

OCD-8

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/306/2024
WITH EC/8/2022
IA NO: GA-COM/1/2024
DHIMAN BANIK
VS
KOTAK MAHINDRA BANK LIMITED AND ORS

BEFORE :
THE HON'BLE JUSTICE HARISH TANDON
AND
THE HON'BLE JUSTICE PARTHA SARATHI SEN
DATE : 3rd October, 2024.

Appearance :
Mr. Om Prakash Singh, Adv.
...for appellant.

Mr. Ritoban Sarkar, Adv.
Mr. Paritosh Sinha, Adv.
Ms. Shrayashee Das, Adv.
Mr. Himangshu Bhanusingha, Adv.
Mr. Rohan Kumar Thakur, Adv.
...for respondents.

The Court :- The objection as to the jurisdiction exercised by the Commercial Division in relation to an execution of an award is decided in the impugned order which is assailed before us in the instant appeal.

The primary objection is raised at the behest of the contesting respondent that the instant appeal is not maintainable in view of the provisions contained under Section 13 of the Commercial Courts Act, 2015. Section 10 of the Commercial Courts Act, 2015 contained an exhaustive provision relating to the jurisdiction exercised by the Commercial Courts as well as the Commercial Division in relation to arbitration matters and it is no gain saying that it has the jurisdiction to execute the award being the Court within the definition

assigned under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996. The Commercial Courts Act, 2015 is a later Act and imbibes within itself the disputes concerning the arbitration matters and the mode of adjudication as well as the jurisdiction to be exercised by the Commercial Courts or the Commercial Division. Section 8 of the CC Act expressly created bars in filing of the revisional application or the appeal against any interlocutory order of the Commercial Court including an order raising a dispute on the jurisdiction with the rider that in the event a person felt aggrieved by any adjudication on jurisdiction, it can take such point in an appeal against the decree passed by the court. Section 12(3) of the CC Act also contemplates a bar in filing an appeal or civil revisional application under Section 115 of the Code from an order of the Commercial Division or Commercial Court upholding the jurisdiction. Section 13 contained an exhaustive provision relating to a remedy by way of an appeal and sub-section (1A) was introduced by way of an amendment having brought subsequently with the proviso added thereto creating an embargo in maintaining an appeal otherwise than flowing from Order 43 of the Code of Civil Procedure and Section 37 of the Arbitration and Conciliation Act, 1996. The provision contained under the Arbitration and Conciliation Act, 1996 has also undergone a sea change wherein Section 17 was completely amended with a new get up and correspondingly Section 37 of the said Act was also amended including the remedy by way of an appeal against an order or a decision of the Court which was earlier not provided in an un-amended provision of Section 37. A distinction was noticed when clause (b) of sub-Section (2) of Section 37 A&C Act was untouched and the questions

arises whether an appeal would lie from an order of the arbitral tribunal under Section 37 of the said Act. Though the judgment of the Apex Court has been relied upon in support of the contention that the appeal would not lie in the event an order is passed by the arbitral tribunal while enforcing its order, delivered in the case of Amazon.Com NV Investment Holdings LLC vs. Future Retail Limited And Others, we feel that the said judgment has to be considered in the perspective of the facts as well as the points involved therein. The Apex Court formulated two points, one of which was whether an order passed under Section 17(2) of the Arbitration and Conciliation Act, 1996 for enforcement of an award of an emergency arbitrator by a single Judge of the High Court is appealable. While answering the said point, the Apex Court in unequivocal terms held that Section 37 being the complete Code in relation to an appeal from an order and the award yet after the prolongation of the Commercial Courts Act, 2015, the Court must bear in mind the restrictions having imposed in the later Act. The Apex Court while harmonizing the restrictive provisions contained both in the Arbitration and Conciliation Act, 1996 and the Commercial Courts Act, 2015 held that the moment Section 37 of the earlier Act does not include a remedy by way of an appeal against an order passed under Section 17(2) of the said Act, such right of appeal cannot be presumed. The Apex Court took note of the legislative intent where no amendment was brought in clause (b) of sub-Section (2) of Section 37 of the said Act providing the remedy by way of an appeal against granting or refusing to pass an order under Section 17 and held that it is in relation to an order passed under

Section 17(1)(i) and (ii) and does not engulf an order passed under Section 17(2) of the said Act in the following.

“96. Despite Section 17 being amended by the same Amendment Act, by making Section 17(1) the mirror image of Section 9(1) as to the interim measures that can be made, and by adding Section 17(2) as a consequence thereof, significantly, no change was made in Section 37(2)(b) to bring it in line with Order 43 Rule 1 (r). The said section continued to provide appeals only from an order granting or refusing to grant any interim measure under Section 17. There can be no doubt that granting or refusing to grant any interim measure under Section 17 would only refer to the grant or non-grant of interim measures under Sections 17(1)(i) and 17(1)(ii). In fact, the opening words of Section 17(2), namely, “subject to any orders passed in appeal under Section 37...” also demonstrates the legislature’s understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1). For example, an appeal against an order refusing an injunction may be allowed, in which case sub-section (2) of Section 17 then kicks in to enforce the order passed in appeal. Also, the legislature made no amendment to the granting or refusing to grant any measure under Section 9 to bring it in line With Order 43 Rule 1 (r) , under Section 37(1)(b). what is clear from this is that enforcement proceedings are not covered by the appeal provision.”

The Coordinate Bench of this Court to which one of us [Harish Tandon, J.] in the case of Super Smelters Ltd. vs. Predominant Engineers and Contractors Pvt. Ltd. was considering a question whether clause 15 of the Letters Patent providing an appeal against an order passed by a court having ordinary original civil jurisdiction is immuned from being affected by either Section 37 of the Arbitration and Conciliation Act, 1996 or Section 13 of the Commercial Courts Act, 2015. It was held that the intention behind

incorporation of those provisions into the Act is laudable to the effect that it excludes the operation of clause 15 of the Letters Patent and, therefore, an appeal would not lie unless the order comes within the purview of Order 43 Rule 1 of the Code of Civil Procedure and Section 37 of the Arbitration and Conciliation Act, 1996. The order complained herein is passed by the executing court upholding the jurisdiction and, therefore, in view of the embargo created under Section 8, Section 10(3) and Section 13 of the Commercial Courts Act, the appeal is not maintainable. However, it shall not preclude the appellant in assailing the said order in an appeal against the final judgement that would be passed in the proceeding.

The appeal is, thus, dismissed. No order as to costs.

(HARISH TANDON, J)

(PARTHA SARATHI SEN, J.)

pkd.