

M.P. HOUSING AND INFRASTRUCTURE DEVELOPMENT A
BOARD & ANR.

v.

K.P. DWIVEDI

(Civil Appeal No. 6768 of 2021) B

DECEMBER 03, 2021

[M. R. SHAH AND B.V. NAGARATHNA, JJ.]

Madhya Pradesh Madhyastham Adhikaran, 1983 – ss. 7 and 19 – Reference Petition and Revision Petition – Contract for construction of houses was executed between appellants and respondents – Dispute arose between the parties as regard to extension of time for completion of work – Appellant rescinded the contract – Respondent filed writ petition before the High Court – The High Court by order dated with consensus of both the parties appointed an arbitrator i.e. Housing Commissioner – The Arbitrator passed an award dated 07.11.2008 rejecting the claim of the respondent and granted relief to the appellant – Instead of challenging the said award u/s. 34 of the Arbitration and Conciliation Act, 1996, the respondent filed fresh reference petition before M.P. Arbitration Tribunal u/s. 7 of the 1983 Act – M.P. Arbitration Tribunal by order dated 27.02.2017 dismissed the claim of the respondent as not maintainable since the claim was already decided by the Arbitrator and the award had achieved finality – Respondent then filed Arbitration Revision Petition before the High Court u/s. 19 of the 1983 Act, which was allowed by the High Court and Tribunal was directed to decide the reference/claim in accordance with law – On appeal, held: The order passed by the High Court referring dispute to the Arbitrator was a consent order – The respondent-contractor participated in the arbitration proceedings by submitting claim is binding on the parties by ‘issue estoppel’ – The award passed by the Arbitrator was not challenged and it has attained finality – As per s.19 of the 1983 Act, revision application is maintainable only against the award passed by the Arbitral Tribunal – In the instant case, the Arbitral Tribunal had not passed any award – Even the High Court had not set aside the award passed by the arbitrator – Technically, award passed by the arbitrator stands – It is binding between the parties – Thus, the

- A *impugned judgment and order passed by the High Court in the Arbitration Revision petition is quashed and order passed by the Arbitral Tribunal dated 27.02.2017 is restored.*

Allowing the appeals, the Court

- B **HELD:** 1. The case of the respondent – contractor that the earlier order passed by the High Court dated 20.08.2008 passed in Writ Petition No.9131 of 2008, referring the dispute between the parties for adjudication to the Arbitrator – Housing Commissioner and thereafter the award declared by the Arbitrator – Housing Commissioner dated 07.11.2008 are non-est and void
- C and therefore, it was open for the contractor to file a fresh reference petition before the Arbitral Tribunal under Section 7 of the 1983 Act, cannot be accepted for the following reasons: (i) It was the respondent – contractor who approached the High Court by filing Writ Petition No.9131 of 2008 submitting that he has invoked the arbitration clause; (ii) The order passed by the High Court dated 20.08.2008 passed in Writ Petition No.9131 of 2008 referring the dispute between the parties to the Arbitrator – Housing Commissioner was a consent order; (iii) Thereafter the respondent – contractor submitted the claims before the learned Arbitrator – Housing Commissioner; (iv) The learned Arbitrator – Housing Commissioner passed an award which has attained the finality; (v) That the review petition filed by the contractor for clarification of the order dated 20.08.2008 passed in Writ Petition No.9131 of 2008 to clarify the aforesaid order to the extent that it did not take away the right of the contractor to file the reference petition before the Arbitral Tribunal under the 1983 Act came to be rejected and the same also attained finality; (vi) The claims submitted before the Arbitrator – Housing Commissioner; before the High Court in Writ Petition No.9131 of 2008; and the claim submitted in Reference Petition before the Arbitral Tribunal under the 1983 Act are the same without any change; (vii) In the subsequent reference petition before the Arbitral Tribunal under the 1983 Act there was no reference to the earlier order passed by the High Court in Writ Petition No.9131 of 2008 referring the dispute between the parties for adjudication to Arbitrator – Housing Commissioner and the award

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passed by the Arbitrator – Housing Commissioner. Thus, there was a suppression on the part of the respondent – contractor; (viii) The order passed by the High Court dated 20.08.2008 passed in Writ Petition No.9131 of 2008 referring the dispute between the parties for adjudication to the Arbitrator – Housing Commissioner as such was a consent order and thereafter the contractor participated in the arbitration proceedings before the Arbitrator – Housing Commissioner by submitting the claim is binding between the parties on the ground of ‘issue estoppel’. [Para 14][1101-G-H; 1102-A-H; 1103-A]

2. Apart from the fact that the award declared by the Arbitrator – Housing Commissioner was not challenged by the respondent – contractor, even, so long as the said award is not challenged before the higher forum the same is binding between the parties. Even the award or a nullity order has to be challenged before the appropriate forum/higher forum. In the present case it cannot be said that there was a total lack of jurisdiction of the Arbitrator – Housing Commissioner in passing the award as it was the High Court who passed the order with consent referring the dispute between the parties for the adjudication to the Arbitrator – Housing Commissioner. Therefore, unless and until it was challenged by the contractor before the higher forum, the respondent – contractor cannot be permitted to ignore and/or to avoid the award passed by the Arbitrator – Housing Commissioner dated 07.11.2008. [Para 16][1103-C-E]

3. Even otherwise, it is required to be noted that what was filed before the High Court was the revision application filed by the contractor under Section 19 of the 1983 Act rejecting the reference petition as not maintainable. Therefore, as per Section 19 of the 1983 Act, Revision Application to the High Court shall be maintainable only against the award passed by the Arbitral Tribunal. Therefore, *prima facie* it appears that as such the order passed by the Arbitral Tribunal rejecting the reference petition was not maintainable as by order dated 27.02.2017, no award was passed by the Tribunal. However, as no such objection was raised before the High Court and no submission has been made by the parties, we rest the matter there. [Para 17][1103-E-F; 1104-E-G]

