the contractor may choose to claim for the loss of profits on account of black-listing, if such cause arises on or before the date of seeking reference. The consequential relief has to be necessarily claimed in terms of Section 34 of the Specific Relief Act, 1963. The proviso to Section 34 of the said Act bars the Court, which expression will include Arbitrator in case of a statutory arbitration that the Court will not grant any declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Therefore, the simpliciter dispute of termination of contract is not a dispute which can be claimed from any forum in cases relating to works contract.

21. The conditions of the agreement (Annexure A/1) between parties in respect of the situation when the work is left incomplete, abandoned or delayed beyond the permitted limit allowed by the Divisional Officer as envisaged in Clause 3 thereof, read as under:-

> "**Clause 3** - In any case in which under any clause or clauses of this contract he (*sic the*) contractor shall have rendered himself liable to pay compensation amounting to the whole of the security deposit (whether paid in one sum or deducted by installments) or committed a breach of any of the rules contained in Clause 24 or in the case of abandonment of the work, except due to permanent disability or death of the contractor, or any other cause, the Divisional Officer on behalf of the Governor of Madhya Pradesh shall give a notice before 15 days for work costing up to Rs.10.00 lacs and before 30 days for works costing above Rs.10.00 lacs and in the event of the contractor failing to comply with the directions contained in the said notice shall have power to adopt any of the following courses, as he may deem best in the interest of the Government.
>
> a) To rescind the contract (of which rescission notice in writing to the contractor under the hand of the Divisional Officer shall be conclusive evidence) and in which case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of Government).
>
> b) To employ labour paid by the works Department and to supply materials to carry out the work or any part of the work, debiting the contractor with cost of the labour and the price of the materials (of the amount of which cost and price certificate of the Divisional Officer shall be final and conclusive against the contractor) and crediting him with the value of the work done in all respects in the same manner and the same rates as if it had been carried out by the contractor under the terms of his contract or the cost of the labour and the price of materials as certified by the Divisional Officer, whichever is less. The certificate of the Divisional Officer as to the value of the work done shall be final and conclusive against the contractor.
>
> c) To measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to

> another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (of the amount of which excess certificate in writing of the Divisional Officer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under the contract or otherwise or from his security deposit or the proceeds of sale thereof or a sufficient part thereof.

> In the event of any of the above courses being adopted by the Divisional Officer, the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any agreements or made any advances on account of or with a view to the execution of the work or the performance of the contract. And in case the contract shall be rescinded under the provision aforesaid the contractor shall not be entitled to recover or be paid any sum for any work thereto for actually performed under the contract unless and until the Divisional/Sub-Divisional Officer will have certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.

> Whenever action is taken under clause 3 the contractor's bill shall be finalized up within three months from the date of rescission both in the case of building works and road and bridge works."

22. At this stage, it may be mentioned that the judgment of the Supreme Court reported as **(2011) 13 SCC 261 (Va Tech Escher Wyass Flovel Ltd. vs. MPSE Board & Another)** was found to be a judgment *per incuriam* by the Supreme Court in the matter of **L.G. Chaudhary-I** (**supra**). However, there was difference of opinion on a question: as to whether the dispute regarding termination of contract falls within the jurisdiction of the Statutory Arbitral Tribunal under the State Act. Therefore, the matter was referred to a Larger Bench. Such reference to Larger Bench has since been answered on 08.03.2018 in **L.G. Chaudhary-II** (**supra**). The Court held as under:-

> "………. We find from the definition under Section 2(d) of the Arbitration and Conciliation Act, 1996 that even after a contract is terminated, the subject-matter of dispute is covered by the said definition. The said provision has not been even referred to in the judgment rendered by Hon'ble Gyan Sudha Mishra, J.
>
> In view of above, we are of the opinion that the view expressed by Hon'ble Ganguly J. is the correct interpretation and not the contra view of Hon'ble Gyan Sudha Mishra J. Reference stands answered accordingly.
>
> Taking up appeal on merits, we find that the High Court proceeded on the basis of the judgment of this Court in Va Tech Escher Wyass Flovel Ltd. (supra) which has been held to be per incuriam. The M.P. Act cannot be held to be impliedly repealed.
>
> We are, thus, is agreement with the proposed opinion of Hon'ble Ganguly J. in para 42 of the reported judgment which reads as follows:
>
> > "42. Therefore, appeal is allowed and the judgment of the High Court which is based on the reasoning of Va Tech Escher Wyass Flovel Ltd. V. M.P. SEB, Misc. Appeal No.380 of 2003, order dated 5-3-2003 (MP) is set aside. This Court holds the decision in Va Tech Escher Wyass Flovel Ltd. v. M.P. SEB, (2011) 13 SCC 261 has been rendered in per incuriam. In that view of the matter the arbitration proceeding may proceed under M.P. Act of 1983 and not under the A.C. Act 1996."
>
> The appeal is accordingly disposed of."

23. It is contended that in matters other than works contract, if there is arbitration clause, then parties have to seek recourse to appointment of an Arbitrator under the Central Act. If there is no arbitration agreement between the parties, the remedy of aggrieved person is before the Civil Court alone. It is argued that in terms of **L.G. Chaudhary-II** (**supra**), the State Act will prevail over the Central Act. But in the cases of works contract, if the ascertained amount including consequential relief is less than Rs.50,000/- then the aggrieved person has to approach Civil Court as the Civil Court has plenary

jurisdiction under Section 9 of the Code of Civil Procedure, 1908 in respect of all matters which are not expressly or impliedly barred. Therefore, even in the cases of works contract, if the ascertained amount along with consequential relief is less than Rs.50,000/-, the remedy for the aggrieved person is before the Civil Court and not under the Central Act as the State Act is complete Code and that no provision of the Central Act would be applicable to any person to seek resolution of disputes in the matter of works contract under the Central Act. It is contended that bar of jurisdiction of Civil Court as contained in Section 20 of the State Act is only in respect of matters which fall within the scope of the State Act. However, in the case of contracts other than the works contract, if there is an arbitration clause, the matter is required to be decided in terms of the provisions of the Central Act.

