
(1996) 10 PAT CK 0014

In the Patna High Court

Case No : Miscellaneous Appeal No. 124 of 1983

Messers Bhagalpur Cold Storage

APPELLANT

Vs

The Oriental Fire and General Insurance Company Ltd. and
Another

RESPONDENT

Date of Decision : 17-10-1996

Acts Referred:

Arbitration Act, 1940 — Section 17, 30, 34, 39, 39(1)

Citation : (1996) 2 PLJR 925

Hon'ble Judges : N. Pandey, J

Bench : Single Bench

Advocate : Krishna Mohan, Parmeshwar Pal and Manoj Singh, for the Appellant;
Ratneshwar Pd. Singh and Madan Pd. Singh, for the Respondent

Final Decision : Dismissed

Judgement

N. Pandey, J.—Both these appeals arise out of a common judgment dated 5.2.1983, whereby, the 2nd Additional Sub-ordinate Judge, Bhagalpur, has dismissed the Title Suit No. 163 of 1973 and decreed Title Suit No. 64 of 1973.

Since these appeals have been heard together, therefore, they are being disposed of by this common judgment.

2. Title Suit No. 65 of 1973 was initially filed by the Oriental Fire and General Insurance Company Limited before the Munsif, 3rd Court, Patna, for a declaration that Sri Manohar Sah, Advocate, had no authority or jurisdiction to enter into upon the reference as an arbitrator regarding the difference between the parties. Title Suit No. 163 of 1973 was filed before the Sub-ordinate Judge, Bhagalpur, at the instance of the Bhagalpur Cold Storage and Ors. to make the award, submitted by Sri Manohar Sah, Advocate, on 17.7.1973 a rule of the court and decree be prepared accordingly.

3. It appears a petition for injunction was filed on 8.6.1973 on behalf of the Insurance Company for restraining the arbitrator from proceeding with the

reference. On behalf of the Bhagalpur Cold Storage an objection was filed that the court had no jurisdiction to proceed with the suit because of the arbitration agreement and steps taken so far for referring the matter to arbitrator. The objection was however, rejected, holding that the court had jurisdiction to decide such dispute. Against the said order Civil Revision No. 815 of 1973, filed on behalf of the Bhagalpur Cold Storage was dismissed by this Court. Similar objection was again raised when the award was filed in Title Suit No. 163 of 1973. But the same was also rejected. Being aggrieved by the said order, again a Civil Revision bearing C.R. No. 225 of 1974 was preferred by the Bhagalpur Cold Storage but the same was also dismissed on 26.4.1974. It further appears that by the order of the High Court, Title Suit No. 65 of 1973 was transferred to Bhagalpur for its disposal along with Title Suit No. 163 of 1973.

4. The case of Bhagalpur Cold Storage as would appear from the impugned judgment, is that on a proposal made on its behalf for insurance of the stock of potatoes stored in the cold storage, which was latter accepted by the Insurance Company on 21.12.1971 and insurance policy was issued.

5. As per Clause 9 of the said policy in case of any dispute or difference between the parties, the dispute was required to be referred before an arbitrator. Therefore having regard to certain disputes, the Bhagalpur Cold Storage preferred a claim before the Insurance Company, which was ultimately repudiated on 25.7.1972. But subsequently on 3.8.1972 again a request was made upon which the matter was referred to the Regional Office for necessary orders. Ultimately on 3.10.1972 the Bhagalpur Cold Storage was informed that no consideration in the matter was possible. It is stated that thereafter, Sri B.P. Saha, Advocate of the Bhagalpur Cold Storage by his letter dated 15.3.1973, informed the Insurance Company to agree upon the proposal for appointment of Sri Manohar Sah, Advocate within fifteen days from the date of receipt of the letter to act as an arbitrator. Subsequently, Anr. notice was also issued to the Insurance Company by the arbitrator on 26.5.1973, indicating that he had already entered upon the reference for arbitration.

6. It appears steps taken by Sri B.P. Saha, Advocate or Mr. Manohar Sah (arbitrator) were without any proper contractual or statutory notice, as required u/s 9 of the Act, the Insurance Company, as stated above, filed a Title Suit No. 65 of 1973, to declare that Manohar Sah had no authority to proceed with the arbitration.

