

\$~8

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

% *Date of Judgment: 15th October, 2018*

+ **FAO(OS) (COMM) 211/2018 and CM No. 37188/2018**

PUNJ LLYOD LTD

..... Appellant

Through: Mr Dayan Krishnan, Sr Adv with
Mr Rishi Aggawala, Mr Karan
Luthra, Ms Niyati Kohli, Mr
Simranjit Virk and Ms Aarushi Tiku,
Adv

versus

M/S HADIA ABDUL LATIF JAMEEL CO LTD & ANR Respondents

Through: Mr A.S. Chandiok, Sr Adv and Mr
T.K. Ganju, Sr Adv with Mr Aditya
Ganju and Mr Abhishek Bhardwaj,
Adv for R-1

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. The present appeal is directed against the order dated 25.07.2018 passed by the learned Single Judge. Since the order out of which the appeal arises is rather short, we deem it appropriate to reproduce the relevant part of the order, which reads as under:-

“1. Counsel for the defendants submits that he has filed an application for recall of order dated 09th May, 2018 by which the present suit was numbered as a commercial suit. The objection by the defendants is that the suit relates to

recovery of rents and invocation of corporate guarantee and that the suit does not involve a Commercial dispute.

2. The said objection is untenable as transactions involving corporate guarantees are clearly covered by Section 2(c)(i) of the Commercial Courts Act, 2015, being financial transactions relating to mercantile documents. The word 'mercantile' is broad and includes within its conspectus, any transaction relating to trade or business. A Corporate guarantee is nothing but a mercantile document which is executed for the purposes of securing the interest of the party in whose favour it has been issued. Such transactions would clearly constitute commercial disputes. The objection that the present suit is not a commercial suit is thus rejected."

2. Before the rival submissions of learned senior counsels who have appeared in the matter can be considered, we deem it appropriate to set out some relevant facts. The respondent before us has instituted a suit for recovery of arrears of rent and invocation of a corporate guarantee. Respondent No. 1 (hereinafter referred to as "Jameel") had entered into an agreement with respondent No. 2 (hereinafter referred to as 'DPLCCC') for taking on lease a penthouse in Jeddah. To secure the rent a corporate guarantee was to be provided, which was provided by the appellant. During the pendency of the suit on 09.05.2018, the following order was passed:-

"IA No.6335/2018

This application is for appointment of Local Commissioner to record the evidence. It is submitted by

learned senior counsel for the defendant that they had moved an application under Order 7 Rule 10 CPC but it was dismissed. An appeal against the said dismissal is pending before the Division Bench of this Court which is coming up on 9th July, 2018. The learned counsel for the defendant submits he intends to file a reply to this application since re-issue is the territorial jurisdiction. Be filed within four weeks from today.

List on 16th July, 2018.

CS(OS) 2716/2014

In view of the nature of dispute between the parties, registry is directed to re-number the suit as a “Commercial Suit” and while doing so retain both the numbers.”

(Emphasis added)

3. We have reproduced this order as in the impugned order dated 25.07.2018 a reference has been made with respect to the same. We are informed that an application seeking recall, though filed, was not listed. The date of filing this application as informed is 25.07.2018. It is also submitted by counsel for respondent No. 1 that no copy was even received by them. Mr Dayan Krishnan, learned senior counsel appearing for the appellant submits that having regard to the nature of dispute the learned Single Judge has fallen in error by treating the present suit as a commercial suit. Strong reliance is placed on the definition of Commercial Dispute as per Section 2(c)(i) of the Commercial Courts Act, 2015 which we reproduce below:-

(c) “commercial dispute” means a dispute arising out of-

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents.”

4. Mr Krishnan contends that the appellant is neither a merchant, nor a banker, or financier or trader and as such the present suit could not have been converted into a commercial suit. He submits that the agreement entered into between the respondents would not cover the appellant as the appellant is not a signatory to the said agreement. He further submits that since the appellant would not be covered with illustration 7 i.e., ‘agreement relating to immovable property used exclusively in trade or commerce’, the reference to mercantile documents would not bind the appellant herein as the terms mercantile documents is to be read in relation to the 22 illustrations, which would cover commercial disputes. He further submits that a corporate guarantee by itself does not fall within the definition of a commercial disputes and in case that was the objective of the legislature, that would have been specifically included. With respect to the preliminary objection raised with regard to maintainability of the present appeal in the light of Section 13 of the Commercial Courts Act, 2015. Mr Krishnan submits that this question stands decided by a Division Bench of this court in the case of **Eros Resorts & Hotels Ltd. v. Explorer Associates Pvt. Ltd.** reported in **2018 SCC Online Del 8945**. Relevant paragraphs 20, 21 and 23 are reproduced below:-

“20. The Appellant had refuted the plaintiff’s contention that the appeal is liable to be dismissed as not maintainable.

