ANDHRA PRADESH HIGH COURT

Govt. of A.P

Vs.

Bactchala Balaiah

Civil Revn. Petn. No. 2415 of 1983 and C. M. A. No. 764 of 1984

(Punnayya and Ramachandra Raju, JJ.)

25.06.1984

JUDGEMENT

Punnayya, J.

1. The Revision and the C. M. A. arise out of the proceedings of Original Suit No. 124 of 1982. The brief facts leading to the revision and the C. M. A. areas follows: The plaintiff in the suit was a contractor. He entered into an agreement with defendants 1 and 2 who represent the State of Andhra Pradesh to do earth work over the embankment of Godavari South canal beyond lower Manair Dam. His tender was accepted and he completed the work as per the agreement. However, disputes arose between him and the defendants regarding the payment of the amounts for the work done by him. Both parties appointed defendants 3 to 5 as arbitrators to resolve the dispute. After due enquiry, defendants 3 to 5 passed an award on 15-8-1982 in favour of the contractor-plaintiff. Copies of the award were communicated to defendants 1 and 2. But the Government did not pay the amount as per the award and hence the contractor filed the suit in the Subordinate Judge's Court, Ongole, to make the award a rule of Court. Defendants 1 and 2 did not file any petition to set aside the award in the Court under Section 30, Arbitration Act. R. P. Notices were taken on the defendants 1 to 5 on 29-10-1982. Notices were served personally on defendants 1 to 5. The Government Pleader filed his memo of appearance on 29-10-1982. The suit was adjourned to 27-11-1982 for written statement. From that day it was adjourned from time to time for written statement till 27-1-1983. Though several adjournments were granted in between 27-11-1982 and 27-1-1983, written statement was not filed by the defendants. On 27-1-1983 the Government Pleader requested the Court for further time for filing written statement. But the learned Subordinate Judge refused to grant further adjournment and set the defendants ex parte. The suit was adjourned to 28-1-1983 for the plaintiffs evidence. On 28-1-1983 the plaintiff gave evidence as P. W. 1 and the award was marked as Ex. A-I. The learned Subordinate Judge on the basis of the evidence of P. W. 1 and Ex. A-I decreed the suit in the terms of the award. No petition was filed for setting aside the award under Section 30, Arbitration Act. Hence the learned Subordinate Judge decreed the suit in terms of the award with costs as prayed for making the award the rule of the Court. The learned Subordinate Judge also passed orders stating that there shall be no order for the payment of subsequent interest.

2. Defendants 1 and 2 in the suit filed I. A. No. 539 of 1983 under Order 9, Rule 13. Civil Procedure Code for setting aside the *ex parte* decree passed in O.S. No. 214 of 1982 with a petition, I. A. No. 538 of 1983 for condonation of delay of 9 days in presenting I. A. 539 of 1983. As to why the delay in filing I. A. No. 539 of 1983 was caused, the petitioners in I. A. No. 538 of 1983 explained that they were informed of the *ex parte* decree dated 28-1-1983 by the Government Pleader, Ongole, as per his letter dated 31-1-1983 and hence they could not get instructions from the Government of Andhra Pradesh even up to 28-2-1983 and they could not file the petition I. A. No. 539 of 1983 under Order 9. Rule 13. Civil Procedure Code within the prescribed time of 30 days and left with no other remedy they filed the petition I. A. No. 538 of 1983 under Section 5, Limitation Act, seeking for the condonation of delay, which according to them, was due to purely administrative reasons. This petition was opposed by the plaintiff.

3. The plaintiff contends that the Government Pleader was aware of the proceedings in the suit. O.S. No. 214 of 1982 and he took several adjournments for filing written statement ever since 27-11-1982 till 28-1-1983 when finally the suit was decreed in the absence of the defendants. He also contends that the Government can have no better privilege than any other party and they did not explain every day's delay for these 9 days, and their contention that they could not file the petition in time for want of instructions from the Government does not constitute a sufficient cause warranting condonation of delay. He also contends that the defendants also did not file O. P. under Section 30, Arbitration Act, as it would be futile. The plaintiff therefore contends that it is for this reason that the defendants remained *ex parte* in the suit and hence the petition. I. A. No. 538 of 1983 was intended only to avoid payments due under the award now made a rule of the Court.

