..* **HIGH COURT OF DELHI : NEW DELHI**

\+ **FAO No.111-112/2006**

Judgment reserved on: 9th February, 2009

% Judgment decided on : 18th September, 2009

Usha Drager Pvt. Ltd. & Anr. ....Appellants

Through : Mr. A.S. Chandhiok and Mr. Arvind K. Nigam, Sr. Advs. with Mr. Navin Chawla and Mr. Sandeep Mittal, Advs.

Versus

Dragerwerk AG & Ors. ….Respondents

Through : Mr. Rajiv Nayar, Sr. Adv. with Mr. Manoj Kumar, Mr. Sushant Kumar, Mr. Shekhar, Mr. Tarun Arora and Mr. Sushil, Advs.

Coram:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment? No

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. By this common judgment we shall dispose of the two appeals filed by M/s. Usha Drager Pvt. Ltd and RKKR Infotech Pvt. Ltd. against the order passed by learned Single Judge of this court in I.A. Nos. 8159/2005 and CS(OS) No.1217/05 on 17th January, 2006.

2. The brief facts are that the suit was filed by the Appellants/ Plaintiffs against the defendants/respondents, inter alia, seeking the following reliefs:-

"3. The suit filed by the plaintiff's seeks, inter alia, the following reliefs :

"(a) pass a decree of declaration in favour of the plaintiffs and against the defendants declaring that Distributor Agreement dated 22.2.1999 as being null and void, inoperative and being unenforceable between the parties;

(b) pass a decree of permanent injunction in favour of the plaintiffs and against the defendants restraining the defendants from proceeding with the International Chambers of Commerce Arbitration Case No.13588/MS before the International Court of Arbitration;

(c) Any other order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. The relevant facts and submissions of the parties have been recorded be the Learned Single Judge in paras 4 to 8 of the impugned order, which read as under :

"a) On 9.5.1987 a Joint Venture was entered into between the defendant No. 1 and one Usha Services & Consultants (P) Ltd. This was by a Joint Venture Agreement for conducting business in India. As a result of this Joint Venture Agreement of 9.5.1987, the plaintiff No. 1, being the joint venture company, came to be incorporated under the name Usha Draeger (P) Ltd. (hereinafter referred to as UDPL).

b) Subsequently, it appears that an agreement was entered into on 22.2.1999 between the defendant No. 2 and the said Joint Venture Company, that is the plaintiff No. 1 (UDPL). This agreement was a Distributor Agreement. Therefore, we have two agreements one being the Joint Venture Agreement of 1987 and the other being the Distributor Agreement of 1999.

c) Both the agreements contained arbitration clauses providing for settlement of disputes by way of arbitration. The agreement with which we are concerned with in the present suit is the Distributor

Agreement between the defendant No. 2 and the plaintiff No. 1.

d) The plaintiff No. 2 is the successor-in-interest of the said Usha Services Consultant (P) Ltd. who was the original joint venture partner in the plaintiff No. 1.

e) The Distributor Agreement of 1999 was acted upon and the plaintiff No. 1 received payments under the agreement and, therefore, there is no question of the plaintiffs now challenging the validity of the same.

f) There was a Board Meeting of the plaintiff No. 1 (UDPL) held on 22.9.1999 itself wherein one Dr. Mahavadi was authorised to enter into such an agreement. The agreement itself was signed on 22.2.1999. The agreement was no doubt signed by Dr. Mahavadi but the same was not to be acted upon and there was an oral arrangement between the parties that although this Distributor Agreement is being entered upon, it is not to be acted upon by the parties and that it was only for the purposes of showing to Governmental agencies and other agencies that there was a foreign partner involved.

g) That Dr. Mahavadi was indeed authorised by the Board of UDPL on 22.2.1999 to sign such an agreement, there are only two situations which are possible. The first situation is that the Distributor Agreement of 22.2.1999 was signed prior to the Board Meeting. The second situation is that the said Distributor Agreement was signed and executed after the Board Meeting. In the former case it would be obvious that although the execution of the agreement would initially have been without authority, but, because the Board had authorised Dr. Mahavadi subsequently, the same would stand ratified. In the latter case, it is obvious that as Dr. Mahavadi had been authorised, the execution of the Distributor Agreement would be with the authority of the plaintiff No. 1 company. So, whichever way one looks at the matter, it cannot be contended that the Distributor Agreement did not have the stamp of approval by the Board of Directors of the plaintiff No. 1.

