

**Bharat Drilling Vs. District Rural Development Agency and ors.**

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**Court :** Patna

**Decided On :** May-22-1997

**Judge :** M.Y. Eqbal, J.

**Appeal No. :** Appeal From Appellate Order No. 120 of 1989 (R)

**Appellant :** Bharat Drilling

**Respondent :** District Rural Development Agency and ors.

**Disposition :** Appeal Allowed

**Judgement :**

**M.Y. Eqbal, J.**

1. This appeal under Section 39 of the Arbitration Act, 1940 (hereinafter to be referred to as 'the Act' for short) is directed against the judgment and decree dated 31.7.1989 passed by the learned Subordinate Judge-II Daltonganj, in T.S. No. 85 of 1985 whereby and whereunder the court below rejected the objection filed by the appellant under Section 30 of the said Act and made the award Rule of the Court.

2. The facts of the case are not in very much dispute. The plaintiff-appellant (M/s. Bharat Drilling) Ranchi, entered into an agreement with the defendants-respondents for drilling tube-wells on 400 different points in

different parts of the district of Palamu and an agreement to that effect in F-2 Form was executed on 8.7.1983. It was alleged by the appellant-firm that the defendants did not supply the drilling points, so the work could not be done and

due to the inaction on the part of the respondents all the machines, equipments and experts so arranged by the appellant remained idle from 1.12.1983 to 31.3.1984 and the firm did not get other works in the season. The appellant's further case was that it suffered a huge loss. The intiff-appellant,

therefore, filed Title Suit No. 85 of 1985 before the Subordinate Judge, Palamu at Daltonganj under Section 20 of the Act with a prayer that the defendants-respondents be directed to file the agreement and the matter be referred to the sole Arbitrator for adjudicating the disputes.

3. It appears that the Subordinate Judge after hearing the parties passed the order for reference of the dispute to the sole Arbitrator. The said order was challenged by the respondents up to the Supreme Court. The Supreme Court

ultimately by its order dated 31.10.1988 directed the sole Arbitrator, namely, the Superintending Engineer, Minor Irrigation Department, Daltonganj, to decide the dispute. The Superintending Engineer accordingly gave the award against the appellant and filed it in the court of the Subordinate Judge, Palamu at Daltonganj. The appellant on being noticed filed its objection under Section 30 of the Act challenging the legality and validity of the award. The court below after hearing the parties rejected the objection filed by the appellant and refused to set aside the award. The court below accordingly made the award Rule of the Court. Hence, this appeal.

4. Mr. A.K. Sinha, learned Sr. counsel appearing for the appellant, assailed the impugned judgment and order passed by the court below as being illegal and wholly without jurisdiction. The learned Counsel first of all took a

very interesting point that filing of the award by the Arbitrator in the court of the Subordinate Judge, Palamu at Daltonganj, itself is illegal, inasmuch as the Supreme Court by specific order passed in Civil Appeal No. 3865 of 1988

referred the matter to the Arbitrator for deciding the two points formulated by the Supreme Court. According to the learned Counsel, therefore, the award ought to have been filed in the Supreme Court and the court below has no

jurisdiction to entertain the award and make it Rule of the court. In support of his contention, learned counsel relied upon a decision of the Supreme Court in the case of Bharat Cooking Coal Ltd. v. C.K. Ahuja and Anr. 1995 (Suppl.)

1 SCC 744.

Learned Counsel next submitted that the Arbitrator has not at all taken into consideration the points of reference referred by the Supreme Court, nor the award has been given in conformity with the points formulated by the Supreme Court. Learned Counsel submitted that the Arbitrator has misconducted himself and the proceeding by not giving the award in the true spirit of the order passed by the Supreme Court. Learned Counsel has also drawn my attention to the order dated 5.9.1988 and the subsequent orders by which time was allowed to the Arbitrator for filing of the records of the Arbitration proceeding, but the same was not produced and for that the respondents filed an application on 15.3.1989 for revoking the authority of the Arbitrator as he has not filed the award and the records of the proceeding within time. Lastly, learned Counsel submitted that the impugned award was otherwise invalid and the court below completely failed to consider all these points and has passed the impugned judgment on extraneous consideration.