24. It is further argued that mere astuteness in drafting of the plaint will not be allowed to stand in the way of the Court looking to the substance of the relief asked for. Reference was made to the decision of the Supreme Court reported as **(1973) 2 SCC 524 (Shamsher Singh vs. Rajinder Prashad and others**). The said judgment further lays down that mere fact that the relief as stated in the prayer clause is expressed in a declaratory form does not necessarily show that the suit is for a mere declaration and no more. If the relief so disclosed is a declaration pure and simple and involves no other relief, the suit would fall under Article 17 (iii) of the Court Fees Act. The relevant extract of the said decision, as relied upon by the learned counsel, reads as under:-

"**4**. As regards the main question that arises for decision it appears to us that while the court-fee payable on a plaint is certainly to be decided on the basis of the allegations and the prayer in the plaint and the question whether the plaintiff's suit will have to fail for failure to ask for consequential relief is of no concern to the court at that stage, the court in deciding the question of court-fee should look into the allegations in the plaint to see what is the substantive relief that is asked for. Mere astuteness in drafting the plaint will not be allowed to stand in the way of the court looking at the substance of the relief asked for. In this case the relief asked for is on the basis that the property in dispute is a joint Hindu family property and there was no legal necessity to execute the mortgage. It is now well settled that under Hindu Law if the manager of a joint family is the father and the other members are the sons the father may by incurring a debt so long as it is not for an immoral purpose lay the joint family estate open to be taken in execution proceedings upon a decree for the payment of the debt not only where it is an unsecured debt and a simple money decree for the debt but also to a mortgage debt which the father is personally liable to pay and to a decree for the recovery of the mortgage debt by the sale of the property even where the mortgage is not for legal necessity or for payment of antecedent debt (*Faqir Chand v. Harnam Kaur, AIR 1967 SC 727*). Consequently when the plaintiffs sued for a declaration that the decree obtained by the appellant against their father was not binding on them they were really asking either for setting aside the decree or for the consequential relief of injunction restraining the decree holder from executing the decree against the mortgaged property as he was entitled to do. This aspect is brought out in a decision of the Full Bench of the Lahore High Court in *Zeb-ul-Nisa v. Din Mohammad, AIR 1941 Lah 97*, where it was held that:

> "The mere fact that the relief as stated in the prayer clause is expressed in a declaratory form does not necessarily show that the suit is for a mere declaration and no more. If the relief so disclosed is a declaration pure and simple and involves no other relief, the suit would fall under Art. 17(iii)."

In that case the plaintiff had sued for a twofold declaration : (i) that the property described in the plaint was a waqf, and (ii) that certain alienations thereof by the mutwali and his brother were null and void and were ineffectual against the waqf property. It was held that the second part of

> the declaration was tantamount to the setting aside or cancellation of the alienations and therefore the relief claimed could not be treated as a purely declaratory one and inasmuch as it could not be said to follow directly from the declaration sought for in the first part of the relief, the relief claimed in the case could be treated as a declaration with a "consequential relief." …… It was substantive one in the shape of setting aside of alienations requiring ad valorem court-fee on the value of the subject-matter of the sale, and even if the relief sought for fell within the purview of Section 7(iv)(c) of the plaintiffs in view of Sections 8 and 9, Suits Valuation Act, having already fixed the value of the relief in the plaint for purposes of jurisdiction were bound to fix the same value for purposes of court-fee. It was also pointed out that in deciding whether a suit is a purely declaratory, the substance and not merely the language or the form of the relief claimed should be considered............"
>
> (emphasis supplied)

25. Learned Advocate General also referred to a Full Bench judgment of this Court reported as **2007 (4) M.P.H.T. 444 (Shri Shankaranarayana Construction Company vs. State of M.P. and others**), wherein it has been held that the State Legislature was competent to enact the State Act in respect of 'arbitration' in terms of Entry 13 of the Concurrent List, even though the Arbitration Act, 1940 made by the Central Legislature was already in the same field because the State Act had been reserved for consideration and had received the assent of the President, as provided in clause (2) of Article 254 of the Constitution. The Parliament while enacting the Central Act has expressly saved the provisions of the Statutes such as the State Act in sub-sections (4) and (5) of Section 2 of the Central Act, both in respect of statutory arbitrations and arbitrations pursuant to arbitration agreements in respect of disputes arising out of works contracts between the State Government or a State Government Undertaking. Hence, the provisions of the State Act are not

repugnant to the provisions of the Central Act and are not void and do not stand impliedly repealed by the Central Act. The extracts of the said judgment on which reliance has been placed, are reproduced as under:-

> "**13**. Sub-section (4) of Section 2 of the 1996 Act is relevant as it has been held by the Division Bench of this Court in *M/s Bhanu Kumar Jain & Associates Vs. State of MP and others* (*W.P. No. 3138 of 1997* decided on 21.11.1997), that this sub-section saves the 1983 Adhiniyam even after the 1996 Act came into force. Sub-section (4) of Section 2 provides that the provisions of Part-I of the 1996 Act except sub-section (1) of Section 40 and Sections 41 and 43 shall apply to every "arbitration under any other enactment for the time being in force" as if the arbitration were pursuant to an arbitration agreement and "as if that other enactment were an arbitration agreement". The phrases "arbitration under any other enactment for the time being in force" and "as if that other enactment were an arbitration agreement" in sub-section (4) of Section 2 of the 1996 Act clearly show that this sub-section relates to statutory arbitration under any other enactment for the time being in force and not to arbitration pursuant to arbitration agreement. This sub-section, however, states that the provisions of Part-I of the 1996 Act shall apply to the statutory arbitrations under other enactments for the time being in force with the rider that if there is inconsistency between the provisions of Part-I of the 1996 Act and the provisions of the other enactments or rules made thereunder providing for statutory arbitration, the provisions of the other enactments or rules providing for statutory arbitration will prevail over the provisions of Part-I of the 1996 Act.
>
> **14**. We may now examine whether the 1983 Adhiniyam is one such other enactment for the time being in force providing for statutory arbitration. That the 1983 Adhiniyam provides for statutory arbitration will be clear from a perusal of the different provisions of the 1983 Adhiniyam. Section 3 of the 1983 Adhiniyam provides that the State Government shall by notification constitute an Arbitration Tribunal for resolving all such disputes and differences pertaining to works contract or arising out of or connected with execution, discharge or satisfaction of any such works contract. Thus, the jurisdiction of the Arbitration Tribunal is to decide all disputes and differences pertaining to works contract or arising out of or in

connection with execution, discharge, or satisfaction of any such works contract. Sub-section (1) of Section 7 of the Adhiniyam states that either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Arbitration Tribunal. This provision in the 1983 Adhiniyam makes it clear that a reference to the Arbitration Tribunal can be made by a party under the 1983 Adhiniyam even in the absence of an arbitration agreement. In *M/s Spedra Engineering Corporation, Bhopal v. State of M.P., AIR 1988 MP 111*, the Division Bench while deciding the validity of the 1983 Adhiniyam held that the 1983 Adhiniyam provides for statutory arbitration because in the absence of agreement between the parties, disputes can be referred to the Arbitration Tribunal. Relevant passage from Para 12 of the judgment in *M/s Spedra Engineering Corporation, Bhopal v. State of M.P.* (supra), as reported in the AIR is quoted herein below:

> "...So there can be statutory arbitration even in the absence of agreement between the parties to refer their dispute to an arbitrator. Therefore, it cannot be said that the present enactment is an antithesis of arbitration because it provides for arbitration even in the absence of any agreement between the parties to refer their dispute to the arbitrator. It is also not a misnomer to call the tribunal constituted under the Act as an Arbitration Tribunal as it has all the requisites to arbitrate in the dispute between the contractor and the State except that there is no agreement to refer the dispute to the Tribunal for arbitration that is by the statute...."

