

HIGH COURT OF DELHI AT NEW DELHI

FAO (OS) No. 198/2004

Reserved on:- 13th May, 2008
Date of Decision: May 30th, 2008

#M/s. Shyam Telecom Ltd. Appellant.
! Through Mr. Suresh Singh, Advocate
with Ms. Sunita Bansal, Adv.
and Ms. Ruchi Kohli, Adv.

Versus

\$M/s. A.R.M. Ltd. Respondent
Through Mr. Neeraj K. Kaul, Sr. Adv.
with Mr. Tajas Karia, Adv.
Ms. Anu Bagai, Advocate.

CORAM:

* HON'BLE MR. JUSTICE MANMOHAN SARIN
* HON'BLE MR. JUSTICE MANMOHAN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the digest? Yes.

J U D G M E N T

MANMOHAN, J :

1. The Appellant has filed the present appeal being FAO (OS) No. 198/2004 under Section 37 of the Arbitration and Conciliation Act, 1996 and Section 10 of the Delhi High Court Act, 1996. In this appeal the appellant has prayed for setting aside of the

judgment and order dated 17th September, 2004 passed by the Single Judge of this Court in OMP No. 407/2003 by virtue of which the Appellant's application under Section 14 (2) of the Arbitration and Conciliation Act, 1996 was dismissed.

2. At the outset, the learned counsel for the Respondent has raised a preliminary objection to the maintainability of the present appeal. Mr. Kaul contends that in view of Section 37 (1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Arbitration Act, 1996), it is not open to the Appellant to file the present appeal before a Division Bench of this Court. He submits that the present appeal is not maintainable as the two contingencies in which appeal is maintainable as provided under Sub-Section (a) & (b) of Section 37 (1) are admittedly not there namely (a) it is not an order granting or refusing to grant any measure under Section 9 or, (b) setting aside or refusing to set aside arbitral award under Section 34. Emphasis is laid by the Respondent's counsel on the expression "and from no others" to say that the appeal in all other cases is excluded. Section 37 (1) of the Arbitration Act, 1996 is reproduced herein below for ready reference :-

“37(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.”

3. Learned Senior Counsel for the Respondent referred to and relied upon a full bench judgment of this Court in the case of ***Union of India Vs. A.S. Dhupia reported at AIR 1970 Delhi 108.*** According to him in this judgment it was specifically held that Section 10 (1) of the Delhi High Court Act provides only a forum of appeal from the judgment of a Single Judge to a Division Bench and the said Section does not overwrite Section 39 (1) of the old Arbitration Act, 1940 which is a special provision dealing with right of appeal in arbitration matter. It is pertinent to mention that Section 39 (1) of the Arbitration Act, 1940 uses a similar expression “and from no others” like Section 37 (1) of the Arbitration Act, 1996.

4. Mr. Kaul also referred to a judgment of this Court in the case of ***Pradeep Anand Vs. I.T.C. Ltd. & Ors. reported at 2000 (4) Raj 518 (Del)***. The relevant para of the said judgment is reproduced herein below for ready reference :-

“.....41. As we have held that the Order passed by the learned Single Judge was an Order under the Act, Section 10 of the Delhi High Court Act will not be of any avail to the Appellant to contend that right of Appeal having been provided by Section 10, this right could not be taken away by Section 39 of the Act. In a Full Bench Judgment of this Court in Union of India Vs. A. S. Dhupia and Another, AIR 1972 Del. 108 it was held that Section 10 of the Delhi High Court Act provides only a forum of Appeal and the question of right of Appeal is to be decided by reference to Section 39 of the Act and not by reference to Section 10 of the Delhi High Court Act. The Appeal is a creature of statute. There is no inherent right of Appeal. The right to file an Appeal has to be conferred by legislation. It is, therefore, under the provisions of Section 39 of the Arbitration Act that one has to look into to decide whether an Order of the nature appealed against is appealable or not. The Order in the present case, therefore, being not one of the Orders specified in Section 39 of the Act, in our view, the present Appeal is not maintainable.....”