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- A **4. Even otherwise it is required to be noted that while passing the impugned judgment and order, the High Court has not set aside the award passed by the Arbitrator - Housing Commissioner dated 07.11.2008. Therefore, technically speaking the award passed by the Arbitrator – Housing Commissioner dated 07.11.2008 stands even today. It is binding between the parties.**
- B **So long as the award passed by the Arbitrator – Housing Commissioner dated 07.11.2008 stands, there cannot be any subsequent fresh proceeding with respect to the same claims which were considered and adjudicated by the Arbitrator – Housing Commissioner while passing the award dated 07.11.2008.**
- C **So long as the said award stands it is binding between the parties.**
[Para 18][1104-G-H; 1105-A-B]
- 5. Even otherwise it is required to be noted that no objection was raised by the respondent – contractor before the Arbitrator – Housing Commissioner on the jurisdiction of the**
- D **Housing Commissioner to act as an Arbitrator. On the contrary, the order passed by the High Court referring the dispute between the parties for adjudication to the Arbitrator – Housing Commissioner was a consent order and the respondent contractor conceded to and accepted the said order and submitted his claim before the Arbitrator – Housing Commissioner. The Arbitrator – Housing Commissioner also passed an award on the said claim. Therefore, as no objections were raised by the respondent – contractor at the appropriate stage, the award cannot be annulled subsequently. At the cost of repetition, it is observed that at no point of time the respondent – contractor had challenged the award**
- F **passed by the Arbitrator - Housing Commissioner and even no court has set aside the award declared by the Arbitrator – Housing Commissioner dated 07.11.2008 and the same has attained finality. Therefore, the same is binding between the parties. Hence, the subsequent fresh reference petition before the Arbitral Tribunal under the 1983 Act for the very same claims which were raised before the Arbitrator – Housing Commissioner would not be maintainable at all. This Court agrees with the view taken by the Arbitral Tribunal. [Para 19][1105-B-F]**

Madhya Pradesh Rural Road Development Authority and Another vs. L.G. Chaudhary Engineers and Contractors, (2018) 10 SCC 826 : 2018 (5) SCALE 103; Hope Plantations Ltd. vs Taluk Land Board, Peermade and Another, (1999) 5 SCC 590 : [1998] 2 Suppl. SCR 514; Bhanu Kumar Jain vs Archana Kumar and Another, (2005) 1 SCC 787 : [2004] 6 Suppl. SCR 1104; Pushpa Devi Bhagat (D) Th. LR. Sadhna Rai (Smt.) vs. Rajinder Singh & Ors., (2006) 5 SCC 566 : [2006] 3 Suppl. SCR 370; Rafique Bibi (Dead) By Lrs. vs. Sayed Waliuddin (Dead) by LRs and others, (2004) 1 SCC 287 : [2003] 3 Suppl. SCR 100; M.P.Road Development Authority and Anr. vs. L.G. Chaudhary Engineers & Contractors reported in (2012) 3 SCC 495 : [2012] 2 SCR 162; M.P. Rural Road Development Authority and Anr. vs. L.G. Chaudhary Engineers & Contractors reported in (2018) 10 SCC 826: 2018 (5) SCALE 103; Viva Highways Ltd. vs. MP Rural Road Development Corporation Ltd. I.A.No.14 of 2017 decided by the Full Bench of Madhya Pradesh High Court; M/s Essel Infra Projects Ltd. vs. The State of MP in Civil Appeal No.4250 of 2018 decided by the Supreme Court of India; Hindustan Zinc Ltd. vs. Ajmer Vidyut Vitran Nigam Ltd., (2019) 17 SCC 82: [2019] 15 SCR 113 – referred to.

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Case Law Reference

[1998] 2 Suppl. SCR 514	referred to	Para 6.6	
[2004] 6 Suppl. SCR 1104	referred to	Para 6.6	
[2006] 3 Suppl. SCR 370	referred to	Para 6.7	
[2003] 3 Suppl. SCR 100	referred to	Para 6.7	
[2012] 2 SCR 162	referred to	Para 8.2	
[2019] 15 SCR 113	referred to	Para 8.6	

- A CIVIL APPELLATE JURISDICTION: Civil Appeal No.6768 of 2021.

From the Judgment and Order dated 08.05.2018 of the High Court of Madhya Pradesh, Main Seat Jabalpur in Arbitration Revision No.13 of 2017.

- B With

Civil Appeal Nos. 6769 and 6770 of 2021.

Bharat Singh, AAG, Arjun Garg, Ms. Sagun Srivastava, Advs. for the Appellants.

- C Kavin Gulati, Sr. Adv., Anuj Tyagi, Ms. Maitry Kakade, Advs. for the Respondent.

The Judgment of the Court was delivered by

M. R. SHAH, J.

- D 1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 08.05.2018 passed by the High Court of Madhya Pradesh in Arbitration Revision Nos.11, 12 & 13 of 2017 by which the High Court has quashed and set aside the orders passed by the Madhya Pradesh Arbitration Tribunal, Bhopal and has directed the said Tribunal

- E to decide the respective references on merits, Madhya Pradesh Housing and Infrastructure Development Board and another have preferred the present appeals.

2. As common question of law and facts arise in these group of

- F appeals, all these appeals are decided and disposed of together by this common judgment and order.

