Institute Of Continuing Education vs The State Of Jharkhand on 21 July, 2022

Author: Sujit Narayan Prasad

Bench: Sujit Narayan Prasad

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IN THE HIGH COURT OF JHARKHAND AT RANCHI

Arbitration Application No. 44 of 2021
with
Arbitration Application No. 46 of 2021
with
Arbitration Application No. 49 of 2021

Institute of Continuing Education, Research & Training, a Society registered under the Societies Registration Act, having its registered office at 472 Pepee Compound, P.O.-Ranchi G.P.O., P.S. - Hindpiri, District-Ranchi, through its Secretary and Chief Executive Officer, Dr. Devendra Singh, son of Late Jogendra Singh, residing at First Floor, Sudarsan Building, 508/B Pepee Compound, P.O.-Ranchi GPO, P.S.-Hindpiri, District-Ranchi..... Applicant Versus

1.The State of Jharkhand

2.Secretary, Scheduled Tribe, Scheduled Caste, Minority and Backward Class Welfare, Government of Jharkhand, Project Bhawan, P.O.-Dhurwa, P.S. Jagannathpur, District -Ranchi (Jharkhand).

... ...Respondents with Arbitration Application No. 51 of 2021 with Arbitration Application No. 52 of 2021 with Arbitration Application No. 55 of 2021

Rinchi Trust Hospital, a Unit of Research Institute for Civil Health Integration, a Trust registered under the Indian Trusts Act, having its registered office at Kathal More, Itki Road, PO and PS-Itki, District - Ranchi, through its Chairman Dr. O.P. Mahansarai, Son of Maliram Mahansarai, Residing at Mega Sports Complex, Village-Khelgaon, P.O.-G.P.O., P.S.-Sadar, District-Ranchi. ..... Applicant Versus

1.The State of Jharkhand

2.Secretary, Scheduled Tribe, Scheduled Caste, Minority and Backward Class Welfare, Government of Jharkhand, Project Bhawan, P.O.-Dhurwa, P.S. Jagannathpur, District -Ranchi (Jharkhand).

... ...Respondents with Arbitration Application No. 1 of 2022 with Arbitration Application No. 2 of 2022

Dynamic Tarang Pvt. Ltd., a Company registered under the Indian Companies Act, having its registered office at Jatratand, PO-Kokar, PS-Kokar, District- Ranchi, through its Chairman cum Managing Director Sri Manish Kumar, Son of Late Binod Kishore Prasad, Residing at Subhash Chowk, Jatra Tund Bazar, P.O.- Kokar, P.S. Sadar, District-Ranchi, Jharkhand ..... Applicant Versus

1.The State of Jharkhand

2.Secretary, Scheduled Tribe, Scheduled Caste, Minority and Backward Class Welfare, Government of Jharkhand, Project Bhawan, P.O.-Dhurwa, P.S. Jagannathpur, District -Ranchi (Jharkhand).

... ...Respondents

CORAM:HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD

For the Applicants : Mr. Amit Kumar Das, Advocate For the Respondents : Mr. Sachin Kumar, A.A.G.-II Mr. Ashutosh Anand, AAG-III Mr. Ashok Kumar Yadav, G.A.-I. Mr. P.A.S. Pati, G.A. II Mr. Shashank Shekhar, AC to GP-I Ms. Archna Kumari, AC to AAG V

Order No. 5/Dated 21st July, 2022 All the applications, since arising out of the similar contract, prayer has been made to hear the matters together. Accordingly, the same are being heard together.

2. It requires to refer herein that today a counter affidavit has been filed on behalf of respondents in Arbitration Application No. 55 of 2021.

3. Mr. Sachin Kumar, learned A.A.G.-II appearing for the respondents-State and its functionaries has submitted that counter affidavit filed in Arbitration Application No. 55 of 2021 may be considered in all the similar matters.

4. Mr. Amit Kumar Das, learned counsel for the applicants has not sought for adjournment to file reply to the counter affidavit and submitted that the matter may be heard on merit.

5. Accordingly, with the consent of learned counsel for the parties, the matter is being heard.

6. The instant applications are filed by the applicants invoking the jurisdiction conferred under Section 11(6)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as „Act, 1996) for appointment of arbitrator for adjudication of the dispute as per Clause 8.1 of the Memorandum of Understanding (MoU) entered between the parties, which stipulates that any dispute/differences arising between the parties shall be referred to the arbitrator.

