IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

L.P.A. No.150 of 2016 (O&M)
DATE OF DECISION : 17.5.2016

Talwandi Sabo Power Limited and another ... APPELLANTS

VERSUS

SEPCO Electric Power Construction Corporation and another
... RESPONDENTS

CORAM : HON'BLE Mr.JUSTICE MAHESH GROVER
HON'BLE JUSTICE Mrs.LISA GILL

1. Whether reporters of Local Newspapers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present:- Shri Ashwani Chopra, Senior Advocate with Shri K.S.Nalwa, Ms.Rupa Pathania and Shri Adhiraj Thind, Advocates for the appellants.

Shri M.L.Sarin, Senior Advocate,
Shri Puneet Bali, Senior Advocate with
Shri Tushar Sharma, Shri Ranjit Prakash, Ms.Ankita Sambyal and Shri Anshuman Pandey, Advocates
for respondent-1.

MAHESH GROVER, J.

This Letters Patent Appeal is against the order of the learned Single Judge dated 20.1.2016 wherein directions were given while exercising powers under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) as amended, to order continuance of the interim orders dated

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1.12.2015 and 8.12.2015 requiring a bank guarantees to be maintained for a period of three weeks from the date of constitution of an Arbitration Tribunal with liberty to the respondents to seek interim relief by invoking provisions of Section 17 of the amended Arbitration Act.

The debate has centered on the issue of maintainability of the L.P.A. against an order passed under Section 9 of the Act as the issues impinging the merits of the dispute would largely be contingent on its acceptance.

There would be an inter-play of some of the provisions of the Act which for the purpose of reference, are extracted here below :-

> "**9. Interim measures, etc., by Court.-** (1) A party may, before or during arbitral proceedings or at any time after the making of the atbitral award but before it is enforced in accordance with Section 36, apply to a Court.-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings ; or
>
> (ii) for an interim measure of protection in respect of any of the following matters namely :-
>
> xxx xxx xxx
>
> (d) interim injunction or the appointment of a receiver ;
>
> (e) such other interim measure of protection as may appear to the Court to be just and convenient,
>
> and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

The respondents have invoked this provision to seek an interim

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relief. It is also not in dispute that till the time of hearing of this appeal, the Arbitration Tribunal has not come into existence as there was a failure to agree upon the Third Arbitrator.

Section 37 of the Act provides for appeals to be preferred against the orders. It is, therefore, apposite to extract the said provision here :-

> "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) refusing to refer the parties to arbitration under section 8,
>
> (b) granting or refusing to grant any measure under section 9,
>
> (c) 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."

It is the common case of the parties that an appeal certainly lies in terms of Section 37(1)(b) of the Act against an order of the Court granting or

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refusing to grant any measure under Section 9. Section 37(3) of the Act however, lays down that no second appeal shall lie from an order passed in appeal under this section, but nothing in this section will affect any right to appeal to the Supreme Court. A closer reading of Section 37(1) of the Act reveals an appeal to the "**court authorized by law to hear appeals from "original decrees of the court passing the order**".

The Court in turn, has been defined in Section 2(e) of the Act which is extracted here below :-

> "**2. Amendment of Section 2.-** In the Arbitration and Conciliation Act, 1996 (26 of 1996) (hereinafter referred to as the principal Act), in section 2,-
>
> (I) in sub-section (1),-
>
> (A) for clause (e), the following clause shall be substituted,namely:-
>
> (e) "Court" means -
>
> (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes ;
>
> (ii) in the case of international commercial arbitration, the High Court in exercise of its

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ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court ;

(B) in clause (f), in sub-clause (iii), the words "a company or" shall be omitted,

(II) in sub-section (2), the following proviso shall be inserted namely :-

"Provided that subject to an agreement to the contrary, the provisions of sections 9,27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act."

Relevant to the present case would be section 2(1)(e)(ii) as the issue involves international commercial arbitration in which eventuality, the High Court has been empowered to exercise its ordinary original civil jurisdiction to decide questions forming the subject matter of arbitration as if the same had been the subject matter of a suit and in other cases, the High Court having jurisdiction to hear appeals from decrees of courts subordinate to the High Court.

