
(1973) 08 PAT CK 0023
In the Patna High Court
Case No : Civil Revision No. 765 of 1973

Sashi Prasad and Others

APPELLANT

Vs

Baleshwar Prasad Mandal and Others

RESPONDENT

Date of Decision : 01-08-1973

Acts Referred:

Arbitration Act, 1940 — Section 17, 33, 39

Citation : AIR 1974 Patna 63

Hon'ble Judges : H.L. Agrawal, J

Bench : Single Bench

Advocate : S.B. Sanyal and Mukteshwar Singh, for the Appellant; Gyaneshwar Prasad and Narayan Singh for Opposite party No. 2, for the Respondent

Final Decision : Allowed

Judgement

H.L. Agrawal, J.—This application in revision has been filed by the defendants 1st party and raises an important question of law.

2. In order to appreciate the question raised before me, it is necessary to state briefly the relevant facts. A proceeding was started in the Court of the Munsif at Bhagalpur by the plaintiffs in representative capacity for filing an award by the defendants 2nd party and making the same a rule of the Court. It appears that some dispute arose between the parties regarding the nature of the user of plot Nos. 888 and 889 of village Sabour. The case of the plaintiffs was that these plots were being used as a play ground by the children of the village and the defendants 1st party wanted to take forcible possession of the same on the basis of some settlement from the ex-landlord. This resulted in proceedings under Sections 107 and 144 of the Code of Criminal procedure between the parties. The dispute was ultimately agreed to be decided by arbitration and the defendants second party were appointed arbitrators and authorised to settle the dispute between them. The further case of the plaintiffs is that the arbitrators made local inspection of the land in dispute in presence of both parties, took down their statements and examined witnesses and after due deliberation gave

their award-The petition filed by the plaintiffs was registered as a regular title suit and treated as a plaint. On 7-2-1963. defendants Nos. 1 to 3 (defendants first party) entered appearance and filed a petition stating that they had no knowledge of the award and the award, if anv. was illegal and asainst the principles of natural iustice. The above petition was filed by them even before the service of notice upon them. On 3-5-1963, the Court ordered for issue of notice to the defendants 2nd party for filing the award in Court, and the award was actually filed by them on 27-6-1963. It further appears that on 22-7-1963, the defendants first party filed an application in the Court below for converting the title suit as a Miscellaneous case under the Arbitration Act and for issuing the statutory notice to them along with the copy of the award filed by the defendants 2nd party. By order dated the 31st July 1963. the trial Court rejected the objection and held that the controversies between the parties could be gone into only in a title suit. No order was passed for issue of notice of the filing of the award by the arbitrators. Thereafter a written statement was filed by the defendants 1st party on 19-11-1963, which was accepted.

3. The case of the defendants 1st partv in their written statement, besides challenging the plaintiffs" case on merits (which is not necessarv to be stated for deciding the point involved in this case). was that the alleged reference to the arbitrators was illegal and void ab initio as fraud was practised upon them to agree to such a reference. Various allegations of misconduct by the arbitrators, such as giving of any notice by the arbitrators to them or providing opportunity of being heard were made. It was further alleged that the arbitrators, neither held any sitting nor took any statement of the parties or examined any witness and gave their award in collusion of the plaintiffs. Ultimately, a prayer was made that the reference was fit to be superseded and the award fit to be set aside.

4. The learned Additional Munsif framed several issues and decided and disposed of all of them in the judgment itself. He recorded a finding that the arbitration agreement and the award were genuine and valid and the defendants 1st party were not entitled to challenge the award. In paragraph 14 of his iudgment, while dealing with the question of limitation in filing the obiection by the defendants 1st party to the award, he came to the following conclusion:

".....the defendants did not only challenge the award but they also challenged the arbitration agreement on various grounds. Thus they have challenged the award on the ground of invalidity of arbitration agreement and thus their obiection does not fall u/s 30 of Arbitration Act and as such it is not barred by limitation."

Relying upon a Bench decision of this Court in Dip Narain Singh v. Nosstt Bhuneshwari (AIR 1960 Patna 201), the learned Additional Munsif held that the objections of the defendants first partv were under the provisions of Section 33 of the Arbitration Act for which there was no period of limitation, He. however, decided all the other issues against the defendants first party and decreed the plaintiffs" suit and directed that the award dated 21-10-1962 be made a rule of

the Court. The defendants first party filed an appeal before the learned District Judge, which was heard and disposed of by the Additional Subordinate Judge, Bhagalpur.

5. Before the appellate court a preliminary objection was taken on behalf of the plaintiffs regarding the maintainability of the appeal itself. This question has been disposed of along with the decision of the main appeal itself. It has recorded the following findings:

(i) The arbitration agreement could not be challenged by the defendants 1st party:

(ii) The arbitration agreement (Ext. 4) must be held to be invalid on account of vagueness:

(iii) The entire case regarding the arbitrators misconducting themselves in the proceeding must be rejected:

(iv) Notice of the filing of the award u/s 17 of the Arbitration Act was not issued far less served on the defendants 1st party. Hence limitation for contesting the award never commenced running. Besides, the objection of the defendants 1st party was not u/s 30 of the Arbitration Act so as to attract the rule of one month's limitation, but was covered by Section 33 of the Act. for which no period of limitation was prescribed.

