

CASE NO.:
Appeal (civil) 981-983 of 2000

PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
ARADHANA TRADING CO & ORS.

DATE OF JUDGMENT: 01/04/2002

BENCH:
B.N. Kirpal, K.G. Balakrishnan & Brijesh Kumar

JUDGMENT:

BRIJESH KUMAR, J.

These appeals arise out of the Judgment and Order dated 19.3.1999 passed by the Division Bench of Calcutta High Court in a bunch of appeals preferred by the present appellant before us. We have heard the learned counsel for the parties. The main question that falls for our consideration in these appeals is about the maintainability of appeal before the Division Bench against the judgment and order of the learned Single Judge of the Calcutta High Court, rejecting the application under order 9 Rule 13 CPC for setting aside the ex-parte decree making the Award Rule of the Court. The other question is as to whether the High Court was justified in entertaining the proceedings for making the award Rule of the Court since the District Courts of Asansol had also been moved by the appellant to issue notice to the Arbitrator, under Section 14(2) of the Arbitration Act 1940, for filing of the award in the Asansol Court.

It appears that the appellant, namely the Union of India entered into agreements with the respondents for supply of certain items to the Railways viz Chittranjan Locomotives. After the supplies, the Department felt that the bills of exorbitant amount were being raised by the respondents and an enquiry was also set up in that connection. Since however, payments were not being made, the respondents filed writ petitions in Calcutta High Court for direction to the Government to make payment of bills. The High Court passed a common order dated 24.11.1995 in the writ petitions, directing the General Manager to appoint arbitrators to settle the disputes, consequently on December 12, 1995 four Arbitrators were appointed. Parties filed their respective claims before the Arbitrators and put forth their pleas and placed the interim report of the Committee regarding rates of 42 items involved in various purchases made under different agreements. Since the time to make the Award had expired, the High Court on being approached by the parties, extended time with their consent; for a period of two months, by order dated 4.2.1997. The Awards were published by Arbitrators on 14.8.1997 sending notices of the same to the parties. The Awards had been filed by the Arbitrators in the Calcutta High Court on 11.11.1997. Notices of the filing of the Award had also been issued by the High Court which were served upon the appellants on 11.12.1997. The appellants did not

file any objection against the Award. The case was fixed on 27.1.1998. It appears that nobody appeared on behalf of the Appellant despite notice and since no objections too, were preferred by them against the award, the High Court passed Decree in terms of the Award making the same Rule of the Court. The Appellant moved an application on 24.2.1998 for recalling the order dated 27.1.1998 passed by the High Court, explaining its absence on the date of hearing and stating that it had moved an application on 29.9.1997 under section 14(2) of the Arbitration Act 1940 before the Assistant District Judge, Asansol, praying for a direction to the Arbitrators to file Awards in the Asansol Courts, therefore awards could not be filed in the High Court..

It may be noted that no appeal was preferred against order and decree dated 27.1.1998 passed by the learned Single Judge. The High Court however, dismissed the application by order dated 23.4.1998, finding that since no objections were filed against the Award, the Court had to pass the Orders making the Award Rule of the Court in accordance with Section 17 of the Arbitration Act. It had also been observed that Decree cannot be said to have been passed ex-parte as it was with due notice to the appellant and that on passing of the order according to Section 17 of the Arbitration Act, the Court had become functus officio. It was also found that Award was rightly filed in High Court. The appellant then filed appeals before the Division Bench against the order dated 23.4.1998 passed by the Single Judge. The Division Bench dismissed the appeals repelling the objections that the High Court could not entertain the matter and also found that the appeal was not maintainable before the Division Bench against the order of Single judge of the High Court.

Coming to the question as to whether the arbitrators could file the award under Section 14 (2) of the Arbitration Act 1940 in the High Court of Calcutta or not, it has been submitted on behalf of the appellant that the subject-matter of arbitration viz. supplies, have been made to Chitrangan Locomotive which is situate in District of Asansol. Therefore, it was only appropriate for the arbitrator to have filed the award in the District Court of Asansol. A reference has again been made to the application dated 24.9.1997 moved before the Assistant District Judge, Asansol for directions to the Arbitrators requiring them to file the award in original along with all records and documents within the time as may be fixed by the Court in Asansol. It has nowhere been indicated by the appellant that the Court of Assistant District Judge, Asansol had ever issued any notice on the aforesaid application or any direction to the Arbitrators as prayed. On the other hand, the award was undisputedly filed in the High Court on 11.11.1997 in respect whereof notice was issued, which was received by the appellant on 11.12.1997. Despite service of notice, the appellant did not seem to have moved any application informing the High Court or the respondents that they had already moved any application before Assistant District Judge, Asansol for a direction to the Arbitrators to file the award in that Court or indicating any reservation about filing of the award in the High Court.