It is also not in dispute that this Court i.e. the Punjab & Haryana High Court does not have the original jurisdiction to deal with the subject matter of a suit and if the latter part of Section 2(e) of the Act is to be seen, the

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jurisdiction would vest in the Court empowered to hear appeals from decrees of courts subordinate to the High Court which in turn, means a learned Single Judge of this Court.

Section 2(2) read with proviso applies where the place of arbitration is in India provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) to sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration even if the place of arbitration is outside India.

Large parts of the arguments were in fact, addressed on this aspect and the applicability of Section 37 of the Act and for that purpose, the laws on the place and seat of arbitration with reference to several judgments of the Hon'ble Supreme Court which were cited, such as **Bharat Aluminum Co. v. Kaiser Aluminum Technical Services INC.** (2012) 9 S.C.C. 552 (hereinafter referred as the "BALCO"), **Bhatia International v. Bulk Trading S.A. and another** (2002) 4 S.C.C. 105 and **Enercon (India) Limited and others v. Enercon GMBH and another** (2014) 5 S.C.C.1.

We are of the opinion that these issues would erupt for consideration only when we decide the primary issue of maintainability of the L.P.A.

A perusal of the relevant provisions of the Act make it clear that it is silent in so far as the remedy of L.P.A. is concerned. Section 37 talks of an appeal before a "Court authorized by law" to hear appeals from original decrees of the Court passing the order i.e. granting or refusing to grant any measure under Section 9 (37(1)(b)).

The vexed question would be, whether an appeal would lie before a Division bench under clause X of the L.P.A. against an order of the learned Single Judge under Section 9(1)(e) and can the **L.P.A. Bench be construed to be a Court empowered to hear appeals from original decrees of the Court that**

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has passed an order under Section 9(1)(e) as an interim measure of protection upon a recorded satisfaction of that Court.

The scope and extent of an L.P.A. has been elaborately set out in the judgment of the Hon'ble Supreme Court in **Fuerst Day Lawson Limited v. Jindal Exports Limited** (2011) 8 S.C.C. 333, wherein in para-14 it was observed as under :-

> "14. The question regarding the availability of an appeal under the relevant clause of the Letters Patent has engaged the attention of this Court from time to time under different circumstances and in cases arising under different Acts. We take note of some of the cases here that were brought to our notice by the two sides."

After noticing several judgments of the Hon'ble Supreme Court such as-

(1) **National Sewing Thread Co.Ltd. v. James Chadwick and Bors. Ltd.,** AIR 1953 S.C. 357,

(2) **Vinita M.Khanolkar v. Pragna M.Pai** (1998) 1 S.C. 500,

(3) **Sharda Devi v. State of Bihar** (2002) 3 SCC 705,

(4) **Subal Paul v. Malina Paul** (2003) 10 SCC 361 and

(5) **P.S.Sathappanv. Andhra Bank Ltd.** (2004) 11 scc 672,

the Hon'ble Supreme Court went on to observe as follows :-

> "36. The decisions noticed so far lay down certain broad principles that may be stated as follows :-
>
> (i) Normally, once an appeal reaches the High Court it has to be determined according to the rules of practice and

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procedure of the High Court and in accordance with the provisions of the charter under which the High Court is constituted and which confers on it power in respect to the method and manner of exercising that power.

(ii) **When a statute merely directs that an appeal shall lie to a court already established then that appeal must be regulated by the practice and procedure of that court.**

(iii) The High Court derives its intra-court appeal jurisdiction under the Charter by which it was established and its powers under the Letters Patent were recognized and saved by Section 108 of the Government of India Act, 1915, Section 223 of the Government of India Act, 1935 and finally, by Article 225 of the Constitution of India. **The High Court, therefore, cannot be divested of its Letters Patent Jurisdiction unless provided for expressly or by necessary intendment by some special statute.**

(iv) If the pronouncement of the **Single Judge qualifies as a "judgment**", in the absence of any bar created by a statute either expressly or by necessary implication, it would be subject to appeal under the relevant clause of the Letters Patent of the High Court.

