

Union Of India And Others vs Manager M/S Jain And Associates on 6 February, 2001

Equivalent citations: AIR 2001 SUPREME COURT 809, 2001 (3) SCC 277, 2001 AIR SCW 607, (2001) 2 JT 286 (SC), 2001 (2) UJ (SC) 1040, 2001 (1) ARBI LR 494, 2001 SCFBRC 170, 2001 (2) JT 286, 2001 (1) SCALE 635, 2001 (1) LRI 583, 2001 (3) SRJ 273, 2001 UJ(SC) 2 1040, 2001 (1) ALL CJ 540, (2001) 1 SCALE 635, (2001) 2 CIVILCOURTC 1, (2001) 2 LANDLR 255, (2001) 1 ARBILR 494, (2001) 1 SUPREME 593, (2001) 2 RECCIVR 119, (2001) 2 ICC 15, (2001) WLC(SC)CVL 161, (2001) 42 ALL LR 689, (2001) 2 ALL WC 914, (2001) 2 CAL HN 1, (2001) 1 CIVLJ 831, (2001) 1 CURCC 142, (2001) 1 ALL RENTCAS 424

Bench: M B Shah, S.N. Phukan

CASE NO.:
Appeal (civil) 1059 of 2001

PETITIONER:
UNION OF INDIA AND OTHERS

Vs.

RESPONDENT:
MANAGER M/S JAIN AND ASSOCIATES

DATE OF JUDGMENT: 06/02/2001

BENCH:
M B Shah. & S.N. Phukan.

JUDGMENT:

Shah, J.

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T...J Question involved in this appeal is whether provisions of Order IX Rule 13 of the Code of Civil Procedure (for short referred to as the CPC) or the principles thereof are applicable in a case where objections under Section 33 of the Arbitration Act, 1940 (for short referred to as the Act) are not filed and ex-parte decree is passed on the basis of the award

filed before the Court by making the award rule of the Court. The High Court has arrived at the conclusion that Order IX Rule 13 CPC is not applicable in such cases.

Before appreciating the contentions, we would refer to few dates pertaining to the question involved. Both the parties to the present appeal were having disputes regarding the work of design and construction of two lane road bridge (both sub-structure and super structure) across Feeder Canal at R.D.16.5 (Balance Work). In a Special Suit No.31 of 1993 filed by the present respondent, the High Court of Calcutta vide its order dated 25.6.1993 directed appointment of Arbitrator to settle their disputes. The Arbitrator passed an award on dated 28.12.1996 against the appellants herein which was filed before the High Court on 6.3.1997. Notice for filing objections was received by the appellants on 21.03.1997. Time of 30 days for filing the objections expired on 20.4.1997, which was a Sunday and, therefore, the date stood extended to 21.4.1997. The matter was placed before the Court on 28.4.1997 and on that day the Court rejected the oral prayer of the learned counsel for the appellants that since objection application under Sections 30 and 33 of the Act was under preparation, time to file such application be granted. The award was made rule of the Court on the same day. On 5.5.1997, appellants filed an application for setting aside the ex-parte decree and also submitted that application under Section 30 was ready. In the said application, grounds for setting aside the award and for condoning delay in filing application were mentioned. Thereafter, another application under Section 33 of the Act raising objections against the award was also filed on 16.5.1997. The learned Judge by order dated 25.9.1998 dismissed the said application.

Being aggrieved, the appellant moved the Division Bench by filing an appeal. The Division Bench in view of conflicting judgments referred the question whether the decree passed in terms of Arbitration Award, where no objection has been filed within 30 days from the date of filing of the award in terms of the Act, would be an ex-parte decree within the meaning of Order IX Rule 13 CPC to the Full Bench? The Full Bench by judgment and order dated 7.10.1999 dismissed the appeal by holding that: - We are of the opinion that (1) the decree passed in terms of Section 17 of the Act where no objection is filed cannot be said to be an ex-parte decree; (2) an application for condonation of delay in terms of Section 5 of the Limitation Act may be applicable for filing an objection either under Section 30 or 33 of the Act or both; (3) as in the instant case no such application has been filed, the question of setting aside the decree does not arise; (4) an application for setting aside the decree passed in terms of Section 17 of the Act is maintainable only in a case where a decree has been passed in ignorance of the conditions precedent laid down therein.

In the result, the High Court rejected the application for setting aside the decree solely on the ground that judgment and decree passed in terms of Section 17 of the Act where no objections are filed before pronouncing judgment and passing the decree cannot be said to be an ex-parte decree. That judgment and order is under challenge in this appeal.

The aforesaid question is required to be decided on the basis of Section 41 of the Act, which provides that provisions of CPC are applicable to all the proceedings before the Court under the Act. It reads thus: - 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, 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.

