



O.S.A.(CAD)No.130 of 2023

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

**RESERVED ON : 11.10.2023
DELIVERED ON : 20.10.2023**

CORAM:

**THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR
AND
THE HONOURABLE MR. JUSTICE P.DHANABAL**

**O.S.A(CAD)No.130 of 2023
and CMP.No.22788 of 2023**

Toram Exports Pvt. Ltd.,
S.F.No.5, No.1(2), Asher Nagar,
1st Street Alamedu Industrial Complex,
Tirupur - 641 603.

... Appellant

Vs.

Samwon Textiles Co., Ltd.,
#4022 227, Bangbae -ro-
Seocho-gu, Seoul,
Republic Of Korea

... Respondent

PRAYER: Original Side Appeal filed under Section 13 of the Commercial Courts Act, 2015 read with Order XXXVI Rule 9 of Original Side Rules and Clause 15 of the Letters Patent against the order dated 13.06.2023 made in Arb.O.P.No.572 of 2022.



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For Appellant : Mr.Senthur
for Mrs.Ananda Gomathy

For Respondent : Mr.Srinath Sridevan,
for M/s.Anita Suresh

JUDGMENT

[Judgment of the Court was made by *D.KRISHNAKUMAR, J.*]

This Intra Court appeal is filed, challenging the order dated 13.06.2023 passed in Arb.O.P(Com.Div) No.572 of 2012, which has been filed by the respondent herein to declare the award dated 29.01.2021 be deemed to be decree of this Court and for a direction to the respondent to enforce the Foreign Award dated 29.01.2021 passed by the Arbitrator of the Republic of Korea.

2. The respondent herein had filed Arb.O.P.(Com.Div) No.572 of 2022 before this Court seeking enforcement of the Foreign Award passed by the Republic of Korea, vide Award dated 29.01.2021. In the said Arbitration Original Petition, the appellant has raised a ground that the arbitration proceedings has not been conducted in a fair manner and no opportunity has been provided to the appellant to present his case and he had filed numerous documents before the



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Arbitrator, however the same had not been considered by the learned Arbitrator and further, the arbitration proceedings were conducted during COVID-19 pandemic and due to closure of the office of the appellant, they were not in a position to participate in the arbitration proceedings physically. The learned Single Judge has rejected the aforesaid grounds raised by the appellant and held that the Foreign Award is enforceable in terms of Sections 47, 48 and 49 of the Arbitration and Conciliation Act, 1996 [in short "Arbitration Act"]. Aggrieved by the allowing of the Arbitration Original Petition, the appellant has filed the instant appeal.

3. Mr.Senthur, learned counsel for the appellant has placed reliance upon Sections 47, 48, 49 and 50 of the Arbitration Act and Sections 10 and 13 of the Commercial Courts Act, 2015 and would contend that the award has been passed based on the submissions made by the respondent without considering the documents submitted by the appellant and also in violation of the principles of natural justice and as such, it cannot be legally binding and enforced on the appellant. The learned counsel for the appellant has relied on the decision of the



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Hon'ble Supreme Court in ***Vijay Karia and Others v. Prysmian Cavie Sistemi SRL and Others [(2020) 11 SCC 1]***.

4. Mr.Srinath Sridevan, learned counsel for the respondent has raised preliminary objection on the maintainability of the present appeal, on the ground that it is a non-appealable order and as per Section 50 of the Arbitration Act, an appeal lies only against an order refusing to enforce a Foreign Award and no appeal lies as against the order deciding to enforce a Foreign Award. In support of his arguments, the learned counsel for the respondent has placed reliance on the following judgments of the Hon'ble Supreme Court :

(i) Furest Day Lawson Limited v. Jindal Exports Limited [(2011) 8 SCC 333],

(ii) Kandla Export Corporation and another v. OCI Corporation and another [(2018) 14 SCC 715] and

(iii) Noy Vallestina Engineering SPA v. Jindal Drugs Limited and Others [(2021) 1 SCC 382].



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5. This Court has anxiously considered the submissions made and also perused the judgments relied on by the parties.

6. It is not in dispute that the partes had moved arbitration in Seoul in accordance with the Commerical Arbitration Rules of the Korean Commercial Arbitration Board. The Arbitral Award was passed on 29.01.2021 and for enforcement of such award under Sections 47 to 49 of the Arbitration Act, the respondent herein has filed Arb.O.P.No.572 of 2022 before this Court, which came to be allowed in favour of the respondent holding that the Foreign Award to be enforceable, against which the present appeal is filed.

7. The respondent herein has raised preliminary objection on the maintainbility of this appeal by relying upon Section 50 of the Arbitration Act, which deals with appealable orders and the same is extracted here under:

"50. Appealable orders.—

(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the order refusing to—

- (a) refer the parties to arbitration under section 45;
- (b) enforce a foreign award under section 48, to the court



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authorised by law to hear appeals from such order.

(2) 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."