For the sake of convenience Civil Appeal No.6768 of 2021 arising out of Special Leave Petition No.32557 of 2018 arising out of the impugned judgment and order passed by the High Court of Madhya Pradesh in Arbitration Revision No.13 of 2017 is treated and considered as the lead

- G matter and the facts in the said appeal are narrated which in nutshell are as under:

2.1 Appellants floated a tender for construction of houses at Riviera Town, Near MANIT Square, Bhopal. Contract was awarded to the respondent herein. An agreement dated 15.07.2005 was executed

- H between the appellants and the respondent. In the year 2008, the disputes

arose between the parties. According to the appellants, the respondent was supposed to complete the work within 18 months. However, despite granting repeated extensions, the contractor failed to complete the work, on account of which, appellants rescinded the contract by invoking clause 3 of the contract agreement. Aggrieved by the order dated 30.06.2008, rescinding the contract, the respondent - contractor by invoking clause 29 of the contract agreement filed a claim petition along with granting extension of time upto 31.03.2009 before the Deputy Housing Commissioner, Bhopal. The respondent - contractor also filed a writ petition before the High Court seeking direction to permit him to complete the work. High Court vide Order dated 20.08.2008 disposed of the said petition on a joint consensus of the parties that the dispute shall be decided by the arbitrator i.e., Housing Commissioner, M.P. Housing Board within the stipulated period. The respondent - contractor thereafter filed a modified claim before the Office of the Housing Commissioner along with prayer for grant of extension of time. Thus, the respondent - contractor participated in the arbitration proceedings before the Housing Commissioner, M.P. Housing Board. That the learned Arbitrator passed an award on 07.11.2008 rejecting the claim of the respondent - contractor and granting some relief in favour of the appellants. Instead of challenging the said award by way of an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act, 1996'), the respondent filed a fresh Reference Petition before the Madhya Pradesh Arbitration Tribunal under Section 7 of the Madhya Pradesh Madhyastham Adhikaran, Vindhyaachal, Bhopal, (hereinafter referred to as 'the 1983 Act'). The appellants filed their written statements on various grounds along with preliminary objections including that the dispute has already been decided by the Arbitrator vide award dated 07.11.2008 which was duly constituted by the High Court and therefore, the fresh claim petition for the same claim before the M.P. Arbitration Tribunal, Bhopal was not maintainable. It was also submitted that the award passed by the Arbitrator had already achieved finality and therefore, the dispute for the said claim cannot be entertained by the Tribunal subsequently. Vide order dated 27.02.2017 the learned M.P. Arbitration Tribunal, Bhopal dismissed the said claim/reference as not maintainable since claim made by the respondent had already been decided by the Arbitrator appointed by the High Court and the award passed by the learned Arbitrator had achieved finality and so the dispute for the said claim could not be entertained by the learned Tribunal subsequently.

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- A 3. Having realized that the earlier order dated 20.08.2008 passed in W.P. No.9131 of 2008 by which the dispute was referred for arbitration to the Housing Commissioner would come in his way, as an afterthought, the respondent - contractor filed a review petition in the month of May, 2017 seeking clarification of the order dated 20.08.2008 passed in W.P. No.9131 of 2008 to the extent that by directing the adjudication of the dispute by the Housing Commissioner, it did not take away the jurisdiction of learned Arbitral Tribunal constituted under the 1983 Act. It appears that in the mean time the full Bench of the High Court of Madhya Pradesh vide judgment and order dated 05.05.2017 held that if an agreement falls within the definition of 'works contract' then the dispute arising from such an agreement shall be adjudicated by the Tribunal under the 1983 Act. The review application was opposed by the appellants. Vide order dated 07.09.2017, the High Court dismissed the review petition by observing that the case did not fall within the review jurisdiction of the Court under Order 47 Rule 1, CPC.
- D 3.1 That after the dismissal of the review petition, the respondent - contractor filed the present Arbitration Revision Petition before the High Court under Section 19 of the 1983 Act challenging the order passed by the learned Tribunal dated 27.02.2017 dismissing the claim/reference as not maintainable. By the impugned judgment and order the High Court has allowed the said revision and has quashed and set aside the order passed by the learned Tribunal dated 27.02.2017 and has directed the learned Arbitral Tribunal constituted under the 1983 Act to decide the reference/claim on merits and in accordance with law.
- F 4. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, M.P. Housing and Infrastructure Development Board has preferred the present appeal.
- G 5. Shri Bharat Singh, learned AAG has appeared for the appellants and Shri Kavin Gulati, learned Senior Advocate has appeared for the respondent - contractor in the respective appeals.
- H 6. Shri Bharat Singh, learned counsel appearing on behalf of the appellants has vehemently submitted that the impugned judgment and order passed by the High Court quashing and setting aside the order passed by the learned Arbitral Tribunal dated 27.02.2017 by which the learned Arbitral Tribunal dismissed the reference/claim petition filed by the respondent - contractor as not maintainable, in view of the earlier award passed by the learned Arbitrator and directing the learned Arbitral

Tribunal to entertain the claim reference and to decide the same on A merits is unsustainable in law as well as on facts.

6.1 It is urged by learned counsel appearing on behalf of the appellants that the High Court while passing the impugned judgment and order has not at all appreciated and considered the fact that earlier the dispute between the parties was referred to the Arbitrator- Housing Commissioner by the High Court and that too in the petition filed by the respondent - contractor himself. It is submitted that the High Court has not at all appreciated the fact that as such the learned Arbitrator appointed pursuant to the order passed by the High Court had passed an award which had attained finality inasmuch as the said award had not been challenged by the respondent – contractor by way of appeal under Section 34 of the Arbitration Act, 1996. B C

6.2 It is contended that the learned Arbitrator had passed an award and the only remedy available to the respondent - contractor was to challenge the same by way of an appeal under Section 34 of the Arbitration Act, 1996, which remedy the respondent - contractor had failed to avail. D It is submitted that instead he filed a fresh claim petition before the learned Arbitral Tribunal constituted under the 1983 Act which as such and as rightly observed by the Arbitral Tribunal was not maintainable.

