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

Date of decision: 20th October, 2020

+ **FAO (OS) (COMM) 14/2020, C.M. Appl. No.1569/2020 (of the appellant for condonation of 10 days delay in filing)**

RAJ KUMAR BROTHERSAppellant
Through: Mr. Anil Goel, Advocate

versus

LIFE ESSENTIALS PERSONAL CARE (P) LTD.....Respondent
Through: Mr. Harpreet Singh Popli,
Advocate

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

% **ORDER**
20.10.2020
[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. This appeal, nomenclatured as a FAO (OS) (COMM), has been preferred against the order dated 31st October 2019 of the Commercial Division of this Court, returning the petition under Section 34 of the Arbitration & Conciliation Act, 1996 filed by the appellant / petitioner, for filing in the Court of appropriate territorial jurisdiction.

2. We deem it appropriate to record that the appeal came up first before this Court only on 17th January 2020, when the same was adjourned to 13th February 2020, when arguments on the appeal were heard and judgment reserved. However the appeal was directed to be listed on 24th February 2020, on which date it was recorded that neither side had addressed the Court on the maintainability of the appeal and which aspect came to light after going through the files; hence, counsels were given opportunity to address arguments on the aspect of maintainability of the appeal. The appeal, thereafter was listed on 13th March 2020 and 17th July 2020, when owing to change of roster, the appeal was released from part heard. Thereafter the appeal was listed before this Bench on 24th September, 2020.

3. On 24th September 2020, we observed/ordered as under:

“4. As far as the aspect of maintainability of the appeal is concerned, since we do not have the benefit of the reasons for which maintainability of the appeal was doubted, we can only prima facie observe that, (i) Section 37(1)(c) of the Arbitration & Conciliation Act permits an appeal against an order setting aside or refusing to set aside an arbitral award under Section 34 of the Arbitration & Conciliation Act; vide the impugned order, though the award has not been set aside on any of the grounds enumerated in Section 34 but it needs consideration, whether the return of the petition under Section 34 for lack of territorial jurisdiction, would be within the ambit of the words “refusing to set aside the arbitral award” inasmuch as by return of the petition, there is in one sense, refusal to set aside the award though on the aspect of

*territorial jurisdiction; and, (ii) however, after coming into force of the Commercial Courts Act, 2015 and classification of matters pertaining to arbitration as commercial, the arbitration matters filed in this Court are heard by the Commercial Division of this Court and Section 13 of the Commercial Courts Act provides for an appeal to the Commercial Appellate Division of this Court against orders enumerated in Order XLIII of the Code of Civil Procedure, 1908 (CPC) and Section 37 of the Arbitration & Conciliation Act; Order XLIII Rule 1(a) of the CPC provides for an appeal against an order of return of plaint under Order VII Rule 10 of the CPC; applying Order XLIII, an appeal against an order of return of a petition under Section 34 of the Arbitration & Conciliation Act for filing in the Court of appropriate territorial jurisdiction, would lie. Attention of the counsels is however invited to **BGS SGS Soma JV Vs. NHPC Ltd.** 2019 SCC OnLine SC 1585.*

5. *Neither counsel is prepared to address on the aforesaid aspect and seek time. While granting time, we may notice that the arbitral award with respect to which the petition under Section 34 of the Arbitration & Conciliation Act was filed, was with respect to a claim for about Rs.36 lacs and a counterclaim for about Rs.16 lacs. Even taking the aggregate value of the claim and the counterclaim, in accordance with Section 10 of the Commercial Courts Act, the petition under Section 34 of the Arbitration & Conciliation Act, even if maintainable in Delhi, did not lie before the High Court of Delhi but could have at best been filed before the District Court.*

6. *The counsel for the appellant / petitioner states that he has not examined the said aspect also.*

7. *Thus, looking either way, the petition under Section 34 of the Arbitration & Conciliation Act,*

whether on account of territorial jurisdiction or on account of pecuniary jurisdiction, did not lie before this Court and has been rightly returned.

