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

\+ **RFA (OS) No.0034/2010**

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Date of Decision: 06.05.2010

M/s Maruti Clean Coal & Power Limited .... Appellant

Through Mr.,Sandeep Sethi, Sr. Advocate, Mr. S.Kumar. , Mr. Kartik Nagar Advocate for Appellant

Versus

Kolahai Infotech Pvt. Ltd. & Others .... Respondents

Through Mr. Rajiv Nayar Sr. Advocate, Mr. Kailash Gahlot Advocates for Respondent no.1
Mr.Neeraj Kishan Kaul Sr. Advocate, Kamal Mehta Advocate for Respondent no.2

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

ANIL KUMAR, J.

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1. The appellant has filed the above noted appeal against the order dated 10th March, 2010 passed in I.A.No.1659 of 2010 in CS(OS) No.2241 of 2009 under Section 8 of Arbitration and Conciliation Act, 1996, allowing the application and directing the reference of disputes between the appellant and the respondents to the Arbitration in terms of the Share Holder Agreement dated 4th April, 2008 containing the Arbitration Clause under Clause 21 and directing the parties to

approach the concerned court for referral of their disputes in terms thereof for adjudication. The appellant has also challenged the order dated 19th March, 2010 holding that the civil suit being CS(OS) No.2241 of 2009 was not maintainable.

2. The appellant contended that it is a limited company and respondent No.1 is also a private limited company which is an investment company. Respondent Nos.2 and 3 are stated to be the nominated Directors of the appellant's company. Respondent Nos. 4 to 7 are also companies and they together with their promoters, or associates, or affiliates, or other known, presently own 81% of equity of the appellant company.

3. It is asserted that a Share Holder Agreement, which contained an Arbitration Clause, which is an admitted document between the parties dated 4th April, 2008, was executed at Raipur Chhatisgarh between the appellant and the respondent No.1. There are six signatories to the said agreement. The Share Holder Agreement (hereinafter referred to as 'the SHA') contains an Arbitration Clause in terms of Clause 21.

4. The appellant had filed the Civil Suit for mandatory injunction and declaration being CS(OS) No.2241 of 2009, praying inter-alia, to declare that the shares issued to respondent No.1 pursuant to the

Share Holder Agreement dated 4th April, 2008 are void and of no effect and be cancelled or issue mandatory injunction directing respondent Nos. .1 to 3 to transfer the shares held by respondent No.1 in appellant's company at fair valuation not exceeding the face value of the share or as determined by this Court.

5. In the suit filed by the appellant, an application being I.A.No.1659 of 2010 was filed under Section 8 of the Arbitration and Conciliation Act, 1996 praying, inter-alia, to refer the disputes to Arbitration in terms of the Share Holder Agreement and dismiss the suit with cost, as the Share Holder Agreement in terms of Clause 21 has a specific Arbitration Agreement. It was asserted that in terms of Clause 21, it is categorically provided that no party to the Share Holder Agreement shall file a suit and shall only initiate arbitration proceedings upon failure of discussion after 60 days. It was also contended that in terms of Clause 21 an irrevocable consent for only arbitration proceeding was given and the said Clause is severable and will survive any cancellation or termination for any reasons and since the plaintiff has filed the suit despite categorically agreeing not to file the suit, it is without jurisdiction and breach of the said obligation.

6. Respondent No.1/applicant also contended That the shares of the plaintiff issued to Applicant/Defendant No. 1"pursuant to the Shareholders Agreement" be declared as void and of no effect. It is also

submitted that the alternative prayer which is prayer (b) seeks a mandatory injunction directing defendant Nos. 1 to 3 to transfer shares "held by defendant no. 1 in Plaintiff Company" at a certain valuation to the other defendants. This alternate prayer (b) is also subject matter of arbitration and no suit can be filed in relation thereto.

7. The orders dated 10th March, 2010 passed in I.A.No.1659 of 2010 and order dated 19th March, 2010 passed in CS(OS) No.2241 of 2009 are primarily challenged contending, inter-alia that civil suit is maintainable and the dispute could not be referred to Arbitration. The orders have been impugned also on the ground that the Single Judge erred in taking up the application under Section 8 of the Arbitration and Conciliation Act, 1996, though, respondent No.1 had also filed an application under Order VII Rule 11 of Code of Civil Procedure for return of the plaint on the ground that the High Court of Delhi has no jurisdiction. It is also asserted that the Share Holder Agreement entered into was based on inducement, fraud and misrepresentation which vitiated the entire transaction and every clause thereof including the purported arbitration agreement contained therein, and as such there was no valid arbitration clause, therefore, reliance on Section 16(1)(b) of the Arbitration and Conciliation Act, 1996 could not be placed. The appellant has taken other grounds also impugning the order/judgment dated 10th March, 2010 in I.A.No.1659 of 2010 and order dated 19th March, 2010 passed in CS(OS) No.2241 of 2009.

