Bombay High Court M/S. Anuptech Equipments Private ... vs M/S. Ganpati Co-Op. Housing ... on 30 January, 1999 Equivalent citations: AIR 1999 Bom 219, 1999 (2) BomCR 331, 1999 (2) MhLj 161 Author: F Rebello Bench: F Rebello ORDER F.I. Rebello, J. 1. The important question of law which arises in this matter is "what is the remedy available to an aggrieved party if Arbitral Proceedings are terminated under section 25(a) or under section 32(2) of the Arbitration & Conciliation Act, 1996. The Arbitration & Conciliation Act, 1996 will hereinafter be referred to as the Act of 1996 and the Arbitration Act, 1940 will be referred to as the Act of 1940. 2. The petitioners and respondent No. 1 had entered into an agreement. In terms of the said agreement dated 7th January, 1994 there was a provision to refer disputes arising between them to an Arbitral Tribunal. The address of the employer was 108, Standard House, 83, Maharashi Karve Road, Bombay-400 002. The agreement was for construction of buildings. The site where the building was to be constructed was at Nerul. By letter dated 18th November, 1996 the petitioners invoked the arbitration clause and appointed Prof. Madhav Deobhakta, as Arbitrator for 3 disputes arising from the claim as contained in letter dated 17th October, 1996. By letter of 22nd November, 1996 the 1st respondent pointed out that there were still works to be completed. The record shows that as per the petitioner's contention the building was completed in all respects and handed over to the 1st respondent society on 7th December, 1996. By letter of 17th December, 1996 the petitioners informed the 1st respondent that the Arbitrator to be appointed by them had to be a fellow of the Indian Institute of Architects as required by Clause 56. By letter of 19th December, 1896 the 1st respondent confirmed that the building was handed over by petitioners on 7th December, 1996. On 28th December, 1996 the petitioners once again informed the 1st respondent that the Arbitrator to be appointed had to be a fellow of the Indian Institute of Architects. On 14th May, 1997 according to the petitioners they submitted their final claims. On 8th February, 1997 the 3rd respondent informed the 1st respondent society his willingness to act as joint Arbitrator. The joint Arbitrators appointed respondent No. 4 as the third Arbitrator. The first meeting of the joint Arbitrators was fixed on 11th March, 1997. It was subsequently postponed to 15th April, 1997. On 15th April, 1997 the petitioners were directed to submit their statement of claim by 15th May, 1997. By letter of 15th May, 1997 the petitioners informed the Arbitral Tribunal the reason as to why they could not submit their claim by 15th May, 1997. On 30th May, 1997 the 1st respondent addressed a letter to the Arbitrators informing that the petitioners had not submitted the statement of claims by 15th May, 1997 as directed. On 14th June, 1997 the 1st respondent reminded the Arbitral Tribunal that the petitioners had not submitted their statement of claims by 15th May, 1997. By letter of 18th June, 1997 the Arbitral Tribunal informed the parties that they will hear the parties on petitioners letter dated 15th May, 1997 as also the letter of the 1st respondent. On 4th July, 1997 the Arbitral Tribunal fixed the 2nd meeting on 18th July, 1997. On 17th July, 1997 the petitioners invoked the arbitration clause for further claims and appointed Prof. Madhav Deobhakta, as Arbitrator from the petitioners' side and called on the 1st respondent to ap-

point joint Arbitrator from their side. 3. The Arbitral Tribunal met on 18th July, 1997 and decided to terminate the proceedings under section 25(a) of the Act of 1996 and informed that the detailed order will be despatched by post. It seems that on the very day i.e. on 18th July, 1997 on behalf of the petitioners a letter was addressed to the Arbitral Tribunal to point out that Shri D.A. Limaye, the Arbitrator appointed by the 1st respondent did not satisfy the qualifications required under Arbitration Clause 56. It may be mentioned that the said clause requires an Arbitrator be a fellow of the Indian Institute of Architects. Attention was invited to the previous correspondence wherein the attention of the 1st respondent was invited to that effect. The Arbitral Tribunal was requested to enquire from Shri D.A. Limaye whether he was a fellow of the Indian Institute of Architects. The decision dated 1st August, 1997 received by the petitioners on 9th August, 1997 itself shows that Shri D.A. Limaye is not a fellow of the Indian Institute of Architects. The Arbitral Tribunal held that this was known to the petitioners. The Award was forwarded to the petitioners by letter dated 6th August, 1997. The award was received by the petitioners on 9th August, 1997. By letter of 7th August, 1997 the petitioners wrote to the Arbitral Tribunal challenging the appointment of Shri D.A. Limaye as Arbitrator under section 13 read with section 12(3)(b) of the Act, of 1996. It may also be mentioned that the petitioners herein have filed a petition bearing No. 55 of 1998 praying therein for appointment of suitable person as Arbitrator and contending that the award was a nullity and there was no need to challenge the said Award. During the pendency of the said proceedings petitioners have filed this Arbitration petition. Respondent No. 1 has filed an affidavit in reply to the petition. The principal contentions raised therein are :— (1) that the application is not maintainable; (2) that this Court has no jurisdiction in as much as the matter was outside the territorial jurisdiction of this Court being at Nerul and (3) that the Award dated 1stAugust, 1997 was communicated to the petitioners on 9th August, 1997 and the application has been filed on 16th August, 1998 and thus the same was clearly barred under sub-section (3) of section 34 of the Act of 1996. Considering the nature of the disputes involved, notice was given to the learned Additional Solicitor General, for the Union of India, who appeared and has been heard in the matter. 4. It will, therefore, be essential to first deal with the contention whether the petition as filed is maintainable. The jurisdiction of this Court is sought to be invoked under sections 12(3)(b), 13, 14, 15, 24 and other provisions of the Arbitration and Conciliation Act, 1996 as can be seen from the cause title of the petition. The reliefs, as prayed for amongst others, are that Shri D.A. Limaye, the 3rd respondent herein, was not validly appointed and as such Shri M.D. Tambekar who was appointed by the joint Arbitrators is also not validly appointed Arbitrator. It is further prayed that the Arbitrators misconducted themselves in not deciding the objections raised by letter dated 7th August, 1997 addressed to the Arbitrators wherein they had contended that Shri D.A. Limaye was not a fellow of the Indian Institute of Architects and the similar objection as raised on 13th August, 1997. At this stage itself it may be mentioned that these are objections raised after the decision dated 18th July, 1997 terminating the proceedings. Various other