h) Payments were received and even the balance-sheet for the year ending 31.3.2002 of the plaintiff No. 1 shows amounts receivable from and payable to the defendant No. 2. The Distributor Agreement

was terminated by a notice dated 18.6.2003 whereby the defendant No. 2 purported to terminate the Distributor Agreement w.e.f. 31.12.2003. In response to this letter, the plaintiff No. 2 gave various reasons as to why the termination would not be valid and, ultimately, by its letter dated 5.8.2003, requested the defendant No. 2 to take back the notice of termination of the Distributor Agreement. However, since disputes had arisen between the parties, an Arbitral Tribunal had been constituted in terms of Clause 27 of the Distributor Agreement and the Arbitral Tribunal even had its first meeting on 20.7.2005. In the Minutes of the Meeting of 21.7.2005, the Arbitral Tribunal had noted that issues with regard to the jurisdiction of the Tribunal were raised by the plaintiff No. 1 herein and that the same would be decided upon as the Arbitral Tribunal had jurisdiction to entertain and decide such issues. It was also noted in the said Meeting that the question of jurisdiction would be decided after the terms of reference were settled. It is thereafter that on 29.8.2005 this suit came to be filed.

4. Dragerwerk Medical AG & Co. KGaA filed I.A No. 8159/2005 under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') for reference of the disputes to arbitration and the same was allowed by learned Single Judge vide order dated 17th January, 2006, which also resulted in disposing of the suit itself.

5. The Learned Single Judge observed that it was not possible to hold the distribution agreement containing the arbitration clause as either null and void or inoperative as plaintiff no. 1 had executed the same, acted upon it, had money transactions under it and even requested defendant no. 2 to take back the termination of the said distribution agreement.

6. While disposing of the application filed by the respondents as well as the suit being CS(OS) 1217/05 the learned Single Judge, inter alia, has given the following finding in Para 9 of the impugned judgment which reads as under:-

> "9. Having considered the arguments raised by the parties on this issue, I am of the *prima facie* view that the plaintiffs and in particular plaintiff No. 1, in point of fact, had executed the Distributor Agreement, had acted upon it, had money transactions under the said agreement and had even requested the defendant No. 2 by virtue of its letter dated 5.8.2003 for taking back the letter of termination of the Distributor Agreement. In these circumstances, it is extremely difficult to accept the view espoused by the learned Counsel for the plaintiffs that the Distributor Agreement was not to be acted upon and, as a consequence, it was null and void. Therefore, it is not possible for me to hold and return a finding that the Distributor Agreement which contains the Arbitration clause is null and void, inoperative or incapable of being performed."

7. It is against the above-stated order that the present appeal has been filed. At the beginning of the hearing of the present appeal, Senior Counsel Mr. Rajiv Nayar for the respondents raised a preliminary objection by submitting at the outset that the present appeal is not maintainable under the provision of the Letters Patent Appeal under Section 10 Delhi High Court Act, 1966. While considering the objection of maintainability of the appeal, learned counsel for both the parties have given their consent that if after hearing of the matter this court comes to the conclusion that the appeal itself is not maintainable then there will be no question of going into the merit of the appeal.

8. The main contentions of Mr. Nayar in support of his preliminary objection are:

(a) That Section 50 of the Arbitration Act is a special and specific provision in respect of appeals against the judgments and orders passed in Part II of the Arbitration Act and an appeal only lies against an order refusing to refer the parties to arbitration under Section 45. No appeal is maintainable from an order passed under Section 45 referring the parties to arbitration.

(b) Since in the present case the learned Single Judge has passed an order under Section 45 referring the parties to arbitration, the said order is not appealable and, therefore, the appeal is not maintainable.

(c) The next submission is that the Arbitration Act is a special Statute dealing with arbitration, both domestic and international, held in India (Part I) and in respect of foreign awards the rights and remedies are provided in the Act itself. It is settled law that the right of appeal is to be conferred by Statute and no right to appeal can be conferred upon a party except by express words of the Statute. Since the Arbitration and Conciliation Act, 1996 is a special statute and confers a statutory right of appeal under

Section 50 only in certain matters specified in that section.