7. In view of the pleadings of the parties, the following questions were formulated before the Court below for consideration:

(a) Is Title Suit No. 65 of 1973 barred under the provisions of the Arbitration Act, or has it become infructuous in view of the Award subsequently made and filed in T.S. No. 163/737?

(b) was the reference to Arbitration legal and valid as per terms contained in Clause 9 of the policy of Insurance?

(c) Was the Insurance Co. entitled to be given a month's notice under the terms of the policy and if so, was the reference to arbitration legal and valid in absence of the same giving Sri Manohar Saha, Advocate, valid jurisdiction to act as the sole arbitrator?

(d) Whether Shri Manohar Saha, Advocate misconducted himself and the proceeding before him as the sole Arbitrator?

(e) Is the award dated 17.7.1973 valid and legal so as to make it a Rule of the Court?

(f) Is T.S. No. 65/73 as framed maintainable and if so, is the Plaintiff of the said suit entitled to get any relief as prayed for?

8. The court below after examining all the relevant materials declared that the Title Suit No. 65 of 1973 was maintainable and not barred under the provisions of Arbitration Act. The court further held that as per Clause 9 of the policy one month's time should have been given to the Insurance Company for appointment of arbitrator. But in this case only fifteen days time was given in the notice. Therefore, admittedly no contractual notice was ever served on the Insurance Company. The court has also held since reference to the arbitrator by the Bhagalpur Cold Storage was itself illegal and in contravention of Clause 9 of the policy, entire reference became illegal and invalid.

9. At the time when hearing of this case was taken up, learned Counsel appearing for the Insurance Company raised preliminary objection about the maintainability of the appeal before this Court. He contended that the main relief on behalf of the insurance Company in the instant suit was for a declaration that Sri Manohar Sah (arbitrator) had no jurisdiction to proceed with the matter of arbitration and further for restraining Sri Manohar Sah from submitting any award in absence of a valid reference and participation of the relevant parties. Therefore, the impugned decision has to be construed as a judgment in terms of Section 17 of the Arbitration Act and not u/s 39. He contended that admittedly, these appeals have been filed u/s 39 of the Act. From a bare reference to the provisions of Section 39 of the Act it reveals that an appeal shall lie before the High Court against the following orders:

(i) superseding an arbitration;

(ii) on an award stated in the form of a special case;

(iii) modifying or correcting an award;

(iv) filing or refusing to file an arbitration agreement;

(v) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(vi) setting aside or refusing to set aside an award;

10. Therefore, in absence of any objection to the award of the arbitrator on any

of the abovementioned grounds, as well as an order of the court on such adjudication, no appeal can be preferred under the said provision.

11. In my view, since admittedly both the suits have been disposed of by a common judgment, setting aside the arbitration award on the ground that the arbitrator had misconducted, the Appellants had no other remedy but to file appeal u/s 39(1)(vi) of the Arbitration Act. Therefore, this preliminary objection raised on behalf of the Insurance Company has to be rejected.

12. Now I would like to adjudicate the grievance of the parties on the merit of case. It would be relevant to consider whether the reference to arbitration was valid and whether proper contractual and statutory notices were served at the instance of the Bhagalpur Cold Storage to the authorities of the Insurance Company and whether Sri Manohar Sah misconducted while submitting the award against the Insurance Company as also whether Title Suit No. 65 of 1973 was barred under the provisions of Arbitration Act.

13. So far the maintainability of Title Suit No. 65 of 1973 is concerned, the trial court having noticed different orders, passed by this Court in C.R. No. 815 of 1973 and 225 of 1974, as also since relief, sought for in that case was for a declaration that Sri Manohar Sah had no authority to enter upon the reference as an Arbitrator, and no notice was ever served against the authorities of the Insurance Company, prior to institution of the suit, held that the suit in question at the instance of the Insurance Company was maintainable.

