
(1973) 09 AHC CK 0024

In the Allahabad High Court

Case No : F.A.F.O. No's. 41 of 1966 and 9 of 1967

State of U.P.

APPELLANT

Vs

Reishma Devi and Others

RESPONDENT

Date of Decision : 28-09-1973

Acts Referred:

Arbitration Act, 1940 — Section 16, 16(3), 17, 39(1)

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4, Order 41 Rule 1(2), Order 41 Rule 4, 34(2)

Citation : AIR 1974 All 257

Hon'ble Judges : Trivedi, J;S.K. Kaul, J

Bench : Division Bench

Advocate : K.S. Verma, for the Appellant; Akhilesh Sahai, for the Respondent

Final Decision : Dismissed

Judgement

Trivedi, J.—These are two connected appeals and may be conveniently decided by one judgment as they raise same common questions of fact and law.

2, Both the appeals have been filed by the State of U. P., against Smt. Shabati Devi and 6 others who are the legal representatives of Sita Ram Gupta. The facts giving rise to these appeals may be summarised as follows:

Sita Ram Gupta was a building contractor and there was a contract between him on the one side and the Executive Engineer, P. W. D. on behalf of the State of U. P. on the other by which Sita Ram Gupta was given a contract for building three storeyed ward in the King Georges Medical College, Lucknow. This work was to start from 20-10-1948 and to be completed by 18-10-1949. The work according to the respondents could not be completed within the stipulated time on account of defaults and omissions of the officers of the appellant. Subsequently, the time for completion of the building was extended upto 12-10-1950. Sita Ram Gupta then filed a suit against the State of U. P. for recovery of Rs. 3,53,577-2-6 on account of the constructions made by him in terms of the contract. During the pendency of the suit he died and seven of his heirs and legal representatives

including a daughter Km. Runa Gupta were substituted in his place. Thereafter the parties agreed on 20th July, 1962, to refer the dispute to the arbitration of Sri U. C. Oswal, the then Deputy Legal Remembrancer to U. P. Government. The arbitrator made an award on 10-10-1965.

Against this award the appellant-defendant filed objections u/s 30 of the Arbitration Act with a prayer that the award may be set aside. The respondents-plaintiffs also filed objections. On hearing these objections the Additional Judge Small Causes, Lucknow, decided to remit the award and by an order dated 2-3-1966 dismissed the appellant-defendant's objection to set aside the award and remitted the award to the arbitrator for reconsideration of three points stated in the judgment. The arbitrator was directed to submit his final award within two months. F. A. F. O. No. 41 of 1966 has been filed by the State of U. P., aggrieved from this order of the lower court dated 2nd March, 1966. In accordance with the aforesaid order of remittance the final award was made by the arbitrator on 3rd May, 1966 and a sum of Rs. 90,416.94 paise was awarded to the respondents against the defendant-appellant with pendent lite interest at the rate of 3% per annum simple except for the period commencing from 1-7-57 and ending on 31-7-60. There was also an order with regard to costs. Against this award also objections were filed on behalf of the appellant, but they were partly allowed and the award dated 10-10-1965 and the final award dated 3-5-1966 treated as the supplementary award 1966 were made rule of the court with the modification that no interest was to run on the amount of Rs. 692-12-9. It is against this judgment that F. A. F. O. No. 9 of 1967 has been filed.

3. A preliminary objection has been raised by Sri Nazir Uddin, learned counsel for the respondent in both these appeals which may be first considered. The objection is that in these appeals one of the heirs and the legal representatives of Sita Ram Gupta deceased plaintiff, namely, Km. Runa Gupta was not impleaded as a respondent. Runa Gupta, it is submitted, was impleaded as one of the plaintiffs in the plaint on the death of Sita Ram Gupta on 3-2-69 and on account of omission to implead her in the array of respondents the memorandum of appeal becomes fatally defective and these appeals are liable to be dismissed on this ground alone. When this defect was brought to the notice of a Bench of this Court it was pointed out by way of explanation that the name of Runa Gupta was omitted from the formal order prepared from the impugned judgment of the lower court. The Bench ordered that appellant should take steps to get the formal order corrected by securing addition of the name of Runa Gupta in the formal order within one month and also to implead Runa Gupta as a respondent in these appeals. The formal order was corrected, but the appellant did not take any steps for implement of Runa Gupta during the time allowed by the Court. Subsequently the State of U. P. prayed for further extension of time u/s 148, CPC for implement of Runa Gupta in the appeal, but this prayer was rejected by a Bench of this Court on 14-12-72. The position, therefore, is that Runa Gupta who happened to be one of the plaintiffs before the Court below has not been impleaded and we have to judge the consequences of this omission. It is clear

