

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.636 of 1985
(Against the judgment and decree dated 22.08.1985 passed by
Subordinate Judge, Sitamarhi in Partition Suit No.36 of 1980)

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Ajay Kumar & Ors.

.... Defendants-Appellants

Versus

Rajesh Kumar & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. Vaidehi Raman Prasad Singh, Advocate

For the Respondent/s : Mr. Laxmi Narayan Das, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date:01-08-2017

1. The defendants have filed this First Appeal under Section 96 of the Code of Civil Procedure against the judgment and decree dated 22.08.1985 passed by Subordinate Judge, Sitamarhi in Partition Suit No.36 of 1980.

2. The plaintiff-respondent filed the aforesaid Partition Suit No.36 of 1980 claiming partition of the suit property. During the pendency of the aforesaid partition suit both the parties jointly filed an application on 26.07.1984 praying for referring their dispute to the Arbitrator named by them Sri Nagendra Sah. The said application was heard by the court and by terms of order dated 26.11.1984, after hearing both the parties, referred the dispute of the parties regarding the subject matter of the suit to the Arbitrator, Nagendra Sah. The court also directed the parties to file the necessary



documents for handing over the same to the Arbitrator. After entering into reference, the Arbitrator made award which was filed by the Arbitrator in the court on 13.06.1985. On which date, the defendant was present. The court directed that the parties will be heard on the report on 08.07.1985. On which date, again the defendant No.1 was present. No objection was filed by any one and ultimately after next two dates, on 22.08.1985, the court below accepted the award and directed to prepare decree.

3. The learned counsel, Mr. Vaidehi Raman Prasad Singh for the appellants raised many grounds challenging the illegality of the award and the order passed by the trial court. However, the learned counsel, Mr. L.N. Das appearing on behalf of the respondents raised a preliminary objection regarding the maintainability of this first appeal under Section 96 of the Code of Civil Procedure. According to the learned counsel, Mr. Das, neither this first appeal under Section 96 C.P.C. nor miscellaneous appeal under Section 39 of the Arbitration Act is maintainable because no objection to the arbitral award was filed by the appellants.

4. The learned counsel for the appellants submitted that because no notice was served on the appellants under Section 14(2) of the Arbitration Act, 1940, objection could not be filed. In such circumstances, the court passing the decree had the jurisdiction



to look into the award and examine the correctness and otherwise for the same but the court below did not consider the same. Therefore, when the decree has been passed under Section 17 of the Arbitration Act, 1940, this appeal is maintainable against the decree.

5. So far interlocutory application Nos.8367 of 2014, 587 of 2016 and 3039 of 2016 are concerned, these applications have been filed by the parties seeking permission to sell. Likewise, interlocutory application Nos.1291 of 2016 and 1886 of 2016 have been filed for initiating contempt proceeding under Order 39 Rule 2A C.P.C. Because the appeal is being heard, both the parties did not press their respective interlocutory applications. Therefore, all these interlocutory applications are hereby dismissed as not pressed. So far I.A. No.4411 of 2016 is concerned, it appears that all the legal representatives of the deceased respondent No.2 are already on record except respondent No.1 who is sought to be added as respondent. There is no objection on behalf of the respondent. Therefore, this application is allowed and one son of the respondent No.2 namely Mithilesh Kumar is added as party-respondent. This interlocutory application is thus allowed.

6. In view of the above submission of the learned counsels for the parties, the point arises for consideration is as to “whether this first appeal is maintainable under Section 96 C.P.C. or



not and if it is not maintainable whether appeal under Section 39 of the Arbitration Act, 1940 is maintainable or not?”

7. From perusal of the order sheet of the court below, it appears that on 26.11.1984, the joint application filed by the parties for referring the matter to the Arbitrator was pressed. The court below after hearing the parties referred the matter to the Arbitrator. Now therefore, when in presence of the parties the matter was referred to the Arbitrator, the parties were knowing the fact that the Arbitrator will now enter into reference. In such circumstances, the notice by Arbitrator was not required. However, the argument of the appellant is that after filing the award, no notice was issued by the court. From perusal of order dated 13.06.1985, it appears that when the defendant was present, the award was filed in the court and the court adjourned for hearing on the award to 08.07.1985. On the said date also, the defendant No.1-appellant was present in the court. However, since no objection was filed within one month, as required under Article 119(b) of the Limitation Act, the learned court below on 22.08.1985 accepted the award.

8. It is admitted fact that objection was not raised by the appellant and the only ground is no notice was served on him.

9. It is settled principles of law that Arbitration Act, 1940 is a self-contained complete code. The appeals are filed under



the said Act.

10. So far the points raised by the learned counsel for the appellants that no notice was served, therefore, objection could not be filed within time is concerned, it may be mentioned here that the Hon'ble Supreme Court in **AIR 1962 Supreme Court 666(Nilkanta Sidramappa Ningashetti v. Kashinath Somanna Ningashetti and others)** has held that oral intimation of filing award to the pleader of party is "service of notice". In the present case, since the defendant-appellant was himself present before the court on the date of filing of the award and subsequent date, therefore, there is no question of further issuance of notice in terms of Section 14(2) arises.

11. The Hon'ble Supreme Court in the aforesaid case has also held that when no party filed an objection praying for the setting aside of the award, no question of refusing to set it aside can arise and, therefore, no appeal was maintainable under Section 39(1)(vi) of the Arbitration Act which allows an appeal against an order refusing to set aside an award.

12. In view of the settled proposition of law laid down by the Supreme Court when objection was not filed by any party, the court accepted the award and, therefore, in no case it can be said that the court refused to set aside the award. Thus, the appeal under Section 39 is not maintainable. It appears that in the said decision of



the Supreme Court also partition suit was filed and the matter was referred to the Arbitrator. The Arbitrator filed the award on February, 1948. The Supreme Court found that objection was not raised to the award and the judgment was passed according to the award and decree was prepared as in the present case at our hand. In the said case also, non-service of notice under Section 14(2) was raised. The Hon'ble Supreme Court as stated above held that even oral information is notice and information to Advocate is also notice to the party and further held that since no objection was filed, the appeal is not maintainable. In that case, appeal was filed under Section 39(1)(vi) of the Arbitration Act.

13. Now, the question will be, if the appeal will not maintainable then according to the decision of the Supreme Court whether this first appeal will be maintainable? The answer will be no. There is no provision in Arbitration Act, 1940, when the court will refuse to set aside the award then appeal will lie under Section 39 and if the award is accepted and judgment is passed in terms thereof appeal will lie under Section 96 of the Code of Civil Procedure. Section 39 of the Arbitration Act, 1940 in unambiguous terms provide that an appeal shall lie from the following orders passed under this Act and from no others..... . Therefore, appeal will lie if the order is covered by Section 39(1)(vi) only. Because appeal is not maintainable



under Section 39, it cannot be said that appeal is maintainable under Section 96 of the C.P.C. In my opinion, therefore, the decision of the Supreme Court in the case of Nilkanta Sidramappa Ningashetti (supra) fully covers the present case. Thus, I find that neither this first appeal is maintainable nor appeal under Section 39 of the Arbitration Act is maintainable.

14. So far the arguments advanced by the learned counsel for the appellants on the merit are concerned, when the appeal is not maintainable, there is no question of deciding the appeal on merit arises.

15. Thus, this First Appeal is dismissed.

(Mungeshwar Sahoo, J)

Saurabh/-

AFR/NAFR	NAFR
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