REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **COMPANY APPLICATION NOS. 1701/2010 IN COMPANY APPEAL (SB) NOS. 31 OF 2010**
COMPANY APPLICATION NOS. 1702/2010 IN COMPANY APPEAL (SB) NOS. 32 OF 2010

Reserved on : 19th October, 2010.
% **Date of Decision :** 2nd November, 2010.

VIJAY SEKHRI & ANR ...Appellants .
Through Mr. Gaurav Duggal, Ms. Ameeta V. Duggal & Mr. Rakesh Sharma, Advocates.

VERSUS

M/S TINNA OILS & CHEMICALS & Others. ....Respondent in CO.A. (SB) No. 31/2010
M/S TINNA AGRO INDUSTRIES LTD. & Others. ...Respondent in CO.A. (SB) No. 32/2010
Through Mr. Dushyant Dave, Sr. Advocate
with Mr. G. Khaitan, Mr. Ramesh Singh, Mr. A.T. Patra, Ms. Roopa Dayal & Ms. Aradhna Patra, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

1. These applications have been filed by ADM Interoceanic Limited, the respondent No. 2, for dismissal of the present appeals under Section 10F of the Companies Act, 1956 (hereinafter referred to as Companies Act, for short) filed by Vijay Sekhri and others. It is submitted that by the impugned orders dated 20th July, 2010 the

Company Law Board (hereinafter referred to as CLB, for short) has allowed the applications under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Arbitration Act, for short) and these orders are not appealable under Section 50 of the Arbitration Act. Accordingly, the appeals under section 10F of the Companies Act are not maintainable, in view of the specific bar stipulated by Section 50 of the Companies Act.

2. The appellants have contested the applications. In the reply, reference is made to the pleas and contentions raised in the appeals on merits relating to challenge to the orders dated 20th July, 2010. It is submitted that all orders of CLB including an order wrongly referring the disputes to arbitration can be made subject matter of an appeal under Section 10F of the Companies Act. Section 50 of the Arbitration Act cannot control the scope and ambit of an appeal under Section 10F of the Companies Act. All orders of CLB are amiable and can be made subject matter of an appeal under Section 10F of Companies Act on questions of Law.

3. The present applications raise the issue of jurisdiction and scope of Section 50 of the Arbitration Act, Section 10F of the Companies Act and whether the impugned orders dated 20th July, 2010 passed by the CLB allowing the applications and referring the parties to arbitration can be assailed and challenged in an appeal under the said Section 10F of the Companies Act and whether Section 50 of the Arbitration Act bars/prohibits the present appeals.

4. Sections 45 and 50 of the Arbitration Act, are reproduced below:-

> "**45. Power of judicial authority to refer parties to arbitration.—** Notwithstanding anything contained in Part I

or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

50. Appealable orders.—(1) An appeal shall lie from the order refusing to—

(*a*) refer the parties to arbitration under Section 45;

(*b*) enforce a foreign award under Section 48;

to the Court authorised by law to hear appeals from such order.

(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."

5. Sections 10 and 10F of the Companies Act, read:-

"10. Jurisdiction of Courts.—(1) The Court having jurisdiction under this Act shall be—

(*a*) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2); and

(*b*) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district.

(2) The Central Government may, by notification in the Official Gazette and subject to such restrictions, limitations and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction conferred by this Act upon the Court, not being the jurisdiction conferred—

(*a*) in respect of companies generally, by Sections 237, 391, 394, 395 and 397 to 407, both inclusive;

(*b*) in respect of companies with a paid-up share capital of not less than one lakh of rupees, by Part VII (Sections 425 to 560) and the other provisions of this Act relating to the winding up of companies.

> (3) For the purposes of jurisdiction to wind up companies, the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding for presentation of the petition for winding up.
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> **10-F. Appeals against the orders of the Company Law Board**.—Any person aggrieved by any decision or order of the Company Law Board 2[made before the commencement of the Companies (Second Amendment) Act, 2002] may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:
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> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.]"