from the facts that the interest of all the legal representatives and heirs of Sita Ram Gupta, the present plaintiffs, was joint and indivisible. The impugned judgment and orders of the lower courts have become final in favour of Runa Gupta and against the State of U. P. If in the circumstances the present appeals were allowed then they will result in two contradictory decrees, one in favour of Runa Gupta and another in favour of the appellant and against the present respondents. When such may be the consequence of a defect in the memo of appeal, this court cannot proceed to decide the appeals which are liable to dismissal due to defective record.

4. A situation analogous to the present one arose in an appeal before the Supreme Court and was considered in the case of *The State of Punjab Vs. Nathu Ram*, . Certain land belonging to two brothers L and N jointly was acquired for military purposes and on their refusal to accept the compensation offered by the Collector, the matter was referred for enquiry to an Arbitrator who passed a joint award granting higher compensation. The State Government appealed against the award to the High Court. While the appeal was pending L died and his legal representatives were not brought on record. The appeal abated against him. The question arose whether the appeal also abated as against N. It was held that appeal against N alone could not proceed and it was essential for the appellant to implead both the joint decree-holders and in the absence of one the appeal was not properly constituted. In this connection it was further observed that when Order 22, Rule 4 C. P. C. does not provide for the abatement of appeal against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. The provisions of Order 1, Rule 9 C. P. C. also show that if the court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent it has to proceed with the appeal and decide it. It is only when it is not possible for the court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

5. In the case of *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, the Supreme Court observed that where a number of persons have filed an appeal and pending the appeal one of the appellants dies, the surviving appellants cannot be paid to have filed the appeal as representing the deceased appellant. And if in respect of the appellant deceased the appeal has abated and the decree in favour of the respondents has become final against his legal representatives, these having not been brought on record in time, it will be against the scheme of the Code to hold that Rule 4 of Order 41 empowers the Court to pass a decree in favour of the legal representatives of the deceased appellant on hearing an appeal by the surviving appellants even though the decree against him has become final. See also *Ghulam Abbas v. Safdar Jah Zahid Ali Mirza* AIR 1941 Oudh 219 and *Shabbar Husain Vs. Abbas Ali and Others* .

We therefore, uphold this preliminary objection deciding that these appeals are liable to be dismissed for failure to implead Runa Gupta as a respondent and for

defective record.

6. Coming now to the merits of the two appeals there was only one submission made by the learned counsel for the appellant and that submission is common to both the appeals. The submission is that the Arbitrator misconducted himself in making an award in favour of the respondents in total disregard of the fact that there was discrepancy in the amount claimed as per schedules attached to the notice u/s 80, CPC and the schedules attached to the plaint and those filed before the Arbitrator. This point is raised in ground No. 8 of memo of appeal of F. A. F. O. No. 9 of 1967 and in ground No. 5 of memo of Appeal of F. A. F. O. No. 41 of 1966. So far as F. A. F. O. No. 9 of 1967 is concerned a perusal of the objections filed for the appellant against the award of 3rd May, 1966, on behalf of the State of U. P., shows that no such ground was taken in the objection and no such ground appears to have been argued also before the Additional Judge Small Causes, as appears from his judgment of 30th September, 1966. This point, therefore, cannot be urged for the first time in appeal.

