

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

IA NO: GA-COM/1/2024
APOT/244/2024
WITH
EC/176/2021

R. PIYARELALL IRON & STEEL PVT. LTD.
VS
RAM PRASAD AGARWALA & ORS.

(Commercial Division)

BEFORE
The Hon'ble Justice I.P. MUKERJI
-And-
The Hon'ble Justice BISWAROOP CHOWDHURY
Date: 8th July, 2024

Mr. Surajit Nath Mitra, Sr. Adv.
with Mr. Ankan Rai,
Mr. Ratnesh Kr. Rai,
Ms. Devanshi Deora &
Ms. Sakshi Kejriwal, Advs.
...for the appellant.

Mr. Mainak Bose with
Mr. Zeeshan Haque,
Mr. Altamash Alim,
Mr. Selim Mallik &
Ms. Sarbani Ghosal, Advs.
...for the respondent nos.4&6.

Mr. Jayanta Kr. Mitra, Sr. Adv.
with Mr. Debdut Mukherjee,
Ms. Nilanjana Adhya,
Mr. Kaushik Banerjee &
Ms. Sudipta Paul, Advs.
...for the respondent no.5.

Order in terms of prayer (a) of the stay petition.

Mr. Jayanta Kumar Mitra, learned senior advocate appearing for the respondent no.5 and Mr. Mainak Bose, learned advocate for the respondent nos. 4 and 6, question the maintainability of the appeal.

It is said that the order in execution passed in a commercial matter is not appealable under section 13 of the Commercial Courts Act, 2015. The said provision specifically stipulates that only those orders, specified in Order XLIII of the Civil Procedure Code, 1908 are appealable. Order XLIII does contain a list of orders passed in execution but not the type appealed against. On that analogy, the above contention was made.

On the other hand, Mr. Surajit Nath Mitra, learned senior advocate appearing for the appellant, submits that section 13 relates to orders passed in exercise of commercial jurisdiction of the court and does not cover orders passed in execution, which are only in exercise of its ordinary jurisdiction under the Civil Procedure Code.

This point regarding maintainability could only be resolved after proper hearing of the appeal.

But it appears in the circumstances that an early resolution of the appeal is necessary in view of the pending proceeding before the NCLAT.

We decide it, dispensing with all formalities.

Mr. Surajit Nath Mitra has cited a division bench judgement of this court in Sabri Properties Pvt. Ltd. & Ors. Vs. Frostees Exports (India) Pvt. Ltd. reported in 2024 SCC Online Cal 2530, which refers to a judgement in Damodar Valley Corporation Vs. Reliance Infrastructure Ltd. reported in 2021 SCC Online Cal 3065. The court observed as follows :

“15. At the same time, we observed:-

In our view, the court should carefully and purposively scrutinize the type, nature and depth of orders that fall in the ambit of the provisions of Section 37, rather than taking a microscopic view based on the section on which the application is made and the section under which the order is described to have been passed.

Just because an application is styled as having been made under Section 36, it does not follow that all orders passed thereunder must have been made strictly within the four corners of Section 36. One has to penetrate the order, dissect it and examine its effect. In the instant case, when the award was not executable, the only order that the court could have passed was under Section 9 of the Arbitration and Conciliation Act. The impugned order is a mandatory order of injunction which is appealable under section 37(1)(b) of the Act read with Section 9(1)(ii) (d) of the Arbitration and Conciliation Act, 1996.

16. On a close examination of the impugned judgment and order, we find that it was an order passed on an application described as having been made under Section 36 of the Arbitration and Conciliation Act, 1996. We also discern that the nature, purport and scope of the order confined its extent and operation to the question of security to be furnished by the appellant to obtain stay of execution of the order under Section 36. Hence, it is not a type of order without jurisdiction or one transgressing the jurisdiction of the court under the Arbitration and Conciliation Act, 1996. The legislature enacting Section 37 of the said Act expressly provided that an appeal lay from certain orders described in that section and from no other orders. This, in our opinion, expressly excludes the applicability of Clause 15 of the Letters Patent with regard to appealability of orders made under the Arbitration and Conciliation Act, 1996 which as the Supreme Court has told us should be treated as a self contained code. Moreover, this is a commercial matter to which the Commercial Courts Act, 2015 also applies. As the Supreme Court has said in the above decisions, this section provides no extra right of appeal than that provided by Section 37 of the Arbitration and Conciliation Act, 1996. If an order is not appealable under Section 37, it is also not appealable under Section 13 of the Commercial Courts Act, 2015. Moreover, Section 13 of the Commercial Courts Act, 2015 makes it abundantly clear by express words that clause 15 of the Letters Patent could not be invoked if an order was not appealable under Section 13. The impugned judgment and order is not appealable under Section 13."

Therefore, the nature, purport and scope of the order under appeal have to be weighed and adjudged by the court as to whether it is appealable under the Commercial Courts Act, 2015 or not.

According to the contention of Mr. Surajit Nath Mitra, there is no moratorium at all. The execution application is maintainable against all the respondents. The pendency of the insolvency resolution process

should not prevent his client from realising the decree from the other respondents.

On the other hand, Mr. Jayanta Kumar Mitra and supplemented by Mr. Mainak Bose submit that the execution proceeding ought not to be continued against the respondents other than the award-debtor when there was moratorium against the award-debtor.

If the award-debtor ultimately succeeded, by that time the other respondents would have suffered immense prejudice by the award having been executed against them.

By the impugned order, all proceedings before this court have been adjourned awaiting the decision of the NCLAT.

We are of the view that this does not resolve the issue.

Prima facie, we hold that this order is not only an order in execution but has a bearing on the main controversy between the parties. The effect or status of the award or an interim measure concerning the award pending proceedings before the NCLAT is involved. It relates to the jurisdiction of the court also. So, prima facie, the order may be appealable under section 37 of the Arbitration and Conciliation Act, 1996. If there is failure to exercise jurisdiction under the Commercial Courts Act, 2015, the order may cease to be one in exercise of that jurisdiction and hence appealable under clause 15 of the Letters Patent or an appeal from an order in exercise of the court's civil jurisdiction, prima facie.

We are of the view that simplicitor adjournment of the setting aside application and execution application "with all connected applications" ought not to have been made by the learned judge. We direct that the said matters be restored to the list. The submissions made today are permitted to be regurgitated before the learned judge, who is requested to consider and decide the application or proceedings where the impugned judgement and order was passed afresh.

With the above direction and observation, this appeal (APOT/244/2024) and the connected application (IA NO: GA-COM/1/2024) are disposed of.

(I.P. MUKERJI, J.)

(BISWAROOP CHOWDHURY, J.)