

## Cement Corporation of India Ltd. Vs Narula Trading Corporation and Others

**Court:** Jharkhand High Court

**Date of Decision:** Jan. 9, 2004

**Acts Referred:** Arbitration and Conciliation Act, 1996 & Section 11(6) Constitution of India, 1950 & Article 226

**Citation:** (2004) 2 JCR 491

**Hon'ble Judges:** S.J. Mukhopadhyaya, J; Gurusharan Sharma, J

**Bench:** Division Bench

**Advocate:** Gautam Rakesh and P.N. Rai, M.K. Laik, for the Appellant; G. Mustafa, A.K. Mustafa and Anjar Ahmad, for the Respondent

### Judgement

S.J. Mukhopadhyaya, J.

The petitioner, Cement Corporation of India Ltd. (hereinafter referred to as the CCI), a Government of India

Enterprises, have challenged the order dated 16th December, 2002 and 28th March, 2003 passed by the Chief Justice of Jharkhand High Court,

Ranchi in A.A. No. 16 of 2002. By the order dated 16th December, 2002, the Chief Justice of Jharkhand High Court while held that the

appointment of Arbitrator as made by the respondent (petitioner herein) shall not be taken into consideration and observed that he would like to

appoint an Arbitrator exercising his power u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, 1996). By

subsequent order dated 28th March, 2003 while the Chief Justice refused to review the order dated 16th December, 2002, allowed time to the

respondent (petitioner) to submit a panel of Arbitrators to enable the Chief Justice to select the name of an Arbitrator from the panel as submitted

by both the parties.

2. The case of the petitioner is that the CCI and respondent M/s. Narula Trading Corporation (hereinafter referred to as the Corporation) reached

an agreement in pursuance of Tender Notice No. 11 (15-F)/C/93-MMO appointing the respondent Corporation as an Agent for clearing,

transportation, handing, searching and secondly transportation of cement at Ranchi Dump. Subsequently, certain dispute arose in connection with

the aforesaid contract between the parties. There being a clause of arbitration in the contract, respondent Corporation and others requested the

petitioner CCI to appoint Arbitrator as per the Arbitration and Conciliation Act, 1996. No action having been taken by the petitioner to appoint

Arbitrator, the respondent Corporation filed an application under Sub-section 4(b) of Section 11 of the Act, 1996 before the Chief Justice,

Jharkhand High Court requesting him to appoint an Arbitrator. The said application was registered as A.A. No. 16 to 2002, wherein the petitioner

was also impleaded as party respondent.

3. During the pendency of the A.A. No. 16 of 2002, the petitioner appointed one Shri. V.K. Arora, General Manager (Marketing), CCI as the

Arbitrator vide their memorandum dated 29th September, 2002. It was brought to the notice of the Chief Justice by way of counter affidavit filed

on behalf of the respondent-petitioner herein that the Arbitrator has been appointed. The case was taken up on 16th December, 2002 but after

hearing the parties, the Chief Justice, Jharkhand High Court ordered that the appointment of Arbitrator as made by the CCI shall not be taken into

consideration and as such decided to exercise his jurisdiction under Sub-section (6) to Section 11 of the Act, 1996 to appoint an Arbitrator, The

parties were directed to submit a panel of three persons each by the next date for the purpose of selecting the Arbitrator. The petitioner, who was

the respondent in A.A. No. 16 to 2002 filed an application to review the order dated 16th December, 2002, but it was rejected by the Chief

Justice vide order dated 28th March, 2003. Further time was granted to the respondent-petitioner to submit a panel of Arbitrators to enable the

Chief Justice to select the name of an Arbitrator from the panel as submitted by both the parties.

4. Counsel for the petitioner placed reliance on Clause 11 of the "General Terms and Conditions" as enclosed with the agreement which reads as

follows :--

It is hereby agreed by the parties hereby that only Courts at Delhi/New Delhi shall have the jurisdiction to decide or adjudicate any dispute which

may arise out of or be in connection with the agreement.

Clause 10.6 of the said "General Terms and Conditions" as attached with the agreement was also relied upon as quoted hereunder :--

The venue of arbitration shall be New Delhi or such other place as the Arbitrator at his discretion may determine.

