
(1999) 04 AP CK 0059
In the Andhra Pradesh High Court
Case No : AAO No. 190 of 1999

ITC Limited, Calcutta

APPELLANT

Vs

Coromandal Cashews Limited, Madras

RESPONDENT

Date of Decision : 17-04-1999

Acts Referred:

Arbitration Act, 1940 — Section 8
Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 8 Rule 10, Order 9 Rule 13, Order 9 Rule 6

Citation : (1999) 3 ALD 238 : (1999) 1 APLJ 435

Hon'ble Judges : B.S.A. Swamy, J

Bench : Single Bench

Advocate : Mr. V.V.S. Rao, for Bimal Bhaskar, for the Appellant; Mr. G.S.R. Anjaneyulu, for the Respondent

Judgement

1. This appeal is filed aggrieved by the orders of the First senior Civil Judge, City Civil Court, Hyderabad in IA No. 1643 of 1996 in OP No.7 of 1996 dated 9-11-1998, whereunder, the application filed under Order 9 Rule 13 CPC seeking to set aside the ex parte order passed on 27-8-1996 in OP 7/96 was dismissed. The factual background of this case is that the respondent herein filed OP 7 of 1996 on 17-1-1996 seeking appointment of an Arbitrator u/s 8 of the Arbitration Act, 1940. The petitioners went on taking adjournments to file counter. On 27-8-1996, when the request was repeated, the senior Civil Judge passed the following order:

"Counter not filed, requested for time is refused. It is recorded that respondent has no counter. Heard arguments. Petition is allowed. Sri Justice P.L.N, Sharma, retired Judge of High Court is appointed as arbitrator to determine the disputes between the parties arising out of the agreement dated 25-9-1992. Petition is ordered accordingly".

2. On 30th August, 1996 itself, the petitioner filed IA 1643 of 1996 under Order IX, Rule 13 seeking to set aside the ex parts order passed in OP 7/96 on

27-8-1996 by stating that the petitioner Company is having its business in Aree states and the company is in the process of getting the required material for drafting the counter from the branch offices in three States. Hence, there was delay in filing the counter. The senior Civil Judge for reasons best known to her kept this application pending for two long years and she was merely adjourning the 1A without disposing the same on merits. In the meanwhile the respondent herein filed an application u/s 151 of-CPC in December, 1997 to change the arbitrator as Sri Justice P.L.N. Sharma was appointed as Chairman of the Special Court under A.P. Land Grabbing Prohibition Act. There is a dispute whether this application is filed on 15-2-1997 or on 17-12-1997,¹ need not verify that fact for the simple reason that the papers were served admittedly on the petitioner's Counsel only on 17-12-1997 and on that date he made an endorsement on the docket of the application "received copies subject to filing of counter" and on the same day i.e., on 17-12-1997 the learned senior Civil Judge passed the following order:

"Heard both the Counsel. The respondent Counsel now says he has no particular objection. In view of appointment of Mr. P.L.N. Sharma as Chairman, Land Grabbing, this petition is allowed."

Thereafter she disposed of this application on 9-11-1998.

3. Sri V.V.S. Rao, learned Counsel appearing for the petitioner strenuously contended that the view taken by the senior Civil Judge is contrary to the view expressed by the superior Courts time and again and she has not followed the procedure prescribed under Law either in allowing the OP or in disposing the IA. Hence, the order is liable to be set aside.

4. Mr. G.S.R. Anjaneyulu strenuously contended that the order of the lower Court dated 27-8-1996 is not an ex parte order and it was passed in the presence of the Counsel for the petitioner. The order of the senior Civil Judge in dismissing the application IA 1643/96 is quite in order.

5. Now, in the light of the rival contentions the only question that fails for consideration of this Court is whether the order of the senior Civil Judge in OP 7 of 1996 dated 27-8-1996 is an ex parte order or it is passed on merits. The facts of this case are not in dispute. Admittedly the petitioner herein failed to file counter in OP 7/96 within a reasonable time. Then what the Court should follow is the question. In Civil Procedure Code, two courses are open to the Court; one is under Order 8 Rule 10 whereunder the Court is given the power to pronounce the judgment against the defendants, if defendants fail to file counter within the time permitted by the Court or under Order 17 Rule 3 which speaks of the procedure to be followed by the Court when either of the parties fails to produce evidence. Under the above rule, if the parties are present, the Courts can proceed with the matter and decide the suit forthwith or if or any of them is, absent, proceed under Rule 2. Under Order 17 Rule 2 when the parties fail to appear, the Court may proceed to dispose of the suit in one of the modes

indicated in that behalf by Order 9 or make such other order as it thinks fit. Under Order 9 Rule 6 when summons were duly served and the defendants fail to appear in the Court, the Court may make an order that the suit be heard *ex parte*.