reliefs have been sought including a prayer calling on this Court to terminate the mandate of the learned Arbitrators under section 14(2) of the Act of 1996 and a declaration that the decision terminating the proceedings by order of 1st August, 1997 was not correct and some other reliefs. It will, therefore, have to be examined whether the petitioner's application as filed is maintainable in law and whether this Court has jurisdiction under the sections indicated in the cause title to interfere with the decision of the Tribunal. 5. For that purpose it is essential to examine the provisions of the Act of 1996. Before so proceeding it may be noted that the main object of the Act of 1996 is for early resolution of disputes once the Arbitral Tribunal enters upon reference. Procedural defects in the Act of 1940 have been sought to be removed by the Act of 1996. Restrictions have also been put on Courts/ judicial authorities intervening during the course of Arbitral proceedings. The main objects as contained in the Arbitration and Conciliation Bill, 1995 amongst other are to make provisions for an arbitral procedure which is fair, efficient, and capable of meeting the needs of the specific arbitration; to provide that the Arbitral Tribunal gives reasons for its final award; to ensure that the Tribunal remains within the limits of its jurisdiction; to minimise the supervisory role of the courts in the arbitral process; to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court. Let us now briefly advert to the relevant sections. Arbitration Agreement means an agreement referred to in section 7 and by virtue of subsection (4) of section 2 also includes Arbitration under any other enactment; Arbitral Tribunal means a sole Arbitrator or a panel of Arbitrators and Court means the Principal Civil Court of Original Jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court or any Court of Small Causes. Section 4 provides that any party who knows that the parties may derogate or there is non-compliance with any requirements of the Arbitration Agreement and proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object. Section 5 sets out that notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part. Section 8 provides that a judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute; refer the parties to arbitration. Under section 9 power is conferred on the Court to grant interim reliefs before or during arbitral proceedings or at any time after making of the arbitral award, but before it is enforced under section 36. Section 17 confers a power on the Arbitral Tribunal unless otherwise agreed by the parties, at the request of a party, to order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. Section 10

confers a power on the parties to determine the number of arbitrators provided that such number shall not be an even number. Section 11 provides as to who can be an Arbitrator and also the procedure to be followed by the Arbitrator and the failure of an agreement of appointing Arbitrators. Sub-section (5) of the said section further provides that on failure to do so, the parties can request the Chief Justice or any person or institution designated by him to take necessary measures for appointment. Sub-section (6) provides for contingencies in the event of failure of the parties to follow the appointing procedure. Subsection (7) provides that the decision on a matter entrusted by sub-section (4) or (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final. Section 12 provides that if a person is approached in connection with his possible appointment as an Arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Sub-section (2) provides that the Arbitrator is duty bound from the time of his appointment and throughout the arbitral proceedings, to disclose to the parties without delay in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him. Sub-section (3)(a) provides that the Arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality. Sub-section (3)(b) provides that such a challenge can be made if he does not possess the qualifications agreed to by the parties. Sub-section (4) provides that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. Section 13 sets out the time limit and the manner in which the appointment of an Arbitrator can be challenged. Sub-section (3) provides that unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the Arbitral Tribunal shall decide on the challenge. Sub-section (4) sets out that even if a challenge under any procedure is agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. Sub-section (5) provides that where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34. Section 14 of the Act provides that the mandate of an arbitrator shall terminate if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay and under Clause (b) he withdrawn from his office or the parties agree to the termination of his mandate. Sub-section (2) provides that if the controversy remains concerning any of the grounds referred to in Clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. Section 15 sets out that in addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate (a) where he withdraws from office for any reason or (b) by or pursuant to agreement of the parties. Sub-section (2) provides for appointment of substitute arbitrator in the event the mandate terminates. Section 16 confers a power on the tribunal to rule on its own jurisdiction in-

cluding ruling on any objections with respect to the existence or validity of the arbitration agreement Sub-section (2) provides the time when the issue as to jurisdiction has to be raised. Sub-section (3) requires, the plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter is alleged to be beyond the scope of its authority during the course of arbitral proceedings. A power is conferred on the Tribunal to admit a plea to cases referred to in sub-section (2) or (3) if it considers the delay as justified. By virtue of sub-section (5) the Arbitral Tribunal shall decide on the plea referred to in sub-section (2) or (3) and in the event the plea is rejected, continue with the arbitral proceedings and make a arbitral award. A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34 of the Act of 1996. 6. Section 25 of the Act of 1996 provides that unless otherwise agreed by the parties where, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the Arbitral Tribunal shall terminate the proceedings. Sub-section (b) provides for a situation where the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, in which event the orbital tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant. Clause (c) provides that if a party fails to appear at an oral hearing or to produce documentary evidence, the Arbitral Tribunal may continue the proceedings and make the arbitral award on the evidence before it. Section 29 provides that unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the Arbitral Tribunal shall be made by a majority of all its members. Section 30 confers a power on the Arbitral Tribunal to encourage settlement and if during the arbitral proceedings the parties settled the dispute the Arbitral Tribunal shall terminate the proceedings and if requested by the parties and not objected to by the Arbitral Tribunal record the settlement in the form of an arbitral Award on the agreed terms. Section 32 provides that the arbitral proceedings shall be terminated by the final award or by an order of the tribunal under sub-section (2). Subsection (2) provides that the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where the claimant withdraws his claim unless the respondent objects to the order and the Arbitral Tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute or the parties of the parties agree on the termination of the proceedings or the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. Sub-section (3) provides that subject to section 33 and sub-section (4) of section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings. Section 33 is a power conferred on the arbitral tribunal to correct the errors or to make additional arbitral award. Arbitral Award has been defined under section 2(c) to include an interim award. Sub-section (6) of section 31 confers a power on the Arbitral Tribunal to make an interim arbitral award in matter with respect to which it may make a final arbitral award. Section 31 provides that an arbitral award shall be made in writing and shall be signed by

