

Devi Narain and anr. Vs. Harish Chandra

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Court : Rajasthan

Decided On : Aug-08-1980

Reported in : AIR1981Raj67

Judge : Mahendra Bhushan, J.

Acts : [Arbitration Act, 1940](#) - Sections 5, 20 and 30

Appeal No. : Civil Revn. No. 131 of 1980

Appellant : Devi Narain and anr.

Respondent : Harish Chandra

Advocate for Def. : M.D. Agarwal, Adv.

Advocate for Pet/Ap. : B.L. Luhadia, Adv.

Disposition : Revision petition allowed

Judgement :

ORDER

Mahendra Bhushan, J.

1. The learned District Judge, Jaipur City, under the impugned order Das held the application of the petitioners under Section 5 of the Indian [Arbitration Act, 1940](#) to be infructuous in view of the fact that the arbitrator had submitted his award in the

Court. This order is challenged by the petitioner.

2. The relevant facts for the disposal of this revision petition are these. An application under Section 20 of the Indian Arbitration Act (hereinafter referred to as the Act) was filed by the non-petitioner against the petitioners in the Court of District Judge, Jaipur City on 27-4-1978, and one Mr. Guman Chand Lunia, a practising lawyer at Jaipur, was appointed an arbitrator to decide the disputes between the parties vide order of the Court dated 11-11-1978. The said Shri Lunia entered into arbitration. An application under Section 5 of the Act was filed on 27-8-79 on behalf of the petitioners for revoking the authority of the arbitrator. In that application, an application for stay of the proceedings before the arbitrator was also filed, but for one reason or the other no progress could be made either in the application under Section 5 or in the stay matter, and the arbitrator, Shri G.C. Lunia, proceeded with the reference. The arbitrator gave his award on October 12, 1979. On October 15, 1979, the Court gave notice of the filing of the award to the parties, and the award is yet to be made the rule of the Court. It may also be observed that when the application under Section 5 of the Act came up before the learned District Judge, Jaipur City, on 19-1-1980, he rejected the application holding that as the arbitrator has filed the award, the same has become infructuous.

3. An important question arises that if during the pendency of the application under Section 5 of the Act, the arbitrator gives his award, whether the application under Section 5 of the Act becomes in-fructuous. The contention of the learned Advocate for the petitioner is that unless the award is made the rule of the Court and a decree in terms of the award is passed, the mere giving and filing of the award by the arbitrator will not make the application infructuous. The contention of the learned Advocate, Mr. Agrawal, for the non-petitioner is that once an award is filed, then the only course open to the parties is to file objections under Section 30 of the Act, and those objections have been filed and one of the objections taken is that the arbitrator has misconducted himself during the proceedings. The authority of an appointed arbitrator can only be revoked with the leave of the Court under Section 5 of the Act. The Court will only grant such leave, if a good and sufficient cause is shown. Some of the grounds on which leave may be granted by the court

are, apprehension of failure of justice, partiality or bias of the arbitrator, collusion by the arbitrator with one of the parties. Under Section 30 of the Act, one of the grounds on which the award may be set aside is, that an arbitrator has misconducted himself. It is contended by the learned Advocate for the respondent that because the misconduct of the arbitrator was one of the grounds seeking leave of the Court to revoke his authority, and because an award has been filed by the arbitrator, and in the objections for setting it aside one of the grounds is that the arbitrator has misconducted himself, therefore the learned trial Court has rightly observed that because of the filing of the award, application under Section 5 of the Act has become infructuous.

4. 'Infructuous' according to Chambers Dictionary means 'not fruitful'. In Webster's Third New International Dictionary (Vol. 11) at page 1161 (Column 2), 'infructuous' has been defined as 'unfruitful', 'fruitless', 'unprofitable.' To my mind, unless the award is made the rule of the Court, and a decree in terms of the award is passed, it can hardly be said that the award has fructified. The application under Section 5 of the Act, to my mind, cannot become infructuous unless the award is made the rule of the Court. Merely because one of the grounds seeking leave to revoke the authority of arbitrator in an application under Section 5 of the Act is misconduct of the arbitrator, and the same ground is raised or might be raised, in an application under Section 30 of the Act for setting aside the award, it cannot be said that an application under Section 5 becomes infructuous by mere filing of the award by the arbitrator.

