

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

+ **FAO(OS) No.387/2007**

Reserved on : April 16th, 2009

Pronounced on: April 18th, 2009

ECON PURI CONSORTIUM & ANR. ... Appellants

Through : Mr. C. Mukund, Mr. Rajeshwar K. Gupta,
Mr. Pankaj Jain, Advocates

versus

PURI INTERNATIONAL P. LTD. Respondent

Through : Mr. A.K. Verma, Advocate

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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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 |

% **JUDGMENT**

VALMIKI J. MEHTA, J.

1. This appeal challenges the interlocutory order dated 19.9.2007 of the learned Single Judge passed in the main petition being Arbitration Petition No.

154/2003 which was filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “A & C Act”) for appointment of an Arbitrator. By the impugned interlocutory order, the learned Single Judge in exercise of his powers under Order X Rule 2 of the Code of Civil Procedure, 1908 (hereinafter “CPC” for short) has directed the personal appearance of the Managing Director of the appellant/respondent No. 1. The learned Single Judge passed this direction in order to put questions with respect to the pleadings and the issue in the case as regards the existence of the arbitration agreement. Though the impugned order does not refer to Order X Rule 2 CPC but the directions issued thereunder can be traced to the power under Order X Rule 2 CPC.

2. This Court at the time of issuing notice in the present appeal on 1.10.2007 had stayed the operation of the impugned order.

3. Today, when the matter was called out for the first time, a request was made on behalf of the appellant for pass over. A pass over was then again requested when the matter was called out for the second time and which we did with reluctance. On the third call, another request was made for a pass over and we declined the request and

asked the Advocate on record to argue the matter as the arguing counsel was not yet available. Mr. Pankaj Jain, Advocate then argued the matter and after the arguments were completed, the arguing counsel Mr. C. Mukund appeared and he was also heard in the interest of justice. It may be noted that on two other earlier dates viz 23rd October, 2008 and 17th December, 2008, requests were made for a pass over from the side of the appellant and the matter has to be adjourned on account of heavy board. On the next date i.e. on 16th February, 2009, an adjournment slip was circulated on behalf of the appellant and accordingly the matter was adjourned for today.

4. We have heard the counsel for the parties on the issue with regard to the maintainability of the appeal as also, assuming the appeal to be maintainable, the error in the order of the learned Single Judge.

5. Arguing in favour of maintainability of the appeal, the counsel for the appellant has strongly placed reliance upon the judgment of the Hon'ble Supreme Court in ***Punjab Agro Industries Corporation Ltd. Vs. Kewal Singh Dhillon, (2008) 10 SCC 128***. The counsel for the appellant also relied upon ***Liverpool & London S.P. & Association Ltd. Vs. M.V. Sea Success & Anr., (2004) 9 SCC 512***.

6. We are of the opinion that the present appeal is not maintainable for two reasons.

7 (i). The first reason is that the order in question is a purely procedural order as the same does neither decides any matter in controversy between the parties nor does it vitally affect any right of the appellant and hence is not a “judgment” under Section 10 of the Delhi High Court Act, 1966. Also since there is no decision on any issue, it cannot be said that a party is aggrieved. The legal position is fully settled by the judgment of the Hon’ble Supreme Court in ***Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8***. Paras 114 and 119 of the said judgment are relevant and are reproduced below:

“114. In the course of the trial, the Trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the Trial Judge.

119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion, exercised or routine orders passed by the Trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice to one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the Trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the question in controversy in an ancillary proceedings or in the suit itself or in a part of the proceedings.”

(Emphasis supplied)

7(ii). Clearly, therefore, the impugned order which merely called for the presence of the Managing Director under Order X Rule 2 CPC for elucidating the matter in controversy cannot be said to be an order which vitally affects the rights of the parties. The issue with regard to whether or not there is an arbitration agreement and whether the matter can be referred to the arbitration in the main Arbitration Petition under Section 11 is still at large and

there is no decision thereon by the impugned order. The tendency to file an appeal against such innocuous interlocutory orders is to be discouraged.

