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

\+ **RFA (OS) No.9/2006**

Judgment reserved on: 14th April, 2009

% Judgment decided on : 18th September, 2009

ITE India (P) Ltd. ....Appellant

Through : Mr. Sanjay Jain, Sr. Adv. with Ms. Neeru Sharma and Mr. Sarfaraz, Advs.

Versus

Mukesh Sharma and Ors. ….Respondents

Through : Mr. Rajiv Nayar, Sr. Adv. with Mr. Viplav Sharma, Adv. for Respondents

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 judgment we shall dispose of RFA filed by the plaintiff/appellant (hereinafter referred to as 'ITE') against the judgment of a Learned Single Judge of this court passed on December 20, 2005 in I.A. No. 6527/2005 and in CS (OS) No. 926/2005.

2. Brief facts as stated in the plaint are :

(a) That the Appellant filed a suit for declaration whereby a decree of declaration was sought to the effect that there exists no valid arbitration agreement between the parties and that the letter issued by respondent no.6 at the request of respondents 3 and 5 herein is null and void. Another declaration prayed for was that the letter dated 29th June 2005 issued by respondent no.6

declaring that the appellant be asked to jointly nominate the arbitrator along with defendants 1 and 2 be declared null & void.
(b) The Appellant is a company incorporated under the provisions of the Companies Act having its registered office at 583, Lajpat Nagar, Part-II, New Delhi. The respondent no.1 Sh. Mukesh Sharma is a citizen of India who entered into a Shareholders agreement with respondent no.3 containing the arbitration clause vide agreement dated 1st July, 1998. Respondent no.2 was a company incorporated in the year 1997 by respondent no.1 and his other family members. Respondent no.3 purchased shares in respondent no. 2 company in the year 1998 and shareholders agreement dated 1st July 1998 was arrived at between respondent no. 1 and respondent no. 3. The respondent no. 2 company is also a party to the said agreement which contains the arbitration clause. The appellant and respondents 1 to 5 are shareholders of the company in view of the shares allotted from time to time and since the present dispute arose, arbitration was invoked by contesting respondents 3 to 5.

3. On 20 May, 2005, before respondent no. 6, the said respondent no. 3 claimed that such invocation is in terms of the arbitration agreement in Clause 14 of the Shareholders Agreement dated 1 July, 1998. Thereafter, respondent no. 6 issued notice to the appellant on 27 May, 2005 calling upon the parties to nominate an arbitrator. In receipt of this notice, the appellant wrote a letter dated 23 July, 2005 stating that it was not a party to the Shareholders Agreement, but respondent no. 6 issued another letter dated 29 June, 2005, inter-alia, insisting that the appellant nominate an arbitrator. Therefore, a suit before this court was filed. An ex parte injunction dated 12th July, 2005 was granted by a learned single Judge of this court stating that ITE is not open to participate in the arbitration proceedings as prima facie it did not appear to be party to the arbitration agreement relied upon.

4. The respondent nos. 3 to 5 filed I.A No.6527/2005 under Section 45 of the Arbitration and Conciliation Act, 1996 (referred to as

'the Arbitration Act') for reference of ITE to arbitration proceedings initiated by the said respondents in ICC (against ITE and defendant nos. 1 and 2).

5. By the impugned judgment dated December 20, 2005, Learned Single Judge of this court allowed the application under Section 45 of the Act with the observation that the matter be considered by the ICC. By the same judgment, the main suit was also dismissed. The Ld. Single Judge observed that ITE was not totally outside the purview of the arbitration clause in the shareholders agreement and further held that it was up to the ICC to consider the validity of the arbitration clause qua ITE.