*** *** ***

16. We are of the considered opinion that the view taken in the two Division Bench decisions of this Court in *M/s Spedra Engineering Corporation* and *M/s Bhanu Kumar Jain and Associates* (supra), that the 1983 Adhiniyam provides for statutory arbitration is correct in law because it provides for arbitration of disputes by the Arbitration Tribunal even without an arbitration agreement. Accordingly, the provisions of Part-I of the 1996 Act will also apply to arbitration under the 1983 Adhiniyam as if the arbitration was pursuant to an arbitration agreement and as if the provisions of the 1983 Adhiniyam were an arbitration agreement, but if there is any conflict between the provisions of Part-I of

the 1996 Act and the provisions of the 1983 Adhiniyam, then the provisions of the 1983 Adhiniyam will prevail as provided in sub-section (4) of Section 2 of the 1996 Act.

*** *** ***

24. In our considered opinion, therefore, the State Legislature was competent to make a law in respect of 'arbitration' in Entry 13 of the Concurrent List, even though the Arbitration Act, 1940 made by the Central Legislature was already in the same field because the 1983 Adhiniyam had been reserved for consideration and had received the assent of the President, as provided in clause (2) of Art. 254 of the Constitution. Under the proviso to clause (2) of Art. 254 of the Constitution, Parliament was competent to make the 1996 Act in the same field, but while making the 1996 Act, has expressly saved the provisions of the 1983 Adhiniyam in sub-sections (4) and (5) of Section 2 of the 1996 Act, both in respect of statutory arbitrations and arbitrations pursuant to arbitration agreements in respect of disputes arising out of works contracts between the State Government or a State Government Undertaking and the contractor from the provisions of Part-I of the 1996 Act which are inconsistent with the provisions of the 1983 Adhiniyam. Hence, the provisions of the 1983 Adhiniyam are not repugnant to the provisions of the 1996 Act and are not void and do not stand impliedly repealed by the 1996 Act.

The application made under Section 11(6) of the 1996 Act is therefore not maintainable and the writ petition has no merit. The MCC and the writ petition are accordingly dismissed."

The aforesaid decision of the Full Bench in **Shri Shankaranarayana Construction Company** (**supra**) is in tune with the recent order of the Supreme Court in **Gammon India's** case (**supra**) decided on 08.03.2018.

26. We may also notice that a Division Bench of Indore Bench of this Court in **Arbitration Appeal No.21/2007 (M/s Highway Enterprises Pvt. Ltd. vs. The State of M.P. and Another**) decided on 01.05.2008 has held that in order to invoke the jurisdiction of the Arbitral Tribunal under the State Act,

the dispute between the parties must relate to claim of ascertained money of Rs.50,000/- or above. Secondly, it must relate to execution or non-execution of the works contract. It is only on fulfillment of these two conditions, the parties are under legal obligation to seek adjudication of the disputes from the Arbitral Tribunal. It was also held that if the dispute cannot be referred to the Arbitral Tribunal under the State Act, the objections by the appellant under Section 34 of the Central Act against the Award by a Committee of Arbitrators would be maintainable. The matter was remanded back to the Additional District Judge, Indore to decide the application under Section 34 of the Central Act on merits in accordance with law.

27. The relevant provisions of the State Act, as are relevant for the present case, read as under:-

M.P. Madhyastham Adhikaran Adhiniyam, 1983

2. Definitions. - (1) In this Act, unless the context otherwise requires, -

** ** **

(**d**) "**dispute**" means claim of ascertained money valued at Rupees 50,000 or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof;

** ** **

(**i**) "**works-contract**" means an agreement in writing for a letter of intent or work order issued for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformer or such other works of the State Government or Public Undertaking or of the Corporations of the State as the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by any official of the State Government or by Public Undertakings or Corporation or by any Official of the State Government for and on behalf of such Corporation or

Public Undertakings and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works and also includes the services so hired for carrying out of the aforesaid works and shall also include all concession agreement, so entered into by the State Government or public undertaking or Corporation, wherein a State support is involved or not.

** ** **

7. Reference to Tribunal. - (1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.

** ** **

7-A. Reference petition. - (1) Every reference petition shall include whole of the claim which the party is entitled to make in respect of the works contract till the filing of the reference petition but no claims arising out of any other works contract shall be joined in such a reference petition.

(2) Where a party omits to refer or intentionally relinquishes any claim or any portion of his claim, he shall not afterwards be entitled to refer in respect of such claim or portion of claim so omitted or relinquished.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2) disputes relating to works contract which may arise after filing of the reference petition may be entertained as and when they arise, subject to such conditions as may be prescribed.

** ** **

20. Bar of jurisdiction of Civil Court. - (1) As from the date of the constitution of the Tribunal and notwithstanding anything contained in Arbitration Act, 1940 (No. 10 of 1940) or any other law, for the time being in force, or in any agreement or usage to the contrary, no Civil Court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under this Act.

(1-A) Notwithstanding anything contained in sub-section (1), a Civil Court may entertain and decide any dispute of the nature specified in the said sub-section referred to it by a person in the capacity of indigent person.

Explanation. - For the purpose of this sub-section "indigent person" shall have the meaning assigned to it in the Code of Civil Procedure, 1908 (No. 5 of 1908).

> **(2)** Nothing in sub-section (1) shall apply to any arbitration proceeding either pending before any arbitrator or umpire or before any Court or authority under the provisions of Arbitration Act, or any other law relating to arbitration, and such: proceedings may be continued, heard and decided in accordance with agreement or usage or provisions of Arbitration Act or any other law relating to arbitration in all their stages, as if this Act had not come into force."

28. In the context of the rival contentions of the parties and the provisions of the relevant enactments, we shall now proceed to deal with the first two questions as are mentioned above. For the sake of convenience, the same are again reproduced as under:

QUESTION NOS. (1) AND (2)

> (1) Whether the dispute relating to termination of a contract without claiming any consequential relief is maintainable before the Arbitral Tribunal under the M.P. Madhyastham Adhikaran Adhiniyam, 1983?
>
> (2) Whether, under the guise of challenge to an action of termination of contract, the remedy under the MP Act can be said to be not available, when the real challenge is to the Revenue Recovery Certificate issued by the State for recovery of the loss/damages?

29. The arbitration is a procedure to determine legal rights and obligations of the parties judicially with binding effect, which is enforceable in law. The arbitrators are appointed by the parties to do justice in the sense of arriving at a "fair decision" and not in the sense of "judicial justice". The arbitrator is not bound by a strict Law of Evidence as contained in the Indian Evidence Act, 1872. Section 1 of the Evidence Act contemplates that such Act is not applicable to proceedings before an arbitrator. In fact, a resolution of dispute by an Arbitrator is one of the four alternative dispute resolution mechanism contemplated by Section 89 of the Code of Civil Procedure, 1908.