It is argued that the relevant date when the appellate remedy vests in the parties to the lis, is the date when the dispute is initiated; therefore since the present suit was already instituted before the enforcement of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the amendment to the Provisions of the CPC with respect to the Commercial Courts Act, contained in Section 16 of the said act shall not apply in the present case and consequently the restrictive Section 13, does not apply. It is further argued that the right of appeal under Section 10 of the Delhi High Court Act, 1966, would subsist.

21. What is a "vested right" to appeal to a higher court, in the context of a judgment or appealable order was explained in *Videocon International Ltd.*(supra) as follows:

"39. As illustrated above, an appellate remedy is available in different packages. What falls within the parameters of the package at the initial stage of the lis or dispute, constitutes the vested substantive right, of the concerned litigant. An aggrieved party, is entitled to pursue such a vested substantive right, as and when, an adverse judgment or order is passed. Such a vested substantive right can be taken away by an amendment, only when the amended provision, expressly or by necessary intendment, so provides. Failing which, such a vested substantive right can be availed of, irrespective of the law which prevails, at the date when the order impugned is passed, or the date when the appeal is preferred. For, it has repeatedly been declared by this Court, that the legal pursuit of a remedy, suit, appeal and second appeal, are steps in a singular proceeding. All these steps, are connected by an intrinsic unity, and are regarded as one legal proceeding.

40. Where the appellate package, as in the present case, is expressed differently at the "pre" and "post" amendment stages, there could only be two eventualities. Firstly, the pre-amendment appellate package, could have been decreased by the amendment. Or alternatively, the post-amendment package, could have been increased by the amendment. In the former situation, all that was available earlier, is now not available. In other words, the right of an individual to the appellate remedy, stands reduced or curtailed. In the latter situation, the amendment enhances the appellate package. The appellate remedy available prior to the amendment, stands included in the amendment, and some further addition has been made thereto. In the latter stage, all that was available earlier continues to subsist. The two situations contemplated hereinabove, will obviously lead to different consequences, because in the former position, the amendment would adversely affect the right, as was available earlier. In the latter position, the amendment would not affect the right of appeal, as was available earlier, because the earlier package is still included in the amended package.

41. In the facts and circumstances of this case, it is apparent that Section 15Z of the SEBI Act prior to the amendment, postulated that the appellate remedy would extend to "...any question of fact or law arising out of such order.". Whereas, the appellate remedy was curtailed consequent upon the amendment, whereunder the appellate right was limited to, "...any question of law arising out of such order.". Accordingly, by the amendment, the earlier appellate package stands reduced, because under the amended Section 15Z, it is not open to an appellant, to agitate an appeal on facts. That being the

position, it is not possible for us to accept the contention advanced at the hands of the learned counsel for the appellant, that the amendment to Section 15Z of the SEBI Act, envisages only an amendment of the forum, where the second appeal would lie. In our considered view, the amendment to Section 15Z of the SEBI Act, having reduced the appellate package, adversely affected the appellate right vested of the concerned litigant. The right of appeal being a vested right, the appellate package, as was available at the commencement of the proceedings, would continue to vest in the parties engaged in a lis, till the eventual culmination of the proceedings. Obviously, that would be subject to an amendment expressly or impliedly, providing to the contrary. Section 32 of the Securities and Exchange Board of India (Amendment) Act, 2002, which has been extracted in paragraph 12 hereinabove reveals, that the 'repeal and saving' clause, neither expressly nor impliedly, so provides. Thus viewed, we are constrained to conclude, that the assertion advanced at the hands of the learned counsel for the appellant, that the instant amendment to Section 15Z of the SEBI Act, does not affect the second appellate remedy, but merely alters the forum where the second appellate remedy would lie, is not acceptable.

.....

43. Having recorded our conclusion, as has been noticed in the foregoing paragraph, it is apparent, that insofar as the vesting of the second appellate remedy is concerned, neither the date of filing of the second appeal, nor the date of hearing thereof, is of any relevance. Legal pursuit of a remedy, suit, appeal and second appeal, are steps in a singular proceeding. All these steps are seemingly

connected by an intrinsic unity, which are treated as one singular proceeding. Therefore, the relevant date when the appellate remedy (including the second appellate remedy) becomes vested in the parties to the lis, is the date when the dispute/lis is initiated. Insofar as the present controversy is concerned, it is not a matter of dispute, that the Securities Appellate Tribunal had passed the impugned order (which was assailed by the Board), well before 29.10.2002. This singular fact itself, would lead to the conclusion, that the lis between the parties, out of which the second appellate remedy was availed of by the Board before the High Court, came to be initiated well before the amendment to Section 15Z by the Securities and Exchange Board of India (Amendment) Act, 2002. Undisputedly, the unamended Section 15Z of the SEBI Act, constituted the appellate package and the forum of appeal, for the parties herein. It is, therefore, not possible for us to accept, the contention advanced at the hands of the learned counsel for the appellant, premised on the date of filing or hearing of the appeal, preferred by the Board, before the High Court. We accordingly reiterate the position expressed above, that all the appeals preferred by the Board, before the High Court, were maintainable in law."

