* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ RFA(OS) 17/2009 & CM No.13622-23/2009

SHIVNATH RAI HARNARAIN INDIA COMPANY ..... Appellant
Through : Mr. Dushyant Dave, Sr. Adv. with Mr. Rohit Gandhi, Adv.

versus

GLENCORE GRAIN ROTTERDAM & ORS. ..... Respondent
Through: Mr. Rajiv Nayyar, Sr. Adv. with Mr. Darpan Wadhwa and Mr. Vidut Bhatia, Advs.

WITH

RFA(OS) 20/2009

SHIVNATH RAI HARNARAIN INDIA COMPANY ..... Appellant
Through : Mr. N.N.Aggarwal and Mr. Rohit Gandhi, Advs.

versus

GLENCORE GRAIN ROTTERDAM & ORS. ..... Respondent
Through : Mr. Rajiv Nayyar, Sr. Adv. with Mr. Darpan Wadhwa and Mr. Vidut Bhatia, Advs.

WITH

EFA(OS) 36/2009 & CM Nos.13904-05/2009

SHRI LAL MAHAL LTD. ..... Appellant
Through : Mr. Chetan Sharma, Sr. Adv. with Mr. Anshuj Dhingra, Adv.

versus

NAVALGENT MARITIME LTD. ..... Respondent
Through : Ms. Aruradha Dutt with Mr. Anish Kapur, Ms. Ekta Kapil & Mr. Gaurav Chauhan, Advs.

WITH

EFA(OS) 29/2008 & CM No.16151/2008

TINNA FINNEX LTD. ..... Appellant
Through : Mr. J.P. Sengh, Sr. Adv. with
Mr. Virendra Rawat &
Mr. Sumit Batra, Advs.

versus

NATIONAL ABILITY S.A. & ANR. ..... Respondent
Through : Ms. Sunita Dutt, Adv. for
Respondent No.1
Mr. Sudhir Nandarajog, Sr.
Adv. with Mr. Mrinal Bharti
& Mr. Akhil Anand, Advs.
for Respondent No.2

% Date of Decision : November 06, 2009

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SUNIL GAUR

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

VIKRAMAJIT SEN, J.

1. At the threshold, a preliminary objection has been raised by Mr.Rajiv Nayyar, learned Senior Counsel for the Respondent, to the effect that the present Appeal is not maintainable. The Appeal assails the Judgment of the learned Single Judge enforcing a Foreign Award bearing No.12031A dated 29th July, 1997, passed by London Rice Brokers' Association and further holding that by virtue of Section 49 of the Arbitration and

Conciliation Act, 1996 (A&C Act for short) the Award shall be deemed to be a decree of this Court. The impugned Judgment further declares that the Plaintiff/Respondent is entitled to the Award amount together with interest till the date of the Award along with future interest at the same rate, till realisation. Reliance has been placed on Section 50 of the A&C Act which prescribes that an Appeal shall lie from the Order refusing to - (a) refer the parties to arbitration under Section 45; and (b) enforce a foreign award under Section 48, to the Court authorised by law to hear appeals from such order. It proscribes the filing of appeals in all other matters.

2. It is in this context that Section 10(1) of the Delhi High Court Act, 1966 ('DHC Act' for short) assumes some significance in that it ordains that where a single Judge exercises ordinary original civil jurisdiction conferred by the preceding Section 5(2) an appeal shall lie from that judgment to the Division Bench. The first sub-section of Section 5 preserves to the Delhi High Court all original appellate and other jurisdiction as were exercisable by the erstwhile High Court of Punjab. The second sub-section bestows jurisdiction upon the Delhi High Court in respect of every suit the value of which exceeds Rupees twenty lakhs. By this provision the Delhi High Court exercises ordinary

original civil jurisdiction which its precursor, namely, the Punjab High Court, did not possesses.

3. It is jurisprudentially considered expedient to provide one opportunity to assail a verdict of a judge and it is palpably in furtherance of this that an appeal to a Division Bench is provided for by the DHC Act. This is manifestly clear once we bear in mind that the Supreme Court exercises appellate jurisdiction either on Certificate by the High Court or upon special leave being granted by it (see *Shiu-Etsu Chemical Co. Ltd. –vs- Vidhya Telelinks Ltd.*, JT 2009(4) SC 537). A Five Judge Bench of this Court in *Union of India –vs-* ***A.S. Dhupia****,* AIR 1972 Delhi 108 had ruled that Section 10(1) of the DHC Act does not confer a right of appeal even against those orders which are not covered under Section 39(1) of the Arbitration Act, 1940 which was a specific code indicating the orders which alone are appealable. The Five Judge Bench had clarified that Section 10 of the DHC Act only provides for a **forum** of Appeal but not provide the **right** to Appeal. This distinction is more often than not lost sight of. We need not advert further to Section 39 of the Arbitration Act, 1940 beyond noting that the orders that were postulated to be appealable were greater in number than those prescribed under the A&C Act.