the members of the arbitral tribunal. The arbitral award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under section 30. (Settlement). An arbitral award can be set aside only on grounds set out under section 34 which includes amongst others that the composition of the Arbitral Tribunal or arbitral procedure was not in accordance with the agreement of the parties unless such agreement was in conflict with the provisions of Part I from which the parties cannot derogate, or, failing such agreement, was not in accordance with Part I. Sub-section (3) sets out the time limit to challenge the award. Section 37(2) provides for an appeal to a Court from an order of the Arbitral Tribunal accepting the plea referred to in sub-section (2) or (3) of section 16 or granting or refusing to grant interim measure under section 17. Under section 43(4) when an Arbitral Award is set aside the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in counting the time prescribed by the Limitation Act of 1963. 7. Section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act and the parties are free to agree on the procedure to be followed by the Tribunal in continuing its proceedings. Failing such agreement the Arbitral Tribunal subject to this part can conduct the proceedings in the manner it considers appropriate. Section 23 provides for filing of the Statement of Claims and documents as also for amendment. Section 24 provides that unless agreed to by the parties the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral arguments and in the event of a request by the party the tribunal shall hold oral hearings unless the parties have agreed that no hearing shall be held. Under section 27 the Arbitral Tribunal or a party who approaches the tribunal can apply to the Court for assistance in taking evidence. By virtue of sub-section (3) the Court can execute the request by ordering that the evidence be provided directly to the arbitral tribunal. Sub-section (4) provides that for making an order under sub-section (3) can issue the same processes to witnesses as it may issue in suits tried before it. Sub-section (5) further provides that if a person fails to attend in accordance with such process, or making any other default, or refuses to give evidence, or is guilty of any contempt to the Arbitral Tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the Arbitral Tribunal as they would incur for the like offences in suits tried before the Court. Under section 35 the Arbitral Award is made final and binding on the parties and persons claiming under them respectively. Under section 36 after the time to set aside the Arbitral Award under section 34 has expired or such application had been made has been refused an award shall be enforced under the Code of Civil Procedure in the same manner as it were a decree of the Court. By virtue of section 43 the provisions of Limitation Act are made applicable. By section 33 power is retained in the Tribunal for a specific period to correct error or pass an additional arbitral award. Under section 34(4) the Court can adjourn proceedings when the award is under challenge to entitle the Arbitral Tribunal to resume proceedings or eliminate the grounds for setting the

Arbitral Award. 8. From a perusal of the above it becomes clear that the Act uses three different expressions which are arbitral award, order and decision. In so far as remedies are concerned, they are contained partly under sub-section (7) of section 11, sub-section (3) of section 13, sub-section (2) of section 14 in so far as Clause (a) of sub-section (1) is concerned, but not in case of Clause (b) of sub-section (1). Similarly, under sub-section (5) of section 16 the Arbitral Tribunal is to decide the plea raised under sub-section (2) or (3). Section 34 is the section which provides the circumstances under which an award can be challenged. Section 37(2) makes certain orders appealable accepting a plea referred to in sub-section (2) or (3) of section 16 and orders under section 17 granting or refusing to grant an interim measure under section 17. The anciliary question that has to be considered is what happens in respect of other matters wherein purportedly no remedy is provided for. Let me consider some situation. A situation can arise where one of the parties produces an agreement in writing that they have agreed for termination. The other party challenge the said agreement on the ground that it was produced by fraud, coercion or undue influence. If the proceedings are closed accepting the agreement there is no remedy provided for. Similarly, if the Court under sub-section (2) of section 14 decides the controversy erroneously what is the remedy of a party. Will the normal, remedy available against decisions of Courts be available or is the party left without remedy even though the Court has come to a wrong conclusion. Similarly, under section 25(a) if the Arbitral Tribunal holds that there is no sufficient cause when in fact cause has been shown and terminates the proceedings, what is the remedy available to a party at law?. If the Tribunal under sub-section (2) of section 32 wrongly terminates the arbitral proceedings, does the aggrieved party have no remedy, Similarly, under section 11(2) where finality is given to the decision of the Chief Justice or the person or institution designated by him, what happens if the decision is erroneous in law. In all these cases can it be said that there is no remedy available to the party in law and the proceedings stand closed on that count or such decisions are also awards and consequently can be challenged under section 34 of the 1996 Act. 9. In that light, what is the remedy at law, against orders terminating proceedings contrary to law. Section 5 provides that no judicial authority shall intervene except where so provided in Part I. Therefore, if there is an illegal order in terms of sub-section (7) of section 11 or for that matter under subsection (4) of section 13 or section 14(1)(b) or section 15(1)(b) or section 25(a) and/or section 32(2) is it the case that no judicial authority can intervene under the Act In the light of the above discussion, the matter may now be considered. 10. It was urged on behalf of the Union of India by the learned Additional Solicitor General that in the first instance it is the Court's duty to find out the remedy in the section itself. For that purpose it was sought to be pointed out that section 34 itself would be available. Section 34 to become available, it must be held that all such orders or decisions must amount either to ninterim or final award. Therefore, the expression order in section 32(2) must be read as an Award. There are requirements for an Award. Section 31 contemplates giving reasons for the award. An interim award can also made in respect of those matters in which a final award can be made. In

other words what this indicates is that an award like a decree is the final determination of the proceedings. This is made clearer by section 32, which speaks about the termination of arbitral proceedings either by the final arbitral award or by an order of the arbitral tribunal. The Act itself, therefore, contemplates that the proceedings stand terminated by the final arbitral award or by an order of the Arbitral Tribunal. Under sub-section (2) there is no decision on merits. The Legislature has chosen two distinct expressions in section 32 for closure of arbitral proceedings. These are situations where the proceedings come to an end before adjudication or in the course of. Take the example in the instant case. Proceedings have been closed in terms of section 25(a) for default of the parties in filing the claim statement. Section 25(a) perhaps can be read for the purpose of avoidance of conflict in section 32(2)(c). In case they are not so read but are read independently then they will be termination of proceedings under section 25(a) and section 32(2) respectively. Therefore, the arbitral proceedings are terminated not by virtue of an award, but by an order of the arbitral tribunal. Coming to the expression order again, the Act provides for appeal only against certain orders made under sub-section (2) of section 37. These are orders referable to sub-section (2) of (3) of section 16 accepting the plea. There is no appeal in the event the plea is rejected as the section itself provides that in such a case the matter can be challenged under section 34(2). What, therefore, is clear is that the decision accepting the plea that the Tribunal has no jurisdiction or is exceeding the scope of its authority is an order under section 37(2) which is appealable. Therefore, an order terminating the proceedings under sub-section (2) and (3) of section 16 is appealable. This makes the legislative intent more clear namely that an order even finally terminating the proceedings under sub-section (2) and (3) of section 16, is not an award and on the contrary if the plea is rejected it can be challenged when the award is being challenged." Therefore, only in respect of certain orders is a remedy provided. Under section 43(4) limitation is concerned. If the order accepting the plea of jurisdiction also amounted to an award there was no need to provide the remedy by way of an appeal under section 37(2). That order could have been challenged under section 34(2) as an award. The Legislature has chosen otherwise. What that means is that the expression "order" and "award" are distinct and different. One is termination of proceedings without deciding the merits of the matter, the other is termination on merits. Therefore, it is clear that looking at the Act itself there is no provision to challenge certain orders or decisions. 11. Let us consider a case where proceedings are terminated on account of the failure to file claims statement as in the present case. Under section 25(a) of the Act of 1996 the Arbitral Tribunal could terminate the proceedings if the petitioners herein had been unable to show sufficient cause. In the event the petitioner seeks to challenge the order on the ground that the material on record shows sufficient cause what is the remedy available to of a party. Will such a decision tantamount to an award under section 34 and consequently is the remedy under section 34(2) of the Act of 1996 available. Let us, therefore, proceed to examine whether in the Act itself the decision under section 25(a) itself provides for any relief against the decision by the Arbitral Tribunal. In terms of section 37 such