23. This court is of the opinion that the appellant's argument is merited. Though no vested right to procedure exists, Videocon is a clear authority that the right to an appellate remedy is not extinguished by the enactment of a new statute; a previously instituted litigant's right to appeal is preserved intact. It is therefore, held that the present appeal is maintainable."

5. It is contended that the present suit was instituted on 04.09.2014 while the Commercial Courts Act came into force on 23.10.2015. He submits that his right to a remedy would not be extinguishable by the enactment of a new statute.

6. Having regard to the observations, which we have detailed above would show that the present appeal would thus be maintainable.

7. Mr Chandiok and Mr Ganju, learned senior counsels who have appeared for respondent No. 1 submit that even in case, such an appeal is maintainable, no appeal lies against an order rejecting a review. It is contended that it is the submission of learned senior counsel for the appellant (defendant No. 1 in the suit) that an application for recall of the order dated 09.05.2018 was filed. The submission of counsel for the appellant before the learned Single Judge also relates to the suit not involving any commercial dispute and order dated 09.05.2018 was sought to be recalled. Reliance is placed on Order XLVII rules 4 & 7 CPC. Mr Krishnan, learned senior counsel contends that the review application was neither listed nor argued and thus, the reliance on Order XLVII Rules 4&7 CPC by learned counsels for respondent No. 1 is misplaced. Learned counsels for respondent No. 1 have also opposed this appeal on merits. It is contended that the reading of the entire plaint would show that it relates to a commercial disputes between the parties. The respondents entered into an agreement relating to an immovable property to be used exclusively in trade or commerce. The suit was with respect to recovery of arrears of rent and for invocation of the corporate guarantee, which was issued by the appellant herein and

which was in continuation of the agreement entered into between the respondents and is evident upon reading the terms of the corporate guarantee. It is further contended that reading of the opening lines of the corporate guarantee leave no room for doubt that the appellant and respondent No. 1 are closely connected, respondent No. 2 being a joint venture of the appellant herein. The opening paragraphs of the guarantee read as under:-

“Dated: 12.11.2008

To,
Mr. Osama El Hadded,
Managing Director,
Hadia Abdul Latif Jameel Co.
P.O. Box 15496,
21444, Jeddah.

Sub: Guarantee securing lease rent in respect of lease agreement proposed to be executed for a period of five years between yourselves (“Landlord”) and our Joint Venture, Dayim Puni Lloyd Construction Contracting Co. Ltd. (“Tenant”) for penthouse admeasuring 1300 sq. meter situated at Jameel Square building, in Jeddah, Saudi Arabia.

Dear Sir,

In consideration of your agreeing to let out penthouse admeasuring 1300 sq. meter situated at the penthouse floor of Jameel Square building, Tahliya St., Jeddah, Saudi Arabia to Dayim Punj Lloyd Construction Contracting Co. Ltd. at annual lease rent of Saudi Riyal 1,950,000 (One Million Nine Hundred Fifty Thousand Only), we agree, undertake and guarantee:

1. That is case of default in payment of lease rent by the

Tenant under the lease agreement proposed to be executed between you (Landlord) and the Tenant, we shall make good on demand such default and shall indemnify you against all losses, damages, costs and expenses thereby arising, or incurred by you.”

(Emphasis added)

8. It is thus contended by learned senior counsels for the respondents that a composite reading of the plaint and the corporate guarantee would leave no room for doubt that the nature of dispute is a commercial dispute and duly covered under the Commercial Courts Act.