8. Respondent Nos.1, 2 and 3 have raised a preliminary objection that the appeal is not maintainable against an order passed on an application under Section 8 of the Arbitration and Conciliation Act, 1996, under Section 37 of the said Act. The learned counsel has also relied on the decision of a Division Bench of this Court in Tandav Film Entertainment Pvt. Ltd. vs. Four Frame Pictures & another', 2010 (114) DRJ, 219 and RITES Ltd. v. JMC Projects (India) Ltd., 2009 (3) R.A.J. 13 Delhi to support their contentions that the appeal against an order passed on an application under section 8 of the Arbitration and Conciliation Act, 1996 is not maintainable.

9. The learned counsel for the appellant has contended that the appeal under Section 96 read with Section 151 of the Code of Civil Procedure read with Section 10 of the Delhi High Court Act, 1860 is maintainable and has relied upon (1999) 2 SCC 541, M/s Orma Impex Pvt. Ltd. v. Nissai ASB PTE Ltd.

10. Perusal of the order dated 10th March, 2010 in I.A.No.1659 of 2010 and order dated 19th March, 2010 shows that the disputes in the suit have been held to be arbitrable and therefore, the application under Section 8 of Arbitration & Conciliation Act, 1996 has been allowed and the disputes between the appellant and the respondents have been referred to Arbitration in terms of Share Holder Agreement

dated 4th April, 2008. Since the disputes which were raised by the appellant in the suit were ordered to be referred to the Arbitration under Section 8 of the Arbitration & Conciliation Act, 1996 therefore, nothing survived in the suit the suit was dismissed as not maintainable by order dated 19th March, 2010. In the circumstances, the orders impugned by the appellant are under Section 8 of the Arbitration & Conciliation Act, 1996.

11. If the orders impugned by the appellant are under Section 8 of the Arbitration & Conciliation Act, the appeal could be maintained only if the order passed under Section 8 of the Arbitration & Conciliation Act are appealable under the said Act. The Arbitration & Conciliation Act, 1996 provides for appeal under Section 37 of the said Act, which is as under:-

> "37. Appealable orders.- (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:-
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> (a) granting or refusing to grant any measure under section 9;
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> (b) setting aside or refusing to set aside an arbitral award under section 34.
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> (2). An appeal shall also lie to a Court from an order granting of the arbitral tribunal.-
> (a). accepting the plea referred 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."

12. This cannot be disputed by the parties in the circumstances that an order passed under Section 8 of Arbitration & Conciliation Act, 1996 is not appealable under Section 37 of the said Act, and therefore, an appeal under Section 37 of the Arbitration & Conciliation Act shall not be maintainable.

13. If an appeal is not maintainable under section 37 of Arbitration and Conciliation Act, 1996 from an order passed under section 8 of the Arbitration and Conciliation Act, 1996, whether an appeal shall be maintainable under any provision of Code of Civil Procedure or Delhi High Court Act or Letters Patent Act, against the said order. Section 37 of the Act categorically stipulates that only orders detailed in that section will be appealable and no other orders.

14. In Tandav Film Entertainment Pvt. Ltd. (supra), the disputes which were raised in the suit were referred to the Arbitration on an application passed under Section 8 of the Arbitration & Conciliation Act, 1996. It was held that there cannot be a doubt that an order passed under Section 8 of the Act is neither an order granting or refusing to grant any measure under Section 9 of the Act, nor an order setting aside or refusing to set aside an arbitral award under Section

34, nor an order under Section 8 of the Act is an order passed by the Tribunal, and therefore, it was held that an appeal against the order passed under Section 8 of the Act shall not be maintainable under Section 37 of the 1996 Act. It was also held that Section 8 of the 1996 Act is peremptory in nature and since where an arbitration agreement exist, the Court is under obligation to refer the parties to Arbitration in terms of the Arbitration Agreement and consequent thereto no issues remain to be decided in the suit and therefore, it was held that the suit was rightly dismissed and the appeal filed against the order referring the disputes to the Arbitration and dismissal of the suit are not maintainable.

15. In Canbank Financial Services Ltd. v. Haryana Petro Chemicals Ltd., 2008 (2) ARBLR 365 (Delhi) a Division Bench of this Court had held that an appeal against the order referring the parties to arbitration could not be entertained under Section 37 of the Act, and it was further held that an appeal could not be maintainable even under Clause 10 of the Letters Patent Act,. It was held that legislature has expressed itself that the right of an appeal against the order passed under the Arbitration Act may be exercised only in support of certain orders and right to appeal against other orders is expressly taken away and the right to appeal being a creature of statue, no litigant can claim an inherent right to appeal against a decision of a Court. Relying on Union of India v. A.S Dupia, AIR 1970, Delhi; Banwari Lal Radhey Mohan v.