7. Since common facts and the question of law are involved in these arbitration applications, therefore, for the sake of convenience, brief facts of the case, as per the pleading made in Arbitration Application No. 44 of 2021, are referred as under:

> The applicants, a Society registered under the Societies Registration Act and also registered as Non-
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> Governmental Organization with the State of Jharkhand , has expertise in running and maintaining hospitals. Pursuant to invitation for providing services for running and maintaining 50-Bedded Hospital at Basaridih, Lohardaga, the applicant participated in the selection process and was selected as an agency to provide such services. Accordingly, a Memorandum of Understanding (MoU) was executed between the applicants and the respondents on 4th February, 2009.
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> Clause 3 the Memorandum of Understanding deals with financial assistance which the respondents-
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> Government of Jharkhand was required to pay in the form of Grant-in-aid and Performance Linked Bonus etc. to the applicant for the purpose of running the hospitals. The concerned department was required to pay said Performance Linked Bonus on an annual basis to the applicant on successful achievement of performance benchmarks set out in the Memorandum of Understanding.
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> It is the case of the applicants that after the hospital was handed over to the applicants, it appointed sufficient number of doctors, para-medical staffs and other employees and provided the best possible treatment facility to the villagers and target population. Initially, the agreement was for 60 months and as per agreement, the same could be extended for a further period of five years on satisfactory performance of the applicants.
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> Clause 7.1 of the Memorandum of Understanding speaks that each party has a right to terminate the agreement by giving six months advance notice. It has further been stated that the applicants had achieved and/or crossed all the targets/benchmarks fixed by the respondents-Department, as given time to time.
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> Thereafter, the applicants is approaching regularly with a request to make the payment of Performance Linked Bonus but the same was kept pending.
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> It is the case of the applicants that on

15.02.2011, a meeting was convened under the

Chairmanship of Tribal Welfare Commissioner, wherein a decision was taken that a sum equivalent to 5% of the annual operation cost of the 50-Beded MESO Rural Hospital shall be given to the respective NGO/Agency running the said hospitals as annual Performance Linked Bonus, subject to achievement of Performance Targets set out for the respective Financial Year. It is alleged that the though applicants achieved all the targets fixed by the Government time to time but the Performance Linked Bonus was not given to it, as such the applicants submitted various letters claiming Performance Linked Bonus for the relevant time.

It has further been stated that as per Clause 5.1 of the agreement, since the performance of the applicants-agency was outstanding the agreement was renewed from time to time and on the instruction obtained from the respondents, the applicants continued to operate the hospitals but all of a sudden vide order dated 12.11.2018 as contained in Memo No. 1602, the Tribal Welfare Commissioner re-settled it vide a new tender and directed the applicants to handover the management of the hospital from 20th November, 2018. It has been stated that such action of termination with a short notice of eight days was in utter violation of Clause 7.1 of the Agreement, which says that at least six months notice and in absence thereof, the respondents are required to pay the operational cost and financial remuneration to the applicant for the entire notice period of six months.

Pursuant thereto, the applicants approached the respondents-authorities on several occasions for release of the outstanding dues but when the same was not released, the applicants gave notice under Section 11 of the Act, 1996 on 18.08.2021 requesting to either pay the entire claim of the applicants or in alternative refer the dispute to the Arbitrator, but in spite of issuance of such notice, the respondents neither paid the amount claimed nor appointed arbitrator within the statutory period. Therefore, the instant Arbitration Applications have been filed for appointment of Arbitrator in terms of Clause 8.1 of the Memorandum of Understanding.

8. Counter affidavit filed on behalf of respondents in Arbitration Application No. 55 of 2021 which has been adopted in all the Arbitration Applications, wherein inter alia stand has been taken that applicants have not obeyed the conditions stipulated in the Memorandum of Understanding since on the one hand, the applicants are claiming Performance Linked Bonus etc. on an annual basis as per Clause 3.5 of the Memorandum of Understanding whereas on the other hand, the applicants have disobeying Clause 8.1 of Memorandum of Understanding. It has further been stated that the applicants may approach the authority as per condition stipulated in the Memorandum of Understanding.

9. Mr. Sachin Kumar, learned A.A.G.-II as also Mr. Ashutosh Anand, learned A.A.G.-III and other State counsel appearing for the respondents-State have raised the issue of maintainability of arbitration applications and vehemently objected to the prayer made by the applicants on the following grounds:

> (I).The arbitration clause, as contained under Clause 8.1 of the MoU, cannot be construed to be arbitration clause for resolution of dispute in strict sense in consonance with the definition of „Arbitration as provided under the Act, 1996. Such submission has been made by making reference in Clause 8.1. of the MoU wherein since no stipulation has been made about the finality of the adjudication of dispute and as such it has been stated that stipulation of the condition under Clause 8.1 cannot be said to be an Arbitration Clause.

(II).In furtherance to the aforesaid submission, it has been submitted that applicants have not filed any application before the Secretary of the concerned Department and in that view of the matter also, the instant arbitration applications are not maintainable. (III).Condition stipulated under Clause 8.1 cannot be construed to be an arbitration clause since even the Secretary of the concerned department has passed the order and if the applicants do not agree with the decision of the concerned Secretary matter may be referred to the Chief Secretary, Government of Jharkhand. Therefore, the condition stipulated under Clause 8.1 and 8.2, if read together, the Clause 8 cannot be said to be arbitration clause.

