

(1977) 11 PAT CK 0001
In the Patna High Court
Case No : Civil Revision No. 109 of 1977

Sahagir Ahmad and Others	Vs	APPELLANT
Israil Mian and Others		RESPONDENT

Date of Decision : 26-11-1977

Acts Referred:

Arbitration Act, 1940 — Section 12, 13, 14, 15, 16
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (1977) 25 BLJR 478

Hon'ble Judges : Madan Mohan Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Madan Mohan Prasad, J.—This application in revision is directed against an order dismissing an application filed by the petitioners u/s 14 of the Arbitration Act, 1940 (hereinafter called "the Act").

2. It appears that the petitioners filed an application u/s 14(2) of the Act alleging that the dispute between the parties had been referred to arbitration, that the Arbitrators had given their award, that the petitioners had requested the Arbitrators to file the award in court but they were not paying any heed to that request and for that reason they should be asked to file the award in court and that the same may be made a rule of the court. This was registered as a title suit. In pursuance thereof notices were issued to the Arbitrators and the other party concerned. The Arbitrators appeared and filed the award and prayed for a decree on its basis. The other party to the dispute appeared and filed written statement denying any agreement to refer to arbitration, denying the genuineness of the award, questioning the proceeding and praying for setting aside the award. Thereafter it appears that issues were framed. For some reason or the other the hearing of the matter was not taken up for long. It was, however, fixed for 12th of September 1972. On that date the petitioners (plaintiffs) were absent. The learned Munsif dismissed the suit for default.

3. Thereafter it appears that the petitioners filed an application under Order IX Rule 9 read with Section 151 of the CPC (herein after called "the Code"), The trial court dismissed this application The petitioners went up in appeal but again they were unsuccessful Hence this application.

4. Counsel for the petitioners has not taken up the stand that the orders of the court below dismissing their application are wrong for the reason that there was sufficient cause for the non-appearance of the petitioners on the date in question. He has raised a point which was not raised before the courts below It has been urged that the order dismissing the application u/s 14 of the Act itself should be set aside by this Court for the reason that in view of the procedure prescribed by the Act itself the court below had no jurisdiction to dismiss the application in the aforesaid circumstances. It is said that after the award had been filed by the Arbitrators and the objection petition by the other party to the dispute, the only course left open to the court below was to proceed to dispose of the application for setting aside the award and either remit the award for reconsideration, modify it or set it aside but if nothing of that kind was done the court below had to pass a decree in consonance with the award. Secondly, it has been urged that Order IX Rule 8 of the Code under which alone the court purport to act while dismissing the petition for default, is not applicable to a proceeding in court as a result of filing of an award. Both the contentions are well founded and must be accepted.

5. Noticing the scheme of the Act briefly, it appears that Chapter 1 thereof is introductory and Chapter II deals with arbitration without intervention of a court, Sections 3 to 12 contained therein relate to various matters with which we are not concerned in the present case. Section 13 details the powers of the Arbitrators and inter alia, it gives the Arbitrators the power to state a special case for the opinion of the court on any question of law involved Section 14 prescribes that when the Arbitrators have made their award they shall give notice in writing to the parties of the making thereof. Thereafter, in view of Sub-section (2) thereof the Arbitrators at the request of any party to the agreement or any person claiming under such party, or if so directed by the court, cause the award to be filed in court, The court has then to give notice to the parties of the filing of the award. Sub-Section (3) of Section 14 provides for giving notice to the parties and hearing of the matter relating to the special case referred by the Arbitrators u/s 13. Section 15 provides the court the power to modify the award in circumstances mentioned therein. Section 16 gives power to the court to remit the award to the Arbitrators for reconsideration in the cases mentioned therein. Then comes Section 17 which provides for pronouncing a judgment in terms of the award if the award is not remitted for reconsideration or set aside. Section 18 enables the court to pass interim orders and Section 19 contains the power to supersede a reference and order that the arbitration agreement shall cease to have effect. Then comes Chapter III which contains just one section, namely Section 20. This Chapter is devoted to arbitration with intervention of a court where there is no suit pending. According to this section, a party to an