6. Sri G.S.R. Anjaneyulti, Counsel for the respondent contends that the Presiding Officer, having not only set the defendants *ex parte* but also heard the arguments of both the Counsel and passed the order and the same is reflected in the order; as such it can not be considered as an *ex parte* order and the interference of this Court is not warranted. I have seen the order passed by the Court below. I have no manner of doubt that if the Court below wants to proceed with the case and dispose of the case on merits, the Court is bound to make a reference to the contentions of both the parties and record the findings on the issues involved in the suit. Admittedly, the senior Civil Judge, simply said "Heard arguments, petition allowed". This order cannot be construed as an order on merits. Hence, it cannot be said that the Presiding Officer followed the procedure prescribed under Order 17 Rule 3. Admittedly, she followed the procedure prescribed under Order 8 Rule 10. Now the application filed by the petitioner is dismissed solely on the ground that the order of the Court dated 27-8-1996 is not an *ex parte* order and it cannot be set aside on an application filed under Order 9 Rule 13. The issue involved is no more *res Integra* in the light of the judgment in *Innovation Apartments Flat Owners Association, Secundrabad Vs. M/s. Annovation Associates, Secundrabad*, . His Lordship Justice Iyyapu Panduranga Rao, as he then was, having followed the judgments of the Madras and Karnataka High Courts held that "the requirement under Order 8 Rule 10 CPC does not indicate that the need for writing a judgment is dispensed with and the mechanical one-sided order should be made by the Court without applying its mind should be treated as an *ex parte* order and thus attracts Order 9 Rule 10 CPC." His Lordship further held that Order 9 Rule 13 can be invoked in any case in which a decree is passed *ex parte* and the question whether the *ex parte* decree was passed in view of non-filing of the written statement or otherwise is of no consequence. The objective in doing so is to avoid driving the parties to file a regular appeal involving a lot of expenditure and waste of time." Thus, following this judgment I hold that the order passed by the senior Civil Judge dated 27-8-1996 cannot be considered as an order on merits and it is only an *ex parte* order.

7. In the light of the view taken by me, the order of the senior Civil Judge dated 9-11-1998 can not be upheld and is accordingly set aside and 1A No. 1643 of 1996 in OP No.7 of 1996 is allowed and the Court below is directed to restore OP 7 of 1996 to the file and dispose of the same as expeditiously as possible at any rate within five months from the date of receipt of copy of this order.

8. Before parting with the case, I would like to observe that the senior Civil Judge has shown undue haste in passing the orders in this case. Having passed the orders in OP 7 of 1996 on 27-8-1996, the senior Civil Judge would not have

kept IA 1643/96 filed on 30-8-1996 till November, 1998 i.e., for more than two years. Further, when this application is pending, when the respondent filed an application to change the Arbitrator, even without giving an opportunity to the petitioner, she passed an order by stating that the respondent Counsel has "no objection" and I am sure there is no material to establish this fact on the file. Had she applied her mind she would have seen that this application is filed on 17-12-1997 and on that the respondent Counsel made an endorsement "Received copy subject to filing of counter". On the same day, it is not known when the order is passed but the Officer says "the respondent Counsel has no particular objection" and passed the order. If really the respondent Counsel has consented for appointment, more so in the light of the pendency of the application to set aside the order of appointment of the Arbitrator, she would have obtained an endorsement of the Counsel on the docket before putting (he words in the mouth of the Counsel for petitioner. The Officer should know that unlike others the Judicial Officers are expected to "dispense justice but not dispense with justice." They should be more careful in passing orders involving the rights and liabilities of the parties in a lis.

9. As the order of the senior Civil Judge dated 27-8-1996 has been set aside, consequently the order of the senior Civil Judge dated 17-12-1996 appointing Justice A. Venkatarama Reddy as arbitrator also goes and the matter has to be heard afresh.

10. Accordingly, the CMA is allowed. No costs.