

(1996) 07 PAT CK 0042

In the Patna High Court

Case No : Appeal from Oroginal Order No. 459 of 1993

State of Bihar and Others

APPELLANT

Vs

Bhartiya Ispat Udyog Private Ltd.

RESPONDENT

Date of Decision : 26-07-1996

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 13, 14, 15

Citation : (1996) 2 BLJR 1276 : (1996) 2 PLJR 493

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—This appeal has been tiled by the defendant-appellants State of Bihar challenging the impugned order passed by the subordinate Judge I, Patna, setting aside an award of the arbitrator on the concession made by the counsel of the parties and referring lite dispute again for fresh arbitration.

2. The brief facts of the case is that the appellant State of Bihar published notices inviting tenders for supply of different types of 3100 M.T. of steel rods in the Public Works Department vide notice bearing No. 2952 (E) dated 1.10.1980. In response to the said notice, various tenderers, including the respondent, submitted their tenders and the tender of the respondent being the lowest was accepted and the supply order was issued to it vide Engineer-in-Chief-cum Special Secretary, Public Works Department, Government of Bihar, letter No. 549 (E) dated 21.2.1981. Before the respondent could resume the supply, it raised a grievance for enhancement of rates which dispute, however, was settled by the Engineer-in-Chief-cum-Special Secretary vide letter bearing No. 914 (E) dated 13.3.1981 and 1122 (E). dated 30.3.1981. It is relevant to state that the Chief Engineer, Communication, North Bihar Wing, Darbhanga, also placed orders with the respondent firm for supply of steel rods after making reference firm for supply of steel rods after making reference to the aforementioned two letters of the Engineer-in-Chief, vide his letter No. 173 dated 6th April, 1981. The

respondent firm, however, in spite of the direction contained in the supply order to execute the agreement, failed to execute the same but commenced the supply of iron rods on approved rates for which payments were duly made.

3. It appears that, in the year 1985, the respondent firm moved the Court of Subordinate Judge, Patna, with a prayer to appoint an Arbitrator to settle the claim against the State of Bihar, Building and Road Construction Department, relating to price variation clause. The application so filed by the respondent firm were registered as Miscellaneous Case Nos. 123, 124 and 125 of 1985 which were subsequently converted into Title Suit Nos. 201, 202, and 203 of 1987. It further appears that the learned Subordinate Judge disposed of the abovementioned suits in terms of the judgment dated 25.6.1987 by appointing Chief Engineer, building and Road Construction Department, State of Bihar, as the sole Arbitrator to arbitrate the dispute between the appellants and the respondent firm and to submit a reasoned award, In compliance with the said judgment, the, sole Arbitrator, namely, the Chief Engineer, issued notices to the parties, in response where to, the respondent firm submitted three claims of Rs. 14,79,127.43; Rs. 54,74,928.05; and Rs. 1,17,05,024.70. The appellant State of Bihar also submitted its counter claim denying the claim made by the respondent firm. The State of Bihar in its counter-claim demanded recovery of certain amounts from the respondent firm. The Chief Engineer, being the sole Arbitrator, after hearing the parties and after considering the claim and counter-claim, gave a reasoned award dated 19.5.1988 in which he held that the total amount claimed but he respondent firm and the counter claim of the State of Bihar comes to "nil".

4. The sole Arbitrator, after signing and publishing the said award, remitted it to the learned Subordinate Judge I, Patna, by registered post with a request to make the same rule of the court.

5. The appellant State of Bihar, after receiving a copy of the said award, filed Miscellaneous Case Nos. 54, 55 and 56 of 1988, praying, inter alia, that the aforesaid award submitted by the sole Arbitrator be made rule of the Court and a decree be prepared in terms thereof, the aforementioned Miscellaneous Cases were converted into Titles Suit Nos. 88, 89 and 90 of 1990.