7(iii). We accordingly hold that no appeal lies under Section 10 of the Delhi High Court Act against the impugned order which is purely interlocutory in nature and does not affect the rights of the parties and nor does it decide any matter in controversy between the parties.

8. The second reason is that the appeal is also otherwise not maintainable because the appeals which can be filed are only those as enumerated under Section 37 of the A & C Act. The issue with regard to the non-maintainability of the appeal except with respect to the matter provided under Section 37 of the A & C Act has been recently dealt with by a Division Bench of this Court in ***Canbank Financial Services Ltd. (M/s) vs. M/s. Haryana Petrochemicals Ltd. & Anr., 2008 VIII AD (Delhi) 100***. The Division Bench in the said judgment has referred to the judgment of the Hon'ble Supreme Court in ***Union of India vs. Mohinder Supply, AIR 1962 SC 256*** as also the other Division Bench judgments of this Court. The Division Bench in ***Canbank's*** case has held that an appeal is not maintainable against an order whereby an application is allowed for referring of the disputes to arbitration. The Division Bench has also specifically in para 11 of the said judgment held that

independent of Section 37 of the A & C Act, the appeal is not maintainable even under Clause 10 of the Letters Patent.

9. In a recent judgment, a Division Bench of this Court, being FAO(OS) 173/2007 titled as *rites Limited vs. J.M.C. Projects (India) Ltd.* decided on 18.3.2009, has held that no intra court appeal to the Division Bench will lie from an order of the learned Single Judge under the A & C Act except appeals which are specifically provided for under Section 37 of the A & C Act. The said decision held that an appeal from a decision dismissing an application under Section 8 of the A & C Act was not maintainable to a Division Bench of this Court from an order of the learned Single Judge of this Court.

10. We also feel that if no appeal lies from a final judgment in a petition under Section 11 of the A&C Act, then naturally an appeal cannot lie against an interlocutory order in the same proceedings before the learned Single Judge more so when the order is only an order seeking examination of a party by the court under Order X Rule 2 of the Code of Civil Procedure, 1908.

11. The judgment which is heavily relied upon by the counsel for the appellant in ***Punjab Agro's*** case (supra) in fact goes against the appellant. We may refer to para 9 of the judgment of the Hon'ble Supreme Court in the ***Punjab Agro's*** case (supra) which is reproduced as under:

“8. We have already noticed that though the order under Section 11(4) is a judicial order, having regard to Section 11(7) relating to finality of such orders, and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP does not bar such a writ petition. The observations of this Court in SBP that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as Designate of the Chief Justice. This Court has repeatedly stressed that Article 136 is not intended to permit direct access to this Court where other equally efficacious remedy is available and the question involved is not of any public importance; and that this Court will not ordinarily exercise its jurisdiction under Article 136, unless the appellant has exhausted all other remedies open to him.....”

(emphasis supplied)

12. The judgment, therefore, in **Punjab Agro’s case** in fact goes against the appellant because the Supreme Court has clearly laid down that an appeal from an order passed under Section 11 of the A & C Act, if so passed by a designated judge of the High Court, then in such a case appeal will only lie to the Hon’ble Supreme Court under Article 136 of the Constitution of India.

The judgment in the **Liverpool & London’s** case cited by the appellant has no application to the facts of the case in as much as the judgment in the **Liverpool & London’s** case pertained to an appeal against the order under

Order VII Rule 11 CPC and which is surely not the nature of impugned order in the present case as the impugned order in this case is only merely a procedural order directing the presence of a party under Order X Rule 2 CPC. Also as already held above there is no question of applicability of Section 10 of the Delhi High Court Act, 1966 or Clause 10 of the Letters Patent as appeals under the A&C Act are only permissible if so included in the categories as stated therein.

13. We accordingly held that the present appeal is not maintainable even under Section 37 of the A & C Act.

14. We now independently examine the merits of the impugned order. The impugned order is reproduced hereunder:

"19.09.2007

Present: Mr. A.K.Verma, Advocate for the petitioner.