4. Almost half a century ago, the Supreme Court in *Union of India –vs-* ***Mohindra Supply Co.,*** AIR 1962 Supreme Court 256 had clarified that the question before them was whether the right to appeal under Letters Patent was in any manner regulated by Section 39 of the Indian Arbitration Act, 1940. Their Lordships opinion can be discerned from these paragraphs:

> 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 section 39, sub-sections. (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 in respect of a decree or order made in the 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 clause 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 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 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 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. 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-section (1) is competent.

....

16. Prior to 1940 the law relating to contractual arbitration (except in so far as it was dealt with by the Arbitration Act of 1899) was contained in the Code of Civil Procedure and certain orders passed by courts in the course of arbitration proceedings were made appealable under the Code of 1877 by section 588 and in the Code of 1908 by section 104. In 1940, the legislature enacted Act X of 1940, repealing schedule 2 and section 104(1) clauses (a) to (f) of the Code of Civil Procedure 1908 and the Arbitration Act of 1899. By section 39 of the Act, a right of appeal was conferred

upon litigants in arbitration proceedings only from certain orders and from no others and the right to file appeals from appellate orders was expressly taken away by sub-section 2 and the clause in section 104 of the Code of 1908 which preserved the special jurisdiction under any other law was not incorporated in section 39. The section was enacted in a form which was absolute and not subject to any exceptions. It is true that under the Code of 1908, an appeal did lie under the Letters Patent from an order passed by a single Judge of a Chartered High Court in arbitration proceedings even if the order was passed in exercise of appellate jurisdiction, but that was so, because, the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved.

17. There is in the Arbitration Act no provision similar to section 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 section 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 section 39(1) and (2) of the Arbitration Act.

> 18. Under the Code of 1908, the right to appeal under the Letters patent was saved both by section 4 and the clause contained in section 104(1), but by the Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; the right of appeal can therefore be exercised against orders in arbitration proceedings only under section 39, and no appeal (except an appeal to this Court) will lie from an appellate order. ”

5. Arijit Pasayat, Chief Justice, as His Lordship then was, speaking for the Bench, in *Cref Finance Ltd. –vs- Puri Construction Ltd.,* AIR 2001 Delhi 414 had clarified that the Single Judge on the Original Side of this High Court exercises Appellate Jurisdiction; such an order is an order in Appeal; a Second Appeal is not maintainable in the light of Section 37(3) of the Act. It will be advantageous to immediately clarify that Section 37 is in *pari materia* to Section 50.

6. Yet another Division Bench of this Court comprising Devender Gupta and Mukul Mudgal, JJ has held that where a petition for appointment of an Arbitrator has been dismissed as infructuous, an appeal under Section 37 of the A&C Act was not envisaged. This pronouncement is available in *Vidyawati Construction Company –vs- Rail India Technical & Economic Services Ltd,* 91 (2001) Delhi Law times 538 (DB), and the Bench had referred to the conclusion arrived at by an earlier

Division Bench in *The East India Hotels Ltd. –vs- Jyoti Pvt. Ltd.,* 1996 III Apex Decision (Delhi) 242. In EFA(OS) 29/2008 Mr. J.P. Sengh, learned Senior Counsel has sought to place reliance on an earlier view of the Division Bench comprising Devender Gupta and S.K. Aggarwal, JJ. in *Jindal Exports Ltd. –vs- Fuerst Day Lawson*, 1999(51) DRJ 170 decided on 1.9.1999 but this has been set aside in *Rajan Worlikar –vs- State of Karnataka*, AIR 2001 SC 2303. Their Lordships have not stated that the view pertaining to jurisdiction is either upheld or left open. It is, therefore, trite, yet deserves reiteration, that the Letters Patent is only indicative of the forum to which an Appeal against an order of the Single Judge would lie. It does not confer an additional right to file an Appeal, such a right being a creature of a statute such as the A&C Act.

7. We are unable to comprehend the manner in which *Nirma Ltd. –vs- Lurgi Lentjes Energietechnik GMBH,* 2002 (5) SCC 520 advances the case of the Appellants in RFA(OS) Nos.17/2009 and 20/2009. Since the order is a short one, it is reproduced for facility of ready reference:

> 1. This is a petition under Article 136 of the Constitution of India, seeking leave to file civil appeal against an appellate order of the XIth City Civil Court, Ahmedabad, passed under Sub-section (2) of Section 37 of the Arbitration and Conciliation Act, 1996. We are

not inclined to entertain this special leave petition inasmuch as, in our opinion, an efficacious alternate remedy is available to the petitioner by way of filing a revision in the High Court under Section 115 of the Code of Civil Procedure. Merely because a second appeal against an appellate order is barred by the provisions of Sub-section (3) of Section 37, the remedy of revision does not cease to be available to the petitioner, for the City Civil Court deciding an appeal under Sub-section (2) of Section 37 remains a court subordinate to the High Court within the meaning of Section 115 CPC. In taking this view, we find support from a decision of this Court in Shyam Sunder Agarwal & Co. v. Union of India, [1996]1SCR245.