6. The respondent firm, on the other hand, filed objection u/s 30 read with Section 33 of the Arbitration Act for setting aside the award and for appointing a fresh Arbitrator. The said objection was registered as Title Suit No. 501 of 1989. The aforementioned Title Suit Nos. 88, 89 and 90 of 1990 and Title Suit No. 501 of 1989 were made analogous. The appellant State of Bihar filed objection to the objection filed by the respondent firm u/s 30 and Section 33 of the Arbitration Act and prayed for making the award rule of the Court.

7. Upto this stage, there is no dispute with regard to the facts Stated hereinbefore. The appellant Stale of Bihar alleged that, on. 19.6.1983, the Government Pleader of the Civil Courts, Patna, appeared on behalf of the State

of Bihar and its officers in the aforementioned title suits and submitted before the Courts that the award, dated 19.3.1983 be made rule of the Court. On the other hand, the respondent firm submitted that the award be set aside and a fresh Arbitrator be appointed. It is alleged that the learned Subordinate Judge, after hearing the counsel for the parties, reserved his order in the aforementioned suits.

8. The further case of the appellant State of Bihar was that this Secretary of the Building Construction Department and the Secretary of the Road Construction Department received copies of memo dated 26.9.1993 issued, under the signature of Sri Hari Lal Agrawal, Senior Advocate of the Supreme Court, addressed to the Subordinate Judge I, Patna, from which it appeared that Sri Hari Lal Agrawal was appointed an Arbitrator in terms of the order 19th June, 1993, passed in the aforementioned Title Suit No. 501 of 1989. It was further alleged by the appellant State that the Director, Purchase, contacted Sri Hari Lal Agrawal at his Patna, residence, where, from he could obtain a copy of the order dated 19.6.1993 passed by the learned Subordinate Judge I, Patna, in Title Suit No. 501 of 1989, which is impugned in the instant appeal.

9. For further appreciation, the impugned dated 19th June, 1993, under appeal is quoted herein below:

Learned Counsel for the plaintiff and learned Government Pleader, appearing for the State of Bihar have submitted that the disputes may be referred to the consented Arbitrator Hon"ble Mr. Justice H.L. Agrawal, Ex-Chief Justice of Oriss High Court. Hence, let this dispute be referred to the Arbitrator/named above, for submitted the award after entertaining the claims of the parties, within four months from the receipt of this reference. The parties are directed to place there claims before the Arbitrator, so appointed, at the earliest "possible" time. The office is directed to inform the learned Arbitrator accordingly.

As the hearing of the Title Suit Nos. 88, 89 and 90 of 1990 have been taken up analogously with Title Suit No. 501 of 1989 "and; therefore, all these four Title Suits stand disposed of on contest but without cost. The award dated 19.5.88 is hereby set aside.

10. The appellant State of Bihar further made out a case that, after having come to know of the impugned order, the Additional Secretary to the Government in the Department of Public Works Department consulted the Government Pleader in presence of the Secretary, Building Construction Department, and enquired from him as to under what circumstances the Government Pleader consented for appointment of another Arbitrator, in response thereto, the Government Pleader categorically stated that he never consented for appointment of another Arbitrator and for setting aside the award rather he made submission to the Court for making the award rule of the Court.

11. Mr. V.N. Sinha, learned Government Pleader DC assailed the impugned order as illegal and without, jurisdiction. The learned Counsel submitted that the order

is vitiated in law for the reason that it proceeds on the basis of the concession given, by learned Government Pleader when, in fact, no such consent was given by him for appointment of another Arbitrator or for setting aside the award. The learned Counsel further submitted that even assuming that the concession was made by the Government Pleader that cannot be binding on the Government, as it is obviously unsafe to rely on the wrong or erroneous or wanton concession made by the counsel appearing for the State unless it is writing on instructions from the responsible officer. The learned Counsel relied on a decision in the case of Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala, .

12. On the other hand, Mr. Ram Mahto, learned Senior Counsel, appearing on behalf of the respondent firm, has made two fold submissions. Firstly, he submitted that the impugned order being a consent order no appeal lay against the same. In other words, learned Counsel submitted that the order passed on the consent of the parties is not appealable and therefore, the appeal is liable to be dismissed on this ground alone. In support of his submission, the learned Counsel relied on the decisions reported in Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa, .