14. The crucial question, therefore, arises whether the reference of the dispute to the arbitrator was legal and valid for want of contractual notice? As per Clause 9 of the agreement, the Bhagalpur Cold Storage was required to give one month's time to the Insurance Company for appointing their arbitrator. But admittedly from the notice (Ext. 10) it would reveal that only fifteen days' time was given for appointment of arbitrator. Learned Counsel appearing for the Appellant contended that apart from the notice dated 13.2.1973, the Insurance Company was already informed about the appointment of the arbitrator on 20.12.1972 by means of a letter, marked as Ext. 2/1. On the other hand, there has been specific denial on behalf of the Insurance Company that any letter or request for appointment of arbitrator was ever sent by Sri B.P. Saha, Advocate on 20.12.1972. Although it has been claimed on behalf of the Bhagalpur Cold Storage that notice was issued under a certificate of posting, but in absence of any proof of service of notice, as also having regard to the provisions of Section 42 of the Act, that such a notice by a party or by the arbitrator could be either by delivering it hand to hand or by sending through registered post, it would be difficult to hold that there was a valid service of notice. Therefore, having regard to the facts, noticed above unless there is a positive evidence that notice was received by the Insurance Company, it has to be held that there was no proper service of notice. That apart, as I have already noticed, Clause 9 of the policy indicates that one month's time was required to be given to the Insurance Company for appointing their arbitrator, but admittedly in this case only fifteen

days" time was mentioned. Therefore, in my view, the court below has rightly held that no contractual notice was ever served on the Insurance Company.

15. There is no dispute that as per Section 9(b) of the Act, if one of the parties fails to appoint an arbitrator within fifteen days after the service of notice by the other party, such other party having appointed his arbitrator before giving notice, may proceed with the arbitration and in that case, the award given by such arbitrator shall be binding on both the parties. It is well settled that the provisions of Arbitration Act can not over-ride the effect of the agreement, but can only supplement the agreement between the parties. When according to the agreement, a party was entitled to nominate its arbitrator within a period of one month, on being required to do so by the notice, such right can not be taken away. But after expiry of such a period, if the party fails to appoint its arbitrator, then as per the requirements of Section 9, the other party would be entitled to serve a notice giving fifteen days time for nomination of an arbitrator. Therefore, in this background, it was essential for the Bhagalpur Cold Storage to serve firstly contractual notice upon the Insurance Company, giving one month's time and after expiry of such a period, a notice u/s 9, giving fifteen days" further time. But admittedly all these requirements have not been fulfilled on a presumption that fifteen days" time was already given by Mr. Saha, learned Advocate while giving intimation to the Insurance Company regarding appointment of Sri Manohar Sah (arbitrator).

16. Therefore, having regard to the aforesaid findings that the reference of dispute at the instance of Bhagalpur Cold Storage before Manohar Sah, was bad for want of valid notice, either contractual or statutory, there cannot be any hesitation in holding that entire arbitration proceeding was invalid, illegal and without jurisdiction.

17. Apart from the aforesaid, it would also be relevant to notice that the alleged arbitration proceeding in this case commenced on 30.4.1973 and the award was made on 17.7.1973. A copy of the award was delivered to the learned Advocate of Bhagalpur Cold Storage on 18.7.1973. It would appear from the award that total claim of Bhagalpur Cold Storage was allowed by the arbitrator. Therefore, on this ground also it has to be held that the award was delivered without determining the dispute under reference.

18. Apart from the irregularities, noticed above, the conduct of the arbitrator; was also not above board. The word "misconduct" occurring in Section 30 of the Arbitration Act has been used in the sense of negligence of duty and responsibilities of the arbitrator. The arbitrator in this, case has also been-examined as witness has admitted in his cross-examination that he received summons along with a copy of the plaint of Title Suit No. 65 of 1973, along with a petition of objection on 9.6.1973. Therefore, it was fair on his, part either to stay his hands in the arbitration proceeding till disposal of the injunction matter or to make a prayer before the court for stay of the proceeding in Title Suit No. 65 of 1973 under the provisions of Section 34 of the Act. Such type of behaviour

and negligence on the part of the arbitrator has to be held a misconduct as defined u/s 30(a) of the Act.

19. In view of the facts, noticed above, I find nothing wrong if the court below has set aside the award as invalid and illegal. Accordingly, I affirm the order of the court below and dismiss both the appeals, as devoid of merit. But in the circumstances of the case, there shall be no order as to costs.