

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

Judgment Reserved on: **16th August, 2011**
% Judgment Pronounced on: **5th September, 2011**

+ **FAO(OS) No. 385-386/2011**

CROWN BUILDTECH PVT. LTD. Appellant
Through: Mr. Sandeep Sethi, Mr. Kirti
Uppal, Mr. Sunil Narula, Sr.Advs.
with Mr.Badar Mahmood

Versus

BHUPINDER LAL GHAI Respondent
Through: Mr. D.S. Chaddha, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1 | Whether reporters of the local papers 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 |

DIPAK MISRA, CJ

The present appeal is directed against the order dated 14th July, 2011 passed by the learned Single Judge in IA No.8248/2009 and 8249/2011 in Arbitration Petition No.470/2009 and 471/2009 respectively. On a perusal of the order passed by the learned Single Judge, it is manifest that IA Nos. 5823/2011 and 5824/2011 have been jointly filed by the parties duly signed by them and their respective

counsels supporting by the affidavit that the Court may allow payment of additional fee to the learned sole arbitrator in accordance with the Delhi High Court Arbitration Centre (Arbitrator's Fees) Rules, to be shared equally after deducting amount of Rs.2 lakhs which was the lump sum fee fixed by the Court in the two cases. After the joint applications were filed, the appellant herein sought to withdraw its consent and alleged bias against the learned arbitrator.

2. The learned Single Judge referred to the agreements entered into between the parties, the appointment of the arbitrator on 15.2.2010, the sum fixed towards fees, the commencement of proceedings before the learned arbitrator, the applications filed on consent, the statement of the appellant herein expressing its unwillingness to pay any additional fees to the learned arbitrator, the issue of bias raised against the learned arbitrator as he changed the rules in the middle of the proceedings, the conduct of the counsel before the learned arbitrator, the order dated 28th March, 2011 whereby the learned arbitrator had declined to recall the witness, the issue raised with regard to the relevance of the recall of the said witness, the conduct of the parties before the learned arbitrator and the power of the Court to appoint an arbitrator under Section 11 of the

Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act') and came to hold as follows:

"37. Consequently, I am of the view that the learned Arbitrator was perfectly right in rejecting each and every allegation made by the respondent to allege bias against him. The issue raised by the Arbitrator as to why application was filed at such a belated stage of the arbitration proceedings, when only arguments were left to be heard before making of the award, is a valid and germane question. To me, it appears from the conduct of the respondent and its counsel, who appeared before the Arbitrator on 05.05.2011, that the whole purpose was to somehow derail the arbitration proceedings; get the learned Arbitrator to resign, and; to prevent the Arbitrator from making the award. Consequently, I find absolutely no justification in the respondent withdrawing its consent to the raising of the fee of the learned Arbitrator, which, in any event, had been agreed to be paid only at the rates prescribed under the Delhi High Court Arbitration (Arbitrators Fees) Rules.

38. The learned Arbitrator, out of his anguish and the hurt suffered by him, returned the cheques to the parties and they were left with the Coordinator of the Delhi High Court Arbitration Centre. In my view, the Arbitrator has to be paid for the work that he has done, and my request to the learned Arbitrator is to accept the fees and not to refund any part thereof. Otherwise, it would send a very wrong message to everyone – that one can ill-treat an Arbitrator; have him removed, and; also get refund of the fee paid to him for the work done by him."

3. After so holding, the learned Single Judge directed the appellant to make payment of the fees of Rs.1 lakh along with secretarial expenses received from the learned arbitrator forthwith. He also took note of the fact that as the learned arbitrator has tendered his resignation, it would be appropriate that 50% of the fees computed in the manner prescribed therein is paid to the learned arbitrator in each case. The learned Single Judge has further held that there was no reason to direct the learned arbitrator to recuse himself while expressing the view that there is no reason to entertain any doubt about the independence and impartiality of the learned arbitrator. Being of this view, he proceeded to direct as follows:

“47. In view of the aforesaid position, I allow the application being I.A. No.8248/2011 and I.A. No.8249/2011, and appoint Mr. Justice S.N. Dhingra, retired Judge of this Court to be the sole Arbitrator in both the cases. The learned Arbitrator is requested to complete the arbitration proceedings at the earliest, and preferably within the next four months. The proceedings shall continue from the stage left by the earlier Arbitrator. The fee of the newly appointed Arbitrator shall be paid @50% of the fee prescribed under the schedule of the Delhi High Court Arbitration Centre (Arbitrators Fee) Rules, in each case.

48. For its conduct, the respondent is subject to costs of Rs.2 lacs in both the cases. Out of the said amount, Rs.1 lac be paid to the petitioner, and the remaining Rs.1 lac be paid to the Advocates Welfare Fund. Costs be paid within two weeks.”

4. We have heard Mr. Sandeep Sethi, Mr. Kirti Uppal and Mr. Sunil Narula, learned senior counsels along with Badar Mahmood for the appellant and Mr. D.S. Chaddha, learned counsel for the respondent.

