

24 January, 2023.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 888 OF 2023**

M/s. Bongaigaon Refinery &
Petrochemicals Ltd., a subsidiary of
Indian Oil Corporation Limited,
Registered Office : Dhaligaon-783 385
District-Chirang, Assam

.....Petitioner

V/s.

M/s. Miraj Instrumentation Services
through its authorized representative,
Shri. Ganesh M. Mandlekar, 604,
Dev Corpora, 6th Floor, Opp. Cadbury
Junction, Thane (W), 400 601,
Maharashtra

....Respondent

**Mr. Chirag Mocdi a/w. Mr. Amit Meharia a/w. Ms. Tannishtha S.
Paramita Banerjee, Mr. Abhilash Mahapatra & Mr. Shubham
Sawant i/by. Meharia & Co. ,**

Advocate for the petitioner.

Mr. Arjun Amanchi, Advocate for the respondent.

CORAM : SANDEEP V. MARNE, J.

TUESDAY, 24 JANUARY, 2023.

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ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, taken up for final hearing.

2. Judgment and order dated 30 June, 2022 passed by the Additional Sessions Judge, Thane dismissing Regular Civil Appeal No. 64/2017 filed by the petitioner is the subject matter of challenge in present petition. The Appeal was filed challenging order dated 12 January, 2017 passed by 11th Jt. Civil Judge Senior Division, Thane rejecting petitioner's application filed under Section 8 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

3. Petitioner is a subsidiary of Indian Oil Corporation Limited and had floated Notice inviting tender for 'Supply and Services of Instrumentation Works'. A purchase order dated 20 June, 2008 was issued by petitioner in favour of respondent and a Contract Agreement was executed between the parties on 13 October, 2009. It appears that the work was completed and Work Completion Certificate was issued. The respondent filed Summary Suit No.91/2014

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in the Court of Civil Judge Senior Division, Thane for recovery of amount of Rs.63,51,494/- from petitioner alongwith interest of Rs.12,37,236/-.

4. An application under Section 8 of the Arbitration Act was filed by petitioner in the suit praying for dismissal of the Summary Suit by referring the same to arbitration as per the arbitration clause in the contract. The trial Court proceeded to reject Section 8 application by its order dated 12 January, 2017. Petitioner filed Regular Civil Appeal No. 64/2017 in the District Court, Thane challenging the order rejecting Section 8 application. By impugned judgment and order dated 30 June, 2022, the District Court has held the Appeal to be not maintainable and has proceeded to dismiss the same.

5. Mr. Modi, learned counsel appearing for petitioner, would draw my attention to the arbitration clause being Clause 9.0.0.0 of the general conditions of contract. He would submit that petitioner had rightly filed an application under Section 8 of the Arbitration

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Act for referring the disputes to arbitration. That in the event of rejection of application under Section 8, a remedy is provided under Section 37 of the Arbitration Act to file an appeal. He would contend that therefore Regular Civil Appeal No. 64/2017 was rightly filed by petitioner which was clearly maintainable in view of the provisions of Section 37 of the Arbitration Act. He would submit that the District Court has erroneously held that no Appeal is provided under Section 37(1) of the Arbitration Act.

6. *Per-contra*, Mr. Amanchi the learned counsel appearing for the respondent would oppose the petition and support the order passed by the District Court. He would submit that the petitioner did not clarify the exact provision under which Regular Civil Appeal No. 64/2017 was filed by it. He would submit that the said Appeal was filed under the provisions of Order 43 of the Code of Civil Procedure which was clearly not maintainable. He has also made submissions with regards to the merits of the matter to show how the respondent is lawfully entitled to the amounts claimed in the summary suit.

