IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.2.2018

CORAM

The HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE ABDUL QUDDHOSE

Original Side Appeal No.66 of 2018
& CMP.No.3821 of 2018

1.The Chief Engineer/CN/South/
MS, Southern Railway,
Egmore, Chennai-8.

2.The Deputy Chief Engineer,
Construction/III/Madurai,
S.Railway, Arasaradi,
Madurai. ...Appellants/Respondents

Vs

M/s.M.R.K.R.Railone (J.V), rep.
by its Authorized Signatory
B.V.V.Krishna Reddy ...Respondent/petitioner

PRAYER : APPEAL under Clause 15 of the Letters Patent and under Order XXXVI Rule 1 of the Original Side Rules against the order dated 28.11.2017 made in O.P.No.472 of 2017.

prayer in O.P.NO.472 OF 2017:

A. Appoint an Independent and Impartial Arbitrator to hear and decide the disputes between the petitioner and the Respondents in accordance to the Sec.12(5) of the amended arbitration and conciliation act, 1996 arising out of the agreement dated 26.10.2010 as set out above and to complete the arbitration proceeding within the stipulating time decided by this Hon'ble court.

B. to direct the Respondents to pay the cost of this application.

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For Appellants	Dr.S.R.Sundaram

JUDGMENT
(Delivered by Ms.Indira Banerjee, Hon'ble Chief Justice)

This appeal is against an order dated 28th November 2017 passed by the learned Single Judge in O.P.No.472 of 2017 allowing the application of the respondent herein under Section 11(4) of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act", for the appointment of an Arbitrator.

2. The 1996 Act is a complete Code, which governs all proceedings relating to arbitration. Section 37 of the 1996 Act provides as follows :

> "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) 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."

3. An appeal lies from an order of the Court refusing to refer the parties to arbitration under Section 8; granting or refusing to grant any measure under Section 9; or setting aside or refusing to set aside an arbitral award under Section 34.

4. It may be pertinent to note the language and tenor of Section 37, which makes it clear that an appeal shall lie only from the orders specified in the Section and from no others. There can be no question of any original side appeal from an

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order appointing an Arbitrator.

5. In Fuerst Day Lawson Limited v. Jindal Exports Limited, reported in (2011) 8 SCC 333, the Supreme Court referred to and relied upon its earlier judgment in Union of India v. Mohindra Supply Co., reported in AIR 1962 SC 256 in relation to Section 39 of the Arbitration Act, 1940 and held:

> "88. Mohindra Supply Co. [AIR 1962 SC 256 : (1962) 3 SCR 497] was last referred in a Constitution Bench decision of this Court in P.S.Sathappan [(2004) 11 SCC 672] , and the way the Constitution Bench understood and interpreted Mohindra Supply Co. [AIR 1962 SC 256 : (1962) 3 SCR 497] would be clear from the following para 10 of the judgment: (P.S. Sathappan case [(2004) 11 SCC 672] , SCC pp. 689-90)
>
> > "10. … The provisions in the Letters Patent providing for appeal, insofar as they related to orders passed in arbitration proceedings, were held to be subject to the provisions of Sections 39(1) and (2) of the Arbitration Act, as the same is a self-contained code relating to arbitration."
> >
> > (emphasis supplied)
>
> 89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan [(2004) 11 SCC 672]) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on 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 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 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.

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> 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."

6. Section 50 of the 1996 Act relating to foreign awards provides that an appeal is to lie from an order refusing to refer the parties to arbitration under Section 45; or to enforce a foreign award under Section 48 of the 1996 Act.

7. The opening sentence of Section 37 of the 1996 Act uses the language "An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals....." The restrictive language of Section 37 is far stronger than the language of Section 50. Section 37 of the 1996 Act is almost identical to Section 39 of the Arbitration Act, 1940, which was considered in Mohindra Supply Co., supra.

8. An intra-court appeal from an order of a Single Bench under the 1996 Act is not governed by the Letters Patent. The proposition that Letters Patent would not apply to appeals under the 1996 Act finds support from Fuerst Day Lawson Limited, supra, and Mohindra Supply Co., supra.

9. We may also refer to Section 11(7) of the 1996 Act, as amended, which provides as follows :

> "11. Appointment of Arbitrators :
> .....
> (7) A decision on a matter entrusted by Sub-Section (4) or Sub-Section (5) or Sub-Section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including letters patent appeal shall lie against such decision."

10. The learned counsel appearing on behalf of the

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appellants submitted though styled as a Original Side Appeal with a memorandum of appeal, this is not, in fact, an appeal, but an application to set aside the appointment of the Arbitrator. We are unable to appreciate the submission. Any order of the Single Bench can only be set aside by a Division Bench of the same High Court in an appeal and not otherwise. There is no other way, in which, an order passed by the Single Bench can be set aside by the Division Bench of the same Court.

11. The learned counsel for the appellants submitted that the contract being of a technical nature, Railway Officials ought to have been appointed as Arbitrators and that the Single Bench ought to have appointed an Arbitral Tribunal comprising Railway Officials.

12. A reference has been made to an order of the Single Bench in a different matter. However, the general conditions of contract, which provides for arbitration, do not specify any qualification for the Arbitrator. In any case, as observed above, since this appeal itself is not maintainable, we cannot look into the merits of appointment.

13. The appeal is not entertained and the same is dismissed. Consequently, the connected CMP is also dismissed.

Sd/-
Assistant Registrar(CS-ix)

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Sub Assistant Registrar

RS/sasi

TO:

1.The Chief Engineer/CN/South/
MS, Southern Railway,
Egmore, Chennai-8.

2.The Deputy Chief Engineer,
Construction/III/Madurai,
S.Railway, Arasaradi,
Madurai.

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COPY TO.

1. THE SUB ASSISTANT REGISTRAR,
   ORIGINAL SIDE,
   HIGH COURT, MADRAS.

+1cc to Mr.S.R. Sundaram, Advocate, S.R.No. 15242

O S A No.66 of 2018
& CMP.No.3821 of 2018

TR(01/03/2018)

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