8. According to the appellant, as per Section 50 of the Arbitration Act, appeal remedy is provided only if the order passed refusing to refer the parties to arbitration under Section 45 or refusing to enforce a foreign award under Section 48 and that no Second Appeal would lie against the order passed under Section 50 of the Arbitration Act. The appellant has also relied upon Section 10(1) of the Commercial Courts Act, 2015, which deals with jurisdiction in respect of arbitration matters where the international arbitration is commercial in nature. It is relevant to extract Section 10(1) of the Commercial Courts Act, 2015.

"10.Jurisdiction in respect of arbitration matters-

Where the subject-matter of an arbitration is a commercial dispute of a specified value and -

(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 that have been filed in a High Court, shall be heard and disposed of by the Commercial Appellate Division where such Commercial Division has been constituted in such High Court."



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9. According to the appellant, Section 13(1) of the Commercial Courts Act, 2015 provides appeal remedy from decrees of Commercial Courts and Commercial Divisions and that under Section 49 of the Arbitration Act, where the foreign award is enforceable then, it is deemed to be a decree of that Court and Section 50 of the Arbitration Act provides appeal remedy only if the order passed refusing to refer parties to arbitration under Section 45 or refusing to enforce a foreign award under Section 48, leaving silent in the remedy for appeal against the order for enforcement of foreign award and therefore, Section 13(1) read with Section 10(1) of the Commercial Courts Act, 2015 fills in the place without any inconsistency to Section 50 of the Arbitration Act and as such, the present appeal is maintainable.

10. It is relevant to extract Section 13(1) of the Commercial Courts Act, 2015, which reads as under:

"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.



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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 and Section 37 of the Arbitration Act. "

Therefore, according to the appellant, the present appeal is very much maintainable."

11. The Hon'ble Supreme Court in ***Fuerst Day Lawson Limited v. Jindal Exports Limited [(2011) 8 SCC 333]*** held as under:

"74. Section 49 of the present Act makes a radical change in that where the court is satisfied that the foreign award is enforceable, the award itself would be deemed to be a decree of the court. It, thus, not only omits the procedural formality for the court to pronounce judgment and a decree to follow on that basis *but also completely removes the possibility of the decree being in excess of, or not in accordance with the award. Thus, even the limited basis on which an appeal would lie under sub-section (2) of Section 6 of the 1961 Act, is taken away.* There is, thus, no scope left for an appeal against an order of the court for the enforcement of a foreign award. It is for this reason that Section 50(1)(b) provides for an appeal only against an order refusing to enforce a foreign award under Section 48.

75. There can be no doubt that under Section 6, except on the very limited ground, no appeal including a letters patent appeal was maintainable against the judgment and decree passed by the court under Section 6(1). It would be futile, therefore, to contend that though the present Act even removes the limited basis on which the appeal was earlier maintainable, yet a letters patent appeal would lie notwithstanding the limitations imposed by Section 50 of the Act. The



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scheme of Sections 49 and 50 of the 1996 Act is devised specially to exclude even the limited ground on which an appeal was earlier provided for under Section 6 of the 1961 Act. The exclusion of appeal by Section 50 is, thus, to be understood in light of the amendment introduced in the previous law by Section 49 of the Act.

.....

90. We, thus, arrive at the conclusion regarding the exclusion of a letters patent appeal in two different ways; one, so to say, on a micro basis by examining the scheme devised by Sections 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal under Section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself.

91. In light of the discussions made above, it must be held that *no letters patent appeal will lie against an order which is not appealable under Section 50 of the Arbitration and Conciliation Act, 1996.*"
(emphasis supplied)

12. In yet another decision in *Nov Vallesina Engineering Spa v. Jindal Drugs Limited and Others [(2021) 1 SCC 383]*, the Hon'ble Apex Court has held as under:

"26. The above discussion would have been sufficient to dispose of this appeal. However, it is noticeable that the decision in *Fuerst Day Lawson [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178]* unambiguously ruled out the maintainability of any appeal against an order granting enforcement of a foreign arbitration award. In the present case, both the partial and final awards are foreign awards. Therefore, the provisions of Sections 47/48 were correctly invoked by NV



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Engineering, for enforcement of the awards (through Application No. 156 of 2005). Jindal objected to the enforcement proceedings, in accordance with grounds articulated in Part II of the Act. A Single Judge substantially upheld the award, and proceeded to its enforcement, by a judgment dated 5-6-2006 [*Noy Vallesina Engg. SpA v. Jindal Drugs Ltd.*, 2006 SCC OnLine Bom 545 : (2006) 3 Arb LR 510. The enforcement proceeding, under Sections 47/48 were registered as Arb. Petition No. 156 of 2005. The decision was rendered on 5-6-2006.] , at the same time rejecting the challenge to enforcement laid out by Jindal. Both parties appealed to the Division Bench; Jindal, on the challenge to the order rejecting its objection to enforcement (Appeal No. 492 of 2006), and NV Engineering, as to that part of the order of the Single Judge, refusing to enforce a part of the award (Appeal No. 740 of 2006).