5. On the other hand, Mr. Mungeshwar Sahu learned Counsel for the respondents, in reply to the submissions of Mr. Sinha submitted that the question with regard to filing of the award before the Supreme Court was not taken by the appellant before the court below, instead the appellant filed its

objections under Section 30 of the Act before the court below without raising any objection with regard to the jurisdiction. According to the learned Counsel, the

appellant, therefore, cannot be allowed to raise the question of jurisdiction at this stage.

Learned Counsel further submitted that from the award itself it will appear that the Arbitrator was fully conscious about the points of reference and the order passed by the Supreme Court. The very fact that the Arbitrator held that the contract was not terminated goes to show that the Arbitrator proceeded in terms of the direction of the Supreme Court. Learned Counsel lastly submitted that the award is perfectly legal and valid and the court below has not committed any illegality in making the award Rule of the Court. In support of his contentions/learned Counsel relied upon the decisions rendered in the cases of : (i) Raipitr Development Authority v. Chokhatnai Contractors AIR 1990 S.C. 1426, (ii) Allen Berry & Co. Put. Ltd. v. Union of India : [1971]3SCR282 and (iii) Bihar State Electricity Board v. Khalsa Brothers AIR 1988 Patna, 304.

6. Having regard to the facts of the case and the submissions made by the learned Counsel for the parties the following points emerge for consideration by this Court:

(i) Whether filing of the award by the Arbitrator in the court of the Subordinate Judge, Palamu at Daltonganj is valid in law, and if not, whether the impugned order making the award Rule of the court is vitiated on that account?

(ii) Whether the appellant succeeded in proving that the Arbitrator misconducted himself or with the proceeding and the award is otherwise in-valid in law?

Re: Point No. (i):- 7. As State above the proceeding under Section 20 of the Act was initiated from the court of the Subordinate Judge, Palamu at Daltonganj and the matter went up to the Supreme Court in Civil Appeal No. 3865 of 1988. The Supreme Court passed the following order:

## **ORDER**

Special Leave granted.

Having considered the facts and circumstances of the case, we pass the following orders:

The disputes are referred to the Superintending Engineer, Minor Irrigation, the Arbitrator named in the agreement, who shall adjudicate the disputes. He will enter upon the reference within four months from the date of the communication of this order to him. He will adjudicate upon the following disputes, namely:

(1) Whether there was a repudiation of the contract by the appellant? If

so, was such repudiation justified? If not, is the respondent entitled to any relief?

(2) To what reliefs or damages are the parties entitled to in respect of the aforesaid contract?

The Arbitrator will give the award within four months from the date of entering into the reference.

The appeal is disposed of.

8. From perusal of the aforesaid order of the Supreme Court it is manifest that the Supreme Court has not given any indication to the Arbitrator for filing of the award before it or before the proper court. Now, therefore, for deciding the question raised by the appellant it is necessary to look into the provisions of Section 14 of the Act, which reads as under:

14. Award to be signed and filed.--(1) When the arbitrators or umpire have made their award, they shall sign it, and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party of if so

directed by the Court and upon payment of the fees and charges due in

respect of the arbitration and award and of the costs and charges of filing the award cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire State a special case Under Clause (b) of Section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of the award.

The word 'Court' has been defined in Section 2(c) of the Act which reads as under:

2. Definitions.--In this Act, unless there is anything repugnant in the subject or context.

(a)...

(b)...

(c) 'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of the suit, but does not except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court;

9. From composite reading of Section 2(c) and 14 of the Act, it is manifest

that the award has to be filed in a court having jurisdiction to decide the

subject matter of reference. This question came for consideration before the Apex

Court on several occasions.

