

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division
Original Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Aniruddha Roy

LPA 1 of 2022
AP 4 of 2020

APL Metals Ltd.

Vs.

Mountview Tracom LLP & Ors.

For the Appellant : Mr. Ahin Choudhury, Sr. Adv.
Mr. Gopal Pahari,
Ms. Mandeep Kaur.

For the Respondent : Mr. Abhrajit Mitra, Sr. Adv.
Mr. Jishnu Choudhury,
Ms. Radhika Singh,
Mr. Chayan Gupta.

Judgment on : 05.04.2022.

I. P. MUKERJI, J:-

We heard out the appeal on the point of maintainability. It is this. This appeal under Clause 12 of the Letters Patent from the judgment and order dated 7th February, 2022 of the learned single judge directing security to be furnished as a condition precedent to stay of the impugned award, does not lie before a Division Bench of this court. If the respondents succeed on this point, the question of hearing out the appeal on merits does not arise.

It would appear from the cause title of the application before the learned trial court, that it was described as one under Section 36(2) and (3) of the Arbitration and Conciliation Act, 1996. The prayers were also in accordance with those sections asking for stay of operation of the arbitral award dated 1st October, 2009 as corrected by the learned arbitrator's order dated 3rd December, 2019.

The learned single judge by his judgment and order dated 7th February, 2022 rejected the offer of the appellant/ petitioner to furnish security in the form of an immovable property. If they could furnish a bank guarantee for Rs.7.93 crores to the satisfaction of the learned Registrar, Original Side within two weeks from the date of the order execution of the award would be stayed. In default the respondents would be free to execute the award.

Section 37 of the Arbitration and Conciliation Act, 1996 provides as follows:

“37. Appealable orders.—

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under section 9;

(b) 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 granting of the arbitral tribunal.—

(a) accepting the plea referred 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.”

Since this proceeding is brought in the commercial jurisdiction of this court, Section 13 of the Commercial Courts Act, 2015 is also applicable and is to be noticed. It is as follows:-

“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.”

Clause 15 of the Letters Patent lays down as hereunder:-

“15. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.-And we do further ordain, that an appeal shall lie to the said High Court Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act (in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made on or after the first day of February One thousand nine hundred and twenty nine in the exercise of appellate jurisdiction in respect of a decree or order made

in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council as hereinafter provided.”

Mr. Ahin Choudhury, learned senior advocate appearing for the appellant tried to contend that this appeal was competent under the Letters Patent.

Let me now discuss the cases on Letters Patent appeal cited by learned counsel. In **Vinita M. Khanolkar vs. Pragna M. Pai and Ors.** reported in **(1998) 1 SCC 500** the Supreme Court viewed Letters Patent as a source of “constitutional power” of the Bombay High Court granted by “the paramount charter under which the High Court functions.” The provision of appeal provided by that charter could not be excluded unless the statute expressly excluded it. The court did not notice any such exclusion in Section 6(3) of the Specific Relief Act, 1963. The same view in relation to an appeal provision in Section 54 of the Land Acquisition Act, 1894 was expressed by a three judge bench of the same court in **Sharda Devi Vs. State of Bihar** reported in **(2002) 3 SCC 705**. In **P.S. Sathappan (Dead) by LRS. Vs. Andhra Bank Ltd. & Ors.** reported in **(2004) 11 SCC 672** the said court opined that Section 104(1) of the Civil Procedure Code saved the power of the High Court to entertain Letters Patent appeals, unless specifically excluded by statute. A general exclusion would not be sufficient. This saving was also reinforced by Section 4 of the Code which provided that unless expressly excluded, the code would not limit the operation of any special or local law or any special jurisdiction or power conferred in a court by law. A Division Bench of this court in **Great Eastern Shipping Co. Ltd vs. Board of Trustees for the Port of Calcutta** reported in **(2004) 3 CHN 37** went to the extent of holding that Section 37 of the Arbitration and Conciliation Act, 1996 did not affect the power of the High Court to entertain a Letters Patent appeal. However, Mr.