a decision is also not appealable as what is appealable, is only accepting the plea referred to in sub-section (2) or (3) of section 16 or an order granting or refusing an interim relief in terms of section 17. Under section 16(6) also no remedy is available as the issue as to whether the Tribunal has jurisdiction or that the Tribunal was exceeding the scope of its authority and in the event the plea had to be rejected could only be taken up in the event an award was passed. Can, therefore, it be said that the decision under section 25(a) constitute an award. Ordinarily, as suggested by the learned Additional Solicitor General it would be prudent to look into the provisions of the Act itself to find out the remedy. Therefore, it perhaps could have been held if possible that closing of proceedings under section 25(a) should be termed as an Award as the definition of an arbitral award under section 2(c) merely states that it includes an interim award. However, section 31 of the Act of 1996 speaks about the forms and contents of Arbitral Award. Sub-section (3) of section 31 requires that the Award must state the reasons. Sub-section (6) of section 31 provides that the Arbitral Tribunal can also make an interim award on any matter with respect to which it could have made a final Arbitral Award. This interpretation, however, stands, excluded in view of the express language contained in section 32 of the Act of 1996. Section 32 provides that the Arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2). In other words it is clear that the Act itself recognizes two methods by which the arbitral proceedings could be terminated one by passing of the final arbitral award and the other in terms of sub-section (2) of section 32 of the Act of 1996. Sub-section (2) of section 32 provides in what other cases other than the final Arbitral Award the proceedings can be terminated. In the instant case we are not concerned with sub-section (2)(a), (2)(b) but under sub-section (2)(c) where the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. To my mind this would include proceedings under section 25(a) as section 25(a) contemplates termination of arbitration proceedings if the tribunal comes to the conclusion that there is no sufficient cause. A harmonious construction of section 25(a) and 32(2)(c) would indicate that the termination of proceedings in section 25(a) can also be read with section 32(2)(c). Therefore, termination of proceedings under section 25(a) would be also termination of proceedings by an order. Even if it be not so what is the remedy available to a party in respect of an order passed under section 25(a) or section 32(2). Section 34 provides a remedy in so far as an award is concerned only. There is no remedy in so far as an order is concerned. Here also once again one must consider the issue pertaining to section 32(2). What would be the effect under section 32(2)(a) where the respondent objects to the order and the arbitral tribunal does not recognise a legitimate interest on his part in obtaining a final settlement of the dispute. Will such a decision be final? Similarly, under section 32(2)(c) when the Tribunal gives a finding that the continuation of the proceedings is necessary, will the order become final and incapable of challenge? What will be the effect of such an order? Considering section 5 which contemplates that in matters governed by Part I, no judicial authority shall intervene except where so provided. As pointed out earlier, once

it is held that an award is distinct from an order and that the order would not constitute an award in terms of section 31 the award cannot be challenged under section 34. Even if a wider interpretation is given to section 33 to include orders passed under section 32(2) the jurisdiction is limited to correction of errors in terms of sub-section 10(a) or to give an interpretation of a specific point or part of the award. This could only be in the event-there was some ambiguity in the award. Under sub-section (4) if there was a requirement to decide a claim then also the Arbitral Tribunal has jurisdiction. This could be only where the award passed had omitted a decision on a claim. Therefore, it is clear that the expression order and award are distinct and different and that the decision given under section 25(1)(a) is an order terminating the proceedings. 12. In the instant case as pointed out earlier the Arbitral Tribunal closed the proceedings under section 25(a). The order of the Arbitral Tribunal itself discloses in paragraph 11 that Shri D.A. Limaye was not a fellow of the Indian Institute of Architects and yet have come to the conclusion that the Arbitral Tribunal is duly constituted and it is within their jurisdiction to decide any matter under arbitration. In the instant case the claims statement was not filed. However, the petitioners had persistently pointed out to the respondent No. 1 the necessity for appointment of Arbitrator, who met with the necessary qualification. Under section 12 appointment of an Arbitrator could have been challenged if he did not possess the qualification agreed by the parties Under section 14 the mandate of the arbitrator terminates if he becomes de jure unable to perform his functions. There is no provision whereby a party could derogate or waive the said challenge as under section 34(3) an award could have been challenged on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement. Even assuming that they could derogate or had waived the objection under section 4, on the facts of this case that would not apply as the petitioners did not proceed with the arbitration. They had sought time to file the claims statement in view of other claims submitted to respondent No. 1. As referred to earlier, section 4 of the Act of 1996 is clear. In the event a party is aware that they can derogate from any provisions of Part I or any requirement under the arbitration agreement has not been complied with and yet proceed with the arbitration without stating their objection to such non-compliance without undue delay or, if a time limit is provided for stating that objections, within that period of time, is deemed to have waived the right to so object. The first question, therefore, is whether non-raising of objection to the appointment of Shri Limaye by respondent No. 1 can be said to have been waived by the petitioner herein. Alternatively can it be said that the petitioners had an opportunity of raising objections. This has a bearing, if, the objection to the appointment of an arbitrator, who is not duly qualified has been waived, then it would not be open to the petitioner to challenge his appointment on the ground that he was not duly qualified. For that purpose correspondence will have to be examined. By letter of 3rd December, 1996 addressed to the Secretary of the 1st respondent the petitioner expressed their happiness over the action of the respondent No. 1 in agreeing to their nominee as joint arbitrator. Then by letter of 7th December, 1996 the Secretary informed the petitioners that he had appointed Shri

