

A very intriguing question of law has arisen in these appeals. Whilst arguments in the suit were underway, the appellants defendants (the appellant) made two applications - one for amendment of the written statement and the other for leave to adduce further evidence by recalling

their witness. On 20th July, 2023 a learned single judge of this court dismissed the application.

The appellant moves us.

Before the appellant could move the appeals on merits, Mr. Sabyasachi Chowdhury, learned advocate for the respondent/plaintiff (respondent) objected to the court entertaining the appeal.

He said that an appeal did not lie from the impugned order. His short ground was this:

The suit is a commercial cause. Under Section 13 of the Commercial Courts Act only specified appeals can be entertained by the court.

There is no doubt whatsoever that the impugned order is not appealable under Section 13.

It was through his legal acumen and vast experience that Mr. Haradhan Banerjee, learned advocate, appearing for the appellant could put forward some very compelling arguments in support of maintainability of the appeal. He argued that the suit was instituted as an ordinary suit in 2015. After coming into force of the Commercial Courts Act, 2015 it was transferred to the Commercial division and marked as a commercial suit. Thus, on the date of coming into force of the said Act, the suit was marked as an ordinary suit. The rights and liabilities of the parties existing on the date of coming into force of the said Act were preserved, despite its enactment. It followed that the right of appeal against the impugned order available under Clause 15 of the Letters Patent was not taken away from

the parties by transfer of the suit to the Commercial division under the said Act. Hence, the appeal was maintainable.

At this point of time, it is necessary to discuss the decisions cited at the bar.

The first is **RubINETTERIE Bresciane Bonomi SpA vs. Lehry Instrumentation & Valves Pvt. Ltd.** reported in **(2019) SCC Online Mad 29916**, cited by Mr. Banerjee. In Paragraph 22 of the judgment the learned judge summarized the law with regard to the right of a party on appeal after a change of law had taken place between filing of the proceedings and preferment of the appeal. Unless expressly taken away all rights prevailing on the date of institution of the proceeding continued to apply. The court observed in paragraph nos. 22, 42, 43 & 44 as follows:-

“22. To consolidate the principles that flow from the above authorities which are but a few among the many on the subject, it can now be stated with a fair degree of certainty that a right of appeal, though a statutory right, though conceived as a procedural right, yet is a substantive right that vests in a suitor on the date of institution of the original action. And, when the said right is interfered with by any subsequent statute, or even by an amendment of the same statute, it is impermissible to attempt at a statutory interpretation to take away a vested right of appeal in a party, unless the statute itself either expressly or by necessary implication makes its retrospective.

42. If the quintessence of the ideas that the Courts have hitherto declared through their judgments are taken and grouped, there emanates a larger idea which indicates that the Courts have come to recognise the right of appeal, though procedural in nature, as a substantive right, and once vested in a litigant, Courts ought to guard itself in granting retrospective effect to any statute that purports to affect it. Should there be a legislative intent to give it a retrospective operation, and to divest a litigant

of his vested right of appeal, it must be positively stated in the statute, or in its absence, it must surface as a compulsive consequence on a wholesome reading of the statute. The present statute, the CCA, does not possess both. Consequently, the right of appeal under the Letters Patent should continue to be available to all Orders passed in any proceedings in all suits pending on the date of commencement of Commercial Courts Act, subject however to the test they must be 'judgments' within the meaning of clause 15 thereof.

43. *If Sec.21 of the CCA is turned to, it reads:*

21. Act to have overriding effect: *Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act.*

44. *When the all critical Sections 13 and 15 do not reflect a legislative intent to give it a retrospective effect to the Commercial Courts Act as to take the vested right of appeal in Section 21, on its own, unaided by other provisions, cannot take the same away."*

The learned judge dismissed the application on the ground that the impugned order did not qualify as one under Clause 15 of the Letters Patent.

