

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 899 OF 2018
WITH
NOTICE OF MOTION IN COMM. DIV. MATTERS NO. 1436 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO. 899 OF 2018

Maharashtra State Road Development Corporation ...Petitioner
Ltd.

Versus

Jai Laxmi Constructions Engineers And ...Respondents
Contractors

Dr. Birendra Saraf, Advocate General, a/w Mr. Jay Sanklecha, Mr. Arun Siwach, Ms. Priyanka Mitra and Mr. Shanthan Reddy, i/b Cyril Amarchand Mangaldas, for the Petitioner.

Mr. Sachin Punde a/w Mr. Suraj B. Jadhav, for Respondents.

CORAM : SOMASEKHAR SUNDARESAN, J.
RESERVED ON: March 23, 2026
PRONOUNCED ON: April 16, 2026

Judgement:

Context and Factual Background:

1. This Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“*the Act*”) is filed by the Maharashtra State Road Development

Corporation Ltd. (“*MSRDC*”), impugning an arbitral award dated April 18, 2018 (“*Impugned Award*”) passed in favour of the Respondent, Jai Laxmi Constructions Engineers and Contractors (“*Jai Laxmi*”). The challenge is primarily on the ground of absence of jurisdiction owing to non-existence of an arbitration agreement covering the subject matter of the dispute.

2. The factual matrix relevant for purposes of these proceedings may be summarized as under:

A) On July 9, 2005, MSRDC floated a tender inviting offers for the appointment of a contractor for purposes of toll collection at a toll station near Dusarbeed on the Mehkar-Sindkhedraja Road (“*Toll Road*”) and issued an offer document;

B) A corrigendum was issued on July 18, 2005 pursuant to a pre-bid meeting held on July 16, 2005. On July 20, 2005, Jai Laxmi purchased the bid document and went on to submit the offer accepting the terms and conditions of the tender on July 26, 2005;

C) The selected bidder was to pay upfront the net present value of the potential toll that could be collected, for which the right to collect toll from the Toll Road was granted. Jai Laxmi was the third highest bidder but was selected after the first and second highest bidders backed

out. Jai Laxmi was issued a letter of acceptance dated December 30, 2005, appointing Jai Laxmi as the contractor for the Toll Road with an entitlement to collect the toll for a period of 156 weeks i.e. three years (***“Collection Period”***);

D) Jai Laxmi’s bid was for an amount of Rs.3.60 crores payable to MSRDC upfront on a lumpsum basis. Jai Laxmi was also required to provide a performance bank guarantee in the sum of Rs.14 lakhs and make the upfront payment within 30 days. To make this payment, Jai Laxmi would borrow Rs. 3.5 crores, from State Bank of India (***“SBI”***);

E) On January 27, 2006, the parties executed a contract by which MSRDC appointed Jai Laxmi as the “contractor” for the project (***“Toll Collection Agreement”***), which does not contain an arbitration clause;

F) On the same date and simultaneously, an agreement was executed among MSRDC, Jai Laxmi and SBI, by which a person nominated by SBI would have a right to step into the shoes of Jai Laxmi if the Toll Collection Agreement were to be terminated (***“Replacement Agreement”***) with a default being alleged against Jai Laxmi;

G) On January 27, 2006, a Work Order was executed by MSRDC in favour of Jai Laxmi to commence the Collection Period, effective midnight of January 28, 2006. A *status quo* order passed by a Civil Court in a Suit filed by another bidder, led to Jai Laxmi taking possession only at midnight of February 21, 2006 and until February 16, 2009;

H) On February 16, 2009, MSRDC extended the Toll Collection Agreement on the same terms and conditions for a further period until June 14, 2009, with upfront monthly payments as stipulated in a letter issued on that date. This arrangement too ran its course as scheduled without any termination or substitution of Jai Laxmi. In short, the Replacement Agreement never had to be invoked and nothing contained in it had to be activated;

I) On May 26, 2012, Jai Laxmi invoked arbitration raising 10 claims under the Toll Collection Agreement but invoking the arbitration clause contained in the Replacement Agreement and proposed three names, one of whom could be appointed as a Sole Arbitrator. On June 28, 2012, MSRDC proposed three different nominees for appointment of a Sole Arbitrator. On July 3, 2012, Jai Laxmi consented to appointment of one of the three nominees proposed by MSRDC as the

Sole Arbitrator, who commenced proceedings on October 12, 2012 with a meeting that was not attended by MSRDC;

