
(1983) 08 PAT CK 0016
In the Patna High Court
Case No : A.F.O.O. No"s. 63 and 64 of 1981

State of Bihar and Others

APPELLANT

Vs

Khetan Brothers and etc.

RESPONDENT

Date of Decision : 23-08-1983

Acts Referred:

Arbitration Act, 1940 — Section 39(1)

Citation : AIR 1984 Patna 74 : (1984) 32 BLJR 136 : (1984) PLJR 23

Hon'ble Judges : S.K. Jha, J; Binodanand Singh, J

Bench : Division Bench

Advocate : C.K. Sinha, Govt. Pleader No. 1, Ram Krishna Prasad, Jr. Counsel to Govt. Pleader No. 1 in M.A. No. 63 and A.K. Sinha, Jr. Counsel to Govt. Pleader No. 5 in M.A. No. 64 of 1981, Prem Lal, Bar-at-Law and A.B. Mathur, for the Respondent

Final Decision : Dismissed

Judgement

1. In both these appeals, a pure question of law is involved and hence they have been made analogous, and this judgment shall govern both the appeals both having been heard together.

2. Miscellaneous Appeal 63/81 arises out of Title Suit 51 of 1965 instituted on 23rd August, 1965. and Miscellaneous Appeal 64/81 is directed against an order passed in Title Suit 50 of 1965 which was instituted on 21st August 1965 -- both in the court of the learned Subordinate Judge, Khagaria.

3. A preliminary objection has been raised by Mr. Prem Lal. learned counsel on behalf of the respondent with regard to the maintainability of these appeals. It is submitted that these appeals are not maintainable under any of the clauses of Sub-section (1) of Section 39 of the Arbitration Act, 1940 (Act 10 of 1940) -- hereinafter to be referred to as the Act --although they have been purported to have been filed u/s 39(1)(vi) of the Act. Since we are going to uphold the preliminary objection raised on behalf of the respondent, we shall set out only the relevant facts relating thereto. These are the relevant facts. Two contracts

were entered into by two separate deeds of agreement one dated 17-7-1960 and the other dated 13-7-1960. between the parties. In both these agreements, there was an arbitration clause which stipulated that in case of any dispute arising between the parties, the matter shall be referred to the arbitration of the Superintending Engineer. National Highway of the Circle concerned. The deed of agreement dated 17-7-1960 is involved in M. A. 63/81 and that dated 13-7-1960 in M. A. 64/81. The impugned order in M. A. 63/81 arising out of Title Suit 51/65 is that dated 18-12-1980 and that in M. A. 64/81 arising of Title Suit 50/65 is dated 22-12-1980. Both the orders are more or less in the same terms.

4. The further relevant facts are these. The respondent of each of the appeals instituted 2 title suits for ventilation of the grievances sought to be made out by each of the respondents. As we have already stated above there being an arbitration clause in each of the agreement the learned Subordinate Judge referred the dispute to the arbitration of the sole arbitrator, namely, the Superintending Engineer of the Circle concerned by an order dated 23-12-1966 in each of the suits. The arbitrator did not submit his award within the time stipulated by law nor did he ever pray for any extension of time by the court and he sat tight over the matter for about 4 years. When nothing was done by the arbitrator in course of all these four years, an application was filed by the respondent of each suit on 4-12-1979 to appoint a fresh arbitrator. The defendant. State of Bihar, which along with others is the appellant here. in the first instance objected to the change of the arbitrator. But the court ordered on the 5th of March, 1980 in each of the suits that since the arbitrator had failed to submit any award within the time permitted by the Act and had never applied for any extension of time and had sat over the matter for a very long time, it was a fit case in which a new arbitrator should be appointed. On that very date, both the parties in each of the two suits gave three names separately out of which an arbitrator was prayed to be appointed. One of the names with found place in the list submitted by the defendant appellants was of Shri Janardan Prasad, an Advocate of Khagaria. In Title Suit 50/65 giving rise" to Misc. Appeal 64/81 an application was filed on behalf of the respondent on the very date, namely. 5th March, 1980 agreeing to the name of Shri Janardan Prasad being appointed as sole arbitrator. An application to the same effect was filed on 15-3-1980 in Title Suit 51/65 giving rise to Misc. Appeal 63/81. Thus, one of the nominees of the defendant appellants was appointed the sole arbitrator in each of the two cases with the consent of the parties. It may bear repetition to state that the reference to old arbitrator, namely, the Superintending Engineer had already been recalled in presence of both the parties on 5th March, 1980. and the defendant appellants never demurred against that order. On the contrary, an application was filed on the same date on behalf of the defendant appellant giving a list of three names out of which a sole arbitrator should be appointed, one of which was of Shri Janardan Prasad. as already stated earlier, and to this the plaintiff respondent acceded. And thus the sole arbitrator was appointed with the consent of the parties. The defendant appellants never raised any grievance nor came up in

