

**SUPREME COURT OF INDIA**

Arun Dev Upadhyaya

Vs.

Integrated Sales Service Ltd & Anr.

C.A.No.8475-76 of 2016

(Dipak Misra and C.Nagappan,JJ.,)

30.09.2016

**JUDGMENT**

**Dipak Misra,J.,**

SLP.(Civil)No.22991-92 of 2016

1. Aggrieved by the order dated 23.06.2016 passed by the Division Bench of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in C.A.M. No. 34 of 2016 in Arbitration Appeal No.3 of 2016 rejecting the preliminary objection raised by the appellant and further being dissatisfied with the order dated 15.07.2016 expressing disinclination to entertain the Civil Miscellaneous Application (Review), the present appeals, by special leave, have been preferred for annulling the same.

2. The facts which are relevant to be stated for adjudication of the appeals are that an award was passed in favour of the 1st respondent in ICDR Case No. 50-181-T-00327-09 by the International Arbitration Tribunal (for short, “the tribunal”) making the appellant the DMC Management Consultants Limited and another jointly and severally liable to pay USD 6,948,100 within ten days from the date of passing of the award.

3. It is the case of the respondent that the international arbitration award had attained finality as the appellant herein had not challenged it under Delaware Law which is the applicable law. On 29.04.2010, the 1st respondent filed an application under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 (for brevity, “the 1996 Act”) for enforcement of the Award before the District Judge, Nagpur and the proceeding continued before the concerned District Judge till the Arbitration and Conciliation (Amendment) Act, 2015 (for short, “2015 Act”) came into force with effect from 23rd October 2015, by which the High Court was conferred with the original jurisdiction in case of International Commercial Arbitration. After the 2015 Act came into force, the 1st respondent filed Misc. Civil Application No. 1319 of 2015 before the High Court for enforcement of the award. The Learned Single Judge by his final order dated 18.04.2016 came to hold that the award dated 28.03.2010 was enforceable against the DMC Management Consultants Limited and passed a decree against it in terms of

the award. However, the learned single judge opined that the award was not enforceable in India against the other respondent as the arbitral tribunal could not have passed the award against them. The opinion expressed by the learned Single Judge reads as follows:-

“(1) The award dated 28.3.2010 passed by the International Arbitration Tribunal in ICDR Case No. 50181T0032709 becomes unenforceable in India to the extent it operates against the non-applicant No. 2-Arun Dev s/o Govindvishnu Upadhyaya and No. 3 Gemini Bay Transcription Pvt. Ltd., and the claim for passing a decree against them in terms of the said award is refused.

(2) The award passed by the International Arbitration Tribunal in ICDR Case No. 50181T0032709 to the extent it operates against the non-applicant No. 1-DMC Management Consultants Ltd. is made enforceable in India and the decree is passed in terms of the said award against the non-applicant No. 1.”

4. Being dissatisfied with the decision of the learned single judge, the 1st respondent preferred an appeal under Section 50(1)(b) of the 1996 Act read with Clause 15 of the Letters Patent of the High Court of Bombay which was registered as Arbitration Appeal No. 3 of 2016.

5. The appellant herein who was the respondent before the High Court filed application C.A.M No. 34 of 2016 contending, inter alia, that the appeal was not maintainable in view of the abolition of the Letters Patent Appeal by Section 3(1) of the Maharashtra High Court (Hearing of Writ Petitions by Division Bench and Abolition of Letters Patent Appeals) Act, 1986 (for short, “the 1986 Act”). The Division Bench repelled the said submission by placing reliance on an earlier Division Bench judgment rendered in *Padamshri Purushottam Vyas & Ors. v. Tusar Dhansukhlal Shah*<sup>1</sup> and opined that the appeal is maintainable.

