

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

% **Date of decision: 6th September, 2017.**

+ **CM(M) 971/2017 & CM No.32438/2017 (for stay)**

DEEPAK MITTAL & ANR **Petitioners**

Through: Ms. Neha Garg, Adv.

Versus

GEETA SHARMA & ORS **Respondents**

Through: None.

AND

+ **CM(M) 975/2017 & CM No.32454/2017 (for stay)**

SANTOSH & ANR **Petitioners**

Through: Ms. Neha Garg, Adv.

Versus

KRISHAN KANT SHARMA **Respondent**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.32544/2017 in CM(M) 971/2017 & CM No.32455/2017 in CM(M) 975/2017 (both for exemptions)

1. Allowed, subject to just exceptions.
2. The applications are disposed of.

CM(M) 971/2017 & CM(M) 975/2017

3. These petitions, both under Article 227 of the Constitution of India, impugn identical orders [both dated 16th August, 2017 in Arbitration No.23/2017 & Arbitration No.24/2017 of the Court of Additional District

Judge-07 (ADJ) (Central), Tis Hazari Courts, Delhi] though issuing notice of a petition filed by the petitioners under Section 9 of the Arbitration & Conciliation Act, 1996 for 28th October, 2017 but not granting the *ex parte* order sought by the petitioners.

4. The petitioners, though have categorized these petitions as CM(M) i.e. under Article 227 of the Constitution of India, but have also invoked Section 37(1)(b) of the Arbitration Act which provides for an appeal against orders granting or refusing to grant any measure under Section 9 of the Arbitration Act and categorisation whereof is as 'FAO'. Once the remedy of an appeal under Section 37(1)(b) of the Arbitration Act is available against the impugned order, a petition under Article 227 of the Constitution of India would not lie as it is the settled position in law (See ***Sadhana Lodh Vs. National Insurance Co. Ltd.*** (2003) 3 SCC 524) that if a remedy under CPC or any other statute is available against an order, a petition under Article 227 of the Constitution of India does not lie.

5. The counsel for the petitioners states that she had earlier filed appeals under Section 37(1)(b) of the Arbitration Act but the Registry of this Court insisted that since the application under Section 9 has not been disposed of, the appeal under Section 37(1)(b) of the Arbitration Act would not lie; thereafter these petitions have been filed. The counsel for the petitioners otherwise agrees that the impugned orders are appealable.

6. It is not for the Registry to educate the advocates but *vice versa*. Once the counsel for the petitioners also agrees that the appeal is maintainable, it was for the counsel to satisfy the Registry of this Court and / or to have the matter listed subject to the said objection raised by the Registry. Even if

these petitions under Article 227 have been filed under instructions of the Registry of this Court, the same, if are not maintainable in law, would not become maintainable.

7. Section 9 of the Arbitration Act entitles a party to, before or during arbitral proceedings or at any time after the making of the arbitral award, apply to the Court for interim measures and empowers the Court to grant interim measures as specified therein, in exercise of powers for making orders as the Court has for the purpose of, and in relation to any proceedings before it.

8. Section 37(1)(b) is as under:

“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)
- (b) granting or refusing to grant any measure under Section 9;
- (c)

An order refusing to grant *ex parte* any measure under Section 9, would in my opinion be as much an order refusing to grant any measure under Section 9, within the meaning of Section 37(1)(b) supra as an order refusing to grant *finally* any measure under Section 9, and would be appealable thereunder. In a large number of situations refusal to grant *ex-parte* any measure may have a sense of finality, amounting to *finally* refusing to grant any measure under Section 9 and the right of appeal statutorily conferred cannot be defeated by carving out a distinction between refusal to grant interim measure *finally* and refusal to grant interim measure *ex-parte*. Moreover, the language of Section 37(1)(b) is wide enough, without anything therein to suggest that it is only a final order either allowing or

refusing interim measure which was made appealable. The legislature, at the time of drafting Section 37(1)(b) is deemed to be aware of the practise of claiming interim orders *ex-parte* and if had intended to make appealable only the final order on an application under Section 9, would have used the appropriate language therefor. Once an appeal under a statute is available, the same can be invoked as a matter of right and the discretionary jurisdiction under Article 227 cannot be a substitute therefor.

9. Though with respect to appeal against order on an application under Order XXXIX Rules 1&2 CPC, under Order XLIII Rule 1 (r) of the CPC which is as under:

“1. Appeal from orders. – An appeal shall lie from the following orders under the provisions of Section 104, namely:-

.....

(r) an order under Rule 1, Rule 2 [Rule 2A], Rule 4 or Rule 10 of Order XXXIX”

.....

”

a Division Bench of this Court in *Nisha Raj Vs. Pratap K. Kaula* ILR (1995) II Delhi 281 held that the order issuing notice of an application under Order XXXIX Rules 1&2 of the CPC and not granting *ex parte* order sought thereon is not an order under Rule 1 or Rule 2 of Order XXXIX within the meaning of Order XLIII Rule 1 (r) supra but the reason given for so holding was Order XXXIX Rule 3, which is as under:

“3. Before granting injunction, Court to direct notice to opposite party. – The Court shall in all cases, except where it appears that the object of granting the

injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant –

- (a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with –
 - (i) a copy of the affidavit filed in support of the application;
 - (ii) a copy of the plaint; and,
 - (iii) copies of documents on which the applicant relies, and
- (b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.”

It was held that an order issuing notice of the application under Order XXXIX Rules 1&2 of the CPC is an order under Order XXXIX Rule 3 of the CPC and not an order under Rule 1 or Rule 2 of Order XXXIX whereagainst only appeal under Order XLIII Rule 1 (r) is provided.

10. However there is no equivalent of Order XXXIX Rule 3 in the Arbitration Act and there is otherwise no requirement as in Order XXXIX Rule 3 to, before granting any interim measure, direct notice of the application under Section 9 of the Arbitration Act to be given to the opposite party. Thus what has been held by the Division Bench of this Court in relation to Order XLIII Rule 1(r) of the CPC would not apply to appeals under Section 37(1)(b) of the Arbitration Act.

11. I find that the High Court of Bombay in ***Perin Hoshang Davierwalla Vs. Kobad Dorabji Davierwalla*** MANU/MH/0569/2014 and the Division Bench of the High Court of Andhra Pradesh in ***ICICI Bank Ltd. Vs. IVRCL Ltd.*** AIR 2015 Hyd 179 have also held that an *ex parte* ad-interim order on an application under Section 9 of the Arbitration Act is appealable under

Section 37(1)(b) thereof and the appeal under Section 37(1)(b) is not restricted to only final orders on an application under Section 9 of the Arbitration Act.

12. I find a Single Judge of the High Court of Karnataka to have in *Symphony Services Corporation (India) Private Limited, Bangalore Vs. Sudip Bhattacharjee* 2007 SCC OnLine Kar 368 held that the word “granting” under Section 9 of the Arbitration Act would necessarily mean the final adjudication of the application under Section 9 of the Act and the remedy under Section 37(1)(a) (as it was before the amendment w.e.f. 23rd October, 2015) is not available when the petition under Section 9 is still pending but I am, with respect, unable to agree therewith. Moreover, the reason which prevailed for holding so was that alongwith the petition under Section 9 in that case, a separate application for *ex-parte* ad-interim order was filed and it was the order made thereon which was held to be not under Section 9. However the petition under Section 9 itself being for interim measures, is not required to be accompanied with another application and thus, in my view, refusal or granting of *ex-parte* order ad-interim order in a petition under Section 9 would also be appealable.

13. These petitions under Article 227 of the Constitution of India are thus not maintainable and are dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 06, 2017

‘gsr’..