

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO.849 OF 2015
IN
ARBITRATION PETITION NO.715 OF 2014

**Home Care Retail Marts
Private Limited**

..... Appellant (Original Petitioner)

V/s

Haresh N. Sanghavi

..... Respondent

Mr. Rajiv Kumar, Senior Advocate a/w Mr. K.G. Munshi, Ms. Shivani Khanna i/b M/s. FZB & Associates for Appellant (Original Petitioner) in Appeal and Notice of Motion.

Mr. S.U. Kamdar, Senior Advocate a/w Mr. Y.M. Chaudhari i/b Mr. Omkar Kulkarni for Respondent.

**CORAM : ANOOP V. MOHTA &
A.A. SAYED, JJ.**

RESERVED ON : 26 APRIL 2016

PRONOUNCED ON : 04 MAY 2016

JUDGMENT:- (PER A.A. SAYED, J.)

1 The above Appeal is filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') challenging the orders dated 28 July 2015 and 23 October 2015 passed by the learned Single Judge in Arbitration Petition No.715 of 2014 filed under section 34 of the Arbitration Act. The impugned order dated 28 July 2015 reads as follows:

“ Admit. Learned counsel appearing for the respondent waives service.

2. Affidavit-in-reply, if any, shall be filed within four weeks from today. Rejoinder, if any, shall be filed within two weeks from the date of service of affidavit-in-reply. Parties are at liberty to file compilation of documents within eight weeks from today. Hearing of the petition is expedited.

3. In view of the learned arbitrator having rendered a final award rejecting the claims made by the petitioner herein, the interim order passed by the learned arbitrator under Section 17 of the Arbitration Act duly modified by the Supreme Court stands vacated.”

2 The aforesaid impugned order dated 28 July 2015 was corrected upon an Application by the Applicant for speaking to the minutes, by the order dated 23 October 2015 which reads as follows:

“Matter is placed on board for speaking to the minutes of the order dated 28th July, 2015. In paragraph (3) of the order, it is clarified that in view of the learned arbitrator having rendered a final award rejecting the claims made by the petitioner herein, the interim order passed by the learned arbitrator under section 17 of the Arbitration Act duly modified by this court by an order dated 11th November, 2011 and further modified by the Supreme Court by an order dated 30th January, 2012 has come to an end. Order dated 28th July, 2015 stands corrected accordingly.”

3 Learned Senior Counsel for the Respondent raised a preliminary objection and submitted that the Appeal is not maintainable and therefore, the Appeal ought not to be entertained and is required to be dismissed. He submitted that no Appeal lies against an order under section 34 of the Arbitration Act where such order does not set aside or refuses to set aside the Award. The learned Senior Counsel contended that the impugned orders do not set aside or refuse to set aside the Award, hence, the Appeal is not maintainable.

4 Learned Senior Counsel for the Appellant on the other hand submitted that the impugned orders passed by the learned Single Judge are in the nature of refusing to grant any measure under section 9 of the Arbitration Act, therefore, the Appeal would be maintainable. The learned Senior Counsel submitted that the scope of proceedings under section 34 of Arbitration Act is limited. However, the observations/directions in the impugned orders have the effect of discharging the Court Receiver, thereby leaving the property in question is unprotected. He submitted that the impugned orders are contrary to the order of the Supreme Court dated 12 January 2012 continuing the Court Receiver for five years in respect of the premises in question.

5 Section 37 of the Arbitration Act 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."*

6 The impugned orders have been passed in a Petition under section 34 of the Arbitration Act. The impugned orders neither set aside nor refuse to set aside the Award. In these circumstance, in our view, the Appeal against the impugned orders would not be maintainable as the impugned orders passed by the learned Single Judge do not come with the purview of the appealable orders under section 37 of the Arbitration Act. The Appeal being creature of statute, even if the Appellant is impugned by any directions in the impugned orders that would not give a right to the Appellant to file an Appeal as contemplated under section 37 of the Arbitration Act.

7 Even otherwise, we find that the Appeal cannot be entertained for reasons stated hereinafter. The Appellant is essentially aggrieved by the observations in the impugned order dated 28 July 2015 and impugned order dated 23 October 2015 which according to the Appellant have the effect of discharging the Court Receiver in respect of the premises in question and the said premises are left unprotected. Pertinently, the Appellant had filed an Arbitration Petition under section 9 of the Arbitration Act being Arbitration Petition (L) No.1642 of 2015 inter alia seeking the relief of appointment of Court Receiver and the Appellant in the said Arbitration Petition has made a reference to the very order dated 28 July 2015 which is impugned in this Petition. In paragraph 11 of the Petition while making reference to the impugned order dated 28 July 2015, the Appellant has stated thus:

“The Petitioner submits that interim relief granted by order dated 30th January 2012, and vacated by order dated 28 July, 2015 needs to be continued and relief as prayed for in this Petition needs to be granted”