5. Mr. Kaul drew our attention to Section 5 of the Arbitration Act, 1996 to contend that the new Arbitration Act, 1996 limits the extent of judicial intervention. Mr. Kaul lastly referred to a judgment of this Court in case of ***National Thermal Power***

Corporation Ltd. (NTPC) Vs. Siemens Antiengesellschaft (SAG) reported at 2005 VI AD (Delhi) 256 wherein it has been held that the words "and from no other orders" appearing in Sub-section 1 of Section 37 are analogous to the provisions of Section 39 of the Arbitration Act, 1940 and further after relying upon case of **A.S. Dhupia** it was held that appeals would lie only against the orders specifically mentioned in Section 37.

6. On the other hand Mr. Suresh Singh, learned Counsel for the Appellant submitted that the Letters Patent is the Charter of the High Court and it is a specific law under which a High Court derives its powers. According to him a Letters Patent Appeal cannot be excluded by implication and in case of a conflict the provisions of Letters Patent would always prevail unless there was a specific exclusion. In this context, Mr. Suresh Singh referred to and relied upon the judgment of a Constitutional Bench of the Supreme Court in the case of **P.S. Sathappan (Dead) through LRs V. Andhra Bank Ltd. & Ors. reported at 2004 (11) SCC 672**. Mr. Singh referred to and relied upon paras 26 & 32 of the said judgement which are reproduced herein below for ready reference:-

“26. In the case of Vinita M. Khanolkar v. Pragna M. Pai an appeal had been filed against an order passed under Section 6 of the Specific Relief Act. It was contended that such an appeal was barred by sub-section (3) of Section 6 of the Specific Relief Act. This Court agreed that Section 6(3) of the Specific Relief Act barred such an appeal but went on to consider whether Section 6(3) could bar a letters patent appeal. In this context this Court held as follows: (SCC p. 502, para 3)

“3. Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under Letters Patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by learned counsel for the respondents that if clause 15 of the Letters Patent is invoked then the order would not be appealable. Consequently, in our view, on the clear language of clause 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by learned Single Judge of the High Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed.”

The question whether a letters patent appeal was maintainable against the judgment/order of a Single Judge passed in a first appeal under Section 140 of the Motor Vehicles Act was considered by this Court in the case of Chandra Kanta Sinha v. Oriental Insurance Co. Ltd. In this case, it was held that such an appeal was maintainable. It was held that the decision of this Court in the case of New Kenilworth Hotel (P) Ltd. was inapplicable.....

32. *It was next submitted that clause 44 of the Letters Patent showed that Letters Patent were subject to amendment and alteration. It was submitted that this showed that a Letters Patent was a subordinate or subservient piece of law. Undoubtedly, clause 44 permits amendment or alteration of Letters Patent, but then which legislation is not subject to amendment or alteration? CPC is also subject to amendments and alterations. In fact it has been amended on a number of occasions. The only unalterable provisions are the basic structure of our Constitution. Merely because there is a provision for amendment does not mean that, in the absence of an amendment or a contrary provision, the Letters Patent is to be ignored. To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters Patent. As has been held in Vinita Khanolkar case and Sharda Devi case a Letters Patent is the charter of the High Court. As held in Shah Babulal Khimji case a Letters Patent is the specific law under which a High Court derives its powers. It is not any subordinate piece of legislation. As set out in the aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the High Court concerned. The Civil Procedure Code is a general law applicable to all courts. It is well-settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between the Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of the Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 of the Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 CPC only a specific provision to the contrary can*

exclude the special law. The specific provision would be a provision like Section 100-A.....”

7. According to Mr. Singh there are observations to the same effect in the case of ***Midnapore Peoples' Coop. Bank Ltd. v. Chunilal Nand reported in (2006) 5 SCC 399***. Mr. Singh then referred to the judgment of the Supreme Court in the case of ***Kamla Devi Vs. Khushal Kanwar & Anr. reported at AIR 2007 Supreme Court 663*** wherein the Apex Court has reiterated and followed the ratio of ***P.S. Sathappan (Supra)***. Mr. Singh also referred to the judgments of the Apex Court in the case of ***Subal Paul v. Malina Paul reported in (2003) 10 SCC 361*** and ***ITI Ltd. v. Siemens Public Communications Network Ltd. reported in (2002) 5 SCC 510***.

