

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.272 of 2015

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The State Of Bihar Through The Executive Engineer, Road Construction
Department, Gopalganj, District Gopalganj

... .. Appellant

Versus

M/s Bhaibhaw Construction Pvt. Ltd. Sareya Ward No.5, P.S. Gopalganj,
District Gopalganj through its Managing Director, Braj Kishore Singh, son of
Late Gorakh Singh

... .. Respondents

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Appearance :

For the Appellant/s : Mr. Binod Kumar, AC to GP-10

For the Respondent/s : Mr. Nand Kishore Singh, Adv.

Mr. Jitendra Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 18-01-2019

Heard Mr. Binod Kumar, learned AC to GP-10 for the
appellant-State and Mr. Nand Kishore Singh, learned counsel
appearing for the respondent.

This appeal purportedly filed by invoking the provisions
of Section 37(1)(b) of the Arbitration Act in fact depicts a
thoroughly confused state of affairs prevailing in the State in so far
as pursuing the legal course is concerned because the appeal was
filed as an appeal against the original decree but somewhere down
the line, the pleadings were modified to change the nomenclature
of the appeal as Misc. Appeal under section 37(1)(b) of the
Arbitration and Conciliation Act, 1996 (hereinafter referred to as
'the Act').



The pleadings on record would confirm that an Arbitral Award was passed by the sole Arbitrator appointed by this Court on 4.6.2005. This Award was challenged by the State through the Assistant Engineer by filing a Title Suit in the court of Sub Judge I, Gopalganj giving rise to T.S.No. 427/2005. It is under the orders of this Court that the lower court records have been received and the copy of the plaint nowhere indicates that the suit was filed by invoking the provisions of Section 34 of 'the Act' rather a reading of the pleadings would confirm that it is a suit simplicitor filed for declaring the award non est by setting it aside. The prayer for temporary injunction until disposal of the suit was also made.

The respondent herein appeared and filed their written statement and while contesting the claim on merit, also raised the issue of maintainability. Perhaps the appellant as plaintiff before the Court below, realized his mistake on the filing of preliminary objection by the respondent herein on 7.2.2009 because even when the preliminary objection raised by the respondent in the court below, on maintainability as well as on jurisdiction got rejected, the appellant- plaintiff filed an application on 17.12.2012 for converting the suit into a Miscellaneous Case under section 34 of 'the Act'. This petition of the appellant- plaintiff was rejected by the court below on 12.9.2013 but never came to be challenged



before the superior forum as per Mr. Singh, learned counsel appearing for the respondent.

The suit was dismissed vide judgment and decree passed on 15.4.2015. The learned Sub Judge while dismissing the suit on merits on the failed cause of action as per parameters set up under section 34 of 'the Act' also held the suit framed as not maintainable. It is feeling aggrieved by the judgment and decree passed by the learned Sub Judge I, Gopalganj in T.S.No. 427/2005 that the plaintiff as appellant initially filed an appeal against the original decree but perhaps on objection being raised, converted the appeal as a Miscellaneous Appeal under section 37(1)(b) of 'the Act'.

We have heard Mr. Binod Kumar, learned counsel for the appellant herein and Mr. Nand Kishore Singh, learned counsel for the respondent and in the nature of the facts which transpire from the pleadings and taken note of hereinabove, we do not intend to engage ourselves in a long drawn discussion because in view of the interpretation given to the term "Court" as found in Section 2(1)(e) of 'the Act' by the Courts read alongside the remedy provided under section 34 of 'the Act', in our opinion neither the title suit was maintainable for questioning the award nor the learned Sub Judge was competent to adjudicate on the



issue. We completely fail to appreciate as to why the appellant-State failed to take recourse to the proper remedy despite their prayer for conversion of the Title Suit into a Miscellaneous application under section 34 of 'the Act' was rejected by the court below on 12.9.2013 and even when a preliminary objection was raised not only on the maintainability but also on jurisdiction vested in the learned Sub Judge to adjudicate in the matter by the sole respondent.

