

13.09.2022

Court : 37
Item : CD-18
Matter : **FMAT**
Status : **DISMISSED**
Transcriber: nandy

**IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Commercial Division).**

**FMAT 90 of 2022
with
CAN 2 of 2022**

Jagadish Patra
Vs.
Tapas Kumar Bhunia

Mr. A.K. Gayen, Advocate
Mr. A.A. Gayen, Advocate

.....for the Appellant

Mr. Tapas Dutta, Advocate
Mr. Mritunjoy Halder, Advocate

.....for the Respondent

Admittedly the instant appeal has been filed in a commercial division, more particularly under Section 13 of the Commercial Courts Act, 2015 (hereinafter referred to as 'the said Act'), challenging the order passed by the commercial Court under Order XXI Rule 26 of the Code of Civil Procedure.

A preliminary objection has been raised by the respondents on the maintainability of the instant appeal taking aid to Section 13(1A) of the said Act. According to the learned Advocate for the respondent, the aforesaid provision would evince the eventualities pertaining to the appeal to be filed before the commercial division against the order of the commercial Court and the instant case does not fulfil such conditions/eventualities and, therefore, the appeal is required to be dismissed at the threshold.

Before we proceed to decide whether the appeal is maintainable, it would be profitable to quote the provisions contained under Section 13 of the Commercial Courts Act, 2015 which runs thus: -

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 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 of 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 this 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.

It is to be remembered that the appeal is a creature of statute. Unless the statute provides for filing of an appeal, such remedy is not inhered to an aggrieved person. The right of appeal emanating from the statute, its maintainability has to be adjudged on the basis of the provisions containing the remedy for an appeal.

The aforesaid provisions leave no ambiguity that any person aggrieved by a judgment or order passed by a commercial Court may appeal to a commercial appellate Court within the time specified therein. However, the proviso to sub-section (1A) postulates that an appeal would lie from such orders of the commercial division or the commercial Court, which are

specifically enumerated under Order XLIII of the Code of Civil Procedure and Section 37 of the Arbitration and Conciliation Act. Sub-section (2) of Section 13 creates an express embargo in exhausting the remedy of an appeal from any order or decree of the commercial division or commercial Court having not provided in the said Act.

The aforesaid sub-section starts with a non-obstante clause and excludes the provision of a letters patent wherein the clause 15 provides for an appeal. The Special Act if excludes the operation of any law, the provisions contained in the said law is expressly excluded and cannot be resorted to, because of the applicability to the High Court. The exclusion may be express or implied and Court, therefore, does not assume jurisdiction to entertain any proceeding not contemplated under the Special Act.

There is no ambiguity in our mind that sub-section (2) of section 13 has not manner of application in the instant case as the appeal arise from an order passed by the commercial Court and not the commercial division of this Court.

The question is still begging an answer whether an order passed under Order XXI Rule 26 of the Code is amenable to be challenged by way of an appeal before the commercial appellate court under the aforesaid provision. Proviso to section 13(1A) of the said Act expounded the right of an appeal provided such right is recognized and emanate from Order XLIII of the Code and Section 37 of the Arbitration and Conciliation Act.

Undeniably, Order XLIII Rule 1 does not imbibe within itself the categories of the orders passed under

Order XXI Rule 26 of the Code and, therefore, there is no quarrel that such order is not amenable to be challenged by way of an appeal before the commercial appellate Court.

However, an interesting argument is advanced at the behest of the appellant that previously the impugned order was challenged by filing a revisional application before this Court and a point of demur was raised by the respondent that the same is not maintainable which has been accepted and upheld by the revisional Court.

According to the learned Counsel for the appellant, the corollary effect of the said order which can be perceived that the remedy by way of an appeal is available, as no litigant would be left without any remedy. An argument is further advanced that the moment proviso to sub-section (1A) of Section 13 of the Act engulfed within itself the provision contained under Order XLIII of the Code of Civil Procedure, it should not be squeezed to Rule 1 thereof and if the remedy by way of an appeal is provided in the other Rules, the same is inbuilt and inherited in the said provision.

Taking a clue from the aforesaid submission an argument is advanced that Rule 1A of Order XLIII of the Code makes the order other than the category of the orders included in Sub-Rule (1) thereof and the order impugned in the instant appeal coming within the ambit of Rule 1A of Order XLIII; and therefore, the appeal is maintainable. It would be relevant to quote Order XLIII Rule 1A of the Code of Civil Procedure as under: -

O. XLIII R. 1A. Right to challenge non-appealable orders in appeal against decrees. –

(1) Where any order is made under this Code against a party and there upon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should or should not, have been recorded.

The meaningful reading of the said provision does not instill any justification in us on the applicability thereof on the basis of the interpretation sought to be assigned by the Counsel appearing for the appellant. There is no confusion in our mind that apart from the orders enumerated under Sub-Rule (1) of Order XLIII, other categories of orders are amenable to be challenged by way of an appeal provided the eventualities and/or contingencies provided there are duly fulfilled. The language employed in Order XLIII Rule 1A of the Code is explicit, clear and exposes the legislative intent that an order passed in exercise of power conferred in the Code against a party may be challenged by way of an appeal provided the judgment is pronounced thereupon and a decree is drawn up. In the event, the said decree is challenged, it is open to the party to assail the said order contending that the same should not have been made and, therefore, the basis of the judgment thereupon is required to be vitiated.

Apart from the aforesaid provision, Section 105 of the Code also conferred power upon the aggrieved party to challenge any order effecting the decision of the case in an appeal filed against the decree. We are amazed whether the section has any manner of application in the instant appeal for the simple reason that the order passed in exercise of power under Order XXI Rule 26 of the Code

cannot be regarded as an order upon which the judgment is based upon. Rater it is a situation at post-decree stage and, therefore, we do not find that the aforesaid provision has any manner of applicability in the instant case. Rule (1A) of Order XLIII doesn't contemplate a situation like the one before us and in view of the express provision contained in the Commercial Courts Act as quoted above, we have no hesitation to hold that the appeal is not maintainable. Merely because of the revisional application was turned down by this Court, the right of appeal cannot be assumed unless provided under the statute.

The appeal being **FMAT 90 of 2022** thus **dismissed as not maintainable**. However, there shall be no order as to costs.

In view of dismissal of the main appeal itself, the connected application being **CAN 2 of 2022** also stands **dismissed**.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

