
(2008) 05 DEL CK 0249
In the Delhi High Court
Case No : FAO (OS) No. 71 of 2006

Canbank Financial Services Ltd.

APPELLANT

Vs

Haryana PetroChemicals Ltd. and Another

RESPONDENT

Date of Decision : 20-05-2008

Acts Referred:

Arbitration Act, 1940 — Section 39, 39(1)
Arbitration and Conciliation Act, 1996 — Section 34, 37(1), 5, 8, 9
Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 104, 4, 96
Delhi High Court Act, 1966 — Section 10, 10(1), 37

Citation : (2008) 2 ARBLR 365 : (2008) 104 DRJ 59

Hon'ble Judges : Manmohan, J; Manmohan Sarin, J

Bench : Division Bench

Advocate : Anil Airi, for the Appellant; B. Ghosal, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—The Appellant has filed the present first appeal being FAO (OS) No. 71/2006 under Order XLIII read with Order XLIIA read with Section 10 of Delhi High Court Act, 1966, against the order dated 29th August, 2005 passed by the learned Single Judge of this Court. By way of impugned order, the learned Single Judge has allowed the Respondent No. 1's application for referring the disputes raised in the suit by the Appellant/plaintiff to arbitration. In fact, the learned Single Judge specifically directed, "that the parties should take recourse to arbitration and the Arbitrators be appointed in terms of the Arbitration Clause."

2. The learned Counsel for the Appellant contends that the plaintiff is dominus litus and has the right to choose the parties and the forum to enforce the rights legally available to him. He further contends that the Single Judge failed to appreciate that the Respondent/Defendant No. 2 is neither a signatory nor a party to the Master Lease Agreement or the supplementary agreement incorporating the Arbitration Clause. The Appellant's counsel also relied on the judgment of the apex Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya

and Another, to contend that there can be no splitting of causes of actions or parties. He further states that even though today plaintiff/Appellant may have no relief against Defendant/Respondent No. 2 yet the Single Judge failed to appreciate that the subject matter of the suit has to be seen at the time when the Appellant/plaintiff instituted the suit. According to the counsel for the Appellant, the subject matter of the suit was not the subject of the Arbitration Agreement, at the time of institution of the suit.

3. The learned Counsel for the Respondent No. 1 raises a preliminary objection to the maintainability of the present appeal. He contends that in view of Section 37(1) of the Arbitration and Conciliation Act, 1996, it is not open to the Appellant to file the present appeal before a Division Bench of this Court. He submits that the present appeal is not maintainable as the two contingencies in which appeal is maintainable as provided under Sub-sections (a) & (b) of Section 37(1) are admittedly not there namely (a) it is not an order granting or refusing to grant any measure u/s 9 or (b) setting aside or refusing to set aside an arbitral award u/s 34. Emphasis is laid by Respondent's counsel on the use of words "and from no others" to say that appeal in all other cases is excluded. Section 37(1) of the Arbitration and Conciliation Act, 1996 is reproduced hereinbelow for ready reference.

37(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:

(a) granting or refusing to grant any measure u/s 9;

(b) setting aside or refusing to set aside an arbitral award u/s 34."

4. The learned Counsel for Appellant submits that the act of allowing Section 8 application tantamounts to a plaint being rejected and Therefore, Appellant could maintain this appeal u/s 96 of the CPC Code. The Appellant's counsel further submits that the impugned order being in the nature of a judgment deciding valuable rights of the plaintiff to maintain a civil suit is challengeable u/s 10 of the Delhi High Court Act, 1966. In this connection the Appellant also relies upon judgment of the Hon'ble Supreme Court rendered in Shah Babulal Khimji v. Jayaben D. Kania reported in AIR 1981 SCC 1786.

5. To our mind the embargo on appeals in Section 37 is an absolute and categorical one. Moreover, in the instant case the Arbitration and Conciliation Act, 1996 which is a special act dealing with the arbitrations, specially limits the extent of judicial intervention inasmuch as it provides that no judicial authority shall intervene except where so provided. Section 5 of the Arbitration and Conciliation Act, 1996 is reproduced hereinbelow for ready reference:

Arbitration and Conciliation Act, 1996

5. Extent of judicial intervention. - Notwithstanding anything contained in any other law for the time being in force, in matter governed by this Part, no judicial

authority shall intervene except where so provided in this Part.

6. It is also well settled in catena of cases that an appeal is a creature of the statute, the right to appeal inheres in no one. Since in the present case Section 37 uses an expression that an appeal shall lie from the following orders and from no others, it to our mind consciously takes away the right of appeal against other orders. Any other interpretation, to our mind, would render the expression "and from no others" as otiose or nugatory. The Apex Court in catena of cases has held that any interpretation which renders words of a statute "otiose" is to be avoided and eschewed. Consequently, appeal to the Division Bench lies only from the two orders mentioned in Section 37(1) and reliance of the Appellant on Section 96 of CPC is misconceived.

7. We may also refer to the interpretation placed by the Supreme Court with regard to similar provision namely Section 39(1) of the Old Arbitration Act, 1940. The said provision is reproduced herein below for ready reference:

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 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].

