Dispute Resolution Hotline

June 24, 2014

BOMBAY HIGH COURT: AD-INTERIM ORDERS UNDER SECTION 9 APPEALABLE UNDER SECTION 37 OF THE ARBITRATION ACT

The Bombay High Court has held that ad interim orders passed by the courts in exercise of their power under Order 39 Rule 1 of the Code of Civil Procedure, 1908 while exercising power under Section 9 of the Arbitration and Conciliation Act, 1996 are appealable under Section 37 of the Act.

BACKGROUND

The Bombay High Court in its recent judgment in *Mrs. Perin Hoshang Davierwalla & Anr. v. Mr. Kobad Dorabji Davierwalla & Ors.*[1] has resolved the question pertaining to the appealability of an ad-interim order [an order which is operative either till the final disposal of the interim application or till the next hearing] passed under Section 9 of the Arbitration and Conciliation Act, 1996 ["**the Act**"]. It has held that the appeal provisions under Section 37 of the Act include within their ambit not only an appeal which maybe filed against an interim order passed under Section 9 of the Act but also an ad-interim order which maybe passed by a trial court under the same provision.

FACTS

The Appellants and the Respondents were partners in a partnership firm. The Appellants contended that the Respondent No. 1 was attempting to utilize the partnership assets for his personal benefit. By notice dated March 15, 2013, the Appellants dissolved the partnership with immediate effect on the grounds of lack of trust in the Respondent No.1.

The Appellants filed an application seeking certain interim reliefs under Section 9 of the Act. They also prayed for the following reliefs to be granted to protect their interests during the pendency of the Section 9 application before the District Judge, Satara [the ad-interim reliefs]:

- Order restraining the Respondents from withdrawing any amount from the partnership account except under joint signatures of the Appellants during the pendency of the application.
- Order restraining the Respondents from creating any third party rights in the business or assets of the partnership firm
- Order seeking appointment of a Court Receiver to manage the business of the partnership firm during the pendency of the Section 9 application

While the first two ad-interim reliefs were granted by the District Judge, the last ad-interim relief sought was rejected pending the final adjudication of the Section 9 application. This rejection at the interim stage was challenged by the Appellants in the Bombay High Court by way of an appeal under the provisions of Section 37 of the Act.

CHALLENGE TO THE MAINTAINABILITY OF THE APPEAL BY THE RESPONDENT

The Respondents challenged the maintainability of the appeal on the ground that the ad-interim reliefs are passed by a court under Section 9 of the Act in exercise of its powers under Order 39 Rule 1 of the Code of Civil Procedure, 1908 ["**CPC**"]. It was further stated that an ad-interim order under Section 9 of the Act was not appealable because only a final order under Section 9 of the Act was appealable. The Respondents relied on the decision in *Conros Steels Pvt. Ltd. v. Lu Qin (Hong Kong) Co. Ltd.*[2] ["**Conros Case**"] in this regard wherein it had been stated that "*Perusal of* Section 37 *which we have quoted above shows that that provision provides for an appeal against final order passed in the proceedings instituted under* Section 9 *and 34 of the Arbitration and Conciliation Act.*". Section 37 of the Act which states that an appeal shall lie from the certain orders including orders "*granting or refusing to grant any measure under* Section 9" and "*(from no others)*" was also relied upon.

ISSUE

One of the main issues before the Bombay High Court was whether an ad interim order passed by a court under Section 9 of the Act would be appealable under Section 37 of the Act.

JUDGMENT

The Bombay High Court held that while entertaining an application under Section 9 of the Act a court would have the same powers to pass an order as it would have while passing an order under Order 39 Rule 1 of the CPC. The Court relied on the Supreme Court judgment in *Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation*[3] to provide the rationale for the same stating that when a power is conferred on a court by way of a special statute [as

under Section 9 of the Act, in this case] then the general rules of procedure of that court would apply [Order 39 Rule 1 of the CPC in this case]. In light of this, it was further held that grant or refusal of an interim measure of protection by way of an ad-interim order under Section 9 of the Act is an appealable order under Section 37 of the Act.

The Court further considered the contention of the Respondent and stated that the decision in the *Conros Case* had not decided whether an ad-interim order passed under Section 9 is appealable under Section 37 and a casual reference that 'final order' under Section 9 was appealable could not be deemed to settle the law in that respect.

Thereafter, upon considering the merits of the case, the Court allowed the appeal and passed an order for appointment of a court receiver who would take symbolic possession of the assets and business.

ANALYSIS

The present judgment deals with the pertinent issue of appealability of an ad-interim order passed under Section 9 of the Act which has previously not been dealt with by the Bombay High Court.

Previously, the parties defending an appeal, under Section 37 of the Act, against an ad-interim order would frequently raise the objection that no appeal could lie from an ad-interim order under Section 9 of the Act. This often left the parties aggrieved by an ad-interim order with the only option of approaching a High Court under Articles 226 and 227 of the Constitution of India.

The view however, taken by various other High Courts on the issue of appealability of an ad-interim order passed under Section 9 of the Act remains divergent. While in cases such as *Aventis Pasteur S.A v. Cadila Pharmaceuticals Ltd.*[4] and *Bilasraika Sponge Iron Pvt. v. Devi Trading Company*[5] the High Courts have held that an ad-interim order would be appealable under Section 37, in other cases such as *Symphony Services Corporation (India) Pvt. Ltd. v. Sudip Bhattacharjee*[6] ["**Symphony case**"] the Courts have held that such orders cannot be appealed against. In the *Symphony case,* the Karnataka High Court while dealing with the same issue came to the conclusion that an order granting ad interim measure was not appealable under Section 37 of the Act. The rationale provided for the same was that Section 37 makes an order "granting" or refusing an interim measure under Section 9 appealable. The use of the word "granting" was interpreted to mean final adjudication of a Section 9 application. It was further held that since an ad-interim order is not in the nature of a final adjudication under Section 9 of the Act it was not appealable under Section 37.

The Bombay High Court's decision in the present case adds to the body of case laws advocating the appealability of ad-interim orders under Section 37 of the Act. The High Court has arrived at this conclusion after having considered the *Conros Case*. However, it maybe observed that decisions passed by other High Courts on this issue, including the decision of the Karnataka High Court in the *Symphony Case*, have not been considered by the Bombay High Court in its judgment.

Considering that divergent views are being taken by various High Courts, the issue of appealability under Section 37 of the Act, of an ad-interim order passed under Section 9 of the Act would be put to rest only once the Supreme Court deals with such an issue.

– Varuna Bhanrale, Moazzam Khan & Vyapak Desai
You can direct your queries or comments to the authors

[1] MANU/MH/0569/2014
[2] 2012(6) Bom.C.R. 149
[3] (2007) 6 SCC 798
[4] 2003 (2) ARBLR 259 (Gujarat High Court)
[5] (2011(5)ALD327) (Andhra Pradesh High Court)
[6] (2007(4) KCCR2399) (Karnataka High Court)

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