J) On November 6, 2012, MSRDC communicated its objection to the appointment of the Learned Sole Arbitrator stating that there was no arbitration agreement between the parties in relation to the Toll Collection Agreement and that the dispute resolution procedure set out in the Toll Collection Agreement would need to be adopted – civil courts and not arbitration;

K) On March 16, 2013, MSRDC sought time to file a formal application under Section 16 of the Act challenging the jurisdiction of the Learned Sole Arbitrator, which was filed on April 18, 2013. Meanwhile, a Statement of Claim had been filed by Jai Laxmi on November 26, 2012. Along with a preliminary objection to jurisdiction, and without prejudice to it, the Statement of Defence was filed by MSRDC on June 27, 2013 i.e. after the application under Section 16 of the Act;

L) On June 30, 2013, Jai Laxmi filed its reply to the Section 16 Application, contending that the arbitration clause in the Replacement Agreement stood incorporated by reference in the Toll Collection Agreement in terms of Section 7(5) of the Act. That apart, it was

contented that the participation by MSRDC in the appointment of the Arbitral Tribunal, with none other than MSRDC having recommended three names, one of which was picked by Jai Laxmi, led to an arbitration agreement coming into existence by exchange of correspondence under Section 7(4)(b) of the Act;

M) On July 5, 2013, MSRDC filed written submissions pursuant to the Section 16 Application and dealt with the interpretation of Sections 7(5) and 7(4)(b) of the Act to contend that no conscious acceptance of an arbitration agreement is discernible. It was stated that mere participation in the constitution of the Arbitral Tribunal would not confer jurisdiction on an Arbitral Tribunal constituted without an arbitration agreement between the parties being in existence, and under Section 16, participation in constitution would not preclude the right to challenge the absence of jurisdiction; and

N) Between September 2013 and November 2013, pleadings were completed including on MSRDC's counter claim. Eventually, the arbitral proceedings were concluded in October 2017 and the Impugned Award was passed on April 18, 2018 with reasons for rejecting the Section 16 Application being set out in the Impugned Award.

MSRDC's Contentions:

3. It is against this backdrop that the submissions were made before this Court. The hearing was conducted last year and I heard Dr. Birendra Saraf, Learned Senior Advocate for MSRDC and Mr. Sachin Punde, Learned Advocate for Jai Laxmi. Due to a significant efflux of time since the hearing, the matter was fixed for hearing afresh on March 23, 2026, when I heard Mr. Jay Sanklecha for MSRDC and Mr. Sachin Punde for Jai Laxmi. Judgement was reserved afresh.

4. Having examined the record with the assistance of the advocates, I must note at the threshold that MSRDC restricted its line of attack to the Impugned Award to questioning the jurisdiction of the Arbitral Tribunal. If the Arbitral Tribunal had no jurisdiction at all to conduct the proceedings, the Impugned Award would be a nullity in the eyes of law. Consent by expression of clear and unfettered exercise of sovereign autonomy to contract is the bedrock of arbitration. In the absence of consensual agreement to arbitrate to the exclusion of all forums, there cannot be jurisdiction for an Arbitral Tribunal to adjudicate. On the other hand, if despite being party to an arbitration agreement, if a party were to avoid arbitration, the Arbitral Tribunal would be entitled to proceed the whole hog and adjudicate since there has been a consensual expression of commitment to arbitrate.

5. Therefore, whether the disputes referred to arbitration were amenable to arbitration is the core issue to be considered in this Petition.

6. MSRDC would contend that the Toll Collection Agreement and the Replacement Agreement may have been executed on the very same day but each of them individually dealt with a different scope of coverage. It was contended that not only was the subject matter of the two contracts distinct and separate, even the privity to contract was not uniform. Further, MSRDC would contend that in the Toll Collection Agreement the parties explicitly agreed that all disputes would be subject to the exclusive jurisdiction of the Principal Court of Ordinary Civil Jurisdiction at Mumbai and that no suit or other proceedings relating to the conditions of the tender and the performance or breach of contract could be filed in any forum other than the aforesaid Court.

7. Reliance was placed on Clause 8.2 of the Toll Collection Agreement to contend that the parties had squarely agreed to resolve their disputes and differences by reference to the aforesaid exclusive jurisdiction alone. Clause 38 of the Toll Collection Agreement also provided that disputes and differences of opinion between the parties would be resolved by the decision of the Vice Chairman and Managing Director of MSRDC, which shall be final and binding.

Yet, the parties also agreed in Clause 8 that their litigation would be subject to the exclusive jurisdiction of the Principal Civil Court in Mumbai.

