

22.09.2022

Court : 37
Item : CD-01
Matter : **FMAT**
Status : ALLOWED
Transcriber: nandy

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

FMAT 172 of 2022
with
CAN 1 of 2022

Dongfang Electric (India) Private Limited
Vs.
Aristocrat International Private Limited

Mr. Jishnu Saha, Senior Advocate
Ms. Sananda Ganguly, Advocate
Mr. Shubradip Roy, Advocate
Mr. Ishaan Saha, Advocate

.....for the Appellant

Mr. Arnab Roy, Advocate
Mr. Satyam Mukherjee, Advocate
Ms. Sayani Ahmed, Advocate

.....for the Respondent

The challenge to the impugned order dated April 13, 2022 passed by the Commercial Court in Title Suit No. 28 of 2021 is restricted to a solitary ground that the Court proceeded to dispose of an application for attachment before the judgment under Order XXXVIII Rule 5 of the Code of Civil Procedure when the said date was fixed for hearing of an application under Section 151 of the Code.

To buttress the aforesaid submission, it is contended by the appellant that none of the Counsel had argued on an application for attachment before judgment and the entire argument was restricted on an application under Section 151 of the Code, the entire order is liable to be interfered with and the matter is required to be remitted to the Commercial Court for rehearing.

However, a preliminary objection is taken by the respondent that the instant appeal is not maintainable as

the order under Order XXXVIII Rule 5 of the Code has not been included under Order XLIII Rule 1 of the Code of Civil Procedure.

There appears to be a fallacy in the aforesaid submission for the simple reason that an earlier order passed on 15.03.2022 revealed that on the said date an application under Section 151 of the Code filed on 26.11.2021, was taken up for hearing and it was recorded that hearing is concluded and 13.04.2022 was fixed for passing an order and acceptance of written-statement. What logically follows from the aforesaid order is that an application under Section 151 of the Code was heard and a date was fixed for passing an order disposing of the said application. If the Court passed an order upon a misconception of law and proceeded to dispose of something else, it would still be regarded as an order to be passed under Section 151 of the Code. In fact, the said application was heard and the argument was concluded and the next date was fixed for passing the order which logically follows that whatever order is to be passed on the next date is supposed to be passed on the basis of the said application.

There is an apparent error in the impugned order in disposing of an application under Section 151 of the Code and, therefore, the findings which are recorded therein cannot be said to a proper finding. It leads to another question whether an order under Section 151 of the Code is amenable to be challenged by way of an appeal in a Commercial Appellate Division having not included within the four corners of Order XLIII Rule 1 of the Code.

We do not find any ambiguity in this regard as the law is somewhat settled that the Court shall not be swayed by the nomenclature of an application. It is the duty of the Court to consider the merit of the application and the relief claimed therein and even if a wrong provision is quoted, the Court is empowered to apply the correct provision and decide the application on its merit.

The application though captioned as an application under Section 151 of the Code, but after perusing the averments and the reliefs claimed therein, it appears to us that it was, in fact, an application filed invoking the provision contained under Order XXXIX Rule 10 of the Code. There is no quarrel that Order XLIII Rule 1(r) of the Code imbibe within itself the orders passed under Order XXXIX Rule 10 of the Code and, therefore, any determination and/or decision taken therein is amenable to be challenged by way of an appeal. Section 13(1A) of the Commercial Courts Act, 2015 contains an exhaustive provision relating to an appeal against the order/decreed passed by the Commercial Court to a Commercial Appellate Division and the proviso inserted thereto makes the position clearer engulfing the orders which are amenable to be challenged by way of an appeal under Order XLIII as enumerated therein.

The contention of the appellant cannot be disregarded that, in fact, the reliefs are claimed under the provisions contained under Order XXXIX Rule 10 of the Code and, therefore, if the date was fixed for disposal of the said application, any order passed has to be passed on the touchstone of the relevant provision under which the said application was filed.

We thus find that the order impugned cannot be sustained, more particularly, the manner in which it has been passed. The same is hereby set aside.

The Commercial Court is directed to fix a date for hearing of an application under Section 151 of the Code as well as an application under Order XXXVIII Rule 5 of the Code on the next date so fixed and efforts shall be shown to dispose of the said application on the same date.

In the event, the same cannot be disposed of on the same date because of the unforeseen and compelling circumstances, endeavour shall be made to dispose of the same within two days thereafter.

The appearing Counsel before us assured that they would not seek unnecessary adjournment before the Commercial Court and shall cooperate and assist the Court in adhering the time limit indicated hereinabove.

The appeal being **FMAT 172 of 2022** is **allowed** and **disposed of**. The connected application being **CAN 1 of 2022** also stands **disposed of**.

For abundant precaution, it is made clear that this Court has not gone into the merit of the aforesaid applications which shall be decided independently in accordance with law, without being influenced by any observations made hereinabove.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