4. The learned Subordinate Judge did not accept the defendant's explanation as to why the delay has been caused as the letter of the Government Pleader was not placed before the Court and it is not known whether the defendants or the Chief Engineer addressed the Government for necessary instructions. In support of his conclusion the learned Subordinate Judge relied upon the decision of the Supreme Court in *Ramlal v. Rewa Coal Fields Ltd*[1]*.,* and also the two decisions of this Court in *R. D. O. v. T. Laxminarayanayar*[1]*,* and *Spl. Dy. Collector v. Nawath T Yar Jung*[2]*,* The learned Subordinate Judge also took into consideration the ultimate result of the suit, which will be decreed against the defendants, as no petition was filed for setting aside the award within the period of limitation as provided under Section 30, Arbitration Act, and the award would be ultimately made as a rule of Court under Section 17, Arbitration Act, even if the delay is condoned and the *ex parte* decree is set aside and if the defendants are given an opportunity to contest the suit and the learned Subordinate Judge, therefore took the view that no useful purpose would be served even if the delay is condoned. So holding he dismissed the petition I. A. No. 538 of 1983 and consequently he dismissed I. A. No. 539 of 1983 which was filed for setting aside the *ex parte* decree under Order 9. Rule 13. Civil Procedure Code The learned Subordinate Judge also decreed the suit making the award rule of Court. Aggrieved with the orders in I. A. No. 538 of 1982 and I. A. No. 539 1983. C. R. P. No. 2415 of 1983 and C. M. A. No. 764 of 1983 respectively are filed. Even against the decree in O.S. No. 214 of 1982 a revision is filed but it is unnumbered.

[1]AIR 1975 And Pra 109

[2] AIR 1973 And Prad43

5. Kum. V. Lakshmi Devi, the learned Government Pleader, contends that the learned Subordinate Judge did not appreciate the explanation offered by the Government for the condonation of the delay of nine days in its proper perspective.

6. As against this contention Sri N. V. B. Shankara Rao, the learned counsel for the respondent plaintiff submits that the learned Subordinate Judge has rightly dismissed I. A. No. 538 of 1983 as the explanation offered by the defendants is unsatisfactory and consequently has rightly dismissed I/A. No. 539 of 1983 which is filed for setting aside the *ex parte* decree.

7. This Court took the view that the interdepartmental correspondence or consultation or administrative reasons will not constitute sufficient cause for condonation of delay. The explanation offered by the Government comes under inter-departmental correspondence. Hence, it does not constitute sufficient ground or cause for the condonation of delay. Vide *Spl. Dy. Collector v. Nawab, T. Yar Jung*[3]. *Revenue Divisional Officer v. T. Lakshminarayana*[4]*, S. M. Hadi Jaffery v. Spl. Dy. Collector*[5]*,* and *R. Janakirama Raju v. State of A. P*[6]*.,* The learned Subordinate Judge, therefore, was justified in not accepting the explanation offered by the Government for condonation of delay.

8. The learned Government Pleader contends that the lower Court has committed illegality in dismissing the I. A. No. 539 of 1983 holding that no useful purpose would be served even if the delay is condoned, as ultimately the suit has to be decreed since no petition is filed under Section 30, Artitration Act, within 30 days from the date of notice the learned Subordinate Judge has no jurisdiction to consider the ultimate result of the suit, while disposing of these two petitions.
9. As against this contention Sri Shankara Rao the learned counsel for the respondent plaintiff contends that the provisions of Order 9, Rule 13, Civil Procedure Code are not applicable to the proceedings under Arbitration Act much less to an *ex parte* decree passed by the learned Subordinate Judge.

10. In this case, the defendants have deliberately chosen to be absent and have chosen not to file written statement even after receiving notice of filing of the award, though several adjournments were taken by the learned Government Pleader for filing the same.

11. We think the contention of Sri Shankara rao that the provisions of Order 9, Rule 13, Civil Procedure Code are not applicable to the *ex parte* decree passed by the learned Subordinate Judge in terms of the award filed by the arbitrators, when the defendants did not choose to file written statements in spite of sufficient time being given, is well founded.

