

Superintending Engineer And Ors vs B. Subba Reddy on 26 April, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1747, 1999 (4) SCC 423, 1999 AIR SCW 1479, 1999 (2) UJ (SC) 881, 1999 (2) ALL CJ 1465, 1999 (2) ARBI LR 304, 1999 (3) SCALE 55, 1999 (3) LRI 62, 1999 (4) ADSC 162, (1999) 2 PUN LR 585, 1999 ADSC 4 162, 1999 ALL CJ 2 1465, 1999 (122) PUN LR 585, 1999 (5) SRJ 330, 1999 UJ(SC) 2 881, (1999) 3 JT 311 (SC), 1999 (3) JT 311, (1999) 4 CIVLJ 610, (1999) 2 MAD LW 629, (1999) 2 MAH LJ 858, (1999) 2 MPLJ 187, (1999) 2 ARBILR 304, (1999) 4 SUPREME 386, (1999) 4 RECCIVR 708, (1999) 3 SCALE 55, (1999) 2 CURCC 127, (1999) 4 ANDHLD 38

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Bench: D.P. Wadhwa, N. Santosh Hegde

CASE NO.:

Appeal (civil) 451-58 of 1994

PETITIONER:

SUPERINTENDING ENGINEER AND ORS.

RESPONDENT:

B. SUBBA REDDY

DATE OF JUDGMENT: 26/04/1999

BENCH:

D.P. WADHWA & N. SANTOSH HEGDE

JUDGMENT:

JUDGMENT 1999 (2) SCR 880 The Judgment of the Court was delivered by D.P. WADHWA, J. This appeal is against the judgment dated December 23, 1992 of a Division Bench of the Andhra Pradesh High Court in proceedings arising out of the Arbitration Act, 1940 (for short, the 'Act') where the High Court made the award as given by the arbitrator, rule of the court. High Court dismissed the appeal filed by the Superintending Engineer, the same appellant as now before us and allowed the cross-objections of the respondents-contractor.

Two objections have been raised by Mrs. K. Amareshwari, Senior Advocate appearing for the appellant : (1) cross-objections are not maintainable under Section 41 of the Act; and (2) the arbitrator could not award interest for the period prior to reference of disputes to him. Not only that the arbitrator awarded interest over interest which he had no authority to do.

An agreement was entered into between the appellant and the respondent For execution of the work called "providing lining to bet and side slopes of Pamidipadu Branch Canal of N.S. Canals from K.M. 0-0-008 to 1-00-004 KM", four separate agreements were entered into. As is usual in such contracts, disputes arose and these were referred to sole arbitrator who gave separate awards dated April 18, 1986 in respect of each of the agreements as under:-

SI. No. of agreement Amount awarded

1. A.S.. No. 8/SE, dated 20-5-82 Rs. 3,73,486 + final Bill, withheld amounts and damages.

2. A.S. No.9/SE, dated 20.5.82 Rs. 4,08,377 + final Bill, withheld amounts and damages.

3. A.S. No. 10/SE dated 20.5. 82 work not executed) Rs. 1,23,250 + E.M.D., Bank Guarantee and damages.

4. A.S. No. 11/SE, dated 20.5.82" (work not executed) Rs.

1,23,250 + E.M.D., Bank Guarantee and damages.

At the same time, the award also directed payment of interest at the rate of 18% per annum on the amounts so awarded.

To understand the rival contentions; we may refer to one of the awards in agreement No. 11/SE (serial No. 4 above). The arbitrator allowed five claims of the respondents and these are :

SI. No. Claims Amount claimed Amount awarded
1 Towards loss of advances to labour Rs. 40,000 Rs. 40,000
2 Towards loss of advance on machinery and crew Rs. 30,000 Rs. 20,000

3.- Towards over-head charges Rs. 10,000 Rs.5,000
4 Loss of Profit Rs. 40,000 Rs.20,000

