

CASE NO.:
Appeal (civil) 1062 of 2003

PETITIONER:
Municipal Corporation of Delhi & Ors.

RESPONDENT:
Intl. Security & Intelligence Agency Ltd.

DATE OF JUDGMENT: 06/02/2003

BENCH:
R.C. LAHOTI, BRIJESH KUMAR & ARIJIT PASAYAT.

JUDGMENT:

JUDGMENT

[Arising out of SLP(C) No.20508/2002]

WITH

CIVIL APPEAL NO. 1063/2003
[Arising out of SLP(C) No.20511/2002]

R.C. Lahoti, J.

Leave granted in both the SLPs.

The respondent-International Security and Intelligence Agency Ltd. entered into a contract with the Municipal Corporation of Delhi whereby the former undertook to provide security services etc. to the latter. The agreement contained an arbitration clause obligating the parties to have the disputes arising between them and referable to the contract determined by reference to arbitration under the provisions of the Arbitration Act, 1940, hereinafter 'the Act', for short.

It appears that originally when the agreement was entered into between the parties the respondents were a sole proprietary concern and the appellant no.1 was an institution known as Delhi Development Authority (Slum Wing). Subsequently, the respondents, the sole proprietary concern, was taken over by a private limited company as the respondents presently are while the DDA (Slum Wing) was taken over by the Municipal Corporation of Delhi. Whether or not the arbitration clause incorporated in the contract entered into between the parties as they were then, would be binding on and available to be invoked by the present parties, was the subject matter of controversy raised by the appellants but we need not enter into the details thereof inasmuch as that is irrelevant for adjudicating upon the neat questions of law arising for decision in these appeals.

Disputes arose between the parties and on a petition under Section 8 of the Act filed by the respondents, the Court directed the same to be determined through arbitration by a retired Judge of the High Court. The order of the Court appointing the arbitrator and referring the disputes for determination by him achieved a finality as the appellants did not file any appeal thereagainst and both the parties submitted to the jurisdiction of the arbitrator. On 14.3.1997, the arbitrator gave an award. The award is a non speaking one. The arbitration agreement between the parties does not require the arbitrator to make a reasoned award. The respondents filed an application under Section 14 of the Act for making the award a rule of the Court. On 26.5.1997, objections were filed by the appellants seeking setting aside of the award. Though the objection petition is

styled as one under Sections 30 and 33 (both) of the Act, a perusal of the contents of the objection petition shows that all the objections raised therein fall within the scope of Section 30 of the Act. During the pendency of the hearing on the said objection petition, on 20.1.2000 the appellants filed another objection petition styled as one under Section 33 of the Act wherein for the first time a plea was raised that so far as the respondents company is concerned it was not a party to the contract and therefore appointment of arbitrator at its instance and all the subsequent proceedings upto the date of making of the award were without jurisdiction and nullity and were liable to be adjudged so. By judgment dated 17.1.2001, the Court directed the objection raised on behalf of the appellants to be dismissed and the award to be made a rule of the Court. A decree in terms of the award as upheld by the judgment was later drawn up and dated as 17.1.2001.

On 20.2.2001, the respondents moved an application seeking review of the judgment. The judgment and the decree drawn up did not award future interest on the decretal amount to the respondents and the only relief sought for in the review petition was to suitably modify the operative part of the judgment and the decree so as to include therein a direction for payment of interest from the date of decree till realization of the decretal amount. On 25.9.2001, the learned single Judge directed the review petition to be dismissed.

On 8.10.2001, the respondents filed an appeal before the Division Bench of the High Court feeling aggrieved by the judgment and decree dated 17.1.2001. Condonation of delay in filing the appeal by excluding the time lost in prosecuting the review petition was sought for. A perusal of the memo of appeal shows that the only relief sought for in the appeal was for a suitable modification in the decree so as to include therein direction to pay future interest from the date of decree till realization. On 27.10.2001, the appellants too filed an appeal against the judgment and decree dated 17.1.2001 laying challenge to the order of the original court rejecting the objection petition filed by it and directing the award to be made a rule of the Court. The appeal was filed with a delay of 230 days. The appellants sought for condonation of delay in filing the appeal on the ground that it was awaiting the result of review petition and was persuaded to file an appeal because of the respondents having filed an appeal. The cause assigned by the appellants for seeking condonation of delay did not apparently amount to sufficient cause within the meaning of Section 5 of the Limitation Act. When the matter came up for hearing, the appellants submitted that the memo of appeal filed on 27.10.2001, if barred by time and hence not maintainable as an appeal, could still be treated as a cross objection under Order 41 Rule 22 of the CPC which having been filed within the prescribed period of limitation for filing cross objection the same deserved to be heard and decided on merits along with the first appeal filed by the respondents herein.