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7. Having heard the learned counsels for parties and after perusal of the order passed by the District Court, it is difficult to comprehend as to how the District Court has arrived at a conclusion that an Appeal under Section 37 of the Arbitration Act challenging order of rejection of Section 8 application would not be maintainable. The finding recorded by the District Court in paragraphs-16, 17 and 19 of the order are reproduced below :

“16. The third limb for consideration is whether appeal is provided against order under section 8 in the Act, 1996. Section 37 of the Act, 1996 speaks above appellable orders. This section provided appeals against order under section 9 and 34 of the Act, 1996. It has not provided appeal against order under section 8.”

17. The net result from the aforesaid reasons is that against the impugned order no appeal is provide either under Order 41 and 43 of the C.P.C. or under Section 37 of the Act, 1996.

19. To sum up, in view of the aforesaid provisions, I am of the considered view that the present appeal is not maintainable. It is quite unfortunate that the registry entertained the appeal without scrutinizing its maintainability. The parties are before this court from last more than five years. The real dispute is pending on the file of the learned Civil Judge Senior Division. Had the

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appropriate care been taken during the examination of the appeal, these five years of the parties wasted before this court could have been saved.”

8. From the above findings, it is clear that attention of the District Court was drawn to the provisions of Section 37 of the Arbitration Act, which reads thus :

“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 decree of the Court passing the order, namely :-

- (a) refusing to refer the parties to arbitration under section 8;
- (b) granting or refusing to grant any measure under section 9;
- (c)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 of the arbitral tribunal.-

- (a)accepting the plea referred to 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.”

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9. Thus under Clause (a) of Section 37, the remedy of filing an appeal challenging an order refusing to refer the parties to arbitration under Section 8 is clearly provided for. Petitioner had filed application under Section 8 of the Arbitration Act, which came to be rejected by the trial Court by its' order dated 12 January, 2017. Under Section 37 of the Arbitration Act, the petitioner is entitled to file an Appeal challenging the order dated 12 January, 2017. Such an appeal was filed by Petitioner which is numbered as Regular Civil Appeal No. 64/2017. The District Court has erroneously held the Appeal to be not maintainable by either ignoring or misreading the provisions of Section 37 of the Arbitration Act. Despite specific provision for filing of an Appeal against an order refusing to refer the parties to arbitration under Section 8, the District Court has recorded untenable finding that no appeal is provided under Section 37 of the Arbitration Act. The order passed by the District Court is thus indefensible and is liable to be set aside.

10. Ideally the discussion would have ended here. However, there is one disturbing fact which cannot escape attention of this

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Court. The dispute arising out of a commercial transaction warranting speedy decision is raised by Respondent by filing a summary suit in the year 2014, possibly to secure his claim in a faster manner. However despite passage of about 9 long years, the parties are still at disputes as to the exact forum where the claim can be decided. Though Section 8 application filed by Petitioner on 10th October, 2016 came to be decided relatively in speedier manner on 12 January, 2017, the Appeal challenging that order remained pending on the file of the District Court for five long years and the same was erroneously held to be not maintainable and dismissed on 30 June, 2022. The District Court has criticized its Registry in entertaining the appeal without scrutinising its maintainability. The Appeal was not only maintainable but the Registry ought to have brought to the notice of the District Court that the same was filed under the provisions of Section 37 of Arbitration Act and ought to have been decided in an expeditious manner. By now a period of 9 long years has elapsed and the merits of claim raised by Respondent is yet to be taken up for decision on account of disputes relating to the exact forum which can decide the same. It would therefore be

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necessary to direct the District Court to decide the Appeal in an expeditious manner.

11. The Petition accordingly succeeds. The judgment and order dated 30 June, 2022 passed by the Additional Sessions Judge, Thane in Regular Civil Appeal No. 64/2017 is set aside and the appeal is restored on the file of the Additional Sessions Judge, Thane who shall proceed to decide the Appeal on merits in an expeditious manner, preferably within a period of 2 months from today.

12. Writ Petition is accordingly allowed. Rule is made absolute.

**NEETA
SHAILESH
SAWANT**

(SANDEEP V. MARNE, J.)

Digitally signed by
NEETA SHAILESH
SAWANT

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