
(1946) 12 PAT CK 0009
In the Patna High Court

Sheocharan Mahton and Others

APPELLANT

Vs

Sanichar Mahton and Others

RESPONDENT

Date of Decision : 23-12-1946

Acts Referred:

Arbitration Act, 1940 — Section 39

Citation : AIR 1948 Patna 207

Hon'ble Judges : Agarwala, Acting C.J.;Imam, J

Bench : Full Bench

Judgement

Imam, J.—This is an appeal by the defendants against the decision of the Sixth Additional Subordinate Judge of Patna. The plaintiffs had instituted a suit for declaration of title and recovery of possession. After filing of the written statement by the defendants all the parties agreed that the dispute should, be referred to arbitration. Accordingly eleven arbitrators were appointed as agreed to by the parties in the suit. After some time the arbitrators submitted their award to the Court, but it appears that only eight of them had signed it. According to the award the plaintiffs' suit would stand dismissed. Plaintiffs objected to the award on various grounds, the principal ground being that all the eleven arbitrators did not attend the arbitration proceedings, and, therefore, the award was invalid. The Munsif, before whom the objections were raised, decided that the award was not invalid and pronounced judgment in terms of the award. Against this decision of the Munsif the plaintiff's appealed, and the appeal was heard by the Sixth Additional Subordinate Judge, who came to the conclusion that the award was invalid, having regard to the fact that the proceedings in arbitration were conducted in the absence of all the eleven arbitrators taking part in the same. He found as a fact that the case before him was not one where all the arbitrators had attended the proceedings, but that only some of them attended the proceedings and a majority of them had signed the award.

2. Mr. Rahman on behalf of the respondents took a preliminary objection that no second appeal lay in view of the provisions of Section 39, Arbitration Act of 1940.

Mr. De, however, contended that the lower appellate Court had no jurisdiction to entertain the appeal at all, and, in view of certain decisions of this Court, a second appeal lay. He urged, however, that if no second appeal lay, the appeal may be treated as an application in revision. He further objected, that it was illegal for the lower appellate Court to have found that all the arbitrators had not attended the arbitration proceedings as there was no evidence of it except the affidavits. He also cited certain authorities of this Court to show that it was not necessary for all the arbitrators to have signed the award when it was clear that a majority decision was binding on the parties. In this case, out of eleven arbitrators eight had signed the award, and their award was against the plaintiffs.

3. In meeting the preliminary objection raised by Mr. Rahman Mr. De argued that the decision of the Munsif refusing to set aside the award and pronouncing a judgment in accordance with it was a case where the order refusing to set aside the order had merged into decree, and, accordingly, no appeal lay. He referred to Section 17 of the Act which provides:

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.

4. He pointed out that there was no separate order refusing it to set aside the award, but that the Munsif had pronounced judgment in accordance with the award and, in the course of that judgment, had refused to accede to the objections of the plaintiffs and had refused to set aside the award. Section 39 of the Act, however, provides that

an appeal shall lie from the following orders passed under the Act, and from no others, to the Court authorized by law to hear appeals from original decrees of the Court passing the order.

5. It then enumerates a number of instances of orders appealable, and the relevant clause is Clause (vi) which speaks of an order setting aside or refusing to set aside an award. By Sub-section (2) of Section 39 it is provided that no second appeal shall lie from an order in appeal under this section.

6. The question which has to be determined is whether, by pronouncing a judgment in accordance with the award and rejecting the grounds for setting aside the award, the action of the Munsif, in law, prevents the plaintiffs from urging that no second appeal lies as stated in Section 39. It seems to me that Section 39 is a specific provision which provides for an appeal against certain orders of the Court, one of which is an order refusing to set aside an award. The Act cannot be so interpreted as to destroy this specific provision for an appeal by the argument that a judgment having been pronounced in accordance with

Section 17, no appeal lay. It seems to me that the scheme of the Act provided that an appeal shall lie against the orders enumerated in Section 39 and from none others on the one hand, and that no appeal shall lie against a decree which is made in accordance with an award. The reason for this distinction appears to me to be indicated in Section 30 of the Act which provides that an award shall not be set aside except on one or more of the following grounds: (a) that an arbitrator or umpire has misconduct himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35; (c) that an award has been improperly procured or is otherwise invalid; that is to say, the grounds on which an appeal is allowed against an order refusing to set aside an award are limited, and the merits of the litigation between the parties cannot be raised. In the present case Clauses (a) and (b) of Section 30 would not be applicable, and, under Clause (c) the only question that could be determined was as to whether the award was otherwise invalid, there being no question of it having been improperly procured.

7. In my opinion, if all the arbitrators do not attend the arbitration proceedings, the award given in the proceedings would be invalid. The provisions of Section 17 merely state that, where a Court refuses to set aside the award, it shall pronounce judgment in accordance with it with a decree following, and no appeal shall lie against such a decree. There is, therefore, a clear distinction between an appeal against an order as mentioned in Section 39 and an appeal against a decree as mentioned in Section 17. The question of merger does not arise, in my opinion, for this proposition one may refer to the decision of the Allahabad High Court in Jagat Pande Vs. Sarawan Pande and Others, and to the decision of the Calcutta High Court in Saudamini Ghosh v. Gopal Chandra Ghosh AIR 1915 Cal. 745. I would accordingly, hold that the preliminary objection raised by Mr. Rahman is a valid one, and that no second appeal lies to this Court.

8. It is unnecessary, therefore, to decide the other question raised by Mr. De that as the lower appellate Court had no jurisdiction to entertain an appeal therefore a second appeal was permissible, as I have already held that an appeal against the order of the Munsif was permitted u/s 39. For the other submission made by Mr. De that the decision of the lower appellate Court was made on no evidence except affidavits, reference must be made to Section 33 of the Act which provides:

Any party to arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavit:

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also and it may pass such orders for discovery and particulars as it may do in a suit.

This contention of Mr. De, therefore, must be rejected as it is permissible to a Court to decide the validity or otherwise of an award, on affidavits. The Court can also, under the proviso, take other evidence.

9. In the circumstances, I am satisfied that no interference is called for against the order of the lower appellate Court, and the appeal must be dismissed with costs.

Agarwala Ag. C.J.

I agree.