*Mr. C.Mukund, Mr. Pankaj Jain and Mr. Amit
Kasera, Advocate for the respondents.*

Arbitration Petition No. 154/2003

The petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) seeking reference of disputes to arbitration in view of a contract being awarded by the DMRC. Respondent No.2 was formed as a consortium of the petitioner and respondent No.1. It is the case of the petitioner that there were works sub-contracted to the petitioner and the petitioner has been thrown

unceremoniously out of the project giving rise to claim in favour of the petitioner.

The petitioner has filed along with the petition two communications dated 11.2.2001 issued by the consortium whereby the appointment of the petitioner as a sub-contractor was confirmed. These two communications, however, are unsigned. The petitioner has relied upon the Minutes of the Board Meeting held on 14.3.2002, where in para 5, a reference has been made to the petitioner as a sub-contractor. Similarly, in the Minutes of the Meeting held on 13.3.2002, the petitioner has again been referred to as a sub-contractor. These Minutes are signed.

The stand of the respondent is that there was no concluded agreement between the parties and, thus, the arbitration clause contained in the said document cannot be relied upon. It is further stated that at best this was only an understanding. Learned counsel for the respondents has relied upon the reply filed in OMP No. 188/2003 in para 9 to contend the same. The averments therein state that an understanding was reached between the consortium partners, being petitioner and respondent No.1, for the mutual division of works between the partners while the piling work was to be done by M/s ECON, a subsidiary of respondent No.1. Since it was only an understanding, the same is stated to have never been reduced to a formal sub-contract. A specific query was posed to learned counsel for the respondents as to what is the document which records the arrangement between the parties. Learned counsel seeks to contend that there was no written understanding but on such oral understanding, the execution of the sub-contract was going on. Prima facie it is very difficult to accept such a plea.

Learned counsel for the petitioner states that in fact the petitioner has raised bills and even payments have been made. It is directed that these documents be placed on record with a proper affidavit to be filed within three days.

I also consider it appropriate, in view of the pleadings, to direct the personal presence to the Managing Director of respondent no.1 to record his statement on oath in respect of the arrangement between the petitioner and respondent No.1.

List on 1st October, 2007 in the category of 'Short Matters'. At this stage, learned counsel for the respondents states that the Managing Director of respondent no.1 should not be summoned and only an affidavit should be directed to be filed. I am unable to accept this plea for the reason that I deem it appropriate to put certain court questions to him to answer in respect of the so-called arrangement between the petitioner and respondent no.1 in respect of which no document has been filed.

Dasti."

15. Even on merits, on examining the order, the impugned order shows that the learned Single Judge duly noted the respective contentions of the parties based on certain documents as relied upon by the parties and has then narrowed down the issue and the controversy at hand and in order to resolve that controversy and to elucidate such matters the learned Single Judge in the exercise of his discretion passed the impugned order directing the personal presence of the Managing Director of the appellant respondent No. 1 for examination under Order X Rule 2 CPC.

16. We are also reminded at this stage of the observation made by the Hon'ble Supreme Court in para 119 of **Shah Babulal Khimji's case** (*supra*) that a Division Bench of the High Court should not ordinarily interfere in the

exercise of the discretion by the learned Single Judge of that Court. In the facts of the present case, we find that the said observations of the Supreme Court are apposite and directly apply to the facts in hand.

17. We are informed by the counsel for the respondent that contracts in question are of the value of over 50 crores and even the counsel for the appellant also agreed that the contract in question is of “a few crores”. Considering the facts of the present case as stated above including the settled position of non-maintainability of the appeal and that seven dates on which the matter has been taken up by this Court we are inclined to dismiss the appeal with costs which we quantify as Rs. 50,000/-. We, therefore, dismiss the appeal with costs of Rs. 50,000/- in the circumstances, as detailed above.

VALMIKI J. MEHTA, J

MUKUL MUDGAL, J

April 18th, 2009
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