Limaye as their Arbitrator. On 17th December, 1996 the petitioner informed the respondent No. 1 to appoint an arbitrator who was duly qualified. Letter dated 17th December, 1996 was in further reference to letter of 10th December, 1996. By letter of 19th December, 1996 the petitioners were informed by the respondent No. 1 that the final decision of appointment would be taken only after calling the Special General Body Meeting of the society. In response to the letter of 19th December, 1996 the petitioners by letter dated 28th December, 1996 again called on the Chairman/Secretary of the society to appoint as their nominee, a fellow of Indian Institute of Architects and to inform his full address at the earliest. Reference to appointment of duly qualified Arbitrator was again reiterated in the letter of the petitioners dated 8th January, 1997 addressed to the Chairman/Secretary of the petitioners. It seems that the respondent No. 1 in response to letter dated 28th January, 1997 by his letter of 8th February, 1997 consented to his appointments Arbitrator. By letter of February, 21, 1997 the two joint arbitrators appointed the respondent No. 4 as the 3rd arbitrator. The first preliminary meeting of the Arbitral Tribunal took place on 15th April, 1997. The next meeting was scheduled for 8th August, 1597 and 9th August, 1997. In the said preliminary meeting held on 15th April, 1997 the time table for filing claim statement, etc. was finalised. By letter of 15th May, 1997 the Tribunal was informed that the petitioner would not file their statement, but would file it after the events set out in the letter had been complied. Thereafter there was exchange of correspondence on account of non-filing of claims statement by the petitioner. By letter of 4th July, 1997 it was decided to call second meeting on 18th July, 1997 to hear both parties on the issues raised by the respondents. In their letter of 17th July, 1997 the petitioners sought one month's time to prepare their statement of claim. This was on account of the fact that they had referred some other claims for determination by the arbitral tribunal. On 18th July, 1997 the Arbitral Tribunal unanimously decided to terminate the proceedings. On that very day a letter dated 18th July, 1997 was written on behalf of the petitioners to point out that the 3rd respondent was not a fellow of Indian Institute of Architects. This letter has been considered by the Arbitral Tribunal in paragraph 10 of their decision. It is thus clear that the petitioners had called on the respondent No. 1 to appoint a duly qualified person as arbitrator. This fact was brought to the notice of the Arbitral Tribunal by letter of 18th July, 1997 as on 17th July, 1997 the petitioners had sought time to file their claims statement. In fact as can be seen from the first meeting after complying with the schedule of settlement, the Arbitral Tribunal was to meet some time on 8th August, 997 and 9th August, 1997. The Arbitral Tribunal, however, proceeded on the footing that the respondents were aware that Shri D.A. Limaye was not a fellow of Indian Institute of Architects. On these facts can it be said that this amounted to a waiver by the petitioner in terms of section 4(b) of the Act. To my mind it is not possible to accept that there has been a waiver as the petitioners had been constantly reminding the respondent No. 1 to appoint a person who was duly qualified. The proceedings were closed before the claim statement was filed even though on 17th July the petitioners had requested for time to file their claim statement on account of subsequent claims arising out

of the final bill being submitted. There is nothing on record to show that the petitioners were aware of the qualifications of the respondent No. 3. The Tribunal, therefore, as constituted was not in terms of the agreement the parties. Under section 12(3) appointment of Arbitrator could have been challenged if he did not possess the qualification agreed to between the parties at the earliest available opportunity. The challenge was made by letter of 18th July, 1997 received by the Arbitral Tribunal after a few days before their written decision supported by record. The decision of the Arbitral Tribunal does in fact disclose that Mr. Limaye was not qualified. In other words the 3rd respondent could not have been appointed as an Arbitrator in terms of the Agreement. In these circumstances I am of the considered view that there has been no waiver by the petitioners of their right to challenge the appointment of respondent No. 3. The composition of the Tribunal was, therefore, ex facie illegal, null and void. The 4th respondent had been appointed as the joint Arbitrator including by the 3rd respondent who was not duly qualified and consequently the appointment of 4th respondent would be illegal. What then is the effect of the decision of the Arbitral Tribunal terminating the proceedings. I have already set out as to what is the effect of a decision given by a tribunal which is the effect of a decision given by a tribunal which is not constituted according to the Act or the agreement between the parties. A tribunal constituted contrary to the provisions of the agreement or Act will be illegal and consequently its decision will be null and void. This is the view taken my me in Vinay Bufna v. Yogesh Mehta & others, in respect of arbitrations under statutory agreements. Though the provisions for arbitration therein was under bye-laws, I have accepted the contention that those are statutory bye-laws and hence subordinate legislation. I have, however, explained the difference between and distinguished a statutory bye-laws and a rule. The distinction is clearly brought about by Subba Rao, J., in Dr. A. Indramani Pyarelal Gupta and others v. W. K. Natu, . Apart from that distinction it must be remembered that Rules to have the force of law have to be tabled in the Legislature. Courts now normally reject the plea of excessive delegation on the ground that the rules made are subject to the control of the legislature. There is no such requirement of tabling for statutory bye-laws. Unlike statutory Bye-laws, Rules are usually made by the Government whereas bye-laws are made by local bodies or associations. It is in these circumstances that the provisions in the statutory contract of the Bombay Stock Exchange regarding the number of arbitrators, which was even, has been held to be contrary to section 10 of the Act of 1996, not being protected by section 2(4) of the Act of 1996. Section 2(4) of the Act of 1996 only protects inconsistent provisions in so far as the enactment and Rules are concerned, not Bye-laws. The expression enactment has been held to be an Act and does not include rules or bye-laws as section 2(4) of the Act of 1996 issues only the expression enactment and Rules but has omitted bye-laws. The said judgment I am informed is presently under appeal.
13. With this background we can now consider whether the present application is maintainable. As pointed out earlier in the cause title the petitioner has invoked various provisions of the Act. If the proceedings were pending before the Tribunal in the event the tribunal was improperly constituted it could have