6.3 It is further submitted that the order passed by the High Court referring the dispute between the parties to the Arbitrator - Housing Commissioner was a consent order and the same was as per the relevant arbitration clause in the agreement entered into between the parties. E

6.4 It is further urged that even subsequent to the order passed by the Arbitral Tribunal dated 27.02.2017, with a mala fide intention as an afterthought, the respondent - contractor filed a review application before the High Court challenging the consent order dated 20.08.2008 i.e., after a period of 9 years of the order and the said review petition had also came to be dismissed by the High Court. It is submitted that even dismissal of the review petition had also attained the finality and the same was not carried further. It is urged that therefore, it was not open for the respondent – contractor to file a fresh claim petition for the same claim which was made before the learned Arbitrator - Housing Commissioner constituted pursuant the order passed by the High Court. F G

6.5 It is submitted that in the case of **Madhya Pradesh Rural Road Development Authority and Another vs. L.G. Chaudhary** H

- A **Engineers and Contractors**, (2018) 10 SCC 826, relating to the issue of jurisdiction of the M.P. Tribunal, this Hon'ble Court has categorically held that if no objection to the jurisdiction of the arbitration was taken at the relevant stage, that award cannot be annulled only on that ground. It is urged that in the present case no such objection was raised by the respondent - contractor at the relevant stage. It is urged that in fact, the entire proceedings before the Arbitrator - Housing Commissioner was at the behest of the respondent - contractor, as it was he who filed the writ petition culminating in the consent order appointing an arbitrator, and then filed a claim.
- B 6.6 It is contended that even a fresh reference petition by the respondent - contractor is also not maintainable in view of the principle of Issue Estoppel. Reliance is placed on the decisions of this Court in **Hope Plantations Ltd. vs Taluk Land Board, Peermade and Another**, (1999) 5 SCC 590 and **Bhanu Kumar Jain vs Archana Kumar and Another**, (2005) 1 SCC 787.
- C 6.7 It is further contended that the claim of the respondent - contractor that the judgment passed by the High Court in the year 2008 was contrary to law and cannot confer jurisdiction on the arbitrator is misconceived and erroneous for the reason that the order was passed with consent and even if the order is wrong, it will continue to bind the parties until and unless it is set aside by a competent court. Reliance is placed on the decisions of this Court in the case of **Pushpa Devi Bhagat (D) Th. LR. Sadhna Rai (Smt.) vs. Rajinder Singh & Ors.**, (2006) 5 SCC 566 (para 17) and **Rafique Bibi (Dead) By Lrs. vs. Sayed Waliuddin (Dead) by LRs and others**, (2004) 1 SCC 287 (paras 7 and 8).
- F 7. Making the above submissions and relying upon the above decisions, it is prayed to allow the present appeals and set aside the impugned judgment and orders passed by the High Court.
- G 8. Present appeals are vehemently opposed by Shri Kavin Gulati, learned Senior Advocate appearing on behalf of respondent – contractor. It is submitted that the 1983 Act is a Special Act providing for statutory and compulsory arbitration under the said Act for disputes pertaining to ‘works contract’. It is submitted that Section 7 of the Act provides 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 Tribunal. It is contended that the term ‘dispute’ is defined

in Section 2(d) to mean a claim having a value of Rs.50,000/- or more. It is contended that therefore the claims above Rs.50,000/- are to be compulsorily brought before the Tribunal constituted under Section 3 of the 1983 Act.

8.1 It is urged that even as per Section 7B of the 1983 Act no dispute can be referred to the Arbitration Tribunal unless the dispute is first referred for decision of the final authority under the scope of the term ‘works contract’. It is only once a decision is made or if the authority fails to make a decision can a claim be preferred before the Tribunal.

8.2 It is submitted that the 1983 Act is a Special Act insofar as the State of M.P. is concerned, and therefore it will prevail over the provisions of the Arbitration Act, 1996. Reliance is placed on the decision of this Court in the case of **M.P. Rural Road Development Authority and Anr. vs. L.G. Chaudhary Engineers & Contractors** reported in (2012) 3 SCC 495 and the subsequent decision in **M.P. Rural Road Development Authority and Anr. vs. L.G. Chaudhary Engineers & Contractors** reported in (2018) 10 SCC 826.

8.3 It is submitted that the full Bench of the Madhya Pradesh High Court has also taken the same view in the case of **Viva Highways Ltd. vs. MP Rural Road Development Corporation Ltd.** in AA No. 14 of 2017 and connected matters. It is submitted that the said judgment has been approved by this Hon’ble Court in the case of **M/s Essel Infra Projects Ltd. vs. The State of MP** in Civil Appeal No.4250 of 2018.

8.4 It is submitted that in the present case, arbitration clause contained in Clause 29 of the Agreement contemplates a two-stage adjudication. At the first stage a reference has to be made to the Deputy Housing Commissioner for his decision. If the amount is above Rs.25,000/- then the papers have to be placed before the Housing Commissioner. This constitutes the first stage. The second stage then contemplates that, if the parties are aggrieved by the decision of the Deputy Housing Commissioner, then the dispute will be referred to the Additional Housing Commissioner subject to the jurisdiction and limitations in accordance with the provisions of the 1983 Act. It is submitted that even the Additional Commissioner can only deal with the disputes which are only below Rs.50,000/- as disputes above that amount are statutorily referable to the arbitration by the learned Tribunal as is clear from Sections 3, 7, 2(d) and 7B of the 1983 Act.

