

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 28.03.2008

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ARB. A. 1/2008

M/S I.T.I. LIMITED

... Petitioner/Appellant

- versus -

**M/S HIMACHAL FUTURISTIC COMMUNICATIONS
LIMITED**

... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Dayan Krishnan with Mr Gautam Narayan and
Mr Samrat Singh

For the Respondent : Mr Rakesh Tikku with Mr Vivek Singh

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

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

BADAR DURREZ AHMED, J (ORAL)

1. This appeal has been filed under Section 37 (2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'). The appellant is aggrieved by the order dated 17.12.2007 passed by the arbitral tribunal whereby the appellant's application under Sections 16 and 17 of the said Act was dismissed.

2. The learned counsel for the respondent has raised a preliminary issue with regard to the maintainability of this appeal. He submitted that the order appealed against is actually an order passed under Section 16 (2) of

the said Act and not under Section 17 thereof. That being the case, he submitted, the present appeal would not be maintainable in view of the provisions of Section 16 (6) read with Section 37 (2) (a) of the said Act.

3. On the other hand, the learned counsel for the appellant submitted that the application made by the appellant before the arbitral tribunal was a hybrid application invoking both Section 16 (2) and Section 17 of the said Act. He further submitted that the order passed by the arbitral tribunal is also a hybrid order concerning both Section 16 (2) and Section 17. He submitted that in view of this, an appeal under Section 37 (2) (b) of the Act would be maintainable because an appeal lies to a court against an order of the arbitral tribunal granting or refusing to grant an interim measure under Section 17 of the Act. His contention was that the appellant is a sick company under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA') and in respect of which a rehabilitation scheme is pending consideration before the BIFR. Consequently, in view of the provisions of Section 22 of SICA, the arbitral proceedings could not be continued because, according to the learned counsel for the appellant, the expression 'suit' as appearing in the said Section 22 would also cover arbitral proceedings.

4. The arbitral tribunal passed the impugned order dated 17.12.2007 and took the view that the expression 'suit' appearing in Section 22 of SICA would not cover the arbitration proceedings. It was further held

that once the award is made, the appellant could take recourse to Section 22 of SICA inasmuch as the award could not then be executed in view of the said provisions during the pendency of a rehabilitation scheme before the BIFR.

5. In the context of these rival contentions and the decision of the arbitral tribunal, I have to consider the question of maintainability of this appeal. It is apparent upon examining the provisions of the said Act that Section 16 (2) provides that a plea that the arbitral tribunal does not have jurisdiction is required to be raised not later than the submission of the statement of defence thereof. However, a party is not precluded from raising such a plea merely because he had appointed or participated in the appointment of an arbitral tribunal. The prayer that was made in the application filed by the appellant before the arbitral tribunal required the arbitral tribunal to direct that the arbitration proceedings did not lie and be not proceeded further without the express consent of the BIFR or as the case may be, the AIFR. It is clear that the prayer that was made in that application concerned a jurisdictional issue. It was the contention of the appellant before the arbitral tribunal that the arbitral tribunal could not proceed with the arbitration without express consent being given to the respondent / claimant by the BIFR in terms of Section 22 (1) of SICA.

6. In my view, the provisions of Section 17 do not come into play at all unless and until the arbitral tribunal has jurisdiction in the matter.

Insofar as the argument *qua* jurisdiction is concerned, the arbitral tribunal, rightly or wrongly, has rejected the contention of the appellant and has refused to agree with the appellant that it had no jurisdiction to continue with the arbitration proceedings unless and until an express consent was obtained from the BIFR. In such a situation, the only remedy available to the appellant would be that which is provided by Section 16 (6) of the said Act and that is to await the making of the arbitral award and thereafter to make an application for setting aside the said award on this ground in accordance with the provisions of Section 34 of the said Act. It is also clear that an appeal can lie from an order passed under Section 16 (2) only if the plea that the arbitral tribunal does not have jurisdiction is accepted. This is apparent from the provisions of Section 37 (2) (a) of the said Act. Since the plea of jurisdiction raised by the appellant has been rejected, the provisions of Section 37 (2) (a) of the said Act would not be available to the appellant.

7. The learned counsel for the appellant contended, as pointed out earlier, that the application was a hybrid application under Section 16 and Section 17 and, surely, any order passed under Section 17 by the arbitral tribunal could form the subject matter of an appeal particularly in view of the provisions of Section 37 (2) (b) which permitted the filing of an appeal against an order of the arbitral tribunal granting or refusing to grant an interim measure under that Section (i.e., Section 17). Although this argument is attractive, I am of the view that Section 17 would only apply where the arbitral tribunal has jurisdiction and, secondly, the interim

measures that are referred to in Section 17 are passed during the pendency of the arbitration proceedings and not when they are stultified. Moreover, the interim measures that are sought are with the object of seeking protection of the subject matter of the dispute and the interim measures that are granted are by way of the tribunal ordering a party to take such measure or protection.

8. In the present case, what the appellant is seeking is that the arbitration proceedings should be stalled and not be proceeded with until and unless the respondent / claimant obtains a consent from the BIFR. This, in my view, would not fall within the ambit of interim measures as provided under Section 17 of the said Act. While it may be true that in the facts of the present case, as presented by the appellant, Sections 16 and 17 have been inter-twined, it is also true that the interim measures under Section 17 that are sought by the appellant would only arise when the pre-condition of Section 16 is fulfilled and that is that the arbitral tribunal has jurisdiction. What the appellant requires this court to hold is that the arbitral tribunal does not have jurisdiction and that such an order stating that it does not have jurisdiction would amount to an interim measure under Section 17 of the said Act. Unfortunately, in the scheme of the Act and the provisions contained therein, such an order cannot be passed.

9. Consequently, I am of the view that the appeal is not maintainable. It is, accordingly, dismissed. It is made clear that the passing

of this order does not, in any way, impinge upon the appellant's rights under
Section 16 (6) of the said Act.

March 28, 2008
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BADAR DURREZ AHMED
(JUDGE)