2023:CHC-OS:5125-D

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

COMMERCIAL DIVISION

ORIGINAL SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS

APOT 38 of 2023

With
AP 756 of 2022
IA NO: GA 1 of 2023

Super Smelters Ltd.
Vs.
Predominant Engineers and Contractors Pvt. Ltd.

Appearance:

For the Appellant : **Mr. Joy Saha, Sr. Adv.**
Mr. Zeeshan Haque, Adv.
Mr. A.K. Awasthi, Adv.

For the Respondent : **Mr. Mainak Bose, Adv.**
Mr. Pratik Shanu, Adv.
Mr. Debnath Ray Choudhury, Adv.
Mr. Rishabh Karnarni, Adv.

Judgment On : **10.10.2023**

Harish Tandon, J.:

The instant appeal is filed assailing an order passed by the Commercial Division of the High Court under Section 36 (2) of the

Arbitration and Conciliation Act, 1996 whereby and whereunder the direction was passed upon the appellant to deposit a sum of Rs. 4,05,50,000 as cash deposit with the Registrar, Original Side and the balance amount by way of bank guarantee before the Registrar, Original Side as condition precedent for stay of the award pending an application under Section 34 of the Arbitration and Conciliation Act.

Obviously, the impugned order is passed under the aforesaid provision of law with due regard to the provisions contained in Code of Civil Procedure for grant of stay of a money decree.

A preliminary objection is taken by the respondent that the instant appeal is not maintainable in view of the Section 37 of the Arbitration and Conciliation Act, 1996 and Section 13 by the Commercial Courts Act, 2015. Mr. Bose, learned Advocate appearing for the respondent contends that the Court exercising jurisdiction under Section 36 (2) of the Arbitration and Conciliation Act in relation to the stay of the award pending adjudication under Section 34 of the Said Act does not exercise such power under Section 34 in absence of any express provisions contained in the said Section. Mr. Bose further submits that any order passed under Section 36 of the said Act is regarded as an order passed under the said provision and, therefore, not appealable under Section 37 of the said Act. It is further submitted that even the Commercial Courts Act, 2015 does not contemplate any remedy by way of an appeal if such remedy is not provided under the Arbitration and Conciliation Act, 1996. In support of the aforesaid contention, the reliance is placed upon the unreported judgment of the Co-

ordinate Bench of this Court rendered in case of ***APL Metal Ltd. vs. Mountview Tracom LLP & Ors. (LPA 1 of 2022 decided on 05.04.2022)***.

It is arduously submitted by Mr. Bose that appeal being a creature of a statute, such remedy cannot be assumed unless the statute provides such remedy by way of an appeal and, therefore, the instant appeal is not maintainable. Lastly, it is submitted that the Commercial Courts Act in relation to an appeal expressly contained a provision for the exclusion of the applicability of the provisions contained under the Letters Patent and, therefore, the instant appeal even if it is presumed to have been filed under Clause 15 of the Letters Patent is not maintainable.

Per contra, Mr. Saha, the learned Advocate appearing for the appellants submits that even if an order is passed under Section 36 (2) of the Arbitration and Conciliation Act, but in relation to a proceeding under Section 34 of the said Act, it would be deemed to have been passed in relation to the proceeding under Section 34 and, therefore, in view of the provisions contained under Section 37 of the said Act, the remedy by way of an appeal is available. It is further submitted that the proviso contained in Section 13 of the Commercial Courts Act, is restricted only to an *inter locutory* order passed during the pendency of the suit and does not apply to a post suit proceeding. It is fervently submitted by Mr. Saha that there is no provision contained in Commercial Courts Act in relation to an execution of the decree passed by the Commercial Courts or Commercial Division and, therefore, such execution proceeding are levied before the Original Jurisdiction of the High Court and, therefore, the Letters Patent has its full applicability. It is, thus, submitted that the order passed in an execution

proceeding initiated for enforcement of a decree passed by the Commercial Courts is not covered under Section 13 of the Commercial Courts Act. In support of the aforesaid contention, Mr. Saha placed reliance upon the head note of the Section 13 of the Commercial Courts Act which relates to a decree and not an order and, therefore, the enabling provisions has to be interpreted and given a restricted meaning in relation to a remedy by way of an appeal. Lastly, it is submitted that the Court below did not assign any reasons in disposing of the said application filed for stay of the award and placed reliance upon a judgment of the Supreme Court in ***Kranti Associaties Pvt. Ltd. & Anr. vs. Masood Ahmed Khan & Ors. reported in (2010) 9 SCC 496***.

In view of the preliminary objection touching upon the maintainability of the instant appeal, we decided to determine the said point and did not invite the parties to argue on merit. Obvious reason for the same is that in the event, it is held that the appeal is not maintainable, the Court should not venture into the merit of the impugned order as any observations made therein may impact the appropriate proceedings if taken out by the appellant provided under the law.

