IN THE HIGH COURT AT CALCUTTA
In Appeal from its
ORDINARY ORIGINAL CIVIL JURISDICTION
CIVIL APPELLATE JURISDICTION
(Commercial Division)

APOT No. 171 of 2021
AP No. 40 of 2020
IA No. GA 1 of 2021

Damodar Valley Corporation

Versus

Reliance Infrastructure Ltd.

And

APOT No. 179 of 2021

Damodar Valley Corporation

Versus

Reliance Infrastructure Ltd.

Before:
The Hon'ble Justice I. P. MUKERJI
And
The Hon'ble Justice ANIRUDDHA ROY
Date: 7th December 2021
(via Video Conference)

Appearance:
Mr. Tushar Mehta, Ld. SGI
Mr. Ratnanko Banerjee, Sr. Advocate
Ms. Vineeta Meharia, Advocate
Mr. Amit Meharia, Advocate
Mr. Santanu Chatterjee, Advocate
Ms. Urmila Chakraborty, Advocate
Ms. Tannistha Singh, Advocate
Ms. Paramita Banerjee, Advocate
Ms. Subika Paul, Advocate
for the appellant

Mr. Sudipto Sarkar, Sr. Advocate
Mr. Surojit Nath Mitra, Sr. Advocate
Mr. Jay Saha, Sr. Advocate
Mr. Prateek Sakseria, Advocate
Mr. A.Roy Chowdhury, Advocate
Mr. Prashun Majumdar, Advocate
Ms. Asmita Raychoudhuri, Advocate
for the respondent

The Court: APOT No. 171 of 2021

By the order of the Supreme Court dated 3rd December 2021 we were requested to decide this appeal (APOT No. 171 of 2021). With deference to this mandate we have heard out the appeal on the available papers as expeditiously as possible, dispensing with all formalities.

This appeal arises from a judgment and order dated 18th November 2021 made by a learned single judge of this court sitting in its commercial division. It was made on an application by the appellant/award-debtor for stay of an arbitral award.

By the impugned judgment and order the learned judge "rejected the prayer of the petitioner.....for stay on the direction for return of the bank guarantee" furnished by the respondent/award-holder to the appellant. There is no difficulty in understanding that the direction referred to in the said order was of the arbitral tribunal in the award on the award-debtor to return the subject bank guarantees. The order clarified that there was no obligation on the part of the award-holder to furnish any counter guarantee or to keep the bank guarantees alive.

What is the purport, scope and effect of this order is the main point under consideration in this appeal? A preliminary objection has been made on behalf of the respondent that the appeal is not maintainable.

Mr. Sarkar, learned senior advocate appearing for the respondent has taken us through section 13 of the Commercial Courts Act, 2015 which is inserted hereunder:

> "13. **Appeals from decrees of Commercial Courts and Commercial Divisions.**– [(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of the judgment or order.
>
> (1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period sixty days from the date of the judgment or order:
>
> Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the

> Code of Civil Procedure, 1908 (5 of 1908) as amended by the Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]
>
> 2. Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act."

He contended that the impugned order was passed on an application for stay of the award under section 36(2) of the Arbitration and Conciliation Act, 1996. No appeal lay from that order under Section 13 of the Commercial Courts Act, 2015. Even an order in execution was not appealable under the said section read with Section 37 of the Arbitration and Conciliation Act, 1996.

He argued, anticipating the arguments of the appellant that they would try to justify this appeal on the ground that the impugned order was in the nature of an execution under the Civil Procedure Code. An appeal under clause 15 of the Letters Patent lay from such an order, as execution was a different procedure under the Civil Procedure Code, from the scheme of things envisaged by the Commercial Courts Act, 2015. Even then, it was not appealable as the said Acts constituted a complete code, learned counsel urged. The counter-claim of the appellant had been rejected by the arbitral tribunal. The court, even if it allowed the section 34 application could not re-write or modify the award. If successful in that application the appellant would have to seek another legal remedy by way of a new arbitration or a civil proceeding to urge its counter-claim and seek orders for retention of the bank guarantees. Hence, the impugned order which has been passed in an application for stay of the award, could be justified, even if an appeal lay from such an order.

At this stage it is most important to notice sections 36 and 37 of the Arbitration and Conciliation Act, 1996 which are set out hereinbelow:

“[**36. Enforcement.**–(1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award in accordance with the provision of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant say of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provision for grant of stay of a money decree under the provisions of the Code Civil Procedure, 1908 (5 of 1908).]