27. In the decision in *Fuerst Day Lawson* [*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] this Court had to interpret Section 50 of the Act (quoted in the footnote below

[**50. Appealable orders.**—(1) An appeal shall lie from the order refusing to—(a) refer the parties to arbitration under Section 45;(b) enforce a foreign award under Section 48;to the court authorised by law to hear appeals from such order.(2) 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.”]), which provides for a restrictive category of appealable subject-matters, and prohibits appeals in other matters. The Court after noticing previous judgments held as follows : (SCC p. 371, paras 88-89)

“88.*Mohindra Supply Co.* [*Union of India v. Mohindra Supply Co.*, AIR 1962 SC 256] was last referred in a Constitution Bench decision of this Court in *P.S. Sathappan* [*P.S. Sathappan v. Andhra Bank Ltd.*, (2004) 11 SCC 672] , and the way the



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Constitution Bench understood and interpreted *Mohindra Supply Co.* [*Union of India v. Mohindra Supply Co.*, AIR 1962 SC 256] would be clear from the following para 10 of the judgment : (*P.S. Sathappan case*)

30. In view of the categorical holdings in the judgments of this Court, Jindal's appeal to the Division Bench, (Appeal No. 492 of 2006) is not maintainable. However, in view of the above decisions, and the express terms of Section 50, NV Engineering's appeal (Appeal No. 740 of 2006), against the order of the Single Judge (to the extent it refuses enforcement) is maintainable. *S. Sathappan v. Andhra Bank Ltd.*, (2004) 11 SCC 672] , SCC pp. 689-90)

"10.... The provisions in the Letters Patent providing for appeal, insofar as they related to orders passed in arbitration proceedings, were held to be subject to the provisions of Sections 39(1) and (2) of the Arbitration Act, *as the same is a self-contained code relating to arbitration.*'

89. It is, thus, to be seen that the Arbitration Act, 1940, from its inception and right through to 2004 (in *P.S. Sathappan v. Andhra Bank Ltd.*, (2004) 11 SCC 672] was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it 'a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done'. [The reference is to *S.N. Srikantia & Co. v. Union of India* [*S.N. Srikantia & Co. v. Union of India*, 1965 SCC OnLine Bom 133 : AIR 1967 Bom 347] at p. 354, para 9.] In



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other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.”

(emphasis in original)

30. In view of the categorical holdings in the judgments of this Court, Jindal's appeal to the Division Bench, (Appeal No. 492 of 2006) is not maintainable. However, in view of the above decisions, and the express terms of Section 50, NV Engineering's appeal (Appeal No. 740 of 2006), against the order of the Single Judge (to the extent it refuses enforcement) is maintainable."

13. In the light of the dictum laid down by the Hon'ble Supreme Court in the decisions cited supra, no appeal would lie as against the order of the learned Single Judge insofar as the order directing enforcement of the Foreign Award, since Section 50 of the Arbitration Act, provides for an appeal only against an order refusing to enforce a foreign award under Section 48 of the Arbitration Act.

14. The appellant also raised an alternative plea that the present appeal is maintainable under Section 13 of the Commercial Courts Act, 2015. In yet another decision, the Hon'ble Supreme Court has considered the maintainability of the appeal in ***Kandla Export Corporation and another v. OCI Corporation [(2018) 14 SCC 715]***, wherein it was held as under:



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"20. Given the judgment of this Court in *Fuerst Day Lawson* [*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178], which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in para 89 of *Fuerst Day Lawson* [*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.

21. However, the question still arises as to why Section 37 of the Arbitration Act was expressly included in the proviso to Section 13(1) of the Commercial Courts Act, which is equally a special provision of appeal contained in a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act. One answer is that this was done *ex abundanti cautela*. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where an order is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasise the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(a) and would, therefore, not be appealable under Section 13(1) of the



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Commercial Courts Act. Whatever may be the ultimate reason for including Section 37 of the Arbitration Act in the proviso to Section 13(1), the ratio decidendi of the judgment in Fuerst Day Lawson [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] would apply, and this being so, appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone. (emphasis supplied)

The Hon'ble Supreme Court in the penultimate para of the aforesaid decision has categorically laid down that the appealability of orders pertaining to Arbitration and Conciliation Act, must be determined only as per the drill under Section 50 alone and it is impermissible to look into any other Act, such as Commercial Courts Act, to see if an appeal will lie thereunder.

15. In the light of the above discussions and decision of the Hon'ble Apex Court in *Kandla Export Corporation cited supra* and accepting the preliminary objection raised by the respondent, we are of the view that the appeal filed by the appellant as against the order directing enforcement of Foreign Award under Section 48 of the Arbitration Act is not maintainable and this appeal is liable to be dismissed as not maintainable.



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16. Accordingly, this Original Side Appeal (Commercial Appellate Division) stands dismissed as not maintainable. We make it clear that we have not gone into the merits of the case and decided only on the maintainability of the appeal. It is for the appellant to raise all the grounds and work out his remedy before the appropriate forum. No costs. Consequently, connected miscellaneous petition is dismissed.

(D.K.K., J.) (P.D.B., J.)
20.10.2023

Intex : Yes/No
Internet : Yes/No
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D.KRISHNAKUMAR, J.
and



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Jvm

ORDER IN
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