8. The Replacement Agreement, MSRDC would contend, granted rights to SBI to step in and replace Jai Laxmi in the case of termination of the Toll Collection Agreement. The arbitration clause in this instrument could never be intended to cover disputes and differences between MSRDC and Jai Laxmi. That arbitration agreement, it is contended, was meant to cover disputes with SBI over the replacement and substitution of Jai Laxmi. The dominant object of the Replacement Agreement was protection of SBI in the event of the replacement of Jai Laxmi, bearing in mind that SBI had lent Rs.3.5 crores used by Jai Laxmi to pay MSRDC. Therefore, if Jai Laxmi were to be replaced, SBI would need to be protected with the underlying rights of toll collection vesting in SBI for the residual period of the contract.

9. The Toll Collection Agreement governed the terms on which Jai Laxmi would pay MSRDC upfront and recover the investment from toll collection during the Collection Period while the Replacement Agreement governed the terms on which SBI would replace Jai Laxmi with a selectee for toll collection work for the residual contract period should the Toll Collection Agreement be terminated.

Jai Laxmi's Contentions :-

10. In sharp contrast, Jai Laxmi would contend that the tender document should be read as a whole and the drafts of both the agreements constitute a composite unified contract and therefore the arbitration clause in the Replacement Agreement would form a binding arbitration agreement that would govern the offer and acceptance represented by the terms of the tender. The offer document has been signed by MSRDC as well as by Jai Laxmi upon the latter's selection and such signatures would indicate that that instrument by itself contained the consent of the parties to its contents and thereby to the arbitration agreement, which came into existence under Section 7 of the Act.

11. Jai Laxmi would further contend that the tender terms provided for three options to pay MSRDC. These included Jai Laxmi making the payment using its own funds; Jai Laxmi taking financial assistance from a lender without the Replacement Agreement being executed; and Jai Laxmi taking financial assistance from a lender who executes the Replacement Agreement along with MSRDC and Jai Laxmi. The sample form of the Replacement Agreement also forms an integral part of the offer document along with the tender. Indeed, Jai Laxmi availed of a loan from SBI which led to execution of the Replacement Agreement. Therefore, it is contended, the arbitration clause in that agreement read with the integral composite whole represented by the

offer document and tender terms which have been signed by all parties together, would indicate that the two instruments fused into one, with the arbitration clause of the Replacement Agreement also governing disputes and differences between MSRDC and Jai Laxmi including disputes under the Toll Collection Agreement.

12. Jai Laxmi would also point out that the term “Replacement Agreement” is defined and incorporated into the Toll Collection Agreement and the term “parties” would refer to Jai Laxmi, MSRDC, the lenders and any special purpose vehicle, if applicable. Therefore, the tripartite Replacement Agreement, would only lead to a lender becoming a party to the bipartite Toll Collection Agreement by execution of the Replacement Agreement. Therefore, the privity of contract is to be considered as uniform across both instruments. Jai Laxmi would point to the Replacement Agreement to indicate that the lender would be able to take over the toll collection rights of Jai Laxmi by appointing a selectee, underlining the interlinkage between the two instruments. So also, the step-in rights of the lender are pointed to, to indicate that the lender would be deemed to be in the shoes of Jai Laxmi under the Toll Collection Agreement, again interlinking the two instruments. Therefore, Jai Laxmi would contend that there is an inseparable interlinkage between the Toll Collection Agreement and the Replacement Agreement.

13. Case law relating to non-signatory veritable parties being amenable to the arbitration agreement is also relied upon in a bid to address the absence of SBI's signature on the Toll Collection Agreement. It is also contended that the arbitration clause in the Replacement Agreement relates to disputes and differences “arising out of” or “in connection with” the Replacement Agreement being amenable to arbitration. The Toll Collection Agreement and the Replacement Agreement being inter-connected, disputes and differences arising out of the Toll Collection Agreement would have a connection with the Replacement Agreement. Therefore, it is contended that the arbitration clause in the Replacement Agreement would also be an arbitration agreement between MSRDC and Jai Laxmi even if SBI had no role in the dispute.

14. Finally, Jai Laxmi would also point to the fact that in response to the three names proposed by Jai Laxmi, MSRDC proposed three names of arbitrators and all that Jai Laxmi did was pick one of the names suggested by none other than MSRDC. Therefore, the exchange of correspondence on the identity of the arbitrators, with Jai Laxmi's invocation notice indicating three names, which were rejected by MSRDC only to propose three other names, which would indicate that there was no quarrel about the applicability of the arbitration clause under the Replacement Agreement to the disputes between the parties. Therefore, the exchange of letters in connection with the process of appointment of the arbitrator itself constitutes an agreement under Section 7

of the Act, and the parties had consensus on the identity of the arbitrator. In the absence of a positive repudiation of the arbitration clause in the Replacement Agreement being invoked by Jai Laxmi, MSRDC has not only participated in the constitution of the Arbitral Tribunal but also expressed its consent by proposing names. Moreover, MSRDC filed a counter claim and is therefore deemed to have submitted to the jurisdiction of the Learned Arbitral Tribunal and cannot now be heard to deny the existence of the arbitration agreement.