On 12th July, 2002, the first appeal filed by the appellants has been directed to be dismissed by the Division Bench as barred by time consequent upon the dismissal of its application under Section 5 of the Limitation Act. Feeling aggrieved by the judgment dated 12.7.2002, SLP(C) 20508/2002 has been filed by Municipal Corporation of Delhi.

Subsequently by an order dated 20th September, 2002, the first appeal filed by the respondents has been directed to be dismissed by the Division Bench as not maintainable on the Division Bench forming an opinion that the order put in issue by the respondents (herein and appellant in the High Court) and the relief sought for in appeal did not fall within the purview of clauses (i) to (vi) of sub-Section(1) of Section 39 of the Act and, therefore, the appeal was not maintainable and was incompetent.

On the respondents taking out execution of the decree based on award, the appellants preferred an objection petition under Section 47 of the Code of Civil Procedure before the Executing Court submitting that in the absence of any arbitration agreement between the parties, the reference to arbitration, the award and the decree incorporating the award were all invalid and hence the decree was not executable. By order dated 5.3.2002 the Executing Court over ruled the objection. Feeling aggrieved thereby, the appellants preferred an appeal before the High Court which has been dismissed by the High Court as devoid of any merit vide its decision dated 12th July, 2002. SLP(C) No.20511/2002 impugns the decision dated 12.7.2002 of the High Court.

It is not disputed by the learned senior counsel for the parties that so far as appeal filed by the respondents before the Division Bench is concerned, the same was not maintainable under Section 39 of the Act and has, therefore, been rightly dismissed as not maintainable. Two questions arise for decision in these appeals: firstly, whether in an appeal under Section 39 of the Arbitration Act, 1940, a respondent has a right to file cross objection and, if so, whether the cross objection must be heard and decided on merits though the appeal by reference to which cross objection has been filed is itself dismissed as not maintainable?

When the matter came up for hearing before a two-Judge Bench of this Court, reliance was placed on behalf of the respondents on *Superintending Engineer & Ors. Vs. B. Subba Reddy*, (1999) 4 SCC 423, wherein a two-Judge Bench of this Court has held that cross objection in an appeal under Section 39 of the Arbitration Act are not maintainable. On 09.12.2002, the two-Judge Bench entertaining some doubt about the correctness of the view taken in *B. Subba Reddy's* case deemed it proper for this appeal to be placed for hearing before a three-Judge Bench.

We have heard Dr. K.S. Sidhu, Senior Advocate for the appellants and Mr. R.F. Nariman, Senior Advocate for the respondents. We answer the questions posed before us as under.

Competence and maintainability of cross objections in an appeal preferred under Section 39 of the Arbitration Act, 1940?

Sections 39 and 41 of the Act and Rule 22 of Order 41 of the Code of Civil Procedure provide as under:

"Arbitration Act, 1940

Sec.39 Appealable orders — (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order: —

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 in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Sec. 41. Procedure and powers of court. — Subject to the provisions of this Act and of rules made thereunder

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 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 of any of such matters.

Order XLI Rule 22 of CPC :

22. Upon hearing respondent may object to decree as if he had preferred separate appeal. — (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Form of objection and provisions applicable thereto. — Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgement from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."

Right of appeal is creature of statute. There is no inherent right of appeal. No appeal can be filed, heard or determined on merits unless the statute confers right on the appellant and power on the Court to do so. Section 39 of the Act confers right to file appeal, in so far as the orders passed under this Act are concerned, only against such of the orders as fall within one or other of the descriptions given in clauses (i) to (vi) of sub-Section (1) of Section 39. The Parliament has taken care to specifically exclude any other appeal being filed, against any order passed under the Act but not covered by clauses (i) to (vi) abovesaid, by inserting the expression "and from no others" in the text of sub-Section (1). Clause (a) of Section 41 extends applicability of all the provisions contained in the Code of Civil Procedure, 1908 to (i) all proceedings before the Court under the Act, and (ii) to all the appeals, under the Act. However, the applicability of such of the provisions of the Code of Civil Procedure shall be excluded as may be inconsistent with the provisions of the Act and/or of rules made thereunder. A bare reading of these provisions show that in all the appeals filed under Section 39, the provisions of the Code of Civil Procedure, 1908 would be applicable. This would include the applicability of Order 41 including the right to take any cross objection under Rule 22 thereof to appeals under Section 39 of the Act.

