

**HIGH COURT OF GUJARAT**

**P DATANI AND CO  
V/S  
STATE OF GUJARAT**

**Date of Decision:** 28 November 1972

**Citation:** 1972 LawSuit(Guj) 105

**Hon'ble Judges:** [S H Sheth](#)

**Eq. Citations:** 1973 GLR 809

**Case Type:** Civil Revision Application

**Case No:** 614 of 1972

**Subject:** Arbitration

**Head Note:**

**S.39 not controlled by S.17 - Right of appeal of aggrieved party - appeal against order against decree passed in terms of award - Court order rejecting objections to the awards Appeal against such order governed by Art.13 of court fees Act.**

**Since secs. 39 and 17 of the Arbitration Act are not mutually exclusive and since it is also clear that sec. 17 does not control sec. 39 an aggrieved party has right of appeal against the order by which objections against the award have been dismissed and he has also a right of appeal against the decree passed in terms of the award. Where a composite order of this kind has been passed it is open to a party to appeal either under sec. 17 or under sec. 39. (Para 13) Held that in the instant case the plaintiff has filed the appeal not only in form but also in substance against the order of the trial court rejecting his objections against the award and refusing to set aside the award. The court fees therefore payable on the memorandum of appeal is governed by Article 13 in Schedule II of the**

**Bombay Court-Fees Act 1959 (Paras 14 and 15) Mr. Ishwar Dei v. Chhedu Indian Minerals Co. v. N.I L.M. Assocn Sheoramprasad v. Gopal Prasad Mathura Prasad v. Manohri Kuer Taxing Officer v. Jamnadas Dharamdas and ors.**

**Acts Referred:**

[Arbitration Act, 1940 Sec 39, Sec 17](#)

[Bombay Court Fees Act, 1959 Art 13](#)

**Final Decision:** Rule made absolute

**Advocates:** [D D Vyas](#), K S Nanavati, [V H Bhairavia](#)

**Reference Cases:**

[Cases Cited in \(+\): 1](#)

[Cases Referred in \(+\): 7](#)

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**Judgement Text:-**

S H Sheth, J

**[1]** This Civil Revision Application is directed against the order of the Taxing Officer.

**[2]** The plaintiff filed the present suit against the defendant to recover a sum of Rs. 12,798.33. During the pendency of that suit, the dispute between the parties was referred to arbitration. The arbitrator made his award on March 27, 1969, by which he awarded to the plaintiff a sum of Rs. 406.78 and rejected the rest of his claim,

**[3]** The award was filed in the Court. The plaintiff filed objections to the award. They were rejected by the trial Court and the trial Court made the following composite order :-

"The plaintiff's application, Ex. 131, is dismissed. The plaintiff's objections against the award are disallowed. It is further ordered that the award, Ex. 130, is hereby made a rule of the Court. Decree in terms thereof be passed".

**[4]** Against that order, the plaintiff has filed in this Court First Appeal Stamp No. 1658 of 1970. He paid on the Memorandum of Appeal a court-fee of Rs. 5/-. The office raised an objection and required the plaintiff-appellant to pay ad valorem court fee on Rs.

12798.33. The learned advocate for the plaintiff-appellant did not agree to that requisition and, therefore, the matter was referred to the Taxing Officer.

**[5]** The Taxing Officer, by his order dated January 20, 1971, has held that the plaintiff-appellant is liable to pay ad valorem court-fee on the claim which he has made in his Memorandum of Appeal.

**[6]** This revision application has been filed against that order.

**[7]** Mr. Vyas has contended before me that sec. 39 of the Arbitration Act, 1940, confers upon an aggrieved party the right to appeal against an order setting aside or refusing to set aside an award (vide clause (vi) of sub-sec. (1) of sec. 39). He has also invited my attention to sec. 17 of the Arbitration Act which, inter alia, provides that, after the Court has pronounced judgment on the award, a decree shall be passed and that 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. In his submission, whereas sec. 17 contemplates an appeal against a decree passed in pursuance of the award, clause (vi) of sub-sec. (i) of sec. 39 contemplates an appeal against the order refusing to set aside an award. According to him, both these are independent rights and if the trial Court has passed a composite order by which it has refused to set aside the award and passed decree in terms of the award, the right of the aggrieved party under sec. 39(1) (vi) to appeal against the order refusing to set aside the award is not lost.