The Arbitration and Conciliation Act, 1996 has undergone a radical changes apart from the other in relation to the execution/enforcement of the arbitral award before the Court. Prior to the amendment having brought w.e.f., 23.10.2015, the law as stood was to the effect that in the event, the arbitral award is assailed by an aggrieved party under Section 34 of the said Act before the Court, the enforceability of the arbitral award remained automatically suspended until adjudication by the Court in the said

proceeding. By virtue of an amendment having brought subsequently, Section 36 of the Arbitration and Conciliation Act, 1996 has undergone a sea-change and the concept of automatic suspension of the enforceability of the award has been gradually eroded and it is imperative to secure the order of stay of the award despite the filing of an application under Section 34 of the said Act. The law as it stands today makes it obligatory on the part of the award-debtor who has filed an application challenging the award under Section 34 to apply for stay of the award and such power is vested under Section 36 (2) of the said Act.

The Court passing an order of stay of the operation of the arbitral award derives such power from Sub-Section (2) of Section 36 of the said Act and, therefore, it cannot be conceived that such order is passed under Section 34 of the said Act. It is manifest from the provisions contained in Section 36 of the said Act that Sub-Section (2) recognises the right of the award-debtor to make an application for a stay of the operation of the arbitral award and Sub-Section (3) thereof confers jurisdiction on the Court to pass such order subject to any condition as it may deem fit for the reasons to be recorded in writing.

The proviso to Sub-Section (3) of Section 36 has to be construed in the more meaningful and pragmatic manner where the exercise of power by the Court in relation to grant of stay of the operation of the arbitral award, the due regard to the provisions for grant of stay of money decree under the provisions of the Code of Civil Procedure is to be observed. The contention of Mr. Saha that the moment the order staying the operation of the arbitral award is passed, the same shall be understood to have been passed under

the Provisions of the Code of Civil Procedure and, therefore, the remedy provided in the Code of Civil Procedure shall have to be given a full effect to, is not acceptable. The reference of the provisions of the Code of Civil Procedure in Proviso to Sub-Section (3) of Section 36 cannot be interpreted in such manner as sought to be assigned by Mr. Saha. The Proviso is explicit in the sense that all the provisions of Code of Civil Procedure shall not be automatically applied but the principles governing the exercise the power in granting a stay of money decree is required to be kept in mind. It is further manifest from the expression "due regard to the provisions for grant of stay of money decree" that the remedy provided in the Code of Civil Procedure against such order is not inbuilt and/or engrained into it. The expression "due regard" has to be understood in the perspective of the principles to be applied and not that all the provisions of the Code of Civil Procedure became applicable including the right of an appeal if provided in the Code of Civil Procedure.

Legislatures do not use any words or the expression in the statute unnecessarily and, therefore, every word which is used in the statute has to be interpreted in such a manner which would be inconformity with the legislative intent. The intention is laudable to the extent that while granting the stay of the operation of the order the principles underlying the provisions relating to a grant of stay of money decree under the Code of Civil Procedure shall be taken into account. Section 34 of the Arbitration and Conciliation Act does not contain any provisions relating to the exercise of powers conferred upon the Court to grant the stay of operation of the arbitral award. Such power is reserved under Section 36 and, therefore, any order passed in exercise of such power conferred under the said Section is

exercised under the aforesaid section which cannot be construed to have been passed under Section 34 of the said Act. Furthermore, Sub-Section (2) of Section 36 makes the position more clear that mere filing an application for setting aside the arbitral award under Section 34 shall not *ipso facto* render the award unenforceable but a separate application is required to be filed for such purposes. The reason is obvious that Section 34 does not vest any power to grant the stay of the operation of the decree and such power is required to be exercised under Section 36 of the said Act on the basis of a separate application.

A further argument is advanced by Mr. Saha that Section 13 of the Commercial Courts Act is restricted to an *interlocutory* order passed during the currency of the suit and loses its applicability in the post suit stage is not tenable. Section 13 of the Commercial Courts Act contained an exhaustive provision relating to a remedy by way of an appeal before the higher forum. It is sought to be contended by Mr. Saha that The head note of the said Section plays a significant role in interpreting the enabling provisions contained therein and the moment it is found that it is restricted to a decree, it takes away within its fold the orders passed in a proceeding initiated at Post Decree Stage, does not appear to us a logical and sound proposition of law. The head note cannot override the enabling provisions. The significance of the head note at times may be pressed in service in case of an ambiguity in an enabling provision. In absence of any ambiguity or obscurity in the languages used in the enabling provisions, recourse to the head note should not be resorted to. Though the head note does not indicate the right of an appeal from an order but the enabling provisions are laudable, clear and exposit of the legislative intent that a right of an appeal

