

(1990) 07 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : O.M.P. No. 417 of 1988 in C.S. No. 71 of 1986

Shivalik Forest Co.

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 19-07-1990

Acts Referred:

Arbitration Act, 1940 — Section 17, 41
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (1990) 2 ShimLC 293

Hon'ble Judges : D.P. Sood, J

Bench : Single Bench

Advocate : Prem Goel, for the Appellant; M.S. Guleria, Asstt. A.G., for the Respondent

Final Decision : Allowed

Judgement

D.P. Sood, J.—The substantial question which requires determination is "whether there is sufficient cause for the failure of the objector's Counsel to appear in the Court when the proceedings were called on-for hearing".

2. Shortly stated, the Deputy Commissioner, Mandi entered into reference with respect to the disputes between the parties pursuant to orders dated March 29, 1976 made by this Court. The learned Arbitrator gave his award dated September 24, 1985 and filed it in the Court for making it a rule of the Court.

3. Notices were sent to the parties for filing objections, if any, within the prescribed period. The objectors M/s. Shivalik Forest Co., filed objections alleging that the learned Arbitrator has misconducted himself and the proceedings. The opposite party contested the aforesaid objections. As a sequel, issues were framed and the parties led evidence. The case was then listed for final hearing. However, vide orders dated September 28, 1988, the objections stood dismissed in default

4. Against the aforesaid order, the objectors-claimants have filed the present

application under Order 9, Rule 13 CPC on the ground that Mr. Prem Goel, learned Counsel for the objectors, became unwell and left the Court premises after instructing his colleague Mr. Dev Raj, Advocate, for making a request to the Court for an adjournment. However, Mr. Dev Raj could not appear before this Court as he himself remained busy arguing a case in another Court.

5. In reply, the Respondents (State of Himachal Pradesh) disputed the allegations and contended that despite restorer of this Court having been sent for calling the Advocates, none was available which resulted in the dismissal of the objections. Thus, according to the Respondents, the dismissal of the objections was legal and valid.

6. On the pleadings of the parties, the following issue was framed on December 14, 1988:

Whether there are sufficient grounds for restoration of the objections and subsequent setting aside of the decree?

The Court directed the parties to adduce evidence by way of filing affidavits.

7. The objectors, in support of their application, filed affidavits of S/Shri Prem Goel and Dev Raj, Advocates. In rebuttal, the Respondents furnished counter-affidavit of Mr. H.C. Sharma, the then Additional Chief Conservator of Forests.

8. Mr. Prem Goel in his affidavit reiterated the allegations made in the application and specifically stated that before lunch time he was present in the Court and thereafter suddenly felt pain in his fractured arm due to which he left the Court premises after instructing his colleague to seek adjournment. Mr. Dev Raj, Advocate, corroborated Mr. Prem Goel to that extent and further stated that he remained busy arguing his Company Petition No. 6 of 1984 titled H.K.S. Malik v. Kanwar, Papers and when he was free he made enquiries about Mr. Prem Goel's case and found that it had been dismissed in default. Accordingly, he informed Mr. Prem Goel on the following day.

9. The counter-affidavit of Mr. H.C. Sharma discloses that the restorer of this Court was sent for calling the Advocates but none put in his appearance and, as such, the objection petition was dismissed in default. Regarding other factors, the allegations have been denied for want of knowledge which amount to vague reply to that part of allegations.

10. From the close perusal of the evidence adduced by the parties, it is clear that firstly, Mr. Prem Goel had become unwell, secondly, he in fact had instructed his colleague to seek adjournment and thirdly, Mr. Dev Raj, Advocate, remained busy in arguing his case in Court No. 2 after lunch when in the meantime the objection petition was dismissed. Even if the factum of the restorer having been sent for calling the Advocates is believed, the aforesaid facts remain unrebutted. Thus, to my mind, there exists sufficient cause which prevented Mr. Prem Goel from appearing in the Court when the petition was called for hearing.

11. Now, the ancillary question that survives for consideration of this Court is whether application under Order 9, Rule 13 CPC is or is not maintainable.

12. Under Order 9 of the CPC the scheme is that in a civil suit there is a Plaintiff and the Defendant. According to the provisions of the Code, if the Plaintiff does not appear, the suit is dismissed and no decree can be passed. On the other hand, if the Defendant fails to appear then the Plaintiff has to prove his case ex parte and accordingly a decree is passed which can be set aside under Order 9, Rule 13 Code of Civil Procedure, in case the Defendant satisfies the requirements thereunder. u/s 41 of the Arbitration Act, the CPC applies to all the proceedings before the Court. Admittedly, u/s 17 of the Arbitration Act, if no objections pursuant to the notice of filing of the award for making it a rule of the Court are filed by either party to the lis, the Court is legally bound to make it a rule of the Court which in legal parlance becomes a decree. In that view of the matter it cannot be said to be an ex parte decree. Consequently, Order 9 CPC is not attracted in such circumstances. However, if the objections have been filed and they are contested and during the pendency of such objections the same are dismissed in default for non-appearance of the Defendant, the award is made a rule of the Court and it amounts to an ex parte decree and Order 9 CPC is attracted.

13. In the present case, admittedly, the objections filed by the objectors-claimants were being hotly contested by the opposite party and the objections were at its final stage on the date of dismissal of the objection petition. Thus, the present petition for setting aside the ex parte decree is maintainable.

14. The cumulative effect of the aforesaid discussion is that the present petition is allowed and the impugned order dated September 28, 1988 is set aside. The Civil Suit is restored against its original number and date.