6. It is admitted case of the parties that the appellants herein had filed two petitions under Sections 397-398 of the Companies Act alleging oppression and mismanagement before the CLB in the affairs of M/s Tinna Agro Industries Limited and Tinna Oil and Chemicals Limited. During the pendency of the said petitions, applications under Sections 8 and 45 of the Arbitration Act were filed and by the impugned orders dated 20th July, 2010 passed by the CLB, the applications have been allowed and the matters have been referred to arbitration to be conducted in accordance with the rules of the conciliation and arbitration of the International Chamber of Commerce in London. What has been decided by the CLB are the applications filed under Sections 8 and 45 of the Arbitration Act and not the petitions under Section 397-398 of the Companies Act. The disputes raised in the main petitions under Sections 397-398 of the Companies Act have not been adjudicated. Rights of the parties

under the Companies Act have not been decided. The CLB while passing the impugned orders dated 20th July, 2010 has adjudicated these applications under Sections 8 and 45 of the Arbitration Act and whether in view of the conditions stipulated in the aforesaid Sections, the applications should be allowed. While doing so, CLB may have incidentally examined the provisions of the Companies Act but only for the purpose of deciding whether or not conditions stipulated in Sections 8 and 45 of the Arbitration Act are satisfied or not; and not for deciding the petitions under Sections 397-398 of the Companies Act.

7. A similar question had arisen before Punjab and Haryana High Court in ***In Re. Hind Samachar Limited: Sudershan Kumar Chopra and Ors. Versus Vijay Kumar Chopra and Ors.*** 2003 (117) Company Cases 660. In the said case, the CLB had dismissed an application under Section 8 of the Arbitration Act, which was made subject matter of an appeal under Section 10F of the Companies Act. It was contended that the appeal was maintainable under Section 10F of the Companies Act in view of the language of the said section and for this purpose and to answer to the issue reference must be made to the provisions of the Companies Act itself and not to Section 37 of the Arbitration Act. These contentions were rejected.

8. It may be noted that Arbitration Act in Section 37 does not provide for an appeal against an order rejecting or accepting an application under Section 8 of the said Act. Under the said Section, appeals can be filed only against the orders specified in Section 37 of the Arbitration Act. Division Bench of the Punjab and Haryana

High Court after examining the provisions of the Companies Act and the Arbitration Act has opined as under:-

> "8. In our view, in order to adjudicate upon the aforesaid contention, it would be imperative for us to first determine the legislative provision under which the impugned order dated 08.12.2000 has been passed. If in the aforesaid determination, this court arrives at the conclusion that the order was passed by the Company Law Board in exercise of its jurisdiction to settle a dispute flowing out of the provisions of the Companies Act, 1956, then and only then, the instant plea advanced on behalf of the appellants would merit acceptance. In such an eventuality, it would have to be concluded that the search for the appellate forum would have to be restricted to the Companies Act, 1956. However, if this court arrives at the conclusion that the impugned order dated 08.12.2000 had been passed by the Company Law Board in its capacity of 'judicial authority' in exercise of obligations flowing out of the Arbitration Act, 1996, in furtherance of the provisions of the Arbitration Act, 1996, then certainly, the remedy must be searched for, from within the provisions of the Arbitration Act, 1996. In such an eventuality, the contention advanced on behalf of the appellants would not merit acceptance.
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> 9. Undoubtedly, when the petition was filed by the respondents (herein) before the Company Law Board, the Company Law Board was exercising jurisdiction under the provisions of Sections 397 and 398 of the Companies Act, 1956. However, when the appellants (herein) moved an application under Section 8 of the Arbitration Act, 1996, before the Company Law Board, the Company Law Board while deciding the said application acted in its capacity as judicial authority' under Section 8 of the Arbitration Act, 1996. There can be no doubt that the impugned order determines rights flowing out of the provisions of the Arbitration Act, 1996, and not the provisions of the Companies Act, 1956. Since the Company Law Board did riot adjudicate the dispute between the parties under Sections 397 and 398 of the Companies Act, 1956 (which was really the subject matter of Company Petition No. 76 of 1999) through the order impugned before us it is not possible for us to accept the contention

> advanced on behalf of the appellants that in disposing of the application filed under Section 8 of the Arbitration Act, 1996, the Company Law Board was exercising jurisdiction vested in it under the Companies Act, 1956. The conclusion has to be, as noticed in the foregoing paragraphs, that the right to prefer an appeal against an order passed by the Company Law i3oard in its capacity as 'judicial authority' while deciding an application filed under Section 8 of the Arbitration Act, 1996, must be searched for, from within the provisions of the Arbitration Act, 1996, more so, because the impugned order is not referable to any provision of the Companies Act, 1956.
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> 10. We find no merit also in the submission relating to grant of preference to the statute laying down substantive law over a statute laying down adjective, incidental, supplemental or procedural law. In our view, there is no conflict between the provision of the Companies Act, 1956, and the Arbitration Act, 1996, therefore, the question whether the Companies Act, 1956, would have an overriding effect over the provisions of the Arbitration Act, 1996, does not arise. In our view, in order to ascertain substantive rights, reference must be made to the statute laying down substantive rights ; and likewise, for determination of procedural rights, one must resort to the enactment laying down the procedure. In the absence of conflict between the two, it is unnecessary to determine which of the two would have over-riding effect over the other. By our aforesaid conclusion, it must not be assumed that we have accepted the submission that the Arbitration Act, 1996, is merely an adjective, incidental, supplemental and procedural legislation, when compared with the Companies Act, 1956. The instant question simply does not arise and, therefore, need not be gone into."