5. Damages towards delay in payments under four claims Rs. 28,800 Rs. 21,600 Rs. 7,200 and Rs. 28,800 Rs. 38,250
Mr. Amareshwari did not challenge award on claims 1,2,3 and 4. She said claim No. 5 was inadmissible. We may note as to how the arbitrator arrived at the figure of Rs. 38,250 under claim No. 5. He held that a total amount of claims allowed under claims 1,2, 3 and 4 worked out to Rs. 85,000. The date of completion of the contract was 21.10.1982. The date of reference of disputes was 21.10.1985. He awarded interest as measure of damages at the rate of 15% per annum on the amount of Rs. 85,000 for three years from 21.10.1982 till the date of reference, i.e., 21.10.1985, The arbitrator further gave interest to the respondent at the rate of 18% per annum on the total amount of award of Rs. 85,000 E.M.D.

(Earnest Money Deposit), E.G. (Bank Guarantee) and Rs. 38,250 (being damages), from the date of reference till the date of the actual payment or the decree whichever is earlier.

We find that under claim No, 5 what the arbitrator has given though in the shape of damages is in fact interest on the amount of Rs. 85,000 for a period prior to the date of reference of disputes to him. The amount of Rs. 38,250 is nothing but interest for a period prior to the date of reference of disputes to him. Interest for a period prior to the reference could be awarded only if there was an agreement or it was allowable under the Interest Act, 1978, There is nothing on the record to show as to how the respondent could claim interest whether under the agreement or under the Interest Act By giving the name of damages, when, in fact it is claim of interest it cannot be permitted. Award of Rs. 38,250 as damages has to be set aside.

In view of the decision of this Court in Secretary, Irrigation Department, Government of Orissa v, G C. Roy, [1992] 1 SCG 508; Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir, AIR (1992) SC 2192, and the latest being State of Orissa v. B.N. Agarwalla, [1997] 2 SCC 469, the arbitrator could award interest both pendant lite and future which he gave at the rate of 18% per annum.

When the matter was pending before the Principal Subordinate Judge, he reduced the award of interest from 18% per annum to 12% per annum. Otherwise he made all the four awards rule of the court and passed decrees in terms thereof. The respondent did not challenge the grant of interest at the lower rate of 12% per annum by the Principal Subordinate Judge by Filing any appeal against his judgment making the awards rule of law. It was the appellant who appealed to the High Court against the judgment of the Principal Subordinate Judge. When notice of appeal was served on the respondent, he filed cross-objections under Order 41 Rule 22 of the Code of Civil Procedure (for short, the 'Code') challenging the judgment of the Principal Subordinate Judge whereby the award of interest was interfered with. The High Court while dismissing the appeals allowed the cross-objections and restored the award of interest at the rate of 18% per annum as given by the arbitrator. This, now the appellant says, High Court could not do as cross-objections were not competent in appeal filed by the appellant under Section 39 of the Act. Respondent, however, says that since provisions of the Code are applicable to the appeal filed under Section 39 of the Act, cross objection filed under Order 41 Rule 22 is maintainable. Sections 39 and 41 of the Act and provisions of Order 41 Rule 22 of the Code are as under :

"Arbitration Act

39. Appealable orders:- (I) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order. An order-

(i) superseding an arbitration;

(ii) on an award stated in the form of a special case;

(iii) modifying or correcting an award;

(iv) filing of refusing to file an arbitration agreement; (V) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(vi) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

41. Procedure and powers of Court- Subject to the provisions of this Act and of rules made thereunder-

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court and to all appeals, under this Act; and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters, Code of Civil Procedure

22. Upon hearing respondent may object to decree as if he had preferred separate appeal.-(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation.-A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may under this rule, file cross-objection in respect of the decree in so far as it is based on that finding notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

(2) Form of objection and provisions applicable thereto.-Such cross- objection shall be in the form of a memorandum, and the provisions of Rule I, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objections so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule."

Court fee is payable on cross-objection as is payable on appeal.

It was contended by Mrs. Amareshwari that Section 41 of the Act did not confer any substantive right on the respondent to file cross-objection and it is only the procedure of the Code which is made applicable while dealing with the appeal filed under Section 39 of the Act. As to what is the scope of cross-objection, whether it is a substantive right or merely procedural, we may refer to some of the decisions cited at the Bar.

