

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.131 of 2014

Om Prakash Saha Son Of Late Banarsilal Saha Resident Of Village -
Naugachia Bazar, Po and P.S. - Naugachia, District - Bhagalpur

... .. Appellant/s

Versus

Ambika Prasad Saha Son Of Late Banarsilal Saha Resident Of Village -
Naugachia Bazar, P.O. and P.S. - Naugachia, District - Bhagalpur

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Rajeev Shekhar

For the Respondent/s : Mr.

**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV JUDGMENT

I have already heard the learned counsel for the appellant as well as the learned counsel for the sole respondent.

2. This miscellaneous appeal has been preferred by the appellant against the order dated 30.11.2013 passed in Misc. Application No. 53 of 2009 whereby and whereunder learned Additional District Judge-I has set aside the award dated 08-10-2007 & 15-10-2007.

3. The appellant, Om Prakash Saha is own brother of the respondent Ambika Prasad Saha. The respondent Ambika Prasad Saha challenged the award dated 15.10.2007 whereby the properties of two brothers were partitioned. According to the respondent, the appellant had



got his signature on a blank paper and behind his back, in collusion with the arbitrators, he got a concocted and fabricated arbitral award without arbitration agreement therein. The respondent challenged that award before the District Judge, Bhagalpur and after admitting it, the learned District Judge, Bhagalpur transferred the case to the Court of Additional District Judge-Ist, Naugachia, and by the impugned order dated 30.11.2013, the Additional District Judge, Ist, Naugachhia allowed the application of the respondent and set aside the arbitral award.

4. The case of the respondent is that he was not aware of the award. On 13.05.2009, one Arunjay Kr. Singh an Advocate Clerk at Naugachia informed him that an Execution Case No. 01 of 2008 is pending against him in the Court of Learned Munsif, Naugachia. On 14.05.2009, the respondent inspected the record of that case and came to know that the execution case has been fixed for ex-parte hearing on that day. Prior to that, he had no knowledge about that case. The Execution Case No. 01 of 2008 was filed by the appellant without giving knowledge to the respondent, on the basis of forged and fabricated arbitration



award and he wanted to procure the order of the Execution Court clandestinely. The respondent applied for certified copies of the award filed by the appellant in the Execution Case but the certified copy thereof was not provided to the respondent. The respondent had also filed an application under Order IX rule VII read with Section 151 of the CPC, to recall the order whereby the case was proceeded for ex-parte hearing, which is pending before the Execution Court. Further case is that the appellant, Om Prakash Saha is his own brother and he was in-charge of joint family and during jointness, he procured a blank paper, signed by the respondent, which remained in his custody. He misused that paper and got forged, fabricated and collusive arbitration award in collusion with his friends; Ratan Kedia, Arun Kumar Sah, Md. Ikram Soni, Munna Bhagat and Arun Kumar Yadav. The respondent made a prayer to set aside the arbitral award on other grounds inter alia that no arbitration agreement was existing between the respondent and the appellant.

5. The appellant filed his written statement and amongst inter alia, he challenged the maintainability of the



application before the District Judge/Addition District & Sessions Judge, Naugachia. The point of limitation was also taken by the appellant pleading that the application was hopelessly time barred as per Section 34(3) of the Act. As per the appellant, the arbitration award is genuine and it should be enforced, as such, he filed Execution Case No. 01 of 2008 and the Executing Court had admitted that case under Section 36 of the Act. The respondent was fully aware with the Execution Case, as through post office, the summons with A/D was delivered upon him, to which, he refused. On 28.01.2009, summons through *Nazarat* was also served upon him but he deliberately did not appear in Execution Case and he filed an application on 16.05.2009 under Order IX Rule VII of the CPC to recall the order whereby the matter was proceeded ex parte. It has been averred further that at the same time, two applications cannot be filed by the respondent; (i) In Execution Court and (ii) in the Court of District Judge, challenging the arbitral award. He has stated in his written statement that the respondent had received the copies of arbitral award and, he has falsely mentioned that he was not aware with the



existence of those award. The appellant and the respondent had appointed two arbitrators each, Sri. Ran Kedia and Sri. Arun Kumar Saha, who is Advocate of Ambika Prasad Saha (respondent) were nominated by him whereas Md. Eqramul @ Soni (Ward Commissioner) and Sri. Munna Bhagat were nominated on behalf of the appellant and those four arbitrators, nominated Sri. Arun Kumar Yadav, the then President Nagar Panchayat, Naugachia as the empire arbitrator. After preparation of the award, the copies thereof were sent to the appellant and the respondents on 20.10.2007 through couriers i.e. M/S Tracon Couriers Pvt. Ltd., Naugachia and both the parties received the arbitration award on the same day. Again, arbitrator, Arun Kumar Yadav@ A.K. Yadav had also delivered two copies of arbitration award to both the brothers through registered post vide letter nos. 3349 & 3350 dated 16.04.2008 and both the brothers received it.