15. Jai Laxmi would also invoke Section 4 of the Act to contend that when any requirement under an arbitral agreement has not been complied with by a party and yet, the other party proceeds with the arbitration without stating an objection to such non-compliance, there would be a deemed waiver of the right to object under the Act. Therefore, it is also contented that MSRDC's conduct is a textbook case of approbation and reprobation, blowing hot and cold by participating in the arbitral proceedings to avail of its benefits and taking a chance with its counterclaim, and yet challenging the jurisdiction of the Arbitral Tribunal after losing in the arbitration. Jai Laxmi would contend that if two views are possible, the view that upholds the arbitration agreement must be preferred. The two instruments being integrally interwoven, the interpretation by the Learned Arbitral Tribunal is a reasonable

and accurate interpretation of contract, which this Court must be slow to interfere with.

Analysis and Findings:

16. It is apparent that the issue falls within a very narrow compass. The core issue to be considered is the existence or absence of the arbitration agreement for existential validity of the Impugned Award.

Reasoning in the Impugned Award:

17. The Learned Arbitral Tribunal interpreted Clause 6.1(xi) of the Replacement Agreement which provided that the parties shall read the two instruments together and construe them harmoniously and that in the event of any inconsistency between the Toll Collection Agreement and the Replacement Agreement, the provisions of the Replacement Agreement shall prevail. The Learned Arbitral Tribunal also relied on Clause 36 of the Toll Collections Agreement to hold that upon a termination of that instrument, Jai Laxmi would not be entitled to any refund of the lumpsum upfront payment made by it at the commencement of the contractual relationship and the action to be taken by MSRDC would be in accordance with the Replacement Agreement.

18. The Learned Arbitral Tribunal went on to refer to the arbitration clause in the Replacement Agreement, to hold that such clause could be invoked for resolving disputes under the Toll Collection Agreement as well and that the decision of the arbitrator would be binding on both the parties. Specifically, examining the Clause 38 of the Toll Collection Agreement, the Learned Arbitral Tribunal took the view that the decision of the Vice Chairman and Managing Director of MSRDC would be binding only on Jai Laxmi and not on MSRDC and the Vice Chairman and Managing Director could never be considered to be a judge in his own cause, and therefore, that provision would not constitute an arbitration clause.

19. The Learned Arbitral Tribunal also held that the Replacement Agreement had been signed by both MSRDC and Jai Laxmi on every page, and therefore, a conjoint reading of the two contemporaneous instruments, according to the Learned Arbitral Tribunal would point to a fusion of the two instruments into an inseparable whole which negated MSRDC's contention that the Toll Collection Agreement was not arbitrable with the consent of the parties. As regards the role of SBI, the Learned Arbitral Tribunal held that SBI was in no way concerned with the disputes between the MSRDC and Jai Laxmi and MSRDC and Jai Laxmi as parties to the dispute appointed the Learned Arbitral Tribunal.

20. Finally, the Learned Arbitral Tribunal also held that MSRDC's own conduct through its officer, recommending three names in response to the three names suggested by Jai Laxmi, would indicate that without any doubt, MSRDC had shown its readiness to resolve the disputes through arbitration. Since Jai Laxmi simply accepted one of the three names suggested by none other than MSRDC, MSRDC could not resile from its conduct which is consistent with a belief that there was an arbitration agreement between the parties.

Interplay between the two Agreements:

21. At the threshold, the arbitration agreement in the Replacement Agreement must be noticed – it reads thus:

(v) Any **dispute, difference or claim arising out of or in connection with or in relation to this Agreement** which is not resolved amicably **shall be decided finally by a sole Arbitrator** appointed by mutual **consent of all parties to the dispute** and in case of disagreement on the appointment of the sole Arbitrator the matter shall be referred to the Chief Justice of High Court Judicature, Mumbai for appointment of Arbitrator under the provision of Arbitration and Conciliation Act, 1996. The Arbitrator shall issue a reasoned award. The venue of such arbitration shall be Mumbai, India. The Award shall be final and binding on the parties. The Parties agree and undertake to carry out the award of the arbitrators (The 'Award") without delay. Subject to the final award during the pendency of Arbitration all costs of Arbitration (Excepting the Advocates

Solicitors fees) shall be borne and paid by in equal proportion by all the parties to the dispute.