(v) Since Section 104(1) C.P.C. specifically saves the letters patent appeal ; it could only be excluded by an express mention in Section 104(2). In the absence of any express mention in Section 104(2), the

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maintainability of a letters patent appeal is saved by virtue of Section 104(1).

(vi) Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred. The appellate jurisdiction of a superior court cannot be taken as excluded simply because a subordinate court exercises its special jurisdiction.

(vii) The exception to the aforementioned rule is where the special **Act sets out a self-contained code and in that event the applicability of the general law procedure** would be impliedly excluded. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred."

Of particular importance would be the words used in the aforesaid conclusions established in clauses (iii), (iv), (vii) which bring out that the **High Court cannot be divested of its Letters Patent Jurisdiction unless provided for expressly or by necessary intendment by some special statute.**

In this very judgment i.e. **Fuerst Day Lawson Limited v. Jindal Exports Limited** (supra) it was further noticed that with regard to the judgment rendered in **State of West Bengal v. Gourangalal Chatterjee** (1993) 3 S.C.C.1 and **Union of India v. Aradhana Trading Co.** (2002) 4 S.C.C. 447, that in the event an order was not appealable under Section 37(1), of the 1996 Act, it would not be subject to an appeal under the Letters Patent by the High Court.

The Hon'ble Supreme Court went on to notice the objects and

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reasons and desirability to bring the Act in conformity with the UNCITRAL MODEL and observed as under :-

> "52. Having regard to the grammatical use of brackets or parenthesis, if the words "(and from no others)" occurring in Section 39 of the 1940 Act or Section 37 of the 1996 Act are viewed as "an explanation or afterthought" or extra information separate from the main context, then, there may be some substance in Mr.Dave's submission that the words in parenthesis are surplusage and in essence the provisions of Section 39 of the 1940 Act or Section 37 of the 1996 Act are the same as Section 50 of the 1996 Act. Section 39 of the 1940 Act says no more and no less than what is stipulated in Section 50 of the 1996 Act. But there may be a different reason to contend that Section 39 of the 1940 Act or its equivalent Section 37 of the 1996 Act are fundamentally different from Section 50 of the 1996 Act and hence, the decisions rendered under Section 39 o the 1940 Act may not have any application to the facts arising under Section 50 of the 1996 Act. But for that we need to take a look at the basic scheme of the 1996 Act and its relevant provisions.
>
> 53. Before the coming into force of the Arbitration and Conciliation Act, 1996 with effect from 16.8.1996, the law relating to domestic arbitration was contained in the Arbitration Act, 1940, which in turn was brought in place of the Arbitration Act, 1899. Apart from the Arbitration Act, 1940, there were two other enactments of the same genre. One called the Arbitration (Protocol and Convention) Act,

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1937 (for execution of the Geneva Convention Awards) and the other called the Foreign Awards (Recognition and Enforcement) Act, 1961 (for enforcement of the New York Convention Awards). The aforesaid three Acts were replaced by the Arbitration and Conciliation Act, 1996, which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model and is broadly compatible with the "Rules of Arbitration of the International Chamber of Commerce".

... ...

55. The Preamble of the Arbitration and Conciliation Act, 1996 is as follows :-

"PREAMBLE

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985 ;

AND WHEREAS the General Assembly of the United Nation has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice ;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980 ;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases

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where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation ;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment *of a unified legal framework* for the fair and efficient settlement of disputes arising in international commercial relations ;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules ;"

(emphasis supplied)

56. The new Act is a loosely integrated version of the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It actually consolidates, amends and puts together three different enactments. But having regard to the difference in the object and purpose and the nature of these three enactments, the provisions relating thereto are kept separately. A mere glance at the 1996 Act is sufficient to show that under its scheme the provisions relating to the three enactments are kept separately from each other.

