SUPREME COURT OF INDIA

Shin-Etsu Chemical Co. Ltd.

Vs.

Vindhya Telelinks Ltd.

C.A.No.4998 of 2007

(R.V.Raveendran and Markandey Katju JJ.)

27.03.2009

JUDGEMENT

R.V. Raveendran J.

1. These appeals by special leave are filed against the order dated 30.11.2006 passed by the IV Additional District Judge, Rewa, Madhya Pradesh, aggrieved by the remand, while allowing in part Civil Appeal Nos.24 and 25 of 2006 filed by the appellant, with a direction to reconsider the applications of the appellant under Section 45 of the *Arbitration and Conciliation Act, 1996* (`Act' for short) in terms of the Judgment of this Court in *Shin-Etsu Chemical Co.Ltd. v. Aksh Optifibre Ltd. & Anr.*[1].

2. Vindhya Telelinks Ltd. and Optic Fibre Goa Ltd. - respondents 1 & 2 in the first of the two appeals filed Civil Suit Nos. 31-A of 2002 (renumbered as Civil Suit No.38A of 2004) on the file of the Civil Judge, Class-I, Rewa, Madhya Pradesh for a declaration that the Long Term Sale and Purchase Agreement entered between appellants and them, was null and void and for a permanent injunction restraining the appellant (first defendant in the suit) from relying upon/invoking/giving effect to any term of the said agreement. Similarly, Birla Ericsson Optical Ltd. and Optic Fibre Goa Ltd - respondents 1 & 2 in the second of these appeals, filed Civil Suit No.30A of 2002 (renumbered as Civil Suit No.39A of 2004) in the said court for similar reliefs.

3. On entering appearance, the appellant filed applications under order 7 Rule 11 of Code of Civil Procedure read with Sections 5 and 8 of the Act seeking dismissal of the suits and a direction for referring the parties to arbitration (in terms of the arbitration agreement contained in the Long Term Sale & Purchase Agreements dated 23rd and 24th January, 2001). The said applications were dismissed by the trial court on 14.07.2003. The revision petitions filed by the appellants were dismissed by the Madhya Pradesh High Court on 26.08.2003. On further appeals, this court in Civil Appeal Nos.6210-6211 of 2004, by order dated 7.12.2005, set aside the orders of the trial court and High Court and remanded the matters to the trial court to decide the matters afresh treating the applications filed by the appellant herein (under Order 7 Rule 11 CPC read with sections 5 and 8 of the Act) as

applications under Section 45 of the Act and dispose them in terms of the decision in Aksh Optifibre Ltd.(supra). In pursuance of it, the trial court considered the applications filed by the appellant as applications under Section 45 of the Act and passed a common order dated 31.3.2006 thereon, holding that the arbitration clause on the basis of which the appellant had filed an application under Section 45 of the Act was prima facie inoperative and in such a situation, the parties cannot be referred to arbitration and the matter should be proceeded with and decided on merits by the court.

4. The said order of the trial court was challenged by the appellant before the IV Additional District Judge, Rewa who by the impugned orders dated 30.11.2006 allowed the appeals, set aside the order of the trial court, and remitted the matters to the trial court with a direction to consider the applications of the appellant under section 45 of the Act, in accordance with the procedure and principles laid down in Para 111 of the decision in Aksh Optifibre Ltd. (supra). The said orders of the Additional District Judge are challenged in these appeals by special leave under Article 136 of the Constitution of India. The appellant contends that as neither the trial court nor the appellate court recorded a finding that the arbitration agreement was null, void, inoperative or incapable of being performed, the appellate court ought to have merely allowed the appeals, and ought not to have remanded the matters to the trial court for fresh consideration.