Section 34 of 'the Act', inter alia, vests a right in a party aggrieved by an Arbitral Award to challenge the same by filing an appropriate application before a court for setting aside the Arbitral Award on the grounds so set up thereunder. A plain reading of the provisions underlying Section 34 of 'the Act' makes itself eloquent that it is the procedure provided thereunder which needed a recourse to by the appellant instead of the procedure under the general law of the Code of Civil Procedure. A Title Suit in such circumstances certainly was not a proper remedy and the appellant-State realizing the position did take some steps for correction of the error but abandoned it half way through.

Although the issue put up for consideration, stands well discussed in the judgments since reported in (2015)1 SCC 32 (**State of West Bengal & ors. v. Associated Contractors**) and



(2018)2 SCC 602 (**State of Jharkhand & ors. v. Hindustan Construction Company**) but for the purpose we are persuaded to reproduce the opinion of the Division Bench of this Court since reported in 2015(3) PLJR 876 (**Shivam Housing Pvt. Ltd. & Anr. v. Thakur Mithilesh Kumar Singh & Anr.**) and paragraphs 1 and 33 puts an end to the contest because Division Bench has settled that it is the Court of District Judge who is exclusively vested with the jurisdiction to entertain and adjudicate upon an application filed under section 34 of 'the Act'. Paragraphs 1 and 33 of the said judgment reads thus:

“1. In the miscellaneous appeal learned Single Judge of this Court under order No.20 dated 25.2.2011 referred the appeal for authoritative consideration by a Division Bench of this Court to decide the question as to whether Subordinate Judge or the District Judge is Principal Civil Court of original jurisdiction in a district within the meaning of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”). In this connection, learned Single Judge doubted the correctness of the judgment of this Court in the case of **The Executive Engineer, Central Public Works Department and Others vs.M/s R.L.Singh, Civil Engineer**, 1997(1) PLJR 523 and the subsequent decisions of this Court in the case of **Md. Sidique vs. State of Bihar**, 2000(4) PLJR 814, **Thakur Prasad**



Singh vs. the State of Bihar and Anr., 2000(4) PLJR 843 and **Bhopal Singh and Others vs. Nagendra Narain Singh & others**, 2001(2) PLJR 530 in the reference under.

33. The view taken by the learned Single Judge in the case of **Executive Engineer vs/ M/s R.L.Singh** (supra), **Md. Sidique** (supra), **Thakur Prasad Singh** (supra) and **Bhopal Singh** (supra) appears to have been rendered without taking note of Section 34 read with Section 2(1)(e) of the Act as also without taking note of Section 18 of the Civil Courts Act which, inter alia, provides the extent of original jurisdiction of District, Subordinate Judge to all original suits cognizable by civil courts subject to Section 15 of the Code of Civil Procedure which provides that the suit shall be instituted in the court of the lowest grade competent to try it. The Scheme of the Act, however, is contrary to the scheme of the Code of Civil Procedure which requires a suit to be instituted, tried by the court of lowest grade competent to try the suit, as in terms of Section 34 read with sub-section 1(e) of Section 2 the arbitral award is required to be assailed before the Principal Civil Court of original jurisdiction which will not include any civil court of a grade inferior, as such, in terms of the Act it is only the District Judge who has jurisdiction to consider the challenge made to the arbitral award.”



A feeble attempt is made by Mr. Binod Kumar to salvage the situation by submitting that the position was different at the stage when the suit was filed in the year 2005. May be the State has its reason to justify the process adopted but then the pleadings on record confirm that whereas a suit simplicitor was filed by the appellant to set aside the award and not an application under section 34 of 'the Act', even the rejection of an application filed by the appellant- State for conversion of the suit into an application under section 34 of 'the Act' was not pursued.

As we have observed, the fault entirely lies with the State in not pursuing their cause with all sincerity and if their attempt has failed whether on merits or on jurisdiction or on improper recourse taken, the default so brazen, cannot be cured by way of appeal, which is dismissed accordingly.

Let the lower court records so received be returned to the court below in a sealed cover forthwith.

The interlocutory application(s), if any, stands disposed of.

(Jyoti Saran, J)

Surendra/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	16.02.2019
Transmission Date	NA

(Arvind Srivastava, J)