6. The learned Additional Subordinate Judge in paragraph 19 of his judgment has come to a definite conclusion that the award in the present case was invalid, if not on any other ground. at least on account of the invalidity of the arbitration agreement itself. But he took the view that the appeal before him itself was incompetent and not maintainable in view of the provisions of Section 17 of the Arbitration Act, as the decree was neither in excess of nor otherwise not in accordance with the award. Against this decision the defendants first party filed a second appeal before this Court which has been allowed to be converted into a Civil Revision.

7. In order to appreciate the question raised before me. it is necessary to refer to the relevant provisions of the Arbitration Act. Section 14 of the Act prescribes the procedure for signing an award by the arbitrators or the umpire and filing the same in Court. Under this provision, the arbitrators or the umpires, either at the request of any party to the arbitration agreement or any Person claiming under such party, or if so directed by the Court, has to file the award (or assigned copy of it) together with any depositions and documents which might have been taken and proved before them, in Court, and the Court shall thereupon give notice to the parties of the filing of the award. u/s 15 of the Act. the Court has been empowered to order for modification or correction of the award on certain grounds. u/s 16 of the Act. the Court has been empowered to remit back the award or any matter to the arbitrators for reconsideration in certain circumstances. Section 30 of the Act indicates the grounds for setting aside an

award by the Court. The powers of the Court are limited and an award can be set aside only on any of the grounds mentioned therein. Apart from the provisions of Section 30, there is yet another section, namely Section 33, which authorises any person to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined to apply to the Court and the Court to decide the question on affidavits, etc. Then comes the most relevant provision for pronouncing the judgment by the Court in terms of the award, namely, Section 17. It lays down that where an award has neither been remitted (under Section 16) nor been set aside (under Section 30 of the Act) 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 the judgment according to the award and upon the judgment so pronounced, a decree is to follow. Therefore, giving of the notice to the parties of the filing of an award for the purpose of inviting objections, as contemplated by Section 14 of the Act referred to above, has been made essential for the Court to proceed to pronounce the judgment according to the award. The right to file an appeal from such a decree, however, has been limited u/s 17 of the Act itself, and no appeal from such a decree, except on the grounds that it is in excess of or, not otherwise in accordance with the award, has been made permissible. That is a judgment in conformity with the terms of the award, and not being at variance from such an award neither, being in excess of nor otherwise not in accordance with, the award, is not appealable. It is on this ground that the Additional Subordinate Judge has held that the appeal before him was incompetent although he found that the arbitration, agreement was vague and invalid.

8. Section 39 of the Act also makes certain orders passed by the Court under the Act appealable namely an order--

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

From Clause (vi) aforesaid, it, is clear that an appeal is provided for against an order setting aside or refusing to set aside an award. I have already referred to the provisions of Section 33 of the Act where a party to an arbitration agreement has been permitted to challenge the existence or validity of an award by applying to the Court

9. It appears that the learned Additional Subordinate Judge has examined the

maintainability of the appeal before him only with reference to the provisions of Section 17 of the Act. If that be so. his decision is perfectly correct.

10. Mr S.B. Sanval appearing on Behalf of the petitioners has, however, submitted that on the facts of the present case, the order under appeal before the appellate Court was a composite order where his objection u/s 33 as well as u/s 30 of the Act has been disposed of I have already referred to the findings of the Court below where while considering the question of limitation it has held that the objection of the Petitioners was also u/s 33 of the Act The grievance of the petitioners, however is that had the trial Court not simultaneously proceeded to pronounce the judgment according to the award u/s 17 of the Act on deciding the objection u/s 33 of the Act, and the petitioners would have been allowed an opportunity to move against the order determining their objection following within the purview of Section 33 of the Act. an appeal under Clause (vi) of Section 39 was certainly competent, and. in any view, the appeal before the appellate court was also directed against the decision of the trial Court with respect to the validity of the award on the grounds covered by Section 33 of the Act.