Such adjudication process is outside the adjudicatory functions of the Court. As per the Halsbury's Law of England, 4th Edition (1973), Vol.2 p. 255, para 502, the "arbitration" is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law; a domestic tribunal – as contra-distinguished from a regularly organized court proceeding according to the course of law. The relevant extract, reads as under:-

> "An arbitration is a reference to the decision of one or more persons of a particular matter in difference between the parties" (*Collins v. Collins, 28 LJ Ch 186, per ROMILY M.R. The process of arbitration means the determination of a matter in dispute by the judgment of one or more persons called arbitrators*). It is the submitting of a disputed matter to the judgment of one or more persons called arbitrators. "In its broadest sense, arbitration is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law; a domestic tribunal – as contra-distinguished from a regularly organised court proceeding according to the course of law – depending upon the voluntary act of the parties disputant in the selection of judges of their own choice. Its object is the final disposition, in a speedy and inexpensive way, of the matters involved, so that they may not become the subject of future litigation between the parties".

30. The Supreme Court in its judgment reported as **(1987) 4 SCC 497 (Municipal Corporation of Delhi vs. M/s Jagan Nath Ashok Kumar and Another**) examined the purport and scope of arbitration. The Court held as under:-

> "**5**. It is familiar learning but requires emphasis that section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in *Haji Ebrahim Kassam Cochinwall v. Nothern Indian Oil Industries Ltd., A.I.R. 1951 Calcutta 230* and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v.*

> *Fortress Fabrics Ltd., [1948] 2 All E.R. 186* observed at pages 188/189 of the report as follows:
>
> > "A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold Awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an Arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award.
>
> **6**. This in our opinion is an appropriate attitude."

31. The Supreme Court in a judgment reported as **(2006) 13 SCC 322 (Paramjeet Singh Patheja vs. ICDS Ltd.)** examined the difference between the courts and arbitral tribunals and held that the litigation is a legal action in a court of law whereas arbitration is the resolution of a dispute between the two contracting parties by the persons chosen by them to be arbitrators. The Supreme Court held as under:-

> "**35**. That litigation is therefore very different from arbitration is clear. The former is a legal action in a Court of law where judges are appointed

by the State; the latter is the resolution of a dispute between two contracting parties by persons chosen by them to be arbitrators. These persons need not even necessarily be qualified trained judges or lawyers. This distinction is very old and was picturesquely expressed by Edmund Davies, J. in these words:

> "Many years ago, a top-hatted gentleman used to parade outside these law Courts carrying a placard which bore a stirring injunction 'Arbitrate don't Litigate"

36. Moreover, the position that arbitrators are not Courts is quite obvious and this Court noted the position as under in two decisions:

> "16. But the fact that the arbitrator under Section 10A is not exactly in the same position as a private arbitrator does not mean he is a tribunal under Article 136. Even if some of the trappings of the Court are present in his case, he lacks the basic, the essential and the fundamental requisite in that behalf because he is not invested with the State's inherent judicial power..... H*e is not a Tribunal because the State has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement of the parties*." (Engineering Mazdoor Sabha & Anr. Vs. Hind Cycles Ltd., AIR 1963 SC 874.) "
>
> (emphasis supplied)
>
> "4. There was no dispute that the arbitrator appointed under Section 19(1)(b) [of the Defence of India Act, 1939] was not a court. (Collector vs. Gauri Shankar Misra & Ors., AIR 1968 SC 384) "

37. Thus the thrust of submissions made by both the learned senior counsel can be summarized as under:

> Courts are institutions invested with the judicial power of the State to finally adjudicate upon disputes between litigants and to make formal and binding orders and decrees. Civil Courts pass decrees and orders for payment of money and the terms 'decree and order' are defined in the CPC. Arbitrators are persons chosen by parties to adjudge their disputes. They are not Courts and they

do not pass orders or decrees for the payment of money; they make awards."

32. A Constitution Bench in a judgment reported as **(1992) 1 SCC 508 (Secretary, Irrigation Department, Government of Orissa and others v. G.C. Roy),** while examining the right of an Arbitrator to award *pendente lite,* held that arbitration is substitution of the forum of Civil Court. The relevant conclusion reads as under:-

"**43**. (i) *** *** ***

(ii) An arbitrator is an alternative form (*sic* forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

*** *** ***"

33. In view of the above, we find that the arbitration is resolution of disputes between two contracting parties by the persons chosen by them to be arbitrators and in the case of arbitration under the State Act, by statutory constituted Tribunal. An Arbitrator is to do justice in the sense of arriving at a fair decision and is not bound by strict law of evidence as contained in Indian Evidence Act. However, the Arbitrator while arriving at a fair decision has to

keep in mind the law applicable to the contract and to the facts of the matter before it.

34. The next question which arises for consideration is in respect as to whether the dispute relating to termination of a contract without claiming any consequential relief is maintainable before the Arbitral Tribunal. We find that in a reference under Section 7-A of the State Act, an aggrieved person is required to include whole of the claim which the parties are entitled to make in respect of the works contract till the filing of the reference petition. Sub-section (2) further contemplates where a party omits to refer or intentionally relinquishes any claim or any portion of his claim, he shall not afterwards be entitled to refer in respect of such claim or portion of claim so omitted or relinquished.

35. The Section 34 of the Specific Relief Act, 1963 contemplates that the courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so. The Supreme Court in a judgment reported as (**2012) 8 SCC 148 (Union of India vs. Ibrahim Uddin and another**) held that a Court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so. The findings are as under:-

> **"55**. The Section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

> **56**. In *Ram Saran & Anr. v. Smt. Ganga Devi, (1973) 2 SCC 60,* this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of Specific Relief Act, 1963 (hereinafter called "The Specific Relief Act") and, thus, not maintainable. In *Vinay Krishna v. Keshav Chandra & Anr., 1993 Supp.(3) SCC 129*, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (See also: *Gian Kaur v. Raghubir Singh, (2011) 4 SCC 567*).
>
> **57**. In view of the above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.
>
> **58**. In the instant case, the suit for declaration of title of ownership had been filed, though the respondent 1-plaintiff was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same."

36. In another judgment reported as **(2014) 14 SCC 502 (Venkataraja and others vs. Vidyane Doureradjaperumal** ***(dead)*** *Through Legal Representatives and others*), the plaintiff has filed a suit for declaration without seeking consequential reliefs of eviction of the tenant who were in possession. It was held that mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both the reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief. The relevant extracts of the said decision are reproduced as under:-

"**23**. The very purpose of the proviso to Section 34 of the 1963 Act, is to avoid the multiplicity of the proceedings, and also the loss of revenue of court fees. When the Specific Relief Act, 1877 was in force, the 9th Report of the Law Commission of India, 1958, had suggested certain amendments in the proviso, according to which, the plaintiff could seek declaratory relief without seeking any consequential relief, if he sought permission of the court to make his subsequent claim in another suit/ proceedings. However, such an amendment was not accepted. There is no provision analogous to such suggestion in the 1963 Act.