agreement may apply to a court having jurisdiction in the matter, that the agreement be filed in court, Such an application is to be in writing and to be numbered and registered as a suit. Notice of such application is to be given to the parties concerned and where no sufficient cause is shown the court is to order the agreement to be filed and make an order of reference to the Arbitrator appointed by the parties or where the parties cannot agree, to an Arbitrator appointed by the court. Under Sub-section (5) the arbitration is to proceed and is to be governed by other provisions of the Code so far as they can be made applicable. Then Chapter IV which contains provision in respect of arbitration in suits. According to them, where there is a suit pending and there is an agreement to refer the matter to arbitration, a written application is to be made to the court, Arbitrators are to be appointed, and the matter is referred to Arbitrators. This chapter contains Sections 21 to 25. u/s 25 the provisions of the other chapters have been made applicable to arbitrations under this chapter Chapter V contains general provisions which are applicable to all arbitrations. Sections 26 to 38 occur in this chapter. I will mention only the important provisions of this chapter which may be relevant to the discussion on the point at issue. Section 30 provides for grounds for setting aside of an award. Section 31 refers to the jurisdiction of a court. It provides that an award may be filed in any court having jurisdiction in the matter to which the reference relates, All question regarding the validity, effect or existence of an award or an arbitration agreement between the parties shall be decided by a court in which the award under the agreement has been or may be filed and by no other court. All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings are to be made to the court where the award has been or may be filed and to no other court. It further provides that notwithstanding anything contained elsewhere in the Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a court competent to entertain it, that court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that court and in no other court. Section 32 provides that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award., nor shall any arbitration agreement or award be enforced, set aside, amended, modified or in any way affect otherwise as provided in this case. Section 37 provides for the law of limitation. Next comes Chapter VI of the Act providing for appeals u/s 39. Chapter VII contains miscellaneous provisions and contains Sections 40 to 48. The most important section thereof, Section 41, inter alia, provides that subject to the provisions of this Act and all rules made thereunder the provisions of the Code shall apply to all proceedings before the court, and to all appeals under this Act. Then there are two schedules appended to the Act, the first one containing implied conditions of arbitration agreements and the second containing the powers of the court.

6. It would be apparent from the scheme of the Act that chapter II relates to

arbitrations which have taken place without the intervention of a court and after the award has been made by the Arbitrators, it has to be filed before a court. Thereafter notice has to be given, objection to the award to be entertained and then either the award has to be remitted, modified, set aside or accepted and a decree passed thereon. The procedure with regard to arbitration with intervention of a court where there is no suit pending obviously would differ in the beginning and so it does. But thereafter the procedures prescribed in Sections 15, 16 and 17 of the Act become applicable thereto by virtue of Sub-section (5) of Section 20. The same thing happens in arbitration in suits provided for in Chapter IV. After the award is filed before the court, the procedures contained in Sections 15 to 17 have been made applicable by virtue of Section 25. It will thus appear that so far as the application of the provisions of Sections 15, 16 and 17 is concerned, they apply to all the three kinds of arbitrations mentioned in the Act.

7. In this background the question arises as to what a court is to when an award has been filed before it by the Arbitrators and objections have been raised thereto, in other words, the other party to the dispute comes forward and asks for setting aside the award. It will be relevant to read the aforesaid Sections at this stage which run as follows:

14. (1) when the arbitrators or umpires have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpires shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpires state special case under Clause (b) of Section 13, the court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

15. The court may by order modify or correct an award-

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(c) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or

(b) where the award contains a clerical mistake or an error arising from an

accidental slip or omission.

16. (1) The court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred ; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) where an award is remitted under Sub-section (1) the court shall fix the time within which the arbitrator or umpire shall submit his decision to the court;

Provided that any time so fixed may be extended by subsequent order of the court.

(3) An award remitted under Sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

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.

Reading the aforesaid Sections there cannot be the slightest doubt that after the filing of the award and after the application in objection to the award or for setting it aside, the first thing that the court has to do is to consider the application or the objection to set aside the award. As a result thereof, the court may modify the award or correct it or remit it to the arbitrators for reconsideration or set it aside. In case, however, he has not done anything of this kind, the court has got no option but to pronounce judgment according to the award and upon the judgment so pronounced a decree follows. What is important thus to be noticed is that the court has no jurisdiction to do anything other than what is in a mandatory way prescribed by the Act to be done by a court in such circumstances. The only requirements of Section 17 are (1) that if the court finds no reason to remit the award or to set it aside, and (2) that it shall wait until the time for making the application to set aside the award has expired. In other words, the court is not to pronounce the judgment and decree is not to follow until the period prescribed by Article 119(b) of the Limitation Act, 1963, i.e., the period of thirty days from the date of service of notice of the filing of the award,

It is again significant that Section 17 prescribes that where an application to set aside the award has been made the court can pronounce judgment according to the award only after refusing such an application. It follows, therefore, that the application for setting aside the award must be disposed of before the court may proceed to pronounce judgment in accordance with the award. There can be no manner of doubt in this respect.

