

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

+ **FAO(OS) 173/2007 & C.M. No.7595/2007**

% **Judgment reserved on: 10.02.2009**
Judgment delivered on: 18.03.2009

rites limited Appellant

Through: Mr. Anil Seth, Advocate

versus

JMC PROJECTS (INDIA) LTD. Respondent

Through: Mr. Rishi Agrawala, Mr. Akshay
Ringe and Ms. Rohma Hameed,
Advocates

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J.

1. This appeal is directed against the judgment dated 20.04.2007 passed by the learned Single Judge in I.A. No.1112/2007 in C.S.(OS) 1632/2006 whereby the aforesaid application filed by the appellant/defendant under Section 8 of the Arbitration and Conciliation Act (the Act) to seek stay of the respondents suit, and reference of the disputes to arbitration has been dismissed.

2. Admittedly, the parties entered into an agreement which contained an arbitration clause for settlement of disputes through arbitration. The respondent initially also invoked the arbitration agreement. An Arbitral Tribunal was also constituted. Before the Arbitral Tribunal, the case of the respondent was that its claims were not referable to arbitration, being “excepted matters”. Correspondence took place between the parties and the Arbitral Tribunal. Thereafter, the Respondent preferred the Civil Suit aforesaid in which the appellant preferred the application under section 8 of the Act.

3. The learned Single Judge rejected the appellants said application after examination of the correspondence undertaken by the parties with the Arbitral Tribunal and upon arriving at the conclusion that the present was a case where the parties have mutually terminated the mandate of the Arbitral Tribunal under Section 15 of the Act. He held that the present was a case of not mere termination of mandate of a particular arbitral tribunal, but the intention of the parties was not to get the disputes resolved through the process of arbitration altogether. He also recorded that he had suggested to the parties that it would be better to have the disputes resolved through a sole arbitrator appointed by the Court. While the respondent was willing for the same, the appellant insisted that the arbitration should proceed only in accordance with arbitration agreement. Consequently, the Court concluded that the parties are *ad idem* that the subject

matter of the disputes is not capable of adjudication through arbitration.

4. Learned counsel for the appellant has argued that the learned Single Judge erred in holding that the arbitration agreement had ceased to exist. He submitted that the arbitral proceedings can be terminated by the Tribunal under Section 32 of the Act upon the agreement of the parties. No agreement to terminate the arbitration proceedings existed and none had been placed by the respondent before the Tribunal.

5. The appellant also sought to place strong reliance upon the following extract from ***Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.*** 2006 5 SCC 275.

“9. It is true that the petitioner had contended before the Jordanian court that there was no arbitration agreement between the parties. But the said contention was not accepted and the suit filed by the petitioner has been dismissed on the ground of want of jurisdiction. Thereafter, on reconsidering the matter and taking legal advice, with reference to the contentions of the respondent, the petitioner has now proceeded on the basis that an arbitration agreement exists between the parties. If, on account of mistake or wrong understanding of law, a party takes a particular stand (that is, there is no arbitration agreement), he is not barred from changing his stand subsequently or stopped from seeking arbitration. [See *U.P. Rajkiya Nirman Nigam Ltd. v. Indure (P) Ltd.*(1996)2 SCC 667 where the contention based on estoppel was negated while considering a reserve (sic reverse) situation.]

6. Various other judgments have also been relied upon by the appellant. On the other hand, learned Counsel for the Respondent has

raised a preliminary objection to the maintainability of the present appeal Under Section 37 of the Act.

7. Having heard the learned Counsel for the parties, we are of the view that we need not go into the merits of the present appeal since we find force in the preliminary objection raised by the respondent to the maintainability of the present appeal. Learned counsel for the respondent has submitted that the only orders of a Court arising out of the Act, against which an appeal lies under Section 37(1) of the Act are orders:- (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. He submits that Section 37(1) of the Act clearly states that an appeal shall lie from the aforesaid two kinds of orders "*and from no others*", to the Court authorized by law to hear appeals from original decrees of the Court passing the order. Admittedly, the impugned order passed by the Court under Section 8 of the Act is neither an order granting or refusing to grant any measure under Section 9, nor an order setting aside or refusing to setting aside an arbitral award under Section 34. He submits that Sub Section (2) of Section 37 has no application since the impugned order has been passed by the Court, and not the Arbitral Tribunal. He submits that a right of appeal is a creature of the Statute and there is no general right of appeal in respect of any order that may be passed under the Act by the Court. In support of his submission, learned counsel for the respondent has relied upon ***Canbank Financial Services Ltd V.***