- A 8.5 It is submitted that in the present case, the contract in question was terminated on 30.06.2008 and a claim was preferred before the Deputy Housing Commissioner on 11.07.2008. Since the contract was terminated and the appellants herein were inviting fresh tenders and also seizing the machinery and material of the respondent - contractor, a Writ Petition was filed bearing no.9131 of 2008 before the High Court to expedite the conclusion of the first stage of adjudication, under the threat of imminent monetary losses. It is submitted that the Hon'ble High Court by its order dated 20.08.2008 after recording the submissions of the respondent – contractor directed the Housing Commissioner to decide the dispute within the period stipulated in the agreement. It is submitted that as there was delay by the Deputy Housing Commissioner in taking the decision, a direction was to the Housing Commissioner to decide the issue, as the amount in dispute was more than Rs.25,000/- and it is only the Housing Commissioner who could take a decision as per Clause 29 of the Contract. Liberty was also granted by the High Court to both parties to seek a redressal of their grievances against the final outcome by approaching the court of law. It is submitted that thus it can be seen that the direction of the Hon'ble High Court was consistent with Clause 29 as this represented a decision which would be the first stage of resolution of dispute as per Clause 29. It is submitted that the Housing Commissioner by an order dated 07.11.2008 by an ex-parte order dismissed the claims of the respondent – contractor. Immediately thereafter, in line with Clause 29 of the Agreement and Sections 7 and 7B of the 1983 Act, a reference was preferred by the respondent – contractor herein under the 1983 Act. It is contended that the decision of the Housing Commissioner dated 07.11.2008 cannot be said to be a decision under the Arbitration Act, 1996. It is therefore urged that the respondent was not required to file the objections under Section 34 of the Arbitration Act, 1996 as contended on behalf of the appellants.

G It is submitted that a reference filed by the respondent – contractor after the order of the Housing Commissioner was maintainable only after the order of the Housing Commissioner dated 07.11.2008 and not before that. It is therefore submitted that the respondent – contractor has acted strictly in accordance with Sections 7 and 7B of the 1983 Act read with Clause 29 of the Contract.

H 8.6 Alternatively, it is submitted assuming that even if the order of the Housing Commissioner dated 07.11.2008 is considered to be under the Arbitration Act, 1996, the same would be non-est as any arbitration

relating to ‘works contract’ in M.P. could only be under the 1983 Act. A
The fact of the respondent – contractor having consented to appear before the Housing Commissioner would be immaterial as the proceedings under the Arbitration Act, 1996 were without jurisdiction and void ab initio. Reliance is placed on the decision of this Court in **Hindustan Zinc Ltd. vs. Ajmer Vidyut Vitran Nigam Ltd.**, (2019) 17 SCC 82. B

Relying upon the above decisions it is prayed to dismiss the present appeals.

9. Heard learned counsel for the respective parties at length.

10. The short question which is posed before this Court for consideration is, whether, in view of the award declared by the Housing Commissioner, M.P. Housing Board, who was appointed as an arbitrator pursuant to the order passed by the High Court in Writ Petition No.9131 of 2008, was it open for the respondent – contractor thereafter to file a reference before M.P. Arbitration Tribunal with respect to the very claim/ claims which were the subject matter of arbitration before the Arbitrator – Housing Commissioner. C D

It is the case on behalf of the respondent – contractor that as the contract was a ‘works contract’ and therefore, the dispute between the appellants and the respondent – contractor could only be decided by the learned Arbitral Tribunal constituted under the 1983 Act, therefore, the Housing Commissioner had no authority to act as an arbitrator and decide the dispute between the parties and the award passed by the Arbitrator - Housing Commissioner can be said to be non-est and wholly without jurisdiction. E

11. While considering the aforesaid issue and the submissions made by the learned counsel of the respective parties, first of all the reliefs which were prayed by the respondent – contractor in Writ Petition No.9131 of 2008 and the respective claims made by the respondent – contractor before the High Court in Writ Petition No. 9131 of 2008, before the Arbitrator – Housing Commissioner and before the learned Arbitral Tribunal are required to be referred to and considered. F G

11.1 In the Writ Petition No.9131 of 2008 the respondent – contractor prayed for the following reliefs:

(a) “To direct the Respondents to complete the arbitration proceedings. H

- A (b) To direct the Respondents not to cancel the agreement and be permitted the Petitioner to complete the work and quash the order of tender dated 20.07.2008 (Annexure P/22) and dated 27.07.2008 Annexure P/23).
- B (c) Set aside the order dated 30.06.2007 (Annexure P/19) passed by the Executive Engineer.
- B (d) To direct the Respondents to pay the amount of outstanding dues of Rs. 17835925.00 with interest and compensation of ten crores.
- C (e) To direct the Respondents not to award the contract to any other person and also direct the Respondents to decide the arbitration, after affording the proper opportunity to the Petitioner.
- D (f) To call the relevant records
- D (g) Any other order/ orders, directions which this Hon'ble Court deems fit and proper may kindly be also granted."

11.2 That thereafter the High Court passed the following order dated 20.08.2008:

"Shri Sameer Seth, Counsel for the Petitioner.

- E Shri T.S. Ruprah, Sr. Counsel with Shri Harmeet Singh, Counsel for Respondents/ M.P. Housing Board.

Learned counsel for the Petitioner fairly stated that the arbitration clause in the agreement has been invoked by submitting reference vide Annexure P20. He drew attention of this Court to the prayer for interim relief regarding restraining from inviting tender for the remaining work. He stated at Bar that no order has been passed on the prayer for interim relief.

This being so, this petition is disposed of with a joint consensus of the learned Counsel for the parties in the following manner:-

- G (i) The arbitrator i.e. Housing Commissioner, M.P. Housing Board would decide the dispute in arbitration within the period stipulated in the agreement.
- H (ii) A decision on the interim prayer made on the interim page-25 of the reference (Annexure P20) would be taken within a period of one week from today.

