

Balde Pentaiah Vs. Balaganti Mallaiah

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Court : Andhra Pradesh

Decided On : Jun-29-1965

Reported in : AIR1968AP228

Judge : Manohar Pershad and ;Kumarayya, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 39, 39(1) and 39(2); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115

Appeal No. : S.R. No. 6053 of 1965

Appellant : Balde Pentaiah

Respondent : Balaganti Mallaiah

Advocate for Def. : Madhavarao, Adv.

Advocate for Pet/Ap. : Jaleel Ahmed and ;Lakshmi Devi, Adv.

Disposition : Appeal admitted

Judgement :

Kumarayya, J.

1. The office has raised an objection as regards the maintainability of this L.P.A. for want of leave of the Court as contemplated by Clause 15 of the Letters Patent on the ground that the order appealed against was passed in C.M. Ps. in Second

Appeal and, therefore, the question whether the party has an unqualified statutory right of appeal under Section 39 of the Arbitration Act was therefore of little moment. It would appear from the facts of the case that in the course of Second Appeal 203 of 1962, the parties agreed that the subject matter of dispute may be referred to the Arbitrators. At their request this Court directed the dispute to be submitted to the Arbitrators for decision. The Arbitrator passed an award and remitted the same to the Court. The appellant herein raised objection thereto and requested the Court to set aside the award. The Court heard the arguments and finally passed an order refusing to set aside the award and directed that a decree be drawn in terms of the award. This order it may be noted was passed in C. M. Ps. Nos. 10668/62, 8929 and 9314 of 1964, No separate order in fact has so far been passed in the Second Appeal itself. But since a decree was directed to be drawn in terms of the award, the office on that basis has closed the file. At the time when the order was made, the petitioner did not apply for leave to appeal presumably because he was under the impression that he has a substantive right of appeal under the provisions of Section 39(1) of the Arbitration Act, that being an arbitration proceeding, though started in the course of a second appeal. If the second appeal had been disposed of, probably the Petitioner would have asked for leave but that did not come to pass. Now the petitioner has filed an appeal against the order passed by a Single Judge of this Court. The question to whether it is maintainable in law

2. It is indisputable that the proceedings in which the order was passed setting aside the award, were initiated for the first time in second appeal. They are governed by the provisions of the Arbitration Act. Section 39 of the Arbitration Act reads thus:

'(1) 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)

(v)

(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 the 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.'

It is thus clear that the Arbitration Act gives an unqualified right of first appeal against the order like the one in question. It has besides fixed the forum to which the appeal may lie. It says 'an appeal shall lie to the Court authorised by law to hear appeals from original decrees of the Court passing the order.' Obviously it has laid down the test in general terms for easy and ready applications to large variety of cases removing scope for confusion or mistake at all events. It is manifest that if an original decree were passed by a Single Judge of this Court, the appeal will lie to a Division Bench of this Court, that being the forum fixed under the Letters Patent. So then, according to the above test if the party is aggrieved by an appellate order made under the Arbitration Act by a Single Judge of this Court he may appeal to the Divisional Bench of this Court which is the proper forum to hear that appeal Section 39(1) be it remembered gives an absolute right of appeal. It is neither qualified by any condition, nor circumscribed by any limitation whatsoever. Of course, so far as right of Second Appeal is concerned, no right as such has been given except the right to appeal to the Supreme Court subject to the limitations provided under the Constitution. Mr. Venuganti Madhavarao the learned counsel for the respondent contends, that since the order was passed in C.M.Ps. in the Second Appeal and no leave was obtained, the appeal is barred under Clause 15 of the Letters Patent. This argument fails to take into

consideration that though the petition filed is styled as C.M.P. it is in substance an O.P. presented on a court-fee stamped paper of Rs. 100. It also ignores the fact that the Indian Arbitration Act (Act 10 of 1940) gives a right of appeal, unqualified and absolute against the order of the kind passed in such proceedings. It must admit of no controversy that the impugned order was made in a proceeding started under the Arbitration Act, though it may be in the course of the Second Appeal. If the Arbitration Act, was not thus attracted of course the qualification for right In appeal imposed by the Letters Patent must needs have been satisfied But that is not the case here. The right of appeal conferred by Section 39 of the Arbitration Act cannot therefore be defeated for want of leave contemplated by the Letters Patent Rules it has been definitely laid down by the Supreme Court in *Union of India v Mohindra Supply Co.*, : [1962]3SCR497 that LPA Rules so far as they deal with the appeals passed against orders in arbitration proceedings must be read subiect to the provisions of Section 39(1) and (2) of the Arbitration Act. The right of appeal therefore must be exercisable shorn of all the limitations of the Letters Patent Rules, as the said rules should guide us only in so far ai fixation of forum is concerned for purposes of Section 39(1) of the Indian Arbitration Act.