***Haryana Petrochemical Ltd & Anr. 2008(2) Arb. Law Reporter
365 (Delhi) DB.***

8. Learned counsel for the appellant, on the other hand, relies on ***P.S. Sathaappan (Dead) by Lrs. V. Andhra Bank Ltd and others,*** AIR 2004 SC 515 which interprets Section 104 C.P.C and holds:-

“29. Thus, the consensus of judicial opinion has been that Section 104(1) Civil Procedure Code expressly saves a Letters Patent Appeal. At this stage it would be appropriate to analyze Section 104 C.P.C. Sub-section (1) of Section 104 CPC provides for an appeal from the orders enumerated under Sub-section (1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by any law for the time being in force.....

30. As such an appeal is expressly saved by Section 104(1). Effect must also be given to Legislative Intent of introducing Section 4 C.P.C. and the words "by any law for the time being in force" in Section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent. As Appeals under 'any other law for the time being in force' undeniably include a Letters Patent Appeal, such appeals are now specifically saved.

9. Reliance is also placed on the following decisions:-

(i) ***Vanita M. Khanolkar v. Pragna M. Pai – AIR 1998
SC 424***

(ii) ***R.K.Sharma v. Ashok Nagar Welfare Association &
Co., AIR 2001 Delhi 272(DB)***

(iii) ***Gurmauj Saran Baluja v. Mrs. Joyce C. Salim &
Ors., AIR 1990 Delhi 13 (DB)***

(iv) *Shah Babulal Khimji v. Jyaben D. Kania – AIR 1981 SC 1786*

(v) *Jugal Kishore Paliwal v. Saj Jit Singh (1984) SCC 358*

10. Learned counsel for the appellant argues that the decision in *Canbank Financial Services Ltd*(supra) is per incuriam, as it has failed to consider the judgments relied upon by the appellant. He argues that an appeal against the judgment of the learned Single Judge is maintainable under Section 10 of the Delhi High Court Act read with Section 104(1) CPC. He submits that the impugned order has been passed in a civil suit, and therefore Section 37 of the Act is not relevant for determining the aspect of maintainability of the present appeal.

11. Section 37 of the Act reads as follows:-

“37. Appealable orders – (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.
- (2) An appeal shall also lie to a Court from an order grating of the arbitral tribunal –
 - (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or
 - (b) granting or refusing to grant an interim measure under section 17.
- (3) No second appeal shall lie form 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.”

12. The Division Bench of this Court in **Can Bank Financial Services Ltd** interpreted Section 37 of the Act. The appellant had preferred the appeal against an order passed by the learned Single Judge on an application under Section 11(6) of the Act. The Division Bench held as follows:-

5. “To our mind, the embargo on appeals in Section 37 is an absolute and categorical one. Moreover, in the instant case, the Arbitration and Conciliation Act, 1996 which is a special act dealing with the arbitrations, specially limits the extent of judicial intervention inasmuch as it provides that no judicial authority shall intervene except where so provided. Section 5 of the Arbitration and Conciliation Act, 1996 is reproduced hereinbelow for ready reference:

Extent of judicial intervention

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

6. It is also well settled in catena of cases that an appeal is a creature of the statute, the right to appeal inheres in no one. Since in the present case Section 37 uses an expression that “an appeal shall lie from the following orders and from no others”, it to our mind consciously takes away the right of appeal against other orders. Any other interpretation, to our mind, would render the expression “and from no others” as otiose or nugatory. The Apex Court in catena of cases has held that any interpretation which renders words of a statute “otiose” is to be avoided and eschewed. Consequently, appeal to the Division Bench lies only from the two orders mentioned in Section 37(1) and reliance of the appellant on Section 96 of CPC is misconceived.”