To substantiate the argument, reliance has been placed upon the judgment rendered in State of Orissa & Ors Vs. Bhagyadhar Dash reported in (2011) 7 SCC 406 in particular paragraph 10 and 15; P. Dasaratharama Reddy Complex Vs. Government of Karnataka & Anr. reported in (2014) 2 SCC 201 in particular paragraph 8, 24 to 26; Karnataka Power Transmission Corporation Limited and Anr. Vs. Deepak Cables (India) Limited reported in (2014) 11 SCC 148 and Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil and Another reported in (2018) 4 SCC 793 in particular paragraph 14.

10. Per contra, Mr. Amit Kumar Das, learned counsel for the applicants has seriously objected to the aforesaid objection since the same has not been taken in the counter affidavit and has submitted that it is incorrect submission on the part of respondent that Clause 8.1 cannot be construed to be an arbitration clause. According to learned counsel for the petitioner, the same is arbitration clause reason being that the moment the aforesaid condition contains phrase „..the parties hereto shall be referred to the Secretary, Department of Welfare, Government of Jharkhand for arbitration. , itself suggests by taking the word „refer for arbitration, which according to learned counsel the word arbitration means adjudication of the dispute by making reference of the same before the arbitrator and, therefore, the very spirit of the condition stipulated under Clause 8.1 is for resolution of dispute by making reference of the dispute before the Secretary of the concerned department for arbitration.

So far as the contention raised on behalf of respondents-State that the applicants have not approached the Secretary of the concerned department, for making request for appointment of arbitrator is concerned, submission has been made that there is no stipulation to that effect having

been made in Clause 8.1 since the application is to be made before the Secretary of the concerned department, by signatory of the Memorandum of Understanding, in case of any dispute/differences arises between the parties.

It has further been submitted that merely because the word „finality has not been stipulated by referring the aforesaid clause that the decision taken by the arbitrator will be treated to have attained its finality it does not construe that clause 8.1 is not an arbitration clause.

Learned counsel for the petitioner further rebutting the argument advanced on behalf of respondents-State that the adjudication so made by the Secretary of the concerned department and if the petitioners/applicants remain aggrieved, they may approach before the Chief Secretary, State of Jharkhand and as such the parties have been given liberty, if aggrieved with the adjudication to be made by Secretary of the concerned department by referring to same to the Chief Secretary, is concerned, it has been submitted that the same has to be done only in a case where the Secretary of the concerned department decides the issue and in case of being aggrieved, the Secretary will refer the dispute to the Chief Secretary, since herein the Secretary has not adjudicated the dispute, as the same has not been referred by the Secretary, therefore, there is non-compliance of condition of agreement so far it relates to adjudication of the claim and in that view of the matter, the applicants have approached this Court by filing the instant application for appointment of arbitrator.

Mr. Das, learned counsel for the applicants has relied upon the judgment rendered in State of Orissa & Ors Vs. Bhagyadhar Dash reported in (2011) 7 SCC 406 in particular paragraph 4(iii).

11. We have heard learned counsel for the parties and scrutinize the Memorandum of Understanding containing therein the Clause stipulated under Clause 8.1 and 8.2.

12. The fact, which led the applicants to invoke the power conferred under Section 11 (6) of the Act, 1996, is that the dispute has not been resolved in spite of repeated applications before the signatory of the agreement, the functionary of the State of Jharkhand. Since the aforesaid grievance has not been referred by the Secretary for arbitration, in view of condition stipulated under Clause 8.1 and 8.2 of the agreement, the instant applications have been filed.

13. This Court, on the pleadings available on record, and even accepting the fact that the issue of interpretation of Clause 8.1 of the MoU has not been raised in the counter affidavit but since the same pertains to interpretation of the Clause 8.1, whether it is to be construed to be an arbitration clause or not which has to be scrutinized on the basis of content of the said clause, as such deems it fit and proper to answer the aforesaid issue and to decide the arbitration application, it is required to answer the following issues, which has been raised on behalf of parties:

> (I).Whether Clause 8.1 of the Memorandum of Understanding (MoU) entered into between the parties can be construed to be arbitration clause?
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> (II).Whether it is fit case where arbitrator is to be appointed?

Except to these issues no other issues have been raised, as would appear from the counter affidavit filed on behalf of respondents.

14. This Court, in order to answer the issue, deems it fit and proper to refer arbitration clauses as under

> Clause 8, which reads as under:
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> "8.Arbitration 8.1 All questions relating to the interpretation and meaning of this Memorandum of Understanding and any dispute/differences arising between the parties hereto shall be referred to the Secretary, Department of Welfare, Government of Jharkhand for arbitration. 8.2 In the event where Institute of Continuing Education, Research & Training, Ranchi does not agree with the decision of the Secretary, Department of Welfare, Government of Jharkhand, the matter may be referred to Chief Secretary, Government of Jharkhand."