6. Some factual Matrix have also been averred in the written statement. As per the appellant, it is correct to say that he was in charge of the joint family. He was the youngest son of late Banarsilal Saha, who had three sons,



the appellant, the respondent and one Arjun Prasad Saha. During his lifetime, Banarsilal Saha was *Karta* of the family and he left only a residential house, which was divided amicably amongst three sons of late Banarsilal Saha. After death of Banarsilal Saha, three brothers separated themselves in all respects. After partition, the appellant got mutated his name with respect to share in ancestral house. Thereafter as per his skill and hard labour he earned some properties. The properties were partitioned between two brothers through the said arbitration award.

8. On the basis of the pleadings of the parties, the following issues have been settled:-

“(i) Is the application as framed maintainable?

(ii) Is the application barred u/s 34(3) of the Arbitration and Conciliation Act 1996?

(iii) Has the applicant any just and proper caus of action to file this application?

(iv) Has the applicant appointed arbitrators in private arbitration proceeding?

(v) Has the applicant participated during



*arbitration proceeding
before arbitrators?*

*(vi) Has the award
been obtained by playing
fraud?*

*(vii) Is the award
valid and genuine?*

*(viii) Whether the
applicant was not
properly informed
regarding the award
passed on 15.10.2007 by
the arbitrators?*

*(ix) Whether the
applicant is entitled to
the relief as prayed
for?”*

7. Following are the documentary evidence on
behalf of the appellant:-

1.	Acknowledgment of Postal receipts	Ext.A
2.	Signature of Om Prakash Saha on Ekrarnama dated 08.10.2007	Ext.B
3.	Signature of Ambika Prasad Saha on Ekrarnama	Ext.B/ 1
4.	Registry No. 3349 which was sent to Ambika Pd. Saha on which post master has given report and signed on it.	Ext.C
5.	Signature of Munna Bhagat on award.	Ext. D
6.	Signature of Ekram on award	Ext.D/ 1
7.	Signature of Ratan Kr. Kedia	Ext.D/



	on award.	2
8.	Signature of Arjun kumar Saha on award	Ext.D/ 3
9.	Signature of Arun Kumar award	Ext.D/ 4

8. No documentary evidence was adduced on behalf of the respondents.

9. Two witnesses including the respondent himself were examined on behalf of the applicant-respondent. AW-1 is the respondent-applicant himself and AW-2 is Arunjay Kr. Singh, the person, who apprised the respondent that Execution Case No. 01 of 2008 was pending against him.

10. Whereas on behalf of the appellant, six witnesses were examined including the appellant himself. The appellant was examined as OPW-1, Munna Bhagat one of the arbitrators was examined as OPW-2, Arun Kr. Yadav one of the arbitrators has been examined as OPW-3, Devendra Pd. Saha is OPW-4, Sukhdev Pd. Saha is OPW-5 and Sahendra Mandal is OPW-6.”

11. AW-1, the respondent has stated during his deposition that he did not enter into an agreement with the appellant nor he had given agreement to decide the matter



by any *Punch* and, as such, the said award was wrong, void, illegal and not enforceable.

12. AW-2, Arunjay Kr. Singh has stated that he informed regarding pendency of Execution Case No. 01 of 2008 to the respondent.

13. The witnesses examined on behalf of the appellant-opposite party had supported his case. The appellant has stated during his deposition that the respondent had taken his land and house for marriage of his daughter but even after the marriage, he did not vacate the same and wanted to grab the whole property on the basis of some forged documents. Then the appellant approached Mrs. Geeta Devi, the Ward Commissioner, and, requested her to resolve the dispute between the two brothers and due to her intervention, both the brothers purchased two non-judicial stamps of Rs. 50/- denomination each and they nominated two *Punches* as referred above and those *Punches* prepared the award dated 15.10.2007 (Ext-I).

14. OPW-3, Arun Kr. Yadav has deposed that the two brothers nominated two *Punches* each and those witnesses were the main *Punches*.



15. OPW-4 is Divendra Pd. Saha. On the statement of this witness, the pleaders notice dated 14.02.2007, sent to the respondent was accepted as ext.-E.”

16. The learned counsel for the appellant assailed the impugned order on two grounds; (i) The first ground is that the Application No. 53 of 2009 filed by the respondent under Section 34 of the Act was hopelessly barred by law of limitation as per the provisions of Section 34(3) of the Act. The application for setting aside of the arbitral award cannot be made after three months from the date of which, the party making the application had received the arbitral award. Learned counsel for the appellant submits that the proviso of Sub-Section (3) of Section 34 gives a discretion to the Court to extend the period for further 30 days if the person applying for setting aside the arbitral award, satisfies the Court that he was prevented by sufficient cause from making the application within the said period of three months. He submits further that beyond the extended 30 days, the period of limitation, according to the statutory provision, is inextendable. The Court has no jurisdiction to extend that period beyond the statutory



limitation given in Sub-Section (3) of Section 34 of the Act. He submitted that the sole respondent during his cross-examination, has himself admitted that he received the arbitral award sent to him on 17.04.2008 through R.L. No. 3349 and he filed the application under Section 34 on 10.07.2009 which is much beyond the limitation prescribed under the statute.

