

20.04.2023

Court : 37
Item : 03
Matter : FMAT
Status : DISMISSED
Bench ID : 266049
Transcriber: NANDY

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

FMAT 154 of 2023
with
CAN 1 of 2023

Sarit Kumar Ghosh & Anr.
Vs.
Biswanath Banik & Ors.

Ms. Manju Bhuteria, Advocate
Mr. Dwaipayan Basu Mullick, Advocate
Mr. Rajesh Upadhyay, Advocate
Ms. Arundhati Barman Roy, Advocate

.....for the Appellant

The instant appeal has been preferred against an order dated February 3, 2023 passed by the learned Civil Judge (Senior Division) Sealdah in Title Suit No. 166 of 2010 by which an application seeking transfer of the said suit to the Commercial Court is rejected. The aforesaid suit was instituted prior to the promulgation of the Commercial Courts Act, 2015. The said suit is primarily for passing a decree for specific performance of an agreement for sale of an immoveable property which according to the appellant herein is exclusively used for trade and commerce and, therefore, satisfies the definition of a commercial dispute under Section 2(1)(c)(vii) of the Commercial Courts Act. The Court below refused to accept the aforesaid contention and declined to transfer the suit to the Commercial Court.

We must remember that the right of appeal emanates from the statute. A party cannot assume the remedy by way of an appeal if the statute does not provide so. Section 13 of the Commercial Courts Act, 2015 contains an exhaustive provision relating to remedy by way of an appeal in favour of a person aggrieved by the judgment and order of the Commercial Court. By Act 28 of

2018, the original sub-section (1) have been re-introduced with certain amendments, more particularly, incorporating Section (1A) with the proviso added thereto. It is beyond cavil of doubt that any person aggrieved by a judgment and order of the Commercial Court may appeal to a Commercial Appellate Court out of the period of limitation provided therein. But if the appeal is filed against an order passed by the Commercial Division or the Commercial Court, it must satisfy that such order is amenable to be challenged by way of an appeal under Order 43 of the Code of Civil Procedure and Section 37 of the Arbitration and Conciliation Act, 1996.

The nature of the order passed by the Court below has not been included under Order 43 of the Code of Civil Procedure so as to make it appealable at the behest of the party aggrieved and, therefore, the instant appeal, in our opinion, is not maintainable. However, we noticed the provision contained under Section 15(5) of said Act providing a remedy to a person aggrieved by an order of the Court refusing to transfer the pending cases to the Commercial Court. The aforesaid provision is quoted as under:-

15(5). In the event that such suit or application is not transferred in the manner specified in sub-section (1), sub-section (2) or sub-section (3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding.

The bare reading of the afore-mentioned provision leaves no ambiguity in our mind that in the event, the suit or application pending before the Civil Court is not transferred under sub-section (1), (2) and (3) of Section 15, the Commercial Appellate Division of the High Court

may on an application taken out by any of the parties to the suit withdraw such suit or application from the Court where the aforesaid proceeding is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit. The logical inference which can be drawn from the aforesaid provision that the remedy by way of an appeal has not been provided but an application before the Commercial Appellate Division of the High Court may be filed seeking to achieve the same goal as intended to achieve by way of appeal which is admittedly not permissible.

We have been informed by the appearing Counsel that the Department may not receive the application to be filed directly before the Commercial Appellate Division of this Court but we do not find such apprehension to be correct. The moment the statute has provided an application to be filed before the Commercial Appellate Division of the High Court, the Department cannot deny such statutory right to be defeated or denied nor do we expect such course to be adopted.

We noticed from the judgment of the Delhi High Court rendered in ***Prem Arora Vs. Satyanarayan Khandelwal*** reported in ***2022 SCC Online (Delhi) 2142*** that the aforesaid transfer application filed under Section 15(5) of the said Act are registered as TR.P.(C) so as to distinguish it from the other transfer applications filed under different provisions. So far as this High Court is concerned the alphabetical letter 'C' may connote different category of the petition and, therefore, we suggest that the application under Section 15(5) of the said Act should be registered as TR.P.(Comm) so as to differentiate other category of petitions seeking transfer.

Since the appeal is not maintainable under Section 13 of the said Act, the same being **FMAT 154 of 2023** is hereby **dismissed**. The connected application being **CAN 1 of 2023** also stand **disposed of**.

However, it is open to the appellant to take appropriate steps as provided under the law, if so advised.

Let the certified copy of the impugned order be returned to the learned Advocate-on-record of the appellant upon replacement with a photocopy thereof.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)