

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.380/2009 & CM No.12375/2009

Union of India

.....Appellant through
Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Maneesha Dhir,
Adv.

versus

Chadha Engineering Works

.....Respondent through
Mr. Shiv Khorana, Adv.

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Date of Hearing: December 09, 2010

Date of Decision: December 23, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE G.P. MITTAL

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

VIKRAMAJIT SEN, J.

1. The short controversy that arise in the present Appeal is whether Section 39 of the Indian Arbitration Act, 1940 (Act for short) provides for an Appeal against the order of dismissal of a suit for making an Award the Rule of Court on the ground that the filing of the Award in the Court was unauthorized and was also barred by the principles of prescription.

2. An Award came to be passed by the learned Sole Arbitrator, Shri R.N. Poddar on 9.8.1996 and the Notice of the same was issued to both the parties on the very same day.

However, the Award came to be filed in the Court by Shri S.B. Sharan (who was not the Sole Arbitrator in the case). The filing of the Award was also delayed by many months, and hence was in violation of Sections 14 and 17 of the Act. On an Application being made by Respondent under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short), the learned Single Judge was pleased to reject the Suit for being in contravention to provisions of the Act, in terms of the impugned Order.

3. The learned counsel for the Respondent, at the very outset, challenged the maintainability of the Appeal, citing the Judgment of a Division Bench of this Court, reported as ***Wee Aar Constructive Builders*** -vs- *Simplex Concrete Piles (India) Ltd.* 2010 (5) RAJ 275 (Del), of which one of us (Vikramajit Sen, J.) was a member. It is argued that the dismissal of the Suit filed by the Appellant neither amounts to setting aside an award nor refusal to set aside the award and, therefore, as per the ratio of the above said Judgment, an appeal under Section 39 of the Act is not maintainable. In ***Wee Aar Constructive Builders***, this Court has held as under:

3. We think it apposite to immediately underscore that as postulated in Section 17 of the Arbitration Act, 1940 ('Act' for short), in the event Objections for setting aside the Award have been refused consideration on the ground of limitation, a judgment

must be pronounced according to the Award, and a decree would automatically follow. The statutory mandate is that “no appeal shall lie from such decree except on the ground that it is in excess of or not otherwise in accordance with the award”. It also needs to be emphasized that Section 39 of the Act itself takes pains to particularize that an appeal shall lie from the enumerated orders passed under the Act and from no others. Rejection of an application seeking condonation of delay does not feature in the six eventualities mentioned in the Section. In any event, such an order is not one passed under the Act. The only recourse, it appears, would then lie under Article 136 of the Constitution of India.

The Court, while arriving at this conclusion, applied the ratio of ***Nilkantha Sidramppa Ningashetti -vs- Kashinath Somnath Ningashetti***, AIR 1962 SC 666 where their Lordships while considering the question whether a time barred Objections filed under the Act would be considered as Objections and the dismissal of the same is appealable under Section 39 of the Act held thus:-

“The second question is whether the order of the Civil Judge amounted to an order refusing to set aside the award and therefore appealable to the High Court. The High court held that it was not such an order and we agree. When no party filed an objection praying for the setting aside of the award, no question of refusing to set aside can arise and therefore no appeal was

maintainable under S. 39(1)(vi) of the Arbitration Act which allows an appeal against an order refusing to set aside an award”.

4. In our view, the same reasoning would apply to an award which is not duly filed in compliance with the provisions of the Act. The said filing of the Award would be *non est* and thus dismissing an application to make the same Rule of Court does not amount to setting aside of the Award.

5. The learned Additional Solicitor General, Mr. A.S. Chandhiok, appearing for the Appellant laid siege to the correctness of ***Wee Aar Constructive Builders*** on the strength of the dictum of the Hon'ble Supreme Court in ***Shyam Sunder Sharma -vs- Pannalal Jaiswal***, AIR 2005 SC 226 which holds that an appeal, though filed beyond time, is still an appeal, and that dismissal on the ground of delay would still be a decision on the appeal. On a careful perusal of the said Judgment, we are of the opinion that the same does not advance the case of the Appellant in any manner. In that case, the Defendant had filed an Application under Order IX Rule 13 of the CPC and had also preferred an Appeal for setting aside of *ex-parte* Decree. The Appeal was dismissed as being filed beyond time and the contention of the Defendant was that since the Appeal had been dismissed as being barred by time and not been refused on merits in effect the Appeal was never before

the Court and thus the bar of the Explanation to Order IX Rule 13 of the CPC would not be attracted. The Explanation reads - "Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the *ex parte* decree". The Apex Court, after considering the factual matrix of the dispute, held that the bar of Explanation to Order IX Rule 13 of the CPC, as explained in *Rani Chaudhury -vs- Suraj*, 1982(2) SCC 596 would be applicable in light of the Appeal filed, though dismissed on the ground of delay. ***Shyam Sunder*** is, therefore, a ruling on the Explanation to Order IX Rule 13 and the bar which is attracted against filing of an application under Order IX Rule 13 because of an Appeal having been preferred and dismissed for any ground but for withdrawal. The present controversy is rather similar to one answered by their Lordships in ***Nilkantha***.

6. The present case, however, is one of filing of a Suit for making an Award Rule of the Court under the Act where the principle as regards a delayed appeal will not be attracted. The present case is, therefore, squarely covered by the Judgment of this Court in ***WNilkantha***.

7. The learned ASG has also contended that the impugned Order is one passed under Order VII Rule 11 of the CPC and, therefore, an appeal is available in the form of a Regular First Appeal under the CPC itself. In our view, since the Suit was filed under the provision of Arbitration Act, 1940, the same would govern the *lis* and a dismissal of the same under Order VII Rule 11 of the CPC will not obviate the bar of Section 39 which allows only those appeals emanating from the particular orders enumerated therein.

8. The present Appeal is, therefore, not maintainable and the same is dismissed. CM No.12375/2009 is also dismissed.

9. Parties to bear their respective costs.

(VIKRAMAJIT SEN)
JUDGE

(G.P. MITTAL)
JUDGE

December 23, 2010
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