57. The 1996 Act is divided into four parts and has three Schedules at its end. Part I has ten chapters that contain provisions governing domestic arbitration and international commercial arbitration. Part II has two chapters ; Chapter I contains provisions relating to the New York Convention Awards and Chapter II contains provisions relating to the

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Geneva Convention Awards. Part III of the Act has provisions concerning conciliation. Para IV has the supplementary provisions such as the power of the High Court to make rules (Section 82), provision for removal of difficulties (Section 83), and the power to make rules (Section 84). At the end there are two repeal and saving sections. Section 85 repeals the three enactments referred to above, subject to the appropriate saving clause and Section 86 repeals Ordinance 27 of 1996, the precursor of the Act, subject to the appropriate saving clause. Of the three Schedules, the first is related to Part II Chapter I i.e. the New York Convention Awards and the second and the third to Chapter II i.e. the Geneva Convention Awards.

... ...

59. Part I has ten chapters. Chapter I begins with definition clauses in Section 2 that defines, amongst other terms and expressions, “arbitration”, “arbitration agreement”, “arbitral award”, etc. Chapter I also contains some “General Provisions” (Section 3-6). Chapter II contains provisions relating to “Arbitration Agreement” (Sections 7-9). Chapter III contains provisions relating to “Composition of Arbitral Tribunal” (Sections 10-15). Chapter IV deals with the “Jurisdiction of Arbitral Tribunals” (Sections 16-17). Chapter V lays down provisions concerning “Conduct of Arbitral Proceedings” (Sections 18-27). Chapter VI deals with “Making of Arbitral Award and Termination of Proceedings” (Sections 28-33). Chapter VII has only one section i.e. section

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34 that provides "Recourse against Arbitral Award". Chapter VIII deals with "Finality and Enforcement of Arbitral Awards" (Sections 35-36). Chapter IX provides for "Appeals" (Section 37 which is akin to Section 39 of the 1940 Act). Chapter X contains the "Miscellaneous" provisions (Sections 38-43).

60. It is also evident that Part I and Part II of the Act are quite separate and contain provisions that act independently in their respective fields. The opening words of Section 2 i.e. the definition clause in Part I, make it clear that meanings assigned to the terms and expressions defined in that section are for the purpose of that part alone. Section 4 which deals with waiver of right to object is also specific to Part I of the Act. Section 5 dealing with extent of judicial intervention is also specific to Part I of the Act. Section 7 that defines "arbitration agreement" in considerable detail also confines the meaning of the term to Part I of the Act alone. Section 8 deals with the power of a judicial authority to refer parties to arbitration where there is an arbitration agreement and this provision too is relatable to Part I alone (corresponding provisions are independently made in Sections 45 and 54 of Chapters I and II, respectively of Part II). The other provisions in part I by their very nature shall have no application in so far as the two chapters of Part II are concerned.

61. Once it is seen that Part I and Part II of the Act are quite different in their object and purpose and the respective

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schemes, it naturally follows that Section 37 (in Part I (analogous to Section 39 of the 1940 Act) is not comparable to Section 50 in Part II of the Act. This is not because, as Mr.Sundaram contends Section 37 has the words in parenthesis “and from no others” which are not to be found in Section 50 of the Act. Section 37 and Section 50 are not comparable because they belong to two different statutory schemes. Section 37 containing the provision of the appeal is part of a much larger framework that, as seen above, has provisions for the complete range of law concerning domestic arbitration and international commercial arbitration Section 50 on the other hand contains the provision of appeal in a much limited framework, concerned only with the enforcement of the New York Convention Awards. In one sense, the two sections, though each containing the appellate provision belong to different statutes.

62. Having come to this conclusion, it would appear that the decisions rendered by the Court on the interplay between Section 39 of the 1940 Act and the Letters Patent jurisdiction of the High Court shall have no application for deciding the question in hand. But that would be only a superficial view and the decisions rendered under Section 39 of the 1940Act may still give the answer to the question under consideration for a very basic and fundamental reason.”