12. It admits of no doubt that if the petition under Section 5, Limitation Act, is allowed, then the petition, I. A. No. 539 of 1983 will have to be disposed of on merits and in such a case, the Court has to examine the question whether decree passed on an award filed by the arbitrators (sic).

[3] AIR 1973 And Pra 43
[4] AIR 1975 And Pra 109
[5](1975) 2 Andh WR 28
[6](1978) 2 Andh WR(HC) 7

13. When an award is passed in the Court, what the aggrieved party has to do is enunciated by Section 30 gives an opportunity to the aggrieved party to file an application under Section 30 for setting aside the award within 30 days from the date of service of the notice of filing of the award in the Court on the grounds mentioned therein and no appeal against such an order lies under Section 30 of the Act. If such a petition is not filed under Section 30, the Court has to pass a decree under Section 17 of the Act making the award the rule of the Court, irrespective of the fact whether the defendants do appear or do not appear and contest. Section 17 makes it mandatory on the part of the Court to pass judgment and decree in terms of the award as such a

decree can be pronounced even if the parties, cannot be treated as ex parte, especially when a petition under Section 30 of the Act for setting aside the award was not filed within 30 days from the date of service of the notice of filing Of the award in the Court. It is not an *ex parte* decree, the question of setting aside such a decree under Order 9, Rule 13 does not arise. Hence the petition filed under Order 9, Rule 13, Civil Procedure Code for setting aside the *ex parte* decree which was passed under Section 17, Arbitration Act, is not maintainable. This legal position is made clear by several High Courts and the Supreme Court. In *Ganeshmal v. S. Kesoram Cotton Mills*[7], this question was examined by Bachawat, J. thoroughly with reference to the case law on this aspect. In that case there is no service of notice of filing of the award in the Court on the defendants in the manner prescribed by law. The limitation for applying to set aside the award, therefore, never started to run and the decree was passed before the expiry of the time for applying to set aside the award and without complying with the mandatory provisions of Section 17, Arbitration Act. Under those circumstances the learned Judge observed :

> In my judgment in spite of Section 43 of the Arbitration Act and Section 141 of the Code strictly the provision of Order 9, Rule 13 does not apply to proceedings for setting aside of an *ex parte* decree passed under Section 17. In a suit there is plaintiff and defendant and Order 9, Rule 13 deals with them differently; strictly neither party to an award is a plaintiff or defendant and both parties are entitled to ask the Court to pronounce judgment according to the award. In a suit if the plaintiff does not appear no decree can be passed and if the defendant does not appear the plaintiff must prove his case. Under Section 17 a judgment must be pronounced and a decree must follow, if the conditions of Sections 14 and 17 are complied with. Such a decree even if pronounced in the absence of the parties cannot be said to be passed as *ex parte* so as to attract Order 9, Rule 13.....Order 9, Rule 13 enables the Court to set aside an *ex parte* decree in case where the summons was not duly served but it does not provide for a case where the decree under Section 17, Arbitration Act, is passed without complying with its mandatory provisions and before the expiry of the time for applying to set aside the award. The provision of Order 9, Rule 13 of the Code cannot be made applicable to the proceedings for setting aside a judgment pronounced under Section 17 of the Arbitration Act. In spite of Section 43, Arbitration Act, such provisions of the Code as are not consistent with the provisions of the Arbitration Act will not apply to the proceedings under the latter Act.

14. For taking this view the learned Judge relied upon the decision in *Raghunath Rai Dilsuk Rai v. Bridhi Chan Sri Lal*[8], and also *Subramaniam v.*

[7] AIR 1952 Cal10 [8] ILR 3 Pat 839

Vasudevan[9]. After enunciating the proposition of law as above, the learned Judge ultimately held in view of the infirmities from which the decree in that case has suffered as follows :-.

