

IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.40132 of 2021
(Through Hybrid mode)

Birat Chandra Dagara

....

Petitioner

Mr. Banshidhar Baug, Advocate

-versus-

Biswajaya Dagara and another

....

Opposite Parties

Mr. S.Satyakam Swain, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
09.03.2022

Order No.

03. 1. Mr. Baug, learned advocate appears on behalf of petitioner and submits, there has been illegality and material irregularity in making of appellate order dated 17th December, 2021, by the Commercial Court, in his client's appeal preferred against order dated 3rd April, 2021 of interim measure passed by Tribunal, no longer there. He submits, in his client's subsequent writ petition WP(C) no.3990 of 2022, dealt with this day, his contention was that the arbitrator was ineligible to assume the office. Hence, all orders and directions made by the Tribunal are non est. He submits, in such a situation the order of interim measure, confirmed by appellate order dated 17th December, 2021 cannot stand, all the more so.

2. He relies on **order dated 14th January, 2002** made by the Supreme Court in **Nirma Ltd. v. M/s. Lurgi Lentjes Energietechnik GMBH**, reported in **AIR 2002 SC 3695**. The order consists of two paragraphs. It is reproduced below.

“This is a petition under Article 136 of the Constitution of India, seeking leave to file civil appeal against an appellate order of City Civil Court No. 11, Ahmedabad, passed under sub-sec.(2) of S. 37 of the Arbitration and Conciliation Act, 1996. We are not inclined to entertain this special leave petition inasmuch as, in our opinion, an efficacious alternate remedy is available to the petitioner by way of filing a revision in the High Court under S. 115 of the Code of Civil Procedure. Merely because a second appeal against an appellate order is barred by the provisions of sub-sec.(3) of S. 37, the remedy of revision does not cease to be available to the petitioner, for the City Civil Court deciding an appeal under sub-sec.(2) of S.37 remains a Court subordinate to the High Court within the meaning of S. 115 of the C.P.C. In taking this view, we find support from a decision of this Court in Shyam Sunder Agarwal and Co. v. Union of India, (1996) 2 SCC 132.

2. The special leave petition is, therefore, dismissed. The petitioner may file a revision before the High Court and in calculating the limitation, the petitioner shall be entitled to exclusion of time spent in this Court, i.e., between the date of filing of the special leave petition and today.”

Mr. Baug submits, the reference to revision in **Nirma Ltd.** (supra) must include revision under article 227 in the Constitution of India.

3. Mr. Swain, learned advocate appears on behalf of opposite party no.1 and submits, there is difference between a

revision contemplated under Code of Civil Procedure, 1908 and power of superintendence of High Court given by article 227.

4. Section 115 in Code of Civil Procedure says, inter alia, the High Court may call for the record of any case, which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. Section 100 provides for second appeal to lie to the High Court on every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Section 37 in Arbitration and Conciliation Act, 1996 says that notwithstanding anything contained in any other law for the time being in force, inter alia, no second appeal shall lie from an order passed in appeal under the section.

5. The Supreme Court in very many recent decisions has declared the law regarding interference in writ jurisdiction on matters of arbitration. Phrases of 'rarest of rare case' and 'exceptional patent illegality' have been used in interpreting section 5 of the 1996 Act, limiting interference by Court. However, petitioner has relied on aforesaid order of the Supreme Court [**Nirma Ltd.** (supra)], whereby petitioner before it (invoking article 136 of the Constitution) was directed to approach the High Court under section 115 in Code of Civil Procedure.

6. On closer scrutiny of the order in **Nirma Ltd.** (supra) it is revealed that the Supreme Court was not inclined to

entertain the Special Leave Petition and it was dismissed. Said Court has interpreted dismissal of Special Leave Petition at the threshold to not constitute merger, for petitioner to be able to approach the Court, which passed impugned order [(**Kunhayammed v. State of Kerala**, reported in (2000) 6 SCC 359)]. Therefore, on **Nirma Ltd.** (supra) all that can be said is, order impugned in **Nirma Ltd.** (supra) was not interfered with by the Supreme Court. In the circumstances, petitioner's reliance on **Nirma Ltd.** (supra) is of no aid.

7. Here impugned order is of the Commercial Court. Proviso under section 13(1-A) in Commercial Courts Act, 2015 does not also permit a second appeal. The writ Court cannot be moved to, per se, bypass the bar of second appeal, since statutory remedy of appeal, on merits, has already been availed of by petitioner. No order can be made as no exceptional patent illegality or circumstances to make it a rare case has been demonstrated. As on date the interim measure subsists as confirmed in appeal. Sub-section (3) in section 37 reserves right of a litigant to approach the Supreme Court by way of appeal. This is a statutory right, by implication.

8. The writ petition is disposed of.

(Arindam Sinha)
Judge