It is evident from the contents of the aforesaid clause wherein it has been referred that all questions related to the interpretations and meaning of the Memorandum of Understanding and any dispute/differences arising between the parties hereto shall be referred to the Secretary, Department of Welfare, Government of Jharkhand now Scheduled Tribe, Scheduled Caste, Minority and Backward Class Welfare, Government of Jharkhand, for arbitration. The aforesaid clause thus stipulates that in the case of dispute/difference arising between the parties shall be referred to the Secretary for arbitration; meaning thereby the Secretary only will arbitrate in a situation when the dispute/differences arising between the parties, if referred. Therefore, the Secretary of the concerned department is having no independent power to arbitrate the dispute rather only in a case when the dispute/differences in between the parties will be referred to the Secretary then only the Secretary will assume the power to adjudicate.

Objection has been raised on behalf of State that the condition stipulated in Clause 8.1 cannot be considered to be arbitration clause since there is no reference that in case of such adjudication the same will have binding effect upon the parties and to substantiate his argument, reliance has been placed upon the judgment, as referred above.

Before scrutinizing the judgment relied upon on behalf of State, it needs to refer the statutory provisions of the Act, 1996, which have got bearing in the case.

The definition of Arbitration, as provided under Section 2(1)(a) of the Act, 1996 is - (a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution. The definition of „party is also relevant, which has given under Section 2(1)(h) of the Act, 1996 that "party" means a party to an arbitration agreement.

„Arbitration agreement has been dealt under Chapter II in Section 7 of the Act, 1996, which reads as under:

> "7. Arbitration agreement.--(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
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> (3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in--
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> (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication 1[including communication through electronic means] which provide a record of the agreement; or
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> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
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> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

It is, thus, evident from Section 7 of the Act, 1996, as quoted above, that „arbitration agreement means agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not; meaning thereby „arbitration agreement will be said to be agreement if the parties submit to arbitration in case of dispute. Sub-section (2) thereof speaks that arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. While sub-section (3) says that arbitration agreement shall be in writing. Sub-section (4) speaks that arbitration agreement is in writing if it is contained in

-- (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Sub- Section (5) speaks that reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 11 of the Act, 1996 is also having relevance in the case at hand in view of prayer made in the instant application for appointment of arbitrator and as such the same is being reproduced as under:

> "11. Appointment of arbitrators.--(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and--

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court]. (6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.] (7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to 3[the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent

Appeal shall lie against such decision].

[(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub- section (1) of section 12, and have due regard to--

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.] (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, 5[the Supreme Court or the person or institution designated by that Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

6[(10)The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub- section (4) or sub-section (5) or sub-section (6), to it.] (11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, [different High Courts or their designates, the High Court or its designate to whom the request has been first made] under the relevant sub-section shall alone be competent to decide on the request.

[(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub- sections shall be construed as a reference to the "Supreme Court"; and

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.] [(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14).For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.--For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral

institution.] Sub-Section (6) thereof stipulates procedure for appointment of arbitrator i.e., (a).a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

It is, thus, evident from perusal of the aforesaid definition of agreement as under Section 2(1)(a), the definition of party under Section 2(1)(h), meaning of „arbitration agreement under Section 7 that the parties to the agreement in case of any dispute is required to submit for redressal of dispute to the arbitration which has arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Legal position: Consideration of Judgments:

15. This Court before considering the argument advanced on behalf of parties and after going into statutory provisions as discussed above, deems it fit and proper to deal with certain judgments of Hon ble Supreme Court on the issue in question.

The judgment rendered by Hon ble Apex Court in State of Orissa & Ors Vs. Bhagyadhar Dash reported (supra), upon which much reliance has been placed by learned counsel for the State by referring to paragraph 10 and 15 thereof, wherein reference of judgment rendered in State of U.P. Vs. Tipper Chand reported in (1980) 2 SCC 341 and State of Orissa & Anr. Vs. Damodar Das reported in (1996) 2 SCC 216, wherein it has been held that said clause did not amount to an arbitration agreement, on the following reasoning, as referred in paragraph 11 of Damodar Das case (supra), which reads as under:

> "11. ... It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for an arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out the existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties."

It is evident from paragraph 11, as quoted hereinabove that arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for arbitration and the clause in the contract must contain such an agreement. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out the existence of

such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties.

Paragraph 15 of the aforesaid judgment, wherein judgment rendered in Rukmanibai Gupta v. Collector reported in (1980) 4 SCC 556 has been considered by taking into consideration paragraph 15 of the said judgment wherein it has been laid down as under:

> 15. In Rukmanibai Gupta v. Collector [(1980) 4 SCC 556] this Court considered whether the following clause amounted to an arbitration agreement: (SCC p. 558, para
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> 2) "15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder in the matter in difference shall be decided by the lessor whose decision shall be final."

This Court held that an arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject- matter of contract such disputes shall be referred to arbitration; and if the answer was in the affirmative, then such an arrangement would spell out an arbitration agreement. Applying the said test, this Court held that the aforesaid clause is an arbitration agreement, as it (a) made a provision for referring any doubt, difference or dispute to a specified authority for decision and (b) it made the "decision" of such authority final."

The Hon ble Apex Court has held that arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such disputes shall be referred to arbitration; and if the answer was in the affirmative, then such an arrangement would spell out an arbitration agreement.