Of course, the Hon'ble Supreme Court then went on to compare the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 as

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also the Arbitration and Conciliation Act, 1996 to conclude as follows :-

> "74. Section 49 of the present Act makes a radical change in that where the Court is satisfied that the foreign award is enforceable, the award itself would be deemed to be a decree of the Court. It, thus, not only omits the procedural formality for the Court to pronounce judgment and a decree to follow on that basis *but also completely removes the possibility of the decree being in excess of, or not in accordance with the award. Thus, even the limited basis on which an appeal would lie under sub-section (2) of Section 6 of the 1961 Act, is taken away.* There is, thus, no scope left for an appeal against an order of the court for the enforcement of a foreign award. It is for this reason that Section 50(1)(b) provides for an appeal only against an order refusing to enforce a foreign award under Section 48.
>
> 75. There can be no doubt that under Section 6, except on the very limited ground, no appeal including a letters patent appeal was maintainable against the judgment and decree passed by the court under Section 6(1). It would be futile, therefore, to contend that though the present Act even removes the limited basis on which the appeal was earlier maintainable, yet a letters patent appeal would lie notwithstanding the limitations imposed by Section 50 of the Act. The scheme of Sections 49 and 50 of the 1996 Act is

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> divised specially to exclude even the limited ground on which an appeal was earlier provided for under Section 6 of the 1961 Act. The exclusion of appeal by Section 50 is, thus, to be understood in light of the amendment introduced in the previous law by Section 49 of the Act."

But this would be germane only on the issue of enforceability of a foreign award.

In **Union of India v. Mohindra Supply Co.** A.I.R. 1962 S.C. 256 wherein the provisions of Section 39(2) of the 1940 Act were considered, the Court held that an L.P.A. was not maintainable. The provisions of Section 39(2) of the 1940 Act are para-materia to Section 37(3) of the 1996 Act. The ultimate conclusion is recorded in paras 89 and 90 of the judgment which may be extracted here below :-

> "89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S.Sathappan) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, no matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are

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> permissible to be done and acts or things not mentioned therein are not permissible to be done." In other words, a letters patent appeal would be excluded by the application of of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.
>
> 90. We, thus, arrive at the conclusion regarding the exclusion of a letters patent appeal in two different ways ; one, so to say, on a micro basis by examining the scheme devised by Sections 49 and 50 of the 1996 Act and the redical change that it brings about in the earlier provision of appeal under Section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself."

The issue thus is as to whether the 1996 Act constitutes a Special Act, to offer a self-contained code so as to exclude the provision of clause (X) for L.P.A. A reading of the conclusion recorded in para-90 of the aforesaid judgment leaves no manner in doubt that the Arbitration and Conciliation Act, 1996 is a special enactment bringing a radical change in the earlier provision and being so, where the remedy of L.P.A. is not expressly provided, the same would necessarily have to be excluded as an available remedy against the orders passed under the Act.

We now proceed to apply the test prescribed to see whether an L.P.A. would be available to the appellants. It has been observed in the aforesaid that :-

(A) An appeal shall lie "to the Court already established" and the appeal must

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be regulated by the Practice and Procedure of the Court.

(B) High Court cannot be divested of its Letters Patent jurisdiction unless provided for expressly or by necessary intendment by some special statute.

(C) Whether the Special Act sets out a self-contained Code in that eventuality, the applicability of the general law procedure would be impliedly excluded.

(D) Even if the words “Letters Patent” are missing, but by a reading of the provision, it is clear that all appeals are barred, then the Letters Patent Appeal would be barred.

(E) If the pronouncement of the Single Judge qualifies as a judgment, then in the absence of any bar created by a statute an appeal shall be under relevant provisions of the Letters Patent of the High Court.

The rules of interpretation of a statute would command that language of the statute be respected to be read as it is without injecting any other meaning to read non-existent words into it. The Hon'ble Supreme Court in **M/s Girdhari Lal & sons v. Balbir Nath Mathur 1986** A.I.R. S.C. 1499 observed as under :-

> “The primary and foremost task of a court in interpreting a statutes is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the

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court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing, the written word if necessary."