been raised under sub-section (2) of section 16 not later than the submission of the statement of defence. The plea raised is a plea pertaining to jurisdiction. Jurisdiction as understood can include territorial jurisdiction, jurisdiction as to subject matter and the pecuniary jurisdiction of the tribunal. Under the Act this will also include composition of Tribunal under section 10 which includes their qualification as it constitutes a ground for challenge under section 12(3). This procedure is set out in Chapter III. An issue pertaining to composition of the tribunal would touch its jurisdiction to hear the matter. There is a specific provision to challenge the appointment of a tribunal under section 12(2)(c). It perhaps could have been argued that a plea as to jurisdiction ought to be raised within the time specified referred to, in which event if the plea is accepted there would be a remedy available to the party under section 37 and if the plea is rejected it will be open to the party to challenge the final award. In the instant case the plea of jurisdiction is not that, the tribunal has no jurisdiction in respect of the subject matter. The plea is regarding a member of the Arbitral Tribunal functioning as an Arbitrator. It could be argued that sections 12, 13 and 14 could be telescoped into section 16 which forms a part of Chapter IV. However, this is excluded by section 14(2), where a remedy is provided to refer the matter to the Court for decision. It is, therefore, not possible to read Chapter III and Chapter IV together. We are here concerned with a decision under section 25(a) or under section 32(2)(c). Must a party be rendered remediless in such a situation or is it open to this Court to consider the challenge to the order, closing the proceedings and if so under what provisions of law. 14. On behalf of the petitioners it was contended that this Court can suo motto exercise jurisdiction. Such suo motto exercise of jurisdiction can only be under section 151 of C.P.C. to exercise its inherent jurisdiction. In so far as suo motto exercise of power is concerned, the learned Counsel placed reliance on the judgment of the Division Bench of this Court in the case of Union of India v. M/s. Ajit Mehta and Associates, Pune and others, and more specifically from paragraphs 29 onwards. In that case the provisions of the Act of 1940 was under consideration. The issue was whether the Court on an application under section 17, even though the award had not been challenged or if challenged where no grounds of challenged had been taken could set aside an award if the party had not raised it as an objection in the petition. A Division Bench of this Court after considering the case law in the matter held, that the exercise of suo motto power in such cases is not disapproved by the Apex Court and the said view can be said to have been modified only to this extent that when the grounds for setting aside the award fell within section 30 of the Act the Court has no power to act suo motto. Thereafter proceeding further and considering certain observations of the Apex Court in paragraph 32 this Court observed that considering the judgment of the Apex Court in Madan Lal v. Sunder Lal and Union of India v. Om Prakash the suo motu power of the Court ore saved, but the suo motu powers of the Court arc saved, but the suo motu powers can be exercised for setting aside awards which are otherwise patently illegal or void and that such grounds can be outside the purview of section 30(c) of the Act of 1940. This argument, to my mind, is of no consequence as in those cases the Court was seized of the

matter pursuant to an application under section 17 of the Act of 1940. The award had to culminate into a decree. That could be done only an application under section 17 or in the event of a challenge to the Award under the rules framed for passing a decree. In the present case as pointed out earlier section 5 of the Act of 1996 makes it clear, that no judicial authority which would include courts, can intervene excerpt where so provided in this Part. Therefore, unless there is a remedy provided under the Act it would be impossible to accept the plea that this Court can exercise its suo motu powers which in the present case would mean its inherent powers. Once the Act expressly excludes judicial interference it will be impossible to exercise the powers under section 151 of the Code of Civil Procedure. 15. It is true that there is no provision under the Act of 1996 whereby the jurisdiction of the Civil Court is excluded in respect of any matter which is subject matter of arbitration agreement. Section 42 of the Act of 1996 only sets out that where an application has been made under Part I to the Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and arbitral proceedings shall be made in that Court and no other Court. Section 8 of the Act of 1996 provides that a judicial authority before whom an action is brought in a manner which is the subject of an arbitration agreement in the event the party applies not later than submitting his first statement on the substance of the dispute, shall refer the parties to arbitration. Sub-section (3) of section 8 sets out that notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made. In other words it is clear that the ordinary remedy by way of a suit is not taken away. The only restriction if and at all is if a party invokes the arbitration clause before a Court, then that Court alone will have jurisdiction in the matter and no other Court. We are, however, concerned with a case where the Arbitral proceedings were commenced and closed on the ground that the claimant has failed to communicate his statement within a reasonable time. Such an order cannot be said to be non est. In other words it is a case where a party after invoking the arbitration clause has his claim rejected because the statement was not filed. In view of section 42 will a Civil Court other than the Court where the arbitral proceedings were commenced have jurisdiction. It may be true that in so far as the competence of the tribunal in certain cases which may be without jurisdiction or non est a suit may still lie for declaration that the order or decision is nullity and for other reliefs. That, however, is no answer to a case where Arbitral Tribunal has exercised jurisdiction and closed the proceedings under section 25(a). If section 42 is considered then it is the same Court which will have jurisdiction. What will be the relief that such a Court can give and under which provisions of the Arbitration Act? The entire exercise is because no remedy can be prima facie discernible. Even if it be held that in a civil suit a declaration can be sought, that the orders are nullities the time taken before the Arbitral Tribunal will not be saved by section 43 of the Act of 1996. Even otherwise once party takes recourse to Arbitral proceedings surely in respect of the same relief in the Civil Court will not be possible. To my mind, therefore, in

a case where arbitral proceedings have been closed when the order itself ex facie does not amount to a nullity the remedy of civil suit may not be available. 16. That leave us with the provisions of section 11 of the Act of 1996. Even here we are confronted with the issue as to what happens on failure by the Chief Justice or any person or institution designated by him to refer the matter to arbitration or to appoint an arbitrator. There is no remedy provided, as sub-section (7) of section 11 makes the decision final. If the Tribunal is held to be a non-statutory Tribunal, even no writ can go to such a tribunal. When the Chief Justice or any person or institution designated by him exercises jurisdiction what is the capacity in which they are exercising jurisdiction. Can it be said that the Chief Justice is a person designata under the Act. If so what is the remedy. Similarly, in respect of persons or institutions merely because the power may be vested in high functionaries, can it exclude judicial review. In the event the Arbitral Tribunal is held to be a statutory tribunal then a writ can go even in cases where there is a finality clause. In other words even when there are provisions of making an order final the position is that writs can still be issued by the courts provided the writ can go to the authority, person or tribunal. Therefore, section 11 by itself may not be an answer for holding that it is the section which provides the remedy, wherein the Chief Justice or the person or institution designated by him can decide whether the decision is a nullity whilst considering the application for reference or appointment of Arbitrator and thereafter refer the matter to arbitration. It is in these circumstances that the Court will have to consider whether the extra ordinary remedy by way of Article 226 or 227 of the Constitution in such situation would be available notwithstanding the object of the Act to reduce the supervision of the courts in matters pertaining to arbitration. 17. The question that will arise is whether this Court can exercise its extra ordinary jurisdiction under Article 226 of the Constitution or Article 227. Article 227 is the power of superintendence of this Court over tribunals. For that purpose it will have to be examined whether the Arbitral Tribunal as constituted under the Act of 1996 is a tribunal over which this Court would have supervisory jurisdiction. The other aspect of the matter would be to consider whether the Arbitral Tribunal would come under the expression of "other person" and as such a writ could be issued to such person or authority under Article 226. Before proceeding to examine the matter it would be advisable to consider some judgments of the Apex Court in so far as appointment of Arbitrators are concerned. At this outset let me make it clear that a distinction has been drawn between a statutory tribunal and a tribunal appointed by consent of parties. It is in that context the need to examine the decisions rendered under section 10-A of the Industrial Disputes Act, 1947. The first such judgment before section 10(A) was amended is in the case of Engineering Mazdoor Sabha and another v. Hind Cycle Ltd., . The question before the Apex Court was whether against an award by an Arbitrator appointed under section 10-A of the I.D. Act, an appeal could lie to the Apex Court under Article 136. An appeal lies only from order of courts or tribunals. The question was whether the Arbitrator appointed under section 10-A was a Tribunal. Gajendragadkar, J., as the learned Chief Justice then was, observed as under :– "Article 226 under which a