8. *We have also drawn the attention of the counsel for the appellant/petitioner to the delay in filing this appeal also and all of which may also impact the requirement of Section 34 of the Arbitration & Conciliation Act, of expediency.*

9. *The counsel for the respondent states that in **Hindustan Copper Limited Vs. Nicco Corporation Ltd.** (2009) 6 SCC 69, though of prior to Commercial Courts Act, it has been held that the return of a petition under Section 34 of the Arbitration & Conciliation Act is not refusal to set aside the award within the meaning of Section 37 of the Arbitration & Conciliation Act.”*

4. The Supreme Court, in **BGS SGS Soma JV Vs. NHPC Ltd.** 2019 SCC OnLine SC 1585, was concerned with an application under Section 34 of the Arbitration Act, filed in the court of District & Sessions Judge, Faridabad, Haryana, who returned the said Section 34 petition for presentation to the proper court having jurisdiction in New Delhi and aggrieved wherefrom an appeal under Section 37 of the Arbitration Act was preferred to the High Court of Punjab & Haryana at Chandigarh. The High Court of Punjab & Haryana held the appeal to be maintainable and allowed the appeal. Supreme Court, on being approached, after examining Section 37 of the Arbitration Act and Section 13 of the Commercial Courts Act, 2015 unequivocally held that (a) orders that are not specifically enumerated under Order 43 CPC would not be appealable and appeals that are mentioned under Section 37 of

the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court; (b) Section 13(1) of the Commercial Courts Act merely provides the forum for filing appeals and does not confer an independent right of appeal; (c) it is the parameters of Section 37 of the Arbitration Act alone which have to be looked at in order to determine whether the appeal is maintainable; (d) Section 37(1) of the Arbitration Act makes it clear that appeals shall only lie from the orders set out in sub-clauses (a), (b) and (c) and from no others; (e) the High Court of Punjab & Haryana had reasoned that even where a Section 34 application is ordered to be returned to the appropriate court, such order would amount to an order refusing to set aside the arbitral award under Section 34; (f) interestingly, under the proviso to Section 13(1A) of the Commercial Courts Act, orders 43 of CPC is also mentioned; (g) however the said provision is conspicuous by its absence in Section 37 of the Arbitration Act, which alone can be looked at for filing appeals against orders setting aside or refusing to set aside awards under Section 34; (h) the refusal to set aside an arbitral award must be under Section 34 i.e. the grounds set out in section 34 must have been applied to the arbitral award; (i) when there is no adjudication under Section 34 of the Arbitration Act and the petition under Section 34 of the Act is simply returned on the ground that the court had no territorial jurisdiction, there is no application of grounds under Section 34; and, (j) the appeal against the said order does not fall within the ambit of Section 37 of the Arbitration Act and is not maintainable.

5. The aforesaid judgment answers all the doubts as were expressed by us in the order dated 24th September 2020. This appeal, as per ***BJS SGS Soma JV*** supra does not lie and there is nothing further left for this court to adjudicate on the said aspect.

6. The counsel for the appellant however has contended that ***BGS SGS Soma JV*** supra does not take into consideration Section 10 of the Delhi High Court Act, 1966.

7. We are unable to agree. Supreme Court in ***BGS SGS Soma JV*** supra has noticed that Section 13(1A) of the Commercial Courts Act, 2015 read with Order 43 of CPC, though provides for an appeal against an order returning a plaint but similar provision is conspicuous by its absence from Section 37 of the Arbitration Act and which alone can be looked for the purpose of filing appeals against the order setting aside or refusing to set aside the Awards under Section 34 of the Act.

8. It thus cannot be said that ***BGS SGS Soma JV*** supra would not apply. Even otherwise, the position in law is that once the Arbitration Act has barred the appeal, Section 10 of the Delhi High Court Act cannot be invoked. As far back as in ***Union of India vs. A.S. Dhupia*** AIR 1972 Delhi 108, a Five Judge Bench of this Court, in the context of an appeal to the Division Bench against the order of the Single Judge of this court of dismissal of an application under Section 33 of the Arbitration Act, 1940, held; (i) that Section 10(1) of the Delhi High Court Act provides only a

