

**Batra Construction Co. Vs. D.D.A. and Another**

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**Court :** Delhi

**Decided On :** Oct-23-1998

**Reported in :** 1999IAD(Delhi)67

**Judge :** Dr. M.K. Sharma, J.

**Acts :** [Arbitration Act, 1940](#) - Sections 30 and 33

**Appeal No. :** SUIT NO. 2305/87 & is No. 4609/88

**Appellant :** Batra Construction Co.

**Respondent :** D.D.A. and Another

**Advocate for Def. :** Mr. V.K. Sharma, Adv.

**Advocate for Pet/Ap. :** Mr. D.P. Sharma, Adv

**Judgement :**

ORDER

**Dr. M.K. Sharma, J.**

1. The petitioner was awarded the work contract for construction of some dwelling units at Dilshad Garden, Delhi by the respondent No.1 and a contract was executed between the parties. During the course of execution of the aforesaid contract disputes arose between the parties and therefore, the said disputes

were referred to be adjudicated upon through the process of arbitration by appointing respondent No. 2 as the sole arbitrator. The arbitrator entered upon the reference and upon hearing the parties and on perusal of the evidence on record, made and published his award on 14th October, 1987.

2. An objection was filed as against the filing of the aforesaid objection, I heard the learned counsel for the petitioner as also for the respondent No.1 in respect of the aforesaid objection as also with regard to the issue of making the award a rule of the court. Mr. D.P. Sharma appearing for the petitioner, pressed the objections passed by the arbitrator as against claim Nos. 4, 9 and counter-claim No.1.

Claim No.4 relates to a claim of the contractor/petitioner for payment of extra amount for polishing mosaic floors amounting to Rs. 83,201/- .According to the petitioner the mosaic floors were wax polished and thereafter saw dust was spread over these floors and , thereforee, the petitioner is entitled to payment for extra amount, since such work was not provided for in the specifications. The arbitrator, however, rejected the claim holding that polishing includes wax polishing and spreading of saw dust is the normal practice and thereforee the aforesaid claim is not admissible.

Counsel appearing for the petitioner, however, submitted that the aforesaid appreciation by the arbitrator is erroneous on the face of the records of the case. According to him, the aforesaid two operations were not covered by the C.P.W.D. specifications governing the execution of contract. My attention is drawn to a decision of this court in D.D.A. Vs . Bhagat Construction Co. Pvt. Ltd. : AIR1984 Delhi358 . In para 6 of the said judgment the Division Bench of this court has held that the C.P.W.D. specifications do not include wax polishing and spreading of saw dust and thus holding, the Division Bench allowed the claim of the contractor in the said case on the same heads. Thus, the award passed by the arbitrator is contrary to the law laid down by the Division Bench of this court and, thereforee, I am of the opinion that the arbitrator misconducted himself. In terms of the aforesaid decision of this court the petitioner is entitled to aforesaid claim. Thus, the aforesaid award stands set aside and the same is remitted back to the arbitrator for re-consideration in the light of the aforesaid Division Bench decision

of this court.

3. The next objection raised is with regard to the award passed by the arbitrator as against Claim No. 9. According to the counsel appearing for the petitioner the award passed by the arbitrator in respect of the aforesaid claim No. 9 contains clerical mistakes. He has brought to my notice the calculation of the arbitrator recorded as  $4.28 \times 31\% = 1.32/-$ . Learned counsel pointed out that while coming to the said calculations the arbitrator committed the mistake of recording 4.28 in place of 3.55 and according to him the calculations should have been read as follows:-

$4.28 - 3.55 \times 31\%$

If the aforesaid calculation is accepted as correct, then the amount awarded would come to Rs.47,170/- instead of Rs.34,024/- as recorded by the arbitrator. Counsel appearing for the respondent No.1 admitted that the same is ,in fact, an error apparent on the face of the record.

My attention was also drawn to the provisions of Section 15(b) of the Arbitration Act wherein it is provided that if there be any clerical obvious mistake the court has power to rectify the same. Since the aforesaid mistake is an obvious clerical mistake and an error apparent on the face of the record, I am inclined to exercise my power vested under Section 15(b) of the Act, which I hereby do. Thus, on this head petitioner shall be entitled to an amount of Rs.47,710/- instead of Rs. 34,024/-.

