

Dispute Resolution Hotline

February 13, 2015

BOMBAY HIGH COURT: LETTERS PATENT APPEAL IS NOT MAINTAINABLE FROM AN ORDER PASSED UNDER SECTION 8 OF THE ARBITRATION ACT

- A three judge bench of the Bombay High Court holds that a Letters Patent appeal is not maintainable from an order passed under Section 8 of the Arbitration Act;
- Bar under Section 37 of the Arbitration Act applies to such appeals;
- An order passed under Section 8 is one under Part I of the Arbitration Act;
- Provisions and judgments rendered under the Arbitration Act of 1940 can be relied upon while interpreting the provisions of the Arbitration Act of 1996.

INTRODUCTION

A three judge bench of the Bombay High Court recently in *Conros Steels Private Limited ("Conros") v. Lu Qin (Hong Kong) Company Limited ("Lu Qin") and Others*¹ has resolved the question pertaining to the appealability from an order passed under Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act") under clause 15 of the Letters Patent. It has been observed that an application under Section 8 of the Act is an application under part I of the Act and hence the bar under Section 37 of the Act would apply to an appeal from an order passed under Section 8 of the Act. It has been held that a Letters Patent appeal is not maintainable from an order passed under Section 8 of the Act.

BACKGROUND

The reference was placed before the three judge bench of the Bombay High Court by a two judge bench of the Bombay High Court. The division bench comprising of D.K Deshmukh and R.Y Ganoo J. opined that the issue of appealability under clause 15 of the Letters Patent appeal against an order passed under Section 8 of the Act in a civil suit is to be referred for consideration to a larger bench since the question frequently arises before the Bombay High Court and non-maintainability of an appeal causes great prejudice to the interest of the litigants.. Accordingly, the Chief Justice of the Bombay High Court constituted a full bench of the Bombay High Court and referred the aforesaid question of law for its consideration.

FACTUAL MATRIX

Conros had filed the suit to recover a sum of about INR 41.9 million together with interest from Lu Qin. Lu Qin filed a notice of motion for an order that the disputes in the suit be referred to arbitration in view of an arbitration agreement between the parties as provided for in the sales contract dated April 28, 2010 and for an order terminating the above suit. The learned Single Judge of the Bombay High Court granted the prayer made by Lu Qin in the notice of motion. The learned Single Judge's Order was appealed by Conros before the division bench of the Court. The division bench referred the matter to the full bench of the Bombay High Court.

ISSUES

1. Whether the bar under Section 37 of the Act would apply to a Letters Patent appeal against an order passed under Section 8 of the Act?
2. Whether an application made under Section 8 of the Act is an application made under Part I of the Act?
3. Whether the judgments and provisions of the Arbitration Act, 1940 could be used to interpret the provisions of the Act?

JUDGMENT AND JUDICIAL REASONING

The reasoning of the three judge bench of the Bombay High Court speaking through S.J Vazifdar J is stated as follows:

1. *Bar under Section 37 is applicable*

The language used in Section 37 of the Act consciously takes away the right of appeal against the orders other than those expressly mentioned in Section 37 and allowing a Letters Patent appeal under Section 37 would render the expression "*and from no others*" otiose or nugatory.² These words mandate that an appeal only lies from orders explicitly mentioned in Section 37 and no others. An order passed under Section 8 is not an order which falls in any of the categories specified in Section 37 and hence is not appealable.³ Further, Section 5 of the Act makes it clear that no judicial authority shall intervene except as provided under the Act. The Act being a self-contained and exhaustive code, the Court must interpret it without adding words which are not to be found in the

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statute.

2. An application under Section 8 is an application under Part I of the Act

Section 8 of the Act empowers the judicial authority to refer parties to arbitration. It is mandatory and pre-emptory in nature and where there exists an arbitration agreement, the court is under an obligation to refer the parties to arbitration.⁴ Section 8 (3) of the Act expressly uses the phrase that ‘*an application is made under sub-section (1)*’ making it abundantly clear that the obligation to refer parties to an agreement arises from and under Section 8 of the Act.⁵ The legislature by expressly using the word ‘*under*’ has made it clear that not only that the application is authorized by the enactment but also it is initiated under that particular enactment.⁶ The Court upon arriving at a *prima facie* opinion that there exists an arbitration agreement between the parties is bound to pass an order and refer the parties to arbitration in an application made under Section 8 of the Act. Hence, an application made under Section 8 of the Act has to be construed as an application made under Part I of the Act.

3. Judgments under 1940 Act can be relied upon for interpreting identical provisions of the 1996 Act

The Supreme Court refuted the contention that the judgments rendered under the 1940 Act cannot be relied upon while interpreting the provisions of the 1996 Act. It stated that the observations in *Ms Sundaram Finance Ltd v. Ms NEPC Ltd.*⁷ that “*the 1996 Act is very different from the 1940 Act and that the provisions of the 1996 Act have to be interpreted independently and in fact reference to the 1940 Act may actually lead to misconstruction*” cannot be interpreted as meaning that in every instance it would lead to a misconstruction. Further, a division bench of the Supreme Court in *Fuerst Day Lawson Ltd v. Jindal Exports Limited*⁸ has held that Section 39 of the 1940 Act is identical to that of Section 37 of the Act.

ANALYSIS

A constitutional bench of the Supreme Court in *Union of India v Mohindra Supply Company* (“*Mohindra*”)⁹ while deciding the issue of appealability under the 1940 Act had held that a Letters Patent appeal would not be maintainable. However, being a decision under the 1940 Act, it was construed to be of only persuasive value while interpreting Section 37 of the Act. This has led to the issue of Letters Patent appeal being continuously agitated before various High Courts of the country. Division bench decisions of the Delhi High Court in *Canbank Financial Services Limited v Punjab and Haryana Papers Chemical and Another*¹⁰ and *Rites Limited v. JMC Projects (India) Ltd.*¹¹ and that of the Bombay High Court in *International Technology Kirchner Italia Branch, S.P.A v. Esteem Projects Private Limited*¹² had taken a similar view as adopted by the Constitutional Bench in *Mohindra*. The three judge bench by clearly observing that the decisions of the 1940 Act can be applied while interpreting a similar provision under the 1996 Act and that an application under Section 8 of the Act is very much an application under Part I of the Act has hopefully put to rest the issue of appealability of a Letters Patent appeal from an order passed under Section 8 of the Act.

– Satish Padhi & Vyapak Desai

You can direct your queries or comments to the authors

¹ Appeal No. 806 of 2011 in Notice of Motion No. 3709 of 2010 in Suit No. 2358 OF 2010

² See also *Canbank Financial Services Limited v. Punjab and Haryana Papers Chemical and Another*, 2008 (2) Arb.LR 365 (Delhi).

³ See *International Technology Kirchner Italia Branch, S.P.A v. Estem Projects Private Limited*, Appeal No. 485 of 2005 in Notice of Motion No. 1238 of 2003 in Summary Suit No. 332 of 2003

⁴ See *Agri Gold Exims Ltd v. Sri Lakshmi Knits and Wovens*, (2007) 3 SCC 686

⁵ *Ibid*, para 34.

⁶ *Ibid*, para 37.

⁷ (1999) 2 SCC 479

⁸ [2011] 11 S.C.R. 1

⁹ AIR 1962 SC 256

¹⁰ 2008 (2) Arb. LR 365

¹¹ 2009 (2) Arb. LR 64

¹² Appeal No. 485 of 2005 in Notice of Motion No. 1238 of 2003 in Summary Suit No. 332 of 2003.

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