8. If this is the true position in law, as in my view it is, the question arises whether the presence of the party who filed an application for making of the decree in terms of the award is at all essential and whether his absence entitles the court to dismiss the application for default. The answer must be in the negative. If a procedure has been prescribed by law and it is a mandatory procedure, a court has no option to disregard it. Section 17 of the Act gives no option to the court to reject such an application, the proceeding having reached a stage when the court was obliged to proceed only in accordance with the terms of Section 17. Once the award had been filed in the court, it had no option except to proceed in accordance with Section 14(2) to give notice to the parties and having done so, it could only proceed under Sections 15, 16 or 17. If the court did not choose to act under Sections 15 or 16 it had to act thereafter u/s 17 of the Act. If it had to act u/s 17, if there is an application it has to wait until the expiry of the period of limitation for the filing of an application to set aside the award. In case, however, such an application is filed the court has first to adjudicate upon this application and obviously if it sets aside the award, there is no question of pronouncement of the judgment and making a decree on its basis. Therefore, only when it refuses the application, then it has to proceed to pronounce judgment according to the award. Obviously, therefore the presence of the party filing the application for making of a decree is immaterial. The court has to proceed in that manner irrespective of the presence of the applicant, u/s 14(2) to pronounce judgment and pass a decree on the basis of the award.

9. It is thus obvious that in the present case after the objection to the award had been made with a prayer to set it aside, the only course left open to the learned Munsif was to adjudicate upon that application first. He had no option to do any thing else. He could not thus dismiss the application for default.

10. That brings me to the question as to whether the principles underlying Rules 2, 3 and 8 of Order IX of Rule 2 of Order XVII of the Code are applicable to a proceeding of arbitration arising out of an application u/s 14(2) of the Act, As I have said earlier, in view of the mandatory procedure laid" down in Section 17, there is no option for a court to do anything other than what is laid down therein. If that be so, a court has no right to dismiss an application for making a decree on an award at that stage. Obviously, therefore, neither Rules 2, 3 and 8 of Order IX nor Rule 2 of Order XVII of the Code can be made applicable to an arbitration proceeding arising out of an application under Section 14(2) of the Act at the stage reached after the filing of the award and an application to set it aside. The relevant section, as I have stated earlier, which makes the code

applicable to arbitration proceedings is Section 41. It will, however, be noticed that Section 41 starts with the words "subject to the provisions of this Act and of Rules made thereunder". Thus any procedure prescribed by this Act cannot be superseded by the rules of procedure to be found in the Code. Section 17 prescribes the bounden duty of the court to dispose of the application of the other side and after refusing it to proceed to pronounce judgment. If this is the only course open to the court, there is no question of the court having the right to dismiss an application u/s 14(2) of the Act for default. That would be obviously inconsistent with the provisions of Section 17 of the Act.

11. There is another reason for my coming to this conclusion. It will appear from a reading of Rule 2 of Order IX of the Code that the power is discretionary. The court is not bound to dismiss the suit. Similar is the situation with regard to Rule 3 of Order IX. With regard to Rule 8 it must be noticed that the court is bound to dismiss the suit where the defendant appears but the plaintiff does not appear, only if the defendant does not admit the claim. Thus if the defendant admits the claim or part of the claim the suit has to be decreed accordingly. It is obvious that this provision cannot apply to a proceeding of arbitration u/s 14(2) of the Act. Under Rule 8 of the plaintiff's claim is not to be adjudicated upon unless the defendant accepts the claim or a part of it, whereas in case of Section 17 of the Act if the other party to the dispute, the defendant, has filed an application for setting aside of the award, that has to be adjudicated upon first and before the plaintiff's prayer for pronouncing judgment and making a decree on the award is to be adjudicated upon. Thus, even though the defendant may be present and the plaintiff absent, the court cannot dismiss the application u/s 14(2) of the Act until after it has disposed of the application to set aside the award and has set it aside. By its very nature, therefore, this provision, in Rule 8 of Order IX cannot be made applicable. Coming now to Order XVII, Rule 2 which provides the court with power to dispose of the suit in one of the modes directed by Order IX on any date to which the hearing of the suit has been adjourned, it must be mentioned that the court is given the discretion to dispose of the suit in manner prescribed by Order IX but the court may even grant an adjournment and it is not obligatory for the court to dismiss the suit. Rule 3 of Order XVII provides that where any party to a suit to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith. The principle thus which has been conceded by the Code is that where there are materials before the court upon which it can proceed to decide the suit, it may do so. Thus it logically follows that where the court is bound to proceed in a particular manner-different from the one prescribed either in Rules 2, 3 or 8 of Order IX or Rule 2 of Order XVII-the provisions contained in these rules cannot be made applicable.