24. A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. *(Vide: Parkash Chand Khurana v. Harnam Singh, (1973) 2 SCC 484 and State of M.P. v. Mangilal Sharma, (1998) 2 SCC 510).*

25. In *Muni Lal v. Oriental Fire & General Insurance Co. Ltd., (1996) 1 SCC 90*, this Court dealt with declaratory decree, and observed that: (SCC p. 93, para 4)

> "4........ mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both the reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief."

26. In *Shakuntla Devi v. Kamla, (2005) 5 SCC 390*, this Court while dealing with the issue held: (SCC p. 399, para 21)

> "21……a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases, if suit for possession based on an earlier declaratory decree is filed, it is open to the defendant to establish that the declaratory decree on which the suit is based is not a lawful decree."

27. In view of the above, it is evident that the suit filed by the appellant-plaintiffs was not maintainable, as they did not claim consequential relief. Respondents 3 and 10 being admittedly in possession of the suit property, the appellant-plaintiffs had to necessarily claim the consequential relief of possession of the property. Such a plea was taken by the respondent-defendants while filing the written statement. The appellant-plaintiffs did

> not make any attempt to amend the plaint at this stage, or even at a later stage. The declaration sought by the appellant-plaintiffs was not in the nature of a relief. A worshipper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought herein, was for the benefit of the appellant-plaintiffs themselves."

37. In a recent judgment reported as **(2017) 3 SCC 702 (Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran and others**), the Supreme Court had an occasion to deal with the unsustainability of the judgment and decree where the Plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. It was held that a suit filed by the plaintiff for a mere declaration without relief of recovery of possession was not maintainable. The Court held as under:-

> "**35**. The plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction. The plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for a mere declaration without relief of recovery of possession was clearly not maintainable and the trial court has rightly dismissed the suit. The High Court neither adverted to the above finding of the trial court nor has set aside the above reasoning given by the trial court for holding the suit as not maintainable. The High Court in exercise of its jurisdiction under Section 100 C.P.C. could not have reversed the decree of the courts below without holding that the above reasoning given by the courts below was legally unsustainable. We, thus, are of the view that the High Court committed error in decreeing the suit."

38. Within this Court, on difference of opinion, the matter was considered by a third Judge in a judgment reported as **AIR 1967 MP 221 (Baldeo Singh Raghuraj Singh vs. Gopal Singh Raghuraj Singh and others**) wherein the

question of court fee was being examined. It was held that the Court is required to determine the real form of relief, which is attempted to be shrouded by dexterous use of expressions of declaratory sort when in reality what is sought is a consequential relief. Thus the majority opinion of the Court is as under:-

> "**37**. The case which is generally referred to in this connection is the decision of Sir Lawrence H. Jenkins in **Deokali Koer v. Kedar Nath, (1912) ILR 39 Cal 704**. In that case the plaintiff sought a declaration that a mortgage decree which was pending execution when the suit was filed had been collusively and fraudulently obtained and it was ineffectual, inoperative and invalid and that for the satisfaction of the said decree the mortgaged property, which was the subject-matter of the earlier decree and the later action in question, could not be sold. She also sought interim injunction. It is in that context of the plaintiff's averments in that case that Sir Lawrence Jenkins made the observations which are as follows:-
>
> > "It is a common fashion to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour".
>
> It was further observed after referring to Section 42 of the Specific Relief Act:-
>
> > "It is in this Section (apart from particular legislative sanction) that the law as to merely declaratory decrees applicable in the circumstances of this case, is now to be found".
>
> And further:
>
> > "The Section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property: it is the disregard of this that accounts for the multiform and at times, eccentric declarations which find a place in Indian plaints."
>
> If the Courts were astute - as I think they should be – to see that the plaints presented conformed to the terms of Section 42, the difficulties that are to

be found in this class of cases, would no longer arise. Nor would plaintiffs be unduly hampered if the provisions of Section 42 were enforced, for it would be easy to frame a declaration in such terms as would comply with the provisions of the section where the claim was one within its policy."

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43. ….... The later decision of the Full Bench of the same High Court reported in Bishan Sarup v. Musa Mal, AIR 1935 All 817 (FB) considered the question with reference to Sections 39 and 42 of the Specific Relief Act and held that it is not open to the Court to treat the suit as one falling within the purview of Section 39 of the Specific Relief Act if the plaintiff desired it to be construed as one under Section 42 of the Specific Relief Act. The plaintiff is at liberty to construe the suit as one under Section 42 of the Specific Relief Act and that if on perusal of the plaint the Court considers that the case is one in which further relief should have been asked for, then it is open for it to refuse to grant a declaration. It was further held that where the plaintiff deliberately seeks the relief of declaration and deliberately avoids claiming consequential relief such as the cancellation of an instrument the court fee on the plaint and the memorandum of appeal should be fixed court-fee under Article 17(iii) Schedule II of the Court-Fees Act.

*** *** ***

52. It thus seems from the review of these authorities that where the plaintiff sues for a declaration simpliciter without further seeking any consequential or substantial relief, the fact that his claim would be incompetent, because of his failure to seek further and consequential relief which he was able to claim does not affect the question of court-fee and he will be liable to pay court-fee under Article 17(iii) of Schedule II of the Court-Fees Act and not under Section 7(iv)(c). But the declaration asked for by the plaintiff in such a case must not be a mere garb for the real, substantial or consequential relief intended to be claimed. If it be so it is competent for the Court to look to the substance of the relief claimed apart from the form and require him to pay the court-fee which he would be bound to pay in case he had not resorted to a device in concealing the relief he really wanted.”

