

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.31 of 2012
(Through hybrid mode)

Union of India and others ***Appellants***

Mr. P.K. Parhi, ASG
Mr. D.R. Bhokta, CGC

-versus-

Yashpal Chopra & Co., Contractor ***Respondent***

Mr. Ajit Ku. Hota, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
04.05.2022

Order No.

19.

1. Mr. Parhi, learned advocate, Assistant Solicitor General appears on behalf of appellants and submits, impugned judgment dated 9th May, 2012 is required to be interfered with in appeal. He submits, it is true the arbitrator was appointed on request made under sub-section (6) in section 11, Arbitration and Conciliation Act, 1996 but his client invoked section 16 to challenge the appointment, in the reference. On being unsuccessful, his client thereafter contested the claims. Award dated 17th February, 2010 was made.

2. His clients being aggrieved by the award had challenged it before the District Judge. By impugned judgment, learned Court below held that challenge to the award was not

maintainable, since the order of appointment of arbitrator under section 11(6) was a judicial order and section 42 required the appeal to be filed in the Court wherein that application was made.

3. Mr. Hota, learned advocate appears on behalf of respondent and relies on several decisions.

(i) **State of Maharashtra v. Ramdas Construction Co.** available at **MANU/MH/0912/2006**, paragraph-9

(ii) **Canbank Financial Services Ltd. v. Haryana PetroChemicals Ltd.** available at **MANU/DE/0794/2008**, paragraph-3 to 6.

(iii) **Today Hotels (New Delhi) Pvt. Ltd. v. Intecture India Designs Pvt. Ltd.** available at **MANU/DE/0068/2016**, paragraphs 6, 10, 12 and 13.

(iv) **Judgment dated 5th April, 2022** by a Division Bench of the High Court at Calcutta in **LPA 1 of 2022 (APL Metals Ltd. v. Mountview Tracom LLP and others)**.

4. Relying on above decisions Mr. Hota submits, impugned judgment was made on his client's application invoking section 42. It, therefore, cannot be said to be a judgment coming under either clause (a) or clause (b) in sub-section (1) of section 37, before amendment. As such, the appeal be dismissed as not maintainable.

5. In **State of Maharashtra** (supra) the Division Bench of Bombay High Court said in paragraph-10, inter alia, the passage extracted and quoted below.

“.....In other words, the Court has not dealt with the application for setting aside of the award on merits and the same has been disposed of solely as a consequence of rejection of the application for condonation of delay and there has been no enquiry as regards the rights of the parties on the issue of setting aside of the award. The appealable order which is contemplated for the purpose of exercise of appellate jurisdiction is the one which deals with the merits of the case in relation to the claim for setting aside or refusing to set aside an arbitral award. As already slated above, the appellate powers under Section 37 are not in relation to the proceedings which precedes the enquiry regarding setting aside or refusing to set aside an arbitral award. Being so, the consequence of the order of dismissal of the application for condonation of delay cannot itself amount to an appealable order under Section 34(1) for the purpose of appeal under Section 37(1) of the Act.”

Sub-section (3) in section 34 mandates a separate period of limitation for a petition made challenging the award. In that case, appellants had challenged the award beyond the period of limitation. In the circumstances, the Division Bench was of the view that order

impugned therein was not one whereby the award was either set aside or there was refusal to set it aside.

6. In **Canbank Financial Services Ltd.** (supra) the appeal was against order of the learned single Judge allowing application of the respondent made under section 8, to refer parties to arbitration. Clearly such order did not come under either of the two clauses in un-amended section 37. So also in **Today Hotels (New Delhi) Pvt. Ltd** (supra) order impugned in the appeal had been made under section 8.

7. In **APL Metals Ltd** (supra) order impugned before the Division Bench was one made under sub-section (3) in section 36. As such it is of no help to respondent in contending that this appeal is not maintainable.

8. Challenge of appellants before the Court below was rejected on the ground of maintainability since appointment of arbitrator was by a judicial order of the High Court. On query from Court, it was ascertained that the challenge petition under section 34 was filed within time before the Court below.

9. Section 37 provides for appealable orders against, inter alia, setting aside or refusing to set aside an arbitral award under section 34. The section has undergone amendment to incorporate refusing to refer parties to arbitration under section 8, also as a ground of appeal. The question arising for adjudication is whether the Court below in

rejecting the petition under section 34, refused to set aside the arbitral award. The question must be answered in the affirmative. Throwing out the challenge on ground of maintainability is a ground accepted by the Court below in refusing to set aside the award. As a consequence, appellants have been deprived adjudication on their challenge to the award.

10. Mr. Avijit Pal, learned advocate, who is present in Court waiting for his matter to be called on points out, this Court does not have original civil jurisdiction. Consequently, this Court does not satisfy definition of Court given in clause (e) under sub-section (1) of section 2. This High Court not having original jurisdiction in civil matters, it cannot become an appellate Court by applying section 42, as it is not a Court within meaning of section 2(1)e, in the facts and circumstances. This was not pointed out to the Court below and also almost missed by this Bench. The near omission by this Bench is attributable to myself having parent High Court, Calcutta, which has the original jurisdiction.

11. Impugned judgment is set aside and the petition under section 34 restored to the Court below, for adjudication as expeditiously as possible.

12. The appeal is allowed and disposed of as above.

(Arindam Sinha)
Judge

Sks