5. As the learned counsel for the respondent has raised the issue of maintainability of the appeal, we think it appropriate to deal with the same. It is contended by learned counsel for the respondent that Section 37 of the 1996 Act provides for an appeal and if the language employed therein is properly understood, it would be graphically clear that no appeal is maintainable against these orders. It is urged by him that the learned Single Judge has exercised the power under Section 11 of the Act and, hence, the same was not appealable as per the decision rendered by the Apex Court in *SBP & Co. v. Patel Engineering Ltd. and Anr.*, (2006) 5 SCC 618. It is urged by him that the tenor of the order should be appreciated in entirety and, therefore, the present order cannot be treated to be an order under the Letters Patent or under Section 10 of the Delhi High Court Act.

6. The learned counsel for the appellant would submit that the direction given by the learned Single Judge in paragraph 47 directs that the proceeding shall continue from the stage left by the earlier arbitrator and such a decision is contrary to the mandate of Section 15(3) of the 1996 Act and, therefore, the appeal is maintainable. It is contended by him that no discretion is left to the substituted arbitrator and though the 1996 Act vests the discretion in favour of the arbitrator, yet this Court in intra-court appeal, in exercise of the power under clause X of the Letters Patent, should rectify the mistake. To bolster the said submission, reliance has been placed on *Vinita M. Khanolkar v. Pragna M. Pai & Ors.*, (1998) 1 SCC 500, *National Sewing Threads Co. Ltd. v. James Chadwick and Brothers Ltd.*, AIR 1953 SC 357, *Subal Paul v. Manila Pal and Anr.*, (2003) 10 SCC 361 and *P.S. Sathappan v. Andhra Bank Ltd.*, (2004) 11 SCC 672.

7. To appreciate the controversy, we may refer with profit to Section 37 of the 1996 which deals with appealable orders. It reads as follows:

“37. Appealable orders. – (1) An appeal shall lie from the following orders (and from no others) to the court authorised 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 of the arbitral tribunal –
- (a) accepting the plea referred to 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 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.

8. In the case of *Patel Engineering* (supra) in para 47(vii), it has been held as follows:

“(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.”

9. Thus, the Apex Court has clearly laid down that no appeal shall lie against an order appointing an arbitrator. What is submitted by Mr. Sethi, learned senior counsel for the appellant, is that it is an order

under Section 15 and, hence, an appeal would lie. Section 15 of the 1996

Act reads as follows:

“15. Termination of mandate and substitution of arbitrator. – (1) In addition to the circumstances referred to in Section 13 or section 14, the mandate of an arbitrator shall terminate –

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

10. Relying on the said provision, it is urged by him that discretion should have been left to the arbitral tribunal but the learned Single Judge has foreclosed the said issue. The same may be a grievance but the same has to be appreciated under the provision relating to an appeal. On a scanning of the anatomy of Section 37, the appealable

orders are basically orders relating to superseding an arbitration, on an award stated in the form of a special case, modifying or correcting an award, filing or refusing to file an arbitration agreement, staying or refusing to stay legal proceedings where there is an arbitration agreement and setting aside or refusing to set aside an award. Barring the aforesaid situations, nothing is provided in the Section pertaining to any order passed under Section 15, as submitted by Mr. Sethi.

11. In this context, we may refer to certain authorities in the field with regard to entertainability of an appeal in the backdrop of the language employed in the statute.

12. In *Smt. Ganga Bai v. Vijay Kumar and others*, AIR 1974 SC 1126, while dealing with the distinction between a suit and appeal, their Lordships have ruled that the right of appeal inheres in no one and, therefore, an appeal for its maintainability must have the clear authority of law and that explains why the right of appeal is described as a creature of the statute.

13. In *Anant Mills Co. Ltd. v. State of Gujarat*, AIR 1975 SC 1234 it has been held as under:

“The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal.”

14. In *Vijay Prakash D. Mehta and Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay*, AIR 1988 SC 2010, it has been held thus:

“Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right – Constitutional or statutory – without any right of appeal, as such. If the Statute gives a right to appeal upon certain conditions, it is upon fulfillment of those conditions that the right becomes vested and exercisable to the appellant.”

(Quoted from the placitum)

15. Similar view was taken in *Shyam Kishore and others v. Municipal Corporation of Delhi and another*, AIR 1992 SC 2279 and *The Gujarat Agro Industries Co. Ltd. v. The Municipal Corporation of the City of Ahmedabad & Ors.*, AIR 1999 SC 1818.

16. In view of the aforesaid, when the scope of an appeal under Section 37 of the 1996 Act cannot be enlarged, the authorities that have

been cited by Mr. Sethi, in our considered opinion, are of no assistance to the case at hand.

17. Consequently, the appeal, being not maintainable, stands dismissed without any order as to costs.

CHIEF JUSTICE

SEPTEMBER 05, 2011
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SANJIV KHANNA, J.