

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) No. 284/2003**

Reserved on : December 11th, 2008

% Date of Decision : December 17th, 2008

MAHANAGAR TELEPHONE
NIGAM LTD.

Through: Appellant
Mr. Prag P. Tripathi, ASG
with Mr. Ravi Sikri and
Mr. Amey Nargolker,
Advocates.

Versus

M/S. UNIBROS & ANR.

Through: Respondents
Mr. Madan Bhatia, Senior
Advocate with
Mr. Jagdish Vatsa,
Advocates.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 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 present appeal has been filed under Section 39 of the Indian Arbitration Act, 1940 for setting aside the judgment and order dated 5th May, 2003 passed by learned Single Judge in Suit No. 266-A/2001.

2. At the outset, Mr. Madan Bhatia, learned Senior Counsel for the Respondent raised a preliminary objection to the

maintainability of present appeal on the ground that under Section 39 of the Arbitration Act, 1940 appeals were maintainable only against the orders mentioned in Clauses (i) to (vi) of Section 39(1). Section 39 of the Arbitration Act, 1940 is reproduced hereinbelow for ready reference :-

"39. Appealable orders. (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:-

An order-

- (i) superseding an arbitration;*
- (ii) on an award stated in the form of a special case;*
- (iii) modifying or correcting an award;*
- (iv) filing or refusing to file an arbitration agreement;*
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;*
- (vi) setting aside or refusing to set aside an award;*

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the [Supreme Court]."

(emphasis supplied)

3. Mr. Bhatia referred to the observations of the Hon'ble Supreme Court in ***Union of India vs. Mohinder Supply reported in AIR 1962 SC 256*** and observations of this Court in ***Union of India Vs. A.S. Dhupia reported in AIR 1970 Delhi 108*** wherein it has been held that the right to appeal is a creature of the statute and the Arbitration Act being a complete code within itself has given a right to appeal only in respect of certain orders and consequently the right to appeal against other orders has expressly been taken away. The relevant observations of the

Supreme Court and this Court are reproduced hereinbelow:-

“(A) Union of India vs. Mohinder Supply reported in AIR 1962 SC 256

(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...

(6) ... But the right to appeal is a creature of statute; no litigant has an inherent right to appeal against a decision of a Court...

(14) The intention of the legislature in enacting sub-s. (1) of S. 104 is clear : the right to appeal conferred by any other law for the time being in force is expressly preserved. This intention is emphasized by S. 4 which provides that in the absence of any specific provision to the contrary, nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force...

(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...”

(B) Union of India Vs. A.S. Dhupia reported in AIR 1970 Delhi 108.

2. We have already held in F.A. O. (O.S.) 6 of 1968 (by separate judgment of today) (now reported in AIR 1972 Delhi

102) (FB) that Section 10 (1) of the Act of 1966 provides only a forum of appeal from the judgment of the single judge to a Division Court. We have repelled the argument that the word 'judgment' under Section 10 (1) of the Act of 1966 is to be read as having a meaning which judicial decisions have given to the expression 'judgment' in Letters Patent. According to our judgment, the appeal from the order of a single judge to a Division Court under Section 10 (1) of the Act of 1966 will lie only against orders mentioned in Section 104 read Order 43, Rule 1 of the Code of Civil Procedure (hereinafter called the Code). The contention therefore that Sec. 10 (1) of the Act 1966 confers unfettered right of appeal without any limitation cannot be accepted....

...The Act is a specific Code dealing with the arbitration matters and Section 39 (1) is a special provision indicating the orders which alone are appealable. It is wrong, therefore, to say that Section 10 of the Act of 1966 which only provides for a forum of appeal is special provision and will override Section 39 (1) of the Act....

...Section 39 of the Act which is a special provision dealing with the right of appeal in arbitration matters cannot be said to have been repealed by implication by Section 10 (1) of the Act of 1966."

(emphasis supplied)

5. Mr. Bhatia stated that the present appeal is against the order dated 5th May, 2003 by virtue of which the Appellant's objections under Sections 14 and 17 of the Arbitration Act, 1940 have been dismissed. According to Mr. Bhatia an order dismissing an application under Section 14 of the Arbitration Act, 1940 was not appealable under Section 39 of the said Act. In this regard, he referred to the observations of a Division Bench of this Court in ***Hari Shankar Vs. Union of India reported in 1974 Rajdhani Law Reporter 335*** wherein it has been held as under :-

"30. We have, therefore, no hesitation in holding that an order dismissing an application under Section 14 of the Act otherwise than a reference to the validity or existence of an award and without adjudicating the question as to its validity or existence could not be said to be tantamount to setting

aside the Award and the first contention of the appellant must, therefore, fail.

31. The contention raised on behalf of the appellant on the second question that assuming that the impugned order was not appealable under Section 39 of the Act, was nevertheless appealable either under clause 10 of the Letters Patent or Section 10(1) of the High Court Act, 1966, appears to us to be equally unsustainable.....”

(emphasis supplied)

6. Mr. Madan Bhatia further submitted that the issue of maintainability of the appeal was squarely covered by a recent judgment of our own Division Bench in **Hardayal Singh Vs. Joginder Singh & Ors. in FAO(OS) No. 269/2007** wherein this Bench after referring to **Mohinder Supply** (supra), **SBP &Co. vs. Patel Engineering Ltd. and Anr., reported in (2005) 8 SCC 618**, **M/s. Canbank Financial Services Ltd. Vs. M/s Haryana Petrochemicals Ltd. & Anr. in FAO(OS) No. 71/2006** and **M/s. Shyam Telecom Ltd. Vs. M/s. A.R.M. Ltd. in FAO(OS) No. 198/2004** came to the conclusion that in view of the absolute and specific embargo contained in Section 39(1) of the Arbitration Act, 1940, appeals were maintainable only against the orders mentioned in Section 39(1)(i) to (vi) and against no other orders.