6. While allowing the application filed by respondents 3 to 5 under Section 45 of the Arbitration Act, the learned Single Judge by his judgment dated 20th December, 2005 has, inter alia, arrived at the following finding after considering the pleadings, documents and the law point involved in the matter:-

> "40. The conduct of the parties including the communications exchanged and pleadings filed also substantiates this view. The letter dated 1.9.2004 cannot be explained away by stating that it was written by Mr. Mukesh Kumar in his personal capacity. The reference to the word "I" was only a manner of addressing and the same is apparently on behalf of the plaintiff. The pleadings before the ICC also show that the stand of the plaintiff was that there could be transfer of shares to bodies corporate without any consideration. This was so since the plaintiff itself understood that it was an assign. The subsequent effort to explain the same away by the affidavit dated 24.11.2005 cannot be accepted since the nature of alleged consideration was adjustment of loans and that appears to be a matter of internal financial adjustment of one group inter se the individuals and the companies representing the said group.

41. In so far as the scope of enquiry under Section 45 of the Act is concerned, the observations in Shin-etsu Chemical Co. Ltd. case (supra) are of great importance. Section 45 of the said Act reads as under:

> 45. Power of judicial authority to refer parties to arbitration.-- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 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.

42. The Supreme Court observed that only a prima facie examination has to take place and a summary decision arrived at on the objections raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case a request to refer the matter to arbitration is to be rejected, at that stage, the court would afford full opportunity to the parties to lead evidence. Thus, at a pre-reference stage, it was held that what was contemplated was only a prima facie view for making the reference leaving the parties to full trial either before the arbitral tribunal or before the court at a post-award stage.

43. In view of the aforesaid position, it is not necessary to go into greater detail into the submission of the learned counsel for the defendant No. 3 to 5 that it a mere suit for declaration to the effect that there exists no arbitration agreement is not contemplated under section 45 of the Act and what is contemplated is a suit which is otherwise maintainable in law but the subject matter of suit is such that the same falls within the domain of determination of arbitration agreement falling under Section 44 of the said Act. It may, however, be observed that the Supreme Court in Kvaerner Cementation India Ltd. case (supra)has laid great emphasis on the principle of the arbitral tribunal ruling on its own jurisdiction including the ruling on any objection with respect to the existence or validity of the arbitration agreement for which civil court would have no jurisdiction.

44. If the facts of the present case are considered within the aforesaid parameters, it cannot be said that the plaintiff is totally outside the purview of the arbitration clause. This is on the reading of the shareholders agreement. It is, however, to be kept in mind that the consideration of these aspects arise from the view to be taken both on the Interlocutory Application for stay of the plaintiff and the

> application filed by defendant No. 3 to 5 under Section 45 of the said Act. The present case is not one where this court can come to the conclusion that the agreement is null and void or inoperative as in Bharti Televentures Ltd. case (supra). There is also thus no question of the bifurcation of any claim which will invite the ratio of Sukanya Holdings Pvt. Ltd. case (supra). Such an eventuality would only arise if it was held that the claim qua the plaintiff was not arbitrable.
>
> 45. I am thus of the considered view that in so far as the interim application for stay is concerned, there is no prima facie case made out. Not only that, the plaintiff himself has moved an appropriate application before the ICC which would consider the validity of the agreement qua the plaintiff.
>
> 46. The said application is thus liable to be rejected. Ordered accordingly. Interim orders stand vacated."

7. The present appeal has been filed against the above-mentioned judgment. At the beginning of the hearing of the present appeal, Senior Counsel Mr. Rajiv Nayar for respondents 3 to 5 raised a preliminary objection by submitting at the outset that the present appeal is not maintainable under the provision of Section 96 Code of Civil Procedure, 1908 or the Letters Patent Appeal under Section 10 Delhi High Court Act, 1996. While considering the objection of maintainability of the appeal, the 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 is a special and specific provision in respect of appeals against the judgments and orders passed in Part II of the 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 go for arbitration the said order referring to arbitration is not appealable and, therefore, the appeal is not maintainable.

(c) The next submission is that the 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 is a special statute and confers a statutory right of appeal under Section 50 only in certain matters specified in that section.