6. After the preliminary objection was rejected the appellant filed an Misc. Civil Application (Review) No. 688 of 2016 by bringing into the notice of the Court the decision in *Fuerst Day Lawson Limited v. Jindal Exports Limited*<sup>2</sup> and relied, especially on paragraphs 74, 75, 76 and 89 and propounded the point that the Letters Patent Appeal under Clause 10 was not available in arbitration matters and Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (for short “the Act”) would not be applicable to an arbitration appeal. The High Court noticed the language used in Section 50(1)(b) of the 1996 Act and the constitution of the forum under Section 15 of the Letters Patent and opined that the submissions canvassed in support of the application for review were absolutely unsustainable. Being of this view, the Division Bench dismissed the application for review. As stated earlier, both the orders have been challenged in these two appeals by special leave.

7. We have heard Mr. Anish Kapur, learned senior counsel for the appellant and Mr. Balbir Singh, learned senior counsel for the respondent.

8. First we shall refer to the decision in *Tusar Dhansukhlal Shah* (supra) as the Division Bench in the impugned order has placed reliance on the same. In the said case, the question that was posed reads as follows:-

“The only question which falls for consideration is: whether intra-court Letters Patent Appeals on the original side of this Court are maintainable of this Court are maintainable in respect of suits or other proceedings which are filed on the original side of this Court.”

9. To answer the said question, the Court referred to Sections 2 and 3 of the 1986 Act. The said provisions read as follows:-

“2. Notwithstanding anything contained in any law for the time being in force or in any instrument having the force of law, every application for the issue of any direction, order or writ under Article 226 of the Constitution of India and every application invoking the jurisdiction of the High Court under Article 227 or Article 228 of the Constitution of India, pending before the High Court of Judicature at Bombay, on the date of commencement of this Act, or filed on or after the said date, whether the matter in dispute is or has arisen in Greater Bombay or outside Greater Bombay, shall be heard and disposed of by a Division Bench to be appointed by the Chief Justice of the High Court: Provided that, the High Court may, by rules made after previous publication and with the previous approval of the State Government, prescribe that such of the applications referred to above, arising in Greater Bombay or outside Greater Bombay, as may be specified in the rules, may be heard and disposed of by a single Judge appointed by the Chief Justice. “

10. Thereafter, the High Court referred to the Constitution Bench judgment in *Jamshed N. Guzdar v. State of Maharashtra and others*<sup>3</sup>, noted that before this Court, the counsel appearing for the State of Maharashtra had found that there was anomaly in Section 3 of the 1986 Act and accordingly made a concession which has been noted in paragraph 18 of the judgment. It reads as follows:-

“Mr U.U. Lalit, learned Senior Counsel for the State of Maharashtra, while supporting the impugned judgment submitted that there is an anomaly created by, or deficiency found in Section 3 of the 1986 Act inasmuch as Section 3 of the said Act read with Section 9 of the 1987 Act fails to make any provision for appeal against a decree or order passed after the commencement of the Act in any suit or other proceedings pending in the High Court since before the commencement of the Act. He sought ten days’ time to have instructions from the State of Maharashtra in this regard. Thereafter, on the basis of Letter No. 37-PF 2131097 dated 17-12-2004 of the Principal Secretary and RLA, State of Maharashtra, IA No. 10 is filed seeking permission to place on record the said letter indicating the willingness of the State of Maharashtra to take necessary steps to make legislative amendment to Section 3 of Maharashtra Act 17 of 1986, relevant portions of which read:

“With reference to the above subject, I have to state that you are hereby given instructions to make a statement before the Hon’ble Supreme Court that the State of Maharashtra will take necessary steps to make legislative amendment to Section 3(1) of Maharashtra Act 17 of 1986 [the Maharashtra High Court (Hearing of Writ Petitions by Division Bench and Abolition of Letters Patent Appeals) Act, 1986] to make a provision for appeal against the judgment, order and decree passed on the appointed date by the High Court and thereafter as may be indicated in the judgment of the Supreme Court.””