7. In response Mr. Prag P. Tripathi, learned ASG appearing on behalf of Appellant submitted that the present case arises out of challenge to the judgment/order dated 5th May, 2003 filed in Suit No. 266-A/2001 wherein not only the petition bearing No. 266A/2001 filed under Section 14 and 17 of the Arbitration Act, 1940 was dismissed but also IA No. 3170/2002 wherein objections

under Sections 30 and 33 of the Arbitration Act, 1940 had been filed, had been set aside. According to Mr. Tripathi since challenge to the Award under Section 30 and 33 of the old Arbitration Act, 1940 were dismissed and were directed to be treated under Section 34 of the Arbitration and Conciliation Act, 1996, the present appeal was maintainable under Section 39(1)(vi) of the old Arbitration Act, 1940. Mr. Tripathi submitted that by virtue of the impugned order, the learned Single Judge had refused to set aside the Award under the old Arbitration Act, 1940 and it is for this reason that the learned Single Judge had directed the IA in question namely No. 3170/2002 to be treated as having been filed under Section 34 of the Arbitration and Conciliation Act, 1996. It is pertinent to mention that Section 39 1(vi) of the Arbitration Act, 1940 refers to an order “setting aside and refusing to set aside an award”.

8. Mr. Tripathi further submitted that the textual, contextual and factual matrix in the case decided by this Court in **Hardayal Singh** (supra) was totally different. According to him, the distinguishing features are that in **Hardayal Singh's** case, the award was made Rule of Court without any modification or amendment, or indeed objections by the Petitioner. Moreover, in **Hardayal Singh's** case, the Petitioner though had no dispute with the initial award, but due to subsequent fraudulent disposal of properties by the Respondent, the Petitioner therein had tried to contend that the mandate of Section 17 had not been followed. He submitted that both these aspects are absent in the present case.

9. Lastly, Mr. Tripathi submitted that he would not press the present appeal in case the Respondents were to make a settlement that they would not raise the issue of limitation with regard to the Appellant's objections to the Arbitration Award. He pointed out that though the Appellant's objections under Sections 30 and 33 of the old Arbitration Act, 1940 were within limitation, the Respondent could now raise a plea that the Appellant's objections under the new Arbitration and Conciliation Act, 1996 were beyond limitation.

10. In rejoinder, Mr. Madan Bhatia stated that the Appellant's objections under Sections 30 and 33 had not been dismissed but were only directed to be treated as objections under Section 34 of the new 1996 Arbitration Act. He further referred to the subsequent order dated 21st May, 2003 of the learned Single Judge by virtue of which the Appellant's objections had now been directed to be treated as a separate OMP.

11. Keeping in view the aforesaid submissions, we are of the view that an appeal is maintainable against only those orders which are mentioned in Clauses (i) to (vi) of Section 39 of the old Arbitration Act, 1940 and from no other orders. In fact, in view of the categorical judgment of this Court in ***Hari Shankar's*** case (supra), we are of the view that no appeal is maintainable against an order of the learned Single Judge dismissing or allowing a petition under Sections 14 and 17 of the Arbitration Act, 1940.

12. In our view, an appeal under Section 39(1)(vi) would certainly lie against an order setting aside or refusing to set aside an award. However, in the present instance, we find that learned Single Judge has not dismissed the application bearing IA No. 3170/2002 filed under Sections 30 and 33 of the old Arbitration Act. The learned Single Judge has only treated the Appellant's application filed under Sections 30 and 33 of the old Arbitration Act as having been filed under Section 34 of the new Arbitration Act, 1996. This order, in our view, cannot be treated as having refused to set aside an award. We do not agree with Mr. Tripathi's submission that by virtue of the impugned order the objections to the Award filed by the Appellant under Section 30 & 33 had been dismissed or set aside by the learned Single Judge.

13. Since we did not find any ground in the appeal challenging the conversion of Appellant's application under Sections 30 and 33 of the old Arbitration Act to Section 34 of the new Arbitration Act, 1996 we asked the learned Counsel for the Appellant to show if there was any specific ground challenging the conversion or treatment of the Appellant's application being I.A. No. 3170/2002. Learned Counsel for the Appellant fairly stated that there was no specific ground in the appeal challenging the conversion of the Appellant's application.

14. Consequently, we are of the view that since the Appellant's objections to the Award under Sections 30 and 33 under the old Arbitration Act have not been refused, the present appeal is not maintainable. In case, the Respondents were to raise the plea

that the Appellant's objections under Section 34 of the new Arbitration Act, 1996 were beyond limitation, the Appellant would be well advised to take all its defences including the plea that the issue of limitation already stood settled by the learned Single Judge's order by converting or treating the Appellant's objections filed by way of IA No. 3170/2002 under Section 34 of the new Arbitration Act, 1996. Moreover, in case, the Appellants are still aggrieved by any subsequent order, they would be at liberty to challenge the same.

15. Consequently, the present appeal is dismissed as not maintainable, but with no order as to costs.

MANMOHAN, J

MUKUL MUDGAL, J

December 17th, 2008
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