12. Learned Counsel has drawn my attention to a number of cases where it has been laid down that the court has no option except to proceed in accordance

with Section 17 of the Act at the stage aforesaid. To start with, in the case of Madan Lal Vs. Sunderlal and Another, the learned Judges after analysing the relevant provisions of the Act contained therein, observed as follows:

the court has to pronounce judgment in accordance with the award if it sees no cause to remit the award on any of the matters referred to arbitration, for reconsideration or if it sees no cause to set aside the award. The court has to wait for the time given to a party to make an application for setting aside the award and where such an application has been made the court has to decide it first and if it rejects the court proceeds to pronounce judgment according to the award. It is clear therefore from Section 17 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, that the court proceeds to pronounce judgment in terms of the award.

I have underlined the word "first" with the definite purpose of showing that once such an application has been filed to set aside the award, that has to be disposed of first before the question of pronouncing judgment arises. In Roshan Lal Marwari and Others Vs. Firm of Bridhi Chan Sri Lal, there was an arbitration with the intervention of the court; the award was filed; the defendants had filed their objections and prayed for time for summoning witnesses : the prayer was refused and the defendants withdrew from the contest and the court then proceeded to pronounce judgment according to the award which was followed by a decree. The defendants moved this Court against the order. The case was remitted to the court below. Thereafter on a particular date fixed the defendants were absent and the court proceeded to pass a decree in terms of the award. The defendants then applied under Order IX Rule 13 of the Code. The Subordinate Judge held it to be maintainable. Against that an appeal was preferred in this Court The learned Judges held that no appeal lay to this Court because the decree passed was not an ex-parte decree within the meaning of Rule 13 of Order IX. While considering whether the decree could be treated to be ex-parte, the learned Judges held:

...An ex-parte decree is a decree passed by the court in the absence of the defendants where the plaintiff has proved his case; but here the presence of the parties was not necessary to enable the court to pronounce judgment according to the award. A party may indeed apply to have the award set aside on one of the grounds mentioned in para. 15(1); but where no such application is made, and where the court does not remit the award to the reconsideration of the arbitrators, there is no option in the court but "to pronounce judgment according to the award....

The observation with regard to the need of the presence of the plaintiff or applicant is what must be noticed. In the case of The District Co-operative Development Federation Ltd. Vs. Ram Samujh Tewari, one of the learned Judges constituting the Full Bench, Jugmohan Lal, J. pointed out (paragraph 31 of the

judgment) that after the award had been filed and the objection, if any, filed by the other side against the award had been rejected, the court shall proceed to pronounce judgment according to the award and pass a decree making the award a rule of the court as required by Section 17 of the Act, even without that party making an application to that effect. In the case of Soorajmull Nagarmal Vs. Golden Fibre and Products, a learned Single Judge while considering the question of the application of Order IX Rule 13 of the Code, held:

...In an award case like the present, both the plaintiff and the defendant are entitled to ask the court to pronounce judgment in terms of the award, Section 17 makes it mandatory on the part of the court to pass a judgment and decree in terms of the award in the circumstances specified in the said section. Such a decree may be pronounced in the absence of parties; even then it cannot be said that the decree has been passed ex parte.