Right to prefer cross objection partakes of the right to prefer an appeal. When the impugned decree or order is partly in favour of one party and partly in favour of the other, one party may rest contented by his partial success with a view to giving a quietus to the litigation. However, he may like to exercise his right of appeal if he finds that the other party was not interested in burying the hatchet and proposed to keep the lis alive by pursuing the same before the appellate forum. He too may in such circumstances exercise his right to file appeal by taking cross objection. Thus taking any cross objection to the decree or order impugned is the exercise of right of appeal though such right

is exercised in the form of taking cross objection. The substantive right is the right of appeal; the form of cross objection is a matter of procedure.

Though the statement of law made hereinabove flows simply by the reading of the relevant statutory provisions yet some available decisions may also be noticed. In Bhadurmal Vs. Bizaatunnisa Begum & Ors., AIR 1964 AP 365, a Division Bench presided over by Jaganmohan Reddy, J. (as His Lordship then was) held cross objection to be maintainable in an appeal preferred under Sections 47 to 49 of Hyderabad Jagirdars Debt Settlement Act, 1952 because the provisions of Civil Procedure Code were generally applicable by virtue of Section 51 thereof. The applicability of Order 41 Rule 22 of the appeals under that Act was held not excluded merely because provisions governing grounds of appeal and court fees were specifically enacted in the Hyderabad Act. In Inayatullah Khan Vs. Diwanchand Mahajan & Ors., AIR 1959 M.P. 58, Chief Justice M. Hidayatullah (as His Lordship then was) upheld maintainability of cross objection in an election appeal under Section 116A of the Representation of the People Act, 1951 because the High Court as an Appellate Court hearing an appeal under Section 116A was enjoined to exercise the same powers, jurisdiction and authority and to follow the same procedure as it would have exercised or followed in respect of a civil appeal under the Code of Civil Procedure. In Ramasray Singh & Ors. Vs. Bibhisan Sinha & Ors., AIR 1950 Calcutta 372, the Division bench consisting of Harries, CJ and Bachawat, J. (as His Lordship then was) held that conferment of right of appeal by Section 38 of Bengal Money-Lenders Act, 1940 which spoke of the order being appealable in the same manner as if it were a decree of the court implied a right in the respondent to file cross objection inasmuch as the jurisdiction to hear appeal was conferred on a pre-established Civil Court namely the Court of the District Judge and nothing was expressly stated as to the procedure regulating such appeal. In A.L.A. Alagappa Chettiar Vs. Chockalingam Chetty & Ors., AIR 1919 Madras 784, a Full Bench of the High Court of Madras presided over by Wallis, C.J. held that right of respondent to proceed by way of memorandum of cross objections was strictly incidental to the filing of appeal by opposite party and therefore in an appeal under Sections 46 and 47 of the Provincial Insolvency Act, 1907 cross objections were maintainable as the procedure prescribed in the Civil Procedure Code is the standard procedure and applicable to courts exercising powers in insolvency cases.

With advantage, we may also refer to observations of this Court made in Shri Baru Ram Vs. Smt. Prasanni & Ors., 1959 SCR 1403. Section 116A of the Representation of the People Act, 1951 contemplates an appeal being laid before the Supreme Court from every order made by High Court under Section 98 or Section 99 of that Act. Section 116C provides for every such appeal being heard and determined by the Supreme Court as nearly as may be in accordance with the procedure applicable to the hearing and determination of any appeal from any final order passed by the High Court in exercise of its original civil jurisdiction subject to the provisions of that Act and the Rules, if any. All the provisions of the Code of Civil Procedure, 1908 and rules of the Court shall, so far as may be, apply in relation to such appeal. P.B. Gajendragadkar, J. (as His Lordship then was) speaking for the Court observed — "There is no doubt that, in an ordinary civil appeal, the respondent would be entitled to support the decree under appeal on grounds other than those found by the trial court in his favour. Order 41, Rule 22 of the Code of Civil Procedure which permits the respondent to file cross-objections recognizes the respondent's right to support the decree on any of the grounds decided against him by the court below. In the present case no appeal could have been preferred by respondent 1 because she had succeeded in obtaining the declaration that the