(emphasis supplied)

8 The aforesaid Arbitration Petition (L) No.1642 of 2015 under section 9 of the Arbitration Act was dismissed by the learned Single Judge vide order dated 21 August 2015 relying upon judgment of the Division Bench of this Court in the case of Dirk India Private Limited vs. Maharashtra State Electricity Generation Company, 2013 (DGLS) (AHC)

4364. The Appellant thereafter challenged the order of the learned Single Judge dated 21 August 2015 by preferring Appeal (L) No.701 of 2011 before the Division Bench of this Court which Appeal came to be dismissed on 23 September 2015. The Division Bench observed that the ratio in Dirk's case raises debatable issue. The Division Bench however further observed that since identical issue in Dirk's case was under consideration before the Apex Court, it did not entertain the Appeal and accordingly dismissed the said Appeal.

9 The Appellant thereafter, preferred Special Leave Petition being SLP No.29972 of 2015 against the order of the Division Bench dated 23 September 2015 which has been admitted by an order dated 7 December 2015 and has been tagged alongwith the SLP pending from the order passed by the Division Bench of this Court in Dirk's case as questions of law arising in both matters were identical. The order dated 7 December 2015 of the Supreme Court reads as follows:

“Heard Mr. Kapil Sibal, learned Senior counsel appearing for the petitioner and Mr. Jaideep Gupta, learned Senior counsel appearing for the sole respondent.

Issue notice.

Mr. P.N. Puri, learned Advocate-on-Record who is on caveat accepts and waives formal notice.

This Special Leave Petition be tagged with Special Leave Petition (Civil) No.13688 of 2013 which is pending before this Court.

Any action being taken by any party in the matter shall abide by the final result of this Special Leave Petition.”

10 In the circumstance, the Appellant having failed to secure the relief in Arbitration Petition (L) No.1642 of 2015 under section 9 of the Arbitration Act inter alia for appointment/continuation of Court Receiver after adverting to and making a grievance that the interim relief of appointment of Court Receiver stands vacated by the order dated 28 July 2015 (which is impugned in the present Appeal) and the co-ordinate Division Bench of this Court having not entertained the Appeal of the Appellant and further that the issue is still at large before the Supreme Court in SLP No.29972 of 2015 and no reliefs have been granted to the Appellant in the said SLP, it would not be appropriate for us to entertain the present Appeal when in essence what the Appellant is seeking is the continuation of the Court Receiver, which is the subject matter of the said SLP No.29972 of 2015 before the Supreme Court. Prima facie, we do find some substance in the submission of the Appellant that the observations contained in the impugned order dated 28 July 2015 has the effect of discharging the Court Receiver which Court Receiver has been continued by the Supreme Court for a period of 5 years by order dated 30 January 2012 in Civil Appeal No.1136 of 2012. The said Civil Appeal No.1136 of 2012 before the Supreme Court arose from an Application under section 17 of the Arbitration Act wherein interim reliefs

were refused by an order dated 16 August 2011 by the learned Arbitrator against which Arbitration Appeal No.23 of 2011 was filed before learned Single Judge under section 37 of the Arbitration Act. The learned Single Judge was interalia pleased to appoint a Court Receiver in respect of the property in question for a period of 3 years. Since there is no intra-court second Appeal is provided from proceedings under section 17 of the Arbitration Act, the aforesaid Civil Appeal No.1136 of 2012 was filed by the Appellant before the Supreme Court which modified the order of the learned Single Judge by continuing the Court Receiver for a period of 5 years. The order dated 30 January 2012 of the Supreme Court reads as follows:

“Leave granted.

2 Heard Dr. Abhishek Manu Singhvi, learned senior counsel for the appellant, and Mr. Mukul Rohtagi, learned senior counsel for the respondent.

3 The Appeal is disposed of as follows:-

- (i) In para 12(i) of the impugned order, 'three years' shall stand substituted by 'five years'.*
- (ii) In so far as para 12(ii) of the impugned order is concerned, it is directed that the Court Receiver shall appoint the present appellant – Haresh N. Sanghavi – as his agent.*
- (iii) The appellant shall be at liberty to give the subject property on leave and license basis immediately and the rent/licence fee shall be received by him as agent for which account shall be kept by him.*

4 *With the above modification, the impugned order is confirmed.*

5 *The arbitrator is required to adjudicate the dispute and pass award as early as may be possible and preferably by the end of July, 2012.”*

We however note that the Appellant is not remediless as the Appellant can always take recourse to filing proceedings before the Supreme Court as contemplated under section 37(3) of the Arbitration Act.

11 For the aforesaid reasons, the Appeal is dismissed as not maintainable. There shall be no order as to costs. We clarify that we have not expressed any opinion on merits of the case.

(A.A. SAYED, J.)

(ANOOP V. MOHTA, J.)

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