8. The Supreme Court while interpreting the said provision in Union of India (UOI) Vs. Mohindra Supply Company, held as under:

(5) ...Under Section 39(1), an appeal lies from the orders specified in that sub-section and from no others. The legislature has plainly expressed itself that right of appeal against orders passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away. If by the express provision contained in Section 39(1), a right to

appeal from a judgment which may otherwise be available under the Letters patent is restricted, there is no ground for holding that Clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent....

(6)...But the right to appeal is a creature of statute; no litigant has an inherent right to appeal against a decision of a Court....

(14) The intention of the legislature in enacting Sub-section (1) of Section 104 is clear : the right to appeal conferred by any other law for the time being in force is expressly preserved. This intention is emphasized by Section 4 which provides that in the absence of any specific provision to the contrary, nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force....

(19)...The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statute are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act of 1940 by codifying the law relating to appeals in Section 39....

9. In *Union of India v. A.S. Dhupia* reported in AIR 1970 Delhi 108 a full bench of this Court held that Section 39 of the Arbitration Act 1940 cannot be said to be repealed by implication by Section 10(1) of Delhi High Court Act 1966. The relevant portion of the said judgment is reproduced herein below:

2. We have already held in F.A. O. (O.S.) 6 of 1968 (by separate judgment of today) (now reported in *University of Delhi and Another Vs. Hafiz Mohd. Said and Others*, that Section 10(1) of the Act of 1966 provides only a forum of appeal from the judgment of the single judge to a Division Court. We have repelled the argument that the word "judgment" u/s 10(1) of the Act of 1966 is to be read as having a meaning which judicial decisions have given to the expression "judgment" in Letters Patent. According to our judgment, the appeal from the order of a single judge to a Division Court u/s 10(1) of the Act of 1966 will lie only against orders mentioned in Section 104 read Order 43, Rule 1 of the CPC (hereinafter called the Code). The contention Therefore that Section 10(1) of the Act 1966 confers unfettered right of appeal without any limitation cannot be accepted....

...The Act is a specific Code dealing with the arbitration matters and Section 39(1) is a special provision indicating the orders which alone are appealable. It is wrong, Therefore, to say that Section 10 of the Act of 1966 which only provides for a forum of appeal is special provision and will override Section 39(1) of the Act....

...Section 39 of the Act which is a special provision dealing with the right of appeal in arbitration matters cannot be said to have been repealed by implication by Section 10(1) of the Act of 1966.

10. In the year 1983, Section 39(1) again came up for interpretation before this Hon"ble Court. It was sought to be urged that in view of the subsequent judgment of the Supreme Court in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , the earlier Full Bench decisions of this Court in *University of Delhi and Another Vs. Hafiz Mohd. Said and Others*, and *Union of India and Others Vs. N.K. Pvt. Ltd. and Another*, were no longer good law. However, this contention was repelled by a Division Bench of this Court in *Banwari Lal Radhey Mohan Vs. The Punjab State Co-operation Supply and Marketing Federation Ltd.*, by holding as under:

18. All the above arguments fail to notice one salient feature and that is that appeals from the judgment/order of a trial Judge to a larger bench of the High Court would be maintainable unless otherwise so provided either expressly or by implication of any law. Section 4 of the Civil P.C. in terms lays down that when anything in the Civil P.C. is in conflict with anything in the special or local law or with any special jurisdiction or power conferred or any special forum or procedure prescribed by or under any other law, the Code will not, in the absence of specific provision to the contrary, prevail so as to override such inconsistent provision. In the cases cited and considered by the Supreme Court in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, no inconsistency was pointed out between the provisions of the Code or the provisions of the Letters Patent. In the present case it is not so. Section 39 of the Arbitration Act in terms says that no other orders would be appealable except those specified in the section. Therefore, on the ratio of *Shah Babulal Khimji's* case, which approves the rule enunciated by the Judicial Committee of the Privy Council in *Chowdry's* case (1882-10 Ind App 4) it has to be held that no appeal is competent from the judgment under appeal before us. Indeed, if we are to read paras 33 and 34 of the Judgment in *Shah Babulal Khimji's* case it would become apparent that the Supreme Court, while upholding the right of first appeal against judgment of a trial Judge from orders from which appeal is permissible under S. 39 of the Arbitration Act impliedly also held that the provisions of Section 39 of the Arbitration Act would apply in appeals from orders from which appeal is permissible u/s 39 or was impermissible. Their Lordships in *Shah Babulal Khimji's* case, a decision rendered by a Division Bench of the Supreme Court, comprising of three Hon"ble Judges noticed with approval the decision of the Supreme Court in the *Union of India (UOI) Vs. Mohindra Supply Company*, given by a Bench of four Hon"ble Judges. As noticed earlier, maintainability of an appeal from an order amounting to a judgment from which appeal is not permissible on a reading of Section 39 of the Arbitration Act was specifically ruled out in *Mohindra Supply Co.'s* case. We are bound by that decision.

11. Though the present case has not been filed under Clause 10 of Letters

Patent, but in view of Mohinder Supply, A.S. Dhupia and M/s. Banwari Lal (which considers Babulal Khimji) even an appeal under Clause 10 of Letters Patent would not be maintainable against an order referring the parties to arbitration. Consequently, the present appeal is dismissed as not maintainable. However, the Appellant is given the liberty to file appropriate proceedings as may be available to it in accordance with law.