9. The Punjab and Haryana High Court also rejected the contention that the ordinary incident of procedure of the Court, including right to appeal, where proceedings were/are pending would automatically get attached with the decision. The Punjab and Haryana High Court has held that the rule of attachment is not

applicable in view of the express provisions and the bar under Section 37 of the Arbitration Act. It was observed:-

> "15.2 In fact, even the judgment in Vanita M. Khanolkar's case, supra, which, according to the counsel for the appellants, completely covers the controversy in the present case, it is apparent from the extract already reproduced above that the procedure including the fight of appeal would not get attached '. . unless the statutory enactment concerned expressly excludes appeals . . '. Additionally, in Vanita M. Khanolkar's case AIR 1998 SC 424, supra, the observations of the Supreme Court in respect of the jurisdiction of the High Court must necessarily be noticed to the limited scope of its examination by the Supreme Court, namely, whether a legislative enactment could override the constitutional power of the High Court In the instant appeal, the appellants are seeking to invoke Section 10F of the Companies Act, 1956, in order to substantiate their plea in respect of the legality of appellant jurisdiction said to be vested in this court against the impugned order passed by the Company Law Board under Section 10F of the Companies Act, 1956, and not the constitutional authority vested in this court under Article 226 of the Constitution of India. It would be pertinent to notice that despite suggestions of the counsel representing the respondents to the appellants, during the proceedings before us, the appellants did not make a prayer, that the instant appeal be treated as a writ petition. Therefore, while deciding the issue of jurisdiction in the present case, we are certainly not dealing with the constitutional authority vested in this court to examine the validity of an order passed by a judicial authority while deciding a claim under Section 8 of the Arbitration Act, 1996. Since the parameters of the issue decided in Vanita M. Khanolkar's case, supra, were clearly different from the issue before us in view of the fact that constitutional authority of this court is not an issue at all, in our view, the aforesaid case is not relevant for adjudication of the dispute before us. Shorn of the conclusion drawn by the Supreme Court in Vanita M. Khanolkar's case, supra, it is clear that the rule of attachment canvassed on behalf of the appellants would be subject to a contrary intention in the referring statute. It would also be pertinent to mention that the decision rendered by the apex court in Vanita M. Khanolkar's case, supra, is under reconsideration in

> view of the order passed by the Supreme Court in Orma Impex (P) Ltd. v. Nissai Asb Pte. Ltd. (1999)2SCC541, wherein the court in the short order passed by it noticed as under :
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> > "In State of W.B. v. Gaurangalal Chatterjee (1993)3SCC1, this court relied upon an earlier decision of the Court in Union of India v. Mohindra Supply Co. AIR1962SC256. The said decision was rendered with reference to the appealability of an order passed by the High Court in an appeal from the order of the subordinate court and not from the order passed by a learned Single Judge sitting on the original side of the High Court. There is also another decision of a two-Judge Bench of this court in Vanita M. Khanolkar v. Pragna M. Pai (1998)1SCC500 which appears to have taken a contrary view relying upon Clause 15 of the Letter Patent applicable to the High Court of Bombay. Thus, there appears to be conflict of decisions on this question."

10. The Punjab and Haryana High Court has further held that the Arbitration Act is an exclusive, exhaustive and comprehensive code as the said Act is a consolidating and an amending Act relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and for matters connected with or incidental thereto. The High Court relied upon observations of the Supreme Court in ***Union of India versus Mohindra Supply Company***, AIR 1962 SC 256 with reference to enactment of Arbitration Act, 1940, which was again a consolidating and an amending statute. It was accordingly held that the remedy by way of appeal would be permissible only if expressed, specifically or by necessary implication in Part I of the Arbitration Act and not otherwise. The legislative intent is to provide remedy of appeal in Section 37 against a limited category of orders and exclude remedy

of appeal against an order not specified in Section 37. Accordingly, it has been observed by the Punjab and Haryana High Court in **In Re. Hind Samachar Limited (supra)** as under:

