

M/s Modern Construction Company Vs State Of Jharkhand

Court: Jharkhand High Court

Date of Decision: March 2, 2022

Acts Referred: Arbitration AND Conciliation Act, 1996 " Section 12(5), 11(6)(C), 24(1), 29A, 34, 37

Hon'ble Judges: Sujit Narayan Prasad, J

Bench: Single Bench

Advocate: Hemant Jain, Salona Mittal

Final Decision: Allowed

Judgement

Sujit Narayan Prasad, J

1. The matter has been taken up through video conferencing.

2. The instant application has been filed under Section 11(6)(C) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the Act

1996), whereby and whereunder, the prayer for appointment of Arbitrator has been made in view of the condition stipulated under Clause-51 of the

Arbitration Agreement dated 12.03.1987.

3. The brief facts of the case, as per the pleading made in the application, read as under:-

4. The petitioner, M/s Modern Construction Company, Engineer Builder, Contractor and Order Supply, acting through its partner Ahmad Raza Khan,

has entered into an agreement on 12.03.1987 for construction of Officer's Bungalows at Jubilee Park site and Adityapur Site, Jamshedpur,

presently in Jharkhand State. The estimated cost of the work was Rs.147.68/- lacs and the value of the agreement was Rs.1,74,51,543.87/-. The

period of completion of works was 18 months from the date of notice to proceed with the work.

The job was awarded underwent changes involving extra items and due to various reasons, time was required to be extended which was formally

extended till 31.12.90 and continued by mutual conduct till 27.06.91, the date mutually agreed as date of completion, as per agenda note.

The final bill as was required to be adjudicated, amounted to Rs.2,11,52,015.34/- According to the respondent State of Jharkhand, amount of

Rs.1,99,91,685.00/- has been paid with remaining amount of Rs.11,60,330.00/-, was remain unpaid. As per the condition of agreement, there was

permissible recovery of Rs.4,12,761.00/- from the contractor, thus, resulting in the dispute related to Rs.7,47,569.00/-

. The respondent State of Jharkhand withheld security deposit of Rs.1,62,694.00/-. The claimants vide their letter No.MC/0395/95 dated 11.09.1993,

claimed an amount of Rs.1,45,22,104.00+Rs.54,000/-.

The aforesaid dispute having not been resolved, the petitioner has made an application under Section 11(6) (C) of the Arbitration and Conciliation Act,

1996 by filing an application being A.A. No.39 of 2001 (Annexure-3). The aforesaid application was disposed of vide order dated 16.02.2005,

whereby and whereunder, one Mr. C.K. Singh, Retd. Engineer-in-Chief, P.W.D. R.E.O. Govt. of Jharkhand, Ranchi was appointed as sole Arbitrator

and was directed to enter into the reference and give an award within two months from the date of entering into the reference. The award was

prepared by the sole Arbitrator on 20.12.2005.

The State of Jharkhand, being aggrieved with the award, has challenged the same by taking recourse of Section 34 of the Act, 1996.

The Court, after hearing the same under Section 34 of the Act, 1996 being Misc. Case No.05 of 2006, has dismissed the aforesaid application by

confirming the award.

The State of Jharkhand, being aggrieved with the order dated 21.12.2017 passed in Misc. Case No.05/2006 has preferred an appeal by taking

recourse of Section 37 of the Act, 1996.

The award dated 20.12.2005 published by the sole Arbitrator, Mr. C.K. Singh, retired Engineer-in-Chief, PWD, Jharkhand as also the order dated

21.12.2017 passed in Misc. Case No.05/2006 have been quashed and set aside vide order dated 27.06.2019 (Annexure-6).

The petitioner has challenged the aforesaid order by filing Special Leave Petition (Civil) No(s).14340/2020 before the Hon'ble Apex Court which

was dismissed vide order dated 15.10.2020 on the ground of delay as also on merits, as would appear from Annexure-7 appended to the paper-book.

The petitioner, after quashing and setting aside of the award, has again made request for appointment of Arbitrator vide request dated 24.10.2020.

The respondent authorities of the State of Jharkhand has refused the claim for appointment of Arbitrator afresh taking the plea that since there is no

liberty having been granted by the Court passing the order under Section 37 of the Act, 1996 and, as such, there is no question of appointment of

Arbitrator afresh for resolution of dispute.