9. Per contra the learned counsel for the appellant has argued that:

(a) Unlike Section 37, Section 50 of the Arbitration Act does not bar appeals maintainable under the provisions of law. The Ld. Single Judge, by the impugned judgment, has disposed of the suit itself, therefore, the present appeal is maintainable as Letter Patent Appeal under Section 10 of the Delhi High Court Rules, 1966.

(b) That unlike Section 8 of the Arbitration Act, the test applicable to section 45 is less stringent and if the plaintiff is able to establish a prima facie case the suit must proceed to trial, therefore, the learned Single Judge had erred in allowing the application filed by the defendants under Section 45 of the Act.

(c) Learned counsel for the appellant submits that the language of Section 50 of the Arbitration Act is different from the language of Section 37. The phrase "and from no other" does not appear in Section 50. Section 37 of the Act is para materia to Section 39 of the Arbitration Act, 1940, therefore, Section 50 does not expressly or impliedly exclude the filing of this appeal. Rather it confers additional rights on a person whose application under Section 45 is dismissed.

10. In view of the above stated, the learned senior counsel for the appellant has argued that the present appeal is certainly maintainable.

11. The point which arises for determination is as follows :-

> a] Whether the Letters Patent Appeal filed under Section 10 of the Delhi High Court Act, 1966 is maintainable in view of the facts and circumstances of the present case or not?

12. Firstly, we shall deal with the preliminary objections raised by the learned counsel for the respondents that an order passed under Section 45 of the Act is not appealable under Section 10 of the Delhi High Court Act,1966.

13. Section 50 deals with "Appealable Order" under Part II of the Act and provides in clear and unambiguous words that an appeal under Part – II shall lie from an order refusing to refer the parties to arbitration under Section 45, to the Court authorised by law to hear appeals from such order. Section 50 reads thus :-

> "50. Appealable Orders
>
> (1) An appeal shall lie from theorder refusing to-
>
> (a) refer the parties to arbitration under section 45;
>
> (b) enforce a foreign award undersection 48, to the court authorised by law to hear appeals from such order**.**
>
> (2) No second appeal shall liefrom an order passed in appeal under this section, but nothing in this sectionshall affect or take away any right to appeal to the Supreme Court**.**

14. Section 50 only provides for an appeal where a Court passes an order refusing to refer the parties to arbitration in terms of Section 45 of the Act and there is no appeal provided in cases where an order

referring the parties to arbitration is passed by the court having jurisdiction.

15. That under Section 104 of the Code of Civil Procedure, 1908 an appeal shall lie only in specific circumstances as enumerated under Section 104[1][ff-i]. Under Section 104 of the Code of Civil Procedure, 1908, an appeal shall like only against orders. Section 104 reads as under :-

> "104. Orders from which appeal lies
>
> (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:--
>
> [1] [***]
>
> [2] [(ff) an order under section 35A;]
>
> [3] [(ffa) and order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;]
>
> (g) an order under section 95;
>
> (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;
>
> (i) any order made under rules from which an appeal is expressly allowed by rules:
>
> [2] [Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]
>
> (2) No appeal shall lie from any order passed in appeal under this section.

16. Section 104 of the Code of Civil Procedure, 1908 does not contemplate any appeal against an order passed under Section 45 of the Arbitration and Conciliation Act, 1996. An order passed under Section

45 of the Act is appealable under Section 50[1][a] of the Act only in a case where the court below has refused to refer the parties to arbitration under Section 45 of the Act. In such a condition an aggrieved party can initiate an appeal under Section 50[1][a] of the Act, not otherwise.

17. The Hon'ble Supreme Court in **Shin-Estu Chemicals Co. Ltd. V/s. Aksh Optifiber Ltd. & Anr. [2005] 7 SCC 234** has held that there is no provision under the Arbitration Act for filing an appeal in case a judicial authority refers the parties to arbitration. In the aforesaid judgment all the three Judges of the Hon'ble Court are unanimous that an order passed under Section 45 of the Act referring the parties to arbitration is non-appealable. Their Lordships have held as under :-