Another judgment upon which reliance has been placed is Karnataka Power Transmission Corporation Limited and Anr. Vs. Deepak Cables (India) Limited (2014) 11 SCC 148, wherein it has been laid down that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator.

The Hon ble Apex Court in the judgment rendered in K.K. Modi Vs. K.N. Modi & Ors reported in (1998) 3 SCC 573 has enumerated the attributes of valid arbitration agreement i.e., (1).Arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement; (2).The jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration;(3).The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal;(4).The tribunal will determine the rights

of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides;(5).That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly;(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

It is, thus, evident that conditions have been laid down for treating the arbitration agreement to be valid one by referring condition from condition no. 1 to 6, as referred hereinabove.

In the case of Bihar State Mineral Development Corporation & Another Vs. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418, the Hon ble Apex Court has laid down the essential elements of arbitration agreement as under paragraph 13 thereof i.e., (1).There must be a present or a future difference in connection with some contemplated affair;(2).There must be the intention of the parties to settle such difference by a private tribunal; (3).The parties must agree in writing to be bound by the decision of such tribunal; and (4).The parties must be ad idem.

Further, the Hon ble Apex Court in the judgment rendered in Jagdish Chander Vs. Ramesh Chander & Ors reported in (2007) 5 SCC 719 has laid down that with respect to principles what constitutes an arbitration agreement, as would appear from paragraph 8, which reads as under:

> "8.This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi v. K.N. Modi [(1998) 3 SCC 573] , Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. [(1999) 2 SCC 166] and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418] In State of Orissa v. Damodar Das [(1996) 2 SCC 216] this Court held that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:
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> (i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.
>
> (ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement

> of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement.

They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration"

> in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

Thus, it is evident from the judgment referred hereinabove that in the case where otherwise specified in the contract decision of the Superintendent Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. Taking the aforesaid

contents of the agreement, the High Court has held that the Clause was an arbitration agreement as it merely conferred power upon the Superintendent Engineer to take a decision on his own and did not authorize the parties to refer any matter to his arbitration.

It has been interpreted by Hon ble Apex Court in State of Orissa & Ors Vs. Bhagyadhar Dash reported in (2011) 7 SCC 406 by considering the judgment rendered in Tiper Chand (supra) that in the absence of a provision for reference of disputes between parties for settlement, the clause merely stating that the "decision of the Superintending Engineer shall be final" was not an arbitration agreement. The Court has clarified that an arbitration agreement can either be in express terms or can be inferred or spelt out from the terms of the clause; and that if the purpose of the clause is only to vest in the named authority, the power of supervision of the execution of the work and administrative control over it from time to time, it is not an arbitration agreement. It has also been held that the clause did not contain any express arbitration agreement, nor spelt out by implication any arbitration agreement as it did not mention any dispute or reference of such dispute for decision.

In the case of State of Orissa & Anr. Vs. Damodar Das (supra) the three-judges Bench of the Hon ble Supreme Court has considered as to whether the following clause is an arbitration agreement, relevant at paragraph 9 reads as under:

> 9. The question, therefore, is whether there is any arbitration agreement for the resolution of the disputes. The agreement reads thus:
>
> "25. Decision of Public Health Engineer to be final.-- Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract."

It is evident from the aforesaid judgment where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract.

The Hon ble Apex Court while interpreting the decision as pronounced in the case of Tipper Chand (supra) and Damodar Das (supra) has held at paragraph 11 as under:

> 11. This Court was called upon to consider a similar clause in State of U.P. v. Tipper Chand [(1980) 2 SCC 341] . The clause was extracted therein. After consideration thereof, this Court held that after perusing the contents of the said clause and hearing learned counsel for the parties "we find ourselves in complete agreement with the view taken by the High Court. Admittedly, the clause does not contain any express arbitration agreement. Nor can such an agreement be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time."

It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for an arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties. The ratio in Rukmanibai Gupta v. Collector [(1980) 4 SCC 556] does not assist the respondent. From the language therein this Court inferred, by implication, existence of a dispute or difference for arbitration. The Full Bench judgment of the Punjab and Haryana High Court relied on by the counsel was expressly overruled by this Court in Tipper Chand case [(1980) 2 SCC 341] . Therefore, it is no longer good law. Moreover, notice was not given to the Public Health Engineer to enter upon the reference but was issued to the Chief Engineer to refer the dispute to an arbitrator. The contention in the rejoinder of the appellants that the respondent received the amount without protest to conclude that the amount was received in full and final settlement of the Act, cannot be accepted unless there is proof or admission in that behalf. The ratio in P.K. Ramaiah & Co. v. Chairman & Managing Director, NTPC [1994 Supp (3) SCC 126] has no application to the facts of the case. It is evident from consideration of both the judgments in the aforesaid paragraphs wherein it has been laid down that arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for arbitration and the clause in the contract must contain such an agreement.