10. In the State of Madhya Pradesh v. Saith and Skelton (P) Ltd, and

Ors. : [1972]3SCR233 the fact was that an agreement was entered into by

and between the State of Madhya Bharat and M/s. Saith and Skelton (P) Ltd. for supply and erection of penstocks for Gandhi Sagar Power Station.

Subsequently disputes arose between the parties and arbitrator was appointed.

The appellant (State of M.P.) filed an application under Section 5 of the Act for setting aside the nomination of the Arbitrator and that matter went to the

Supreme Court in Special Leave Petition. The Supreme Court granted the Special Leave and allowed the appeal and set aside the appointment of the

sole Arbitrator. The Supreme Court further by its order appointed one A.S.

Desai, Sr. Advocate, as Arbitrator by the consent of the parties and directed that the Arbitrator will make his award within three months. Subsequently,

the time for publication of the award was extended time to time and finally

the Arbitrator filed his award in the Supreme Court itself. After the notice by

the Supreme Court, the respondent appeared and took various objections challenging the validity of the award. One of the objections was that the

Supreme Court was not the Court as contemplated by Section 14(2) read with

Section 2(c) of the Act. Hence, filing of the award in the Supreme Court was illegal and in-effective in law. The award ought to have been filed before the

court within whose jurisdiction the dispute arose. The Apex Court held that

filing of the award before it was perfectly legal and valid, inasmuch as while

referring the dispute to the Arbitrator the Apex Court did not indicate that it

had divested itself of its jurisdiction to deal with the award. The Apex Court held as under:

According to Mr. Shroff the award should have been filed not in this Court, but in the Court of the Addl. District Judge, Mandsau, as that is the Court which will have jurisdiction to entertain the suit regarding the subject matter of the reference. We are not inclined to accept this contention of Mr. Shroff. It should be noted that the opening words of Section 2 are 'In this Act, unless there is anything repugnant in the subject or context'. Therefore, the expression 'Court' will have to be understood as defined in Section 2(c) of the Act, only if there is nothing repugnant in the subject or context. It is in that light that the expression 'Court' occurring in Section 14(2) of the Act will have to be understood and interpreted. It was this Court that appointed Sri V.S. Desai on January 29, 1971, by consent of parties as an arbitrator and to make his award. It will be seen that no further directions were given in the said order which will indicate that this Court had divested itself of its jurisdiction to deal with the Award or matters arising out of the Award. In fact the indications are to the contrary. The direction in the order dated January 29, 1971 is that the arbitrator is 'to make his Award'. Surely the law contemplates further steps to be taken after the Award has been made, and quite naturally the forum for taking the further action is only this Court. There was also direction to the effect that the parties are liberty to apply for extension of time for making the Award. In the absence of any other court having been invested with such jurisdiction by the order, the only conclusion that is possible is that such a request must be made only to the court which passed that order, namely, this Court.

A similar question arose before the Apex Court in the case of Punjab State Electricity Board and Ors. v. Ludhiana Steels Private Ltd. : AIR 1993 SC1355 . In that case the plaintiff-Ludhiana Steel entered into an agreement with the Punjab Electricity Board for supply of energy. A dispute with regard to payment of bill arose and the plaintiff filed the suit for injunction. That matter went up to the Supreme Court and the Supreme Court passed the following order:

By the consent of the parties we direct that the dispute be referred to the arbitration of Mr. Justice A.D. Koshal, a retired Judge of this Court. He may take

the assistance of a technical assessor and may consult the Chief Inspector. We would suggest that the arbitrator may fix his terms and would try to make his award within four months from now. The award may be sent to the Registry of this Court. Expenses shall be apportioned fifty-fifty.