forum of appeal from the judgment of the Single Judge to a Division Bench; (ii) that the word ‘judgment’ in Section 10(1) is not to be read as having meaning which judicial decisions have given the expression ‘judgment’ in Letters Patent; (iii) an appeal from an order of Single Judge to a Division Bench under Section 10 will lie only against orders mentioned in Section 104 read with Order 43 Rule 1 of the CPC; (iv) the contention that Section 10 of the Delhi High Court Act confers unfettered right of appeal without any limitation, cannot be accepted; (v) a similar bar as under Section 104 of the CPC, is to be found in Section 39 of the Arbitration Act, 1940 which provides that an appeal shall lie from the orders specified therein (and from no others); (vi) section 39(2) of the Arbitration Act also places a restriction that no second appeal shall lie from an order passed in appeal under the said section; (vii) Supreme Court in *Union of India vs. Mohindra Supply Co.* MANU/SC/0004/1961 held that under Section 39(1) of the Arbitration Act, 1940, appeal lies from the orders specified therein (and from no others); the right of appeal against other orders is especially taken away; if by express provision contained in Section 39 of the Arbitration Act, 1940 a right to appeal from a judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that Section 39(2) does not similarly restrict the exercise of appellate power granted by Letters Patent; and, (viii) Arbitration Act, 1940 is a special code dealing with arbitration matters and it would be wrong to contend that Section 10 of the Delhi High Court Act which only

provides for a forum of appeal will override Section 39(1) of the Act. Again, in ***Canbank Financial Services Limited vs. Haryana Petrochemicals Ltd.*** MANU/DE/0794/2008 (Delhi), it was held, this time in the context of the Arbitration and Conciliation Act, 1996, that the embargo of the appeals in Section 37 was an absolute and categorical one; the said Act is a special Act dealing with arbitrations and especially limits the extent of judicial intervention vide Section 5 thereof; an appeal is a creature of the Statute and the right to appeal inheres in no one; since Section 37 uses the words that an appeal shall lie from the orders enumerated therein and from no others, it consciously takes away the right of appeal against other orders. Reliance was placed on ***Mohinder Supply Co.*** and ***A.S. Dhupia*** supra and it was further held that the same did not stand overruled vide subsequent judgment in ***Shah Babulal Khimji vs. Jayaben De Kanya*** (1982) 1 SCR 187. Reference in this context may also be made to ***Usha Drager Pvt. Ltd. vs. Dragerwerk AG*** (2010) 170 DLT 628 (Delhi), ***Maruti Clean Coal and Power Limited vs. Kolhai Infotech Pvt. Ltd.*** MANU/DE/1387/2010(DB), ***Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*** (2011) 8 SCC 333 (holding that Arbitration Act, 1940, from its inception and right through to 2004 was held to be a self contained Code and so is the Arbitration and Conciliation Act, 1996; once it is so, 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 and that Later Patent Appeal would be excluded by the

application of the principle that where Special Act sets out a self contained code, the applicability of the General Law procedure is excluded). Though in ***Jaswinder Singh vs. Mrigendra Pritam Vikram Singh Steiner*** (2013) 196 DLT 1, a Full Bench of this court held that ***A.S. Dhupia*** supra, after ***Shah Babulal Khimji*** supra was no longer good law and held that the principles enunciated in ***Shah Babulal Khimji*** supra as to what would constitute an appealable judgment / order must equally apply to Section 10 of the Delhi High Court Act so that if an order which is not appealable under the CPC but otherwise satisfies the test laid down in ***Shah Babulal Khimji*** supra, the remedy of appeal to the Division Bench would equally be available but as far as the other ground on which appeals outside Section 37 were held to be not maintainable i.e. because of Arbitration Act being a self contained code, it has continued to be held in ***Today Hotels (New Delhi) Pvt. Ltd. Vs. Intecture India Designs Pvt. Ltd.*** (2016) 226 DLT 706 (DB), ***HPL (India) Limited Vs. QRG Enterprises*** (2017) 238 DLT 123 (DB), ***Asha Saini vs. Omaxe Limited*** MANU/DE/3531/2017 that appeals outside of Section 37 are not maintainable. Mention may lastly be made of ***Kandla Export Corporation Vs. OCI Corporation*** (2018) 14 SCC 715, where relying on ***Fuerst Day Lawson Ltd.*** Supra and noting that the Arbitration and Conciliation Act being a self-contained code, carries the negative import that appeals that are not mentioned therein are not permissible, it was again held that appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the

Commercial Appellate Division of the High Court.

9. Once the appeal is not maintainable, we need not to go into the other aspects highlighted in the order dated 24th September, 2020.

10. The appeal is dismissed as not maintainable.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**ASHA MENON
(JUDGE)**

OCTOBER 20, 2020
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