

Court No. - 9

Case :- FIRST APPEAL FROM ORDER No. - 308 of 2018

Appellant :- Shobha Devi

Respondent :- Bharat Heavy Electricals Ltd. And 6 Others

Counsel for Appellant :- Ashok Shankar Bhatnagar

Counsel for Respondent :- Pranjal Mehrotra, Rishikesh Tripathi, Sarvesh Kumar Mishra

Hon'ble Rohit Ranjan Agarwal, J.

1. Heard Sri Ashok Kumar Bhatnagar, learned counsel for the appellant, Sri Ashish Kumar Gupta, Advocate, holding brief of Sri Pranjal Mehrotra, learned counsel for respondents No.1 and 2 and Sri Sarvesh Kumar Mishra, learned counsel for respondent No.3.

2. This appeal has been filed under Section 37 of Arbitration and Conciliation Act, 1996 (hereinafter called as "Act of 1996") assailing the order passed by Court below dated 27.10.2017 in Arbitration Case No.6 of 2016 rejecting the application 3-B filed by the applicant.

3. The facts in brief are that one Ganesh Prasad had married Ramkali respondent No.3. As matrimonial dispute arose between Ganesh Prasad and Ramkali, an application under Section 13 of Hindu Marriage Act was filed which was registered as Case No.42 of 1981. An ex parte decree was granted on 31.01.1982 in favour of late Ganesh Prasad. Thereafter Ganesh Prasad is said to have married the appellant Shobha Devi, who was earlier known as Shammo Begum. After the death of Ganesh Prasad, dispute arose between the appellant and respondent No.3 for the post death benefit of Ganesh Prasad, who was an employee of Bharat Heavy Electricals Limited (BHEL).

4. The matter was referred to arbitration and Regional Provident Fund Commissioner, Kanpur Region made the award on 17.10.2016 holding that

respondent No.3 Ramkali is the first and legally wedded wife of late Ganesh Prasad and her status never changed till the death of Ganesh Prasad. She was held entitled for all the retiral dues payable to Ganesh Prasad. Aggrieved by the award, an application under Section 34 of the Act of 1996 was filed by the appellant before District Judge, Jhansi on 21.11.2016.

5. During the said proceedings, respondent No.3 had appeared and raised an objection that compliance of sub-section (5) of Section 34 of the Act of 1996 was not made by the appellant by issuing notice prior to the filing of application under Section 34 of the Act of 1996. An application 3-B was filed on 06.07.2017 by the appellant which was dismissed vide order impugned dated 27.10.2017 hence the present appeal.

6. Learned counsel for the appellant submitted that the amendment was made in the Act of 1996 w.e.f. 23.10.2015. According to him, application under Section 34 was filed in the year 2016 and respondent No.3 had put in appearance and it was on the objection of the contesting respondent that application 3B was moved disclosing that prior notice was given to the respondent before filing application under Section 34(5) of the Act of 1996 and compliance of mandatory provision has been made. Reliance has been placed upon decision of Apex Court rendered in case of **State of Bihar & Ors. Vs. Bihar Rajya Bhumi Vikas Bank Samiti (2018) 9 SCC 472**. Relevant para 25 of the judgment is extracted hereas under:

"25. We come now to some of the High Court judgments. The High Courts of Patna [Bihar Rajya Bhumi Vikas Bank Samiti v. State of Bihar, 2016 SCC OnLine Pat 10104], Shamsudeen v. Shreeram Transport Finance Co. Ltd., 2016 SCC OnLine Ker 23728, Madhava Hytech Engineers (P) Ltd. v. Executive Engineers, 2017 SCC OnLine HP 2212, Machine Tool India Ltd. v. Splendor Buildwell (P) Ltd., 2018 SCC OnLine Del 9551, and Union of India v. Durga Krishna Store (P) Ltd., 2018 SCC OnLine Gau 907 have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80 CPC have been drawn to reach the same result. On the other hand, in Global Aviation Services (P) Ltd. v. Airport Authority of India 2018 SCC OnLine Bom 233, the Bombay High Court, in answering Question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because

no consequence has been provided for breach of the time-limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under : (SCC OnLine Bom para 133)

"133. Insofar as the submission of the learned counsel for the respondent that if Section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in the Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights of a party to challenge an award under Section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of the arbitration petition."

The aforesaid judgment has been followed by recent judgments of the High Courts of Bombay in Maharashtra State Road Development Corpn. Ltd. v. Simplex Gayatri Consortium, 2018 SCC OnLine Bom 805 and Calcutta in Srei Infrastructure Finance Ltd. v. Candor Gurgaon Two Developers and Projects (P) Ltd., 2018 SCC OnLine Cal 5606."

7. Learned counsel appearing for respondent submitted that mandatory provision of sub-section (5) of Section 34 has not been complied with and no notice was issued before filing of the objection under Section 34 of the Act of 1996. He however conceded the fact that it was during the hearing of Section 34 application that objection was raised pursuant to which application 3B was filed by the appellant before the Court below.

8. I have heard the learned counsel for the parties and perused the material on record.

9. The short issue before the Court is that whether the mandatory provision of sub-section (5) of Section 34 of the Act of 1996 was complied with by the appellant before filing of application under Section 34 of the Act of 1996 or not?

10. The question is no more res integra and it has attained finality by the decision of Apex Court rendered in the case of **Bihar Rajya Bhumi Vikas Bank Samiti (supra)** wherein the Hon'ble Apex Court has held that the provision of Section

34(5) are directory in nature and not mandatory. Further, in the present case when the objections were raised by contesting respondent No.3, the application 3-B was moved by the appellant on 06.7.2017 disclosing the fact that prior notice, as mandated under sub-section (5) of Section 34 of Act of 1996 was given to the respondent before filing of the application under Section 34 of the Act of 1996.

11. Considering the fact and circumstances of the case and after hearing counsel for the parties, this Court finds that as the Apex Court has already held the provision of sub-section (5) of Section 34 of the Act of 1996 to be directory in nature and moreover the contesting respondent No.3 had appeared before the Court after filing of the application under Section 34 of the Act of 1996 and has been contesting the matter and it was only on the objection raised by respondent No.3 that application 3-B was filed, this Court finds that sufficient compliance has been done and the order passed by Court below on 27.10.2017 is unsustainable in the eyes of law and the same is hereby set aside.

12. The matter is remitted back to the District Judge, Jhansi, who will decide the application filed under Section 34 of the Act of 1996 after hearing both the parties, as expeditiously as possible preferably within a period of six months from the date of production of certified copy of this order before it.

13. The appeal stands disposed of.

Order Date :- 6.11.2023

Kushal