It is further evident from paragraph 15 of the judgment wherein by taking note of the judgment rendered in the case of Smt. Rukmanibai Gupta vs Collector Jabalpur And Ors. reported in (1980) 4 SCC 556 holding therein that Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. Paragraph 6 of the judgment reads under as:

> "6. Does clause 15 spell out an arbitration agreement? Section 2(a) of the Arbitration Act, 1940, defines "arbitration agreement" to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Clause 15 provides that any doubt, difference or dispute, arising after the execution of the lease deed touching the construction of the terms of the lease deed or anything therein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable thereunder, the matter in difference shall be decided by the lessor whose decision shall be final. The reference has to be made to the lessor and the lessor is the Governor. His decision is declared final by the terms of the contract. His decision has to be in respect of a dispute or difference that may arise either touching the construction of the terms of the lease deed or disputes or differences arising out of the working or non-working of the lease or any dispute about the payment of rent or royalty payable under the lease deed. Therefore, clause 15 read as a whole provides for referring future disputes to the arbitration of the Governor. Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. A passage from RUSSELL ON ARBITRATION, 19th Edn., p. 59, may be referred to with advantage:
>
> "If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration."

In the clause under discussion there is a provision for referring the disputes to the lessor and the decision of the lessor is made final. On its true construction it spells out an arbitration agreement."

The Hon ble Apex Court in the judgment rendered in Karnataka Power Transmission Corporation Limited and Anr. Vs. Deepak Cables (India) Limited reported in (2014) 11 SCC 148 has again considered the issue by taking note of all the previous judgments by referring to the judgment rendered by Hon ble Apex Court on the issue and has laid down at paragraphs 23 to 26 thereof, which reads as under:

> 23. Keeping in mind the principles laid down by this Court in the aforesaid authorities relating to under what circumstances a clause in an agreement can be construed as an arbitration agreement, it is presently apposite to refer to Clause 48 of the agreement.
>
> 24. The said clause reads as follows:
>
> "48.0 Settlement of disputes:

> 48.1 Any dispute(s) or difference(s) arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.
>
> 48.2 If any dispute or difference of any kind whatsoever shall arise between the owner and the contractor, arising out of the contract for the performance of the works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the owner and the contractor.
>
> 48.3 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed with the works with all the due diligence. 48.4 During settlement of disputes and court proceedings, both parties shall be obliged to carry out their respective obligations under the contract."

On a careful reading of the said clause, it is demonstrable that it provides for the parties to amicably settle any disputes or differences arising in connection with the contract. This is the first part. The second part, as is perceptible, is that when disputes or differences of any kind arise between the parties to the contract relating to the performance of the works during progress of the works or after its completion or before or after the termination, abandonment or breach of the contract, it is to be referred to and settled by the engineer, who, on being requested by either party, shall give notice of his decision within thirty days to the owner and the contractor. There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties until the completion of works and is required to be given effect to by the contractor who shall proceed with the works with due diligence. To understand the intention of the parties, this part of the clause is important. On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate that the engineer concerned is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submissions of both the parties. That apart, the decision of the engineer is only binding until the completion of the works. It only casts a burden on the contractor who is required to proceed with the works with due diligence. Besides the aforesaid, during the settlement of disputes and the court proceedings, both the parties are obliged to carry out the necessary obligation under the contract. The said clause, as we understand, has been engrafted to avoid delay and stoppage of work and for the purpose of smooth carrying on of the works. It is interesting to note that the burden is on the contractor to carry out the works with due diligence after getting the decision from the engineer until the completion of the works. Thus, the emphasis is on the performance of the contract. The language employed in the clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration. It does not really provide for resolution of disputes.

25. Quite apart from the above, Clause 4.1 of the agreement is worthy to be noted. It is as follows:

> "4.1 It is specifically agreed by and between the parties that all the differences or disputes arising out of the agreement or touching the subject-matter of the agreement, shall be decided by a competent court at Bangalore."

26. Mr Viswanathan, learned Senior Counsel for the appellants, laying immense emphasis on the same, has submitted that the said clause not only provides the territorial jurisdiction by stating a competent court at Bangalore but, in essence and in effect, it stipulates that all the differences or disputes arising out of the agreement touching the subject-matter of the agreement shall be decided by a competent court at Bangalore. Mr Dave, learned Senior Counsel for the respondents, would submit that it only clothes the competent court at Bangalore with the territorial jurisdiction and cannot be interpreted beyond the same. The submission of Mr Dave, if properly appreciated, would convey that in case an award is passed by the arbitrator, all other proceedings under any of the provisions of the Act have to be instituted at the competent court at Bangalore. This construction, in our opinion, cannot be placed on the said clause. It really means that the disputes and differences are left to be adjudicated by the competent civil court. Thus, Clause 48, as we have analysed, read in conjunction with Clause 4.1, clearly establishes that there is no arbitration clause in the agreement. The clauses which were interpreted to be arbitration clauses, as has been held in Ram Lal [Ram Lal Jagan Nath v. Punjab State, AIR 1966 P&H 436 : (1966) 68 PLR 522 : ILR (1966) 2 P&H 428] and Dewan Chand [Dewan Chand v. State of J&K, AIR 1961 J&K 58] which have been approved in Tipper Chand [State of U.P. v. Tipper Chand, (1980) 2 SCC 341] , are differently couched. As far as Rukmanibai Gupta [Rukmanibai Gupta v. Collector, (1980) 4 SCC 556] is concerned, as has been opined in Damodar Das [State of Orissa v. Damodar Das, (1996) 2 SCC 216 : AIR 1996 SC 942] and also in Bhagyadhar Dash [State of Orissa v. Bhagyadhar Dash, (2011) 7 SCC 406 : (2011) 3 SCC (Civ) 721] , it has to rest on its own facts. Clause in Dina Nath [Punjab State v. Dina Nath, (2007) 5 SCC 28] is differently couched, and Clause 48, which we are dealing with, has no similarity with it. In fact, Clause 48, even if it is stretched, cannot be regarded as an arbitration clause. The elements and attributes to constitute an arbitration clause, as has been stated in Jagdish Chander [Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719] , are absent. Therefore, the irresistible conclusion is that the High Court has fallen into grave error by considering the said clause as providing for arbitration."