In *Sahadu Gangaram Bhagade v. Special Deputy Collector. Ahmadnagar & Anr.*, [1970] 1 SCC 685, this Court was considering the question of nature of cross-objections in the context of payment of court fee under the Bombay Court Fees Act, 1959, It was submitted that Article 3 of Schedule 1 of the said Act was inapplicable because that article referred to "plaint, application or petition (including memorandum of appeal), to set aside or modify any award otherwise than under the Arbitration Act, 1940" and that no court fee was payable on cross-objections. This Court held as under :

"Before Article 3 of Schedule 1 can be attracted, there must be (1) a plaint, application or petition (including a memorandum of appeal);

(2) in that plaint, application Or petition (including memorandum of appeal), there must be a prayer to set aside or modify any award; and (3) the award in question must not be one under the Arbitration Act, 1940.

There is no dispute that the proceedings with which we are concerned in this case fulfil two out of the three requirements enumerated above. The award concerned in the proceedings is not one made under the Arbitration Act, 1940 and through his cross-objection the appellant seeks to get the award modified. The only point in controversy is whether the cross- objection filed by the appellant can be considered as "application or petition" within the meaning of Article 3 of Schedule 1. The words in the bracket "including memorandum of appeal" in our opinion refer to the word 'petition' immediately preceding those words. In other words the word 'petition' includes the memorandum

of appeal as well. The question is whether a cross-objection filed by a respondent in an appeal can be considered as a memorandum of appeal. We have no doubt that it is a memorandum of appeal in substance though not in form. It is a right given to a respondent in an appeal to challenge the order under appeal to the extent he is aggrieved by that order. The memorandum of cross-objection is but one form of appeal. It takes the place of a cross-appeal. It is true that while Article 1 of Schedule 1 refers to 'cross-objection', Article 3 of that Schedule does not refer to cross-objection as such but that in our opinion make no difference. It is only an inartistic drafting."

In *Hakam Singh v. M/s. Gammon (India) Ltd*, [1971] 1 SCC 286, the appellant was aggrieved by the order of the Allahabad High Court directing that a petition filed under Section 20 of the Arbitration Act, 1940 in a subordinate court be returned to him for presentation to the proper court. This Court upheld the order of the High Court and said, with reference to Section 41 of the Act, that the Code in its entirety applied to proceedings under that Act and that the jurisdiction of the courts under the Act to entertain a proceeding for filing an award was accordingly governed by the provisions of the Code.

In *N. Jqyaram Reddy & Anr. v. Revenue Divisional Officer and Land Acquisition Officer, Kurnool*, [1979] 3 SCC 578, this Court was considering the nature of cross-appeals and cross-objections. It said:

"Cross-appeal and cross-objections provide two different remedies for the same purpose and that is why under Order 41, Rule 12, cross-objections can be preferred in respect of such points on which that party could have preferred an appeal. If such be the position of cross-objections and cross-appeal a differentiation in the matter of their treatment under Rules 3 and 4 cannot be justified merely on the ground that in case of cross-objections they form part of the same record while cross-appeals are two independent proceedings."

"To say that cross-appeals are independent of each is to overlook the obvious position which parties adopt in cross-appeals. Interdependence of cross-appeals is the same as interdependence appeal and cross-objections because as in the case of appeal and cross-objections a decision with regard to appeal would directly impinge upon the decision in cross-objections and vice versa. Indubitably the decision in one of the cross-appeals would directly impinge upon the decision in the other because both ultimately arise from the same decree. This is really the interdependence of cross-appeals and it is impossible to distinguish cross-appeals from appeal and cross-objections".

"This Court then said that the cases which have taken the view that the view in cross-appeals the position is different than the one in appeal and cross-objections do not proceed on any discernible legal principle. Nor can they be explained by any demonstrable legal principle but in fact they run counter to the established legal principle."

