

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

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Judgment Reserved on: 07th September, 2015

Judgment Delivered on: 13th January, 2016

+ FAO(OS) 417/2015 & CM No. 13586/2015

M/S TODAY HOTELS (NEW DELHI) PVT. LTD. APPELLANT

VERSUS

M/S INTECTURE INDIA DESIGNS PVT. LTD. RESPONDENT

Advocates who appeared in this case:

For the Appellant: Mr Atul Nanda, Sr. Advocate with Mr Abhishek Kumar, M.P. Vasandani, Mr. D.P. Singh & Ms. Rameeza Hakim, Advocates.

For the Respondent: Ms Aditi Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The appellant/defendant has filed the present appeal impugning the order dated 21.07.2015 whereby IA No. 14371/2015 filed by the appellant under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) has been dismissed.

2. The learned counsel for the respondent has raised a preliminary objection as to maintainability of the appeal. It is contended that appeal is a creature of statute and since the order has been passed on an application filed under Section 8 of the Act and an appeal would lie only if the order is appealable under the Act. Reference is made to Section 37 of the Act to contend that it lays down that an appeal shall lie, only from the orders referred to in the said section and from no other and section 8 not being one of the provisions referred to in the said sections, no appeal would lie. It is further contended that even an appeal under the Letters Patent would not lie.

3. The learned counsel for the appellant has contended that the order passed is not an order passed under the Act but is an order passed by the Court under the Code of Civil Procedure, 1908 (hereinafter referred to as CPC) and thus would not be governed by the provisions of Section 37 of the Act and an appeal would lie under Section 10 of the Act read with Section 104/Order 43 Rule 1 CPC alternatively an appeal would lie under the Letters Patent Act. It is contended that an application under Section 8 is filed not before an Arbitral Tribunal or a Court as constituted under the Act but is filed before a Court/Forum/Judicial Authority before which proceedings are initiated in which there is an arbitration agreement, and that Court/Forum/Judicial Authority not being a Court/Arbitral Tribunal under the Act, any order passed by it would be appealable under the

Letters Patent or CPC and would not be restricted by the provisions of Section 37 which would be applicable only to orders of the Arbitral Tribunal or the Court as envisaged under the Act. This it is contended is substantiated by the distinction in wording of Section 8 and Section 37. Section 37 refers only to orders passed by the Court whereas Section 8 refers to Judicial Authority which may include authority/forum other than a Court and as such any order passed by it would not be restricted under the provisions of Section 37 and a right of appeal would not be taken away.

4. The main question that arises for determination in the present case is whether an appeal would lie from an order passed under Section 8 of the Act allowing or refusing to allow an application under Section 8 of the Act?

5. Though several decisions have been referred to by the learned counsel for the appellant, none of those decisions are directly applicable or answers the question that arises for consideration as to maintainability of the present appeal. On the contrary, several decisions of the Division Bench of this Court as also by other High Courts have been relied upon by the learned counsel for the respondent which squarely answer the question. In this view of the matter, we are not referring to the decisions referred to by the learned counsel for the appellant.

6. The Division Bench of this Court in **Canbank Financial Services Ltd. Vs. M/s Haryana Petrochemical Ltd. & Anr. 2008 (104) DRJ 59 (DB)(Delhi)** held as under:-

“5. To our mind the embargo on appeals in Section 37 is an absolute and categorical one. Moreover, in the instant case the Arbitration and Conciliation Act, 1996 which is a special act dealing with the arbitrations, specially limits the extent of judicial intervention inasmuch as it provides that no judicial authority shall intervene except where so provided. Section 5 of the Arbitration and Conciliation Act, 1996 is reproduced hereinbelow for ready reference:

Arbitration and Conciliation Act, 1996

5. Extent of judicial intervention. - Notwithstanding anything contained in any other law for the time being in force, in matter governed by this Part, no judicial authority shall intervene except where so provided in this Part.

6. It is also well settled in catena of cases that an appeal is a creature of the statute, the right to appeal inheres in no one. Since in the present case Section 37 uses an expression that an appeal shall lie from the following orders and from no others, it to our mind consciously takes away the right of appeal against other orders. Any other interpretation, to our mind, would render the expression "and from no others" as otiose or nugatory. The Apex Court in catena of cases has

held that any interpretation which renders words of a statute "otiose" is to be avoided and eschewed. Consequently, appeal to the Division Bench lies only from the two orders mentioned in Section 37(1) and reliance of the Appellant on Section 96 of CPC is misconceived.