13. The second submission of Mr. R.B. Mahto. learned Senior Counsel, was that there is no bar under law for a court to set aside the award on the concession made by the parties. The learned Counsel submitted that by reason of the concession made by the learned Government Pleader no financial burden has been created on the State by the impugned order and, therefore, the decision relied upon by the learned Counsel for the appellant, i.e. Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala, , does not apply on the facts and in the circumstances of this case.

14. After hearing the parties, I am of opinion that the following questions have arisen for consideration in this appeal, namely:

(1) Whether the Subordinate Judge has jurisdiction to set aside the award on the concession made by the parties and to refer the dispute to arbitration afresh without applying his mind on the validity of the award?

(2) Whether the concession made by the Government pleader verbally without any written instruction is binding on the State?

(3) Whether an appeal lies against & consent order passed u/s 30 of the Arbitration Act?

15. Re: Question No. 1-

For Better appreciation of the argument advanced by the learned Counsel appearing on behalf of the parties it is necessary to look into the scheme of the Arbitration Act, 1940. One should keep in mind the scope and spirit of the said Act as observed by the Supreme Court in following words:

Interminable, time consuming, complex and expensive court procedures impelled

jurists to search for an alternative forum, less formal, more effective and speedily for resolution of dispute avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosopher sweep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary., Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with "legalese" of unforeseeable complexity. This case amply demonstrates the same.

16. The Arbitration Act, 1940, was enacted to consolidate the law relating to arbitration. Before 1940, the law relating to arbitration was mainly contained in the Second Schedule to the Code of Civil Procedure. The scheme of the Act is to divide arbitration into three classes. Chapter II of the Act consists of provisions relating to arbitration without intervention of the Court. Chapter III of the Act lays down the provisions of arbitration with the intervention of the Court and Chapter IV deals with the arbitration in suits. The provisions of the Act has been arranged in sequence. Reference may be made to a few which are material for our purpose. Section 5 lays down that the authority of an appointed arbitrator or umpire shall nit be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. Section 8 confers power on the Court to appoint arbitration or umpire in certain circumstances. Section 11 gives power to Court to remove arbitrator or umpire in certain circumstances and Section 12 gives consequential power to Court to appoint persons to fill the vacancies which may have arisen. Section 13 provider powers of the arbitrator and Section 14 provides for the award to be signed and filed. When the award is filed, the Court has to give notice to the parties of the filing of the award. Section 15 confers power on the Court to modify or correct the award and Section 16 provides that the Court can remit the award for reconsideration. Section 17 provides fro judgment in terms of award which reads as under:

17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

Section 19 gives power to the Court to supersede the arbitration agreement in certain circumstances. One more Section with which we are concerned is Section 30 of the said Act which reads as under:

30. Ground for setting aside award:-An award shall not be aside except on one more of the following grounds, namely:

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;
- (b) that an award has been made after the issue of an order of the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35;
- (c) that an award has been improperly procured or it otherwise invalid.

17. The analysis of the relevant provision of the Act shows that the Court has to pronounce judgment in accordance with the award if it sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or if it sees no cause to set aside the award. Section 17 of the Act provides that an application to set aside the award is contemplated therein and it is only when no such application has been made within the time allowed or if such an application has been filed and has been rejected then the Court proceeds to pronounce judgment in terms of the award. The Court, therefore, contemplates the making of an application to set aside the award and the grounds for which such an application can be made are to be found in Section 30. The grounds on which the application can be made for setting aside the award are provided u/s 30 and it will be seen that if a party wants an award to be set aside on any of these grounds it has to make an application. Thus, any party wishing to have an award set aside on the ground that it was improperly procured or was otherwise invalid has to make an application. From the language used in this section, it is apparent that Section 30 of the Act confers jurisdiction on the Court to set aside an award on the grounds mentioned therein and not otherwise.