The Punjab State Co-operative Supply and Marketing Federation Ltd., AIR 1983 Delhi 402, and Shah Babulal Khimji v. Jayaben De Kanya, AIR 1981 SC 86 in Canbank Financial Services Ltd. (Supra), it was categorically held that an appeal under clause 10 of the Letters Patent would also not be maintainable against the order passed under the section 39 of the old act which is analogous to section 37 of the Act.

16. In RITES Ltd. (supra) also it was held that in face of the specific provision of the right to appeal contained in Section 37 of the Act, it cannot be said that the Letters Patent appeal is maintainable against the order passed under Section 8 of the Act, as the legislation intend to exclude the Letters Patent appeal from an order passed under the Arbitration & Conciliation Act, 1996, except those specifically mentioned in Section 37 of the Act. The Arbitration and conciliation Act, 1996 is a consolidating and amending Act in the form of a code relating to arbitration and it must be construed without any assumption that it was not intended to alter the law, relating to appeals. The words of section 37 of the Act of 1996 are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumption derived from previous state of law and without any assumption that the legislature must have intended to leave the existing law unaltered.

17. Reliance by appellant on M/s Orma Impex Pvt. Ltd., where in view of conflicting decisions regarding whether an appeal lies under Section 50 of the Act of 1996 against an order under Section 45 of the Act, where the matter was placed before a Three Judges Bench of the Supreme Court is also of no help as the latter on the said reference was disposed of by order dated 12th October, 1999 passed in Civil Appeal No.1538 of 1999 M/s Orma Impex Pvt. Ltd. v. Nissai ASB PTE Ltd.,(supra) holding the plea that the appeal was under section 10 of the Delhi High Court Act, cannot be accepted as there was nothing on record that the appeal was filed under section 10 of the Delhi High Court Act as the appeal categorically stipulated that the appeal is under section 50 of the Arbitration and Conciliation Act, 1996. Consequently on the basis of the ratio of the said case, the appellant cannot contend that an appeal under section 10 of Delhi High Court Act shall be maintainable. Section 10 of the Delhi High Court Act, is as under:-

> *"**10. Powers of Judges** (1) where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-section (2) of section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court.*
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> *(2) Subject to the provisions of sub-section (i), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges, and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers, shall, with the necessary modifications, apply in relation to the High Court of Delhi."*

18. In LPA No.116/2010, Jindal Exports Ltd v. Fuerst Day Lawson decided on 21st April, 2010 a Division Bench of this Court had held that an appeal is permissible after the relevant statute permits it. If relevant statute does not permit an appeal it may yet be preferred under the Letters Patent, unless that is expressly excluded. In Jindal Exports Ltd the question for consideration was whether an appeal under Clause 10 of Letters Patent (as applicable to Delhi High Court) shall be maintainable against an order enforcing a foreign award (within the meaning of Sections 44 and 47 of the Arbitration and Conciliation Act, 1996 and Article II of the New York Convention). The Division Bench had held that reading of Section 50 of the Arbitration & Conciliation Act, 1996, though the words "and from no others" as appears in Section 37 of the said Act, are missing in Section 50 of the said Act, there cannot be a doubt that "all further appeals are barred" except those mentioned therein. Therefore, in the case of Delhi High Court which was established by Delhi High Court and not by Letters Patent, Section 50 of the Arbitration & Conciliation Act, 1996 was held to bar all appeals under that statute except those permitted. It was thus held that to this extent, it limits the operation of the Letters Patent to as applicable to the High Court and thereby bars appeal under the Letters Patent except those which are permitted under Section 50 of the Act of 1996.

19. Section 37 of the Act of 1996 very categorically permits only appeals from those orders which are supported in Section 37 of the Act of 1996 and from no other orders. Therefore, there cannot be any doubt that all further appeals are barred except those mentioned under Section 37 of the said Act and consequently an appeal under Section 10 of the Delhi High Court would also be barred against the order passed by the Court under Section 8 of the Arbitration & Conciliation Act, 1996 as an appeal against the said order is not provided under Section 37 of the Act of 1996.

20. If the legislature had intended to exclude an appeal from an order passed under the Arbitration & Conciliation Act, 1996 except those specifically mentioned in Section 37 of the Act then an appeal would not lie under Section 10 of the Delhi High Court Act also. This Court is in complete agreement with the reasoning in cases of Tandav Film Entertainment Pvt. Ltd (supra), M/s RITES Ltd.(Supra) and Jindal Exports Ltd. and holds that an appeal under section 10 of the Delhi High Court Act will also be not maintainable.

21. For the foregoing reasons the inevitable inference is that the appeal against an order passed by the Single Judge under Section 8 of the Arbitration & Conciliation Act, 1996 is not maintainable. The appeal

is, therefore, dismissed as not maintainable. Parties are, however, left to bear their own cost.

ANIL KUMAR, J.

MAY 06, 2010 **MOOL CHAND GARG, J.**
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