> "38. Based on the issues dealt with above, we have already recorded our conclusions which we again endeavour to summerise as under :
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> 38.1 Firstly, the Arbitration Act, 1996, is an exhaustive and comprehensive code on the Jaw of arbitration in India, and Section 5 of the Arbitration Act, 1996, makes it exclusive on matters contained in Part I of the Arbitration Act, 1996, by excluding intervention of 'judicial authorities' on matters regulated therein through a non obstante clause.
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> 38.2 Secondly, Section 37 of the Arbitration Act, 1996, excludes, by use of the words 'and from no others', the remedy of appeal, against an order passed by a 'judicial authority' while deciding the claim for reference to an arbitrator made under Section 8 of the Arbitration Act, 1996.
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> 38.3 Thirdly, on a conjoint reading and comparison of Sections 8 and 37 of the Arbitration Act, 1996, on the one hand, with Sections 54 and 57 of the said Act, on the other, the legislative intent to exclude the remedy of appeal against an order passed by a 'judicial authority' while deciding a claim for reference to an arbitrator under Section 8 of the Arbitration Act, 1996, is clearly in the affirmative."

11. Unlike Section 37 of the Arbitration Act which applies to Part I, Section 50 of the Arbitration Act applies to international arbitration covered by New York Convention. Section 50 of the Arbitration Act stipulates that an appeal shall lie against an order refusing to refer the parties to arbitration under Section 45 or to enforce an award under section 48 of the Arbitration Act. In the present case we are concerned with Section 50 of the Arbitration Act. Division Bench of Delhi High Court in ***Jindal Exports Ltd vs Fuerst Day Lawson***

2010 (170) DLT 628 has examined Section 50 of the Arbitration Act and has held that in view of the statutory bar and prohibition a Letters Patent Appeal would not be maintainable except against orders mentioned in Section 50 of the Arbitration Act. In other words, in respect of international awards/arbitrations covered by New York Convention, an appeal can be filed against the orders passed by the Trial Court/first forum only against an order refusing to refer the parties to arbitration or an order refusing to enforce an award under Section 48 of the Arbitration Act and not against other orders. Section 50 of the Arbitration Act creates the said bar. Similar view has been taken in **Shivnath Rai Harnarain India Co. V. G.G. Rotterdam** 164 (2009) DLT 197 and in **Usha Drager Pvt. Ltd. v. Dragerwerk AG**, 2010 (170) DLT 628.

12. In ***Sumitomo Corporation versus CDC Financial Services (Mauritius) Limited and Others***, (2008) 4 SCC 91, the CLB had refused to refer the parties to arbitration under Section 45 of the Arbitration Act. An appeal was filed before the Delhi High Court under Section 50 of the Arbitration Act and was registered as FAO. This FAO was dismissed by the Delhi High Court for lack of territorial jurisdiction holding that Section 10(1)(a) of the Companies Act will take precedence over Section 50 of the Arbitration Act. The question, which arose before the Supreme Court was whether the order passed by the CLB refusing to refer the parties to arbitration under Section 45 of the Arbitration Act was liable to be challenged to the forum under Section 50 of the Arbitration Act or to the forum under Section 10(1)(a) of the Companies Act.

13. It was observed that Section 50 uses the expression 'court' but is followed by the words 'authorised by law to hear appeals from such order'. It was held that the expression 'court' does not refer to 'court' simplicitor but has to be construed and interpreted with reference to the subsequent words. Accordingly, it is not the court having jurisdiction if the subject matter is a suit, where jurisdiction is determined in accordance with the provisions of Sections 16-20 of the Code of Civil Procedure, 1908. On the other hand, Section 50 of the Arbitration Act uses the words "authorised by law" and not Civil Procedure Code or suit. Reference was made by the Supreme Court to ***Ganga Bai versus Vijay Kumar*** (1974) 2 SCC 393 that the right of appeal inheres in no one and, therefore, an appeal for its maintainability must have the clear authority of law. The right to appeal is a creature of statute. The Supreme Court in ***Sumitomo Corporation*** (supra) has held as under:-