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11. Though the present case has not been filed under Clause 10 of Letters Patent, but in view of Mohinder Supply, A.S. Dhupia and M/s. Banwari Lal (which considers Babulal Khimji) even an appeal under Clause 10 of Letters Patent would not be maintainable against an order referring the parties to arbitration. Consequently, the present appeal is dismissed as not maintainable. However, the Appellant is given the liberty to file appropriate proceedings as may be available to it in accordance with law.”

7. Another Division Bench of this Court in **Rites Limited Vs. JMC Projects (India) Limited 2009109 DRJ 577 (DB)** held as under:-

“7. Having heard the learned Counsel for the parties, we are of the view that we need not go into the merits of the present appeal since we find force in the preliminary objection raised by the respondent to the maintainability of the present appeal. Learned counsel for the respondent has submitted that the only orders of a Court arising out of the Act, against which an appeal lies under Section 37(1) of the Act are orders:- (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. He submits that Section 37(1) of the Act clearly states that an appeal shall lie from the aforesaid two kinds of orders "and from no others", to the Court authorized by law to hear appeals from original decrees of the Court passing the order. Admittedly, the impugned order passed by the Court under Section 8 of the Act is neither an order granting or refusing to grant any measure under Section 9, nor an order setting aside or refusing to setting aside an arbitral award under Section 34. He submits that Sub Section (2) of Section 37 has no application since the impugned order has been passed by the Court, and not the Arbitral Tribunal. He submits that a right of appeal is a creature of the Statute and there is no general right of appeal in respect of any order that may be passed under the Act by the Court. In support of his submission, learned counsel for the respondent has relied upon Canbank Financial Services Ltd V. Haryana Petrochemical Ltd & Anr. 2008(2) Arb. Law Reporter 365 (Delhi) DB.

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17. It is, therefore, clear that no appeal could be maintained from an order of the Court passed under the old Act, by resort either to the Letters Patent or Section 104 CPC, unless the same fell within Section 39 of the old Act, even though the order passed by the Court may qualify as being a "judgment" within the meaning ascribed to that term in Shah Babulal Khimji (supra). The Act, having adopted the same terminology in so far as it

defines the scope of the right to appeal against the orders of the Court passed under the Act, as used in the old Act, in our view the decision in Mohindra Supply Co. (supra) is squarely applicable, and resort cannot be had by the appellant to either the Letters Patent or Section 104 of the CPC to maintain the present appeal.

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20. Reliance placed by the appellant on the Constitution Bench's decision in P.S. Sathaappan (supra) appears to be misplaced. Firstly, we may notice that in P.S. Sathaappan (supra), the earlier decision of the Supreme Court in Mohindra Supply Co. (supra) was approved. Secondly, the Supreme Court in P.S. Sathaappan (supra) observed "a specific exclusion may be clear from the words of a statute even though no specific reference is made to Letters Patent".

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22. We find no merit in the appellant's submission that the impugned order having been passed in a civil suit, Section 37 of the Act cannot be invoked to bar the appeal. The order has been passed by the learned Single Judge on an application preferred by the appellant by invoking Section 8 of the Act. Obviously, it is an order passed under the Act. This submission of the appellant is, therefore, rejected."

8. Yet another Division Bench of this Court in **Tandav Film Entertainment Pvt. Ltd. v. Four Frame Pictures & Anr. 2010 (114**

DRJ 219 (DB), relying on the various decisions of the Supreme Court and this Court including the ones referred to herein above held that the appeals are not maintainable and could not be entertained in view of the stringent provisions of Section 37 of the Act.

9. Similarly another Division Bench of this Court by Judgment dated 06.05.2010 in RFA (OS) 34/2010 **Maruti Clean Coal & Power Limited vs. Kolahai Infotech Pvt. Ltd. & others** reported as **2010 SCC OnLine Del 1867** held that Section 37 of the Act very categorically permits only appeals from those orders which are mentioned in Section 37 and from no other orders. Therefore, there could not be any doubt that all further appeals are barred except those mentioned under Section 37 of the Act and consequently an appeal under Section 10 of the Delhi High Court Act would also be barred against the order passed by the Court under Section 8 of the Act as an appeal against the said order is not provided under Section 37 of the Act. It further held that if the legislature had intended to exclude an appeal from an order passed under the Act except those specifically mentioned in Section 37 of the Act then an appeal would not lie under Section 10 of the Delhi High Court Act also. The Division Bench thus held that an appeal against an order passed under Section 8 was not maintainable.