3. It is then contended that inasmuch as this Court has not got or rather ceased to exercise as a rule its regular Original Side Civil Jurisdiction and if at all it nevertheless exercises off and on such a jurisdiction, it is only by reason of Clause 13 of the Letters Patent Rules the Divisional Bench of this Court cannot be deemed to be the proper forum contemplated by Section 39(1) of the Arbitration Act. We are not at all impressed by this argument, which is logically fallacious and factually contradictory. When, as a matter of fact the original decrees are being made by a Single Judge of this Court and the Divisional Bench of this Court hears the appeals against the original decrees passed by the Single Judge of this Court, it will be travesty of truth if it were to be said that the Divisional Bench is not the Court exercising appellate jurisdiction. That apart Section 39(1) is concerned simply with the authority given by law to hear appeals from original decrees. If the Letters Patent Rules which have force of law give such authority, as they undeniably do, that is sufficient for the purpose. The rulings relied on by the learned counsel do not advance his contention as against this. The first case cited is: *In Re, Mathuraman Chettiar*, : AIR1953 Mad395 where in a partition suit, a

reference to arbitration was made. During the course of the arbitration proceedings, the defendant made an application for the nomination of a new arbitrator and the plaintiff made an application for superseding the arbitration. The Subordinate Judge, dismissed the plaintiff's application and allowed the defendant's application. The matter came up in revision before a Single Judge of the Madras High Court who allowed both the petitions with the result that the arbitration was superseded and the suit was directed to be tried on the merits. The question arose whether an appeal lay against an order passed by a Single Judge in exercising of his powers under Section 115 C.P.C. It was observed that a Single Judge while making the order was exercising powers of revision and was not acting as an appellate Court; so no appeal would lie to the Division Bench. That apart, having regard to the nature of the order if it be deemed that he was functioning as an appellate Court in view of the prohibition contained in Section 39(2) of the Arbitration Act no Second Appeal shall lie from an order passed by him These observations are of little assistance to the learned counsel, but he relies on further observations of the learned Judges which were unnecessary for the decision of the said case after the learned Judges had made the above remarks. The learned Judges then observed that Section 39(1) contemplates two different courts viz., a Court which supersedes the arbitration and different Court which is authorised by law to hear appeals from the original decrees of the Court passing the order, and that there was no quality of courts in the High Court and that in that case in as much as the Judge sitting for hearing revision petitions it is not a different Court from a Division Bench hearing appeal and all the judges constitute members of the same court and both are parts of one and the same institution, it cannot be said that a Judge sitting on the appellate side singly is a court different from a Division Bench. We do not think that these observations, to the extent they are claimed to be favourable to the respondent in view of the pronouncement of the Supreme Court in the case of : [1962]3SCR497 , must prevail. There the Supreme Court referring to the decisions of the Punjab High Court in Banwari Lal Ram Dev v. The Board of Trustees: Hindu College, ILR 1948 EP 159=(AIR 1949 EP 165) and the Lahore High Court in Hanuman Chamber of Commerce Ltd., Delhi v. Jassa Ram Hiranand, AIR 1948 Lah 64 did not approve of the remarks of the High Court that the appeals contemplated by Section 39 are

appeals to superior courts and not 'inter-court appeals' and therefore the right to appeal under the Letters Patent was not restricted by Sub-sections (1) and (2). Their Lordships observed that the qualifying expression 'to the Court authorised by law to hear appeals from original decrees of the Court passing the order' in Section 39(1) does not import the concept that the appellate Court must be distinct and separate from the Court passing the order or the decree, that the Legislature has not so enacted and the context does not warrant such an interpretation and that the Clause merely indicates the forum of appeal and that if from the decision of a Court, hearing a suit or proceedings, an appeal will lie to a Judge or more Judges of the same Court, by virtue of Section 39(1) the appeal will lie from the order passed under the Arbitration Act, if the order is appealable to such Judge or Judges of that Court. These weighty observations should dispel all doubts with regard to the meaning of the court contemplated by Section 39(1). The result of the above discussion is: that Section 39(1) of the Arbitration Act has not only given a right of appeal, which is unqualified, but has also fixed the forum by laying down a test, the test being that it should be the court authorised by law to hear appeals from original decrees of the Court passing the order. So then if a Single Judge of this Court were to pass an original decree and the appeal therefrom lies to a Divisional Bench under the Letters Patent which have all the force of law. the Court authorised to hear the appeal from the appealable order under the Arbitration Act would be 3 Division Bench of this Court. When a forum is thus provided the question whether this Court for the time being is exercising its original jurisdiction or not is of little consequence. Section 39 is concerned with the forum authorised by law and does not impose any further limitations. The forum authorised by law being determined, no further question would arise and the appeal would be preferred in that forum in relation to the appealable order. The right of appeal being a creature of special enactment one has to look only to the enactment for the extent and manner in which it is to be exercised. The order under appeal is made under the provisions of the Arbitration Act and is appealable under the said Act. Being a special enactment passed by the Central Legislature, it must prevail over the other Acts in cases of inconsistency. As a matter of fact, as already noticed, the Supreme Court, has said that the Letters Patent Rules are subject to the provisions of Section 39(1) and (2). That being the case, the argument that

since no leave is obtained, no appeal will lie is wholly untenable. Besides when the Letters Patent have fixed the forum in relation to the orders passed by a Single Judge that forum must be the appellate court authorised by law for purposes of Section 39(1). The appeal as filed therefore does not suffer from any infirmity as to its maintainability. The objection taken is overruled. The appeal is hereby admitted.

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