Aforesaid Section is also required to be read in context of Section 141 of the CPC, which is as under: -

141. Miscellaneous Proceedings. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction.

[Explanation. In this section, the expression proceedings includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution] Section 41 of the Act leaves no doubt that in a proceeding where an application is filed for passing the decree on the basis of the award submitted by the arbitrator, the provisions of the CPC are applicable and there is no provision which excludes operation of Order IX. Similarly, in view of Section 141 of the CPC, the procedure prescribed in the Code is to be followed as far as it can be made applicable to all proceedings in the Court of civil jurisdiction. Hence, in the proceedings initiated for making the award rule of the Court, provisions of CPC including Order IX Rule 13 would be applicable. As per the Explanation to Section 141, the expression proceedings includes proceedings under Order IX CPC.

Other provision which is required to be taken into consideration is Section 5 of the Limitation Act, 1963, which inter alia provides for extension of prescribed period of limitation in making application in the civil proceedings, if the applicant satisfies the Court that he had sufficient cause for not making application within such period. For the purpose of filing objection application before the Court, the relevant provision is Article 119 of the Limitation Act, 1963, which inter alia provides that period of limitation is 30 days for filing the award in the Court from the date of service of notice of the making of the award and 30 days for setting aside the award or getting an award remitted for reconsideration from the date of service of notice of the filing of the award. It requires no further discussion that on sufficient cause being shown, if there is any delay in filing an application for setting aside the award, it could be condoned. We would further refer to Sections 15, 16, 17, 30 and 33 of the Act, which read as under: -

15. Power of Court to modify award. (1) The Court may by order modify or correct an award

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

(Emphasis added)

16. Power to remit award.(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

(Emphasis added)

17. Judgment in terms of award.Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award.

30. Grounds for setting aside award.An award shall not be set aside except on one or more of the following grounds, namely:

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid.

33. Arbitration agreement or award to be contested by application. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

In view of the aforequoted Sections, it can be stated that-- (a) after receipt of an award, the Court can suo motu refuse to make award rule of the Court on the ground that

(i) part of the award is upon a matter not referred to arbitration; and (ii) the award is imperfect in form or contains any obvious error. The Court can also remit the award to arbitrator in case (i) where the award has left undetermined any matter referred to arbitration; or (ii) where it has determined any matter not referred to arbitration; or (iii) the award is so indefinite as to be incapable of execution; or (iv) is on the face of it illegal. This is also provided under parenthesis clause of section 17 which provides Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall proceed to pronounce judgment Therefore, it cannot be stated that in case where objections under Section 30 or 33 are not filed the Court is bound to pass decree in terms of the award.

(b) Section 5 of Limitation Act gives discretion to the Court to extend the time for filing application under Section 30 or 33 raising objections to the award.

(c) The Civil Procedure Code including Order IX Rule 13 is applicable to the proceedings initiated by producing award before the Court for passing a decree.

(d) The power of the Court to modify the award under Section 15 or to remit the award to the arbitrator for reconsideration under Section 16 varies from the jurisdiction of the Court to set aside the award under Section 30 or to determine the validity of the arbitration agreement or an award under Section 33.

The result is before pronouncing judgment, the Court has to apply its mind to arrive at the conclusion whether there is any cause to modify or remit the award. Further the phrase pronounce judgment would itself indicate judicial determination by reasoned order for arriving at the conclusion that decree in terms of award be passed. One of the meanings given to the word Judgment in Webster's Comprehensive Dictionary [International Edition, Vol. I (1984)] reads thus : the result of judging; the decision or conclusion reached, as after consideration or deliberation. Further, Order

XX Rule 4(2) C.P.C. in terms provides that Judgment shall contain a concise statement of case, the points for determination, the decision thereon, and the reasons for such decision. This is antithesis to pronouncement of non-speaking order.

Section 17 of the Act is, to some extent, similar to the provisions of Order VIII Rule 5 and/or Rule 10 CPC. Order VIII provides the procedure where written statement by the defendant is not filed. Order VIII Rule 5(2)(4) provides that where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of facts contained in the plaint and after pronouncing the judgment a decree is required to be drawn up in accordance with such judgment. Under Order VIII Rule 10 where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, the court shall pronounce judgment against him or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up. This rule gives a discretion to the Court either to pronounce the judgment against the defendant or make such order in relation to the suit as it thinks fit. While interpreting Order VIII, this Court in *Balraj Taneja & Another v. Sunil Madan & Another* [(1999) 8 SCC 396] held that merely because written statement is not filed the Court should not proceed to pass judgment blindly and observed thus:-

The court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant, it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the courts satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement.