5. The counsel for the petitioner placed reliance on Sub-section (e) to Section 2 and Sub-section 12(b) to Section 11 of the Act, 1996. It was

submitted that in the present case, as per Clause 11 of the General Terms and Conditions of the agreement, the Court being the principal civil

Court of original in at Delhi/New Delhi, for the purpose of Sub-sections (4), (5), (6), (7), (8) and (10) of Section 11, the Chief Justice of Delhi

High Court is only competent to appoint an Arbitrator, if so required; under Sub-section (6) to Section 11 of the Act, 1996. It was also submitted

that the petitioner (CCI) having appointed an Arbitrator of its own, as per agreement, there is no occasion for the Chief Justice, Jharkhand High

Court to appoint an Arbitrator under subsection (6) to Section 11 of the Act, 1996.

6. The questions raised in this case are :--

(i) whether in the facts and circumstances of the case, the Chief Justice of Jharkhand High Court has jurisdiction to appoint an Arbitrator under

Sub-section (6) to Section 11 of the Act, 1996 or not; and

(ii) Whether appointment of such an Arbitrator is proper or not.

7. Counsel for the respondent Corporation questioned the validity of Clause 11 of the "General Terms and Conditions" of the Agreement.

According to him, said Clause 11 of the agreement curtailing the jurisdiction of a competent Court is invalid. But such submission cannot be

accepted in view of following decisions of the Supreme Court.

8. In the case of Hakam Singh Vs. Gammon (India) Ltd., , the Supreme Court while observed that the parties cannot by agreement confer

jurisdiction on Court not possessed by it under the Code, held that one of the Courts having such jurisdiction alone shall try dispute, is not contrary

to public policy and does not contravene Section 28 of the Contract Act.

Said decision was also followed by the Supreme Court in the case of A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, .

In the case of Shriram City Union Finance Corporation Ltd. v. Rama Mishra, reported in AIR 2002 SC 2402, the Supreme Court held that it is

open for the parties to choose any one of the competent Courts to decide their dispute. In case parties under their own agreement expressly agree

that their dispute shall be tried by only one of them then the parties can only file the suit in that Court alone to which they have so agreed.

9. So far as the jurisdiction of the Chief Justice of Jharkhand High Court is concerned, it is not necessary to decide this issue at this stage as it is

always open for a party to raise the question of validity of Constitution of Arbitral Tribunal/or appointment of Arbitrator and its jurisdiction before

the Arbitral Tribunal/Arbitrator.

In the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., similar issue fell for consideration. The Supreme

Court held that the Arbitral Tribunal if improperly constituted and be without jurisdiction, it would then be open to the aggrieved party to require

the Arbitral Tribunal to rule on its jurisdiction.

In the case of State of Orissa and Ors. v. Gokulananda Jena, reported in 2003 (3) JLJR 168 (SC), the Supreme Court observed and held as

follows :--

8. However, we must notice that in view of Section 16 read with Sections 12 and 13 of the Act is interpreted by the Constitution Bench of this

Court in the M/s. Konkan Railway's (supra) almost all disputes which could be presently contemplated can be raised and agitated before the

Arbitrator appointed by the Designated Judge u/s 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly

any area of dispute which cannot be decided by the Arbitrator appointed by the designated Judge. If that be so, since an alternative efficacious

remedy is available before the Arbitrator, writ Court normally would not entertain a challenge to an order of the Designated Judge made u/s 11(6)

of the Act, which includes considering the question of jurisdiction of the Arbitrator himself. Therefore, in our view though a writ petition under

Article 226 of the Constitution is available to an aggrieved party ground available for challenge in such a petition is limited because of the alternative

remedy available under the Act itself.

Similar was the finding of the Supreme Court in the case of Food Corporation of India Vs. Indian Council of Arbitration and Others etc. etc., ,

wherein the Supreme Court held that the legality and propriety of constitution of Tribunal and existence of Arbitration Agreement itself fails within

the jurisdiction of Arbitral Tribunal itself. The Tribunal is empowered to adjudicate such question before deciding the dispute between the parties.

10. As all these grounds of attack can be raised before the Arbitrator appointed by the Designated Judge/Chief Justice, I do not think it

appropriate to decide the issue when alternative remedy is already available.

11. In the aforesaid background, the writ petition is disposed of by permitting the petitioner to raise all its contentions before the Arbitrator, as may

be appointed by the Designated Judge/Chief Justice.

Gurusharan Sharma, J.

12. I agree.