8. Though we find that the present appeal has not been filed under Clause 10 of the Letters Patent, we are still dealing with the argument advanced by Mr. Suresh Singh as it is settled law that a wrong nomenclature under which a petition is filed is not relevant as it does not bar the Court from exercising a jurisdiction which it otherwise possesses. In any event, in our opinion, the issue as to

whether an appeal under Clause 10 of the Letters Patent would lie against any order under the Arbitration Act is no longer res integra.

9. The Supreme Court while interpreting an identical expression “and from no others” under Section 39 (1) of the old Arbitration Act, 1940 in the case of ***Union of India vs. Mohinder Supply reported at AIR 1962 SC 256*** held that the Arbitration Act being a self contained code relating to arbitration, the right of appeal could only be exercised against orders mentioned in Section 39 of the said Act and from no other orders. The relevant portion of the said judgment is reproduced herein below for ready reference :-

“(5) Under S. 39 (1), an appeal lies from the orders specified in that sub-section and from no others. The legislature has plainly expressed itself that right of appeal against orders passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away. If by the express provision contained in S. 39(1), a right to appeal from a judgment which may otherwise be available under the Letters patent is restricted, there is no ground for holding that cl. (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent...”

(19) The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statute are plain and explicit and they must be given their full effect and must be

interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act of 1940 by codifying the law relating to appeals in S. 39.....”

10. Following the judgment of the Apex Court, a Full Bench of this Hon'ble Court in case of A.S. Dhupia referred to herein above held that Section 39 of the Arbitration Act, 1940 cannot be said to be repealed by implication by Section 10 (1) of the Delhi High Court Act, 1966.

11. In the year 1983, Section 39(1) of the Arbitration Act, 1940 again came up for interpretation before this Hon'ble Court. It was sought to be urged that in view of the subsequent judgment of the Supreme Court in ***Shah Babulal Khimji vs. Jayaben De Kanya AIR 1981 SC 1786***, the earlier Full Bench decisions of this Court in ***University of Delhi's*** case reported at ***AIR 1972 Delhi 102*** and ***N.K. Pvt. Ltd.'s*** case reported at ***AIR 1972 Delhi 202*** were no longer good law. However, this contention was repelled by a Division Bench of this Court in ***M/S. Banwari Lal Radhey Mohan, Delhi Vs. The Punjab State Co-operative Supply and***

Marketing Federation Ltd. reported at AIR 1983 Delhi 402 by

holding as under :-

“18. All the above arguments fail to notice one salient feature and that is that appeals from the judgment/order of a trial Judge to a larger bench of the High Court would be maintainable unless otherwise so provided either expressly or by implication of any law. Section 4 of the Civil P.C. in terms lays down that when anything in the Civil P.C. is in conflict with anything in the special or local law or with any special jurisdiction or power conferred or any special forum or procedure prescribed by or under any other law, the Code will not, in the absence of specific provision to the contrary, prevail so as to override such inconsistent provision. In the cases cited and considered by the Supreme Court in Shah Babulal Khimji's case (AIR 1981 SC1786) no inconsistency was pointed out between the provisions of the Code or the provisions of the Letters Patent. In the present case it is not so. Section 39 of the Arbitration Act in terms says that no other orders would be appealable except those specified in the section. Therefore, on the ratio of Shah Babulal Khimji's case, which approves the rule enunciated by the Judicial Committee of the Privy Council in Chowdry's case (1882-10 Ind App 4) it has to be held that no appeal is competent from the judgment under appeal before us. Indeed, if we are to read paras 33 and 34 of the Judgment in Shah Babulal Khimji's case it would become apparent that the Supreme Court, while upholding the right of first appeal against judgment of a trial Judge from orders from which appeal is permissible under S. 39 of the Arbitration Act impliedly also held that the provisions of Sec. 39 of the Arbitration Act would apply in appeals from orders from which appeal is permissible under Section 39 or was impermissible. Their Lordships in Shah Babulal Khimji's case, a decision rendered by a Division Bench of the Supreme Court, comprising of

three Hon'ble Judges noticed with approval the decision of the Supreme Court in the Mohindra Supply Co.'s case (AIR 1962 SC 256) given by a Bench of four Hon'ble Judges. As noticed earlier, maintainability of an appeal from an order amounting to a judgment from which appeal is not permissible on a reading of Section 39 of the Arbitration Act was specifically ruled out in Mohindra Supply Co.'s case. We are bound by that decision....."