Similarly, when the Court is required to proceed without objection application under Section 30 or 33 of the Act, it can not pronounce the judgment without considering the provisions of Sections 15 and 16 of the Act, which provide, as stated above, for modification or correction of any award or for remitting it to the arbitrator for re-consideration on the ground that (i) there is any error of law apparent on the face of the award, (ii) the award is incapable of being executed, (iii) the award has left undetermined any of the matters referred to arbitration, (iv) that a part of the award is upon a matter not referred to arbitration and (v) the award contains any obvious error. Jurisdiction of the Court to pronounce judgment depends on exercise of its power to modify or remit the award.

Further, the Full Bench of the High Court arrived at the conclusion that decree passed in terms of Section 17 of the Act where no objection has been filed cannot be said to be an ex-parte decree because (1) even if both the parties are absent, the Court has duty to pass a decree unlike the

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Further, large part of the controversy involved in this appeal is covered by the decision rendered by this Court in *Essar Constructions v. N.P. Rama Krishna Reddy* [(2000) 6 SCC 94]. The Court observed that because of the applicability of Section 5 of the Limitation Act, 1963, if the court has not pronounced judgment for whatever reason, although the time prescribed for making the application has expired and an application for setting aside the award is made with a prayer for condonation of delay, the court cannot pronounce judgment until the application is rejected. The Court also observed that even after a decree is passed under Section 17, an application under Section 30 can be entertained provided sufficient cause is established. In either case, the rejection of the application would be a refusal to set aside the award. In case where such application is rejected on the ground that it is delayed and no sufficient cause has been made out under Section 5 of the Limitation Act, it would be an appealable order under Section 39(1)(vi) of the Act.

[illegible]

That application was prepared and signed by Advocate Shri S. Bhattacharya. Further, appellant filed an application on 16th May for recalling the judgment and decree passed on 28th April in Award Case No.22 of 1997. In that application also, same reasons for condoning delay in filing the application were mentioned and the prayer recalling the judgment and decree and to grant leave to file the application for setting aside the award was made. In support of that application supplementary affidavit was tendered on 19th May.

From the aforementioned facts, it is apparent that within period of limitation, the Executive Engineer of the Department contacted the counsel on 17th April and gave him necessary instructions for filing objection application against the award. There was delay in preparing the same by the learned counsel. It appears that the same counsel requested the Court, unfortunately orally, that objection application was under preparation and thereafter tendered it before the Court on 5th May. From the said averments, it is apparent that delay in preparing and tendering the application before the Court was on the part of the concerned advocate. This would be sufficient cause for condoning, approximately 12 to 13 days delay in filing objections. In *Essar Constructions (supra)*, this Court held even after a decree is passed under Section 17, an application under Section 30 can be entertained provided sufficient cause is established. In either case the rejection of the application would be a refusal to set aside the award. This decision would be applicable to the facts of the present case and as there was sufficient cause for condoning the delay, the Court ought to have set aside the ex parte decree passed on the basis of the award.

At this stage, we would mention that before referring the question to the Larger Bench, the Division Bench in its judgment dated 16th December 1998 held that in the application filed under Section 33 of the Act, which was affirmed earlier, the appellant had prayed for condonation of delay and asked leave to file application under Section 33 on the ground stated therein. The Court observed that there was some procedural error in seeking leave of the Court to file objections, but it would not warrant a rejection of the prayer. The Court also held that there was no dispute that the case papers had been handed over by the appellants representative to the counsel for drafting the application under Section 33 on 17th April 1997 before the expiry of the period of limitation; after that matter was beyond the control of the appellant until the application was prepared; delay of counsel in preparing and finalising the draft cannot be attributed to the appellant; the application was settled by senior counsel on 29th April 1997; thereafter it was typed; 1st of May was holiday and the Court was closed. The application was accordingly affirmed on 2nd May and therefore, the delay has been sufficiently explained, more so when the appellant is Government. The Court, therefore, held that it would have allowed the appeal and condoned the delay in filing application under Section 33 and consequently set aside the decree dated 28th April, 1987 but having regard to difference of opinion with regard to applicability of Order IX Rule 13, the matter was referred to larger bench. As stated above, in our view, the Division Bench was right in arriving at the conclusion that this was a fit case for condoning the delay and setting aside the decree dated 28th April 1987.

In the result, the appeal is allowed. Delay in filing the objection application under Section 30/33 of the Act is condoned. The impugned judgment and order dated 07.10.1999 passed by the High Court in APOT No.858 of 1998 is set aside and consequently the judgment and decree dated 28.4.1997 passed by the learned Single Judge in Award Case No.22 of 1997 is also quashed and set aside. There

shall be no order as to costs.