

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.03.2018

CORAM

THE HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

O.S.A.No.229 of 2017

M/s.Shriram EPC Limited,
having its registered office at
Sigappi Achi Building,
4th Floor,
No.18/3, Rukmini Lakshmipathi Salai,
Egmore,
Chennai - 600 008. ... Appellants

vs

Rioglass Solar SA,
rep. by its Power of Attorney Agent
Mr.Jose Maria Villanueva Fernandez,
Poligno Industrial Villallana,
S/N 33695 Pola de Lena
Asturias, Spain. ... Respondent

Appeal filed under Order XXXVI, Rule 9 of Original Side Rules read with Clause 15 of Letters Patent against the order dated 9.2.2017 passed in O.P.No.587 of 2015 on the file of this Court.

O.P.No.587/2015:Petition filed under Section 47 of the Arbitration and Conciliation Act 1996 to pass an order that the Foreign award dated 12.02.2015 be deemed to be a decree of this Court and a direction to enforce and execute the said award as decree in favour of the petitioner and as against the respondent along with cost in entirety, cost of the petition be provided for.

For Appellant ... Mr.AR.L.Sundaresan
Senior Counsel
for M/s.Shivakumar & Suresh

For Respondent .. Mr.Hiroo Advani
for Mr.S.R.Raghunathan &
Ms.Taruna Jaiswal

JUDGMENT

(Delivered by Ms.Indira Banerjee, Chief Justice)

This appeal is against an order dated 9.2.2017 passed by the learned Single Bench in a petition filed under Section 47 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act" for, inter alia, enforcement and execution of a Foreign Award.

2. By the order impugned, the learned Single Judge rejected the objections of the appellant against enforcement of the Award and directed the appellant to disclose its assets to enable the respondent to execute the Award.

3. Counsel appearing on behalf of the respondent, Mr.Hiroo Advani has raised a preliminary objection to the maintainability of this appeal, on the ground that the impugned order is not appealable under Section 50 of the 1996 Act.

4. Section 50(1) of the 1996 Act, which provides for appeals in relation to international arbitration and Foreign Awards, provides as follows:

"50. Appealable orders.

(1) An appeal shall lie from the order refusing to-

- a. refer the parties to arbitration under section 45;

- b. enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order."

5. It is now settled by the judgment of the Supreme Court in Fuerst Day Lawson Limited v. Jindal Exports Limited, reported in (2011) 8 SCC 333 that no intra Court appeal lies against an order not appealable under Section 50 since the Letters Patent is not applicable to appeals under the 1996 Act, the 1996 Act being a self-contained code.

6. In Fuerst Day Lawson Limited, supra, the Supreme Court held 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 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 recognised 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) CPC 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 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.

37. These general principles are culled out from the decisions of this Court rendered under Section 104 CPC and various other Acts, as noted above. But there is another set of decisions of this Court on the question under consideration rendered in the context of Section 39 of the 1940 Act. Section 39 of the erstwhile Act contained the provision of appeal and provided as follows:

"39. Appealable orders.—(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the court authorised by law to hear appeals from original decree of the court passing the orders:

An order—

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) 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."

(Insofar as relevant for the present, Section 37 of the 1996 Act, is very similar to Section 39 of the previous Act as quoted above.)

38. In *Mohindra Supply Co.* [AIR 1962 SC 256 : (1962) 3 SCR 497], a Bench of four Judges of this Court held that a letters patent appeal against an order passed by a Single Judge of the High Court on an appeal under Section 39(1) of the 1940 Act was barred in terms of sub-section (2) of Section 39. This decision is based on the bar against further appeals as contained in sub-section (2) of Section 39 of the 1940 Act and, therefore, it may not have a direct bearing on the question presently under consideration.

39. More to the point are two later decisions. In *Gourangalal Chatterjee* [(1993) 3 SCC 1], a Bench of two Judges of this Court held that an order,

against which no appeal would lie under Section 39 (1) of the 1940 Act, could not be taken in appeal before the Division Bench of the High Court under its Letters Patent. The same view was reaffirmed by a Bench of three Judges of this Court in Aradhana Trading Co. [(2002) 4 SCC 447]"

7. The Supreme Court duly considered the submission that the above decisions were rendered in the context of Section 39 of the 1940 Act. Section 39(1) of the Arbitration Act, 1940 was almost identical to Section 37(1) of the 1996 Act. Counsel appearing in support of appealability of an order not appealable under Section 50 of the 1996 Act, conceded that if 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 of the High Court. The Supreme Court recorded the concession in paragraph 40 of the judgment which is extracted herein below:

"40. In regard to these two decisions, Mr Sundaram took the position that both Gourangalal Chatterjee, (1993) 3 SCC 1] and Aradhana Trading Co., (2002) 4 SCC 447 were rendered on Section 39 of the 1940 Act, the equivalent of which is Section 37 of the 1996 Act. In view of the two decisions, he conceded that in the event an order was not appealable under Section 37(1) of the 1996 Act, it would not be subject to appeal under the Letters Patent of the High Court."