Similarly, the Hon'ble Supreme Court in **Satheedevi v. Prasanna** 2010(2) S.C.C. (Civil) 490, observed as under :-

"10. Before proceeding further, we may notice two well recognized rules of interpretation of statutes. The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction, only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise **Kanai Lal Sur v. Paramnidhi Sadhukhan** 1958 SCR 360. **The other important rule of interpretation is that the Court cannot rewrite, recast or reframe the legislation because it has no power to do so. The Court cannot add words to a statute or read words which are not therein it. Even if there is a defect or an omission in the statute, the Court cannot correct the defect or supply the omission. - Union of India v. Deoki Nandan Aggarwal 1992 Supp.(1) SCC 323,**

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Shyam Kishori Devi v. Patna Municipal Corporation (1966) 3 SCR 366."

As a virtual corollary of the aforesaid proposition would be the conclusion that an appeal is creation of a statute and if not otherwise provided in the enactment, the remedy has to be treated to be an exclusion. This has been consistently observed by the Hon'ble Supreme Court and notable amongst the judgments would be **Smt.Ganga Bai v. Vijay Kumar and others** 1974 A.I.R. (SC) 1126), **Seth Nand Lal v. State of Haryana** 1980 A.I.R. (SC) 2097 and **Mardia Chemicals Ltd. etc. etc. v. Union of India and others etc. etc.** 2004 AIR (SC) 2371.

There is also no doubt that the 1996 Act (The Arbitration and Conciliation Act, 1996) has been held to be a special statute enacted to keep pace with the UNCITRAL Model providing expeditious settlement. Therefore, the objective of the Act also has to be kept in mind while placing an interpretation on its provisions.

It was observed by the Hon'ble Supreme Court though in the context of maintainability and interference by a High Court exercising its jurisdiction under Articles 226 and 227 of the Constitution with regard to orders passed by the Arbitration Tribunal before the final award, that there has to be 'minimum judicial intervention' in process arbitrated upon.

Indeed there is no doubt that High Court would have the power to correct any order in intra Court appeal but if a special enactment governs the dispute, then the terms of the statute will dictate the course of remedies, for appeal is a creation of a statute.

Section 37 Chapter 9 of the Act provides for appeals to lie from the orders to the Court authorized by law to hear appeals from original decrees of the Court passing the order i.e. granting or refusal to grant any measure under Section

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9.

In the present case the application under Section 9 of the Act was answered by the learned Single Judge of this Court which would thus be construed to be a Court empowered to pass an original decree against whose orders appeals would lie to the Court authorized by law as per dictate of Section 2(1)(e)(ii). The Intra Court appeal under clause 10 of the Letters Patent would clearly be divested as an available remedy since the Act specifically provides for an appeal under Section 37 and no other interpretation can be given by reading into it provisions unintended by Legislature.

We may also refer to clause 10 of the Letters Patent pertaining to this Court which is extracted here below :-

> "10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that not withstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the High Court or one Judge of any Division Court, pursuant to Section 108 of the

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> Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in exercise of a decree or order made in exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."

The order under Section 9 of the Act would also not qualify as a judgment and hence appeal under Clause 10 of Letters Patent would not be maintainable as also for the reason that this clause is not applicable to judgments passed in the exercise of Appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction of a Court subject to superintendence of this Court. Section 2(1)(e)(ii) of the Arbitration and Conciliation Act provides the High Court to be a Court of jurisdiction hearing appeals from decrees of courts subordinate to that High Court. Since the definition and power of the court flows from the legislation i.e. a Special Act, clause 10 of the Letters Patent as extracted above would clearly not apply. A Division Bench of this Court in **Col.Raghbir Singh and others v. Punjab and Haryana High Court and others** 2016(1) R.C.R. (Civil) 32 also observed as under :-

> "We find that an appeal under clause 10 of the Letters Patent is not maintainable against an order passed by the learned Single Judge against the order of a Civil Court. It is only

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> order passed in exercise of the powers under Article 226 of the Constitution, which is appealable."