> "As can be seen from the above, an order refusing to refer the parties to arbitration under Section 45 of the Act is appellable. There is, however, no provision for filing an appeal if the judicial authority refers the parties to arbitration.
>
> .....The Legislature under Section 50 has clearly allowed appeal only in case the judicial authority refuses to refer the parties to arbitration or refuses to enforce a foreign award. The fact that a provision is not made for an appeal in case reference is made to arbitration is not a ground to say that the court should prima facie decide the validity of the agreement ignoring the express provisions of Section 45. The Legislature has granted the right of appeal in the event of refusal to refer but not in the event of the order being made for reference of parties to arbitration. This provision of appeal is not determinative of the scope of Section 45 to mean that the determination thereunder has to be prima facie..... [Y K Sabharwal, J. as his Lordship then was]
>
> The finding of the court that the arbitration agreement is valid, operative and enforceable, if in favour of the party setting up the arbitration agreement, is not appellable under Section 50 as a matter of legislative policy. Refusing to refer parties to arbitration under Section 45, is however made appellable under Section 50[1][a].....[B N Srikrishna, J.]
>
> .....Where a judicial authority or the Court refused to

> make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the Appellate Court under Section 50 [1][a] of the Act and further appeal to this Court under sub-Section [2] of the said Section.....” [D.N. Dharmadhikari, J.]

18. In the case **Union of India V/s. Mohindera Supply Company AIR 1962 SC 256,** the Hon’ble Supreme Court has held that the intention of the legislation that the special powers conferred upon an Act shall have overriding effect on the general provisions of law as contained in the Code of Civil Procedure. It was further held that in the Arbitration Act there is no provision similar to Section 4 of the Code of Civil Procedure which preserves the powers reserved to courts under special statutes. The Arbitration Act, which is a consolidating and amending Act being substantially in the form of the 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 any other state of law and without any assumption that the legislature must have intended to leave the existing law unaltered. Therefore, Section 10 of the Delhi High Court Act does not rescue the present appeal.

19. This Court in the case of **Union of India V/s. A S Dhupia Air 1970 Delhi 108 [Full Bench]** clearly laid down that the Arbitration Act is a specific code dealing with arbitration matters and appeals are maintainable only against the orders as provided under the Arbitration

Act alone. The right to appeal inheres in no one and therefore, for an appeal to be maintainable, it must be backed by clear authority either given by statute or by some equivalent authority.

20. This court in **Chairman & Managing Director, NTPC vs. Raj Kishan & Co. 2001(5) AD 242** has held that in cases where an appeal is not maintainable under the provisions of the Act, an appeal under Section 10 of the Delhi High Court Act, 1966 will also not be maintainable.

21. Reliance has also been placed by the respondents on the case of **Jindal Exports Ltd vs. Furest Day Canson Ltd., 1995 (51) DRJ 170** decided by a Division Bench of this court, a similar question arose and decided by the Division Bench. Para 9 of the judgment is reproduced as under:

> "9. Only for the purpose of deciding the preliminary objection, which has been raised by learned counsel for the respondent it may be observed that Section 49 of the A&C Act, 19% provides that only where Court is satisfied that foreign award is enforceable under Chapter I of Part II, being New York Convention Awards that the said award shall be deemed to be a decree of that Court. therefore, it would not be permissible to straight away file execution application in Court and in order to enforce the award, it would be necessary, for a person seeking enforcement, to first approach the Court and seek appropriate adjudication, as envisaged under Section 48 of the A&C Act. Such an adjudication was not sought and only execution application was filed, which by the impugned order has been held to be not maintainable. Learned Single Judge observing that since the petition substantially complies with the requirement of an application under Section 47 of the A&C Act, 1996, ordered that it be treated as an application under Section 47 of the said Act. Admittedly, the impugned order is such against which an appeal would not lie under Section 50 of the Act."

22. There is no force in the contention of the appellant that there is a difference between Section 37 and 50 of the Act and, therefore, the judgment rendered under Section 37 would not be applicable to Section 50 of the Act. The argument of the learned counsel for the appellant is that Section 37 of Specific Relief Act, 1963 is different to the extent that it contains the following words "and from other", therefore making it different from Section 50. In a similar proposition of law, in the judgment passed by the Division Bench of the Madras High Court in the case of **Bharat Salt Refineries Ltd. v. M/s Compania and Anr., OSA No. 52/2008** decided on 1st August 2008 it was observed as under:-