5. Mr. Hemant Jain, learned counsel appearing for the petitioner has submitted that since it is the admitted position herein that the dispute pertaining to

agreement has not yet been resolved, therefore, request has been made before the concerned competent authority for appointment of Arbitrator, so

that, the dispute be resolved and when the claim of the petitioner/applicant has been rejected on the ground of having no liberty granted by the Court

while passing the order under Section 37 of the Act, 1996, therefore, the instant application under Section 11(6) (C) has been filed.

6. Mr. Salona Mittal, learned counsel appearing for the State of Jharkhand has submitted by referring to the averment made in the counter affidavit

more particularly, the averment made at para-16 thereof, wherein, stand inter-alia has been taken that in absence of any liberty granted by the Court

passed the order in exercise of power conferred under Section 37 of the Act, 1996, therefore, there is no question of appointment of Arbitrator afresh.

He further submits that the State authority after taking into consideration the aforesaid aspect of the matter is correct in not appointing the Arbitrator.

7. This Court has heard the learned counsel for the parties, perused the documents available on record as also the documents appended thereto.

8. The admitted fact, as would appear from the material available on record that the petitioner/applicant has entered into an agreement on 12.03.1987

for construction of Officer's Bungalows at Jubilee Park site and Adityapur Site, Jamshedpur, presently in Jharkhand State.

9. The petitioner/applicant has concluded the work but certain claim pertaining to disbursement of amount has been crept up, as such, recourse

available under the contract has been resorted to by making request before the concerned competent authority of the State of Jharkhand for

appointment of sole Arbitrator. The concerned competent authority of the State of Jharkhand has appointed the Arbitrator, thereby, the

petitioner/applicant has approached to this Court by filing the arbitration application being A.A. No.39 of 2001 by taking recourse of the mandate of

Law as available under Section 11(6)(C) of the Act, 1996.

10. This Court, while disposing of the arbitration application being A.A. No.39 of 2001, has appointed Mr. C.K. Singh, Retd., Engineer-in-Chief,

P.W.D. as the sole Arbitrator for resolution of dispute within the stipulated period of two months.

The sole Arbitrator has commenced the arbitration proceedings and passed the award dated 20.12.2005 in favour of the petitioner/applicant by passing

the order to the effect that:-

"I direct Respondent to pay as per Award made above Rs.1,97,32,424/- (Rupees One Crore Ninety Seven Lacs Thirty Two Thousand

Four Hundred Twenty Four only) together with future interest @ 18% till the date of actual payment from 31st December 2005 (The date of

Award is 20th December 2005 whereas the interest already calculated is upto 31st December 2005, therefore, the further interest @ 18%

will be payable after 31st December 2005).

Error in typing, calculations, computations etc. if any may be replaced by the corrected words and figures.

The State respondent, being aggrieved with the award, has questioned the same by taking recourse of the provision as contained under Section 34 of

the Act, 1996.

The concerned Court has found no infirmity in the award, as such, has dismissed the application filed by the State respondent vide order dated

21.12.2017. The State of Jharkhand has challenged the order passed by the concerned Court under Section 37 of the Act, 1996 by taking recourse of

the provision as under Section 37 of the Act 1996 being Arb. Appeal No.15 of 2018.

This Court, while passing the order under Section 37 of the Act, 1996 has quashed and set aside the award dated 20.12.2005 as also the order dated

21.12.2017 passed in Misc. Case No.05/2006, taking into consideration the fact that the mandate of Section 24 (1) of the Act, 1996 was not followed.

The petitioner/applicant has assailed the order passed by this Court under Section 37 of the Act, 1996 before the Hon'ble Apex Court, wherein,

the Hon'ble Apex Court while passing the order on 15.10.2020 in SLP(Civil) No(s).14340 of 2020 has dismissed the appeal on the ground of delay

as also on the ground of merits.

The petitioner/applicant, thereafter, has made fresh request vide request letter dated 24.10.2020 for appointment of Arbitrator in view of the arbitration

clause, since, the dispute as has been raised will be said to have not resolved due to quashing and setting aside of the award by the order passed by

the Court of Law. However, the State authorities have rejected the said request letter on the ground that there is no question of appointment of fresh

Arbitrator for resolution of dispute, on the ground, that there is no liberty having been granted by the Court passing order under Section 37 of the Act,

1996.

