

THE STATE OF JHARKHAND AND ORS.

v.

M/S HINDUSTAN CONSTRUCTION CO. LTD.

(Civil Appeal No. 1093 of 2006)

SEPTEMBER 22, 2017

[J. CHELAMESWAR AND S. ABDUL NAZEER, JJ.]

*Arbitration and Conciliation Act, 1996 – Power of Supreme Court to entertain an application for making the arbitral award as Rule of the Court, even if it retains seisin over arbitral proceedings – Supreme Court referred matter for arbitration by retired Judge of Supreme Court observing that the arbitral award be filed before Supreme Court – Award passed – Appellants challenged the said award by filing a petition u/s. 34 before the civil court – However, respondents filed affidavit in Supreme Court requesting it to pronounce judgment in terms of the award on the ground that since the Arbitrator was directed to file his award in Supreme Court, the application for making the award a Rule of the Court must be filed in Supreme Court, which alone has the jurisdiction to pronounce judgment in terms of the award – Held: In **Nav Bharat Construction** case, Supreme Court while following a 3-Judge Bench judgment in **Mcdermott International** case held that since the Arbitrator was directed to file the award in Supreme Court, an application to make the award rule of the Court, has to be filed in Supreme Court – However, in **Bharat Coking Coal** case it was held that jurisdiction cannot be assumed by the Court even by consent of the parties and in **Associated Contractors** case a 3-Judge Bench held that Supreme Court cannot be considered to be a Court within the meaning of s.2(1)(e) of the 1996 Act even if it retains seisin over the arbitral proceedings – In view of difference of opinion in relation to entertainability of an application by Supreme Court for making the award as Rule of the Court, matter is referred to larger Bench – Arbitration Act, 1940 – s.2(c).*

A Referring the matter to larger Bench, the Court

HELD: 1.1 In *Nav Bharat Construction Company* case, Supreme Court while following a three-Judge Bench judgment in *Mcdermott International INC* case held that since the Arbitrator was directed to file the award in this Court, an application to make the award rule of the Court, has to be filed in Supreme Court. [Para 4] [794-D-E]

C *State of Rajasthan vs. Nav Bharat Construction Company* (2) 2010 (2) SCC 182 : [2010] 1 SCR 312 ; *Mcdermott International INC. vs. Burn Standard Co. Ltd. and Others* 2005 (10) SCC 353 – referred to.

D -1.2 In *Bharat Coking Coal Limited* case, Supreme Court held that the Court ordinarily must reserve right of a party to prefer an appeal. A right to appeal is a valuable right and unless there exists cogent reasons, a litigant should not be deprived of the same. It was further held that jurisdiction cannot be assumed by the Court even by consent of the parties. In *Associated Contractors* a three-Judge Bench, held that the Supreme Court cannot be considered to be a Court within the meaning of Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 even if it retains seisin over the arbitral proceedings. In this judgment, the view taken in the cases of *Saith and Skelton (P) Ltd.* and *Guru Nanak Foundation* was doubted wherein it was held that where an Arbitrator was appointed by the Supreme Court itself and the Supreme Court retains seisin over the arbitration proceedings, the Supreme Court would be 'Court' for the purpose of Section 2(c) of the Arbitration Act, 1940. [Para 5] [795-A-C]

G *Bharat Coking Coal Limited vs. Annapurna Construction* (2008) 6 SCC 732 : [2008] 3 SCR 1124 ; *State of West Bengal and Ors. vs. Associated Contractors* (2015) 1 SCC 32 : [2014] 10 SCR 426 ; *State of M.P. vs. Saith and Skelton (P) Ltd.* (1972) 1 SCC 702 : [1972] 3 SCR 233 ; *Guru Nanak Foundation vs. Rattan Singh and Sons* (1981) 4 SCC 634 : [1982] 1 SCR 842 – referred to.

H

Case Law Reference

2005 (10) SCC 353	referred to	Para 4	A
[2010] 1 SCR 312	referred to	Para 4	
[2008] 3 SCR 1124	referred to	Para 5	B
[2014] 10 SCR 426	referred to	Para 5	
[1972] 3 SCR 233	referred to	Para 5	
[1982] 1 SCR 842	referred to	Para 5	C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1093 of 2006.

From the Judgment and Order dated 06.08.2002 of the High Court of Jharkhand at Ranchi in Arbitration Appeal No. 6 of 2002.

Ajit Kumar Sinha, Sr. Adv., Gopal Prasad, Mrs. Reeta Kumari Gupta, Advs. for the Appellants.

Jayant Mehta, Prateek Kumar, Ms. Anushka Sarda, Sanjeev Kumar (For M/s. Khaitan & Co.), Advs. for the Respondent.