> "I have no doubt, however, that the principles of Order 9, Rule 13 should be followed and the judgment and the decree passed under Section 17 should be set aside where such decree was passed without duly giving the notice of the filing of the award or without allowing the time for applying to set aside the award to expire. In both cases the decree is irregularly passed and this Court sitting in revision will set aside such decree if passed by

> the Muffassil Court. In my judgment, if these are good grounds for revision they are equally good grounds for setting aside the *ex parte* decree on a summary application. It is settled law that the Court has the inherent power and duty to correct injustice and to set aside a judgment and order passed *ex parte* without notice to the party.....To obtain a judgment irregularly is a wrongful act and the party applying is entitled *ex debito* justitiae to set it aside. The Court has also inherent power to recall the previous order or decree if it is without jurisdiction. The Court has therefore power to set aside such judgment and decree."

15. A careful reading of the above ruling makes it clear that Bachawat, J. held in unambiguous terms that the principles of Order 9, Rule 13 will not be applicable to a proceeding for setting aside the judgment pronounced under Section 17, Arbitration Act, in spite of Section 43, Arbitration Act, and Section 141, Civil Procedure Code. Civil Procedure Code The learned Judge gave cogent reasons in support of his view. They are that in a civil suit there is plaintiff and defendant. According to the provisions of Civil Procedure Code if the plaintiff does not appear, the suit will be dismissed and no decree can be passed and if the defendant does not appear then the plaintiff will prove his case and an *ex parte* decree will be passed. Such an *ex parte* decree can be set aside under Order 9 Rule 13 if the defendant satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. But in a suit, which was filed for making the award a rule of the Court, neither party to the award is plaintiff or defendant and both parties are entitled to ask the Court to pronounce judgment according to the award. Under Section 17 of the Act judgment must be pronounced and a decree must follow if the conditions of Sections 14 and 17 are complied with. Such a decree even if pronounced in the absence of the parties cannot be said to be passed ex parte. When the decree cannot be said to be *ex parte* the question of applying the provisions of Order 9, Rule 13 for setting aside the *ex parte* decree does not arise.

16. But the learned Judge had taken into consideration the fact that the Court passed the decree under Section 17, Arbitration Act, without duly giving the notice of the filing of the award or without allowing the time for applying to set aside the award to expire. The learned Judge, therefore, felt that the decree was irregularly passed and the Court has no power or jurisdiction to pass such a decree contrary to the mandatory provisions of Section 17. Hence the learned Judge felt that the principles of Order 9, Rule 13 should be applied for setting aside the decree in exercise of the Court's revisional jurisdiction.

[9](1950) 1 Mad LJ 237

17. When the learned Judge declares that the principle of Order 9, Rule 13 should be followed for setting aside the decree passed under Section 17, Arbitration Act, if such a decree was passed without giving notice of the filing of the award or without allowing time prescribed under Article 119(b), Limitation Act, for setting aside the award to expire it should not be understood that the learned Judge has stated that the provisions of Order 9. Rule 13 are applicable to the proceedings for setting aside the *ex parte* decree passed under Section 17, Arbitration Act. There is a marked difference between the two expressions, namely the principles of Order 9. Rule 13 and the provisions of Order 9 Rule 13. The principles for the application of the provisions of Order 9. Rule 13 are (1) non-service of summons that disabled the defendant and (2) sufficient cause that prevented the defendant from appearing in the Court when the suit was called on for hearing. If

those principles are satisfied then the Court is bound to apply the provisions of Order 9, Rule 13 for setting aside the *ex parte* decree. The same principles namely the non-service of notice of the filing of the award in the Court will be applicable for setting aside the decree passed under Section 17 of the Act. It is therefore, clear that the Court can set aside the decree passed under Section 17 on the ground of non-service of notice of the filing of the award in the Court or on the ground that the decree was passed before the expiry of the time allowed by Article 119(b) for setting aside the award and this the Court can do in exercise of its revisional jurisdiction invoking the inherent powers conferred by Section 151. C.P.C though the provision of Order 9. Rule 13 cannot he invoked for setting aside such a decree.