After the aforesaid order was passed by the Supreme Court, the Arbitrator so appointed entered into the reference, published the award and filed it in the Registry of the Supreme Court. Against the said award, the Respondent-Electricity Board filed objections. One of the objections was that the award ought to have been filed in the trial court and even if it is filed before the Supreme Court, it must be sent to the trial court. The Apex Court rejecting the objection of the respondent held as under:

The first objection urged by Shri Goel, learned Counsel for the Board is that the award must be sent to the trial court which will consider and decide whether it should be made the rule of the Court. He submitted that it is not for this Court to consider whether the said award should be made the Rule of the Court. We are not prepared to agree. The order referring the dispute to the arbitrator expressly states that 'the award may be sent to the Registry of this Court.' There is nothing in the order to show that this Court contemplated transmitting the award to the trial court for consideration. It is evident from a reading of the order that the acceptance or rejection of the award lies with this Court and this Court alone.

A similar question again arose before the Apex Court in the case of Bharat Coking Coal Limited (supra). In that case also the Apex Court in the Civil Appeal by its order dated 18.11.1991 referred the disputes and differences for

adjudication to the Arbitrator in the following terms:

The disputes and differences referred to in the aforesaid matters are by consent referred to the arbitration of Mr. J.P. Thakur, Dy. Chief Engineer (Civil) Koylanagar P.O. Koylanagar District-Dhanbad, Bihar. Both the parties undertake to file a regular reference agreement before the said arbitrator within two weeks. Award to be made within four months thereafter.

In terms of the order of the Supreme Court, the Arbitrator entered into the reference and after hearing the parties published and filed the award before the Supreme Court. An application thereafter was filed in the Supreme Court for making the award Rule of the Court. A similar objection was raised that the award ought to have been filed before the court in which the arbitration proceeding originated. The Apex Court following its earlier judgment in the case of State of M.P. v. Saith and Skelton (supra) held that the award was rightly filed before the Supreme Court. The Apex Court further held that since the objection with regard to filing of the award in a particular court was not taken at an appropriate stage, the said objection cannot be allowed to be taken at the subsequent stage. The Apex Court while deciding the question held as under:

In our view the contention raised by Mr. Bhandare is wholly justified. The Registry of this Court gave notice to the learned Counsel for the parties about the filing of the award in April, 1994. It is no body's case that the counsel had an authority to take such notice on behalf of either of the party. It was also open to the counsel to take inspection of the award. As a matter of fact, such inspection was also taken on 3.10.1994 but no objection was filed within thirty days either from the notice given by the Registry in April, 1994 or from the date of inspection of the award on 3.10.1994. It has been held by this Court in State of M.P. v. Saith Skelton (P) Ltd . that where the Arbitrator was appointed by the Supreme Court by consent of parties and no further directions were given in the said order which would indicate that the Supreme Court had not divested itself of its jurisdiction to deal with the award or matters arising out of award, the forum for taking further action is the Supreme Court. It has also been held in the said decision that in the absence of any other court having been invested with such jurisdiction, the only conclusion

that is possible is that further orders must be passed only by the Court that passed the order, namely, the Supreme Court. Mr. Bhandare has relied on a later decision of this Court in Punjab SEB v. Ludhiana Steels (P) Ltd. in support of his contention that when reference to arbitration was made by this Court, the award is to be filed in this Court only. We may only indicate that the said decision has a distinguishable feature inasmuch as in that case after making reference to arbitration, this Court specifically directed that the award would be sent to Registry of this Court. In any event, even if it is assumed that the award should be filed in other Court when the notice of filing the award was given by the Registry of this Court, objection as to the Award including objection as to forum ought to have been raised before this Court and it will not be open to the parties to altogether ignore the notice of filing the award by given the Registry of this Court. We may also indicate here that in the petition of objection it has not been urged that there has been any impropriety in filing the award in this Court. Accordingly such objection should not be permitted to be raised at this stage as the objection to the award has been filed long after the period of limitation, the same should be dismissed. We may also indicate here that even on merit, we do not think that any interference is called for against the award. We, therefore, allow the inter locutory Applications Nos. 9 to 12 of 1994 and direct the award to be made rule of court. It also appears to us that in the facts of the case, the applicants M/s. C.K. Ahuja and another, are entitled to get an award of interest @ 12% from the date of the award till realisation. The interlocutory applications are accordingly disposed of. There will be no order as to costs.

