

CASE NO.:
Appeal (civil) 5647-5648 of 1997

PETITIONER:
Bharat Coking Coal Ltd

RESPONDENT:
M/s. Annapurna Construction

DATE OF JUDGMENT: 05/03/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
JUDGMENT
ORDER

I.A. NOS. 1-2 OF 2005
IN
CIVIL APPEAL NOS. 5647-5648 OF 1997

S.B. SINHA, J :

1. Which would be the appropriate court for the purpose of filing of an award by the arbitrator is the question involved herein.
2. The said question arises in the following circumstances:

Respondent herein admittedly was a contractor of the appellant. Disputes and differences having arisen between the parties, the arbitration agreement was invoked. An arbitrator was appointed.

The parties hereto raised their claims and counter-claims before the arbitrator. He made an award of Rs.18,97,729.37 in favour of the respondent.

3. A question of law was raised when the matter ultimately came up before the court arising out of the proceedings for making the said award a rule of the court, and this Court in its judgment dated 29.08.2003 [since reported in (2003) 8 SCC 154], while setting aside the award, directed:

"40. However, as noticed hereinbefore, this case stands on a different footing, namely, that the arbitrator while passing the award in relation to some items failed and/or neglected to take into consideration the relevant clauses of the contract, nor did he take into consideration the relevant materials for the purpose of arriving at a correct fact. Such an order would amount to misdirection in law.

41. We are, therefore, of the opinion that the matter requires reconsideration. Having regard to the facts and circumstances of this case and particularly keeping in view the fact that the matter relates to pure interpretation of document which gives rise to question of law and in stead and in place of remitting the matter to the named arbitrator, we would direct that the disputes in relation to Claim Items 3, 7 and 11 be referred to the Hon'ble Mr Justice D.N. Prasad, a retired Judge of the Jharkhand High Court on such terms and conditions as may be mutually agreed upon by the parties. The learned arbitrator is requested to consider the desirability of making his award as

entertain an application under Section 14(2) read with Section 30 of the 1940 Act stating:

"18. According to Mr Shroff the Award should have been filed, not in this Court, but in the Court of the Addl. District Judge, Mandsaur, 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 Shri 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 not 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 at 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."

It was furthermore observed:

"21. in Ct. A. Ct. Nachiappa Chettiar v. Ct. A. Ct. Subramaniam Chettiar the question arose whether the trial court had jurisdiction to refer the subject-matter of a suit to an arbitrator when the decree passed in the suit was pending appeal before the High Court. Based upon Section 21, it was urged before this Court that the reference made by the trial court, when the appeal was pending, and the award made in consequence of such reference, were both invalid as the trial court was not competent to make the order of reference. This Court rejected the said contention and after a reference to Sections 2(c) and 21 of the Act held that the expression "Court" occurring in Section 21 includes also the appellate court, proceedings before which are a continuance of the suit. It was further held that the word "suit" in Section 21 includes also appellate proceedings. In our opinion, applying the analogy of the above decision, the expression "Court" occurring in Section 14(2) of the Act will have to be understood in the context in which it occurs. So understood, it

follows that this Court is the Court under Section 14(2) where the arbitration Award could be validly filed."

11. The said principle was reiterated in M/s. Guru Nank Foundation v. M/s. Rattan Singh and Sons [(1981) 4 SCC 634] wherein it was opined:

"18\005By the decision of this Court in the appeal the 2nd respondent was removed as arbitrator and the 3rd respondent was appointed as sole arbitrator. Indisputably, therefore, the arbitrator was appointed by this Court. The order appointing the 3rd respondent as arbitrator gave a further direction that the arbitrator shall enter upon the reference within 15 days from the date of the Order of the Court and he should try to dispose of the same as expeditiously as possible. The final Order was that the appeal was disposed of in terms hereinabove indicated. A contention that thereafter this Court was not in seisin of the matter was urged relying upon the fact that the appeal was disposed of by the Order of the Court and that there was no further proceeding before this Court. This contention has merely to be stated to be rejected, as will be presently pointed out. After the disposal of the appeal, CMP No. 896 of 1977 was presented to this Court for clarification and/or modification of the Order of the Court dated January 5, 1977. This Court by its Order dated February 10, 1977, gave further directions and a specific time-limit was fixed by this Court directing the 3rd respondent as arbitrator to conclude the proceedings within four months from the date of Order of the Court. Even with regard to the conduct of proceedings this Court directed that the 3rd respondent should proceed with the reference from the stage where it was left by the 2nd respondent and that not only that he may permit additional evidence to be led but he must consider the pleadings and evidence already placed before the previous arbitrator. This will indisputably show that this Court had complete control over the proceedings before the arbitrator."

12. Both the aforementioned decisions, therefore, proceed on the basis that the court had complete control over the proceedings of the arbitrator. In the instant case, however, the matter came up before this Court whence an arbitrator had already been appointed and an award had been made. An arbitrator was appointed by this Court while setting aside the said award particularly in view of the fact that construction of the contract was in question. The court did not and could not retain any control over the proceedings of the arbitrator.

13. Thus, a distinction must be borne in mind in a case where this Court had no control over the proceedings and the case in which control of proceedings of the arbitrator had been retained. In the former case, having regard to the definition of the term "court" as contained in Section 2(c) of the 1940 Act, award must be filed before a court which has the requisite jurisdiction thereover.