5. The respondents raised a preliminary objection that these appeals are not maintainable and if the appellant was aggrieved by the orders of the learned District Judge in the appeals, the appropriate remedy was to challenge the same before the High Court. On the other hand, the appellant contended that these appeals are maintainable and at all events as leave has been granted and these appeals are pending for two years, the appellant should not be relegated to the High Court to pursue an alternative remedy, however efficacious it may be. On the contention urged, these appeals give rise to the following two questions:

> "(i) Whether the appellants can directly approach this Court under Article 136 of the Constitution, against the orders of the District Court, without approaching the High Court? (ii) Even if the answer to the first question is in the negative, whether leave having been granted by this Court, these appeals should be considered and decided on merits? Re : Question (i):"

6. Section 45 deals with power of judicial authority to refer the parties to arbitration. It provides that the judicial authority, when seized of an action (in a matter in respect of which the parties have made an agreement referred to in section 44 of the Act) shall, at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Section 50 provides for appeals and it is extracted 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 authorized 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."
>
> Sections 45 and 50 in Part II of the Act relating to `Enforcement of certain foreign awards', correspond to Sections 8 and 37 of Part-I of the Act.
>
> Sub-section (1) of Section 50 provides for an appeal from an order refusing to refer the parties to arbitration under Section 45, to the Court authorized by law to hear appeal by such order. Therefore, the appellant challenged the orders of the Civil Judge (Class I), Rewa, before the Additional District Judge, Rewa, which is said to be the court authorised to hear appeals from the orders of the Civil Judge (Class I). Sub-section (2) of Section 50 bars second appeals. It provides that no appeal shall lie from an order passed in appeal under Section 50. It however clarifies that nothing in Section 50 shall affect or take away any right to appeal to the Supreme Court."

7. Relying upon the exception contained in sub-section (2) of Section 50, the appellant contended that even though an appeal may not lie from the order in the appeal, the right of appeal to Supreme Court having been specifically saved, these appeals to the Supreme Court are maintainable.

> "The appellant does not dispute that the Act does not provide a `right to appeal' to Supreme Court against an appellate order under Section 50(1)(a) of the Act. The appellant would contend that as Article 136 contemplates Supreme Court granting leave to appeal from any judgment, decree or order and as sub-section (2) of Section 50 of the Act specifically saves the right to appeal to Supreme Court, an appeal to Supreme Court by obtaining leave under article 136 should be held to be a remedy in regard to an appellant order under Section 50(1) of the Act, even if the court of appeal was a court inferior to the High Court."

8. What is exempted from the bar against second appeals is `any right to appeal to the Supreme Court'. Article 136 of the Constitution provides that notwithstanding anything in Chapter IV of Part V of the Constitution, the Supreme Court may in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. Article 136 does not confer a right to a party to appeal to the Supreme Court. The said article confers discretion upon the Supreme Court to grant leave to appeal in suitable cases. The power vested in Supreme Court to grant leave, which is to be used sparingly in appropriate cases, cannot be construed as vesting of a right of appeal in a party under Article 136. The right to appeal to Supreme Court referred and excluded from the bar contained in section 50 (2) of the Act, refers to appeals under Article 132 or 133(1) against any judgment, decree, or final order of the High Court, if the High Court certified under Article 134-A that the case

involves a substantial question of law as to interpretation of the Constitution or that the case involves a substantial question of law of general importance and that in the opinion of 8 the High Court the said question needs to be decided by the Supreme Court.

> "The words "right to appeal" refers to a right conferred either under the Constitution or under a statute to file an appeal to a higher court against the judgment, decree or order of a lower court, without having to first obtain any permission or leave. In the absence of a constitutional or statutory provision for an appeal as of right, the appellant cannot contend that it has a `right to appeal' to the Supreme Court. An appeal by special leave to Supreme Court cannot therefore be considered as an appeal as of right or as an appeal in pursuance of a right to appeal to the Supreme Court."

9. Similar questions arose before this Court in *Nirma Ltd. v. Lurgi Lentjes energietechnik Gmbh & Anr.*[2]*- and ITI Ltd. v Siemens Public Communications Network Ltd.*[3] where this Court considered whether a person aggrieved by an appellate order passed by a City Civil Court, under Section 37 of the Act, could challenge it by filing a Special Leave Petition under Article 136. This court held that such petitions were not maintainable in view of the efficacious alternative remedy of revision to the High Court being available under Section 115 of the Code of Civil Procedure. This Court followed its earlier decision in *Shyam Sunder Agarwal & Co. vs. Union of India*[4] wherein this Court observed :

> "In our view, a revisional application before the High Court against an appellate order passed Under Section 39 of the *Arbitration Act (1940)* is maintainable. There is no express provision in the Arbitration Act putting an embargo against filing a revisional application against appellate order Under Section 39 of the Act. The Arbitration Act has put an embargo on filing any second appeal from appellate order Under Section 39 of the Act.
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> The Arbitration Act is a special statute having limited application relating to matters governed by the said Act. Such special statute, therefore, must have its application as provided for in the said statute. The revisional jurisdiction of the High Court under the Code or under any other statute therefore shall not stand superseded under the Arbitration Act if the Act does not contain any express bar against exercise of revisional power by the High Court provided exercise of such revisional power does not mitigate against giving effect to the Provisions of the Arbitration Act."