13. The Division Bench also referred to Section 39 of the Arbitration Act 1940 (old Act) which also contained a similar phraseology. Section 39(1) of the old Act stated “*An appeal shall lie from the following orders passed under this Act (and from no others).....*”. Section 39 of the old Act was interpreted by the Supreme Court in ***Union of India V. Mohindra Supply Co.***, AIR 1962 SC 256. The Division bench quoted the relevant extracts from the Supreme Court decision in ***Mohindra Supply Co.***(supra). From the opening words of para 5 of the decision in ***Mohindra Supply Co.***, it is evident that the Supreme Court was considering the issue “*whether the right to appeal under the Letters Patent is at all restricted by Section 39 Sub-sections (1) and (2)*”. The Supreme Court in ***Mohindra Supply Co.*** held as follows:-

“5.....Under section 39(1), an appeal lies from the orders specified in that sub-section and from no others. The legislature has plainly expressed itself that the 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 section 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 clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent.....”

14. In para 6, the Supreme Court held:-

“6.....If the order is not one falling within Section 39(1), no appeal will evidently lie.....But the right to appeal is a creature of statute; no litigant has an inherent right to appeal against a decision of a Court.”

15. While dealing with Section 104 C.P.C, on which great stress has been laid by the learned counsel for the appellant, the Supreme Court held in Para 14:-

“The intention of the legislature in enacting sub-section (1) of section 104 is clear : the right to appeal conferred by any other law for the time being in force is expressly preserved. This intention is emphasised by section 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. The right to appeal against judgments (which did not amount to decrees) under the Letters Patent, was therefore not affected by section 104(1) of the Code of Civil Procedure, 1908.”

16. The Supreme Court also dealt with the legislative history of the law relating to arbitration and in Para 16 held as follows:-

“16. Prior to 1940 the law relating to contractual arbitration (except in so far as it was dealt with by the Arbitration Act of 1899) was contained in the Code of Civil Procedure and certain orders passed by courts in the course of arbitration proceedings were made appealable under the Code of 1877 by section 588 and in the Code of 1908 by section 104. In 1940, the legislature enacted Act X of 1940, repealing schedule 2 and section 104(1), clauses (a) to (f) of the Code of Civil Procedure, 1908, and the Arbitration Act of 1899. By section 39 of the Act, a right of appeal was conferred upon litigants in arbitration proceedings only from certain orders and from no others and the right to file appeals from appellate orders was expressly taken away by sub-section 2 and the clause in section 104 of the Code of 1908 which preserved the special jurisdiction under any other law was not incorporated in section 39. The section was enacted in a form which was absolute and not subject to any exceptions. It is true that under

the Code of 1908, an appeal did lie under the Letters Patent from an order passed by a single Judge of a Chartered High Court in arbitration proceedings even if the order was passed in exercise of appellate jurisdiction, but the was so, because, the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved.

17. There is in the Arbitration Act no provision similar to section 4 of the Code of Civil Procedure which preserves powers reserved to courts under special statutes. There is also nothing in the expression "authorised by law to hear appeals from original decrees of the Court" contained in section 39(1) of the Arbitration Act which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings. **Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the provisions of section 39(1) and (2) of the Arbitration Act.**

18. Under the Code of 1908, the right to appeal under the Letters patent was saved both by section 4 and the clause contained in section 104(1), but by the Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; **the right of appeal can therefore be exercised against orders in arbitration proceedings only under section 39, and no appeal (except an appeal to this Court) will lie from an appellate order.**

19. There is no warrant for assuming that the reservation clause in section 104 of the Code of 1908 was as contended by counsel for the respondents, "superfluous" or that its "deletion from section 39(1) has not made any substantial difference" : the clause was enacted with a view to do away with the unsettled state of the law and the cleavage of opinion between the Allahabad High Court on the one hand and Calcutta, Bombay and Madras High Courts on the other on the true effect of section 588 of the Code of Civil

Procedure upon the power conferred by the Letters Patent. **If the legislature being cognizant of this difference of opinion prior to the Code of 1908 and the unanimity of opinion which resulted after the amendment, chose not to include the reservation clause in the provisions relating to appeals in the Arbitration Act of 1940, the conclusion is inevitable that it was so done with a view to restrict the right of appeal within the strict limits defined by section 39 and to take away the right conferred by other statutes. 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 X of 1940 by codifying the law relating to appeals in section 39.”** (emphasis supplied)

17. It is, therefore, clear that no appeal could be maintained from an order of the Court passed under the old Act, by resort either to the Letters Patent or Section 104 CPC, unless the same fell within Section 39 of the old Act, even though the order passed by the Court may qualify as being a “judgment” within the meaning ascribed to that term in *Shah Babulal Khimji* (supra). The Act, having adopted the same terminology in so far as it defines the scope of the right to appeal against the orders of the Court passed under the Act, as used in the

old Act, in our view the decision in Mohindra Supply Co. (supra) is squarely applicable, and resort cannot be had by the appellant to either the Letters Patent or Section 104 of the CPC to maintain the present appeal.