9. We have heard learned senior counsels for the parties. The basic facts are not in dispute that the respondent no.1 had filed a suit for recovery of monies against the appellant and respondent no.2 herein. The suit was filed prior to coming in force of the Commercial Company Act. By an order dated 09.05.2018, the suit was ordered to be registered as a commercial suit. When the matter was listed before the learned Single Judge on 25.07.2018, the counsel for the appellant herein informed the court that he had moved an application seeking recall of order dated 09.05.2018 as the suit does not involve a commercial dispute. Keeping this submission in view the Single Judge passed the impugned order. The first question which arises before us is whether the appellant had sought review of the order dated 09.05.2018 or not. A conjoint reading of both the orders dated 09.05.2018 and the impugned order dated 25.07.2018 which we again reproduce would show that on 25.07.2018 the appellant in fact urged before the Court to review the order dated 09.05.2018 else there was no occasion for the learned

Single Judge to note that an application for review had been filed (which was not listed). Also the reason as to why the order dated 25.07.2018 is to be treated as an order seeking review is that till the order dated 09.05.2018 was not reviewed, the submission/objection regarding the suit being treated as a commercial suit could not have been decided. Having, held that the order dated 25.07.2018 was an order seeking review, the next question which would arise is whether an appeal is maintainable.

Order dated 25.07.2018

“1. Counsel for the defendants submits that he has filed an application for recall of order dated 09th May, 2018 by which the present suit was numbered as a commercial suit. The objection by the defendants is that the suit relates to recovery of rents and invocation of corporate guarantee and that the suit does not involve a Commercial dispute.

2. The said objection is untenable as transactions involving corporate guarantees are clearly covered by Section 2(c)(i) of the Commercial Courts Act, 2015, being financial transactions relating to mercantile documents. The word ‘mercantile’ is broad and includes within its conspectus, any transaction relating to trade or business. A Corporate guarantee is nothing but a mercantile document which is executed for the purposes of securing the interest of the party in whose favour it has been issued. Such transactions would clearly constitute commercial disputes. The objection that the present suit is not a commercial suit is thus rejected.”

Order dated 09.05.2018

“IA No.6335/2018

This application is for appointment of Local Commissioner to record the evidence. It is submitted by learned senior counsel for the defendant that they had moved an application under Order 7 Rule 10 CPC but it was dismissed. An appeal against the said dismissal is pending before the Division Bench of this Court which is coming up on 9th July, 2018. The learned counsel for the defendant submits he intends to file a reply to this application since re-issue is the territorial jurisdiction. Be filed within four weeks from today.

List on 16th July, 2018.

CS(OS) 2716/2014

In view of the nature of dispute between the parties, registry is directed to re-number the suit as a “Commercial Suit” and while doing so retain both the numbers.”

(Emphasis added)

10. As far as the objection with regard to maintainability of the appeal, while relying on Order XLVII CPC is concerned, we find force in the same. The order of the learned Single Judge would show that the appellant being defendant No. 1 in the suit had sought to re-agitate what has been decided in the order dated 09.05.2018. It was brought to the notice of the learned Single Judge that an application for recall of the order dated 09.05.2018 had been filed and thereafter as is evident upon reading of order dated 25.07.2018, the learned counsel for defendant

No. 1 (appellant herein) highlighted the dispute, the objection with regard to the suit being registered as a commercial suit. In case such a review was not being sought there would have been no reason for the learned Single Judge to have decided this objection once the order dated 09.05.2018 had already directed the Registry to renumber the suit as a commercial suit. It is upon raising such an objection that the learned Single Judge rejected the objection and thus to say that the learned Single Judge could have decided the objection only upon an application for recall having been listed is not acceptable, for the reason if the application seeking review was not listed before the Single Judge, at best it can be treated as an oral application seeking review which stands rejected. Order XLVII Rules 4&7 CPC are reproduced below:-

“Order XLVII Rule 4. Application where rejected

(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Application where granted- Where the Court is of opinion that the application for review should be granted, it shall grant the same

Provided that-

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

Order XLVII Rule 7. Order of rejection not appealable.
Objections to order granting application

(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.”

(Emphasis added)

11. Reading of Order XLVII Rule 7 makes it abundantly clear that an order of the court rejecting an application seeking review would not be appealable. As far as the matter on merit is concerned, we are of the view that there is no infirmity with the view expressed by the learned Single Judge. The defendant No. 2 in the suit is not a stranger but is a joint venture of the defendant No. 1 (appellant herein). The appellant No. 1 had issued the corporate guarantee in favour of the plaintiff being respondent No. 1 herein. The opening lines of the guarantee would suggest that the same was executed to secure the lease rent in respect of the lease agreement which was proposed to be executed between the plaintiff (landlord) and the joint venture of the appellant herein. Section 2(c)(i) is not to be read in isolation but to be read with the facts of this case along with Section 2(c)(vii). The

respondents had entered into an agreement relating to immovable property, which is to be used exclusively for trade or commerce and with respect to this transaction a corporate guarantee was executed, which would fall under the broader definition of a mercantile document and thus, this plea of the appellant is also rejected.

12. In view of the above, the appeal and pending application are dismissed. No order as to costs.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

OCTOBER 15, 2018

SU