> **"28.** To our mind, the reading of Section 50 clearly suggests that an appeal shall lie from the order of CLB to the court authorised by law to hear the appeals from such order of CLB. To make it clear that in the event the order under Section 45 is passed by CLB, the forum which is provided under law for hearing the appeal from the order of CLB, will be the appellate forum. In other words, while Section 50 of the Arbitration Act provides for the orders which can be made the subject-matter of the appeal, the forum to hear the appeal is to be tested with reference to the appropriate law governing the authority or forum which passed the original order, that is, in the case on hand, CLB. Section 10-F read with Section 10(1)(*a*) of the Companies Act provides for such forum to hear the appeal from the orders of CLB as the High Court within the jurisdiction of which the registered office of the company in issue is situated."
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> **"34.** In view of our conclusion, we are satisfied that the appellant has wrongly based its arguments on matters such as ouster of jurisdiction, overriding effect of special statute over general statute, overriding effect of subsequent statute, etc. Since they have no application whatsoever to the matter in issue, there is no need to refer various decisions in those aspects. Ouster of jurisdiction arises only in regard to original jurisdiction and it cannot have any application to appellate jurisdiction as the one provided in Section 50 of the Arbitration Act. The appeal is a statutory remedy and it can lie only to the specified forum. The appellate forum cannot be decided on the basis of cause of action as applicable to original proceedings such as suit which could be filed in any court where part of cause of action arises. In such circumstances, we are unable to accept the lengthy arguments advanced on the abovementioned subject by learned Senior Counsel for the appellant. Likewise, the submission of the appellant, namely, the Arbitration Act being a special and subsequent statute has no relevance to the present case."

14. Thus, the Supreme Court has held that Section 50 of the Arbitration Act stipulates the orders that can be made subject matter of appeal but does not prescribe or fix the forum which will hear the appeal. The forum to which an appeal will lie, is determined and decided with reference to appropriate law governing the authority of the forum which has passed an order which is appealable under Section 50 of the Arbitration Act. Accordingly, an appeal will lie under Section 10F of the Companies Act against an appealable order under Section 50 of the Arbitration Act passed by the CLB. The aforesaid decision does not help the appellants but supports the contention raised by the applicant-respondent No. 2. As per the said decision, statutory appeal is maintainable if it is permitted under Section 50 of the Arbitration Act. In such cases an appeal can be filed under Section 10F of the Companies Act. The Supreme Court had not held that an appeal

under Section 10F would be maintainable even if an appeal is not maintainable under Section 50 of the Arbitration Act.

15. Decision in the case of ***In Re. Hind Samachar Limited*** (supra) was also referred before the Supreme Court but it was held that the issue raised before the Supreme Court was different as the question was whether appeal under Section 10F should have been filed before the High Court as specified in Section 10(1)(a) of the Companies Act, i.e., Punjab and Haryana High Court and not High Court of Delhi.

16. Learned counsel for the appellants has relied upon a decision of a single Judge of High Court of Bombay in ***Kinetic Engineering Limited Versus Unit Trust of India*** AIR 1995 Bombay 194. This decision was also cited before the Punjab and Haryana High Court in ***In Re Hind Samachar Limited*** (supra) and was dissented from. I am not expressing any opinion in this regard as I feel that the decision in the case of ***Kinetic Engineering*** (supra) is distinguishable. In the case before the Bombay High Court, proceedings were initiated before the CLB under the Securities Contracts (Regulation) Act, 1956 on the question whether the Board of Directors have power to refuse registration of shares under Section 22A (3) of the said Act. It has been held by the Bombay High Court that the order passed by the CLB can be assailed in an appeal under Section 10F as the CLB while passing the impugned order had exercised jurisdiction under Section 10E(1A) of the Companies Act. It was further observed that in the Securities Contract (Regulation) Act, 1956, there is no provision for appeal. In other words, the said Act did not bar or prohibit any appeal.

Accordingly, it was observed that the appeal would lie under Section 10F of the Act as there was no express or implied bar under the Securities Contract (Regulation) Act, 1956. Thus it appears that the Bombay High Court, had accepted that the doctrine of attachment was applicable.

17. In view of the aforesaid discussion, the present applications are allowed and it is held that the appeals under Section 10F of the Companies Act are not maintainable against the impugned orders allowing applications under Section 45 of the Arbitration Act.

18. It is clarified that this Court has not expressed any opinion on the merits of the impugned orders dated 20th July, 2010 allowing the applications and referring the matter to International Arbitration as this Court has no jurisdiction to entertain the present appeals under Section 10F of the Companies Act. It is clarified that this Court has not expressed any opinion whether the appellants have remedy to challenge the said orders by way of writ petitions or in some other appropriate proceedings. This question has not been raised and argued before me.

With the aforesaid observations, the applications are disposed of. The interim stay orders passed earlier will continue for a further period of 15 days to enable appellants to take appropriate steps/proceedings.

(SANJIV KHANNA)
JUDGE

NOVEMBER 02, 2010.
VKR/P