writ of certiorari can be issued in an appropriate case, is, in a sense, wider than Article 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of Courts or tribunals. Under Article 226(1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore, even if the arbitrator appointed under section 10-A is not a tribunal under Article 136 in a proper case, a writ may lie against his award under Article 226." The next judgment is in the case of Rohtas Industries Ltd. and another v. Rohtas Industries Staff Union and others, . Reference was made under section 10-A of the Industrial Disputes Act, 1947. An award came to be passed. The said Award when challenged before the High Court of Calcutta was rejected in so far as denial of wages during the strike period. However, the Court quashed part of the award which directed payment of compensation by the workers to the management. The company came in appeal against the said judgment. Before the Apex Court various challenges were raised. We are concerned with the first challenge which was formulated as under :– "An award under section 10-A of the Act saviours of a private arbitration and is not amenable to correction under Article 226 of the Constitution." To the same argument there was an additional argument which ran as under :– "Even if there be jurisdiction, a discretionary desistance from its exercise is wise, proper and in consonance with the canons of restraint this Court has set down." While answering the said issue the Apex Court has observed as under :— "The expansive and extraordinary power of the High Courts under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person even a private individual and be available for any (other) purpose, even one for which another remedy may exist. The amendment to Article 226 in 1963 inserting Article 226(1-A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to the residence of such person." The Court examined the judgment in Engineering Mazdoor Sabha and thereafter proceeded to answer as under :– "We agree that the position of an arbitrator under section 10-A of the Act (as it then stood) vis a vis Article 227 might have been different. Today, however, such an arbitrator has power to bind even those who are not parties to the reference or agreement and the whole exercise under section 10-A as well as the course of the force of the award on publication derives from the statute. It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory tribunals amenable to judicial review. This observation made en passant by us is induced by the discussion at the bar and turns on the amendments to section 10-A and cognate provisions like section 23, by Act XXXVI of 1964." Relying on these judgments it was sought to be argued that the Arbitral Tribunal under the Act of 1996 would be such other person to whom a writ could go under Article 226 of the Constitution. Before proceeding to consider that aspect of the matter, it is essential to refer to the subsequent judgment of the Apex Court in the case of Raipur Development Authority etc. etc. v. M/s. Chokhamal Contractors etc. etc., . The judgment of Rohtas Industries came up for consideration before the

Apex Court in the case of Raipur Development Authority (supra). It was sought to be contended that under the Act of 1940 the Arbitrators were bound to give reasons as that was a requirement of natural justice and in the event reasons were not given the Award was liable to be remitted or set aside. In other words the Apex Court was called upon to consider the question whether an arbitrator appointed under the Act of 1940 was exercising quasi judicial powers and as such on failure to give reasons the award was liable to be set aside. Reliance was also placed in the case of Rohtas Industries. The same was distinguished by the Apex Court by observing as under :– "A distinction was thus made between statutory arbitrations under section 10-A of the Industrial Disputes Act and private arbitrations. It is not necessary to refer to the other cases cited before us which have a bearing on section 10-A of Industrial Disputes Act, 1947." What is important to bear in mind are the following observations in para 37 of the judgment, which are reproduced herein below:– "There is however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and Governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and requires to act in accordance with law with their concomitant obligations for reasoned decisions are not attracted to a Private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power." It is thus clear from the said judgment that the Apex Court came to the conclusion that trappings of a body which discharges judicial functions and requires to act in accordance with law with their concomitant obligations for reasoned decisions are not attracted to a private adjudication of the nature of arbitration as the latter is not supposed to exert the State's sovereign judicial power. Before proceedings further it will also be necessary to refer to the judgment relied upon by the respondents in the case of Smt. Rukmanibai Gupta v. Collector, Jabalpur and others, . In that case the question before the Apex Court was that in case of a Governmental contract, if there were difference or dispute the matter was left to the State for its final decision. It was held that such a clause was a clause of arbitration. A petition came to be filed challenging the said award under Article 226 of the Constitution of India. The High Court dismissed the writ petition on the ground that the award could not be challenged by way of Article 226 but only under the provisions of the Arbitration Act. While answering the question in paragraph 10 the Apex Court held that the reliefs sought by the appellant by invoking the extra ordinary jurisdiction of the High Court under Article 226 could have been obtained by proceeding in accordance with the relevant provisions of the Arbitration Act. In that situation, if the High Court had declined to entertain the writ petition, no exception could be taken to it as the writ jurisdiction of the High Court under Article 226 of the Constitution is not intended to facilitate avoidance of obligation voluntarily incurred. Therefore, considering the above judgments can it still be said that this Court can exercise the extra ordinary jurisdiction under Article 226. As pointed out earlier, a writ can go to any person or authority. Under the Act of 1940 arbitrations under the Arbitration Act, 1940 have been held to be in the nature of private arbitrations and not in exercise of the State's sovereign judicial power. A distinction has been made