18. Learned Counsel for the respondent has not been able to show me any provision under the Arbitration Act in support of this proposition that it was open to the Court below to ignore the award in the circumstances of the case when all the parties to the award desire it to be cancelled.

19. I, therefore, hold that the learned Court below was in error in setting aside the award merely on the statement of the respective counsel for the parties. It was duty of the learned court below to have considered the objection filed by the parties to the award on merit and if it was satisfied that a case was made out for setting aside the award on any one more of the grounds mentioned in Section 30 of the said Act, it was only in that circumstance that he could set aside the award and then it could proceed further with the suit. The learned court below has not done so and has proceeded with that suit without examining the objection on merit. Thus, the impugned order passed by him, in my opinion, is vitiated and is against the law.

20. Mr. Ram Balak Mahto, learned Senior Counsel appearing on behalf of the respondents, heavily relied on a decision in the case of Munshi Ram Vs. Banwari Lal, , and submitted that the parties can ignore the award by entering into a compromise. I disagree with the submission of the learned Counsel. The decision in Munshi Ram v. Banwari Lal (supra) is not applicable at all in this case. In the case before the Apex Court, the question was whether, after an award is filed in

the Court and the parties entered into a compromise modifying the terms of the award, the Court can pass a decree on the award as modified but the parties. The Apex Court observed that the Act does not disable the parties from terminating their dispute in a different way and if they do, it could not be intended by law that a dispute, which has been successfully terminated, should again become the subject of litigation, If the parties are dissatisfied with the award and want to substitute it by a compromise involving the matters alien to the original dispute which are inseparable, the Court may supersede the reference and leave the parties to work out their agreement in accordance with law outside the Arbitration Act. In such circumstances, the new compromise itself may furnish a very good ground for superseding the reference and thus revoking the award. The Apex Court in the case (supra) has laid down any law that the Court without looking the error on the award can set it aside merely on the basis of the consent of the parties and order for fresh arbitration.

The Supreme Court observed as under:

In the present case, the decree of the award was properly framed, because the award made room for adjustment of the Income Tax, ordering that the Income Tax when assessed, would be borne equally by the three parties, and the compromise merely worked out that direction by reducing the amounts payable to the two respondents by Rs. 4,000/-each. The compromise, on this part, did not go outside the award, but was a direct consequence of the award. It quantified Income Tax, which under the award, was to be quantified later. The amounts were the same which were originally payable, less the Income Tax. The only difference was as to the mode of payment and instead of three instalment per quarter, the amount was payable in more instalments per quarter, the amount was payable in more instalments yearly. This, in our opinion, was a matter on which the parties could agree, and the Court could substitute their agreement in the operative part of the decree. There is nothing in the Arbitration Act, which disentitles the Court from taking note of an agreement of this character, and, in our opinion, the decree cannot be characterised as a nullity on this ground.

21. In the instant case, by the so-called consent order, which is impugned herein, the parties did not intend to terminate their dispute successfully rather, by the said order, the parties intended to go for a fresh round of litigation. Thus, in my opinion, it cannot be the scope and spirit of Section 30 of the said Act. For the reasons given above, even if assuming that the consent given by the Government Pleader was binding on the State, an award cannot be set aside by the Court merely on the ground that the parties by consent agreed for second round of arbitration.

22. Re: Question No. 2:

The next question that arises for consideration is as to how far concession made by the Government Pleader in the trial Court was binding on the State.

Admittedly, nothing was brought on record to show that such concession was made by the Government Pleader on the basis of any instruction either verbal or in writing from the State Government or its Supreme Court in the case of Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala, wherein, while considering the concession made by the learned Advocate General, it was held as under:

...As a limb of the argument Sri Sanghi Has placed reliance on the concession made by the Government Pleader in the trial Court that Ex. P9 would value which worked out @ Rs. 43.50 percent, We are unable to accept the submission of the learned Counsel. Any concession made by the Government Pleader in the trial Court cannot bind the Government as it is obviously always unsafe to rely on the wrong or erroneous or wanton concession made by the counsel appearing for the State unless it is in writing on instructions from the responsible officer. Otherwise it would place undue and needless heavy burden on the public exchequer. But the same yard stick cannot applied when the Advocate General has made a Statement across the bar since the Advocate General makes the Statement with all responsibility.

