

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.386 of 2012

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1. Smt. Tileshara Devi W/O Ramjee Singh R/O Village- Mahabirganj
Sohasa, P.O.- Barahuti Kala, P.S.- Kochas (Parsathua), District- Rohtas

.... Appellant/s

Versus

1. Rajgrih Singh S/O Late Megha Singh R/O Village- Araruwan, P.S.-
Kargahar, District- Rohtas
2. Rajeshwar Singh S/O Late Megha Singh R/O Village- Araruwan, P.S.-
Kargahar, District- Rohtas
3. Shiwanand Singh S/O Late Megha Singh R/O Village- Araruwan, P.S.-
Kargahar, District- Rohtas
4. Rajendra Singh S/O Ram Krit Singh R/O Village- Araruwan, P.S.-
Kargahar, District- Rohtas

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Raj Kishore Prasad Singh, Adv.

For the Respondent/s : Mr. Rajni Kant Singh, App.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR
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ORAL ORDER

9 08-04-2016 Appellant has preferred instant appeal purported to be under Section 299 of the Indian Succession Act against the order dated 02.06.2010 passed by District Judge, Rohtas at Sasaram in Misc. Case No. 75/2001 whereby and whereunder issued letter of administration.

Respondent/propounder filed probate case no. 22/99 before the District Judge to grant probate (ought to be letter of Administration) relating to the property on 1/4/99 belonging to late Bhagwat Singh who, as disclosed, had executed registered deed of 'Will' dated 01.12.95 after death of executor Bhagwat

Singh on 24.09.98.

Deceased Bhagwat Singh, executor, died leaving behind his daughters Mostt M. Kunwar as well as Smt. Tileslara Devi who, after their appearance, objected simultaneously, as has been perceived during course of argument also filed partition suit whereupon converted into Title suit.

While both the proceedings were independently sailed at the instance of respective parties before different Courts, they both entered into an agreement nominating arbitrators to sort out their differences and further, they bound themselves with the ultimate finding going to be made by the arbitrator whereupon, a joint prayer was made in probate case no. 22/99 as well as in the partition suit and the respective courts in terms of agreement referred to the arbitrator on 06.12.2008. Consequently, on 13.04.2009 award was presented and on 18.04.2009 a report was called for from the Sheristedar. On 27.04.2009 Tileslara Devi appeared and filed a petition for grant of an adjournment to file an objection whereupon on 12.05.2009 objection was filed.

It is also evident from the order-sheet that none appeared on behalf of O.P. Subsequently on account thereof, vide order dated 23.11.2009 aforesaid award was accepted and was made rule of the Court. Thereafter, on 16.03.2010 review was filed and the

same was dismissed on 17.05.2010. Then thereafter, as is evident the parties have contested under writ by drawing C.W.J.C. no. 11643/2010 as well as L.P.A. 433/2012. L.P.A. was disposed of vide order dated 03.04.2012 observing that same would not be maintainable against an order passed under Article 227 of the Constitution of India. However, a liberty was given in following way:-

“It is observed that in the event the appellant-writ petitioner files appeal against the order of grant of probate in Probate Case No. 22 of 1990, the appellant shall be at liberty to raise all possible grounds available to her including the grounds of challenge raised in the present Appeal and the writ petition”.

During midst thereof, vide order dated 02.06.2010 the Court has granted letter of Administration under Form VII in terms of Section 290 of the Indian Succession Act, the subject matter of instant appeal.

Heard learned counsel for the appellant as well as learned counsel for the respondents.

During course of appreciating the rival contention, it is evident that learned lower Court had accepted the award only on the absence of the appellant though an objection was at their end and further, her presence was since before. Therefore, while passing an order dated 23.11.2009 even in absence of appellant,

having availability of the objection on the record it was incumbent upon learned lower Court to have properly appreciated the same.

Learned counsel for the respondents happens to be fair in considering with principle laid down by the Hon'ble Apex Court in Hindustan Copper Limited Vs. NICCO Corporation Limited reported in (2009) 6 SCC page 69 and further, for better appreciation para 11 to 14 thereof is quoted below:-

“11. Section 37 of the Act on which emphasis was given by the counsel for the appellant applies only when the preconditions mentioned therein are satisfied. The submission of the learned counsel appearing for the appellant is that since the learned Single Judge refused to set aside the arbitration award, therefore an appeal could be preferred by the appellant as envisaged under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996.

12. We are again unable to persuade ourselves to accept the aforesaid contention of the counsel appearing for the appellant for the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, was dismissed on the ground of maintainability of the petition and not on the ground by refusing to set aside the arbitration award.

13. Being faced with the aforesaid situation, the counsel appearing for the appellant states that he would not like to delay the proceeding and rather would desire that the proceedings are expedited. In terms of his statement and prayer and also in view of the submission of the counsel appearing for the respondent who has submitted that the

matter requires urgent attention of the court, we remit the matter and the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, filed by the appellant to the civil court competent to hear and decide the same as envisaged under Section 2(1)(e) of the Act.

14. The petition under Section 34 of the Act filed by the appellant shall now listed before the District Judge, East Singhbhum, where the parties shall appear on 29.5.2009, when the District Judge shall allot the petition under Section 34 to an appropriate court in terms of the provision of Section 2(1)(e) of the Act.”

Though an order passed under Section 34 of the Arbitration and Conciliation Act, 1996 is appellable under Section 37 of the Arbitration and Conciliation Act, but on account of piquant situation having arisen on account of order dated 23.11.2009 as the same was passed without considering the objection which was pending since before and further having the present proceeding under the Indian Succession Act whereunder acceptability of application of Arbitration & Conciliation Act 1996 also requires proper appreciation more particularly in the background of principle laid down in (1993)2 SCC 507 and further, for the purpose of doing substantial justice, the order impugned is set aside.

In likewise manner, though the order dated 23.11.2009 has not been challenged, but the order dated 02.06.2010 happens

to be an outcome of order dated 23.11.2009 and further happens to be inseparable in the eye of law, in the aforesaid background the same is also set aside.

Appeal is allowed. Matter is remitted back to learned lower Court with a direction to proceed afresh in the matter considering the objection having on behalf of the appellant dated 12.05.2009 along with the fact whether in the facts and circumstances of the case, option of the parties with regard to referring the matter to the arbitrator would be entertainable, and will pass appropriate order in accordance with law. Both the parties are directed to be present before the learned lower Court. For better appreciation, it is also directed that this matter be heard by the District Judge himself.

In the facts and circumstances of the case, parties will bear their own costs.

(Aditya Kumar Trivedi, J.)

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