18. The Division Bench in **Canbank Financial Services Ltd** (supra) also took note of the decision of a Full Bench of this Court in **Union of India v. A. S. Dhupia**, AIR 1972 Delhi 108 which held that Section 10(1) of the Delhi High Court Act 1966 provides only a forum of appeal. It cannot be construed to mean that Section 10(1) of the Delhi High Court Act confers an unfettered right of appeal without any limitation on a party. The Full Bench held:

“....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...”

19. The Division Bench in Canbank Financial Services Ltd (supra) also took notice of another decision of a Division Bench of this Court in **Banwari Lal Radhey Mohan, Delhi v. The Punjab State Co-operative Supply and Marketing Federation Ltd.**, AIR 1983 Delhi 402, which in turn had considered the decision of the Supreme Court in **Shah Babulal Khimji** (supra). In **Banwari Lal** (supra), the Division Bench held as follows:-

“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 1nd 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 Section 39 of the Arbitration Act impliedly also held that the provisions of Section 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."** (emphasis supplied).

20. Reliance placed by the appellant on the Constitution Bench's decision in ***P.S. Sathaappan*** (supra) appears to be misplaced. Firstly, we may notice that in ***P.S. Sathaappan*** (supra), the earlier decision of the Supreme Court in ***Mohindra Supply Co.*** (supra) was approved. Secondly, the Supreme Court in ***P.S. Sathaappan*** (supra) observed "*a specific exclusion may be clear from the words of a statute even though no specific reference is made to Letters Patent*". In the face of a specific exclusion of the right to appeal contained in Section 37 of the Act, except in respect of orders passed by the Court:

- (a) Granting or refusing to grant any measure under Section 9
- (b) Setting aside or refusing to set aside any arbitral award under Section 34;

it cannot be said that a Letters Patent appeal is maintainable against an order passed under Section 8 of the Act. In our view the legislative intent to exclude a Letters Patent appeal from orders passed under the Act, except those specifically mentioned in Section 37(1) of the Act is clear.

21. The decision in **Vanita M. Khanolkar** (supra) in our view is of no avail to the appellant since the said decision was not dealing with Section 37 of the Act. On the other hand, the decision in **Mohindra Supply Co.**(supra) squarely applies as examined hereinabove. For the same reason, the decision in **R.K. Sharma**(Supra) and **Gurmauj Saran Baluja** (supra) have no application to the present case. The Division Bench in **Canbank Financial Services Ltd.** (supra) held that though the said appeal had not been preferred under Clause 10 of the Letters Patent, but in view of **Mohindra Supply Co.** (supra), **A.S. Dhupia and Banwari Lal** (supra), even an appeal under Clause 10 of the Letters Patent would not be maintainable against an order passed under Section 11 of the Act. We respectfully agree with the view taken by the Division Bench in **Canbank Financial Services Ltd.**(supra) and we do not agree with the submission of the learned Counsel for the appellant that the said decision is *per incurium*.

22. We find no merit in the appellant's submission that the impugned order having been passed in a civil suit, Section 37 of the Act cannot be invoked to bar the appeal. The order has been passed by the learned Single Judge on an application preferred by the appellant by invoking Section 8 of the Act. Obviously, it is an order passed under the Act. This submission of the appellant is, therefore, rejected.

23. After the parties had concluded their arguments, we had again offered to the appellant that an independent arbitrator could be appointed by the Court to resolve the disputes between the parties. However, the learned Counsel for the appellant has again rejected the said offer, to which the respondent was agreeable.

24. Consequently, we hold that the present appeal is not maintainable and accordingly dismiss the same leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

March 18, 2009
as/rsk/j