39. The correctness of the said view was doubted and was examined by another Full Bench of this Court in a judgment reported as **AIR 1971 MP 1 (Santoshchandra and others vs. Smt. Gyansundarbai and others**). It was held that where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, it is necessary for him to avoid that and unless he seeks the relief of having that decree, agreement, document or liability set aside, he is not entitled to a declaration simpliciter. The Court held as under:-

> "**9**. So far as this contention of the appellants is concerned, it, in our opinion, is amply borne out by a series of decisions of this Court. We may advert to the pronouncement of a Division Bench of the Nagpur High Court, presided over by Sir Gilbert Stone, C. J. and Digby, J. in ILR (1939) Nag 373 = (AIR 1938 Nag 183) (supra), where it was held that in a suit where the declaration prayed for, if given, involves the granting of the consequential relief, such as the cancellation of a document or the avoidance of a decree, the plaintiff will be deemed to have prayed for the consequential relief and the suit will fall under Section 7(iv)(c) of the Court-fees Act, and will not be governed by Article 17(iii) of Schedule II.
>
> *** *** ***
>
> **13.** Thus, all these cases lay down the proposition that where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, it is necessary for him to avoid that and unless he seeks the relief of having that decree, agreement, document or liability set aside, he is not entitled to a declaration simpliciter. In such cases the question of court-fees has to be determined under Section 7(iv)(c) of the Act. But, however, where a plaintiff is not a party to such a decree, agreement, instrument or liability, and he cannot be deemed to be a representative in interest of the person who is bound by that decree, agreement, instrument or liability, he can sue for a declaration simpliciter, provided he is also in possession of the property. The matter may be different if he is not in possession of the property. In that event, the proviso to Section 42 of the Specific Relief Act might be a bar to the tenability of a suit framed for the relief of declaration simpliciter. But, that would be a different aspect. All the same, if the

plaintiff is not bound by that decree or agreement or liability and if he is not required to have it set aside, he can claim to pay court-fees under any of the sub-clauses of Article 17. Schedule II of the Court-fees Act."

40. The principles of law laid down while interpreting Section 42 of the Specific Relief Act, 1877 or Section 34 of the Specific Relief Act, 1963, may be in the context of payment of appropriate court fee, are applicable with full vigour in relation to a reference petition under Section 7-A of the State Act as the reference under sub-section (1) of Section 7-A of the State Act is analogous to the plaint before the Civil Court. Thus, in terms of sub-section (1) of Section 7-A of the State Act, an aggrieved person has to include whole of the claim which an aggrieved person is entitled to make in respect of the works contract including the consequential relief. The sub-section (2) of Section 7-A of the State Act is analogous to the provisions of Order 2 Rule 2 of Code of Civil Procedure, 1908. Sub-section (3) of Section 7-A of the State Act permits the raising of dispute which may arise after filing of reference petition. If the consequential relief is omitted though available then such claim cannot be raised afterwards not only before the Arbitral Tribunal but before any other forum as all claims have to be raised before one forum.

41. Thus, in terms of Section 7-A of the State Act, the consequential relief such as right to complete the remaining work or to challenge the revenue recovery certificate or to challenge the order of black listing, if passed, are required to be included in a reference under Section 7-A of the State Act. In fact, when claim is raised disputing the termination of contract and as a consequence to complete remaining works, the claim is in fact seeking specific performance of the contract.

42. Another argument raised by learned counsel for the petitioner is that "ascertained money" appearing in Section 2(1)(d) of the State Act means a sum which is known or certain. The argument is that if an order of black-listing has been passed before the date on which reference is sought, the petitioner may not be in a position to quantify the damages. Learned counsel for the petitioner relies upon the Full Bench judgment in **Viva Highways'** case (**supra**) wherein it has been held that the "ascertained money" means a sum which is "known" or "made certain" or "fixed" or "determined" or "quantified". Learned counsel for the petitioner also refers to a judgment in **Satish Kumar Raijada'**s case (**supra**) wherein, the reference was found to be not maintainable under the State Act as the dispute was in relation to fixation of rates of works, therefore, it was held to be a case not relating to ascertained sum of money.

43. In the light of principles of interpretation of statutes, in the absence of any meaning available to the expression "ascertained money" in the statute, we need to examine as to how the meaning of the word "ascertain" is defined in the dictionaries. A Full Bench of this Court in **Viva Highways Ltd**. (**supra**) has interpreted the expression "ascertained money" in the light of dictionary meaning. After considering the various dictionaries on the subject, the Full Bench concluded as under:-

> "**74**. The meaning of 'ascertain'/ascertained given in various dictionaries mentioned hereinabove shows that it is an activity undertaken by which a claim is fixed or made definite. In other words, claim is learnt with certainty or it is made definite or determined. The Stroud's Dictionary makes it clear that where "ascertained" is used in relation to a claim of money to be paid, it has to be ascertained in a particular way. "To be

ascertained" were held to be very strong words and were treated to be a condition precedent.

*** *** ***

76. Shri Amit Seth submitted that money can be ascertained on the basis of average toll collection for a specified period or on the basis of cash flow chart, financial identical rate of return (FIRR) and yearly cash flow statement (YCFS). We do not see much merit in the said contention. As the applicants have based their claim to operate the project for a specified period, if they succeed in their claim, they will get extra days for operating the project. For example, if a Concessionaire who is operating a toll plaza succeeds, what he will get will be in terms of extension of days and not in terms of money which is ascertainable or ascertained. During extended period of operation of projects, how much will be the vehicular movement and how much toll will be collected cannot be ascertained at this point of time by any process of reasoning. Similarly, while operating a sports complex, how much the Concessionaire will earn cannot be determined/ascertained by any guess work. For this reason, the claim of the applicants is in terms of extension of days to operate the project and they are unable to putforth a claim of ascertained money. <u>However, at this stage, it must be made clear that when a claim is ascertainable and yet the concessionaire has not ascertained the claim in order to wriggle out of definition of "dispute", the matter would be different and in such cases the forum for adjudication would be the Tribunal under the Adhiniyam of 1983. Hence, each case needs to be examined in this regard.</u>" (Emphasis Supplied)

44. The Supreme Court in a judgment reported as **(1992) 1 SCC 731** (**Sujir Keshav Nayak v. Sujir Ganesh Nayak)** was considering a suit for accounting or for dissolution of partnership and accounting filed in courts of limited pecuniary jurisdiction. It was held that the plaintiff must take every care to disclose valuation which is not arbitrary as the plaint is liable to be rejected on objection of the defendant. But in suits of such nature filed before courts of unlimited jurisdiction the valuation disclosed by the plaintiff may be

accepted as correct. It was held that in a suit for declaration with consequential relief falling under Section 7(iv)(c) of the Court Fees Act, 1870, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of court fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the Court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the court can examine the valuation and can revise the same. The Court held as under:-

> "**3**. .... For this it is necessary to examine the scheme disclosed in the Civil Procedure Code relating to filing of suit. Section 15 of the Civil Procedure Code (hereinafter referred to as 'C.P.C.') provides that any suit shall be instituted in the court of the lowest grade competent to try it. What is a court of lowest grade and for what nature of suit has been determined and regulated by State enactments. Competency refers to jurisdiction territorial or pecuniary, of limited or unlimited limits. In courts of limited pecuniary jurisdiction valuation assumes great importance. A plaintiff may over or under-value the suit for purposes of avoiding a court of a particular grade. In the former the plaint may be returned under Order 7 Rule 10 for presentation in proper court but in latter it is liable to be rejected. Since under-valuation goes to the root of maintainability of the suit a defendant is entitled to raise the objection irrespective of the nature of the suit. That is why this Court in ***Abdul Hamid Shamsi v. Abdul Majid And Ors., (1988) 2 SCC 575.*** while upholding the right of the plaintiff to value the suit for accounting according to his own estimate held that he "has not been given the absolute right or option to place any valuation whatever in such relief." But that was a case of limited pecuniary jurisdiction in which the defendant could object as arbitrary under-valuation could result in rejection of the plaint. .... In ***Meenakshisundaram Chettiar v. Venkatachalam Chettiar, (1980) 1 SCC 616***, it was observed that even though in suit for accounting the loss of revenue is ensured by statutory