[Emphasis Supplied]

22. The disputes and differences covered by the aforesaid provision are those under “*this Agreement*” i.e. the Replacement Agreement. The disputes must arise out of the Replacement Agreement; or they must be in connection with the Replacement Agreement; or they must relate to the Replacement Agreement. In all circumstances, where the disputes have an inextricable connection to the Replacement Agreement, such dispute irrespective of who the parties to the dispute are – this could include disputes between MSRDC and Jai Laxmi – would need to be referred to arbitration. However, what is vital at the core is that the differences of opinion must relate to the Replacement Agreement. The subject matter of the Replacement Agreement is the substitution of Jai Laxmi in the event of the termination of the Toll Collection Agreement. At the core of the jurisdictional fact necessary to trigger the terms of the Replacement Agreement to start their operation is the termination or even a purported termination of the Toll Collection Agreement.

23. However, the Toll Collection Agreement was not even purported to be terminated. Not only was Jai Laxmi not sought to be ejected from the Toll Road, it was even given an extension on the same terms for a longer period.

The Replacement Agreement had no role whatsoever and nothing contained in it had to ever be acted upon; no obligation contained in it had to be discharged; and nothing in it was to be executed. The claims raised by Jai Laxmi were admittedly under the Toll Collection Agreement. They had nothing to do with the Replacement Agreement. Therefore, on these facets alone, in my opinion, the arbitration agreement among the parties had no role whatsoever.

24. It would then be instructive to examine the provisions governing dispute resolution in the Toll Collection Agreement – Clause 8.2 and Clause 38 read thus:

8.2 LAW : The contract shall be governed and construed in accordance with the law of India. No suit or other proceedings relating to this offer, its conditions and performance or breach of contract shall be filed or taken by the Contractor in any Court of Law except Principal Court of Ordinary Civil Jurisdiction at Mumbai which shall have exclusive jurisdiction to the exclusion of any outside court.

[Emphasis Supplied]

25. The parties evidently contracted that if Jai Laxmi sought to initiate any proceedings, it could only do so in the Principal Court of Ordinary Civil Jurisdiction at Mumbai. Therefore, what is clear is that the parties had agreed how to resolve their disputes in relation to the Toll Collection

Agreement – that was by resort to the Principal Court of Ordinary Civil Jurisdiction at Mumbai.

26. Clause 38 is problematic on the choice by the parties. It reads thus:

*38.0 DISPUTES AND RESOLUTION: **In case of disputes or difference of opinion arising, the decision of the Vice Chairman and Managing Director shall be final and binding on the Contractor.** The Contractor shall be given 'reasonable opportunity to represent his case before the Vice Chairman and Managing Director.*

[Emphasis Supplied]

27. Although the heading uses the words “Disputes” and “Resolution”, the manner of drafting of the provision does not necessarily lend itself to being an arbitration provision – there is nothing to indicate that the parties would have to abide by whatever the Vice-Chairman and Managing Director of MSRDC would say. This provision also has to be reconciled with Clause 8.2, which would only mean that the parties would attempt to resolve by means of Clause 38, but it is possible that Jai Laxmi would be dissatisfied and would want to litigate. If that occasion were to arise, Clause 8.2 would point to Jai Laxmi having to litigate in the Principal Civil Court in Mumbai – far from resorting to arbitration.

28. Whether Clause 38 is an arbitration clause came up for consideration before the Learned Arbitral Tribunal and it has held that this

provision is not an arbitration agreement. I would agree with that decision – merely stating that one of the parties to the agreement would decide upon a dispute would not constitute arbitration. In an arbitration, only the forum changes – from the public courts to private tribunals contractually created by parties. However, what is vital is that the parties must be heard by a neutral impartial and independent forum; they must be able to present their respective positions and reasons; and the forum would adjudicate issues. Clause 38 is more in the nature of identifying who in MSRDC would deal with representations made by Jai Laxmi. Clause 8.2 could only mean that the handling of the representation by the Vice-Chairman and Managing Director may not be satisfactory to Jai Laxmi and therefore, it would have a right to litigate, and such litigation would go to the Principal Civil Court at Mumbai. Therefore, the phrase “final and binding” in Clause 38 would mean the final position from MSRDC i.e. the last word from that party would come from the Vice-Chairman and Managing Director. That may indeed warrant a claim and a dispute, which can be resolved by litigation, and such litigation would fall in the exclusive jurisdiction of the agreed Court, and therefore, not in arbitration.