11. In the light of the principles laid down by the Supreme Court, it is clear that the court which passed the order of reference is the court where the award is to be filed, unless that court divested itself of its jurisdiction to deal with the award. In the cases decided by the Apex Court discussed above, one important fact appears to me is that in all the cases the Supreme Court by its order, with consent of the parties, referred the matter to a particular person as the Arbitrator and not to the named Arbitrator in the arbitration agreement. In the instant case, the Superintending Engineer, Minor Irrigation Department is the named Arbitrator in the agreement. The court of the Subordinate Judge, Palamu at Daltonganj wherefrom the disputes originated passed the order dated 24.4.1987 appointing

the Suprerintending Engineer, Minor Engineering Circle, at Daltonganj, as Arbitrator in terms of clause 23 of the arbitration agreement. The said order was challenged upto the Apex Court and the Apex Court finally by its order referred the matter to the Superintending Engineer, Minor Irrigation Deptt, Palamu at Daltonganj, Who is the Arbitrator named in the arbitration agreement. I am, therefore), of the opinion that the award was rightly filed by the Arbitrator in the court of the Subordinate Judge, Palamu at Daltonganj.

12. Even assuming the submission of Mr. A.K. Sinha is correct that the Arbitrator was required to file the award in the Supreme Court, it appears that the appellant did not raise this question in the objection filed before the court below challenging the propriety of the award or at no point of time any such objection was raised by the appellant about the alleged impropriety in filing the award before the court below. In such circumstances, I am of the opinion that such contention should not be allowed to be raised at the appellate stage.

13. For the aforesaid reasons, I hold that filing of the award before the Subordinate Judge, Palamu at Daltonganj cannot be said to be illegal or without jurisdiction. Point No. (1) is decided accordingly.

Re:-Point No. (2): 14. The next question arises for consideration is whether the appellant succeeded in proving that the Arbitrator mis-conducted himself or the proceeding and the award is otherwise invalid in law. The contention of Mr. Sinha is that the Arbitrator while hearing the disputes and gving the award has not at all considered the points of reference formulated by the Supreme Court, nor the award has been given in confirmity with the points referred to him by the Supreme Court. The further contention of the learned Counsel is that the Arbitrator has mis-conducted himself and the proceeding by not giving the award in the true spirit of the order passed by the Supreme Court.

15. As indicated above, the Supreme Court in its order or reference has referred two disputes to the Arbitrator for adjudication. Firstly, whether there

was a repudiation of contract by the appellant, and if not, then is the respondent entitled to any relief; and secondly to what relief or damages are the parties

entitled to in respect of the aforesaid contract.

16. From perusal of the award it does not appear that the Arbitrator adjudicated the disputes and gave the award in terms of the order of reference

made by the Supreme Court, rather the award shows that the Arbitrator proceeded and gave the award in terms of the order of reference made by the

Subordinate Judge, Palamu at Daltonganj. For better appreciation the award itself is re-produced hereinbelow:

#### AWARD

Whereas I, Ram Chandra Sahu, Superintending Engineer, Minor Irrigation Circle (Palamu) Daltonganj was, by an order issued by the Honorable Sub-Judge, Daltonganj and communicated vide his letter No. 115 dated 30.6.87 appointed arbitrator in case T.S. No. 85/85 between M/s. Bharat Drilling, Ranchi v. District Rural Development Agency, Palamu and where as I, having taken upon my self the burden of the reference of the said arbitration and where as I having considered the statement, document records and papers filed on behalf of the parties before me and having heard and considered the submissions made on behalf of the parties, I do hereby give my award as below.

I award and direct that since the agreement was not rescinded by the appellant, the respondent- M/s. Bharat Drilling is entitled to get the refund of security deposit amounting to Rs. 32,610.00 (Rupees thirty two thousand Six hundred and ten) only.

