
(2009) 06 BOM CK 0003

In the Bombay High Court

Case No : Civil Application No. 103 of 2009 in Appeal From Order No. 39 of 2009

Government of Goa

APPELLANT

Vs

Jaisu Shipping Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 16-06-2009

Acts Referred:

Arbitration Act, 1940 — Section 30

Arbitration and Conciliation Act, 1996 — Section 17, 2, 34, 35, 36

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103, Order 39 Rule 1, 144, 2(2), 36

Citation : (2009) 06 BOM CK 0003

Hon'ble Judges : N. A. Britto, J

Bench : Single Bench

Advocate : S. Dessai, for the Appellant; S. Lotlikar, learned Senior Advocate, for the Respondent

Judgement

N. A. Britto, J.—Heard. Shri S. Dessai, the learned Senior counsel appearing on behalf of the appellant objects to this appeal being heard by Single Judge of this Court. The submission is that this appeal is required to be heard by a Division Bench of this Court and any decision rendered by Single Judge would be without jurisdiction. The appellant, appears to have also made an application to the Hon"ble the Chief Justice to transfer this appeal to the Division Bench. The Hon"ble the Chief Justice has deemed it proper to direct that the application be placed before the appropriate Court for further orders. Learned Senior Counsel appearing on behalf of both the parties therefore have submitted that the maintainability of this appeal before the Single Judge be decided judicially by this Court on merits, and, therefore, I proceed to decide the same.

2. This is an appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996 (Act for short) against the order dated 29.4.2009 of the learned District Judge passed in terms of Section 9 thereof, being the Principal Court of original Civil jurisdiction within the District as defined by clause (e) of section 2 of the Act. There is no dispute that this appeal is required to be heard in conformity with the Rules (Bombay High Court Appellate Side Rules, 1960). This has got to be done

in view of several decisions of the Apex Court including the decision in the case of National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), wherein the Apex Court has noted that ordinarily after an appeal reaches the High Court, it has to be determined according to the rules of the practice and procedure of that Court and in accordance with the provisions of the Charter under which that Court is constituted and which confers on it power in respect of the method and manner of exercising that jurisdiction. Rule 1 provides that Civil and Criminal jurisdiction of this Court on the Appellate side should be exercised, except in cases where it is otherwise provided for by these rules, by the Division Court consisting of two or more judges. The exceptions are enumerated in I(a) onwards.

3. The learned Senior Counsel on behalf of the appellant particularly has referred to clause (v) of the Rules which provides that a Single Judge may dispose of a matter from the orders under local or special Acts not having the force of a decree. There is no dispute that the impugned order is passed under a special Act.

4. The question therefore is whether the order could be termed as a decree ?

5. Contending that the impugned order is a decree, learned Senior Counsel refers to Section 36 of the CPC, 1908 which provides that the provisions of this Code relating to the execution of the decrees, (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order), and, places reliance in support of his submission on the judgment of Division Bench of this Court in Oriental Insurance Company Ltd., and others V/s Mariamma Scaria and others, 2001(supp.) Bom. C.R. 211. While at Section 36 of CPC, reference could also be made to Order 21, Rule 103 of CPC, referred to by Shri S. D. Lotlikar, learned Senior Advocate, on behalf of the respondent, which provides that where any application has been adjudicated upon Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same condition as to an appeal or otherwise as it were a decree.

6. Shri S. D. Lotlikar, learned Senior Counsel appearing on behalf of the respondent, on the other hand, submits that the impugned order is only a interim order made by the Court during the pendency of Arbitration proceedings and as such is not final order to be termed as a Decree. As per the learned Senior Counsel, the impugned order does not have force of a decree and only because it could be executed as a decree, it cannot be termed as a decree, as it does not decide the rights between the parties finally. Learned Senior counsel further submits that the Act also does not say that impugned order is a decree and that it is an order like those which are passed under the provisions of Order 39 Rule 1, and the like. Learned Senior counsel also has placed reliance on the decision of Division Bench in the said case of Oriental Insurance Company Ltd. and others (supra).

7. Section 37 of the Act, deals with appeals against appealable orders, and, sub section (1) thereof provides that an appeal shall lie from the following orders (and from no orders) 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 measures u/s 9;

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

It is not necessary to refer to sub section 2 of Section 37 for our purpose. Sub section (3) of Section 37 of the Act further provides that no second appeal shall lie from an order passed in appeal under this section.

8. Chapter VIII of the Act and Section 35 thereof gives finality to arbitral awards and Section 35 provides that subject to this part an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Section 36 of the Act deals with enforcement of arbitral awards and, provides where the time for making an application to set aside the arbitral award u/s 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (V of 1908) in the same manner as if it were a decree of the Court.

9. The Division Bench of this Court in Oriental Insurance Company Ltd., (supra) was dealing with the appeals filed before it, against the order passed u/s 30 of the Arbitration Act, 1940. The said provision will now correspond to Section 34 of the Act though the grounds available may be different. Admittedly, both the appeals filed before Division Bench were valued, for the purpose of jurisdiction below Rs. 10 lakhs and the learned Division Bench came to the conclusion that both the said appeals were to be entered by the Single Judge of this Court. Shri S. Dessai, learned Senior counsel has particularly referred to para 10 of the judgment while Shri S. D. Lotlikar, learned Senior counsel has referred to para 26 thereof.

