

(1972) 02 PAT CK 0014

In the Patna High Court

Case No : Civil Revision No. 350 of 1971

Chandra Narain Chaudhary and Another

APPELLANT

Vs

Mt. Godavari Choudharain and Others

RESPONDENT

Date of Decision : 01-02-1972

Acts Referred:

Arbitration Act, 1940 — Section 28(1), 3, 33, 39
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1972 Patna 340 : (1972) 5 PLJR 175

Hon'ble Judges : N.L. Untwalia, J

Bench : Single Bench

**Advocate : Satyanand Kumar and Ramanand Kumar, for the Appellant;
Yogendra Mishra, for the Respondent**

Final Decision : Dismissed

Judgement

N.L. Untwalia, J.—The plaintiff opposite party No. 1 filed partition Suit 126 of 1961 against the defendants, two of whom are the petitioners and the others are opposite parties 2 to 14. On the 4th of January, 1971 parties filed a joint petition praying that the disputes between the parties be referred to the arbitration of a person named in the petition. An order of reference was passed on 5-1-71 in accordance with Section 23 of the Arbitration Act, 1940 hereinafter called the Act. In this order the Court below fixed the 5th of February, 1971 as the date for submission of the award. The arbitrator filed a petition on 5-2-71 stating that the work had started but the completion of the arbitration proceeding will take some time. He prayed for time and a week's time was allowed. The order made on this day was-

"Award to be filed positively by 12-2-71 failing which the reference shall be recalled."

On 12-12-71 the arbitrator again filed at petition for time for submission of award. This time petition was rejected, and in accordance with the order dated 5-2-71 the reference was recalled. Two of the defendants have come up in,

revision.

2. Learned Counsel for the petitioners, in the first instance, prayed that this civil revision should be converted into a miscellaneous first appeal and since the valuation is above Rs. 20,000/-, it should be placed for hearing before a Division Bench. He submitted- that the order recalling the reference is an order superseding an arbitration within the meaning of Clause (i) of Sub-section (1) of Section 39 of the Act and as such is appealable. In support of this submission, he placed reliance upon AIR 1943 117 (Oudh) . In ray opinion, the argument is not sustainable on scrutiny. The Oudh case was under the old law. In such a situation, it was held that the order was appealable because of the special language of Section 104(1)(a) of the Code of Civil Procedure. Clause (a) of Sub-section (1) of Section 104, C. P. C. read-

"an order superseding an arbitration where the award has not been completed within the period allowed by the court." The Oudh case, as stated above, was a case decided under the old law. Under the Act the phrase "superseding an arbitration" in Clause (i) of Sub-section (1) of Section 39 has got to be assigned a meaning with reference to the power of the Court to supersede an arbitration under Sec. 19 of the Act. The said section runs as follows:--

"Where an award has become void under Sub-section (3) of Section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred."

In my opinion, therefore, the order recalling the reference is not appealable u/s 39 of the Act. I am of the opinion in the first instance that when the Court has got power to make a reference u/s 23 of the Act, it must be assumed that the Court has got power to, recall the reference. It has been held in numerous cases that the power to appoint a receiver under Order 40, Rule 1, C. P. C, includes a power to remove him also and since an order appointing a receiver is appealable, it has been held that the order removing a receiver is also appealable. But here, an order making a reference u/s 23 of the Act is, undoubtedly, not appealable and, therefore, an order recalling a reference also is not appealable. In the second place, I am of opinion that even assuming that the Court has got no power u/s 23 of the Act to recall a reference made under the said provision of law, it must have undoubtedly inherent power to recall it because after all the reference cannot be allowed to continue indefinitely.

3. Learned Counsel for the petitioners then submitted that the reference could not be recalled before the expiry of the period of four months from the date of the arbitrator entering into the reference; the said period had not expired. In my opinion, this argument also is not well grounded and cannot be accepted as correct. In absence of an agreement to the contrary, in view of the provision of law contained in S. 3 of the Act, the implied conditions of arbitration agreement are provided in the First Schedule appended to the Act. Clause 3 of the First

Schedule says that the arbitrators shall make their award within four months after entering on the reference. But when there is an arbitration through intervention of the Court by an order of reference u/s 23 of the Act, Sub-section (1) itself provides that in that order the Court has to specify such time as it thinks reasonable for the making of the award. The time so specified can be extended u/s 28(1) of the Act as it can be extended in respect of those arbitration proceedings also which have not been initiated through the intervention of the Court. But here, the Court did extend the time u/s 28 by one week and refused to extend it further. I am of the opinion that the Court ought to have extended the time further. But then the difficulty of the limited scope of my revisional powers stares me in the face. If the Court below in its discretion refused to extend the time any further and recalled the reference, howsoever strongly and differently, I may feel, I cannot justifiably say that there is an error of jurisdiction in it and the civil revision should be allowed to interfere with the order of the Court below.

4. In the result, this civil revision application fails and is dismissed but in the circumstances I shall make no order as to cost.