(d) That the appeal under Section 96 of the Code of Civil Procedure, 1908 is not maintainable in view of the objection raised in (a) to (c) of para 8 above.

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 under Section 96 Civil Procedure Code, 1908 and also as Latter 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 Arbitration Act.

(c) Learned counsel for the appellant submits that the language of Section 50 of the 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 Mr. Sanjay Jain for the appellant has argued that the present appeal is

certainly maintainable. On merit a suggestion is given by him that the appellant is ready and willing to have the arbitration conducted by any retired Judge of this court or of the Hon'ble Supreme Court of all disputes which have originated from the agreement between the parties.

11. Learned senior counsel for respondents 3 to 5 is not agreeable to the above-stated suggestion given by the learned counsel for the appellant. The submission of respondents 3 to 5 is that arbitration proceedings are to be conducted as per agreement and in fact the suit filed by the appellant before trial court was not maintainable.

12. The points which arise for determination are 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; and,
>
> b] Whether the appeal filed by the appellant, under Section 96 of Code of Civil Procedure, 1908 against the judgment passed by the learned Single Judge in the application filed by the respondent under Section 45 of the Arbitration and Conciliation Act, 1996 referring the parties to arbitration, is maintainable or not.

13. Firstly, we shall deal with the objections raised by the learned counsel for the respondent nos.3 to 5 that an order passed under Section 45 of the Act is not appealable under Section 10 of the Delhi High Court Act.

14. 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.

15. Section 50 only provides for an appeal where a Court passes an order refusing to refer the parties to a case 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.

16. 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 lie 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.

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

18. 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.]

19. 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 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 explicit and they must be given their full effect and 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, 1966 does not rescue the present appeal.

20. 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.

21. 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 Arbitration Act, an appeal under Section 10 of the Delhi High Court Act, 1966 will also not be maintainable.

22. 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."

23. There is no force in the contention of the appellant that there is a difference between Section 37 and 50 of the Arbitration 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, 1996 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 Arbitration Act, according to us, is exhaustive though it is slightly different from the corresponding provision Section 37 under part I of the Arbitration 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."

24. 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.

25. 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.

26. 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.

27. 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 referred by the appellant is not applicable to the present facts and circumstances.

28. 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 respondents No.3 to 5 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 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 No.3 to 5 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.

29. As regards the other objection of the learned counsel for the respondent nos. 3 to 5 that the present appeal is also not maintainable under Section 96 of the Code of Civil Procedure, 1908, we agree with the submissions of the learned counsel due to the following reasons. Section 96 of the Code of Civil Procedure, 1908 reads as under :-

> **96. Appeal from original decree.—**[1] Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.
>
> [2] An appeal may lie from an original decree

passed ex parte.

[3] xxxxxxxxxxxxxxxx

[4] xxxxxxxxxxxxxxxx

30. From a bare reading of the words "any other law for the time being in force" in the said Section 96, it is clear that if there is any other law which is in force and which provides a separate procedure for appeal, then as per the scheme of the provision the special law will prevail. An order passed under Section 45 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 and in such condition only will an appeal lie under Section 50[1][a] of the Act, and not otherwise. Since in the present case the learned Single Judge while deciding the application under Section 45 of the Act referred the parties to arbitration, in light of the aforesaid, it is clear that no appeal can lie against such an order.

31. 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. We are also of the considered opinion that an appeal under Section 96 of the Code of Civil Procedure, 1908 also does not lie and is not maintainable under the said provisions.

32. The present appeal, therefore, is 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

passed by the Learned Single Judge is affirmed.

Accordingly, C.M. No. 1168/2006, C.M. No. 3483/2006 and C.M. No. 13167/2007 are disposed of along with the appeal herein. Interim order, if any, shall stand vacated. No cost.

MANMOHAN SINGH, J.

A.K. SIKRI, J.

SEPTEMBER 18, 2009