The second is the unreported decision of a division bench comprising of myself and Mr. Justice Biswroop Chowdhury in FMAT 390 of 2023 with CAN 1 of 2023 (Prasad Ecostructure L.L.P vs. City Devcon Pvt. Ltd. and Ors.) decided on 19th January, 2024. The issue involved in the appeal was this. An order was passed by a civil court transferring a suit before it to the commercial division. Section 15 of the Commercial Courts Act, 2015 provides for inter alia, an application to be made to the Commercial Appellate division of the High Court in case the court below refuses to transfer a suit to the commercial division. There is no provision in the said

Act for a remedy when the suit is directed to be transferred and one of the parties alleges that the proceeding is not commercial in nature and ought not to have been transferred. In that appeal also the point of maintainability was taken. We ruled that Section 13 of the said Act dealt with the appealability of orders passed by a court exercising commercial jurisdiction under the said Act. When a court refused to transfer an allegedly commercial suit, the Act itself provided for an application to the High Court complaining of such refusal and for directions for transfer of the said proceedings to the High Court. As such, no appeal was contemplated. When the same court directed transfer of the suit to the High Court, the court was exercising its civil jurisdiction and not any jurisdiction under the said Act. Therefore, Section 13 did not apply as the impugned order was not one passed by the court in exercise of its commercial jurisdiction.

APL Metals Ltd. vs. Mountview Tracom LLP and Ors. reported in **AIR 2022 Cal 212**, another division bench judgment of this court comprising of myself and Hon'ble Mr. Justice Aniruddha Roy was cited before us. In that case, we specifically observed that apart from orders from which appeals lie under Order 43 of the Civil Procedure Code as amended by the Commercial Courts Act, 2015, and Section 37 of the Arbitration and Conciliation Act, no other appeal from an order passed by a court exercising commercial jurisdiction was maintainable. We ruled as follows:

***“10.** An appeal would lie from a judgment and order. The orders from which appeals lie are limited to those provided in Order 43 of the Civil Procedure Code read with Section 104 thereof and Section 37 of Arbitration and Conciliation Act, 1996.*

11. *The proviso makes it absolutely clear that apart from the appealable decrees and orders appeals do not lie from any other decision, notwithstanding anything contained in any other law including the Letters Patent.*

14. *In Damodar Valley Corporation v. Reliance Infrastructure Ltd. on 7th December, 2021 decided by us and reported in Manupatra vide reference 2021 SCC OnLine Cal 3065 we stated:—*

“12. Section 13 of the Commercial Courts Act, 2015 makes it absolutely plain that an appeal will lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Civil Procedure Code, 1908 as amended by the Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996.

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.”

Under Section 6 of the General Clauses Act the rights existing at the time of repeal or amendment of an Act are generally preserved unless expressly taken away by the new or amending Act. This also applies to rights in relation to legal proceedings like appeal existing on the date of the repeal of an Act or its amendment.

Now, dealing with the contention of Mr. Haradhan Banerjee, learned advocate, another look is necessary at Section 13 of the said Act. The language is quite plain that it relates to appealability of orders passed by the commercial court. This simply means an order passed by a court exercising commercial jurisdiction. It says that irrespective of anything laid down in any other law including the Letters Patent of a High Court an appeal would lie only from those judgments, decrees and orders provided therein and from no other.

Now, the suit. The Commercial Courts Act came into force on 23rd October, 2015. Let us assume that the suit was filed as an ordinary suit in 2015 and

subsequently, transferred under Section 15 of the said Act to the commercial court. Now, consider sub-section 3 of Section 15.

“15. (3) Where any suit or application, including an application under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of Specified Value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer.”

The intention of the legislature is absolutely clear that even in suits where the procedure for getting a suit ready for hearing was not complete, the Commercial Courts Act, 2015 would apply to complete those procedures.

Thereafter, Section 21 provides as follows:-

“21. Act to have overriding effect.—*Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act.”*

It is quite evident from reading the above provisions of the said Act that it expressly takes away any right of appeal whether it is considered substantive or procedural in a litigant before transfer of a suit to the commercial court and that after a suit is transferred to the commercial court, the provisions of the said Act applies to it. Those Sections take away procedural rights as well.

In those circumstances, the appellant has no right of appeal from the impugned order. The objection regarding maintainability of the appeal is sustained.

Both the appeals are accordingly dismissed on that ground with liberty to the appellant/petitioner to pursue any other remedy available to them in respect of the said cause of action. The application GA 1 of 2023 in APOT 412 of 2023 and GA 2 of 2024 in APOT 56 of 2024 are dismissed. The application GA 1 of 2024 in APOT 56 of 2024 is allowed. We have not gone into the merits of the matter which are kept open.

No order as to costs.

Urgent certified photo copy of this judgment and order if applied for be furnished to the appearing parties on priority basis upon completion of necessary formalities.

I Agree

(Biswaroop Chowdhury, J.)

(I. P. Mukerji, J.)