appellant's election was void and it should therefore be open to her to support the final conclusion of the High Court by contending that the other finding recorded by the High Court which would go to the root of the matter is erroneous. Prima facie there appears to be some force in this contention." However, the Court did not express any final opinion thereon as it was considered not necessary to decide the point in that appeal.

We have, therefore, no doubt in our mind that right to take a cross objection is the exercise of substantive right of appeal conferred by a statute. Available grounds of challenge against the judgment, decree or order impugned remain the same whether it is an appeal or a cross-objection. The difference lies in the form and manner of exercising the right; the terminus a quo (the starting point) of limitation also differs.

In *Superintending Engineer & Ors. Vs. B. Subba Reddy* (supra) a two-Judges Bench of this Court observed (vide para 24) "if there is no right of cross-objection given under Section 39 of the Act, it cannot be read into Section 41 of the Act. Filing of cross objection is not procedural in nature. Section 41 of the Act merely prescribes that the procedure of the Code would be applicable to the appeal under Section 39 of the Act. We are, therefore, of the opinion that cross objection by the respondent was not maintainable." Such observation is not correct and proceeds on certain wrong premises. Firstly, form of cross objection is procedural and is only a manner of exercising right of appeal which is substantive, as we have already stated. Secondly, it is not merely the procedure prescribed by the Code of Civil Procedure which has been made applicable to proceedings under the Arbitration Act by Section 41 (a) of the Act; the entire body of the Code of Civil Procedure, 1908 has been made applicable to all proceedings before the Court and to all appeals under the Arbitration Act, 1940. The provision is general and wide in its applicability which cannot be curtailed; the only exception being where the provisions of the Arbitration Act and/or of rules made thereunder may be inconsistent with the provisions of the Code of Civil Procedure, 1909 in which case the applicability of the latter shall stand excluded but only to the extent of inconsistency. We may hasten to add that to the extent of our disagreement with the law laid down in *B. Subba Reddy's* case, the proposition appears to have been rather widely stated in that case. In fact the question before the Court in *B. Subba Reddy's* case was whether cross objection seeking the relief of award of interest at a higher rate was maintainable though such an order did not fall within the purview of Section 39(1) of the Act.

Once we hold that by taking cross objection what is being exercised is the right of appeal itself, it follows that the subject-matter of cross objection and the relief sought therein must conform to the requirement of Section 39(1). In other words, a cross objection can be preferred if the applicant could have sought for the same relief by filing an appeal in conformity with the provisions of Section 39(1) of the Act. If the subject-matter of the cross objection is to impugn such an order which does not fall within the purview of any of the categories contemplated by clauses (i) to (vi) of sub-Section (1) of Section 39 of the Act, the cross objection shall not be maintainable.

Effect on cross objection if the appeal itself is held not competent or not maintainable?

What happens to cross objections if the appeal itself is found to be incompetent or not maintainable? Sub-Rule (4) of Order 22 of the CPC provides for only two situations in which the cross objection may be heard in spite of the original appeal having not been heard on merits. These situations are two: (i) the original appeal being

dismissed as withdrawn, (ii) the original appeal being dismissed for default (default in appearance or any other default). Just as the enabling provisions of cross objection contained in sub-Rule (1) of Order 22 of the CPC are applicable to appeals under Section 39 of the Act the disabling provision contained in sub-Rule (4) too would apply to appeals under Section 39 of the Act in view of the generality of the provisions contained in Section 41 of the Act. To put it briefly, if the Appellate Court forms an opinion that the original appeal itself was incompetent or not maintainable as it was filed against an order not falling within one of the clauses (i) to (vi) of sub-Section (1) of Section 39 then the cross objection shall also fall to the ground and cannot be adjudicated upon on merits. It has to be remembered that law of limitation operates with all its rigour and equitable considerations are out of place in applying the law of limitation. The cross-objector ought to have filed appeal within the prescribed period of limitation calculated from the date of the order if he wished to do so. Having allowed that opportunity to lapse he gets another extended period of limitation commencing from the date of service of the notice of the appeal enabling him putting in issue for consideration of the Appellate Court the same grounds which he could have otherwise done by way of filing an appeal. This extended period of limitation commences from the date of service of the notice of appeal and such notice ought to be in a valid or competent appeal.