14. We may notice that such a view has been taken by this Court in National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. and Another [(2004) 1 SCC 540] stating:

"9\005In regard to the forum before which the

application for modification or setting aside the award is concerned, we find no difficulty in coming to the conclusion that in view of the provisions of Section 34 read with Section 2(e) of the 1996 Act it is not this Court which has the jurisdiction to entertain an application for modification of the award and it could only be the principal civil court of original jurisdiction as contemplated under Section 2(e) of the Act, therefore, in our opinion, this application is not maintainable before this Court."

15. Yet again in *State of Goa v. Western Builders* [(2006) 6 SCC 239], this Court opined:

"21. In *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.* unilateral appointment of the arbitrator under the Arbitration Act, 1940 was challenged. This Court in the said appeal after hearing the parties appointed a sole arbitrator. Before the sole arbitrator both the parties by consent agreed that the proceedings should be governed by the provisions of the Arbitration and Conciliation Act, 1996. The arbitrator proceeded on that basis and gave a final award. That final award was challenged. The question arose whether the proceeding shall be governed by the 1940 Act or by the 1996 Act? And which is the appropriate court. The dispute prolonged for nearly 16 years. This Court dismissed the appeal and held that in the present case proceedings should go on under the provisions of the Act, 1996 though the dispute arose prior to coming into force of the Act, 1996, the appropriate forum for challenging the award under Section 34 was the Principal Civil Court of original jurisdiction as contemplated under Section 2(e) of the Act, 1996."

16. Ordinarily, although there may be cases to the contrary, the principle that the right of appeal should not be taken away, should be applied. There might be strong reason to deny the suitor a right of appeal.

17. In *Pandey & Co. Builders (P) Ltd* (supra), however, in the fact situation obtaining therein, this Court held :

"23. In this case, it is not necessary for us to go into the question as to whether sub-section (3) of Section 37 of the 1996 Act would debar an appeal from appellate order passed under sub-section (2) of Section 37 thereof. The consequences of the statutory embargo would ensue but then the question will have to be considered as and when occasion arises therefor. Sub-section (2) of Section 37 of the 1996 Act prescribes for an appeal to a court. We do not see any reason as to why having regard to its plain language, the definition of "court" shall not be put into service. It may be true that the interpretation clause provides for "unless the context otherwise requires". If application of the interpretation clause contained in Section 2 of the 1996 Act shall lead to anomalous and absurd results, one may not stick to the definition but we do not think that such a case has been made out."

18. Reliance has also been placed by Mr. Ajit Kumar Sinha, learned

counsel appearing on behalf of the appellant on an order of this Court dated 22.08.1997 in M/s. Bharat Coking Coal Ltd. v. H.P. Biswas & Company [Civil Appeal No. 3504 of 1992] wherein it was directed:

"In this civil appeal an award has been filed by the Arbitrator appointed by this Court in a proceeding arising out of Section 8 of the Arbitration Act before the trial Court. However, as the appeal arises out of the proceeding under the aforesaid section before the trial court, the appointment of the arbitrator by this Court was in substitution of the earlier order passed by the Trial Court. Hence the appropriate court in which the award is to be filed will be the Court of First Sub-Judge, Dhanbad. Therefore, the Registry is directed to send the original award as well as the entire records to the First Sub-Judge, Dhanbad, Bihar. On receipt of copy of this Order, original award and the records by the trial court, notice will be issued to the parties concerned by the trial court and within 30 days of receipt of such notice objection, if any, under Section 30 of the Arbitration Act will be filed by the concerned objector. Thereafter the trial court will proceed further in accordance with law. The trial court shall decide the objections, if any, of the parties concerned to the request for making the award a rule of the court. The trial court will dispose of the proceedings at an early date preferably within a period of six months from today\005"

19. A Similar opinion was rendered yet recently by a Bench of this Court in Garhwal Mandal Vikas Nigam Ltd. v. M/s. Krishna Travel Agency [IA 1 & 2 in SLP (C) No. 18344 of 2004 dated 24.01.2007] wherein it was held:

"Apart from these four cases, which have been brought to our notice, the position of law is very clear that in case the argument of learned counsel is accepted, that would mean that in every case where this court passes an order, be it on appeal, from the order passed by the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, this court will become a Principal Civil Court of original jurisdiction. If the argument is further taken to its logical conclusion that would mean that the parties will have to approach this Court by making an application under Section 34 i.e. for setting aside the award. The expression 'Court' used in Section 34 of the Act will also have to be understood ignoring the definition of 'Court' in the Act. There is another facet of the problem. The party will be deprived of the right to file an appeal under Section 37(i)(b) of the Arbitration and Conciliation Act. This means that a valuable right of appeal will be lost. Therefore, in the scheme of things, the submission of the learned counsel cannot be accepted..."

[See also the comments in 'Arbitration, Conciliation and Mediation', Second edition by Shri V.A. Mohta, page 82]

20. It is also not a case where this Court has exercised its jurisdiction under Sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 as was done in McDermott International Inc. v. Burn Standard Co. Ltd. and Others [(2005) 10 SCC 353]. A similar view has been taken in ITC Ltd.

v. George Joseph Fernandes and Another [(2005) 10 SCC 425].

21. As the question of jurisdiction of a Court is involved herein, we are of the opinion, by consent of the parties also, jurisdiction cannot be assumed by this court.

22. We, therefore, for the foregoing reasons as also the binding precedents are of the opinion that this Court has no jurisdiction to entertain these applications. The Registry, therefore, is directed to send the records to the Court of District Judge, Dhanbad who in turn is directed to transfer the case to a court having appropriate jurisdiction. The court concerned is requested to dispose of the objection filed by the appellant herein as expeditiously as possible and not later than three months from the date of receipt of records.

23. The applications are disposed of with the aforementioned directions.
No costs.