appeal to this Court, when the reference from the previous arbitrator namely, the Superintending Engineer was re-called rather they acquiesced in the appointment of the new arbitrator who was their own nominee. Be that as it may, we are not concerned as to whether if an appeal were filed against the orders appointing a new arbitrator with the consent of the parties it would have been maintainable or not. But the fact remains that the defendants never appealed against those orders.

5. Subsequently, on 12-4-1980 the Superintending Engineer submitted purported awards and a prayer was made that those awards be made a rule of the court in each of two cases. The trial court, by the impugned orders, has held: to quote its own language,--

"It is apparent that the arbitration reference from Superintending Engineer. National Highways, Muzaffarpur was already re-called by the then learned Sub-Judge and that the Superintending Engineer of the National Highways, Muzaffarpur filed his Award after re-call of this reference. An another arbitrator Sri Janardan Pd. Adv. Khagaria has already been appointed to arbitrate in the dispute of the parties. In view of this state of affairs, the Award submitted by the Superintending Engineer, National Highways, Muzaffarpur. is no longer valid and it is, therefore, rejected. The newly appointed Arbitrator is directed to complete his Award within shortest possible time as this case appears to be quite old originated in the year 1965."

6. To all intents and purposes, what the learned Subordinate Judge has done is not to look into the award and not to treat them as awards and he has treated them more or less as a waste paper and non est in law. The impugned orders, therefore, do not amount to either setting aside or refusing to set aside an award. If the court has not treated the awards as such and thereby refused to entertain the awards then it is neither setting aside nor refusing to set aside the award: rather the so-called awards have been treated as non est in law. We are, therefore constrained to hold that no appeal lies against the impugned orders as they do not fall within the purview of Section 39(1)(vi) of the Act.

7. Mr. Prem Lal, learned counsel for the respondent placed reliance on a Full Bench decision of the Allahabad High Court in the case of Ibrahim Ali and Another Vs. Mohsin Ali, and the case of Arun Chand Raghunath Rai v. Ahmad AIR 1922 Lah 194 These decisions, in our opinion, do, to a great extent, support his contention, re-referred to above.

8. Mr. Chhatrapati Kumar Sinha, learned Government Pleader I appearing on behalf of the defendant appellant contended in the alternative that since the matter was connected with the supersession of an arbitration which fell within the purview of Section 39(1)(i) which speaks of an order superseding an arbitration as an appealable one. the impugned orders should also be held to be appealable. We are afraid, this contention is wholly untenable. As we have already observed earlier, if the appeals were directed against the order dated 5th

March, 1980 whereby the arbitration was re-called from the Superintending Engineer the matter would have been different: but the present appeals are not directed against that order. The order may have been right, wrong or indifferent, legal or illegal but that is not a matter of consideration before us in these appeals. Only more so, because the new arbitrator was appointed with the consent of the parties which may be said to be tantamount a fresh agreement between the parties with regard to the forum of arbitration. We need not detain ourselves on this question any further in the circumstances,

9. We, accordingly, hold that these appeals are not maintainable and they are dismissed as such. In the circumstances of the case, however, there shall be no order as to costs.