> provision yet a plaintiff has a duty to give a fair estimate of the amount for which he sues. Reason for it obviously was insistence on being honest and just when approaching a court of law. The observation was made because of the duty cast on court by Order 7 Rule 11 of C.P.C. But there is no indication if the suit was filed in a court of limited pecuniary jurisdiction. It can thus be resolved that in suits for accounting or for dissolution of partnership and accounting filed in courts of limited pecuniary jurisdiction the plaintiff must take every care to disclose valuation which is not arbitrary as the plaint is liable to be rejected on objection of the defendant. But in suits of such nature filed before courts of unlimited jurisdiction the valuation disclosed by the plaintiff may be accepted as correct. This, however, does not mean that the courts power to examine the correctness of valuation is taken away. If on perusal of plaint the court is prima facie satisfied that the plaintiff has not been fair and valued the suit or relief arbitrarily it is not precluded from directing the plaintiff to value it properly and pay court fee on it. In ***Tara Devi v. Thakur Radha Krishna Maharaj, (1987) 4 SCC 69*** this Court observed: (SCC p. 71 para 4)
>
> > "It is now well settled by the decisions of this Court in ***Sathappa Chettiar v. Ramanathan Chettiar, AIR 1958 SC 245*** and ***Meenakshisundaram Chettiar v. Venkatachalam Chettiar*** that in a suit for declaration with consequential relief falling under Section 7(iv)(c) of the Court Fees Act, 1870, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of court fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the court can examine the valuation and can revise the same."

45. As per the aforesaid judgments including Full Bench judgment of this Court in **Viva Highways Ltd.** (**supra**), the Court can examine as to whether the valuation of a suit is arbitrary and unreasonable and if the plaint is demonstrated to be undervalued, the Court can examine the valuation and can

refuse to accept the valuation given. Similarly, in terms of Section 2(1)(d) of the State Act, the valuation to claim ascertained money at less than Rs.50,000/- can be to avoid the arbitration by a statutory Arbitral Tribunal. Therefore, keeping in view the purpose of the Act that all disputes of works contract excluding the disputes of petty amount should be decided by a statutory Arbitral Tribunal, an aggrieved person cannot resort to undervaluation of the claim. Thus, when a person excludes the consequential relief(s), which could be claimed, so as to exclude the jurisdiction of the statutory Arbitral Tribunal, the purpose of the Act gets defeated. Such undervaluation of the claim would bar an aggrieved person to seek remedy from any other forum as well.

46. In fact, in **Civil Appeal No.4017/2018 (M/s Gangotri Enterprises Ltd. vs. Madhya Pradesh Road Development Corporation and Another**) decided on 18.04.2018, the Supreme Court held that the expression "ascertained money" as used in Section 2(1)(d) of the State Act will include not only the amount already ascertained but the amount, which may be ascertained during the proceedings on the basis of the claims/counter claims of the parties. The relevant extract reads as under:-

> "**2**. Our attention has been drawn to the definition of "dispute" under Section 2(d) of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 ("1983 Act") which is as follows:
>
> > " 'dispute' means claim of ascertained money valued at Rupees 50,000 or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof."
>
> **3**. We consider it appropriate to clarify that the expression "ascertained money" as used in Section 2(d) of the 1983 Act will include not only the amount already ascertained but the amount which may be ascertained

during the proceedings on the basis of claims/counter claims of the parties."

Therefore, in addition to the consequential relief which an aggrieved person has to claim in a reference under Section 7-A of the State Act even the expression "ascertained money" includes the amount which may be ascertained during the proceedings on the basis of the claims/counter claims of the parties. The said order concludes that ascertained amount is not only the claim raised but also the amount determined.

47. The Full Bench in **Viva Highways Ltd.** (**supra**) also held that when a claim is ascertainable, yet the same is not ascertained in order to wriggle out of definition of "dispute", the matter would be different. Attention of the Full Bench was not invited to Section 34 of the Specific Relief Act, 1963 and the consequential relief, which is required to be included in a reference not only before the Civil Court but also before the Arbitral Tribunal in terms of Section 7-A of the State Act. Therefore, though we agree with the finding of the Full Bench in **Viva Highways Ltd.** (**supra**) but we go a step further to say that a reference has to include the consequential relief as well.

48. Further, the Full Bench in **Viva Highways Ltd.** (**supra**) though held that by applying an artistic linguistic engineering, an agreement can be worded in a unique or a different way. While examining the nature of contract, it was held that it may have a different nomenclature but these factors will not determine its real nature. The said finding is equally applicable in respect of reference of dispute to an Arbitral Tribunal before the State Act. The ascertained money has to include the consequential relief which will dependent

upon the facts of each case. The reference that the contractor is claiming only fixation of rates and therefore, not ascertained money, is not tenable as the aggrieved person was able to claim a particular rate of work though it may not be accepted by the Arbitral Tribunal but there cannot be any open ended fixation of rates of work as such is not the substantial relief. The substantial relief is computable in terms of money, therefore, while seeking reference, an aggrieved person has to claim specific amount in proceedings under the State Act. Thus, the astuteness in draft of reference so as to not to claim any money though ascertainable, cannot oust the jurisdiction of the statutory Arbitral Tribunal under the State Law.

49. We find that in the judgments in **Satish Kumar Raizada-I** (**supra**), in a dispute of fixation of rates, the Court held that it is not for ascertained sum of money. In **Satish Kumar Raizada-II (supra**), the Single Bench was again dealing with the claim for fixation of rates. We find that the view of this Court in the above judgments is not the correct enunciation of law. There cannot be any simpliciter declaration of fixation of rates of work. An aggrieved person has to claim a particular rate of work which the Court may or may not grant but the quantification of rate of work was required to be made. It was mere astuteness in drafting of the reference, which led the Court to say that it is not a claim of ascertained money. The ascertained money, as held by the learned Single Bench is not only which is “known” or “made certain” or “fixed” or “determined” or “quantified” but includes all the amounts which could be quantified as without consequential relief, no claim would be maintainable.

50. In **M/s Shree Construction Company** (**supra**), a Division Bench of this Court held that there has to be a fixed and ascertained amount which had to be claimed and denied but the relief of declaration would not be a dispute which could be granted by the Tribunal. However, the argument that consequential relief which arises out of declaration has to be claimed was not raised or examined. In fact, the learned counsels for the parties were candid to say that in none of the judgment before this Court, the question whether the consequential relief, which should have been included in the reference in terms of Section 34 of the Specific Relief Act, has not been raised or examined.