In *M/s. H.M. Kamaluddin Ansari & Co. v. Union of India & Ors.*, [1983] 4 SCC 417, this Court was again considering the ambit and scope of Section 41 of the Arbitration Act. It said:

"The appellant in the instant case took the stand that there was no concluded contract between the parties including arbitration. Therefore, the order of injunction passed in the instant case could not be for the purpose of and in relation to arbitration proceedings. Faced with this difficulty Shri S ,N. Kaicker, learned counsel for the appellant, fell back upon clause (a) of Section 41 to content that clause (a) makes the Code of Civil Procedure applicable to all proceedings before the court and to all appeals under the Act and, therefore, the appellant was entitled to invoke Order 39 of the Code to get an injunction order even if the conditions of clause (b) of Section 41 were not satisfied. We are afraid this contention cannot be accepted.

Clause (a) of Section 41 makes only the procedural rules of the Code of Civil Procedure applicable to the proceedings in court under the Arbitration Act. This clause does not authorise the court to pass an order of injunction. The power is conferred by clause (b) of Section 41. The source of power, therefore, cannot be traced to clause (a). If the contention of Shri Kaicker is accepted, the appeals would lie under Sections 96, 100 or 104 of the CPC but the Arbitration Act itself provides for appeal under Section 39. Besides, if clause (a) of Section 41 gave wide powers to pass an order of injunction, clause (b) of Section 41 would become otiose."

In *Alopi Nath & Ors. v. Collector, Varanasi*, [1986] Supp. SCC 695 this Court in a brief order said:

"We have heard learned counsel for the parties. The short question is as to the admissibility of the cross-objection under the provisions of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959 where an appeal against quantum has been filed and the respondent has not preferred an appeal. We have looked into the provisions of Sections 377, 379 and 381 of the Act and are inclined to take the view that the provision of Order 41 Rule 22 of the Code of Civil Procedure would be inconsistent with the provisions of the Act inasmuch as an appeal is admissible only by a certificate or special leave as provided in provisions (a) and (b) respectively of Section 381(1). It is difficult to contend that a cross-objection is anything other than an appeal as generally understood in law. In the circumstances, benefit of Section 377 or of sub-section (4) of Section 381 of the Act is not available. The appeal therefore fails. There is no order as to costs."

In *R. McDill & Company pvt. Ltd v. Gouri Shankar Sarda & Ors.* [1991] 2 SCC 548, one of questions before the Court was whether the provisions of Order 23 of the Code apply to an application for stay of suit filed under Section 34 of the Act. It referred to Section 41 of the Act which provided that provisions of the Code shall apply to all proceedings before the court subject of course to the provisions of the Arbitration Act and of any rules made thereunder. This Court in that case:referred to a commentary by R.S.. Bachawat on the Law of Arbitration wherein the author with reference tp various, decisions of the High Court pointed out as to which provisions of the Code have been held

to be applicable to proceedings under the Act. Reference was also made to some early decisions of this Court and it was held that provisions of Order 23 of the Code were applicable in view of Section 41 of the Act.

In *Ramanbhai Ashabhai Patel v. Debhi Ajitkunmar Fulsinji & Ors.*, [1965] 1 SCR 712, the main question for consideration before this Court was whether the appellant could be said to be guilty of a corrupt practice as contemplated by Section 123(3) of the Representation of People Act, 1951, when counsel for the respondent referred to the finding of the High Court regarding the validity of the second respondent's nomination paper, counsel for the appellant raised a preliminary objection to the effect that the first respondent was not competent to challenge the correctness of the finding as he had not preferred an appeal therefrom. In the course of discussion in the judgment, this Court observed:

"Apart from that we think that while dealing with the appeal before it this Court has the power to decide all the points arising from the judgment appealed against and even in the absence of an express provision like O'XLI, 22 of the Code of Civil Procedure it can devise the appropriate procedure to be adopted at the hearing. There could be no better way of supplying the deficiency than by drawing upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to appeal from it; Considerations of justice, therefore, require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived in that judgment," Following this decision, this Court again in *Bhanu Kumar Shastri v. Mohan Lal Sukhadia & Ors.*, [1971] 1 SCC 370, on the question of challenging of findings without preferring an appeal observed that the considerations of justice required that "this court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which are negatived in that judgment."