10. In para 10 of the judgment of Oriental Insurance Company Ltd., (supra), it was observed that :

Section 39 of the said Act, in no uncertain terms lays down the forum before which the appeal shall lie from the orders specified in Clauses (i) to (vi) of sub-section (1), passed under the said Act and the forum is the Court authorized by law to hear appeals from original decrees of the Court passing the order. Therefore, we have to see which is the forum prescribed under the said Rules before whom appeals from original decrees of the Court passing the order would lie. Rule 2(I)(a) of the said rules, (as applicable when appeals were filed since during the pendency of appeals, the valuation in the Rule has been enhanced to Rs. 10 lakhs), lays down that save as otherwise expressly provided by these Rules, a Single Judge may dispose of civil appeals from original decree in suits or from adjudication in other proceedings from which appeals lie to the High Court as from appellate decree whether under the CPC or under any local or special Act

wherein the value of the subject matter in dispute in the Court or before the Tribunal of the first instance does not exceed one lakh rupees and wherein the value of the subject matters still in dispute in appeals, is one lakh or less. In Rules 2(I)(a)(i) of the said Rules, the word "Rs. 10 lakhs" have been substituted for the existing words "one lakh". This means that the matters falling under Rule 2(1)(a) (i) where the value does not exceed ten lakhs rupees are to be disposed of by a Single Judge. The amendment shall apply to pending appeals also. Admittedly, there is no dispute in this respect that appeals arising out of Section 17 of the said Act from original decrees would lie before Bench, whether of Single Judge or Division Bench, depending upon the valuation. In view of the same and since Section 39(1) of the said Act lays down that an appeal shall lie from the orders under Clauses (i) to (vi) passed under the said Act to the Court which is authorized by law to hear appeals from original decrees of the Court passing the order, the said Court shall be the forum for hearing such appeals. The said forum, as per amended Rule 2(I)(a)(i) of the said Rules, would be the Single Judge or Division Bench depending upon whether the valuation is 10 lakhs rupees or above. As we have already pointed out above, the amendment shall apply to the pending cases also. Therefore, even according to the arguments advanced by learned Advocates for the appellants, the forum having jurisdiction shall be Single Judge in view of the amendment whereby valuation has been raised to Rs.10 lakhs and where the amendment is applicable to pending appeal also. In this context therefore, Rule 2(I)(a)(v) will have to be read subject to the provisions of section 39 of the said Act, read with Rule 2(I)(a)(v) of the said Rules in the light of the judgment of the Apex Court in *The Union of India v. The Mohindra Supply Co.* (supra).

11. In para 26, the Court has observed that :

bearing in mind, therefore, the difference between the forum for filing of an appeal and the Bench which should hear the matter in the High Court, and considering the rules, particularly Rule 2(I)(a)(i), read with (vi), it is clear that the jurisdiction to hear the appeal would depend on the nature of the order passed by the lower Court and the value of the subject matter of the dispute. If the order is in the form of a decree in the suit, wherein the value of the subject matter in dispute does not exceed Rs. 10 lakhs and where the value of the subject matter still in dispute in appeal is Rs. 10 lakhs or less, or where the order passed is not having a force of decree, then the appeals against such orders are necessarily to be heard by a Single Judge. Otherwise, the matter has to be placed before the Division Bench.

(emphasis supplied).

It is interesting to note that it was argued before the Division Bench that in case of an interlocutory order, irrespective of valuation of the subject matter, the appeal would lie to the Single Judge. It was conceded that the orders appealed from were neither decrees nor orders having the force of the Decree.

12. There could be no dispute that appeals from orders as well as from decrees of the District Court lie before this Court. Section 37 speaks of appeals from orders and this is an appeal from an order passed by the said Court of the District Judge being the Principal Court of Civil original jurisdiction. The expression decree has not been defined under the Act but Section 2(2) of CPC defines the expression "decree" to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include - (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default. A bare reading of Section 37 would show that the impugned order is not in the nature of a decree which has conclusively decided the rights of the parties; that could be done in the arbitration proceedings, now pending, but it is an order passed by way of interim measure pending the final disposal of the said arbitration proceedings. It is only an order as Section 37 of the Act itself mentions. Not a decree. It is possible, to pick up the submission made before the learned Division Bench in the aforesaid case, accept it, and conclude that the impugned order, being an interlocutory order, pending arbitration proceeding, is an order against which appeal lies to this Court to be heard and disposed off by a Single Judge. Section 36 of CPC only creates a deeming fiction and makes orders executable as decrees. It does not make an order into a decree. So is the case with Order 21, Rule 103, CPC which treats orders under Rule 98 or 100 as decrees for the purpose of appeal. That would not make those orders as decrees. A legal fiction is created by a deeming procession for the purpose of assuming existence of a fact which really does not exist. Legal fictions are created only for some definite purpose and a legal fiction is to be limited to the purpose for which it is created and should not be extended beyond that legitimate purpose. Only because an order can be executed as a decree it would not make it into a decree. The appeal, therefore, which has filed against an order passed u/s 9 of the Act, which is interlocutory in nature irrespective of the valuation of subject matter can be entertained by Single Judge. In the circumstances, therefore, the objection that this appeal is required to be decided by Division Bench of this Court is rejected. The appeal be listed to be heard on merits.