5. In *Prafulla Chandra Karmakar v. Panchanan Karmakar* AIR 1946 Cal 427, the facts were that the order for reference to the arbitration was made on 23-1-1945. Soon after that, the plaintiff and defendant No. 3 on 16-4-1945 applied for supersession of the reference. However, the arbitrator submitted their award on 20-4-1945 and the parties thereupon filed objections against the award. It was held by the Court as follows:--

'If leave is granted to revoke a submission, the arbitration agreement, in my view, is not superseded, but simply dissolved or revoked. If it be supersession, then such supersession is authorised by Section 12(2)(b) of the Act and Section 23(2)

is not violated. Nor is the award, if one has been made, set aside or affected by such revocation with leave, since it is only put aside and not considered. Section 32 is therefore not violated, for even if the award be affected, such affectation of the award is authorised by Section 5.

It might be asked whether Section 5 was not limited to cases where an award had yet to be made. I can see no reason to so limit its meaning. Till an award is made a decree of the Court, the submission remains and it can, within the language of the section, be revoked with leave.' The Calcutta High Court has, therefore, held that Section 5 of the Act cannot be limited only to those cases where the award has not been made and it will apply even to a case till an award is made a decree of the Court, as the submission remains, and it can be revoked with the leave of the Court.

6. In *Ismail v. Hansraj*, AIR 1955 Raj 153 reliance on which has been placed by the non-petitioner in the trial Court, during the pendency of an application under Section 5 of the Act, the award had been filed, objections were filed against it, and after disposing of the same, the award was made the rule of the Court. It appears from the perusal of the judgment that the Court was not called upon to consider as to whether by mere filing of an award by the arbitrator, application under Section 5 of the Act becomes infructuous. All that has been decided in that case is, that the authority of an arbitrator cannot be revoked except with the leave of the Court, a statement as contained in Section 5 of the Act.

7. I am, therefore, of the opinion that while application under Section 5 of the Act is pending and the arbitrator gives his award and the same is filed in the Court, unless the award fructifies in a decree, the application under Section 5 of the Act cannot be dismissed as being infructuous. It has to be decided on merits. Even if objections to the award have been filed, and if the leave to revoke the authority of the arbitrator is granted by the Court, then the award submitted by the arbitrator is put aside and need not be considered. But, if the leave is not granted, and an application under Section 5 of the Act is dismissed, then the objections, if any, for setting aside of the award will have to be decided in accordance with law, and the procedure provided in the Act will have to be followed. If the objections are

dismissed, then the award will be made the rule of the Court. It is no fault of a party who files an application under Section 5 of the Act, if during its pendency the arbitrator enters into arbitration and gives his award. Therefore, if during the pendency of the application under Section 5, the arbitrator gives his award it will not amount to rendering the application under Section 5 of the Act infructuous, unless the award is made the rule of the Court.

8. In the instant case, Mr. Agrawal has submitted that objections under Section 5 of the Act had already been disposed of and rejected by the learned Court vide its order dated 19-9-1979. It does appear from the perusal of the certified copy of the order of the District Judge in Civil Miscellaneous Case No. 158/79 under Section 5 of the Act that after hearing the parties application under Section 5 of the Act filed by the petitioner was rejected. It may be as Mr. Agrawal says that the number of the case was wrongly given, though the arguments were heard in Objection Petition No. 140/79. It appears that this order of the learned District Judge was not brought to his notice when the impugned order was passed, otherwise the learned District Judge would have addressed himself to this matter, and would have passed orders in accordance with law. Even if the order dated 19-9-1979 was passed in another application under Section 5 of the Act allegedly filed by the petitioner, as stated by Mr. Luhadia, even then a very important question will arise as to whether the principles of constructive res judicata will apply. The learned District Judge, therefore, should have dealt with this aspect of the matter also, but the order of the learned District Judge that merely because an award has been filed, the application under Section 5 has become infructuous, cannot be said to be in accordance with law, and he has failed to exercise jurisdiction vested in him.

9. In the result, the revision petition is allowed and the impugned order of the learned District Judge is set aside. He is directed to take into consideration his previous order, hear the parties and dispose of the application under Section 5 in accordance with law, if it has not yet been decided. The costs of this revision petition are made easy.