37.–(1) [Notwithstanding anything contained in any other law for the time being in force, 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. An 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.”

We shall deal with the authorities cited by Mr. Sarkar at the time we deal with this point.

Mr. Ratnanko Banerjee, learned senior advocate while dealing with the submissions of Mr. Sarkar was more emphatic in his argument based on wrongful assumption of jurisdiction by the court. He said that if an order was passed by a court inherently lacking jurisdiction or wholly without jurisdiction, then a party enjoying the benefit of an order ostensibly made under a provision, which is not appealable cannot take shelter behind that order to resist an appeal, which might otherwise lie. If an order is made by a Court ostensibly exercising jurisdiction, under the Arbitration and Conciliation Act, 1996 but in reality wholly without jurisdiction, then the appeal lies under Clause 15 of the Letters Patent.

He also submitted that execution in arbitration matters under the Commercial Courts Act, 2015 cannot be taken differently from the procedure prescribed under the Code of Civil Procedure. When an award was under execution the procedure under the code was followed under Section 36(1) of the Arbitration & Conciliation Act, 1996. The substantive and procedural law governing the application for execution of decrees and orders, under the code would apply. Therefore, the appeal was maintainable under clause 15 of the Letters Patent.

OUR VIEWS

Section 13 of the Commercial Courts Act, 2015 makes it absolutely plain that an appeal will lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by the Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996.

Now Order XLIII of the Code refers to an order in execution in sub-rule (1)(ja) thereof. Sub-section (2) of Section 13 of the said Act in no uncertain terms states that notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal would lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of the Act. Therefore, when a particular class of order in execution has been specified to be appealable, beyond question, any other order passed in execution in a commercial matter would not be appealable.

The Supreme Court in *Fuerst Day Lawson Limited versus Jindal Exports Limited* reported in (2011)8 SCC 333; *Kandla Export Corporation and Another Versus OCI Corporation and Another* reported in (2018)14 SCC 715 followed in *BG & SG and Soma JU vs. NHPC Limited* reported in (2020) 4 SCC 234 has clearly laid down the dictum that apart from appeals from orders specifically provided in Section 13 of the Commercial Courts Act, 2015, read with Section 37 of the Arbitration & Conciliation Act, 1996 an appeal does not lie from any other order. In relation to the appeals under the Arbitration & Conciliation Act, 1996, appealability of an order is mandated by Section 37 thereof and in case of any ambiguity or conflict between the said Act and any other law, the Act will prevail. Similarly the Commercial Courts Act, 2015 will prevail over the code in case of any ambiguity or conflict (see Pam Development (P) Ltd. vs. State of West Bengal reported in (2019) 8 SCC 112 and *BG & SG and Soma JU vs. NHPC Limited* (supra). All these cases were cited by Mr. Sarkar.

When an order under an Act is passed by a court, wholly without jurisdiction, the exercise of jurisdiction by it takes the order passed by it wholly out of the Act under which it purports to exercise jurisdiction. The order even if not appealable under the Act would be appealable under the general law, if such appeal is provided.

The impugned order cannot be said to have been passed by a court lacking inherent jurisdiction or by a court wholly without jurisdiction. The court was competent to consider and pass orders for stay of the award or in execution thereof. Therefore, the two judgments relied upon by Mr. Banerjee in *Modi Korea Telecommunication Ltd. vs. Appcon Consultants Pvt. Ltd.* reported in (1999) 2 CHN 107 and the unreported decision of this Court dated 16th September, 2021 *in Fair Deal Supplies Limited Vs. R. Piyarelall Iron and Steel Pvt. Ltd.* have no application.

Now we come to the most important question in the case. Thus, in our view, if the order under appeal is held to be an order in execution or in the exercise of the court's jurisdiction to stay the award, then certainly it is not appealable. Now, we have to examine the nature of this order.

What does the order say? It says that the court does not stay the direction for return of the bank guarantee. In other words, the court does not think it fit to stay the direction of the learned arbitrator in the impugned award for return of the bank guarantee. It follows that as a logical consequence of that order, as the appellant has rightly anticipated, it would be obliged under the award to return the bank guarantee to the bank. As a corollary, the bank would have the power to cancel the bank guarantee if it is not returned.

What is the nature of the impugned order? It is certainly in implementation of the award.