11. It is, therefore, admitted from the undisputed fact that the instant application filed under Section 11(6)(C) of the Act, 1996, is the second one after

filing of the arbitration application being A.A. No.39 of 2001, by which, one Mr. C.K. Singh, Retd., Engineer-in-Chief, P.W.D. was appointed as sole

Arbitrator.

12. This Court, after going through the averments made in the counter affidavit has found therefrom that the claim of the petitioner/applicant has been

rejected since no liberty having been granted by the Court passing the order under Section 37 of the Act, 1996, therefore, this Court is required to

answer the following questions:-

(i) Whether, in absence of any liberty granted by the Court passing the order under Section 37 of the Act, 1996, can an application under Section 11(6)

(C) be held to be maintainable?

(ii) Whether, in a case, where the award has been quashed by the competent court, the disputes remained unresolved, can be allowed to be resolved

by appointment of Arbitrator again?

13. Since both the issues are interlinked, therefore, the same are being discussed and answered hereinbelow together.

14. There is no dispute about the position of law that the second application is not maintainable in absence of any leave by the competent court. But, in

a case of resolution of dispute, can such principle be held to be applicable, that is the question to be considered by this Court, while answering the

aforesaid issues.

The Arbitration and Conciliation Act, 1996 has been enacted for resolution of dispute, depending upon the terms and conditions of the agreement.

The position of law is settled that a man cannot be allowed to remediless and if any dispute is there, the same is required to be decided, either way.

There is also no dispute about the fact that in order to resolve the dispute, the specific condition is to be inserted in the contract.

Herein, also there is specific clause for settlement of dispute which reads as under:-

“51. Settlement of Disputes:-

If the Contractor considers any work demanded of him to be outside the requirements of the contract, or considers any drawings, record or

ruling of the Executive Engineer on any matter in connection with or arising out of the contract or carrying out of work to be unacceptable,

he shall promptly ask the Executive Engineer in writing, for written instructions or decision. Thereupon the Executive Engineer shall give

his written instructions at decision within a period of thirty days of such request.

Upon receipt of the written instructions or decision the Contractor shall promptly proceed without delay to comply with such instructions or

decision.

If the Executive Engineer fails to give his instructions or decision in writing within a period of thirty days after being requested, or if the

Contractor is dissatisfied with the instructions or decision of the Executive Engineer, the Contractor may within thirty days after receiving

the instruction or decision appeal to Superintending Engineer, who shall afford an opportunity to the Contractor to be heard and to offer

evidence in support of his appeal. This officer shall give a decision within a period of sixty days after the Contractor has been given the

said evidence in support of his appeal.

If the Contractor is dissatisfied with this decision, the Contractor within a period of thirty days from the receipt of the decision shall indicate

his intention to refer the dispute to arbitration, failing which the said decision shall be final and conclusive.

15. The contention which has been raised by the State respondent about not maintaining a fresh application under Section 11(6)(C).

16. There is no dispute that the order passed under Section 37 of the Act, 1996 by this Court has attained its finality by the Hon'ble Apex Court

but the Court while passing the order under Section 37 of the Act, 1996 has gone into the principle of natural justice, since according to the order

passed under Section 37 of the Act, 1996, the mandate as provided under Section 24(1) of the Act, 1996, was not followed by the sole Arbitrator,

thereby, the court while passing the order in exercise of power conferred under Section 37 of the Act, 1996 has gone into the principle of natural

justice i.e., the technicality and on that ground, the award has been quashed and set aside.

Thus, there is no dispute about the fact and no dispute has also been raised on behalf of the respondent State of Jharkhand that the dispute which was

the subject matter of the original application filed under Section 11(6)(C) of the Act, 1996, remain un-conclusive.

17. Therefore, the question of maintaining a fresh application under Section 11(6)(C) of the Act, 1996, as has been raised on behalf of the State of

Jharkhand, according to the considered view of this Court, is not tenable in the eye of law, reason being that if the instant application will be held to be

not maintainable then the dispute which is the subject matter of the contract, will remain undecided.

18. This Court, has come to the aforesaid finding, after considering the judgment rendered by the Hon'ble Apex Court in the case of McDermott

International Inc. Vs. Burn Standard Co. Ltd. & Ors. (2006) 11 SCC 181, wherein, at paragraph-52, it has been held as under:-

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness.

Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice,

etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if

it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as

parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the

expediency and finality offered by it.

It is evident from the quoted part of the aforesaid judgment of the Hon'ble Apex Court, in a case, where the award has been quashed, it is open

upon the parties to begin the arbitration again, if it is desired. This proposition, itself clarifies that in a case where the dispute has not been resolved and

the award had been quashed, it will be left open upon the parties to raise the dispute, reason being that the dispute if not resolved cannot be allowed to

remain un-conclusive.

The Hon'ble Apex Court further in the case of Project Director, National Highways No.45 E and 220 National Highways Authority of India Vs.

M. Hakeem & Anr., (2021) 9 SCC 1, has been pleased to hold at paragraph-25 thereof that the application under Section 11(6)(C) of the Act, 1996, is

maintainable for appointment of sole Arbitrator once award is being quashed by the competent court of law, for ready reference, paragraph-25 reads

as under:-

“25. As a matter of fact, the point raised in the appeals stands concluded in McDermott International Inc. v. Burn Standard Co. Ltd.

[McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , where this Court held : (SCC p. 208, paras 51-52)

“51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an

obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his

authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required

to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under

Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided

for under Section 37 of the Act.

52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness.

Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice,

etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if

it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as

parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the

expediency and finality offered by it.”

The Hon'ble Apex Court yet in another judgment rendered in the case of Dakshin Haryana Bijli Vitran Nigam Limited Vrs. Navigant

Technologies Private Limited, (2021) 7 SCC 657, has laid down as under paragraph-44 thereof that in case where the Court set aside the award

passed by the majority members of the tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding, for ready

reference, paragraph-44 reads as under:-

“44. In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require

to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, the court may either dismiss the objections filed,

and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to

modify an arbitral award. In McDermott International

Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under :

(SCC p. 208, para 52)

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness.

Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice,

etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it

is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as

parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency

and finality offered by it.”

19. This Court, after taking into consideration the aforesaid proposition of law, as has been settled by the Hon'ble Apex Court and after going

across the facts of the given case, wherefrom, it is evident that even though the award was pronounced on 20.12.2005 which was affirmed by the

Court in exercise of power conferred under Section 34 of the Act, 1996, but, has been quashed and set aside by this Court in exercise of power under

Section 37 of the Act, 1996 and subsequent thereto, the Hon'ble Apex Court has also affirmed the order passed by this Court in exercise of

power conferred under Section 37 of the Act, 1996, is of the view that the dispute remain unresolved, therefore, if application under Section 11(6)(C)

of the Act, 1996 has been filed by the petitioner/applicant, the same cannot be held to be not maintainable.

20. This Court, in view of the aforesaid finding, is of the considered view that a fresh Arbitrator is required to be appointed, so that the claim in

question be resolved.

21. In view thereof, the instant application is fit to be allowed, accordingly, the same is allowed.

22. Learned counsel for the parties, in course of argument, has suggested the name of Mr. Sudhir Kumar Katriar, Former Judge of the Patna High

Court as the sole Arbitrator.

23. This Court, considering the suggestion put-forth by the learned counsel for the parties about the name of sole Arbitrator, is hereby appoint Mr.

Sudhir Kumar Katriar, Former Judge of the Patna High Court presently residing at Flat No.101, Tower No.12, Supreme Enclave, (Opp. Ahlcon

School), Mayur Vihar Ph-1, New Delhi-110092, Mob. No.8527937916, 8527937917, as the sole Arbitrator, subject to the provision as stipulated under

Section 12(5) of the Arbitration and Conciliation Act, 1996.

24. The learned Arbitrator is requested to decide the dispute between the parties preferably within the period of four months from the date of

commencement of the arbitration proceedings.

25. The learned Arbitrator would be free to lay down fees and other expenses towards conduct of the arbitration proceedings, however, keeping into

account the ceiling prescribed under Schedule IV of the Act, 1996 as amended.

26. Learned Arbitrator would endeavour to conclude the proceedings expeditiously, also taking into regard the mandate of the Legislature under

Section 29-A of the Act, 1996.

27. The Registrar General of this Court is directed to send a copy of this arbitration application along with all annexures to the learned Arbitrator.