29. The Toll Collection Agreement and the Replacement Agreement are of course related. They cannot be unrelated – the removal of Jai Laxmi would lead to the agreed terms for its substitution under the Replacement Agreement kicking in. However, they are not inextricably intertwined at all as is sought

to be contended by Jai Laxmi. They are connected only where the termination of Jai Laxmi is proposed and the provisions of the Replacement Agreement are attracted. Any dispute in connection with the substitution and replacement would be amenable to arbitration. Therefore, in my view the Learned Arbitral Tribunal has taken a view that is foundationally flawed insofar as the existence of the arbitration agreement is concerned.

Section 7 – Formation of the Arbitration Agreement:

30. For an arbitration agreement to come into being, the parties ought to have a written agreement unequivocally committing to arbitration. What is meant by party autonomy is that the parties must have understood in the same manner that the only means of dispute resolution is to arbitrate. The provision governing the subject is Section 7 of the Act, which reads thus:

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.*

(3) *An arbitration agreement shall be in writing.*

(4) *An 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.

(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.

[Emphasis Supplied]

31. Under Section 7(1), the parties to the agreement ought to have agreed to submit specified disputes between them in respect of a defined legal relationship to arbitration. An essential ingredient is that the disputes ought to be in respect of a defined legal relationship. The Replacement Agreement has a very specific defined relationship in respect of which disputes have been agreed to be referred to arbitration. The defined legal relationship in the Replacement Agreement is that of how the substitution of Jai Laxmi as the contractor for collection of tolls on the Toll Road, would be acted upon. In sharp contrast, the defined legal relationship in the Toll Collection Agreement are the terms on which the Toll Collection has been contracted to Jai Laxmi by MSRDC. The two defined legal relationships are distinct and separate

although they are related to each other. Discharge of the terms of the Replacement Agreement would commence when the termination under the Toll Collection Agreement is effected (Clause 38 of that instrument). But if there is no termination, although executed and signed, the Replacement Agreement would have no role to play.

32. Therefore, the main test of Section 7(1) has not been met by the arbitration clause in the Replacement Agreement when applied to disputes raised entirely under the Toll Collection Agreement. On the disputes under the Toll Collection Agreement, the parties have agreed that Jai Laxmi would have resort to the Principal Civil Court at Mumbai.

33. The contractual framework at hand in these proceedings also fails to meet two other provisions where there is potential to discern an arbitration agreement. Indeed, MSRDC raised a counterclaim after having raised its objection to existence of the arbitration agreement. Section 7(4)(c) would discern an arbitration agreement only if there is an exchange of Statement of Claim and Statement of Defence in which existence is alleged by one party and not denied by the other. In this case, MSRDC has clearly denied the existence of an arbitration agreement. The further without-prejudice participation was necessitated because the jurisdictional fact necessary for determining the

existence, was postponed by the Learned Arbitral Tribunal to the stage of final adjudication. Therefore, the ingredients of Section 7(4)(c) are not attracted.

34. Section 7(5) too enables incorporation of an arbitration agreement by reference. A contract that makes a reference in a manner as to incorporate the arbitration agreement in another instrument by making such reference would lead to an arbitration agreement. In this case, the Toll Collection Agreement makes no incorporation by reference. On the contrary it explicitly provides for exclusive jurisdiction in a Court. Therefore, in my opinion, no arbitration agreement is discernible on this count too. Indeed, Jai Laxmi has made a laborious interpolation and sought to canvas an inter-connection between the two instruments. I have already explained why the two instruments are indeed connected but can never be regarded as being inextricably interwoven into a single whole. Therefore, Section 7(5) too is of no avail.

35. The next facet for consideration is whether the exchange of correspondence by Jai Laxmi naming three proposed arbitrators in an invocation notice being replied to by an official of MSRDC with three alternate names (one of which was chosen by Jai Laxmi) would by itself lead to an arbitration agreement having come into existence. While this contention is very attractive at first blush, on a careful consideration, it does not lend itself

to acceptance. This is because the parties had a specific and unequivocal agreement on how they would resolve disputes in each of the respective instruments. Therefore, for the exchange of letters to constitute a new arbitration agreement, it would have to partake the character of an amendment to the Toll Collection Agreement. A reply to the invocation notice cannot be elevated to a considered and conscious amendment to Clause 8.2 of the Toll Collection Agreement. Clearly, there is no evidence to indicate that whoever replied to the invocation notice had authority to amend the Toll Collection Agreement on his own. Moreover, well before the Statement of Defence was filed, MSRDC explicitly raised the plea that the dispute is not amenable to arbitration.