In those circumstances we have no hesitation to accept the Statement of learned Advocate General and hold that the Market value of the lands would be fixed at Rs. 18 percent. From the very nature of compulsory acquisition 15 per cent solatium as an additional compensation was statutorily fixed. Therefore the determination of additional market value is unwarranted.

23. Mr. Ram Balak Mahto. learned Senior Counsel appearing on behalf of respondent, tried to impress me by submitting that the aforesaid decision of the Apex Court Is not applicable in the facts and circumstances of the case, in as much as, the concession made by the Government Pleader does not put undue and needless heavy burden on the public exchequer. I am unable to accept the submission of the learned Counsel for the simple reason that, by reason of concession made by the Government Pleader in. the trial Court, the State was dragged into unnecessary litigation which may ultimately put unnecessary burden on the public exchequer. Had it been a concession from the mouth of the Advocate General of the State then the matter would have been otherwise.

24. I am aware of the legal position that when a concession is made by the Advocate appearing for the parties and on the basis of such concession the judgment and/or order is passed and subsequently when such Advocate resiles for such concession then the Court is not obliged to accept the denial from the side of the Advocate. So far as the State Government is concerned, that principal applies only in respect of concession made by the Advocate General of the State and not other Government Pleader.

25. In the case of State of Maharashtra v. Ramdeo Shrinivas Nayak and Anr. 1982 B.B.C.J. 179, a similar question arose before the Supreme Court where the concession made was subsequently denied. While dealing with the effect of such concession, it was held as under:

When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena "Judgments cannot be treated as mere counters in the name of litigation". We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court. We cannot allow the statement of the Judges to be contradicted by statements at the bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statement of fact as to what transpired at the hearing, recorded in the judgment of the Court are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happening in Court have been wrongly recorded in a judgment, it is incumbent upon the party while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and has led to gross injustice, but, he may not call in question the very fact of making of concession as recorded in the judgment.

26. In the instant case, since the concession made by the Government Pleader in the High Court is not binding on the State, there is no question inquiry by the trial Court even assuming that such concession or agreement was subsequently denied by the Government Pleader. Moreover, I am of the view that the concession made by the Government Pleader was indeed on wrong appreciation of law and therefore, the impugned order cannot be sustained in law.

27. Re: Question No. 3:- The last submission of Mr. R.B. Mahto, learned Senior Counsel appearing on behalf of the respondent, is that the appeal is not maintainable for the reason that no appeal lies against the consent decree or order. In support of his submission, the learned Counsel relied on decisions reported in Smt. Kamlesh Kumari Vs. State of Uttar Pradesh and Others, . It is well settled that no appeal lies from a decree passed by the Court with the consent of the parties. But, in the instant case, I have already observed that the consent was not lawful and, therefore, these decisions will not be of any help to the respondent. In other words, if the decree or the order on the basis of compromise is void or voidable, under the Contract Act, shall not be deemed to

be lawful. In such circumstance, the party can challenge the validity of the compromise in appeal. As observed by me earlier, there is no such provision under the Arbitration Act whereby the award can be set aside on compromise. Now the said Act does not debar the party to challenge the consent order setting aside the award by filing an appeal. Applying Section 41 read with the 2nd Schedule of the said Act, there cannot be any hesitation to hold that such order can be challenged in appeal. Hence, I am of the view that the instant appeal is maintainable.

28. For the reasons given above, I allow this appeal, set aside the impugned order and remand the case back to the learned Court below with a direction to consider the objections filed by the parties u/s 30 of the Arbitration Act and to decide the suit in accordance with law. I shall make no order as to costs.