> "9. From a reading of the above provision, it is clear that the appeal shall lie from an order refusing to refer the parties to arbitration under Section 45 and refusing to enforce a foreign award under Section 48 of the Act. Sub Section 2 of Section 50 of the Act contemplates that 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. So it is categoric, that the legislature intended that only certain orders are appealable. In this case, the foreign award is enforced under Section 48 of the Act and there is no refusal. Once the award is enforced, no appeal is provided under Section 50 of the Act and no second appeal would lie against the order. The only remedy available for the appellant is to file an appeal before the Supreme Court and he does not have the benefit of the second appeal. The right of appeal envisaged under Section 50 of the Act is substantive and has emanated from the statute itself. Since the Arbitration and Conciliation Act does not provide for right of appeal against an order allowing execution, then the same cannot be by-passed by invoking Clause 15 of the Letters Patent. Clause 15 of the Letters Patent is nothing but a law authorizing Court to hear internal appeals in the original side. It is clear that under Section 50 of the Act, appeal can be preferred [amongst others] if the competent Court refuses to enforce a foreign award, which would effectively mean that if there is no refusal then consequently there is no right of appeal.

10. Section 50 of the Act, according to us, is exhaustive though it is slightly different from the corresponding provision Section 37 under part I of the Arbitration and Conciliation Act. A perusal of Section 37 is required since it is similar to section 50 of the Act which is in controversy now. Section 37 of the Act reads as follows:

> "(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 under Section 9;
>
> (b) setting aside or refusing to set aside an arbitral award under Section 34.
>
> (2) An appeal shall also lie to a Court from an order of the arbitral tribunal.
>
> (a) accepting the plea referred to in Sub-section (2) or Sub-section (3) of Section 16; or
>
> (b) granting or refusing to grant an interim measure under Section 17.
>
> (3) 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."

13. Per contra, the learned counsel appearing for the respondent relied on the judgment of this Court reported in 2004 (2) CTC 334 (KARAIKAL MUNICIPALITY BY THE COMMISSIONER, KARAIKAL VS. NABISSA UMMAL AND OTHERS, wherein it has been held that no Letters Patent appeal is maintainable against the order of the learned single Judge of this Court in a matter arising under the Arbitration Act and in para 5 of the said judgment, it has been held as follows:

> "5. The said judgment has been over-ruled by a decision of the Full Bench in Moolchand Kevalchand Daga Vs. Kissindoss Giridhardoss, 1974 L.W. 408, holding that the expression "Second Appeal" in Section 39) of the Arbitration Act would not apply to an appeal under Clause 15 of the Letters Patent from one Judge of the High Court to two or more Judges

of the same Court. The above-said principle held in the said judgment has been declared as not good law by the Supreme Court in Union of India Vs. Mohindra Supply Co., AIR 1962 SC 256. The Apex Court has held as follows:

"(5) The problem to which attention must then be directed is whether the right to appeal under the Letters patent is at all restricted by S.39, sub-secs. (1) and (2). Clause 10 of the Letters Patent of the High Court, in so far as it is material, provides:

" And we do further ordain that an appeal shall lie to the said High Court ..... from the judgment (not being a judgment passed in exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction.....) of one Judge of the High Court...."

By this clause, a right to appeal except in the cases specified, from one Judge of the High Court to a Division Bench is expressly granted. But the Letters Patent are declared by C1.37 subject to the legislative power of the Governor-General in Council and also of the Governor-in-Council under the Government of India Act, 1915, and may in all respects be amended or altered in exercise of legislative authority. Under S.39(1), an appeal lies from the orders specified in that sub-Section and from no others. The legislature has plainly expressed itself that the 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 expression provision contained in S.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 Cl.(2) does not similarly restrict the exercise of appellate power granted by the Letters Patent. If for reasons aforementioned the expression "second appeal" includes an appeal under the Letters Patent, it would be impossible to hold that notwithstanding the express prohibition, an appeal under the Letters Patent from an order passed in appeal under sub-sec.(1) is competent."

"(17) There is in the Arbitration Act no provision similar to S.4 of the Code of Civil Procedure which preserves powers reserved to Courts under special statutes. There is also nothing in the expression "authorised by law to hear appeals from original decrees of the Court" contained in

S.39(1) of the Arbitration Act which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings. Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the provisions of S.39(1) and (2) of the Arbitration Act."