Besides the above, it is to be noticed that the Arbitrators were appointed in pursuance of an order passed by the High Court on the writ petitions filed by the respondents as a consequence whereof the Arbitrators proceeded in the matter and finally published the award. On two occasions earlier, the parties including the appellant had approached the High Court only for extension of time for making the award. The orders were passed by the High Court on 24.2.1997 and 28.7.1997 extending the time that is to say much before the appellant moved application in the

Court of the Assistant District Judge, Asansol for a direction to the Arbitrator to file the award in Asansol. In the above circumstances, it is too late in the day for the appellant to turn around and say that the High Court of Calcutta could not entertain the filing of the award and to proceed with making it a rule of the court. Needless to mention that Calcutta High Court exercises its original civil jurisdiction as well. Therefore, perhaps the appellant has not come up with the case that there was any inherent lack of jurisdiction in the High Court of Calcutta to entertain such suit or proceedings. As indicated earlier the appellant itself had submitted to the jurisdiction of the High Court while moving application for extension of time under Section 28 of the Arbitration Act. We therefore do not find any fault in the finding of the High Court negating the plea raised by the appellant that Arbitrators should have filed the Award in the Asansol courts and not in the High Court.

We may next consider the nature of the application moved by the appellant for recalling the order dated 27.1.1998 passed by the learned Single Judge of the Calcutta High Court. The application dated February 24, 1998 does not indicate the provision of law under which it was moved. The averments made in the application are to the effect that the appellant had received a notice from the Registry of the High Court in the original civil jurisdiction informing that January 21, 1998 was fixed in the case. The case however, it is stated, was fixed on 22.1.1998. The counsel for the appellant remained in the Court concerned throughout the day but the matter was not taken up. The next date fixed was January 27, 1998 on which date also the counsel for the appellant was present in Court up to 12 Noon whereafter he got engaged in another Court. Therefore, he could not be present at the time when the case was called out and the order was passed by the Court. The counsel for the appellant made a mention about the matter in the Court on 4.2.1998 and later moved an application in that behalf stating that there was sufficient ground for not being present at the time, the matter was called upon on 27.1.1998 and ex- parte order was passed. The following prayers were made in the application:

a) The order dated 27th January 1998 passed ex- parte may be recalled;

b) Case may be restored to its file and may be fixed for hearing as "Judgment upon Award" in suitable date which is convenient for your lordship so that the petitioner may take necessary steps to challenge the Award;

c) Any other order or orders as your lordships may deem fit and proper"

It is submitted that it would be treated as an application under Order IX, Rule 13 C.P.C. in view of Section 41 of the Arbitration Act which reads as under:

"41. Procedure and powers of the Court. Subject to the provisions of this Act and of rules made thereunder

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and

in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."

It is thus submitted that subject to the provisions of the Arbitration Act, provisions of the Code of Civil Procedure would apply to all proceedings before the Court and the appeals under the Act. Even taking it to be so, the rival contention of the Respondents is that no appeal will lie against the order of the Single Judge dated 23.4.1998 rejecting the application. Section 39 of the Arbitration Act enumerates the orders against which alone an appeal would lie and against no other order. Section 39 of the Arbitration Act 1940 reads as under:

"39. Appealable orders. (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decree of the Court passing the orders:-

An order

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award.

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed under this section but nothing in this section shall affect or take away any right to appeal to [the Supreme Court]".

We find that prohibition against appeal is provided in two ways one where it is indicated that appeal would lie against given orders and from no other orders and secondly under sub-section (2) of Section 39 that no second appeal shall lie from an order passed in appeal under Section 39 of the Arbitration Act. In the alternate, the Appellants' contention is that in any case a Letters Patent Appeal would lie against the original orders of the Single Judge of the High Court to a Division Bench. A number of decisions have been relied upon by the learned counsel for the parties in support of their rival contentions.