The Hon ble Supreme Court after considering all the previous judgments, wherein, principle which has been laid down as to under what circumstances a clause can be construed to be an arbitration agreement, has been pleased to hold by taking into consideration clause 48 of the contract wherein it has been stipulated that any dispute or differences arising out of or in connection with contracts shall to the extent possible be settled amicably between the parties. 48.2. says that if any dispute or difference of any kind whatsoever shall arise between the owner and the contractor, arising out of the contract for the performance of the works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the owner and the contractor. Further, clause 48.3 speaks that Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed

with the works with all the due diligence and clause 48.4 speaks that during settlement of disputes and court proceedings, both parties shall be obliged to carry out their respective obligations under the contract.

The Hon ble Apex Court on careful consideration of aforesaid clause and considering the intention of the parties which is required to be seen since concerned Engineer has been authorized to monitor the work in order to avoid the delay and as such conclusion has been arrived at that the condition stipulated in the aforesaid clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration, therefore, the aforesaid clause does not really provide for resolution of disputes.

16. This Court, after considering the judgment rendered by Hon ble Supreme Court, as referred hereinabove, is of the view that following law has been laid down to assess as to whether the agreement is arbitration agreement or not, the test of which is as follows:

> (i).The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes, it is arbitration agreement.
>
> (ii).Where the clause provides that in the event of dispute arising between the parties, the dispute shall be referred to arbitration, then it is an arbitration agreement.
>
> (iii).Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement.

Thus, merely because the attributes of an arbitration agreement is not available it cannot be construed that such agreement is not arbitration agreement rather intention of the parties is to be looked into that the parties are agree for redressal of their dispute or not.

The arbitration agreement can either be an expressed term or spell out in the terms of the agreement. The arbitration agreement is not required to be in any particular form.

17. This Court, after having discussed the position of law, as has been settled by the Hon ble Apex Court, as referred hereinabove is now proceeding to critically analyze the argument advanced on behalf of parties.

18. Learned counsel for the State has given much emphasis upon judgment rendered in the case of State of Orissa & Ors Vs. Bhagyadhar Dash reported in (2011) 7 SCC 406 in particular paragraph 10 and 15 by making argument that the binding effect of the resolution of dispute since is not available under Clause 8.1 of the MoU, therefore, it cannot be construed to be arbitration clause, but, merely because the arbitration clause is having no word to the effect that the dispute resolved through arbitration, by appointment of arbitrator, in view of clause 8.1 will render clause 8.1 not to be an

arbitration clause.

Therefore, This Court is not in agreement with such argument, reason being that for treating the agreement to be arbitration agreement, the condition which required to be there, as laid in the judgments discussed above.

So far as the judgment relied upon by learned counsel for the State in the case of Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil and Another reported in (2018) 4 SCC 793 is concerned, this Court after going through the fact of the said case is of the view that in that case there was no arbitration agreement, but, there is no such fact available in the instant case since there is clause 8.1, which is said to be not an arbitration agreement, since it is settled position of law as per the judgments referred hereinabove, the intent of the parties is to be seen and it cannot be disputed about the intent of the parties by going through the content of Clause 8.1 wherein in case of dispute/differences, the same is to be referred before the Secretary of the concerned Department for arbitration which stipulates the intent of the parties for referring the matter for arbitration in case of dispute/differences and, therefore, reliance placed upon such judgment is not applicable in the facts of the case.

19. Mr. Amit Kumar Das, learned counsel for the applicants has also relied upon the judgment rendered in the case of State of Orissa & Ors Vs. Bhagyadhar Dash reported in (2011) 7 SCC 406 by placing reliance upon paragraph 4 thereof, wherein judgment rendered in Jagdish Chander v.Ramesh Chander reported in (2007) 5 SCC 719 has been taken note of. Learned counsel has placed much reliance on paragraph 4(iii) wherein it has been laid down as one of the conditions to treat the arbitration agreement i.e, that as where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement.