11. After the said judgment, the State of Maharashtra brought an amendment, i.e., Maharashtra High Court (Hearing of Writ Petitions by Division Bench and Abolition of Letters Patent Appeals) Amendment Act, 2008 (Maharashtra Act No. XXVII of 2008). The High Court referred to statement of objects and reasons of the said Amendment Act and reproduced Section 3 which has come into existence after the amendment. Interpreting Section 3, the Division Bench ruled that:-

“... The words “an appeal under any statute” clearly referred to any appeal provided under any provision under the statute and where such an appeal is heard by single Judge of the High Court then against such orders passed in appeal by a single Judge of the High Court. Appeals, therefore, provided under Arbitration Act and other Acts which provide that these appeals are to be heard by the single Judge of the High Court then against the order passed in such appeals, Letters Patent Appeal is not maintainable. Here, again, a distinction will have to be drawn between the appeals which are filed from the orders passed by the District Courts, other than the orders passed by the single Judge on the original side of the Bombay High Court. Such appeals which are filed against the orders passed by the District Courts, would be heard by the Single Judge of this Court and against such orders passed by the single Judge of the High Court, Letters Patent Appeal would not be maintainable. However, where Petition is filed before the single Judge of this Court under any provision under the statute, the appeal against such an order would still be maintainable before the Division Bench of this Court. This distinction therefore has to be kept in mind while construing the meaning of the words “appeal arising from a statute”. To give an example, a Petition under section 34 of the Arbitration and Conciliation Act, 1996 where Arbitral Tribunal passes an award - say in the City of Pune - such a petition under Article 34 of the Act would be maintainable before the District Court. An appeal under section 37 would be maintainable in the High Court before the Single Judge on the Appellate Side. No Letters Patent Appeal against the order passed by the single Judge under section 37 can be filed before the Division Bench of this Court, whereas if the Arbitral Tribunal passes an award in City of Mumbai, a Petition under section 34 could be filed on the original side of this Court and, it would be heard by the single Judge sitting on the original side of this Court. Appeal, however, against such an order would be maintainable before the Division Bench of this Court and it would not be barred by the words “appeal arising from a statute”... ”

Be it noted that the Division Bench has referred to earlier judgment in *Jet Air (India) Ltd. v. Subrata Roy Sahara* <sup>4</sup> and concluded that an appeal arising out of any suit or proceeding which are filed on the original side would be maintainable in view of the Amendment Act of 2008. The impugned order, as we find, placing heavy reliance on the aforesaid decision has opined that the Letters Patent Appeal is maintainable.

12. The pivotal question is whether an appeal against the judgment of the Single Judge in an international arbitration matter is appealable to the Division Bench or to put it otherwise, whether the intra-court appeal would lie because of the Letters Patent. In this context, it is necessary to refer to Section 50 of the 1996 Act, which provides for appeals. It is extracted hereunder:-

“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.”

13. On a careful reading of the aforesaid provision, it is limpid that appeal can lie if an order is passed refusing to refer the parties to arbitration as engrafted under Section 45 of the 1996 Act or to enforce a foreign award as envisaged under Section 48 of the said Act. Scheme of Section 50 came up for interpretation before this Court in *Shin-Etsu Chemical Company Ltd. (2) and others v. Vindhya Telelinks Ltd. and others*<sup>5</sup> wherein it has been ruled thus:-

“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 authorised 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”.

14. In the said case a contention was advanced relying on sub-Section (2) of Section 50 that though an appeal may not lie from an order passed in appeal, the right of appeal to the

Supreme Court having been specifically stated, the appellant therein could maintain an appeal before this Court. It was contended that the appellant had a right of appeal to this Court. The two-Judge Bench placing reliance on *Nirma Ltd. v. Lurgi Lentjes Energietechnik GmbH and another*<sup>6</sup>, *ITI Ltd. v. Siemens Public Communications Network Ltd.*<sup>7</sup>, *Shyam Sunder Agarwal & Co. v. Union of India*<sup>8</sup> and *Punjab Agro Industries Corporation Limited v. Kewal Singh Dhillon*<sup>9</sup>, held:-

“20. The right to appeal to the 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 the High Court the said question needs to be decided by the Supreme Court. The words “right to appeal” refer 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.

21. 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 the 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”.