10. A full bench of the Bombay High Court in **Conros Steels Pvt. Ltd. Vs. Lu Qin (Hong Kong) Company Ltd. AIR 2015 Bom 106**

(FB) referring to various decisions of the Supreme Court as also of the Division Bench of this Court agreed with the view taken by the Division Bench of this Court in Canbank Financial Services Ltd. (Supra), Rites Ltd. (Supra), Tandav Film Entertainment Pvt. Ltd. (Supra), Maruti Clean Coal & Power Limited (Supra) that the embargo on an appeal under Section 37 is absolute and categorical and the act which is a special Act dealing with arbitration, specifically limits the extent of judicial intervention and further the language of Section 37 consciously takes away the right of the appellant against the orders other than those mentioned thereunder and any other interpretation would render the expression “and from no others” otiose or nugatory.

11. The full bench of the Bombay High Court further held that an order passed on an application under Section 8 was an order passed under the Arbitration Act, in as much as, the source of power to pass such an order was drawn from Section 8(1) of the Act the necessary consequence of which is that the application in which such an order is passed is under Section 8 of the Act. Though the court/judicial authority exercises powers under the provisions of law pursuant to which the proceedings are filed before it, however, the application under Section 8 of the Act is decided in accordance with the provisions thereof. The order on such an application is passed in view of the power conferred by the section to do so. The Act being

exhaustive and comprehensive code, the order under Section 8 is an exercise of power flowing out of the Act. Therefore, the remedy of an appeal must also be sought from within the provisions of the Act. The full bench further held that as the Act is a self contained code and exhaustive, it carries with it a negative import that only such acts as are mentioned in the Act are permissible to be done and an act or things not mentioned therein are not permissible to be done. Thus, it held that a Letters Patent appeal would be excluded by the application 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.

12. We are in complete agreement with the view taken by the various division benches of this court and also by the full bench of the Bombay High Court in Conros Steels Pvt. Ltd (Supra). The sequitur of the same is that an order passed under Section 8 is an order passed by the judicial authority/forum/court by drawing its power from section 8 of the Act and since the order is passed by drawing the power from Section 8 of the Act, the right to file an appeal being a creature of statute has also to be found in the Act. If the Act does not provide for an appeal or specifically prohibits an appeal from an order passed under Section 8, then no appeal would lie under the Act. Since the order is passed in exercise of powers conferred by the act, reliance cannot be placed for filing an appeal under section 10 of the Delhi

High Court Act, 1966 or under the Letters Patent. Since Section 37 does not permit filing of an appeal from an order passed under Section 8, no appeal would lie from such an order under the Act.

13. The contention of the learned counsel for the appellant that Section 8 uses the expression 'judicial authority' whereas Section 37 uses the word 'Court', is of no consequence. Section 8 uses the expression 'judicial authority', in as much as, proceedings may be initiated by the parties not only before the Court but before various judicial authorities. When such proceedings are initiated, the respondent therein is empowered to file an application under Section 8 of the Act in cases where there is an arbitration agreement between the parties. When such an application is filed before such a judicial authority, that judicial authority is vested with the powers conferred by Section 8 of the Act to refer the parties to arbitration. The power is conferred on the judicial authority by Section 8 to decide such an application under the Act. The judicial authority does not, in those circumstances, exercise powers conferred on it by the statute under which the proceedings/lis was initiated but exercises powers conferred upon it by Section 8 of the Act, which the authority becomes vested with on the filing of an application under Section 8 of the Act. In that context, the expression used in Section 8 is 'judicial authority'. The fact that the Section 37 does not use the expression 'judicial authority' further fortifies our view that it is not an order passed under Section 8

of the Act by the judicial authority which is appealable under Section 37. Section 37 specifically enables filing of an appeal in respect of orders passed under various provisions mentioned therein. In this context, there is a difference in the expression used in Section 8 and Section 37. The fact that Section 37 does not use the expression 'judicial authority' does not thus make any difference.

14. In view of the above, we hold that the present appeal impugning the order rejecting the application under Section 8 of the Act, is not maintainable and is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J.

January 13 , 2016
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BADAR DURREZ AHMED, J.