MSRDC's Participation and Counterclaim:

36. In this light, Section 16 of the Act must be noticed – it reads thus:

16. Competence of arbitral tribunal to rule on its jurisdiction.— (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*

(3) *A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

(4) *The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.*

(5) *The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*

(6) *A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.*

[Emphasis Supplied]

37. This provision clearly empowers the Arbitral Tribunal to rule on its own jurisdiction. Section 16 also makes it clear the participation in the constitution of the Arbitral Tribunal would not preclude the ability to raise a plea on jurisdiction. The question of existence of an arbitration agreement is a core existential question of jurisdiction and cuts to the root of the matter. This cannot be wished away by the participation in constitution of the Arbitral Tribunal. The legislative policy choice is clearly that such a situation may

emerge, and that the participation in constituting the Arbitral Tribunal ought not to preclude the capacity to raise the objection on the existence of the arbitration agreement. Put differently, in the absence of an arbitration agreement, it has been legislatively made impossible to contend that the participation in formation of the Arbitral Tribunal would suffice to constitute an arbitration agreement. This is precisely what Jai Laxmi is contending as its last submission. This is contrary to the scheme of Section 16 and is therefore repelled.

38. Moreover, where the agreement to arbitrate is itself non-existent, the participation in selecting an arbitrator would still be *ultra vires* the contract. The proposal of three names by the officials of MSRDC would be *ultra vires* the Toll Collection Agreement if that instrument did not have an arbitration agreement. As seen above, that agreement contains an exclusive jurisdiction clause pointing to any claim by Jai Laxmi having to be adjudicated in that Court. Therefore, it is not at all tenable to contend that the exchange of correspondence pursuant to the invocation notice gave rise to an arbitration agreement.

39. Indeed, under Section 16 of the Act, the objection to jurisdiction has to be raised at the earliest opportunity, which MSRDC has done. It is equally true that the Learned Arbitral Tribunal did not rule on the jurisdictional

objection as a preliminary point and deferred that decision to the final outcome in the arbitral proceedings. Even if there had been a preliminary ruling in favour of jurisdiction, under Section 16, a challenge at that stage is prohibited and the challenge is deferred to the Section 34 stage, which too is only should the need to challenge arise i.e. if the party raising the jurisdictional objection is the judgement debtor in the arbitral award. Under Section 37(2)(a) too, it is only when a plea of absence of jurisdiction is accepted that a statutory appeal is provided for.

40. In this case, the plea of the absence of an arbitration agreement has been rejected simultaneously with the final adjudication. At this stage, the challenge under Section 34 is the stage at which the plea under Section 16 has been disallowed. If the plea of absence of jurisdiction is allowed, the jurisdiction of Section 37 would be attracted. The plea of absence of jurisdiction has been rejected in this case and outcome in the arbitration also is against MSRDC. The challenge of the decision under Section 16 has now fused into the challenge of the Impugned Award.

41. I have been anxious and conscious of the serious time and expenditure that has been invested by the parties in the arbitration proceedings. Whenever a jurisdictional objection is raised and rejected and eventually has to be adjudicated after an award is made, this facet always

weighs in the mind of the Court. Yet, the jurisdictional objection is a real objection – if there is no jurisdiction, it cuts to the root of the matter. This is a conscious policy feature in the legislative design of the Act. The party seeking to raise the objection has to raise it at the earliest opportunity. The Arbitral Tribunal may rule on it as a preliminary issue and at times may have to consider questions of fact if a facet of jurisdictional fact is involved in taking a decision.

42. In this case, indeed, the Learned Arbitral Tribunal felt it necessary to examine the facts fully with evidence before answering the jurisdictional question. The contemporaneous conduct of the parties and evidence on that would have a bearing on taking the decision, and the Learned Arbitral Tribunal cannot be faulted for deferring the decision on jurisdiction to the stage of final adjudication, after examining the evidence. It must be emphasised that MSRDC had indeed raised its jurisdictional objection at the threshold and at the earliest. The very scheme and design of Section 16 of the Act is that an Arbitral Tribunal is empowered to rule on its own jurisdiction, and should it hold that it indeed has jurisdiction, such decision is not amenable to challenge except at the Section 34 stage i.e. should the need arise for the party raising the jurisdictional challenge to challenge the arbitral award. This is the core element of the scheme of the Act with minimal interference by the Court as codified in Section 5 of the Act.