Did the award become executable or enforceable?

Here, the submission of the learned Solicitor General backed by the submissions of Mr. Banerjee are most relevant and crucial for the determination of this matter.

The award was made and published on 21st December, 2019. Section 36(1) of the Arbitration and Conciliation Act, 1996 provides that the award could be enforced only when the time for making an application to set aside the order under Section 34 had expired.

Did this time expire?

The application to set aside the award under Section 34 of the Arbitration and Conciliation Act,1996 was filed by the appellant on 20th January, 2020. On the same day the application under Section 36(2) of the said Act was filed by the appellant for stay of the award. On or about 23rd March, 2020, lockdown as a consequence of the Covid-19 pandemic was imposed throughout the country. The Supreme Court suo motu passed an order after imposition of the lockdown extending the period of limitation in all proceedings under the general and special law and this continued till 3rd October, 2021 when a final extension was made for 90 days. This extended period of limitation for all proceedings expires on 3rd January, 2022. Therefore, as rightly pointed out by learned Solicitor General the time to file the application to set aside the award has not expired till date. Therefore, if that time has not expired and a Section 34 application has been filed together with an application for stay etc., the award cannot be put into execution, in our opinion, till 3rd January, 2022.

Now, if the award could not be put into execution till 3rd January, 2022, what was the nature of the impugned order that the court had passed? If one considers Section 37 of the Arbitration and Conciliation Act, 1996 together with Section 13 of the Commercial Courts Act they refer to a class of orders which are appealable.

In our view, the court should carefully and purposively scrutinize the type, nature and depth of orders that fall in the ambit of the provisions of Section 37, rather than taking a microscopic view based on the section on which the application is made and the section under which the order is described to have been passed.

Just because an application is styled as having been made under Section 36, it does not follow that all orders passed thereunder must have been made strictly within the four corners of Section 36. One has to penetrate the order, dissect it and examine its effect.

In the instant case, when the award was not executable, the only order that the court could have passed was under Section 9 of the Arbitration and Conciliation Act. The impugned order is a mandatory order of injunction which is appealable under section 37 (1)(b) of the Act read with Section 9(1)(ii)(d) of the Arbitration and Conciliation Act, 1996.

We hold so and come to the conclusion that this appeal is maintainable. Nonetheless there is another most important point to be considered and in this respect the submission of Mr. Sarkar was most instructive in our opinion.

By the impugned award the learned arbitrator has directed return of the bank guarantees. Now, admittedly, these bank guarantees were furnished by the respondent as performance guarantees. Mr. Sarkar contended that the respondent had a counter claim before the learned Arbitrator which was dismissed. Even, if the appellant succeeds in the Section 34 application, the Court cannot modify or rewrite the award. We agree with this submission. See *McDermott International INC vs. Burn Standard Co. Ltd. & Others* reported in (2006) 11 SCC 181, *Dakshin Haryana Bijli Vitran Nigam Limited vs. Navigant Technologies Private Limited* reported in (2021) 7 SCC 657, *National Highways Authorities of India vs M. Hakeem and Another* reported in (2021) 9 SCC 1.

Mr. Banerjee submitted that the bank guarantees were not furnished to secure the counter claim but related to performance of the contract by the respondent and if his client was successful in the Section 34 application, the Court could direct retention of the bank guarantee.

We are satisfied on the authorities above, that even if Mr. Banerjee's client succeeds in the Section 34 application the Court shall have no power to order retention of the bank guarantees as that would amount to modifying the award or returning it. The Supreme Court made it absolutely clear that in such a case a party would have to avail its remedy by new arbitral proceeding or before a civil court.

In that view of the matter, the learned judge's view in the impugned order is plausible and the impugned order is partly supportable. However it needs to be set aside and substituted by a substantially modified order. We dispose of the appeal by directing the appellant to retain the subject bank guarantees. We direct the respondent to keep the same renewed for a period of eight weeks from date only. The issuing bank will also take no steps towards the cancellation of the bank guarantees for a period of eight weeks from date, subject to any orders that may be passed by the Supreme Court or by an arbitral tribunal or by a civil Court.

The impugned order dated 8^{th} November, 2021 is set aside. The connected application is disposed of accordingly.

APOT 179 of 2021

This appeal is disposed of in terms of this order.

(I. P. MUKERJI, J.)

(ANIRUDDHA ROY, J.)

R. Bose/cs/sb