

## Sharda Construction Vs State of Jharkhand and Others

**Court:** Jharkhand High Court

**Date of Decision:** Jan. 16, 2004

**Acts Referred:** Constitution of India, 1950 " Article 226

**Citation:** (2004) 2 JCR 494

**Hon'ble Judges:** P.K. Balasubramanyan, C.J; R.K. Merathia, J

**Bench:** Division Bench

**Advocate:** Y.U. Giri and D.K. Dubey, for the Appellant; M.K. Laik, for the Respondent

**Final Decision:** Dismissed

### Judgement

P.K. Balasubramanyan, C.J.

This appeal is filed by the petitioner in WP (C) No. 6754 of 2002. The appellant is a partnership firm and

had entered into three contracts with the respondents. The appellant is hereinafter referred to as the contractor and the respondents as the

Department of Road Construction.

2. The contractor had entered into three contracts. Job No. 515 was the subject matter of the contract-dated 18.3.1999. It was for the widening

of the national highway between kilometers 53 to 63. The second contract of even date related to Job No. 560, the widening of the national

highway from kilometers 67 to 75. The third was Job No. 538 and the contractor entered into a contract for that on 2.7.2000 and it was also for

widening of another strip of the national highway. The period for completion of the work in all these contracts was one year.

3. The contractor approached this Court by taking the stand that he had completed the contracts relating to Job Nos. 515 and 516 and that only

Job No. 538 remained to be completed. Even though Job Nos. 515 and 516 had been completed, the Department of Road Construction was not

closing the agreements relating to those contracts and were seeking to adjust the amounts due to the contractor from Job No. 538, towards

amounts allegedly due towards the contracts covering Job Nos. 515 and 516. The contractor prayed for the issue of a writ of mandamus directing

the Department of Road Construction not to make any deduction of amounts from any other work undertaken by the contractor; to direct the

Department of Road Construction to refund the amounts already so deducted and to declare that the communication informing the contractor of

such deductions was ab initio void and illegal and that the amount covered by such deductions be refunded. The Department of Road Construction

resisted the writ petition by contending that the disputes were pure disputes arising out of contracts and that the contractor was not entitled to

approach this Court under Article 226 of the Constitution of India to have the disputes removed. It was also contended that towards the contract

covered by Job Nos. 515 and 516, overpayments have been made and the Department of Road Construction was entitled to adjust such

overpayments from the amounts due to the contractor and there was nothing illegal or improper in adjusting that part of the amount covered by

over-payment. There was also no inequity in it. The learned Single Judge after referring to the case set out in the writ petition and in the counter-

affidavit filed on behalf of the respondents came to the conclusion that certain grounds were mentioned in the counter affidavit for not closing

contract Nos. 515 and 516 and in that background, the Court was not inclined to exercise its jurisdiction under Article 226 of the Constitution of

India or to direct the respondents to close the contracts without taking into consideration all the aspects and the terms and conditions of the

contracts. He held that regarding adjustments also, it was a fit case where the contractor was to be referred to the alternate remedy available to it

under law by way of arbitration or by approaching the civil Court. The learned Single Judge found that no satisfactory decision could be rendered

in the dispute between the parties on the materials made available. Thus, leaving the contractor to his remedy in a civil Court or elsewhere, the writ

petition was dismissed.

4. Challenging the dismissal of the writ petition, this appeal was filed. Apart from contending that the learned Single Judge should have decided the

disputes in these proceedings itself without driving the parties to a litigation in the civil Court, counsel for the appellant, the contractor, sought to

contend that there was an identical arbitration clause in the three agreements entered into between the parties and it was a fit case where this

Court, in this appeal, should appoint an Arbitrator for taking a decision on the disputes. In fact on an earlier occasion when the matter came up and

when this suggestion came up, the Division Bench presided over by the Chief Justice (this is mentioned in the context of Section 11(6) of the

Arbitration and Conciliation Act, 1996), asked counsel for the Department of Road Construction whether the respondents were willing to have an

Arbitrator appointed in this proceeding, though this arose from a proceeding, initiated under Article 226 of the Constitution of India and the appeal

was under Clause 10 of the Letters Patent. The contractor also filed an additional affidavit expressing its willingness to have the disputes arbitrated

upon by any one of the persons mentioned in that affidavit, to be appointed as an Arbitrator by this Court. But counsel for the Department of Road

Construction, on instructions, submitted that there was no arbitration clause in the agreements and the respondents were not in a position to agree

to have an Arbitrator appointed in the circumstances. Counsel submitted that excess amounts have been paid towards contract Nos. 515 and 516

and all that has happened is to recover the said over payments by way of adjustment of the amounts due to the contractor and since nothing unjust

or inequitable was involved, the respondents were not in a position to agree to the appointment of an Arbitrator. Counsel contended that the writ

petition was not maintainable. He also pointed out that the works done in certain portions were found to be sub-standard quality and the

contractor was asked to rectify the defects and the same remained to be done any in that situation, there is no question of any amount being due to

the contractor or of the contracts being closed as claimed by the contractor.