12. We do not agree with the submission of Mr. Suresh Singh that the provisions of the Letters Patent conferring a right to file an appeal on a litigant would always prevail unless specifically excluded by an Act. We also do not agree with his submission that the present controversy stands settled by the judgment of the Apex Court in **P.S. Sathappan's** case referred to herein above. In our view the issue that arose for consideration in the case of **P.S. Sathappan** was whether Section 104 (2) of C.P.C. would bar an appeal under the Letters Patent. The Apex Court in the said case after analysing Section 4 and Section 104 of the C.P.C. came to the conclusion that Section 104 (1) specifically saves a Letters Patent Appeal and the only way such an appeal can be excluded is by express mention in Section 104 (2) that a Letters Patent Appeal was prohibited. It is pertinent to mention that the Constitution Bench of the Supreme Court in the said case in fact

referred to, relied upon and approved the earlier judgment of the Supreme Court in case of **Mohindra Supply** referred to herein above. In **P.S. Sathappan's** case the Constitution Bench reaffirmed that since Arbitration Act, 1940 was a self contained code relating to arbitrations and there were no similar provisions, like Section 4 and Section 104 (1) of C.P.C., the right of appeal under the old Arbitration Act could only be exercised against those orders mentioned in Section 39 of the said Act. The relevant paras of **P.S. Sathappan's** case are reproduced herein below for ready reference :-

“10. This Court [in Mohindra Supply case] however noticed that in the Arbitration Act, there was no provision similar to Section 4 of the Code of Civil Procedure which preserved powers reserved to courts under special statutes. Under the Code of Civil Procedure, the right to appeal under the Letters Patent is saved both by Section 4 and the clause contained in Section 104(1), but by the Arbitration Act, 1940, the jurisdiction of the courts under any other law for the time being in force is not saved. The right of appeal could therefore be exercised against orders in arbitration proceedings only under Section 39, and no appeal lay from the appellate order (except an appeal to this Court). The provisions in the Letters Patent providing for appeal, insofar as they related to orders passed in arbitration proceedings, were held to be subject to the provisions of Sections 39(1) and (2) of the Arbitration Act, as the same is a self-contained code relating to arbitration.....

22. *Thus the unanimous view of all courts till 1996 was that Section 104(1) CPC specifically saved letters patent appeals and the bar under Section 104(2) did not apply to letters patent appeals. The view has been that a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. The express provision need not refer to or use the words “letters patent” but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.....*

34. *..... An appeal is a creature of a statute. If a statute permits an appeal, it will lie. If a statute does not permit an appeal, it will not lie. Thus, for example, in cases under the Land Acquisition Act, the Guardians and Wards Act and the Succession Act, a further appeal is permitted whilst under the Arbitration Act a further appeal is barred. Thus different statutes have differing provisions in respect of appeals. There is nothing anomalous in that.....”*

13. Since the other judgments referred to by Mr. Singh only either follow **P.S. Sathappan’s** case or make similar observations as **P.S. Sathappan**, we are of the view that present appeal would not be maintainable in view of the general embargo contained in Section 5 of the Arbitration Act, 1996 and in view of the absolute and specific embargo contained in Section 37 of the new Arbitration Act, 1996.

14. It is pertinent to mention that a Bench of seven Judges of the Supreme Court in ***SBP &Co. vs. Patel Engineering Ltd. and Anr., reported in (2005) 8 SCC 618***, have held that any party aggrieved by an order Under Section 11(6) of the Arbitration Act, 1996 can only file a petition under Article 136 of the Constitution of India.

15. Consequently, the present appeal is dismissed as not maintainable. However, the Appellant is given the liberty to file appropriate proceedings as may be available to it in accordance with law.

[MANMOHAN]
Judge.

[MANMOHAN SARIN]
Judge.

May 30th, 2008
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