The Division Bench in the judgment cited supra followed the judgment of the Supreme Court and held that the Full Bench decision of this Court is no more a good law. The said Division Bench rendered a judgment under Section 39 of the Arbitration Act, 1940. The corresponding provision under the Arbitration and Conciliation Act, 1996 is Section 37. Both the sections deal with appealable orders. The appealable orders are categorised under the old Act as well as the new Act. There is no difference between them. Therefore, we are of the view that the judgment rendered under the 1940 Act is equally applicable to Section 37 of the 1996 Act. Learned counsel appearing for the appellant submitted that there is a difference between Sections 37 and 50 of the new Act and hence, the judgment rendered under Section 37 of the old Act would not be applicable to Section 50 of the 1996 Act. According to him, Section 37 of the Act is different to the extent it contained the following words (and from no others) and therefore makes it different from Section 50 of the Act. We do not find any substantial difference in both the provisions. Both deal with appealable orders under the Arbitration Act. Therefore we follow the Division Bench judgment of this Court cited supra.

17. Learned counsel for the respondent also relied on the following judgements of the Supreme Court reported in 1993 (2) Arb. LR 95 (STATE OF WEST BENGAL VS. GOURANGALA CHATTERJEE), (2002) 6 SCC 201 (SHYAMA CHARAN AGARWALA & SONS VS. UNION OF INDIA), (2002) 10 SCC 506 (RAMCHANDRA TRADING CO. VS. STATE OF UTTAR PRADESH) and (2002) 5 SCC 510(ITI LTD. VS. SIEMENS PUBLIC COMMUNICATIONS NETWORK LTD.) to support the proposition that the second appeal is not maintainable. As we have already concluded the issue in favour of the respondent by following the Division Bench judgment of this Court cited supra, which in turn followed the judgment of the Apex Court in Mohindra Supply Co., we have not considered the above judgment in detail as they only support the view taken by us."

23. It is not in dispute that the right to appeal is a creation of the statute and is not a right under common law, therefore, in cases where the statute does not provide for any opportunity to appeal or where it does not contemplate a particular order to be an appealable order, then no appeal against such an order is maintainable. The Courts have generally taken the view that an appeal is maintainable only in cases where there exists a statutory provision for it and in cases where there is no such statutory provision, no appeal can lie against such an order.

24. It is a settled law that right to appeal being a substantive right has to strictly fulfil the conditions of the provisions under which it is being preferred and no court has the power to enlarge the same.

25. Undisputedly, the Arbitration and Conciliation Act, 1996 is a complete code in itself and regulates both substantive law as well as procedural law and, therefore, it is a specific provision that clearly enumerates the cases under which an appeal is maintainable. Hence, all circumstances which explicitly do not fall under it are barred and hence any appeal beyond the scope of the provisions is barred.

26. The decision of the Madras High Court in fact discusses all the points raised by the parties at great length and squarely covers the present case's facts and circumstances. Considering the submissions of the parties and the legal points involved, we are of the considered opinion that the decision in Babu Lal Khimji and Sukanaya Holdings referred by the appellant is not applicable to the present facts and circumstances.

27. As regards the reliance placed by the appellant on the various decisions referred, we are not agreeable to the submissions of the appellant in view of settled law on the subject. We agree with the learned counsel for the respondents that in the case of Patel Engineering the Apex court was dealing with the nature of the function of the Chief Justice of India under Section 11 of the Arbitration Act i.e. powers with regard to appointment of arbitrators, whereas in Shin Etsu case the Hon'ble court was dealing with the powers of judicial authorities to refer parties to arbitration in case an agreement to that effect exists in cases governed by Part II of the Act. We are in agreement with counsel for respondents that in both the decisions the Apex court was dealing with different subject matters and, therefore, the question of one case over-ruling the other does not arise.

28. For the reasons mentioned by us in the preceding paras, we hold that the Letters Patent Appeal under Section 10 of the Delhi High Court Act, 1966 is not maintainable against the order passed in the application under Section 45 referring parties to arbitration. We are of the considered view that an appeal lies under Section 50 (1) (a) of the Arbitration Act only in case where the court below has refused to refer the parties to arbitration.

29. The present appeal is, hence, dismissed as not maintainable and in view thereof, it is not necessary to go into the merit of the case as agreed by the parties. Therefore, the judgment of the Learned Single Judge is upheld.

Accordingly, CM No. 3513/2006 & CM No. 8241/2006 are disposed of along with the appeals. Interim order, if any, shall stand vacated.

MANMOHAN SINGH, J.

A.K. SIKRI, J.

SEPTEMBER 18, 2009
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