5. On the contractual disputes that have arisen, it is clear that the learned Single Judge could not be faulted for declining to exercise jurisdiction

under Article 226 of the Constitution of India and in leaving the contractor to approach the civil Court or an alternate forum of arbitration for

setting the disputes. On our part, we are fully inclined to agree with the stand adopted by the learned Single Judge on the facts and in the

circumstances of the case. We are also satisfied that the disputes cannot satisfactorily be decided in this proceeding under Article 226 of the

Constitution of India. We are, therefore, one with the learned Single Judge in declining jurisdiction under Article 226 of the Constitution of India. In

fact, learned counsel for the contractor, the appellant, did not pursue this aspect of the case, but really concentrated his fire on getting an Arbitrator

appointed.

6. According to learned counsel for the respondents, the Department of Road Construction, the clause for arbitration in such agreements had been

one away with by virtue of the decision dated 18.11.1992 taken by the Government, as can be seen from Annexure-A produced along with the

counter affidavit filed in the Letters Patent Appeal on behalf of the respondents on 11.11.2003 and in that context, the mere fact that in the

contracts entered into in the years" 1999 and 000. Clause 23 thereof had not been specifically struck out, would not enable the contractor to claim

the existence of the arbitration clause and to seek the appointment of an Arbitrator. It was also submitted that this was not a proceeding under the

Arbitration and Conciliation Act, 1996 or a proceeding invoking the jurisdiction of the Chief Justice or his nominee u/s 11(6) of the Act and in that

situation, the question of appointment of an Arbitrator does not arise. It was further submitted that an excess payment had been made and an

adjustment has been made and since nothing unjust was done, there was no reason for this Court to take the extraordinary step of appointing an

Arbitrator in this proceeding initiated by the contractor. It appears that Clause 23 of the contract providing for a resolution of the disputes referred

to therein by the Superintending Engineer, was not specifically struck out in these contracts, though it appears that the Government had taken a

decision to do away with the arbitration clause in the year 1992 as submitted by the learned Government counsel by way of an order. Of course,

there was some controversy before us as to whether that decision of the Government was carried into effect by the concerned Gazette notification

being published. Counsel for the contractor had a case that the contractor had no notice of doing away with the arbitration clause in such contracts

and in that situation, a decision cannot now be taken that there was no arbitration clause in the contract.

7. Clause 23 of the contract, which had not been struck out in those contracts, entered into by the parts, provides for the resolution of disputes by

the Superintending Engineer. This is not a case where the said clause was invoked seeking resolution of the disputes by the Superintending

Engineer and on a failure to respond, the Chief Justice or his nominee was being approached in terms of Section 11(6) of the Arbitration Act. Of

course, if such an approach had been made, in the light of the decision of the Supreme Court in *Konkan Railway Corporation Ltd. and Another*

*Vs. Rani Construction Pvt. Ltd.*, it might have been necessary to consider whether the Chief Justice is entitled to go into the question of the

existence of the arbitration clause or otherwise, especially in the context of Sections 7 to 11 of that Act. But at this state, in this proceeding with the

prayers as contained in the writ petition as quoted by the learned Single Judge in his judgment, we do not think that it is necessary or proper for us,

or for the Chief Justice, to go into the question whether the matter should be referred to arbitration or not. No doubt, the contractor has sought to

raise disputes relating to the contracts, arising out of the contracts, and regarding the adjustment made by the Department of Road Construction

and the State has essentially sought to contend that it was only an adjustment of over-payment and further that the work was sub-standard and the

contractor had not rectified the defects as noticed and submitted that there was no arbitration clause available. Since the respondents are not

willing to have the Arbitrator appointed, we think that in this proceeding, it would not be just or proper to consider the claim for appointment of an

Arbitrator.

8. We must also remind ourselves that we are sitting in appeal over the decision of the learned Single Judge, who declined to exercise his

discretionary jurisdiction under Article 226 of the Constitution of India. In his proceeding, wherein undoubtedly, contractual disputes have been

sought to be raised before this Court, we have necessarily to agree with the learned Single Judge in the stand adopted by him. With respect, he is

justified in thinking that this is not a fit case for exercise of jurisdiction by this Court under Article 226 of the Constitution of India. The learned

Single Judge has left the contractor to other remedies available under law either by approaching the civil Court or by way or seeking arbitration. In

this context, we are also of the view that it is not necessary or appropriate to consider in this appeal whether an Arbitrator should be appointed to

decide all the questions, including the question whether there exists a valid arbitration clause in the agreements between the parties and the scope of

the clause relied upon.

In this situation, we decline to grant any relief to the appellant. Agreeing with the learned Single Judge, we dismiss this appeal without prejudice to

the rights of the appellant, if any, to pursue other remedies that may be open to it.