**[8]** In support of his contention, he has invited my attention to a few decisions. In *Mt. Ishwar Dei v. Chhedu*, A.I.R. 1952. All. 802-it has been laid down that, where the Court has passed a composite order by which it has dismissed the objections to the award and also passed decree-in terms of the award, it is to be treated as an order refusing to set aside the award and appeal against such an order is maintainable under sec. 39 (1)(vi) of the Arbitration Act.

**[9]** In a later decision in *Indian Minerals Co. v. N.I.L.M. AssoCri.*-A.I.R. 1958 All. 692- a Division Bench of that High Court has made a distinction between an appeal under sec. 39 of the Arbitration Act and an appeal against decree passed under sec. 17 of that Act. It has been held in that decision that the provisions of sec. 39 and sec. 17 cannot be so interpreted as to destroy the specific provision for an appeal under sec. 39 in cases where the Court has passed a composite order rejecting the objections: filed against the award and passing decree in terms thereof.

**[10]** In *Sheoramprasad v. Gopalprasad-A.I.R. 1959 M.R 102-a* a similar principle has been laid down. It has been held, in that decision, that, in case of a composite order by which the Court has refused to set aside the award and also passed a decree in accordance with its terms, the order refusing to set aside the award and the decree are both appealable because Secs. 17 and 39 are not mutually exclusive. Therefore, it has been further laid down that the fact that a decree has been passed does not preclude an appeal against the order refusing to set aside the award.

**[11]** In *Mathura Prasad v. Manohri Kuer-A.I.R. 1968 Pat. 454*, it has been laid down by a Division Bench of that High Court that, where the Court has made a composite order refusing to set aside the award and passing a decree on the basis of that order, an appeal under sec. 39(1)(vi) lies against that order. The provisions of sec. 17 do not control those of sub-sec. (1) of sec. 39.

**[12]** These decisions show that under sec. 39 and under sec. 17 a party has two independent rights of appeal. Both these rights are available to a party even where a composite order has been made by which objections against the award have been dismissed and decree has been passed in terms thereof. This proposition is supported by the aforesaid decisions. There are a number of other decisions also which support this proposition. It is not necessary to burden this judgment with them.

**[13]** Since it is quite clear that sec. 39 and sec. 17 of the Arbitration Act are not mutually exclusive and since it is also clear that sec. 17 does not control sec. 39, an aggrieved party has a right of appeal against the order by which objections against the award have been dismissed and he has also a right of appeal against the decree passed in terms of the award. Where a composite order of this kind has been passed, it is open to a party to appeal either under sec. 17 or under sec. 39. If a party has chosen to appeal under sec. 39, his appeal must be treated on that basis.

**[14]** In the instant case, I have gone through the Memorandum of Appeal filed by the appellant-plaintiff. There is no challenge whatsoever to the decree passed by the trial Court. The Memorandum of Appeal runs into as many as 13 typed pages and contains grounds which are all directed against the order of the Court refusing to set aside the award. It is, therefore, very clear that the plaintiff-appellant has filed the present appeal, not only in form but also in substance, against the order of the trial Court rejecting his objections against the award and refusing to set aside the award. The present appeal is not under sec. 17 of the Arbitration Act. Since the present appeal has been filed under sec. 39(1) (vi) of the Arbitration Act, the appellant-plaintiff is liable to pay the court-fees

on that basis.

**[15]** In these circumstances, the order which the plaintiff has challenged is an order not having the force of a decree. The Court-fee, therefore, payable on the Memorandum of Appeal is governed by article 13 in Schedule II to the Bombay Court-fees Act, 1959. In taking this view, I am supported by a decision of the High Court of Bombay in Taxing Officer v. Jamnadas Dharamdas and others-A.I.R. 1956 Bom. 563. Under article 13 in Schedule II, a fixed court-fee of Rs. 5/- is payable on a Memorandum of Appeal filed in the High Court under sec. 39(1) (vi) of the Arbitration Act.

**[16]** Mr. Vyas tells me that the plaintiff-appellant has paid a court-fee of Rs. 5/-.

**[17]** In this view of the matter, the order made by the Taxing Officer cannot be sustained. The objection raised by the office cannot be upheld.

**[18]** In the result, I allow this Civil Revision Application, set aside the order passed by the Taxing Officer and reject the objection raised by the office in that behalf. I direct the office to register this appeal as an appeal from order. Since this appeal is not directed against the decree or order having the force of a decree, it cannot be registered as a First Appeal. It can be registered only as an appeal from order. Rule is made absolute.

**[19]** I direct that there shall be no order as to costs of this Civil Revision Application.

Rule made absolute.