between the provision for statutory arbitration and for private arbitration. Does the Act of 1996 make any distinction in so far as this aspect is concerned. If the Act is in para materia with the Act of 1940 in that event it will not be possible to hold that a writ could go under Article 226 of the Constitution. To my mind the Arbitration & Conciliation Act, 1996 has made a departure and an Arbitral Tribunal under the Act of 1996 can be said to be a person if not a tribunal to whom a writ could go. Even in Engineering Mazdoor Sabha (supra) the Apex Court noted that the arbitration under section 10-A is different from a private arbitration. The following observations in para, 16 are relevant :– "(16) It may be conceded that having regard to several provisions contained in the Act, and the rules framed thereunder, an arbitrator appointed under section 10-A cannot be treated to be exactly similar to a private arbitrator to whom a dispute has been referred under an arbitration agreement under the Arbitration Act. The arbitrator under section 10-A is clothed with certain powers, his procedure is regulated by certain powers, his procedure is regulated by certain rules and the award pronounced by him is given by statutory provisions a certain validity and a binding character for a specified period. Having regard to these provisions, it may perhaps be possible to describe such an arbitrator, as in a loose sense, a statutory arbitrator and to that extent, the argument of the learned Solicitor General may be rejected. But the fact that the arbitrator under section 10-A is not exactly in the same position as a private arbitrator, does not mean that he is a tribunal under Article 136. Even if some of the trappings of a 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. As we will presently point out, he is appointed by the parties and the power to decide the dispute between the parties who appoint him is derived by him from the agreement of the parties and from no other source. The fact, that his appointment once made by the parties is recognised by section 10-A and after his appointment he is clothed with certain powers and has thus, no doubt, some of the trappings of a Court, does not mean that the power of adjudication which he is exercising is derived from the State and so, the main test which this Court has evolved in determining the question about the character of an adjudicating body is not satisfied. He 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. His position, thus, may be said to be higher than that of a private arbitrator and lower than that of a tribunal. A statutory Tribunal is appointed under the relevant provisions of a statute which also compulsorily refers to its adjudication certain classified classes of disputes. That is the essential feature of what is properly called statutory adjudication or arbitration. That is why we think the argument strenuously urged before us by Mr. Pai that a writ of certiorari can lie against his award is of no assistance to the appellants when they contend that such an arbitrator is a Tribunal under Article 136." The reasons are as under :— Reading of section 8 with section 5 of the Act of 1996 in cases where there is an arbitration agreement, no judicial authority can intervene except when so provided in the Act. The jurisdiction is exclusive. Section 10 controls

the composition of the Arbitral Tribunal. Section 16 confers a power upon the tribunal to decide on its own jurisdiction. Section 17 has conferred a power on the tribunal to make an order as an interim measure for protection of the subject matter of a dispute. Under section 37 such an order granting or rejecting interim relief is subject to appeal to the Court. Under sub-section (4) of section 19 the Arbitral Tribunal has been given power to determine the admissibility, relevance, materiality and weight of any evidence. Under section 25 the tribunal can terminate the proceedings if claims statement is not filed within the time stipulated under section 23 and if no sufficient cause is shown. Under proviso to section 24(1) the Tribunal is bound to grant oral hearing on request by the parties. More important is sub-section (5) of section 27 if persons are guilty of any contempt of the Arbitral Tribunal during the conduct of arbitral proceedings they are subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the Arbitral Tribunal as they would incur for like offences in suits tried before the Court. In the Act of 1940 there was no specific reference to contempt of arbitral tribunal which has been conferred by section 27 of the Act of 1996. Once a person can be punished for contempt of the tribunal, which can be done where the Act tends to bring the administration of justice into disrespect or interference with the administration of justice, shows that such a tribunal discharges the inherent judicial functions of the State. By virtue of section 36 the Award is deemed to be a decree which can be enforced under the Act unlike the Act of 1940 when it had to be made a decree by the order of the Court. Under section 37(2), an appeal is provided for against certain orders made by the Arbitral Tribunal. In other words its orders are appealable. To my mind on consideration of those provisions even if it be held that the tribunal is not a tribunal within the meaning of Article 226 of the Constitution, it would nevertheless be a person to whom a writ could go under Article 226 of the Constitution. I am, therefore, clearly of the opinion that where a remedy is not available to an aggrieved person and considering section 5 of the Arbitration Act of 1996 this Court can exercise its extra ordinary jurisdiction under Article 226 of the Constitution. In passing 1 may mention that this exercise had to be undergone in view of non-availability of remedy to aggrieved parties. It is true also that one of the objectives of the Act of 1996 is to minimise the supervisory role of courts. On the other hand proceedings in arbitration involve the civil rights of the parties. It is a cardinal principle of our jurisprudence that no man should be left without a remedy. Judicial review cannot be made dependent on men who pass orders. Hierarchy of courts is an answer to that. Having so held the question is whether on the fact of the present case this Court should interfere with the decision of the Tribunal. As pointed out earlier the Arbitral Tribunal had to consist of arbitrators duly qualified. Admittedly, Shri Limaye could not have sat on the tribunal as he did not have the qualification for being appointed. Therefore, the tribunal wherein Shri Limaye was party would be a tribunal without jurisdiction. As held by the Apex Court in the case of Kiran Singh and others v. Chaman Paswan and others, a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or

relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. In the instant case even assuming that there could have been a waiver, as already held, the objection was not waived and consequently the composition of the tribunal being contrary to law was without jurisdiction and hence decision given to terminate the proceedings by order dated 18th July, 1997 culminating into the decision of 1st August, 1997 will have to be quashed and set aside on that count. 19. That leaves us with the other objection in so far as the jurisdiction of this Court to decide the petition on the ground of territorial jurisdiction. It was sought to be contended that the dispute arises from a claim falling outside the territorial jurisdiction of this Court. I have referred to various correspondence exchanged. In the agreement itself the reference was made to a place within the jurisdiction of this Court. The place for the purpose of service of notice of the arbitration proceedings was within the jurisdiction of this Court. The correspondence exchanged between the parties and which is on record shows that it was addressed to 108, Standard House, Maharshi Karve Road, Bombay-400 002. In the light of that it is not possible to accept the plea of the respondents that this Court would have no jurisdiction. Even otherwise having held that it is only the extra ordinary jurisdiction of the Court under Article 226 which is available, this Court would have jurisdiction in the matter and consequently that contention has also to be rejected. 20. It is true that in the normal assignment of work petitions under Article 226 of the Constitution would not have ordinarily come to this Court. However, matters pertaining to Arbitration Acts have to be decided by this Bench. After observing the provisions of the Arbitration Act, 1996 I have come to the conclusion that a writ can go to Arbitral Tribunal being other person. In the light of that the following order :– (i) The order dated 18th June, 1997 recorded in the Minutes of the said date and the decision dated 1st August, 1997 communicated vide letter dated August 6, 1997 are quashed and set aside. (ii) Rule made absolute in the aforesaid terms. (iii) There shall be no order as to costs. 21. Rule made absolute