

(1939) 08 PAT CK 0041
In the Patna High Court

Tejpal Marwari and Others

APPELLANT

Vs

Kedarnath Himatsingka and Others

RESPONDENT

Date of Decision : 08-08-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 104, 104(c)

Citation : AIR 1939 Patna 597

Hon'ble Judges : Harries, C.J.; Fazl Ali, J

Bench : Full Bench

Judgement

Fazl Ali, J.—This is an appeal by the defendants against an order modifying an award in a suit brought by the respondents in the Court of the Subordinate Judge of Santal Parganas for recovery of a certain sum of money. The plaintiffs' case was that the defendants used to take certain articles on credit from them and they referred in their plaint to certain adjustments of account between them and the defendants, one of them being alleged to have taken place on 1st Baisakh 1337. On 11th February 1935, before the suit was referred to arbitration, the plaintiffs applied to the Subordinate Judge to allow them to amend their plaint by changing 1st Baisakh 1337 into 16th Kartick 1337 on the ground that the former date had been mentioned by mistake.

2. The Subordinate Judge at first allowed the amendment, but afterwards on objection by the defendants he recalled his previous order and disallowed the amendment with these observations:

The plaintiffs by their amendment now want to shift the date to 16th Kartick 1387 B.S. This changes the position materially. How far this will affect the accounts is another point, and will come up for consideration in due course.

3. It appears that after the suit was referred to arbitration the plaintiffs again prayed for amendment of the plaint by inserting the new date, and the arbitrator allowed the prayer. Thus when the award was submitted by the arbitrator to the Subordinate Judge, one of the objections raised by the appellants to the award

was that the arbitrator had no power to allow an amendment which had previously been refused by the Court. The Subordinate Judge over, ruled not only this objection but all the other objections put forward by the defendants but as he found that the arbitrator had made certain mistakes in calculating interest, he made slight modifications in the award. These modifications are in favour of the defendants, and the learned advocate appearing for them has clearly stated before us that they have no grievance in so far as the award has been modified with regard to interest.

4. He limits his appeal to one question only, namely that the arbitrator was not justified in allowing the amendment of the plaint on a point on which amendment had been refused already by the Subordinate Judge. Now, a preliminary question arises here as to whether it is open to the appellants to attack the award on such a ground in the present appeal. This appeal has been preferred u/s 104(c), Civil P.C., which gives a right of appeal "from an order modifying or correcting an award." It is clear that the scope of such an appeal is a limited one, and the party appealing can attack the order of the Court only in so far as it modifies the award and must confine himself to points which have a bearing on the modification made in the award. Under para. 12 of Schedule. 2, Civil P.C., the Court has power to modify or correct an award:

(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

5. Thus it is clearly open to the party attacking the order to show that none of the conditions mentioned in this paragraph applied and the award could not have been modified; but Section 104, Civil P.C., does not entitle a party to appeal against the award itself; nor can he in appeal under this provision attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. This view is fully supported by the decision of the Calcutta High Court in *Rajbans Sahay v. Sooraj Lal* 17 C.W.N. 617. It was clearly pointed out in that case that Clause (c) of Section 104, Civil P.C., does not confer an unrestricted right of appeal; in other words, when an order has been made by which an award has been modified or corrected, in an appeal preferred against that order the validity of the whole award cannot be called in question, the true effect of the clause being to allow an appeal against the order only in so far as it modifies or corrects the award. The scope of the appeal being limited, it is clear that the award cannot be challenged by the appellants on the ground urged in this appeal.

6. Although this appeal fails on the preliminary ground, it must be stated that there is also no merit whatsoever in the objection put forward by the appellants. The learned advocate for the appellants concedes that if the Subordinate Judge himself tried the suit, he had power to allow the plaint to be amended even if he

had refused such amendment on a previous occasion. As however the entire suit has been referred to arbitration, I do not see why a similar power could not be exercised by the arbitrator. The arbitrator has pointed that the plaintiffs had made a mistake in stating the date of the adjustment of the accounts in the plaint, and, in my opinion, the arbitrator was justified in allowing amendment in these circumstances.

7. In my opinion there is no merit in this appeal and it must be dismissed with costs.

Harries C.J.

I agree.