51. Therefore, the jurisdiction of the Tribunal cannot be avoided only for the reason that the party is claiming only declaration and not the consequential relief as without the consequential relief, the declaration is meaningless. Every declaration has necessary consequence. Even in simpliciter termination of the agreement, there is a forfeiture of the security amount. There is a provision for getting the work done by the department at the cost of the contractor or from third party at the risk and cost of the contractor. If the contractor seeks completion of the remaining work after termination of the contract, the contractor is, in fact, seeking specific performance of the contract, therefore, he has to value the suit at least to the extent of work to be completed. All these reliefs are computable in terms of money, which are required to be disputed by an aggrieved person before a statutory Arbitral Tribunal. Similarly, challenge to revenue recovery certificate under the guise of challenge to only termination of agreement is again not tenable because the consequential relief is to that of challenge to recovery certificate. Similarly, under the guise of termination of

contract, an aggrieved person is required to challenge the order of black-listing as the black-listing as civil consequences and such civil consequences are computable in terms of money. However, such claim should have arisen before seeking a reference under Section 7(A) of the State Act else such claim is barred in terms of Sub-section (2) of Section 7-A of the State Act as a party who omits to refer or intentionally relinquishes any claim or any portion of his claim, he shall not afterwards be entitled to refer in respect of such claim or portion of claim so omitted or relinquished. Therefore, reading of Sub-section (2) of Section 7-A of the State Act will make it abundantly clear that if a consequential relief was available to an aggrieved person before the date of making reference under Sub-section (1) of Section 7-A of the State Act, such person will not be entitled to claim such relief. Such aggrieved person cannot claim that for declaration he is not approaching the statutory Arbitral Tribunal but will claim consequential relief in other proceedings or from the department directly. The same is not permissible. Once the aggrieved person has failed to include the claim of the consequential relief, any such relief cannot be claimed in any subsequent proceedings. Therefore, mere declaration of termination of contract is not the substantial relief and in the guise of mere declaration an aggrieved person cannot be permitted to omit the consequential relief which the party may be entitled to claim in a reference under the State Act.

52. It appears that the process of statutory Arbitral Tribunal is being sought to be avoided by resorting to mechanism that the contractor is not claiming the ascertained money of more than Rs.50,000/- though in substance, the claim is for ascertained money. Such mechanism cannot be permitted to be

resorted to, so as to avoid the intention of the State Legislature that all disputes must be resolved by a statutory Arbitral Tribunal. There cannot be multiple forums for a party to seek resolution of disputes such as to seek declaration of termination of the contract from an Arbitral Tribunal under the Central Act and the consequential relief from other forums. The department would be justified in declining such claim, if not included in the reference. It is perfectly reasonable to resist the reference or dispute for the reason that an aggrieved person has not included the consequential relief though available in terms of Section 7-A(1) of the State Act, as in terms of Sub-section (2) of Section 7-A of the State Act, if the claim is not included in the reference, such claim cannot be sought subsequently.

53. In view of the above, mere astuteness in drafting of a plaint/reference of a petition to seek simpliciter termination of agreement without seeking consequential relief would not be maintainable. If a particular consequential relief can be claimed, the aggrieved person must claim that relief in a reference otherwise the reference would not be maintainable. The consequential relief will differ from case to case. In a case of termination of contract, as argued by the petitioner, if the termination of contract is held to be bad as argued by the petitioner, the petitioner would be entitled to complete the remaining work; therefore, the consequential relief would be the balance amount of the work to be done. The value of the balance work would be ascertained amount. It can also include challenge to revenue recovery certificate consequent to the termination of contract. The value of such revenue recovery certificate would be the consequential relief, which an aggrieved person has to claim in a

reference. There can be a situation of black-listing of the Firm prior to seeking reference. Since black-listing has a civil consequences and the amount of loss is computable in terms of money, such damages have to be ascertained and claimed in a reference under the provisions of the State Act. The above situations are not exhaustive but only illustrative. The consequential relief in each case would dependent upon the nature of the contract, relief which can be claimed by an aggrieved person. In terms of Clause (2) of Section 7-A of the State Act, if the aggrieved person omits to claim a relief though available on the date of seeking reference; he is debarred from claiming such relief in a subsequent action. It only means that for consequential relief, if not claimed in the reference, cannot be claimed subsequently. Therefore, keeping in view the rule that all claims must be included in one petition, as may be arising on the date of reference, has to include the consequential reliefs otherwise the reference would be not maintainable, not for the reason that it is not a works contract or it involves not an ascertained money but for the reason that the aggrieved person though could claim ascertained amount but having omitted to claim so, the reference would not be maintainable and would be liable to be declined.

54. The judgment of the Division Bench of Indore Bench of this Court in **M/s Shree Construction Company** (**supra**) and the Single Benches of this Court in **Satish Kumar Raizada-I** (**supra**) and **Satish Kumar Raizada-II** (**supra**) have literally explained the words “ascertained amount” but have not taken into consideration that the consequential relief which accrues to an

aggrieved person, if omitted to do so, the reference itself would not be maintainable.

55. Thus, we hold that the expression "ascertained amount" appearing in Section 2(1)(d) of the State Act includes the amount of consequential relief. If a particular consequential relief can be claimed, the aggrieved person must claim that relief in a reference otherwise the reference would not be maintainable. The consequential relief in a case of termination of contract can be the value of the remaining work; value of revenue recovery certificate would be the consequential relief and the amount of loss computable in terms of money in case of black-listing of the Firm would be the consequential relief. Such instances are only illustrative and are not exhaustive. The consequential relief in each case would dependent upon the nature of the contract, relief which can be claimed by an aggrieved person. In terms of Clause (2) of Section 7-A of the State Act, if the aggrieved person omits to claim a relief though available on the date of seeking reference; he is debarred from claiming such relief in a subsequent action. Therefore, keeping in view the rule that all claims must be included in one petition, as may be arising on the date of reference, has to include the consequential reliefs otherwise the reference would be not maintainable, not for the reason that it is not a works contract or it involves not an ascertained money but for the reason that the aggrieved person though could claim ascertained amount but having omitted to claim so, the reference would not be maintainable and would be liable to be declined.

> "**Question No.(2A)** - If the dispute is not arbitrable by the Arbitral Tribunal under the Act, the remedy of the aggrieved person is before the Civil Court or under the Arbitration and Conciliation Act, 1996?"

56. This question need not be answered as there would be hardly any situation, in which the amount of ascertained money with consequential relief would be less than Rs. 50,000/-. Therefore, the academic question is not decided. Such question can be raised before an appropriate forum in case such situation arises subsequently.

57. In view of the above opinion, the matter be placed before the Bench in accordance with the Roster for final disposal.

(Hemant Gupta) **Chief Justice**	**(Vijay Kumar Shukla)** **Judge**	**(Subodh Abhyankar)** **Judge**

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