17. He has also challenged the impugned order on the ground of lack of jurisdiction of the court below. He has submitted that an application under Section 34 can only be filed before the 'Court' and the word 'Court' has been defined in Section 2 (1) (e) of the Act and as per definition of the 'Court', the Principal Civil Court of original jurisdiction, in a District can only entertain the application and it includes the High Courts, in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the question, forming the subject matter of the arbitration. Learned counsel has submitted that the Additional District Judge had no jurisdiction either to admit the application under Section 34 or to adjudicate it upon. In support of his submission, he relied upon a decision of a co-ordinate



Bench of this Court in the case of Union of India & Ors. Vs. M/S Jailal Kishore Lal (M.A. No. 375 of 2009) decided on 12.05.2010 reported in **2010 (3) BLJ 129**.

18. Per contra, the learned counsel for the respondent has submitted that the 'Court' has been defined in Section 2(1)(e) of the Act, which means the Principal Civil Court of Original Jurisdiction in a district. He has submitted that the Hon'ble Division Bench of this Court in the case of Shivam Housing Pvt. Ltd. v. Mithilesh Kumar Singh, (2015) SCC Online Patna has been pleased to hold that the definition of the court given in Section 2(1)(e) includes the Additional District Judge. As such, the order passed by the Additional District Judge cannot be assailed on the ground of jurisdiction.

19. So far as the second submission of the appellant, raising the point of limitation is concerned, the application under Section 34 preferred by the sole respondent before the learned court below appears to be highly time-barred. Section 34(3) of the Act provides period of limitation for filing an application under Section 34 of the Act. Sub-section (3) of Section 34 says that an



application for setting aside of an arbitral award cannot be made after three months from the date from which the party had received the arbitral award. The proviso of Sub-section (3) of Section 34 gives discretion to the court to extend the period of limitation for further 30 days, if the sufficient cause for delay is shown to the Court but the last clause of the proviso shows that the period of limitation is not extendable after further 30 days provided by the court. The expression ‘...but not thereafter’ used in the proviso shows that the court has no jurisdiction to extend the period of limitation after 60 days from the date, the applicant received the arbitral award. Sub-section (3) of Section 34 of the Act is being extracted hereinbelow:-

“An application for setting aside may not be made after three months have elapsed from the date on which the the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said



*period of three months it may entertain the application within a further period of thirty days, **but not thereafter.***”

20. Learned counsel for the appellant in support of his argument has relied upon a decision of Hon’ble Supreme Court in the case of Assam Urban Water Supply & Sewerage Board Vs. Subash Projects & MKTG. LTD. A bare perusal of Sub-section (3) of Section 34 of the Act makes it clear that no delay of more than 60 days can be condoned under Sub-section (3) of Section 34 of the Act.

21. The learned court below did not consider the point of limitation whereas there was specific issue No. 2 on this point.

22. Issue No. 2 is extracted hereinbelow:-

(II). “Is the application barred under Section 34(3) of the Arbitration and Conciliation Act, 1996”?

23. It appears that the issue was framed on the point of limitation but there is no finding of the learned court below on this issue. The sole respondent was examined as AW-1 and during his cross-examination, he admitted that he received the arbitral award on 17-04-2008



through RL No. 3349 and contrary to that, in his application filed before the Learned District Judge, Bhagalpur (Miscellaneous Application No. 53 of 2009), he has mentioned that he came to know about the award through an Advocate Clerk, Arunjay Kumar Singh on 24-05-2009, who informed him about the Execution Case No. 1 of 2008. On 24-05-2009, he applied for certified copy of the Execution Case No. 1 of 2008. In his cross-examination, he has stated that he received the award on 17-04-2008. The point of limitation, according to the statement of the sole respondent, in his cross-examination, started running from 17-04-2008. The application under Section 34 of the Act was filed on 06-06-2009, more than a year of the receipt of the award. This inordinate delay cannot be condoned as per the mandate of the proviso of Sub-section (3) of Section 34 of the Act.

24. On the basis of above-mentioned observations, Miscellaneous Case No. 53/2009 filed by the sole respondent before the learned court below under Section 34 of the Act is declared to be highly time-barred.

25. Accordingly, the order dated 03-11-2013



passed by the Learned District Judge, Naugachia in
Miscellaneous Case No. 53/09 is set aside and the appeal is
allowed.

(Nawneet Kumar Pandey, J)

Nirmal/AKV

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