If the appeal cannot be heard on merits for the reason that it was no appeal in the eye of law, service of notice in such appeal would not furnish cause for commencement of a new period of limitation for filing appeal in the form of cross objection. The only exception in which the cross objection can still be heard is one where the memo of cross objection can be said to have been filed within the period prescribed for filing an original appeal against the impugned order and the memo also independently satisfies all the requirements of a memo of appeal. Just as a belated or time-barred memo of cross-appeal can be treated — and taken up for consideration — as cross objection subject to its satisfying the requirements of cross-objection memo so also a cross-objection can be treated as cross-appeal and heard as such subject to its satisfying the requirements as to maintainability of an appeal with regard to limitation and otherwise.

Illustratively, we may refer to some judicial opinion as to non-maintainability of cross objections consequent upon the non-maintainability of the original appeal. In *M/s. Malhati Tea Syndicate Limited Vs. Revenue Officer, Jalpaiguri & Ors.*, AIR 1973 Calcutta 78, a Division Bench of Calcutta High Court presided over by P.B. Mukherji, CJ (as His Lordship then was) held the cross objection liable to fail in view of the original appeal itself failing in view of its having been filed in the name of a company which was no longer in existence. In *Dhani Ram Vs. Smt. Sushila Devi*, AIR 1977 HP 83, R.S. Pathak, CJ (as His Lordship then was) held that though Order 41 Rule 22 speaks of an appeal, it contemplates a valid appeal which ordinarily calls for consideration on its merits. It is such an appeal the pendency of which would entitle the respondent to file a cross objection. An appeal which is barred by time is not a valid appeal and the cross objections too shall have to be rejected. In *Chanchalgauri Ramanlal & Ors. Vs. Narendrakumar Chandulal & Ors.*, AIR 1986 Gujarat 55, a Division Bench presided over by Hon'ble the Chief Justice held that a cross objection filed in a validly instituted appeal against a decree is as good as an appeal and shall have to be disposed of on merits but if an appeal does not lie any cross objection in such an appeal would not call for adjudication on merits. In *Charity Commissioner Vs. Padmavati & Ors.*, AIR 1956 Bombay 86, Chagla, CJ speaking for the Division Bench held that in a time-barred appeal where the delay was refused to be condoned the appeal itself was rendered not maintainable and the cross objection would not survive for consideration. In *A.L.A. Alagappa Chettiar Vs. Chockalingam*

Chetty & Ors. (supra), Wallis, C.J. opined that the right of respondent to proceed by way of memorandum of objections is strictly incidental to the filing of the original appeal in time and it is open to a party against whom a memorandum of objections has been filed to set up the bar that the original appeal was filed out of time. We are in respectful agreement with the view of the law taken by several High Courts and noticed hereinabove. The cross objection is available to be heard if the original appeal is available for hearing on merits. A view to the contrary has been taken by a Division Bench of Allahabad High Court in Shankar Lal & Anr. Vs. Sarup Lal & Anr., (1912) 34 ILR Allahabad 140, and Nanak Bakhsh & Ors. Vs. Wazir Singh & Ors., (1909) 4 IC 625 (Punjab Chief Court). Both the decisions are not supported by any convincing reasoning or logic and to say the least do not lay down the correct law, in our opinion.

The original appeal filed by the respondents herein was found to be not maintainable as not covered by any of the clauses (i) to (vi) of sub-Section (1) of Section 39 of the Act. It was dismissed as incompetent. The question of the memo of appeal filed in the High Court by the appellants herein being treated as cross objection and being taken up for hearing on merits does not arise. Independently treated as an original appeal the same was held to be hopelessly barred by time as the delay was not explained satisfactorily. On this aspect we are not persuaded to take a view different from the one taken by the High Court. The appeal filed in the High court by the appellants herein has been rightly held liable to be dismissed as time-barred and is not available to be heard and decided as cross objection in view of the original appeal filed in the High Court by the respondents herein having failed as incompetent.

The appeals are dismissed. Costs easy.