8. In Fuerst Day Lawson Limited, supra, counsel appearing for the appellant in the Supreme Court had emphasised on the similarity between Section 37(1) of the 1996 Act and Section 39 (1) of the Arbitration Act, 1940 and in particular on the use of the expression appeal shall lie from the following orders and from no others common to Section 37(1) of the 1996 Act and Section 39 of the Arbitration Act, 1940, and argued that the absence of the words "from no others" in Section 50 of the 1996 Act meant that it was the legislative intent that an appeal would lie from an order not appealable under Section 50 of the 1996 Act.

9. The Supreme Court, however, considered the language of Section 50 and thereafter, proceeded to hold as follows:

"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 radical 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.

91. In light of the discussions made above, it must be held that no letters patent appeal will lie against an order which is not appealable under Section 50 of the Arbitration and Conciliation Act, 1996."

10. Our attention has also been drawn by Mr. Advani to the recent judgment of the Supreme Court in *Kandla Export Corporation and others v. OCI Corporation and others* [Civil Appeal Nos. 1661-1663 of 2018 (Arising out of SLP (Civil) Nos. 28582-28584 of 2017)] rendered on 7.2.2018 (2018 SCC Online 170), where the issue of, whether an appeal, not maintainable under Section 50 of the 1996 Act, was nonetheless maintainable under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, hereinafter referred to as "the Commercial Courts Act", was answered in the negative. The Supreme Court held:

"21. Given the judgment of this Court in *Fuerst Day Lawson* (supra), which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in paragraph 89 of *Fuerst Day Lawson* (supra) that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.

28. Given the objects of both the enactments, if we were to provide an additional appeal, when Section 50 does away with an appeal so as to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads. Admittedly, if the amount contained in a foreign award to be enforced in India were less than Rs. one crore, and a Single Judge of a High Court were to enforce such award, no appeal would lie, in keeping with the object of

speedy enforcement of foreign awards. However, if, in the same fact circumstance, a foreign award were to be for Rs. one crore or more, if the Appellants are correct, enforcement of such award would be further delayed by providing an appeal Under Section 13(1) of the Commercial Courts Act. Any such interpretation would lead to absurdity, and would be directly contrary to the object sought to be achieved by the Commercial Courts Act, viz., speedy resolution of disputes of a commercial nature involving a sum of Rs. 1 crore and over. For this reason also, we feel that Section 13(1) of the Commercial Courts Act must be construed in accordance with the object sought to be achieved by the Act. Any construction of Section 13 of the Commercial Courts Act, which would lead to further delay, instead of an expeditious enforcement of a foreign award must, therefore, be eschewed. Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonized by giving effect to the special statute i.e. the Arbitration Act, vis-à-vis the more general statute, namely the Commercial Courts Act, being left to operate in spheres other than arbitration."

11. Mr. Sundaresan appearing on behalf of the appellant submitted that in *Raj Television Network Ltd. v. Thaicom Public Company Limited*, reported in 2017-3-LW 833, a Bench of Co-ordinate strength of this Court had, after considering *Fuerst Day Lawson Ltd.*, supra, entertained an appeal against an order that was not appealable under Section 50, in effect, holding, that such an order would be appealable as a judgment under Clause 15 of the Letters Patent, overruling the objection to the maintainability of the appeal on the same grounds as urged on behalf of the respondent in this appeal.

12. In *Raj Television Network Ltd.*, supra, M. Sundar, J. referred to *Fuerst Day Lawson Limited*, supra, and observed as follows:

"(g) However, there is no such negative import in Section 50 of the A and C Act. When the Parliament in all its legislative wisdom has clearly incorporated negative import in one provision, namely, Section 37 and has deleted it in another provision, namely, Section 50 in the same statute, we have to necessarily come to the conclusion that Sections 37 and 50 of the A and C Act have to be read differently in terms of scope and purport."

13. In Raj Television Network Ltd., supra, the Division Bench appears to have overlooked the fact that in Fuerst Day Lawson Ltd., supra, the issue was whether an order not appealable under Section 50 of the 1996 Act could nevertheless be appealed against under the Letters Patent of the High Court. The Supreme Court clearly held that no Letters Patent appeal would lie against an order which is not appealable under Section 50 of the 1996 Act, after noticing and discussing the difference in the language of Section 37(1) of the 1996 Act, which is similar to Section 39(1) of the Arbitration Act, 1940 with that of Section 50 of the 1996 Act, which does not use the expression "from no others". The judgment of the Supreme Court is binding on this Court.

14. The appeal is, therefore, not entertained and the same is dismissed. We have not gone into the merits of the appeal. No costs. Consequently, CMP.No.15393 of 2017 is closed.

Sd/-

Assistant Registrar(CS IX)

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Sub Assistant Registrar

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To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

+2cc to M/s.Shivakumar & Suresh, Advocate Sr.No.19160

+1cc to Mr.S.R.Raghunathan, Advocate Sr.No.19120

NRJK (CO)

sm:26.3.2018

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O.S.A.No.229 of 2017

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