15. Presently, we may refer to the decision in *P.S. Sathappan (dead) by Lrs. v. Andhra Bank Ltd. And others*<sup>10</sup>, wherein the Constitution Bench was considering the maintainability of the Letters Patent Appeal that arose from the High Court of Madras. The Court referred to various provisions of the Code of Civil Procedure, 1908 and certain clauses of the Letters Patent applicable to the Madras High Court and also referred to Clause 15 of the letters patent of the Bombay High Court and held that:-

“21. We are of the opinion that in reaching this conclusion the Court missed the relevant portion of clause 15 of the Letters Patent of the Bombay High Court. Reliance cannot, therefore, be placed on this judgment for the proposition that under clause 15 of the Letters Patent of the Bombay High Court no appeal to a Division Bench from the order of the Single Judge in exercise of appellate jurisdiction is maintainable.

22. Thus the unanimous view of all courts till 1996 was that Section 104(1) CPC specifically saved letters patent appeals and the bar under Section 104(2) did not apply to letters patent appeals. The view has been that a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. The express provision need not refer to or use the words “letters patent” but if on a reading of the

provision it is clear that all further appeals are barred then even a letters patent appeal would be barred”.

And again:-

“A Letters Patent is a special law for the High Court concerned. The Civil Procedure Code is a general law applicable to all courts. It is well-settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between the Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of the Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 of the Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 CPC only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100-A”.

16. In *Fuerst Day Lawson Limited (supra)*, the two-Judge Bench was dealing with the question whether an order, though not appealable under Section 50 of the 1996 Act would nevertheless be subject to appeal under the relevant provision of the Letters Patent of the High Court. In other words, even though the 1996 Act does not envisage or permit an appeal from the order, the party aggrieved by it can still have his way bypassing the said Act and taking recourse to another jurisdiction. To answer the said question the Court referred to various decisions in the field and culled out the broad principles which are reproduced below:-

“(i) Normally, once an appeal reaches the High Court it has to be determined according to the rules of practice and procedure of the High Court and in accordance with the provisions of the charter under which the High Court is constituted and which confers on it power in respect to the method and manner of exercising that power.

(ii) When a statute merely directs that an appeal shall lie to a court already established then that appeal must be regulated by the practice and procedure of that court.

(iii) The High Court derives its intra-court appeal jurisdiction under the Charter by which it was established and its powers under the Letters Patent were recognised and saved by Section 108 of the Government of India Act, 1915, Section 223 of the Government of India Act, 1935 and finally, by Article 225 of the Constitution of India. The High Court, therefore, cannot be divested of its Letters Patent jurisdiction unless provided for expressly or by necessary intendment by some special statute.

(iv) If the pronouncement of the Single Judge qualifies as a “judgment”, in the absence of any bar created by a statute either expressly or by necessary implication, it

would be subject to appeal under the relevant clause of the Letters Patent of the High Court.

(v) Since Section 104(1) CPC specifically saves the letters patent appeal; it could only be excluded by an express mention in Section 104(2). In the absence of any express mention in Section 104(2), the maintainability of a letters patent appeal is saved by virtue of Section 104(1).

(vi) Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred. The appellate jurisdiction of a superior court cannot be taken as excluded simply because a subordinate court exercises its special jurisdiction.

(vii) The exception to the aforementioned rule is where the special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words “letters patent” but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred”.

17. The Court thereafter referred to Section 50 of the 1996 Act and analysed the earlier decisions in the field including the judgment in *Union of India v. Mohindra Supply Co.*<sup>11</sup> wherein it has been held that the Letters Patent Appeal against an order passed by a Single Judge of the High Court in appeal under Section 39(1) of the Arbitration Act, 1940 was not maintainable in terms of sub-section (2) of Section 39 of the said Act. Though appeal was held not maintainable in view of the express language employed in sub-section (2) of Section 39 of the Arbitration Act, 1940, the two-Judge Bench took note of the observation which is to the following effect:-

“ . The proceedings relating to arbitration are, since the enactment of Arbitration Act 10 of 1940, governed by the provisions of that Act. The Act is a consolidating and amending statute. It repealed the Arbitration Act of 1899, Schedule 2 of the Code of Civil Procedure and also clauses (a) to f) of Section 104(1) of the Code of Civil Procedure which provided for appeals from orders in arbitration proceedings. The Act set up machinery for all contractual arbitrations and its provisions, subject to certain exceptions, apply also to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except insofar as the Arbitration Act is inconsistent with that other enactment or with any rules made thereunder.”