(iii) Till then no work order be issued pursuant to the fresh tender. A

(iv) Petitioner would also be at liberty to move a separate application within three days with regard to the relief granted vide interim order dated 07.08.2008. A decision on such application, if filed, would be taken in an expeditious manner preferably within a week. Interim order dated 07.08.2008 shall continue to operate B till a decision on such interim application is taken.

Petition, accordingly stands disposed of with an observation that the aggrieved party, in case of grievance against the final outcome, shall have a right to approach the Court of law.”

11.3 Thereafter it was the respondent – contractor who himself submitted the claim before the Arbitrator – Housing Commissioner. The Arbitrator - Housing Commissioner issued notice upon the respondent – contractor. However, after submitting the claims, the respondent – contractor did not appear before the learned Arbitrator – Housing Commissioner and consequently on appreciation of evidence and considering the submissions made on behalf of the appellant, the learned Arbitrator – Housing Commissioner passed an award dated 07.11.2008. Subsequently, respondent – contractor filed a reference before the learned Arbitral Tribunal constituted under the provisions of 1983 Act making the very claims which were made before the High Court in Writ Petition No.9131 of 2008 as well as made before the learned Arbitrator – Housing Commissioner. C D E

At this stage, it is required to be noted that in the Reference Petition there was no reference to the order passed by the High Court in Writ Petition No.9131 of 2008 referring the disputes between the parties to the Arbitrator – Housing Commissioner and thereafter submitting the claims before the Housing Commissioner and the award passed by the learned Arbitrator – Housing Commissioner dated 07.11.2008. A detailed written statement was filed. The relevant extracts of the written statement are as under:

1. “The claim was also filed by the petitioner to the Housing Commissioner of Respondents which was duly decided complying with the directions of the Hon’ble High Court of M.P. G
2. The Hon’ble High Court by Order dated 20.08.2008 in Writ Petition No. 9131/2008 directed the Commissioner of M.P. H

- A Housing Board to decide the application of interim stay filed by the Contractor before re-tendering of the works. The Directions were also issued for final hearing under clause 29 of the agreement with in the provision of agreement. The Hon'ble Commissioner had fully complied with the directions of the Hon'ble High Court and the Contractor was duly notice but even than the Contractor did not take any pains even to see the order of Commissioner dt. 07.11.08, which was passed by him in compliance with the directions of the Hon'ble High Court.
- C 3. The petitioner is not entitled to claim any relief as he has not come before this Hon'ble M.P. Arbitration Tribunal with clean hands and the facts of paramount importance have been deliberately suppressed by the petitioner in the said petition.
- D 4. That as per the directions order by Hon. High Court, the matter has already been decided and award has already been passed and duly acknowledged by the petitioner hence the petition filed before the Hon'ble MP Arbitration Tribunal deserved to be dismissed, no relief can be claimed.
- E 5. That the petitioner has duly accepted the award as it evident from his action that he has accepted the payment so ordered by the Arbitrator the Housing Commissioner in the said award. In compliance with the award dated 07.11.2008 passed by the Commissioner the petitioner has already received the payment as per award as is evident from the letter dated 02.11.2009 the award so received is Rs. 3,57,000/- in total through cheque dated 02.01.2009.
- F 6. That from the action and reactions of petitioner it is evident that the petitioner has accepted the award without challenging it before the appropriate court prior to accepting the payments awarded by the Arbitrator in the light of orders of Hon'ble High Court has been accepted and agreed by the Petitioner. Keeping in view of this legal proceedings, this petition of the Petitioner does not even deserves for admission as the final adjudication was complete by the Order of the Commissioner, M.P. Housing Board, issued under the directions of the Hon'ble High Court.”

11.4 That the appellants filed I.A. No.1 raising preliminary issues with respect to maintainability of the reference before the learned Tribunal. The learned Arbitral Tribunal framed the following preliminary issues:

“(i) Whether the Petitioner has complied with provisions of clause 29 before approaching this Tribunal?

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(ii) Whether the Petitioner has no locus standi to file the petition when the appointed arbitrator by the Hon’ble High Court with consent passed the award dated 07.11.2008 and acted upon?”

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11.5 That by a detailed order and considering the order passed by the High Court dated 20.08.2008 referring the disputes between the parties to the Arbitrator – Housing Commissioner; the claims made before the High Court as well as before the learned Tribunal dismissed the reference by holding that the Reference Petition is not maintainable. While dismissing the Reference Petition as not maintainable in para 18, the learned Arbitral Tribunal observed as under:

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“On perusal of the order dated 20.08.2008 (Ex. D/18) passed by the Hon’ble High Court it seems that the said order was passed with the consent of both the parties. The order indicates that the Housing Commissioner was appointed as arbitrator to decide the dispute between the parties. The contention of the learned Counsel of the Petitioner that the Housing Commissioner was directed to decide the Petitioner’s quantified claim by invoking clause 29 as competent authority does not appear to be acceptable because the Housing Commissioner has been designated in the order as the Arbitrator. Moreover, the Housing Commissioner was not directed to decide the dispute as competent authority. Apart from this, under clause 29 there are only two competent authorities, first, is Dy. Housing Commissioner and if he fails to decide the dispute within 60 days second is Additional Housing Commissioner. There is no provision to decide the quantified claim by the 3rd competent authority. Besides it, Hon’ble High Court has no power to create/ appoint a third competent authority by invoking the power clause 29 of the agreement, but Hon’ble High Court has the power to appoint an arbitrator under Section 11 (6) of the Act, 1996. Therefore, keeping in view the aforesaid facts, it can only be inferred that the Hon’ble High Court exercising the power vested in it under Article 227 of the Constitution of India appointed the