2. The special leave petition is, therefore, dismissed. The petitioner may file a revision before the High Court and in calculating the limitation, the petitioner shall be entitled to exclusion of time spent in this Court i.e. between the date of filing of the special leave petition and today.

8. Very recently, in **RFA (OS) No. 9/2006** titled ***ITE India (P) Ltd. –vs- Mukesh Sharma***, another Division Bench of this Court has categorically held that Section 10 of the DHC Act does not confer a right of appeal. Drawing support from a detailed judgment of a Division Bench of Madras High Court in *OSA No.52/2008* titled Bharat Salt Refineries Ltd. –vs- M/s. Compania, our learned Brothers categorically concluded that an Appeal under Section 50(1) (a) of the Arbitration and

Conciliation Act lies only in cases where the Court below refuses to refer the parties to arbitration. These observations were made because the question before our learned Brothers was restricted to that conundrum alone. The present dispute would, however, encompass Section 50 (1)(b), but the reasoning of our esteemed Brothers nevertheless is applicable on all fours. The Appeal was dismissed as not maintainable. Apart from the pronouncements of the Supreme Court on the Arbitration Act, 1940, it is obvious that several Division Benches of this Court, as well as of the Madras High Court, have not entertained appeals at least pertaining to arbitration disputes under Section 10 of the Letters Patent.

9. In *P.S. Sathappan –vs- Andhra Bank Ltd.*, (2004) 11 SCC 672 : AIR 2004 SC 5152 the Constitution Bench, by a majority of 3 to 2, held that the application of Letters Patent enabling appeals from certain orders continued unabated despite later legislation, yet clarified that where "a statue does not permit an appeal, it will not lie. Thus, for example, in cases under the Land Acquisition Act, the Guardians and Wards Act and the Succession Act, a further appeal is permitted <u>whilst under the Arbitration Act a further appeal is barred</u>" (emphasis added by us). This would apply *a fortiori* to the Delhi High Court which came into existence as a distinct entity by virtue of

parliamentary enactment and not by Letters Patent, a distinguishing feature which is not always recognized. This is extremely significant keeping in perspective the fact that the avowed purpose of Letters Patent was to establish High Courts in India, restrict appeals to the House of Lords/Privy Council, and to provide intra court appeals within the High Courts so established. So far as the Delhi High Court is concerned this is the very objective of the enactment of Parliament and therefore reverting to a previous document such as Letters Patent could well be seen as superfluous or futile. It seems to us that the Delhi High Courts Act, 1976 completely substitutes or subsumes the Letters Patent.

10. With utmost respect, we are unable to concur with the decision of the Division Bench of Calcutta High Court in *LMJ International Ltd. –vs- SEA Stream Navigation Ltd,* AIR 2007 Calcutta 260. We are informed that a Special Leave against the said Judgment has been granted by the Hon'ble Supreme Court. We must immediately clarify that as regards the second ground, that is, an order refusing to enforce the Foreign Award, it is no doubt true that the Apex Court has not in precise terms held that Section 10 of the DHC Act was not available. However, it appears to us that if Their Lordships were of the view that Section 10 in fact permitted the filing of an Appeal against the

order of the Single Judge, it would not have rested on punctilio or idle formality to dismiss the Appeal merely because Section 10 has not been mentioned. For all these manifold reasons, we not only respectfully concur with the view of the Division Bench taken very recently in ***ITE India (P) Ltd. –vs- Mukesh Sharma,*** but we make bold to say that the question whether an appeal is maintainable or not under Section 10 of the DHC Act in the context of Arbitration Law, is no longer *res integra.* It is in this analysis we hold that the present Appeal, which is directed against the Order/Judgment of the Learned Single Judge enforcing an Award, is not maintainable.

11. The Appeals are not maintainable and are dismissed. Pending applications also stand dismissed

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12. Judgment was reserved on 13.10.2009 but the matter had been renotified in order to afford an opportunity to the parties to address arguments on the maintainability of the Appeal. For reasons, which we find inexplicable, learned counsel for the Respondent yet again has not pressed this point before us.