Learned counsel for the Respondents has placed reliance upon a decision reported in 1962 (2) S.C.R. 551 Neeilkantha Shidramappa Ningashetti versus Kashinath Somanna Ningashetti and others. It is a decision by a Bench of Four Judges. The parties knew about the filing of the award in the Court and on the date fixed the case was adjourned for "the parties' say to

the arbitrator's report". No notice in writing was issued by the Court of the filing of the award or objections thereto. The objections were filed late beyond the time prescribed by limitation. The court made the award rule of the Court. The plea which was taken was that the period of limitation would start from the date of service in writing of filing of the award. Such a contention was not accepted by the court and it was held that notice in writing was not necessary as the information to the parties of the award having been filed and date adjourned for their say to the arbitrator's report was sufficient notice. It was held that award was not liable to be set aside and no appeal was maintainable under Section 39(1) (vi) of the Arbitration Act. In *State of West Bengal versus Gourangalal Chatterjee* 1993 (3) S.C.C. 1 the appeal under Section 39 was held to be not maintainable against an order passed by the Single Judge appointing a new arbitrator since the order was not covered under any of the clauses of Section 39 nor even Letters Patent Appeal was held to be maintainable. In *Union of India versus Mohindra Supply Company* 1962 (3) S.C.R. 497, a decision by a Bench of Four Judges, held that Section 39 applies to the appeals to superior courts as well as to intra-court against the decree passed in terms of the award but against the order passed in appeal, a Letters Patent Appeal was held to be barred under sub-section (2) of Section 39 of the Arbitration Act according to which no second appeal lies against an order passed under Section 39(1) of the Act. It was further held that in view of the said provision, appeal under Section 100 CPC was also prohibited. We, however, find that so far as this case is concerned, it stands on a different footing since in the present case it is not a further appeal or a second appeal but an appeal against an order passed by the learned Single Judge under Order IX Rule 13 CPC. It would however be relevant for the purpose that restriction on appeal under Section 39 of Arbitration Act shall be applicable to appeals under any provision of law, may be CPC or Letters Patent.

So far the appellants are concerned they placed reliance on a case reported in 1953 S.C.R. 1028 *National Sewing Thread Company Limited versus James Chadwick & Bros Ltd.* It is a decision by a Three Judge Bench. In this case the proceedings related to the Trade Marks Act containing a provision of appeal to the High Court under Section 76 (1) of the Act against an order of the Registrar. It however contained no provision regarding procedure to be followed by the High Court or as to whether the order passed by the High Court was further appealable or not. It was held that the High Court was to exercise the appellate power in the same manner as it exercises its other appellate jurisdiction and where such jurisdiction was exercised by a Single Judge, his judgment was appealable under clause 15 of the Letters Patent. The Court relied upon (1913) A.C. 546 quoting therefrom "When a question is stated to be referred to established Court without more Ordinary instance of the procedure of that court are to attach and also that any general right of appeal from its decision like-wise attaches." It also refers to (1947) 74 I.A. Page 264 quoting, "Where a legal right is in dispute and the ordinary courts of the country are seized of such dispute, the courts are governed by the ordinary rules of procedure applicable there to and an appeal lies if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute, which does not, in terms confer a right of appeal". In *Union of India and others versus Manager, M/s. Jain & Associates* 2001 (3) SCC 277 it was held that by virtue of Section 41 of the Arbitration Act, Order IX of the C.P.C. would be applicable and an application under Order IX, Rule 13 CPC would lie and delay could be condoned under Section 5 of the Limitation Act in filing objections under Section 30 of the Arbitration Act. The refusal to condone the delay

amounts to refusal to set aside the award and the orders become appealable under Section 39 (1)(vi) of the Act. A similar view was taken in Essar Constructions versus Ramakrishna Reddy 2000 (6) S.C.C. 94.

On behalf of the appellant, reliance has also been placed in Vinita M. Khanolkar versus Pragna M. Pai and others 1998 (1) S.C.C. 500. In this case the High Court had passed an order in exercise of its original jurisdiction under Section 6 of the Specific Relief Act. An appeal filed before the Division Bench was held to be maintainable under Clause 15 of the Letters Patent as it was held that such powers are vested in the High Courts of Madras, Bombay and Calcutta which are not whittled down by statutory provisions of Section 6 (3) of the Specific Relief Act. It was observed that power is in pursuance of Section 108 of the Govt. of India Act. It is a decision by a Bench of two learned Judges.

So far the question as to whether the order passed by the learned Single Judge rejecting the application for recalling/setting aside ex parte order dated 27.1.1998 is concerned, it cannot be treated as an order refusing to set aside the award. This position would stand covered by the decision in the case of Neeilkantha Shidramappa Ningashetti (supra) as it has been held if there was no objection before the court for setting aside the award, no question of refusal to set it aside could arise. Hence no appeal under Section 39(1)(vi) of the Arbitration Act would be maintainable. The ground of challenge of the award was that the limitation to file the objection was to run with effect from the date of service of a written notice for filing of the objection which contention was repelled by the Bench consisting of four Hon'ble Judges holding that the knowledge of the appellant of the award having been filed and time allowed to file objections was sufficient notice. In the present case also it is to be found that no objections to the award had been filed despite due notice and nor even subsequently while counsel is said to have been attending the court on two dates fixed in the case. In this view of the matter it would not be necessary to go into other aspect of the matter or the view taken in some other cases as referred to in the earlier part of the judgment. Some cases, a reference of which has been made earlier relate to the question of maintainability of a second appeal in Letters Patent against the appellate order passed under Section 39 (1) of the Arbitration Act as in the case of Mohindra Supply Company (supra) where the Bench of four Hon'ble Judges held that in view of clause (2) of Section 39 of the Arbitration Act, an appeal against an appellate order under the Letters Patent was not maintainable. The restriction to appeal contained under sub-sec. (2) of Section 39 was applicable to Letters Patent. So restriction contained under sub-sec.(1) of Sec.39 of Arbitration Act shall also be applicable.