11. The grounds upon which an award can be set aside are provided ONLY under two sections of the Act: firstly, u/s 30 on grounds of misconduct, etc.. and secondly. u/s 33 on grounds of non-existence of or the invalidity of the arbitration agreement itself. In my opinion, an appeal u/s 17 clearly refers to the grounds covered by Section 30 of the Act. whereas an appeal under Clause (vi) of Section 39 of the Act covers an appeal where the Court refuses to set aside an award on the grounds envisaged in Section 33 of the Act, that is there was no valid reference at all and, consequently, the arbitrators had no jurisdiction to give an award. An application, in so far as it asks for a declaration that the award was an illegal and invalid on the ground of invalidity of the reference, can certainly be treated and dealt with as one coming u/s 33 of the Act and as such, against such an order, in my opinion, an appeal under Clause (vi) of Section 39 of the Act is competent I am supported in my view by a Bench decision of this Court in Deep Narain Singh and Others Vs. Mt. Dhaneshwari and Others, . In this case the dispute between the parties was referred to five arbitrators without the intervention of the Court. On the arbitrators giving the award, the plaintiffs filed an application under Sections 14 and 17 of the Act for filing of the same in Court and passing a decree in terms thereof In that case also, the application was registered as a regular title suit and the defendants had filed written statement challenging the existence or validity of the arbitration agreement and also the validity of the award consequent thereto, that is a ground covered by Section 33 of the Act. They had also attacked the validity of the award on various other grounds, such as. absence of notice and misconduct etc. covered by Section 30 of the Act. The trial Court had dismissed the suit on the findings that the arbitration agreement and the award were not genuine, valid and legal and that the award was wholly void. A miscellaneous appeal was filed in this Court where the question of limitation in filing the objections (written statement) by the

defendants to the award and the maintainability of the appeal in the High Court, as in the present case. were taken. The trial Court has referred to this decision while considering the question of limitation and for the reasons given by their Lordships has answered the question of limitation in favour of the petitioners, on the question of maintainability of the appeal in the High Court, the distinction between the scope of the provisions of Section 17 and Section 33 of the Act were discussed at great length and their Lordships came to the conclusion that the scope of both the sections was entirely different. In the case following (sic) u/s 33 of the Act. an award has to be set aside for want of a competent reference to the arbitrators. In this view, the award being without jurisdiction is rendered illegal and is a nullity and can be ignored altogether.

12. In the case of Prasad Gope Vs. Makhan Gope and Another, , what had happened was that an award was made by panchas in respect of the disputed property without the intervention of the Court. In that case also the defendants had objected and asked the Court to set aside the award on the ground inter alia that they had not entered into any arbitration agreement. The trial Court dismissed the suit on this ground. but on remand by the appellate Court, the suit was decreed. On an appeal by the defendants, the lower appellate Court allowed the appeal and set aside the judgment directing for passing of a decree upon the basis of the award. Thereupon a second appeal was filed. A point was raised in the High Court that in view of the provisions of Section 17, the appeal in the lower appellate Court was not competent. This argument was rejected by Mahapatra J. (as he then was) on the ground that the judgment of the lower appellate court consisted of two parts one in regard to the question of validity of the award and the other as to whether a decree ought to have followed. Against the decision of Mahapatra J. a Civil Review was filed on the ground that the second appeal itself which was heard by him was not competent in view of sub-section (2) of Section 39 of the Act. The Civil Review was heard by Untwalia J. (as he then was) and the said decision is reported in Makhan Gope and Another Vs. Prasad Gope, The view of Mahapatra J. that when in a proceeding or a suit an objection is taken that the award is not, valid and should be set aside, and if a decree is directed to be passed in accordance with the award after rejecting the objection. the judgment and order consisted of two parts, and the finding that the order refusing to set aside an award is appealable u/s 39 of the Act was affirmed, The judgment of Mahapatra J. with respect to the maintainability of the second appeal however, was set aside. Untwalia J. while allowing the Civil Review has held that merely because a decree follows in accordance with the award on the basis of the same judgment in which the question of setting aside the award has been discussed and answered against the objector, the right of appeal u/s 39 of the Act is not extinguished and an appeal would still lie from that portion of the judgment and order by which the Court refused to set aside the award. and if that appeal is allowed, the decree would automatically go.

13. I am in respectful agreement with the views expressed in the above decisions I have quoted the relevant findings of the trial Court as well as of the appellate

court where both the Courts have come to the conclusion that the objection of the petitioners was u/s 33 of the Act also. The appellate court in paragraph 11 of its judgment has clearly held that the arbitration agreement itself was invalid on account of vagueness. In paragraph 19 of the judgment, it has further found:

"My view of the matter is that the award in this case was invalid if not on account of the arbitrators misconducting themselves or the proceeding, at least on account of invalidity of the arbitration agreement itself"

14. In view of the discussions made above and the clear findings recorded by the Court of appeal below, the learned Additional Subordinate Judge has committed an apparent error in holding that the appeal was incompetent as it was neither in excess of, nor otherwise not in accordance with the award. It is therefore, difficult to uphold the view of the court of appeal below which, in my opinion, is contrary to its own findings. It has completely overlooked the provision of Clause (vi) of Section 39(1) of the Act. Since the Court of appeal below has committed an apparent error of jurisdiction, in my opinion, this court in Civil Revision is competent to interfere in the circumstances enumerated above,

15. Learned counsel appearing for the opposite party No. 2 could not challenge the finding of the Court of appeal below with respect to the invalidity of the arbitration agreement and in view of that finding, the Court of appeal below, in my opinion, has committed an apparent error in refusing to exercise its Appellate jurisdiction under an erroneous impression regarding the non-maintainability of the appeal before it.

16. I would, accordingly, allow this application and set aside the judgment and decree of the Courts below. In the circumstances of the present case, however, I would direct the parties to bear their own costs, in this Court also.