18. In *Soorajmull v. Golden Fibre and Products*[10], S.C. Ghose J., followed the decision in *Ganeshmal v. Kesoram Cotton Mills (AIR 1952 Calcutta 10)* supra and held unequivocally that the provisions of Order 9. Rule 13. Civil Procedure Code do not apply to the *ex parte* decree passed under Section 17, Arbitration Act. The learned Judge observed that Order 9 deals with suits and Rule 13 deals with setting aside of *ex parte* decree passed in a suit. In an award case, both the plaintiff and the defendant are entitled to ask the Court to pronounce judgment in terms of the award. Section 17 makes it mandatory on the part of the Court to pass a judgment and decree in terms of the award in the circumstances specified in the said section. Under Section 17 a decree may be pronounced in the absence of parties even then it cannot be said that the decree has been passed ex parte.

19. The Division Bench of the Madras High Court in *Alvel Sales v. Dujadwala Industries*[11]. held that the decree passed by the Court under Section 17, Arbitration Act in the absence of defendant is not an *ex parte* decree at all and it is a decree which the Court is bound to pass under Section 17, Arbitration Act which appears to be rather mandatory in scope. The Bench observed that it therefore, appears to us that there is no scope for the contention that this is a case in which an *ex parte* decree ought to he set aside. Even otherwise the respondent had lost its rights to seek for setting aside the award, as under the Limitation Act the period had expired.

20. In *Rajeshwar Pd. v. Ambika Pd*[12]. the Division Bench of the Patna High Court took the same view by holding that where an award is given by the arbitrators on a reference under Section 21, Arbitration Act by all the parties concerned including the minor

[10] AIR 1969 Cal 381 [12] AIR 1956 Pat 28
[11] AIR 1978 Mad295

through his natural guardian the Court under Section 17, Arbitration Act must pass
a decree in terms of that award and no appeal lies from such a decree except on ground stated in that Section. Where a minor has any grievance against such a decree he can file an objection under Section 30, Arbitration Act or he may take other proper steps. Where, however, the father of the minor filed an objection under Section 30 only on his own behalf, although he represented the minor also the contention that the minor's application should be considered to be one under Section 30 so as to give him a right of appeal under Section 30 was not acceptable. Nor could it be said that the decree passed on award was an *ex parte* decree within the meaning of Order 9. R 13. Civil Procedure Code against the minor. Therefore an appeal would not lie against an order rejecting the application made on behalf of the minor to set aside the decree under Order 9, Rule 13, because there could be no appeal against the decree passed in terms of the award under Section 17, Arbitration Act.

21. In *S. S. Gruhanirman Sanstha v. Sree Ram Construction Co*[13]. the Division Bench of the Bombay High Court held that it is incumbent on the person challenging the award filed by the arbitrators in the Court to make an application under Section 30, Arbitration Act for setting aside the award within a period of 30 days from the date of the service of the notice of the award as prescibed by Article 119(b), Limitation Act. In that case it was urged by the learned counsel appearing for the appellants that the arbitrator had exceeded his jurisdiction in awarding the amount in excess of the claim of the respondents in their suit and that the arbitrator had failed to publish the award within the time prescribed by the terms of reference and as such the award is invalid and the application filed under Section 30, Arbitration Act or setting aside such an invalid award should be allowed even if it was filed beyond the period of limitation as prescribed by Section 119(b), Limitation Act. The Bench held that:

> "Assuming, therefore, that the award in the present case which was made by the arbitrator is invalid on the ground that it was made in excess of the terms of reference and that the arbitrator failed to publish the award within the time fixed by the terms of reference such a ground would be clearly covered by the words or is otherwise invalid" in clause (c), Section 30. Further, the ground being covered by the said clause, the remedy of the party lies in making an application for setting aside the award within the limitation prescribed under Article 119, Limitation Act. There is therefore, no scope for the argument that the Court can act suo motu and set aside the award on the ground of invalidity."

22. From this decision it is clear that the relevant Article under the Limitation Act is Article 11(b) which prescribed a period of limitation 30 days for an application to be filed under Section 30 to set aside an award or to get an award remitted for consideration and the starting point of the limitation was the date of service of the notice of filing of the award. It is therefore, clear that the parties have to apply within 30 days from the date of service of notice of filing of the award for setting aside the award or forgetting the award remitted for reconsideration.