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- A Housing Commissioner as Arbitrator to decide the dispute. The submission of the learned Counsel for the Petitioner that appointment of Arbitrator is without jurisdiction and the said order dated 20.08.2008 does not have over riding effect on the provisions of the Act, 1983 and the said order being per incurium has no force appears to be sound but this Tribunal has no power to say that the order dated 20.08.2008 passed by the Hon'ble High Court in writ jurisdiction is without jurisdiction and has effect of nullity because this Tribunal is subordinate of the Hon'ble High Court which has supervisory power over it under Article 227 of Constitution of India. Moreover, the award passed by this Tribunal is challengeable before the Hon'ble High Court under Section 19 of the Act, 1983 by the Civil Revision. If the Petitioner was not satisfied with the order dated 20.08.2008 passed by the Hon'ble High Court, the propriety and the legality of the said order ought to have been challenged by the Petitioner before the competent forum but it was not done so. Moreover, the said order was passed with the consent of both the parties. In the said circumstances, this Tribunal is bound to accept the order passed by the Hon'ble High Court. On the basis of the aforesaid facts and circumstances of the case, it can be safely inferred that Housing Commissioner was appointed by the Hon'ble High Court to decide the dispute between the parties as the Arbitrator who decided the same vide award dated 07.11.2008. The legality and the propriety of the said award could have been challenged by filing appeal under Section 34 of the Act, 1996 but the Petitioner failed to do so, consequently, the said award had achieved finality before filing the reference petition. Once the dispute between the parties had already been decided by the competent Arbitrator, the same dispute cannot be reagitated before this Tribunal by the Petitioner, the Hon'ble High Court in the case of Ditya (*supra*) elaborately discussing in para 12 has held that even a wrong decisions are taken which is contrary to the law is binding upon the parties unless and until it is set aside in the appeal or by the other remedy provided under the clause."
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- H 12. After the aforesaid order dated 27.02.2017 passed by the learned Tribunal holding that the reference petition was not maintainable in view of the earlier order passed by the High Court dated 20.08.2008 passed in Writ Petition No.9131 of 2008 directing the adjudication of the dispute by the Arbitrator – Housing Commissioner, the respondent –

contractor filed a review petition before the High Court, having realized that the order dated 20.08.2008 passed in the Writ Petition No.9131 of 2008 will come in his way in pursuing the reference petition before the learned Arbitral Tribunal, seeking clarification of the order passed in W.P. No.9131 of 2008 to the extent that by directing the adjudication of the dispute by the Housing Commissioner, it does not take away the jurisdiction of the learned Arbitral Tribunal constituted under the Act 1983. The said review petition was opposed by the appellants. Vide order dated 07.09.2017 the High Court dismissed the said review petition. Thereafter the respondent – contractor filed the revision application before the High Court under Section 19 of the 1983 Act being Arbitration Revision No.13 of 2017 challenging the order dated 27.02.2017 passed by the learned Arbitral Tribunal dismissing the reference petition as not maintainable. By the impugned judgment and order, the High Court, relying upon the subsequent decision of the full Bench has set aside the order passed by the learned Tribunal on 27.02.2017 and has directed the learned Arbitral Tribunal to decide the reference on merit. The impugned judgment and order passed by the High Court in A.R. No.13 of 2017 is the subject matter of present appeal.

13. At the outset, it is required to be noted that as such the earlier order passed by the High Court in Writ Petition No.9131 of 2008, by which the dispute between the parties was referred to the Arbitrator – Housing Commissioner was a consent order. It was the respondent – contractor who filed the Writ Petition No.9131 of 2008 submitting that he has invoked the arbitration clause. Thereafter the respondent – contractor submitted the claim before the Arbitrator – Housing Commissioner who passed an award. The respondent – contractor did not challenge the award passed by the Arbitrator – Housing Commissioner and therefore, as such the award passed by the Arbitrator – Housing Commissioner dated 07.11.2008 has attained finality.

14. The case of the respondent – contractor that the earlier order passed by the High Court dated 20.08.2008 passed in Writ Petition No.9131 of 2008, referring the dispute between the parties for adjudication to the Arbitrator – Housing Commissioner and thereafter the award declared by the Arbitrator – Housing Commissioner dated 07.11.2008 are non-est and void and therefore, it was open for the contractor to file a fresh reference petition before the learned Arbitral Tribunal under Section 7 of the 1983 Act, cannot be accepted for the following reasons:

- A (i) It was the respondent – contractor who approached the High Court by filing Writ Petition No.9131 of 2008 submitting that he has invoked the arbitration clause;
- (ii) The order passed by the High Court dated 20.08.2008 passed in Writ Petition No.9131 of 2008 referring the dispute between the parties to the Arbitrator – Housing Commissioner was a consent order;
- B (iii) Thereafter the respondent – contractor submitted the claims before the learned Arbitrator – Housing Commissioner;
- C (iv) The learned Arbitrator – Housing Commissioner passed an award which has attained the finality;
- (v) That the review petition filed by the contractor for clarification of the order dated 20.08.2008 passed in Writ Petition No.9131 of 2008 to clarify the aforesaid order to the extent that it did not take away the right of the contractor to file the reference petition before the learned Arbitral Tribunal under the 1983 Act came to be rejected and the same also attained finality;
- D (vi) The claims submitted before the Arbitrator – Housing Commissioner; before the High Court in Writ Petition No.9131 of 2008; and the claim submitted in Reference Petition before the learned Arbitral Tribunal under the 1983 Act are the same without any change;
- E (vii) In the subsequent reference petition before the learned Arbitral Tribunal under the 1983 Act there was no reference to the earlier order passed by the High Court in Writ Petition No.9131 of 2008 referring the dispute between the parties for adjudication to Arbitrator – Housing Commissioner and the award passed by the Arbitrator – Housing Commissioner. Thus, there was a suppression on the part of the respondent – contractor;
- F (viii) The order passed by the High Court dated 20.08.2008 passed in Writ Petition No.9131 of 2008 referring the dispute between the parties for adjudication to the Arbitrator – Housing Commissioner as such was a consent order and thereafter the contractor participated in the arbitration
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proceedings before the Arbitrator – Housing Commissioner by submitting the claim is binding between the parties on the ground of ‘issue estoppel’. A