The Judgment of the Court was delivered by

S. ABDUL NAZEER, J. 1. By an order dated 10.01.2013, this Court had referred the matter for adjudication to Hon'ble Justice S.B Sinha, retired Judge of this Court. Learned Arbitrator was requested to conclude the arbitration proceedings expeditiously. It was further observed that the award shall be filed before this Court. Learned Arbitrator passed an award on 16.10.2015 and a copy of the award was sent to this Court. Admittedly, the appellants have challenged the said award by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, before the Civil Court. The respondents have filed an affidavit dated 16.06.2016 requesting this Court to pronounce the judgment in terms of the award.

2. Learned counsel for the respondents submits that since the Arbitrator was directed to file his award in this Court, the application for making the award a rule of the Court must be filed in this Court and that

- A this Court alone has the jurisdiction to pronounce the judgment in terms of the award. In this connection, he has relied on a three-Judge Bench judgment of this Court in *Mcdermott International INC. vs. Burn Standard Co. Ltd. and Others* reported in 2005 (10) SCC 353, and a two-Judge Bench judgment in *State of Rajasthan vs. Nav Bharat Construction Company (2)*, 2010 (2) SCC 182.

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- C 3. On the other hand, learned senior counsel appearing for the appellant submits that right to appeal is a valuable right and unless there exists cogent reasons, a litigant should not be deprived of the same. If this Court decides the objections to the award, the parties will lose their right of appeal. It is further submitted that while referring the matter to arbitration, this Court had not retained control of the proceedings of the Arbitrator. In this connection he has relied on the decisions of this Court in *Bharat Coking Coal Limited vs. Annapurna Construction* (2008) 6 SCC 732 and *State of West Bengal and Ors. vs. Associated Contractors* (2015) 1 SCC 32.

- D 4. In *Nav Bharat Construction Company* (supra), this Court while following a three-Judge Bench judgment in *Mcdermott International INC* (supra) has held that since the Arbitrator was directed to file the award in this Court, an application to make the award rule of the Court, has to be filed in this Court. It has been held in paragraph 11 thus:

- E
- F “From the judgment of this Court dated 4-10-2005, it has been made clear by this Court in the operative part of the same, as noted hereinearlier, that the award that would be passed by the umpire must be filed in this Court and secondly, it was clarified in the judgment itself that this was not a case of a new reference but a continuation of the earlier proceeding and thus the Act shall continue to apply. In *McDermott International Inc.*⁴, the three-Judge Bench decision of this Court clearly observed that since the arbitrator was directed to file his award in this Court, the objections as well as the entertainability of the application of the appellant for making the award a rule of the court must be filed in this Court alone and, therefore, this Court has the jurisdiction to entertain the application of the appellant and also the objections filed by the respondent.”

- H (Emphasis supplied)

5. In *Bharat Coking Coal Limited* (supra), this Court has held that the Court ordinarily must reserve right of a party to prefer an appeal. A right to appeal is a valuable right and unless there exists cogent reasons, a litigant should not be deprived of the same. It was further held that jurisdiction cannot be assumed by the Court even by consent of the parties. In *Associated Contractors* (supra) a three-Judge Bench of this Court, after taking note of some of the previous judgments of this Court, has held that the Supreme Court cannot be considered to be a Court within the meaning of Section 2(1)(e) of the 1996 Act even if it retains seisin over the arbitral proceedings. In this judgment, this Court has doubted the view taken in *State of M.P. vs. Saith and Skelton (P) Ltd.* (1972) 1 SCC 702 and *Guru Nanak Foundation vs. Rattan Singh and Sons* (1981) 4 SCC 634 that where an Arbitrator was appointed by the Supreme Court itself and the Supreme Court retains seisin over the arbitration proceedings, the Supreme Court would be 'Court' for the purpose of Section 2(c) of the 1940 Act. It has been observed thus:

"20.....Secondly, under the 1940 Act, the expression "civil court" has been held to be wide enough to include an appellate court and, therefore would include the Supreme Court as was held in the two judgments aforementioned under the 1940 Act. Even though this proposition itself is open to doubt, as the Supreme Court exercising jurisdiction under Article 136 is not an ordinary appellate court, suffice it to say that even this reason does not obtain under the present definition, which speaks of either the Principal Civil Court or the High Court exercising original jurisdiction. Thirdly, if an application would have to be preferred to the Supreme Court directly, the appeal that is available so far as applications under Sections 9 and 34 are concerned, provided for under Section 37 of the Act, would not be available. Any further appeal to the Supreme Court under Article 136 would also not be available."

(Emphasis supplied)

6. We are of the view that there is a difference of opinion in relation to entertainability of an application by this Court for making the award as Rule of the Court. The matter is, therefore, referred to larger bench for decision of the following question :

A “Whether this Court can entertain an application for making the award as Rule of the Court, even if it retains seisin over arbitral proceedings?”

7. Registry is directed to place the matter before the Hon’ble Chief Justice of India for appropriate orders.

B

Divya Pandey

Matter referred to larger bench.