

PETITIONER:
STATE OF WEST BENGAL

Vs.

RESPONDENT:
GAURANGALAL CHATTERJEE

DATE OF JUDGMENT 11/05/1993

BENCH:
SAHAI, R.M. (J)
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SAHAI, R.M. (J)
RAMASWAMY, K.

CITATION:
1993 SCR (3) 640 1993 SCC (3) 1
JT 1993 (3) 394 1993 SCALE (2) 798

ACT:
Arbitration Act, 1940: Sections 39 (1) and (2)--Letters Patent Jurisdiction Clause 15--An appeal against the order passed by Single Judge of High Court under Section 39 (1)--Whether appealable u/s 39 (2) or under Letters Patent Jurisdiction--Section 39(1) itself lays down when an appeal could be filed--Appeal held not maintainable.

HEADNOTE:
Despite several letters by the respondent to the Chief Engineer Public works Department the State did not appoint any Arbitrator as provided in Clause 25 of the agreement. Shri D.K. Roy Choudhry who was appointed as a sole Arbitrator by the learned Single Judge revoking the authority of the Chief Engineer to act as an Arbitrator under the agreement.
On appeal by the State under Section 39(2) of the Act or under Letters Patent. The High Court dismissed the appeal as not maintainable.

This appeal is against the judgment of the High Court.
Appeal dismissed,

HELD: 1. Section 39 of the Arbitration Act came upon for consideration in U.O.I v. Mohindra Supply Company [1962] 3 SCC 497 and the Court held that no Second Appeal lay under section 39(2) against a decision given by a learned Single Judge under Section 39(1). Arbitration Act is a consolidating and amending act relating to arbitration, it must be construed without any assumption that it was not intended to alter the law relating to appeals. The Court held that in view of bar created by sub-section (2) of Section 39 debarring a second appeal from an order passed in appeal under sub-section (1) that the 'conclusion was inevitable that it was so done with a view to restrict the right of appeal within strict limits defined by Section 39'. Therefore the maintainability of the appeal under Letters Patent it stands concluded by this

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decision. (642-G-H)

2. Sub-section (1) of Section 39 of the Arbitration Act is extracted below:-

"(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 decisions of the Court passing the order.

An order-

- (1) 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 Causes 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". (643-D-E-GH)

provides that an appeal could lie only from the orders mentioned in the sub-Section itself. Since the order passed by learned Single Judge revoking the authority of the Chief Engineer on his failure to act as an Arbitrator was not covered in either of the six clauses mentioned in Section 39 it is obvious that no appeal could be filed against the order of the learned Single Judge. (644-642

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2544 of 1993. From the judgment and Order dated 7.5. 1992 of the Calcutta High Court in Appeal No. Nil of 1992 in Matter No. 21 of 1991.

P.S, Poti, and S.K. Nandy for the Appellant.

K. Parasaran, A.K. Ganouli, G.K. Banerjee and. Som Mandal for the Respondent.

The Judgment of the Court was delivered by.

R.M. SAHAI, J. The short and the only question of law that arises for consideration in this appeal is if an appeal was maintainable against an order passed by the Learned Single Judge under Section 39(1) of the Arbitration Act either under Section 39(2) of the Act or under the Letters patent jurisdiction.

Facts are not in dispute. Since the State did not appoint any arbitrator as provided for in clause 25 of the agreement despite letters by the respondent to the Chief Engineer, Public Works Department (P.W.D) and the Secretary P.W.D. the respondent approached the High Court and a Learned Single Judge by order dated 6th September, 1991 revoked the authority of the Chief Engineer to act as an arbitrator and directed one Shri D.K. Roy Chowdhury to act as the sole arbitrator as suggested by the respondent. Against this order State filed an appeal which has been dismissed by the Division Bench upholding the objection of the respondent as not maintainable. It has been held that the appeal was not maintainable either under Section 39(2) or under Letters Patent. It is the correctness of this view that has been assailed in this appeal.

Section 39 of the Arbitration Act came up for consideration

in Union of India v. Mohindra Supply Company [1962] 3 S.C.R. 497. The Court after going into detail and examining various authorities given by different High Courts held that no, second appeal lay under Section 39 (2) against a decision given by a Learned Single Judge under Section 39(1). In respect of the jurisdiction under Letters Patent the Court observed that since Arbitration Act was a consolidating and amending act relating to arbitration it must be construed without any assumption that it was not intended to alter the law relating to appeals. The Court held that in view of bar created by sub-section (2) of Section 39 debarring an, second appeal from an order passed in appeal under sub-section (1) the 'conclusion was

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inevitable that it was so done with a view to restrict the right of appeal within strict limits defined by Section 39'. Therefore, so far the second part is concerned, namely, the maintainability of the appeal under Letters Patent it stands concluded by this decision.

The Learned counsel for the appellant vehemently argued that since the decision by the Supreme Court was in respect of an appeal directed against an order passed by a Learned Single Judge in exercise of appellate jurisdiction no second appeal lay but that principle could not be applied where the order of Learned Single Judge was passed not in exercise of appellate jurisdiction but original jurisdiction. The argument appears to be without any substance as Sub-section (1) of Section 39 which is extracted below

"(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 decrees of the Court passing the order:

An order-

- (i) superseding an arbitration;
- (ii) on an award stated in 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 arbitratio

n

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 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."

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provides that an appeal could lie only from the orders mentioned in the subsection itself Since the order passed by Learned Single Judge revoking the authority of the Chief Engineer on his failure to act as an arbitrator was not covered in either of the six clauses mentioned in Section 39 it is obvious that no appeal could be filed against the order of the Learned Single Judge.]

Reliance was placed on certain orders passed by this Court and it was urged that settlement of dispute under clause 25 of the agreement being in exclusive domain of the Chief

Engineer the High Court was not empowered to appoint anyone else. The submission is devoid of any merit. It is not made out from the agreement. Rather clause 25 itself permits appointment of another arbitrator if the Chief Engineer fails or omits to act as such. Relevant portion of the agreement is extracted below

"Should the Chief Engineer be for any reason unwilling or unable to act as such Arbitrator such questions and disputes shall be referred to an Arbitrator to be appointed by the Arbitrator shall be final, conclusive and binding on all the parties to this contract."

In one of the decisions given by this Court the order of the High Court was set aside as the dispute being technical in nature the appointment of a non-technical arbitrator was not justified. Here in this the High Court has appointed a retired Chief Engineer and not a non-technical man. No allegation has been made against him. Therefore, the order of the learned Single Judge also does not suffer from any infirmity.

In the Circumstances the view taken by the Division Bench dismissing the appeal as not maintainable appears to be well founded. The appeal accordingly fails and is dismissed with costs.

S.K.

Appeal dismissed.

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