20. This Court before considering the aforesaid propositions, as has been relied upon by learned counsel appearing for the parties, again deems it fit and proper to go through the condition stipulated under Clause 8.1 of the MoU, wherein it has been stipulated that in case of any dispute/differences arising between the parties hereto shall be referred to the Secretary, Department of Welfare, Government of Jharkhand for arbitration. Admittedly, the mechanism for resolution of dispute has been carved out at Clause 8.1 of the MoU by making reference the dispute/differences before the named arbitrator for arbitration. Therefore, the intention of the parties to resolve the dispute through arbitration cannot be disputed. Otherwise, the stipulation made under Clause 8.1 of the MoU to the effect that dispute/differences shall be referred for arbitration and moment the word reference has been referred in the said clause to be referred before the Secretary for the purpose of arbitration; meaning thereby that is for adjudication and as such by considering the judgments referred hereinabove, this Court is of the view that the argument which has been advanced on behalf of learned State counsel that the condition stipulated under Clause 8.1 may not be construed to be arbitration agreement, is not acceptable to this Court for the reasons aforesaid since as per the intent of the parties, the dispute/differences is required to be referred for arbitration.

21. At this juncture, the respondents-State cannot be allowed to dispute the intent that at the time signing of the agreement by making reference of the word „refer in case of dispute/differences for arbitration." 22 This Court, in view of the discussions made herein above, on the basis of the legal position as discussed as above is of the considered view that Clause 8.1 of the MoU is held to be arbitration clause.

As such, the argument advanced on behalf of respondents-State is hereby rejected and it is held that Clause 8.1 of the Memorandum of Understanding (MoU) entered into between the parties is arbitration clause.

23. Accordingly, Issue No. I is decided in favour of applicant holding clause 8.1 to be arbitration clause.

24. Issue No. 2: This Court before answering this issue is required to consider as to whether the endeavours have been taken on behalf of applicants/applicants for reference of dispute before the Secretary or not.

25. It is specific case of the applicants that due representations were submitted before the concerned authority but the same was not referred as no reply has been furnished on behalf of respondents in the counter affidavit filed on their behalf. Since the Clause 8.1 stipulates that in case of dispute/differences, the same shall be referred before the Secretary of the department for arbitration, as such when the applicants have made due representations/applications for resolution of dispute, the same having not been resolved, it was incumbent upon the concerned authorities to refer the same before the Secretary of the concerned department as per reference clause made under Clause 8.1 of the MoU but the same has also not been referred before the Secretary for arbitration and thereafter, a notice has been sent to the Secretary also to resolve the dispute/differences but even then also no efforts have been taken, hence, the present applications have been filed.

26. Position of law is well settled that once the condition stipulated in the agreement is to be followed by both the parties and in case of non-observance of the conditions of the MoU particularly the arbitration clause the applicants will have right to take recourse of Arbitration and Conciliation Act, 1996 since the fact about not referring the dispute before the arbitrator is not in dispute as per counter affidavit filed on behalf respondent, therefore, it is a case where arbitrator is required to be appointed.

27. A question has also been raised on behalf of State-respondent that under Clause 8.1 there is no reference as to which law of arbitration will be applicable.

This Court considers it a frivolous argument in the context of the fact that it is a domestic arbitration and there is only one Act in vogue in the field, i.e., Arbitration and Conciliation Act, 1996, and, therefore, the provision of the Act, 1996 will only be applicable.

28. Accordingly, issue No. II is decided.

29. From the discussion made hereinabove this Court, deems it fit and proper to exercise power conferred under Section 11(6)(c) of the Act, 1996 and require to pass an order for appointment of arbitrator considering the factual aspect as also as per the discussions made hereinabove.

30. Accordingly, all the arbitration applications stands allowed.

31. In view thereof and with the consent of the learned counsel for the parties, Hon ble Mr. Justice Amareshwar Sahay, Former Judge, High Court of Jharkhand, residing at "Heritage Parmeshwar"

> Apartment, 4th Floor, 52, Circular Road, Lalpur, Ranchi-834001, email - justicesahay@yahoo.co.in, is appointed as sole arbitrator to adjudicate the dispute between the parties in all the Arbitration Applications, subject to provision as stipulated under Section 12 (5) of Arbitration and Conciliation Act, 1996.

32. Learned Arbitrator would be free to lay down fees and other expenses towards conduct of the arbitration proceedings, however, keeping into account the ceiling prescribed under Schedule IV of the Act of 1996 as amended.

33. Learned Arbitrator would endeavour to conclude the proceedings expeditiously, and preferably within a period of six months from the date of arbitration proceedings so begins, also taking into regard the mandate of the Legislature under Section 29-A of the Act of 1996.

34. The Registrar General of this Court is directed to send copy of the entire pleadings along with copy of the entire order sheet to the learned Arbitrator.

35. Accordingly, the instant Arbitration Applications stand disposed of.

(Sujit Narayan Prasad, J.) Alankar/ -

N.A.F.R.