The question which thus remains to be considered is as to whether an order passed on an application making the prayer like one which could be referable to Order IX, Rule 13 CPC would be appealable or not. Such an application could be made by virtue of Section 41 of the Arbitration Act. An order under Order IX, Rule 13 CPC is appealable under Order 43, clause (c) read with Section 104 CPC. In the case of National Sewing Thread Co. Ltd. (supra), a decision by a Bench of Three Hon'ble Judges, the matter related to Trade Marks Act Section 76(1) of which provided for an appeal against a decision of the Registrar under the Act to the High Court but no further provision in regard to the procedure to be applied was made. An appeal against the order of the Registrar was decided by a learned Single Judge of the High Court against which a Letters Patent Appeal was filed which was held to be maintainable even though no such provision of further appeal was

made under the Trade Marks Act. As indicated earlier the Court in the above-noted case has relied upon certain decision and held as follows:

"Though the facts of the cases laying down the above rule were not exactly similar to the facts of the present case, the principle enunciated therein is one of general application and has an apposite application to the facts and circumstances of the present case. Section 76 the Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized at such of the appellate jurisdiction conferred by section 76 it has to exercise jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a Single Judge, his judgment becomes subject to appeal under clause 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act"

In view of what has been held above a Court while exercising power by virtue of Section 41 of the Arbitration Act shall have all other related powers of the ordinary civil court subject to the constraints contained in the special Act itself. Normally, an appeal would be maintainable but there are two constraints as provided under the Special Act, namely, it should not be a second appeal as provided under sub-section (2) of Section 39 of the Act which position is also clear in the case of Mohindra Supply Company (supra) where it was held that the second appeal under Section 100 CPC or under the Letters Patent against an appellate order was barred by virtue of sub-section (2) of Section 39. Here we find that there is yet another constraint as provided under sub-section (1) of Section 39 of the Arbitration Act itself and it is emphatic too when it says that appeal shall lie against the orders indicated in the provision and from no other order. Section 41 of the Arbitration Act makes the provisions of CPC applicable subject to the provisions of the Arbitration Act and the rules framed thereunder. Therefore, the nature of an order against which an appeal may lie must conform to the nature of the order as enumerated under sub-section (1) of Section 39 of the Arbitration Act. If it does not amount to such an order as enumerated under sub-section (1) of Section 39, the prohibition as contained in this sub-section "(against no other order)" itself, would become operative, subject to which alone provisions of CPC apply under Section 41 of the Act. In the facts of the present case we find that an order refusing to recall an order passed by the court will not amount to refusal to set aside the award under clause (vi) of sub-section (1) of Section 39 of the Arbitration Act as no objections to set aside the award have ever been filed with or without application for condonation of delay, challenging the award. Admittedly, the appellant did not file any appeal against the order dated 27.1.1998. In these circumstances and in view of the provisions of the Arbitration Act, the decision in the case of National Sewing Thread Co. Ltd. (supra) shall also not be applicable as in the Trade Marks Act with which the court was dealing, did not have any provision like the one contained in sub-section (1) of Section 39 of the Arbitration Act restricting the right of appeal only in respect of certain nature of orders and prohibiting appeal against any other order whatsoever. Therefore, in the case of National Sewing Thread Co. Ltd. (supra) it was held that where a provision for appeal was made under Section 76 (1) of the Trade Marks Act to the High Court, with nothing more, the other provisions relating to exercise of that jurisdiction by the High Court would be applicable. The case of National Sewing Thread Co. Ltd. (supra) is thus based on different provisions and

is clearly distinguishable. The case in hand is covered by the decisions in the cases of Neeilkantha (supra) and Mohindra Supply Co.both decided by Bench of four Judges which do not seem to have been noticed in other judgments.

In view of the discussion held above, we find no force in the appeals and they are dismissed. There would however be no order as to costs.

-----J
(B.N. Kirpal)

-----J
(K.G. Balakrishnan)

-----J
(Brijesh Kumar)

April 01, 2002

JUDIS