He placed reliance on a decision in the case of Ganeshmal Bhawarlal Vs. Kesoram Cotton Mills Ltd., where it had been held that the provisions of Order IX Rule 13 of the Code does not apply to a proceeding for setting aside an ex parte decree passed u/s 17 of the Act, as also on the decision in the cases of Subramanian and Others Vs. M.P. Vasudevan Chettiar and Others, and Profulla v. Panchanan AIR 1946 Cal. 427. In the case of Amod Kumar Verma Vs. Hari Prasad Burman and Others, where Desai, J., with whom Beg., J. concurred, held after referring to Sections 14, 15, 16 and 17:

That the four Sections are to be read as connected with one another also follows from the fact that the only prayer that a party should make in his application u/s 14(2) is that the award be filed in court; he is not required to pray for the passing of a decree on the award, or for its being remitted or set aside or corrected. The law contemplates that a decree will be passed on the basis of the award in the ordinary course or it will be set aside or remitted.

Once the award has been filed in court the law will take its course and a decree will be passed if the award is found to be in order.

I have cited these decisions for the limited purpose of showing that the presence of the party, namely the applicant, has been considered to be not essential. I will hereafter, refer to, in the passing, some Division Bench decisions of this Court on the question of application of Order IX, Rule 13, of the Code.

13. I have already referred to the case of Roshan Lal Marwari and Ors. (supra) with regard to the question of application of Order XI Rule 13 of the Code to arbitration proceedings. I would, however, refer to another decision of a Division Bench of this Court which does not appear to have been referred to in the case of Roshan Lal Marwari and Ors. (supra). That is in the case of Mahabir Prasad Bhagat Vs. Bal Kishun Das and Another, There the learned Judges held that Order IX Rule 13 of the Code did apply on a decree passed under paragraph 21 of Schedule 2 of the Code of Civil Procedure, 1908 (the corresponding provision now being Section 17 of the Act). It must, however, be noted that they placed

reliance on paragraph 20 of the Schedule which enabled an application to be made and which was required to be numbered and registered as a suit. In case of arbitration without intervention of court the law is not exactly the same now in the Arbitration Act. A subsequent Division Bench of this Court also considered the question of application of Order IX Rule 13 of the Code in the case of Rajeshwar Prasad Singh Vs. Ambika Prasad Singh and Others, . In this case the learned Judges distinguished the earlier Division Bench decision in the case of Mahavir Prasad Bhagat (supra) on the ground that the award there was made without the intervention of the court whereas in the case before the learned Judges it was an award given in an arbitration in a pending suit. The learned Judges relied upon the decision in the case of Roshan Lal Marwari and Ors. (supra). I have referred to these decisions only with a view to find out as to whether they contain any principles which may be made applicable to the facts of the present case. In the case of Roshan Lal Marwari and Ors. (supra) the question regarding the application of a provision of the Code arose with reference to the time when the defendant's application had been rejected and the decree was drawn up in accordance with the award. In the case of Mahavir Prasad Bhagat (supra) also the defendant had shown no cause against the drawing up of the decree on the basis of the award and as such judgment was pronounced and decree passed, In the case of Rajeshwar Prasad Singh (supra) also, judgment was pronounced and decree drawn up in the absence of the defendant and subsequently a petition under Order IX Rule 13 of the Code was filed. Thus, on facts these cases were different, the question of application of the provision of this Code having arisen with regard to a later stage in an arbitration proceeding. In the instant case, I am not called upon to decide as to what would have happened or should have been done if the defendant were absent and the judgment were pronounced in his absence. What I am called upon to decide is whether before the pronouncement of judgment and making of a decree if the defendant is present and the defendant has made an objection by an application to set aside the award, it is obligatory for the plaintiff to be present in court and if his absence entitles the court to dismiss his application under the pronouncement of Order IX or Order XVII of the Code? These decisions, therefore, are not applicable directly to the present case.

14. For the reasons that I have given, I cannot persuade myself to accept the view that a court in the situation which I have stated above, has any jurisdiction to dismiss the application u/s 14(2) of the Act for default of appearance of the applicant making the prayer to pass a decree on the basis of the award.

15. It is thus obvious that the court below had no jurisdiction to dismiss the application for the pronouncement of judgment and making of the award u/s 17 of the Act. That order itself being without jurisdiction, the question of presence or absence of the petitioners is of no consequence and for that reason alone the petition could not be dismissed for default. Accordingly, I would set aside the order passed by the learned Munsif and direct that he shall proceed to act in accordance with law and in the light of the observations made above.

16. In the result, this application is allowed. There is, however, no appearance for other side and in such circumstances I would make no order as to costs.