
(1989) 01 PAT CK 0008

In the Patna High Court

Case No : Appeal from Original Order No. 40 of 1989 (R)

National Insurance Company Limited and Another

APPELLANT

Vs

Saritibir Singh and Another

RESPONDENT

Date of Decision : 21-01-1989

Acts Referred:

Arbitration Act, 1940 — Section 17, 20, 30, 33

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Citation : (1989) 01 PAT CK 0008

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

Bench : Single Bench

Advocate : Tapen Sen, for the Appellant; Manjul Prasad, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—The important question that arises for consideration in this appeal is as to whether the court under its inherent power can recall/set aside an order by which the Award of the Arbitrator, is made Rule of the court without considering the objection filed u/s 30 of the Arbitration Act, 1940 (hereinafter to be referred to as "the Act" for short).

2. Before deciding this question it would be useful to state some relevant facts which resulted in passing of that order.

3. The Plaintiff-Respondent No. 2 filed an application u/s 20 of the Act before the court of the Subordinate Judge, Palamu, against the Defendants-Appellants which was registered as Title Suit No. 72 of 1985. The learned court below ultimately referred the matter to the Arbitrator and later after hearing the parties published the Award and filed the same in court. The Appellant (Defendant No. 2) filed his objection on 22.12.1986 u/s 30 of the Act challenging the validity of the Award. The learned court below passed an order dated 22.12.1986 adjourning the case to 6.1.1987 for hearing on the said objection. On 6.1.1987 the Appellants could not appear, consequent thereupon the learned court below

without considering the objection made the Award Rule of the court. The Appellants thereafter on 5.2.1987 filed a petition under Order IX, Rule 13 of the CPC for setting aside the ex-parte order dated 6.1.1987 passed in Title Suit No. 72 of 1985. The said application was registered as Misc. Case No. 3 of 1987. The learned court below dismissed the said Misc. Case by the impugned order on the preliminary point that the petition was not maintainable as according to the learned Court below the only course open to the Appellants is to file an appeal before the High Court.

4. I have heard Mr. Tapen Sen, learned Counsel for the Appellants, and Mr. Manjul Prasad, learned Counsel appearing for the Plaintiffs-Respondents.

5. Mr. Sen firstly submitted that the learned court below totally misconstrued the law and has failed to appreciate that when an ex-parte order is passed making the Award Rule of the Court, the court has inherent power to set aside the order.

6. On the other hand Mr. Manjul Prasad submitted that the learned Court below was perfectly right in holding that provision of Order 9 Rule 13 of the Code does not apply and once the Award is made Rule of the court under the said Act, the only remedy available to the aggrieved party is to file an appeal before the High Court. In this connection learned Counsel relied upon a decision of this Court in the case of Babu Basant, Lal v. Babu Surendra Prasad and Ors. reported in 1957 BLJR 94.

7. From perusal of the application filed by the Appellants under Order 9 Rule 13 read with Section 151 CPC it appears that the Appellants very elaborately stated about the causes for non-appearance on 6.1.1987 when the impugned order making the Award Rule of the court was passed. It was, inter alia stated that on 22.12.1986 the case was adjourned to 6.1.1987. Since the X-Mas holdings intervened, the Appellants' lawyer, Sri S.K. Dutta went to Calcutta during the holidays. But the said lawyer could not return to Daltonganj on 6.1.1987 as his daughter all of a sudden fell seriously ill at Calcutta and he had to remain there till 7.1.1987 for treatment of his daughter and in short time the lawyer could not inform the above circumstances to the Appellants. However, on 8.1.1987, when the said lawyer returned to Daltonganj, he came to know that the court has passed an ex-parte order on 6.1.1987 confirming the Award.

8. As indicated above, although objection was filed by the Appellants within time for setting aside the Award the learned Court below without considering the objection petition passed the order on 6.1.1987 making the Award Rule of the court.

9. Section 17 of the Act lays down the provision for passing the judgment in terms of the Award.

According to this Section the court before whom the Award is filed, after expiry of the time for making an application for setting aside the Award or after refusing to set aside the Award, passed its judgment. Section 17 is quoted herein below:

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.

From perusal of the aforesaid provision it is manifest that if objection to the award u/s 30 is filed then the court shall, after refusing and rejecting the objection pronounce its judgment on the said Award.

10. Order 9 Rule 13 of the Code enables the court to set aside an ex-parte decree, in the circumstances mentioned in the said rule. It is apparent that the said rule is not applicable to the instant case. Order 9 Rule 13 would apply only to the application made for setting aside the order and ex-parte decree passed in a suit.

11. The question arises for consideration is whether the court under its inherent power can recall its order or decree passed u/s 17 of the said Act under certain circumstances. As stated above, the provision of Section 17 of the Act casts a duty on the court to consider the objection and comply with other requirements before pronouncing judgment and making the Award Rule of the court. If the same has not been done then in my opinion, the court can under its inherent jurisdiction u/s 151 of the Code recall or set aside the order. In the case of Shrichand Prasad Vs. Mohan Singh, ., a similar question came for consideration before a Bench of this Court whether a decree and Award can be set aside under Order 9 Rule 13 of the Code. Their Lordships took the view that the provision of Order 9 Rule 13 of the Code does not apply but the court may under its inherent power set aside the order.

12. Coming back to the instant case it is not in dispute that the objection under Sections 30/33 of the Act was filed on 22.12.1986 and the case was adjourned to 6.1.1987 for hearing. From perusal of the order dated 6.1.1987, by which the Award was made Rule of the court, it appears that the learned Court below did not at all consider the objection petition filed by the Appellants rather the learned Court below held that as the Appellants did not appear the court has no option but to make the Award Rule of the court. The court below in fact proceeded on the basis that no objection under Sections 30/33 of the Act was filed challenging the validity of the Award by the Appellants and, therefore, the Award is liable to be made Rule of the court. Had the court below passed the order on 6.1.1987 after considering the objection so filed by the Appellants then there would have been a valid compliance of Section 17 of the said Act. In such view of the matter I am of the opinion that the learned Court below has misconstrued the law in holding that the application for setting aside the order was not maintainable. I am further of the view that in the facts and circumstances of the case when an application was filed by the Appellants showing sufficient cause for non-

appearance on 6.1.1987 then the court below should have considered the application under its inherent jurisdiction u/s 151 of the Code. The impugned order, therefore, cannot be sustained in law.

13. In the result, this appeal is allowed and the impugned order passed by the learned Court below is set aside and the matter is remitted back to the court below with a direction to consider the application filed by the Appellants u/s 151 of the CPC and pass appropriate order in accordance with law.