18. Relying on the said authority and also appreciating the decision of the Constitution Bench in *P.S. Sathappan* (supra) the Court ruled thus:-

“It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in *P.S. Sathappan*) 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”. In 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.”

19. The ultimate conclusion reached by the Court is to the following effect:-

“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.”

20. In the case at hand, the proceeding was initiated before the learned District Judge. During the pendency of the proceeding, the Explanation of sub-section (2) of Section 47 of the 1996 Act was amended. The amended Explanation reads as follows:-

“Explanation: In this section and in the sections following in this Chapter, “Court” means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.”

21. In spite of the amendment, the learned District Judge passed an order. However, the respondent moved the High Court and it was accepted by both the parties before the learned Single Judge that the District Judge had no jurisdiction and thereafter the learned Single Judge took up the matter and passed the order. The Division Bench in the impugned order has referred to Section 13(1) of the Act. It reads as follows:-

“13 (1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be:

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 as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996.”

22. On a perusal of the aforesaid provision, it is crystal clear that an appeal would lie if it is in accordance with the provisions of the Act. The said provision has to be read in conjunction with Section 5 of the Act. Section 5 of the Act reads as under:-

“5. (1) After issuing notification under sub-section (1) of section 3 or order under sub-section (1) of section 4, the Chief Justice of the concerned High Court shall, by order, constitute Commercial Appellate Division having one or more Division Benches for the purpose of exercising the jurisdiction and powers conferred on it by the Act.

(2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Appellate Division.”

23. The aforesaid provision clearly lays down that a forum is created, i.e., Commercial Appellate Division. Section 50(1)(b) of the 1996 Act provides for an appeal. Section 50(1)(b) has not been amended by the Act that has come into force on 23.10.2015. Thus, an appeal under Section 50(1)(b) of the 1996 Act before the Division Bench is maintainable.

24. Thus analysed, we find that the impugned judgment of the learned Single Judge under Section 50(1)(b) of the 1996 Act is passed in the original side of the High Court. Be that as it may, under Section 13 of the Act, the single Judge has taken the decision. Section 13 bars an appeal under Letters Patent unless an appeal is provided under the 1996 Act. Such an appeal is provided under Section 5 of the Act. The Letters Patent Appeal could not have been invoked if Section 50 of the 1996 Act would not have provided for an appeal. But it does provide for an appeal. A conspectus reading of Sections 5 and 13 of the Act and Section 50 of the 1996 Act which has remained unamended leads to the irresistible conclusion that a Letters Patent Appeal is maintainable before the Division Bench. It has to be treated as an appeal under Section 50(1) (b) of the 1996 Act and has to be adjudicated within the said parameters.

25. Resultantly, we affirm the judgment of the High Court though for different reasons. Accordingly the appeals stand dismissed without any order as to costs.

Judgment Referred.

<sup>1</sup>(2016) SCC ONLINE BOM 0255

<sup>2</sup>(2011) 8 SCC 0333

<sup>3</sup>(2005) 2 SCC 0591

<sup>4</sup>(2011) SCC Online Bom 1379

<sup>5</sup>(2009) 14 SCC 0016

<sup>6</sup>(2002) 5 SCC 0520

<sup>7</sup>(2002) 5 SCC 0510

<sup>8</sup>(1996) 2 SCC 0132

<sup>9</sup>(2008) 10 SCC 0128

<sup>10</sup>(2004) 11 SCC 0672

<sup>11</sup>AIR 1962 SC 0256: (1962) 3 SCR 0497