7. In so far as F. A. F. O. No. 41 of 1966 is concerned one of the points taken in the objection filed for the appellant against the first award was that the case set up in the new schedules filed for the plaintiffs was entirely new and was not the basis of the notice u/s 80, Civil Procedure Code, but this point does not seem to have been urged before the Additional Judge Small Causes. Before him an entirely different point appears to have been urged, there the argument was that there was discrepancy in Schedule V attached to the plaint and in the combined Schedules II and III which were filed before the Arbitrator with the result that the lower court did not deal with this point. Not having pressed this point before the lower court it is not open to the appellant to raise it for the first time in this appeal. Therefore, this ground is liable to be rejected. These being the only grounds urged in the two appeals, they must fail for the rejection of these grounds.

8. In F. A. F. O. No. 9 of 1967 a cross-objection has been filed for the respondents to the effect that lower court was in error in not awarding future interest from the date of passing of the decree till the date of realization. Awarding of future interest was in the discretion of the lower court and in omitting to say anything about future interest the court will be presumed to have taken the view that in the circumstances of the case interest should not be awarded. We see no reason to dissent from the exercise of this discretion by the lower court and, therefore, dismiss the cross-objection.

Coming now to F. A. F. O. No. 41 of 1966 the learned Counsel for the respondents Sri Nazir Uddin has raised another argument assailing the maintainability of that appeal. Learned Counsel submits that this appeal _was not maintainable as no appeal is provided u/s 39 of the Arbitration Act against an order of remittance of the award. On this point we have heard learned Counsel for the parties and we are of the opinion that this is a sound submission. Sri K. S. Verma, the Chief Standing Counsel, submits on behalf of the State that the

appeal was maintainable under Sub-section (1) Clause (vi) of Section 39 of the Arbitration Act, (hereinafter referred to as the Act) under which an appeal shall lie against an order setting aside or refusing to set aside an award. The submission is that the order of remittance of the award amounted to refusal to set aside the award which was the prayer in the objection on behalf of the State of U. P. We are unable to agree that an order of remittance of the award u/s 16(1) of the Act amounts necessarily to an order refusing to set aside an award. The reasoning of the learned Chief Standing Counsel is that in the present case the court below by its order of 2-3-1966 had remitted the award to the Arbitrator for reconsideration of three points which were raised in the respondents' application (955-C) and therefore the court will be presumed to have confirmed the rest of the award and refused to set aside that portion of the award which has not covered the three remitted points. We are not impressed by this argument for in our judgment the Arbitration Act does not contain any provision about confirmation of the award. Section 17 of the Act says that 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. u/s 17 the court must proceed to pronounce judgment according to the award and a decree shall follow accordingly if and when court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award and the time for making an application to set aside the award has expired. It is, therefore clear from Section 17 that the question of confirmation of the award and pronouncement of judgment according to the award arises only where the court sees no cause to remit the award or to set aside the award and the time for making an application to set aside the award has expired. When these stages have passed, the court has no option but to pronounce judgment according to the award u/s 17. That being the scheme of Section 17, (sic) does not contemplate that the court will confirm part of the award and remit the rest u/s 16(1) of the Act. Indeed in Section 17, as we read it there does not appear to be any provision for remittance of part of the award and for confirmation of the rest of the award by implication. Under Sub-section (1) of Section 16 the court has two options open to it either to remit the award or to remit any matter to the Arbitrator or Umpire for reconsideration, but it is not possible for the court to remit part of the award. It can either remit the whole of the award or remit specific points on matters to the Arbitrator for reconsideration. It is also possible for the court to refer certain points to the Arbitrator for reconsideration which may have been left undetermined by it or matters on which it may have determined but which were not referred to arbitration and such matters were not severable. u/s 16 of the Act the court has power also to remit the whole award at the time of referring certain points for reconsideration to the Arbitrator. That is what appears to have happened in the present case. The operative portion of the order of 2-3-66 is in these words.

"The award is remitted back to the learned arbitrator for reconsideration of the three points raised in plaintiff's application No. 955-C. Let the award and the relevant papers be sent to the learned arbitrator at once. He shall submit his decision to the court within 2 months from today".