43. Therefore, the contention that the counterclaim by MSRDC would indicate submission to arbitration and that MSRDC is approbating and reprobating, is not tenable. Of course, the filing of such counterclaim was without prejudice to the jurisdictional objection, which had been taken at the threshold. Therefore, on this count too, I am not persuaded to hold that MSRDC had given rise to a new arbitration agreement first by proposing three names in response to the invocation notice, and then by filing its counterclaim in the course of the arbitration. MSRDC indeed raised its objection and retained in. The engagement in arbitration was without prejudice to its objection to jurisdiction and therefore, it has not eroded its statutory right to object to jurisdiction at the Section 34 stage. The challenge at this stage is not the case of an ambush after finding that a willing participation in an arbitration turned out adverse – MSRDC had indeed challenged the jurisdiction and contended the absence of an arbitration agreement for the Toll Collection Agreement.

Scope of Review of the Impugned Award – Section 34:

44. Against this backdrop, I have also considered whether the Learned Arbitral Tribunal's interpretation of contract is a plausible and reasonable one or whether it is so unreasonable that it cuts to the root of the matter. This is because it is well settled that the Learned Arbitral Tribunal has the prerogative

of interpreting the agreement and as the master of evidence is the best judge of the quality and quantity of evidence.

45. I have set out my analysis above as to how to interpret the two instruments in the context of discerning an arbitration agreement. In my view the analysis by the Learned Arbitral Tribunal is not just implausible – it is not at all a reasonable view that is possible. Indeed, the Replacement Agreement has to be read consistent with the Toll Collection Agreement. However, for that situation to arise, the jurisdictional fact necessary to attract the provisions of the Replacement Agreement ought to have occurred – the termination of Jai Laxmi as the contractor. That situation never arose. On the contrary the Toll Collection Agreement was extended further. Therefore, the circumstances never even necessitated the parties having to interpret the Replacement Agreement for such interpretation to be consistent with the Toll Collection Agreement. If and when and as and when the hypothesis of the Replacement Agreement having to be interpreted were to arise, it would have had to be interpreted consistent with the Toll Collection Agreement. That situation has nothing to do with the parties having agreed that the disputes under the Toll Collection Agreement can be raised by Jai Laxmi outside the exclusive jurisdiction agreed to in Clause 8.2 of the Toll Collection Agreement, and by reference to arbitration under the Replacement Agreement.

46. Therefore, I am quite satisfied that the error in the interpretation adopted by the Learned Arbitral Tribunal is so gross and perverse that it cuts to the root of the matter. When parties have agreed on a specific means of dispute resolution under the Toll Collection Agreement and that is not arbitration, it is quite perverse to purport that the agreed exclusive jurisdiction provision stood displaced by nothing more than the interpretation of another clause in the Toll Collection Agreement.

47. I have also discounted the fact that the Learned Arbitral Tribunal is not a trained judicial mind and may not express reasons in a sophisticated judicial manner. In fact, I am conscious that even implicit reasons that would otherwise support the outcome, when discernible, must lead to the Section 34 Court not interfering with an arbitral award. This situation at hand is quite grossly skewed – to a degree that the findings are patently illegal for being completely contrary to contract. The Impugned Award provides the reason of harmonious reading when no circumstance of harmonious reading arose. The specific subject matter of the two instruments is distinct and different and this nuance has been completely lost to the Learned Arbitral Tribunal. The requirement that MSRDC would conduct itself in terms of the Replacement Agreement would be attracted only if the Toll Collection Agreement were to be terminated. Far from having been terminated, it was even extended. Therefore, in my opinion, the reading of the two instruments and their

interplay is so patently wrong that it cuts to the root of the matter that no reasonable reading could adopt.

48. It is made clear that the observations in this judgement are in relation to the jurisdictional question and the existence of the arbitration agreement. Having found that there is no jurisdiction, I have explained my reasons for disagreeing with the Learned Arbitral Tribunal. Therefore, nothing contained in this judgement is an expression of an opinion on merits of the case.

49. I have already explained why MSRDC's participation in constitution of the Learned Arbitral Tribunal and the filing of a counterclaim are no bar to filing its objection on jurisdiction and continuing with it. On this count too, the Learned Arbitral Tribunal has fallen into error and has not appreciated the scope and import of Section 16 of the Act.

50. In these circumstances, I am constrained to ***quash and set aside*** the Impugned Award for being a product of a forum that lacked jurisdiction (*coram non iudice*).

51. The Section 34 Petition is ***allowed***. All interim applications shall stand ***disposed of*** accordingly. Any deposits made in this Court shall be

released to MSRDC within a period of six weeks from the upload of this judgement on the website of this Court.

52. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]