23. The learned Judges took the view that notice was served on the appellants. But the

[13] AIR 1981 Bom 260

petition for setting aside the award being filed on June 14, 1978 it was clearly barred by limitation Then the appellants raised the contention that it was a case for condonation of delay as the administrator, who was in charge of the affairs of the society had no knowledge of the receipt of the notice of the filing of award. Since Kanekar was not examined the appellants' contention was not accepted by the learned Judges. The learned Judges, therefore, came to the conclusion that the appellants were negligent and were not interested in getting the award set aside.

24. The Supreme Court in *Madan Lal v. Sunder Lal*[14] held that if a party wants an award to be set aside on any of the grounds mentioned in Section 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Article 158, Limitation Act (old). If no such application is made the award cannot be set aside on any of the grounds specified in Section 30 of the Act. It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection to an award in the nature of a written statement may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an

application to set aside the award, for if it is so treated it will be barred by limitation.

25. The Supreme Court of course did not deal with the question whether the provisions of Order 9 Rule 13 C P. C apply to the decree passed under Section 17 of the Act. But the Supreme Court clearly laid down that the decree of the Court making the award a rule of the Court becomes final when an application is not made on any of the grounds mentioned in Section 30, Arbitration Act within 30 days of the date of service of notice of filing of the award as provided in Article 119(b), Limitation Act and the above decisions of the Madras High Court as well as the Calcutta and Patna High Courts clearly laid down that the provisions of Order 9 Rule 13 Civil Procedure Code are not applicable to the decree passed under Section 17, Arbitration Act.

26. But the learned Government Pleader relied upon a judgment of a learned Single Judge of the Rajasthan High Court in *Ram Chander v. Jamna Shankar*[15]. The learned Judge held in para 17 :

> ".....I am in respectful agreement with the view expressed in AIR 1952 Calcutta 10 that the principles of Order 9 Rule 13 should be followed and the judgment and the decree passed under Section 17 should be set aside on a summary application where such decree was passed without duly giving the notice of the filing of the award or without allowing the time for applying to set aside the award to expire. The Court has inherent power and duty to correct injustice and to set aside a judgment and order passed *ex parte* without notice to the interested parties."

27. In the case before the learned Judge, there was no notice of filing of the award. Hence the defendant had no opportunity of filing objections. Hence the learned Judge felt that the decree is illegal and contrary to the mandatory provisions of Sections 14 and 17 of the Act and set aside the *ex parte* decree passed under Section 17 of the Act in exercise of revisional jurisdiction following the above cited decision of the Calcutta High Court. The

[14] AIR 1967 SC 1233

[15] AIR 1962 Raj 12

learned Judge of the Rajasthan High Court did not say that the provisions of Order 9 Rule 13 apply to the proceedings for setting aside an *ex parte* decree passed under Section 17. He merely stated" however the principles of Order 9 Rule 13, Civil Procedure Code should be followed in such cases and the judgment and the decree passed under Section 17 should be set aside on a summary application where such decree was passed without duly giving the notice of the filing of the award or without allowing the time for applying to set aside the award to expire. This decision, therefore, does not render any assistance to the contention of the learned Government Pleader.

28. The learned Judge based his view on the fact that the notice of the filing of the award was not given. But in the case on hand the impugned decree had not suffered from any infirmity since the notice of the filing of the award was given to the defendants and the learned Government Pleader put in appearance on their behalf and took several adjournments for filing written statement. Hence the case before us is not the one where it can be said that notice of the filing of award was not served on the parties or the defendants. We, therefore, hold that the decisions of the Rajasthan High Court will not apply to the case on hand.

29. Having regard to the reasons given above, we have no hesitation to hold that the provisions of Order 9 Rule 13, Civil Procedure Code will not apply to the decree passed under Section 17, Arbitration Act, in terms of the award filed in the Court by the arbitrators. We are not inclined to express any view in these proceedings whether the decree passed under Section 17, Arbitration Act, is invalid and should be set aside, as that is the subject- matter of an unnumbered revision.

30. In result, the revision as well as the C. M. A. are dismissed but without costs.

31. The learned Government Pleader made an oral application for leave to appeal to the Supreme Court. We do not consider that the case involves any substantial question of law of general importance to be decided by the Supreme Court. Oral application is accordingly refused.
Revision dismissed.