(2) As per letter No. 1002 dated 15.2.83 issued by the Irrigation deptt. Government of Bihar and enclosed with the negotiation letter of M/s. Bharat Drilling dated 20.6.83, the mobilisation charge is to be recovered if the work is not done. Accordingly, mobilisation charge amounting to Rs. 1.00 lakh (Rupees one lakh) paid to the respondent be refunded to the appellant.

3. Other claims as mentioned in the plaint submitted by respondent against item No. A,B,C, D,E,F,G,H and I are rejected.

Ram Chandra Sahu 31/3/89 Sole Arbitrator, Superintending Engineer, Minor Irrigation Circle (Palamu) Daltonganj

17. As stated above, from perusal of the award itself it is abundantly clear that the Arbitrator did not proceed to adjudicate the disputes so referred by the Supreme Court, rather the award was given on the basis of the order passed by the Subordinate Judge, Daltonganj, and it was communicated to the Arbitrator by the learned Subordinate Judge in terms of the letter No. 115 dated 30.6.1987. Moreover from perusal of the forwarding letter by which the award was sent by the Arbitrator to the Subordinate Judge, Palamu at Daltonganj. It further appears that in terms of the aforesaid letter of the Subordinate Judge, the Arbitrator sent his award to that court. I may indicate again that in terms of the order of the Supreme Court dated 31.10.1988 the disputes were referred to the Arbitrator for adjudication. Besides the above, it further appears to me that the Arbitrator has not adjudicated the disputes so referred by the Supreme Court. One of the disputes under reference was as to what relief or damages the parties are entitled to in respect of the contract in question. This question does not appear to have been adjudicated by the Arbitrator in his award. In the objection filed under Section 30 of the Act, the appellant took the specific point that the Arbitrator miserably failed to consider the direction/order of the Supreme Court passed in Civil Appeal No. 3965 of 1988. From perusal of the impugned order, it appears that the court below has not at

all considered this aspect of the matter and has gone into only on the question whether a non-speaking award can be set aside. The court below simply held that the Arbitrator is not obliged to give reasons and non-reasoned award cannot be set aside on the ground that no reason has been given by the Arbitrator in support of the award.

18. It is well settled that the word 'misconduct' does not involve moral turpitude. The words 'misconducted the proceeding' in Section 30 means mis handling of the arbitration as is likely to cause some substantial miscarriage of justice. It is equally well settled that if the Arbitrator travelled beyond the order of reference and give his award without considering the terms of the reference then it will amount to both misconduct of the arbitrator himself and also of the proceeding.

19. In the case of Union of India v. Jain Associates : [1994]3SCR551 , the Apex Court while deciding the question as to whether non-application of mind by the Arbitrator will amount to misconduct has held as under:

It is, therefore, clear that the word 'misconduct' in Section 30(a) does not necessarily comprehend or include misconduct of fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the fact of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result or the like circumstances which tend to show non-application of mind to the material facts placed before the Arbitrator or Umpire. In truth it points to fact that the Arbitrator or Umpire had not applied his mind and not adjudicated upon the matter, although the award professes to determine them. Such situation would amount to

misconduct. In other words, if the Arbitrator or Umpire is found to have not applied his mind to the matters in controversy and yet, has adjudicated upon those matter in law, there can be no adjudications made on them. The arbitrator/umpire may not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilty of any moral turpitude, i.e., in the sense of non-application of the mind to the relevant aspects of the dispute in its judication.

20. Having regard to the facts and circumstances of the case and the discussions made above, I am of the definite opinion that the impugned order passed by the court below refusing to set aside the award is not in accordance with law. This question is answered accordingly.

21. In the result, this appeal is allowed and the impugned order passed by the court below and the award passed by the Arbitrator are set aside. The matter is remitted to the Arbitrator, namely, the Superintending Engineer, Minor Irrigation Department, Palamu at Daltonganj, for re-consideration and adjudicating the disputes in terms of the order of reference passed by the Supreme Court. The Arbitrator is further directed to give his award within four months from the date of appearance of both the parties, who are directed to appear before the Arbitrator within two weeks from today.

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