13. We do not need to enter upon the merits of the case since it is our conclusion that an appeal before the Division Bench is not maintainable as it is not postulated in Section 50 of the A&C Act. The matter had already been argued on the merits and

hence we shall give brief summation of our views in that regard. The striking feature of this litigation is that no written Objections have been filed by the Appellant/Judgment Debtor either in Chapter-IX of Part-I or more appropriately under Section 48 of Chapter-I of Part-II of the A&C Act. Avowedly, the New York Convention applies to the dispute before us. Failure to file any written objections is in the backdrop of several opportunities having been granted for this purpose by the learned Single Judge, but not availed of by the Appellant. Section 48 comprises three sub-sections, the first of which envisages the filing of a motion by the party against whom a foreign award is sought to be enforced or invoked. The second sub-section, in our opinion, casts an obligation on the Court which has been asked to enforce an arbitral award to *suo moto* be satisfied on the question of whether – (a) the submission of the difference is not capable of settlement by arbitration under the law of India or (b) that the enforcement of the award would be contrary to the public policy of India. The Explanation to this sub-section has also been relied upon by Mr. Sharma, learned Senior Counsel for the Appellant in an effort to convince us that the making of the Award was induced and effected by fraud or corruption. Succinctly stated, it is his contention that the Appellant was coerced into making concessions to the

Respondent since it was placed in the predicament of its goods being dumped by the carrier while the ship was on the high seas. The learned Single Judge has returned specific finding on the question of coercion with which we are in respectful agreement. What needs to be underscored is that the Explanation speaks of inducement, fraud or corruption in the making of the award. No fraud or corruption has been disclosed in the making of the Award. So far as the question of public policy of India is concerned, the absence of free consent as dealt with and defined in Sections 13 to 18 of the Indian Contract Act, 1872 would have the effect of rendering a contract voidable under Sections 19 and 19A at the option of the party whose consent is caused by coercion, fraud or misrepresentation. In the case in hand, a hiatus between the off-loading of the goods and the commencement of arbitration in London had occurred. In order to attract Section 48(2) of the A&C Act, it was essential for the Appellant to have immediately recorded that the alleged novation of the contract had taken place without its free consent. The Arbitrators have looked into this question and returned the finding that this cast of coercion is common in commercial transactions. The Arbitrators are best placed to deal with such questions as they are more conversant with them than the Courts of law. In any event, the alleged coercion does not

impact upon whether the parties had agreed to resolve their differences through the aegis of arbitration.

14. Great emphasis has been laid by Mr. Sharma on the fact that an action had been taken by the Respondents for executing the arbitral Award in England, which was subsequently withdrawn. It is trite that a Decree Holder can take steps for executing the Award wherever assets of the Judgment Debtor are to be found. In this case, the arbitral Award was published in England. If execution was to be initiated at that venue, the laws applicable in England would, no doubt, have to be complied with.

15. In the context of the English law, the following provisions were brought to our notice, which we reproduced for ease of reference:-

> 58 Effect of award
> (1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.
> (2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part.
>
> 66 Enforcement of the award
> (1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be

enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the [1950 c. 27.] Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award

16. While on this subject we may briefly note that Section 67 of the English Arbitration Act contemplates the challenging of an Award on substantive jurisdiction, and Section 68 on serious irregularities. The fact that it was possible to file execution in England, and in which case Section 66 would have to be complied with, is of little or no relevance to Courts in countries other than England unless the concerned Arbitration Clause envisaged its applicability. So far as execution proceedings in India are concerned, they are determined and regulated by the

provisions under the A&C Act. We find no merit in the argument of Mr. Sharma that merely because the Award has been passed in London, it must receive the *imprimatur* of Courts in that country under Section 66 of the English Arbitration Act before it can be executed in any other part of the world. When a party seeks execution of a foreign Award in India, it perforce has to comply with the provisions of law obtaining in this country. We find it poignant that while the period of ninety days has been set down for the filing of objections against an Award under Part-I of the A&C Act, no period has been prescribed under Chapter-I of Part-II. This, it appears to us, is for the obvious reasons that a Debtor in arbitral proceedings cannot affirmatively anticipate which country execution proceedings will be initiated in by the party in whose favour the arbitral award has been pronounced. Therefore, Objections obviously have to be filed within a reasonable time once execution or enforcement is claimed at a particular venue. It is in this context that we have already noticed the failure of the Appellant to file written Objections under Section 48(1) of the A&C Act. The circumstances envisaged in Section 48(1)(a)(b)(c)(d)(e) would be irrelevant so far as the attention of the learned Single Judge was concerned. In the context of Section 48(2) the learned

Single Judge has returned the findings with which we are in complete agreement.

17. In these circumstances, the Appeal fails on merits as well and is dismissed. Pending applications also stand dismissed.

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18. The Appeal was argued on the question of whether it was maintainable or not against the impugned Order enforcing the foreign Award. In the light of aforesaid narration, we are of the view that the Appeal is not maintainable and dismiss it on this short ground. Pending application also stands dismissed.

(VIKRAMAJIT SEN)
JUDGE

(SUNIL GAUR)
JUDGE

November 06, 2009
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