However, both the above cases are not the cases where the Court was considering the scope and substance of cross-objection. We may also refer to two decisions of the High Courts—one of the Patna High Court and the other of the Calcutta High Court. A Division Bench of the Calcutta High Court in *Kamasray Singh v. Bibhisian Sinha*, AIR (1950) Cal. 372, was considering the objection that though statutory right of appeal is given under Section 38(3) of the Bengal Money Lenders Act, there is no right given to file cross-objection and that if a litigant is aggrieved by a decision of any court under Section 38 of the said Act his remedy is to file an appeal. High Court negatived the contention and held:

"It is to be observed that by S. 38, Bengal Money-Lenders Act, a right of appeal is given in express terms. By sub-section (3) of S. 38, a declaration under that section is to be subject to an appeal, if any, as if it were a decree of the Court. The right of appeal, under that section is given to an established Court, namely, the Court of the

District Judge:

Nothing is stated expressly in the sub-section as to the procedure regulating such appeal. In Our view, where nothing is stated expressly as to the procedure of an appeal before a District Judge, the law will import that the ordinary procedure of that Court on appeal will apply. The ordinary procedure of an appeal is that the respondent has the right to file cross-objection and therefore it is quite clear that the respondent has the right to file a Cross-objection."

In Bihar State Electricity Board v. Khalsa Bros., AIR (1988) Patna 304, a Division Bench of the Patna High Court speaking through L.M. Sharma, J. (as His Lordship then was) said:

"The Supreme Court cases arose under the Representation of the People Act, 1951 and the Calcutta case under the Bengal Money Lenders Act. The observations made in these cases support the principle which Mr. Chatterjee is relying. So far the arbitration Act is concerned, the view in favour of the maintainability of a cross-objection appears to be stronger inasmuch as S. 41 of the Act says that subject to the provisions of, and the rules made under the Act, the Civil Procedure Code shall apply to all proceedings before the court and to all appeals under the Act. There does not appear to be any provision inconsistent with the application of the Civil Procedure Code. The decision of the Court so far it has gone against the plaintiff-respondent is clearly appealable under S. 39 and I therefore, hold that the cross-objection is maintainable."

While there was no provision like Section 41 of the Arbitration Act in the Bengal Money Lenders Act in the Calcutta case. Patna case was under the Arbitration Act itself. As we will presently see Patna case does not appear to lay good law.

From the examination of these judgments and the provisions Of Section 41 of the Act and Order 41 Rule 22 of the Code, in our view, following principles emerge:

(1) Appeal is a substantive right. It is a creation of the statute.

Right to appeal does not exist unless it is specifically conferred, (2) Cross objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.

(3) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeals by indigent person also apply to cross-objection.

(4) Everi Where the appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.

(5) Respondent even though he has not appealed may support the decree on any other ground but if wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the Court like in appeal.

(6) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give quietus to whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order.

In the present case, as noted above, the respondent did not file any appeal under Section 39 of the Act in the High Court which right he admittedly had when the award of interest @ 18% per annum was reduced to 12% per annum by the trial Court. Section 41 of the Act is merely procedural in nature. If there is no right of cross-objection given under Section 39 of the Act, it cannot be read into Section 41 of the Act. Filing of cross-objection is not procedural in nature. Section 41 of the Act merely prescribes that procedure of the Code would be applicable to the appeal under Section 39 of the Act. We are, therefore, of the opinion that cross-objection by the respondent was not maintainable and the High Court was not correct in holding otherwise and restoring the award of interest to 18% per annum and, thus, interfering in the decree of the Trial Court.

We would, therefore, set aside the award so far it grants damages by way of interest at the rate of 15% per annum on the amount found due to the respondent for the period prior to the date of reference. We would further restore the award of interest at the rate of 12% per annum as decreed by the trial Court.

The appeals partly succeed. Judgment of the High Court appealed against is reversed to-the extent aforesaid. There will be no order as to costs.