Besides the whole scheme of the Act is on the UNCITRAL Model aimed at expeditious resolution of dispute. It is not without any reason that interim orders under Section 9 have been provided a limited life till Arbitral Tribunal is constituted within thirty days in terms of Section 11 whereafter intervention of the Supreme Court or High Court can be invoked by the disputants.

The interim order under Section 9 thus is intended for a brief period and if subjected to Letters Patent would clearly result in the dispute being lost in the maze of litigation frustrating the very object of the Act.

Once the Arbitral Tribunal is constituted the parties can seek the necessary relief from the Tribunal as its existence extinguishes the earlier order.

We also derive sustenance of this view from a Full Bench decision of the Bombay High Court rendered in **Conros Steel Pvt.Ltd., Mumbai v. LU QIN (HONG KONG) Company Ltd.** 2015(1) Mh.L.J.434. In this judgment also, the decision in **Fuerst Day Lawson Limited v. Jindal Exports Limited** (supra) was noticed as also the decision in **Union of India v. Mohindra Supply Company** AIR 1962 SC 256 (supra) to conclude as follows :-

> "In *Union of India v. Mohindra Supply Company* AIR 1962 S.C. 256, it was held that the Arbitration Act, 1940 was an exhaustive and comprehensive code which had consolidated the law relating to arbitration. The provisions of the 1996 Act, including section 5 thereof, make it abundantly clear that it is a self-contained code of the matters relating to domestic arbitration. We are not **concerned with an international** arbitration in this case. We are in respectful agreement with

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> the observation in so far as it holds that the order under section 8 is in exercise of powers "flowing out of" the Arbitration Act, 1996, **in furtherance of the provisions of that Act and therefore, the remedy of an appeal must be sought from within the provisions of that Act.** In other words, the order of the CLB was under section 8 of the Arbitration Act, 1996 and determined the rights flowing out of the provisions thereof and not the provisions of the Companies Act, 1956. On parity of reasoning, we hold that the order impugned in the above appeal was one passed under section 8 of the Arbitration Act, 1996. In that view of the matter, the appeal is not maintainable in view of section **37 of the 1996 Act**."
>
> xxx xxx xxx
>
> 45. In the circumstances, the reference is answered as follows :-
>
> > "An appeal against an order passed in an application under section 8 of the Arbitration and Conciliation Act, 1996 is not maintainable under clause 15 of the Letters Patent being barred by the provisions of section 37 of the Arbitration and Conciliation Act, 1996."

Of course, the Bombay High Court was answering a reference in the context of Section 8 of the 1996 Act and regarding domestic arbitration which is also one of the orders appealable under Section 37(1)(a), to hold the power under Letters Patent to be unavailable. On the same parity, this remedy would also be unavailable to orders passed under Section 9 of the Act.

We are also convinced that this view satisfies the test prescribed by

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Furest Day Lawson Limited v. Jindal Exports Limited (supra) as extracted above i.e. the statute provides for an appeal to a Court already established by law and the necessary intendment finds expression in the special statute which is a self-contained Code.

Besides, the term “Court” has been defined in the case of international commercial arbitration as the High Court in exercise of its ordinary civil jurisdiction which the present High Court does not have and therefore, it falls within the latter contingency contemplated under Section 2(e)(ii) i.e. 'in another case a High Court having jurisdiction to hear appeals from decrees of the courts subordinate to that High Court'. This would imply that a learned Single Judge would be the Court as intended by the Act and thus, an order passed by the learned Single Judge under Section 9 would be appealable under Section 37(1)(b) but not under clause 10 of the Letters Patent.

With the aforesaid observations, we dismiss the L.P.A. as being not maintainable leaving the parties to their remedies in law.

(MAHESH GROVER)
JUDGE

(LISA GILL)
JUDGE

May 17, 2016
GD

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