Mitra assisted this court by pointing out that in **Ace Pipeline Contracts (P) Ltd. vs. Bharat Petroleum Corpn. Ltd.** reported in (2007) 5 SCC 304 in paragraph 15 the Supreme Court had remarked that **Great Eastern Shipping Co. Ltd Vs. Board of Trustees for the Port of Calcutta** reported in (2004) 3 CHN 37 was not good law. He also said that **P.S. Sathappan (Dead) by LRS. Vs. Andhra Bank Ltd. & Ors.** reported in (2004) 11 SCC 672 had been considered by the Supreme Court in **Union of India vs. Simplex Infrastructures Ltd.** reported in (2017) 14 SCC 225, cited by Mr. Mitra.

Section 37 of the Arbitration and Conciliation Act, 1996 makes it absolutely plain that appeals would only lie from the orders mentioned in the said section and from no others. Section 36 is not one of the Sections mentioned in Section 37.

Now let me consider Section 13 of the Commercial Courts Act, 2015.

An appeal would lie from a judgment and order. The orders from which appeals lie are limited to those provided in Order 43 of the Civil Procedure Code read with Section 104 thereof and Section 37 of Arbitration and Conciliation Act, 1996.

The proviso makes it absolutely clear that apart from the appealable decrees and orders appeals do not lie from any other decision, notwithstanding anything contained in any other law including the Letters Patent.

An order under sections 36(2) and (3) of the Arbitration and Conciliation Act, 1996 is not one of the orders contemplated in Section 13 from which an appeal lies.

In **Union of India vs. Simplex Infrastructures Ltd.** reported in (2017) 14 SCC 225 cited by Mr. Mitra, the Supreme Court relied on its earlier decision in **Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.** reported in (2011) 8 SCC 333 and **P.S. Sathappan (Dead) by LRS. Vs. Andhra Bank Ltd. & Ors.** reported in (2004) 11 SCC 672 reiterating that the Arbitration and Conciliation Act, 1996 was a self contained code and that

no appeal lay from any order other than those enumerated in Section 37 of the Act. In **BGS SGS Soma JV vs. NHPC Ltd.** reported in **(2020) 4 SCC 234**, also cited by Mr. Mitra, the Supreme Court inter alia remarked:-

“13. Given the fact that there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals, it is the parameters of Section 37 of the Arbitration Act, 1996 alone which have to be looked at in order to determine whether the present appeals were maintainable.”

In **Damodar Valley Corporation vs. Reliance Infrastructure Ltd.** on 7th December, 2021 decided by us and reported in Manupatra vide reference MANU/WB/0903/2021 we stated:-

“12. 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.

13. 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.

14. 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.

15. 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.

16. 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.”

At the same time, we observed:-

“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.”

On a close examination of the impugned judgment and order, we find that it was an order passed on an application described as having been made under Section 36 of the Arbitration and Conciliation Act, 1996. We also discern that the nature, purport and scope of the order confined its extent and operation to the question of security to be furnished by the appellant to obtain stay of execution of the order under Section 36. Hence, it is not a type of order without jurisdiction or one transgressing the jurisdiction of the court under the Arbitration and Conciliation Act, 1996. The legislature enacting Section 37 of the said Act expressly provided that an appeal lay from certain orders described in that section and from no other orders. This, in our opinion, expressly excludes the applicability of Clause 15 of the Letters Patent with regard to appealability of orders made under the Arbitration and Conciliation Act, 1996 which as the Supreme Court has told us should be treated as a self contained code. Moreover, this is a commercial matter to which the Commercial Courts Act, 2015 also applies. As the Supreme Court has said in the above decisions, this section provides no extra right of appeal than that provided by Section 37 of the Arbitration and Conciliation Act, 1996. If an order is not appealable under Section 37, it is also not appealable under Section 13 of the Commercial Courts Act, 2015. Moreover, Section 13 of the Commercial Courts Act, 2015 makes it abundantly clear by express words that clause 15 of the Letters Patent could not be invoked if an order was not appealable under Section 13. The impugned judgment and order is not appealable under Section 13.

In those circumstances, the above decisions cited by Mr. Ahin Chowdhury are not applicable at all to this case.

For all those reasons, the appeal is not maintainable. We dismiss the appeal on the point of maintainability. We have not gone into the merits of the appeal which are kept open before the appropriate jurisdiction, if it is approached by the appellant.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(ANIRUDDHA ROY, J.)

(I. P. MUKERJI, J.)