10. We may also usefully refer to the observations of this Court in *Punjab Agro Industries Corporation Ltd. v Kewal Singh Dhillon*[5] where an order was passed by the District Judge under section 11(6) of the Act (as designate of the Chief Justice) was sought to be challenged before this court, by seeking special leave. This Court held:- "This Court has repeatedly stressed that Article 136 is not intended to permit direct access to this Court where other equally efficacious remedy is available and the question involved is not of any public importance; and that this Court will not ordinarily exercise its jurisdiction under Article 136, unless the appellant has exhausted all other remedies open to him.

Therefore, the contention that the order of the Civil Judge, Sr. Division rejecting a petition under section 11 of the Act could only be challenged, by recourse to Articlr136 is untenable. The decision in SBP did not affect the maintainability of the writ petition filed by appellant before the High Court."

11. We therefore reiterate that though the existence of an alternative remedy by itself will not take away the jurisdiction of this Court under Article 136, this Court would not grant leave and entertain appeals against orders/judgments/decrees of the district court or courts subordinate thereto, if remedy by way of appeal or revision to the High Court or other court or forum is available.

Re: Question No. (ii)

12. It is now well settled that the discretionary power vested in this Court under article 136 continues even after granting leave. Therefore, on hearing an appeal by special leave, this Court may refuse to go into merits, or even if it goes into merits, merely declare the law and refuse to interfere if interests of justice and/or facts of the case do not call for interference. If this Court finds that leave ought not to have been granted and that no prejudice will be caused, it may reject the appeal by special leave, reserving liberty to the appellant to pursue the alternative remedy before the High Court or other appropriate forum. In extreme cases, this Court may even revoke the leave already granted. See *Taherakhatoon v. Salambin Mohammed*[6] *and Raghuath G. Panhle . v. Chaganlal Sundarji & Co.*[7].

13. In this case the Special Leave Petition was filed on 11.12.2006 and this Court on 4.1.2007 ordered issue notice and subsequently granted leave on 22.10.2007. We are conscious of the fact that the matter has been pending before this Court for more than two years and relegation to alternative remedy will further delay the consideration of the issue. But it is inevitable in the circumstances. Though, Article 136 provides that this Court has the discretion to grant leave to appeal against any order (judgment, or determination) in any cause by any court, this Court has been consistently following the practice of not entertaining appeals directly from the orders of district courts or court subordinate thereto, if an alternative remedy by way of appeal or revision was available before the High Court. In fact, after the scope of revision under section 115 was curtailed by Amendment Act 46 of 1999 with effect from 1.7.2002, the availability of even the remedy by invoking the supervisory jurisdiction under Art. 227 of the Constitution (as enunciated by this Court in *Surya Dev Rai vs. Ram Chander Rai*[8], has been considered as an adequate alternative remedy, for the purposes of Article 136. If an xception is to be made in this case on the ground that the leave has been granted, there is a risk of its becoming an erroneous precedent. Further on the examination of the facts we are of the considered view that the case does not involve any special and exceptional circumstance that warrants direct interference with an order of a district court bypassing the remedy available before the High Court. Therefore the mere fact of leave having been granted will not come in the way of the appellant being relegated to the available alternative efficacious remedy.

14. We therefore dismiss these appeals without going into the merits reserving liberty to the appellants to pursue their remedy in accordance with law before the High Court. It is needless to say that if and when the appellant approaches the High Court, the time spent in prosecuting the special leave petitions and appeals before this Court, will stand excluded.

[1] *2005(7) SCC 234* [2] *2002(5) SCC 520* [3] *2002 (5) SCC 510* [4] *1996 (2) SCC 132*
[5] *2008 (11) SCALE 616* [6] *1999 (2) SCC 635* [7] *1999 (8) SCC 1* [8] *2003 (6) SCC 675*