15. In the case of **Bhanu Kumar Jain (supra)** it is observed and held that a cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event, the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. B

16. Apart from the fact that the award declared by the Arbitrator – Housing Commissioner was not challenged by the respondent – contractor, even, so long as the said award is not challenged before the higher forum the same is binding between the parties. Even the award or a nullity order has to be challenged before the appropriate forum/ higher forum. In the present case it cannot be said that there was a total lack of jurisdiction of the Arbitrator – Housing Commissioner in passing the award as it was the High Court who passed the order with consent referring the dispute between the parties for the adjudication to the Arbitrator – Housing Commissioner. Therefore, unless and until it was challenged by the contractor before the higher forum, the respondent – contractor cannot be permitted to ignore and/or to avoid the award passed by the Arbitrator – Housing Commissioner dated 07.11.2008. C D E

17. Even otherwise, it is required to be noted that what was filed before the High Court was the revision application filed by the contractor under Section 19 of the 1983 Act rejecting the reference petition as not maintainable. Section 19 of the 1983 Act reads as under: F

“19. High Court’s power of revision. – The High Court may *suo motu* at any time or an application for revision made to it within three months of the award by an aggrieved party, call for the record of any case in which an award has been made under this Act by issuing a requisition to the Tribunal and upon receipt of such requisition, the Tribunal shall send or cause to be sent to that Court the concerned award and record thereof; G

Provided that any application for revision may be admitted after the prescribed period of three months, if the applicant satisfied the High Court that he had sufficient cause for not preferring the revision with such period. H

- A Explanation: - The fact that the applicant was misled by any order, practice or judgment or the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this sub-section.
- (2) If it appears to the High Court that the Tribunal-
- B (a) has exercised a jurisdiction not vested in it by law; or
(b) has failed to exercise a jurisdiction so vested; or
(c) has acted in exercise of its jurisdiction illegally, or with material irregularity; or
- C (d) has misconducted itself or the proceedings; or
(e) has made an award which is invalid or has been improperly procured by any party to the proceedings,
- the High Court may make such order in the case as it thinks fit.
- D (3) The High Court shall in deciding any revision under this section exercise the same powers and follow the same procedure as far as may be, as it does in deciding a revision under Section 115 of the Code of Civil Procedure 1908 (No. 5 of 1908).
- (4) The High Court shall cause a copy of its order in revision to be certified to the Tribunal.
- E *Explanation.* - For the purposes of this section, an award shall include an ‘interim’ award.”
- Therefore, as per Section 19 of the 1983 Act, Revision Application to the High Court shall be maintainable only against the award passed by the learned Arbitral Tribunal. Therefore, *prima facie* it appears that
- F as such the order passed by the learned Arbitral Tribunal rejecting the reference petition was not maintainable as by order dated 27.02.2017, no award was passed by the Tribunal. However, as no such objection was raised before the High Court and no submission has been made by the parties, we rest the matter there.
- G 18. Even otherwise it is required to be noted that while passing the impugned judgment and order, the High Court has not set aside the award passed by the Arbitrator – Housing Commissioner dated 07.11.2008. Therefore, technically speaking the award passed by the Arbitrator – Housing Commissioner dated 07.11.2008 stands even today.
- H It is binding between the parties. So long as the award passed by the

Arbitrator – Housing Commissioner dated 07.11.2008 stands, there cannot be any subsequent fresh proceeding with respect to the same claims which were considered and adjudicated by the Arbitrator – Housing Commissioner while passing the award dated 07.11.2008. So long as the said award stands it is binding between the parties.

19. Even otherwise it is required to be noted that no objection was raised by the respondent – contractor before the Arbitrator – Housing Commissioner on the jurisdiction of the Housing Commissioner to act as an Arbitrator. On the contrary as observed hereinabove the order passed by the High Court referring the dispute between the parties for adjudication to the Arbitrator – Housing Commissioner was a consent order and the respondent - contractor conceded to and accepted the said order and submitted his claim before the Arbitrator – Housing Commissioner. The Arbitrator – Housing Commissioner also passed an award on the said claim. Therefore, as no objections were raised by the respondent – contractor at the appropriate stage, the award cannot be annulled subsequently. At the cost of repetition, it is observed that at no point of time the respondent – contractor had challenged the award passed by the Arbitrator – Housing Commissioner and as observed and held hereinabove even no court has set aside the award declared by the Arbitrator – Housing Commissioner dated 07.11.2008 and the same has attained finality. Therefore, the same is binding between the parties. Hence, the subsequent fresh reference petition before the learned Arbitral Tribunal under the 1983 Act for the very same claims which were raised before the Arbitrator – Housing Commissioner would not be maintainable at all. We agree with the view taken by the Arbitral Tribunal.

20. In view of the above and for the reasons stated above, the present appeals are allowed. The impugned judgment and order dated 08.05.2018 passed by the High Court in A.R. No.11, 12 & 13/2017 quashing and setting aside the order passed by the learned Arbitral Tribunal constituted under the 1983 Act dated 27.02.2017 is hereby quashed and set aside and the order passed by the Arbitral Tribunal dated 27.02.2017 stands restored.

All these appeals are allowed accordingly. In the facts and circumstances of the case, there shall be no order as to costs.