4. Next and the last objection was raised by the petitioner in respect of the counter-claim No.1. In respect of the aforesaid claim, the respondent No.1 claimed an amount of Rs. 7,73,676/- spent at the risk and cost of the petitioner. The arbitrator after considering the records of the case found that an amount of Rs. 5,79,221.80 is recoverable from the petitioner on that account. Mr. Sharma appearing for the petitioner submitted that the aforesaid counter-claim was not referred to the arbitrator by the court and the same was only referred to by the appointing authority. According to him the reference in the instant case to the arbitrator was done by the court in pursuance of a petition filed by the petitioner in

this court and this court directed that the disputes raised in the petition be referred to arbitrator. During the pendency of the aforesaid proceedings in this court, the respondent No.1 did not put up the aforesaid claim seeking reference of the same to the arbitrator.

My attention is also drawn to the decision given by this court in S.No.14-A/82 disposed of on 15.3.1982 wherein this court referred to the arbitrator the disputes as arose in the petition filed by the petitioner. Subsequent to the aforesaid order passed by this court, the appointing authority appointed the arbitrator and referred the disputes raised by the petitioner to the arbitrator, on 14.5.1982. Subsequently, however, by his order dated 5.9.1985 the appointing authority also referred counter-claim No.1 of respondent No.1 to the arbitrator for adjudication. Entertaining of the aforesaid counter-claim by the arbitrator was objected to by the petitioner, as per the records. This court in the said judgment held that the said claim could not have been entertained and decided by the arbitrator which was not referred by the court.

Counsel submitted that in view of the aforesaid legal position, the appointing authority could not have referred the aforesaid dispute in the same proceedings and the arbitrator also acted illegally and without jurisdiction in entertaining the aforesaid counter-claim. In support of his statement, the learned counsel appearing for the petitioner also relied upon the decisions in *Natwarlal Shamaldas & Company v. M.M.T.C* : AIR1982 Delhi44 , *Orissa Mining Corporation Ltd. Vs . Prannath Vishwanath Rawley*, : [1978]1SCR285 and also an unreported judgment of this court in *Balbir Singh Jain v. Central Warehousing Corporation & Another* in S.No.1397/91 disposed of on 22nd November, 1995. In the afore-said decision it was held that when there is no discretion of the court to consider the counter claim of respondent No.1, the arbitrator has no jurisdiction to entertain the counter-claim and if he entertains the counterclaim, then that conduct of him would amount to misconduct. In *Orissa Mining Corporation's case (supra)*, it was held that when an agreement is filed in court and an order of reference is made under Section 20(4) then the claim as a result of the order of reference is limited to a particular relief and that the arbitrator cannot enlarge the scope of the reference and entertain fresh claims without a further order of reference from the court. The facts of the

present case are similar in nature. When the petitioner had come before this court seeking for reference of the disputes arising between the parties, it was open for respondent No.1 to raise counter-claim before the court by saying that in case the court was pleased to make reference of the disputes raised by the petitioner to the arbitrator, then the counter-claims may also be referred to the arbitrator but no such claim was made by respondent No.1 before the court and consequently the court had no occasion to pass any order asking the arbitrator to consider the said counter-claim along with the disputes raised by the petitioner. The aforesaid counter-claim came to be referred by the appointing authority to the same arbitrator after expiry of almost three years from the date of reference of the disputes of the petitioner to the arbitrator. Thus, the aforesaid reference of counter-claim No.1 to the arbitrator by the appointing authority was improper and against the settled position of law and thus the same could not have been entertained by the arbitrator and no award should have been passed by the said arbitrator in respect of the aforesaid claim.

5. I hold that the arbitrator was not justified in considering the counter-claim of respondent No.1 and awarding the aforesaid amount in favor of respondent No.1. The award passed by the arbitrator in respect of counterclaim No.1 of respondent No.1 is set aside.

6. In the light of the aforesaid discussions claim No. 9 stands modified to the extent noted above, whereas counter-claim No.1 stands set aside. Award passed by the arbitrator in respect of claim No.4 stands set aside and remanded back to the arbitrator. The award of the arbitrator with modifications to the aforesaid extent is made a rule of the court. In addition the petitioner shall be entitled to interest @ 15% p.a. from the date of decree till realisation.