It is noteworthy that the lower court remitted the whole award in express terms and did not remit specific points for reconsideration to the Arbitrator u/s 16(1) of the Act and there being no provision for remittance of part of the award, in this situation the argument that rest of the award was confirmed is clearly untenable. This order of remittance of the award was evidently passed by the lower court in accordance with the provisions contained in Sub-section (2) of Section 16 which says: "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." Sub-section (2) of Section 16 again significantly contemplates remittance of the award and not part of the award. Our view that there can be no confirmation of part of the award and remittance of another part to the Arbitrator u/s 17 is reinforced by the provision contained in Sub-section (3) of Section 16 of the Act which says that 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 and the provisions contained in Section 19 to the effect that where an award has become void under Sub-section (3) of Section 16 or has been set aside, the court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred. If a part of the award is confirmed, as suggested in arguments by the learned Chief Standing Counsel and it becomes subsequently void on default of the arbitrator under Sub-section (3) of Section 16 of the Act, then it will lead to a wholly conflicting position. In view particularly of the provisions contained in Sub-section (3) of Section 16 we are inclined to take the view that upon remittance of the award the award becomes suspended and this is also the view which commended to the Calcutta High Court. See *Brahma Swaroop Gupta Vs. Diwan Chand Minotra*, . In the present case there is a positive indication that the whole of the award was remitted, and that no part of it was confirmed. This is clear from the two awards. Under the first award of 10-10-1965 the Arbitrator had awarded a sum of Rs. 69,359.34 paise to the respondents against the appellant, whereas in the second award dated 3rd May, 1966 the Arbitrator had awarded a sum of Rs. 90,416.94 paise plus pendente lite interest at the rate of 3% per annum simple. This was in clear modification of the earlier award which could not have been possible if part of the award had been confirmed. The award of 3-5-1966, therefore, was a fresh award and not a supplementary award, as urged for the appellant.

9. For the reasons given above we are of the opinion that an order of remittance of the award does not fall within Subsection (1) Clause (vi) of Section 39 of the Act as it neither amounts to an order setting aside or refusing to set aside an award and an appeal against an order of remittance of the award, therefore, does not lie u/s 39 of the Act. Learned Counsel for the appellant places reliance

on an authority of the Nagpur High Court in the case Jayantilal Keshavlal v. Surendra Gangsa, AIR 1956 Nag 245. In that case the Nagpur High Court took the view that when an award is accepted on certain points and is remitted for reconsideration only on the remaining points, the order would amount to a refusal to set aside an award on the points the award is accepted and as such will be appealable. We are unable to agree with this view for attention of their Lordships was not drawn to the provisions contained in Sub-section (3) of Section 16 of the Act and to the fact that in Section 17 there is no provision for confirmation of the award for remittance of a part of the award.

10. View similar to ours was taken in the case of Mehta Teja Singh and Co. Vs. Fertilizer Corporation of India, Ltd. and Another, by the Delhi High Court holding that an order remitting a part of an award and affirming a part does not necessarily amount to an order setting aside or refusing to set aside an award and is not appealable. This decision was rested on a decision of the Supreme Court in Civil Appeal No. 1094 of 1963, B. S. Madhava and Co. v. Kapila Textile Mills Ltd., decided on 9-9-1964 (SC), in which it was observed that an order u/s 16(1)(c) of the Act refusing to remit an award to the Arbitrator or the umpire is not appealable under the Act. The learned Judges of the Delhi High Court observed that refusal to remit an award cannot constitute refusal to set aside an award and therefore was not appealable. Remission of an award or any matter would also on parity of reasoning not amount to setting aside an award or a part of it.

10. We therefore uphold the argument of the learned Counsel for the respondents that F. A. F. O. No. 41 of 1966 did not He u/s 39 of the Act.

As an upshot of the findings above recorded both the appeals and the cross-objections in F. A. F. O. No. 9 of 1967 fail and accordingly are dismissed with costs to the respondents. This judgment shall govern both the above appeals.