against the order is also provided therein. Sub-Section (1) of Section 13 confers power upon any person aggrieved by judgment or order of a Commercial Court whereas Sub-Section (1A) of Section 13 subsequently inserted by way of an amendment with effect from 03.05.2018 provides a remedy by way of an appeal against the order though circumscribed by the Proviso inserted thereto to the extent that every order passed by the Commercial Division or the Commercial Court may not be appealable unless enumerated under Order 43 of the Code of Civil Procedure and Section 37 of the Arbitration and Conciliation Act. The reference of Section 37 of the Arbitration and Conciliation Act indicates that unless such order comes within the purview thereof, the right of appeal under Section 13 cannot be invoked. We are conscious of the proposition of law that the Arbitration and Conciliation Act is the special Act and the Commercial Courts Act, 2015 is a general Act. **The raison d'etre** for enactment of the Commercial Courts Act is to decide a commercial dispute involving a high amount of money to be tried speedily.

In Kandla Export Corporation & Anr. vs. OCI Corporation & Anr. reported in (2018) 14 SCC 715 the Apex Court held that the provisions contained under Section 13(1) of the Commercial Courts Act should be construed in accordance with the objects sought to be achieved by the said Act and by applying the doctrine of harmonious construction of both statute, it is apparent that they are best harmonize giving effect to the special statute i.e., the Arbitration and Conciliation Act *vis-a-vis* the more general statute namely, Commercial Courts Act. However, by virtue of a subsequent insertion of the Proviso to Sub-Section (1A) of Section 13 of the said Act, the remedy of appeal is somehow abridged and/or circumscribed

by limiting to Section 37 of the Arbitration and Conciliation Act and, therefore, the harmonious interpretation of both the provisions leaves no ambiguity that unless the nature of the order is included within Section 37 of the said Act, remedy by way of an appeal against any other order is not maintainable.

Mr. Saha raises an interesting point that the Commercial Courts Act does not contain any provisions relating to execution of a decree passed by the Commercial Courts or the Commercial Division as the case may be and, therefore, all such decrees are executed by a Civil Court having jurisdiction. The aforesaid contention does not appear to us having stand on a sound logic in view of the provisions contained under Section 10 of the said Act, Section 10 read thus :

> ***"10. Jurisdiction in respect of arbitration matters. – Where the subject-matter of an arbitration is a commercial dispute of a specified value and –***
>
> ***(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.***
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> ***(2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and***

Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(3) If Such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted."

It is apparent from the aforementioned Section that in the event, the subject matter of the arbitration relates to a commercial dispute of a specified value, all applications or appeals arising out of such arbitration under the Arbitration and Conciliation Act shall be filed on the Original Side of the High Court and disposed of by the Commercial Division where such Commercial Division has been constituted in the High Court. Obviously, the aforesaid provision takes care of the situation in relation to an International Commercial Arbitration where sub-Section (1) of Section 10 would have its application. The expression "all application or appeals" appearing in Sub-Section (2) of Section 10 of the Commercial Courts Act has to be interpreted in harmonious manner. The recent judgment rendered in case of ***PASL Wind Solutions (P) Ltd. vs. GE Power Conversion (India) (P) Ltd. reported in (2021) 7 SCC 1*** can be gainfully applied in understanding the

legislative intention supplying the incorporation of the aforesaid provisions under Section 10 of the Commercial Courts Act. Though in the said report, the Apex Court was considering the matter relating to an International Commercial Arbitration but the enforceability of such award was one of the concern of the Apex Court therein. The Apex Court held that the expression "International Commercial Arbitration" though found existence in proviso to sub-Section (1) of Section of the Arbitration and Concilation Act but does not find place in the definition contained under Section 2 (1) (f). The Apex Court further noticed that sub-Section (1) of Section 10 of the Commercial Courts Act has its applicability to an International Commercial Arbitration in relation to applications and appeals arising therefrom both under Part I and Part II of the Act. The Apex Court held that in view of the explanation to Section 47 of the Arbitration and Conciliation Act *vis-a-vis* Section 10 of the Commercial Courts Act, an award will be enforceable in a High Court under Section 10 (1) of the Commercial Courts Act in the following:

> ***"96. We have already seen how "international commercial arbitration", when used in the proviso to Section 2 (2) of the Arbitration Act, does not refer to the definition contained in Section 2 (1) (f) but would have reference to arbitrations which take place outside India, awards made in such arbitrations being enforceable under Part II of the Arbitration Act. It will be noted that Section 10 (1) applies to international commercial arbitrations, and applications or appeals therefrom, under both Parts I and II of the Arbitration Act. When applications or appeals arise out of such arbitrations under Part I, where the place of arbitration is in India, undoubtedly the definition of***

"international commercial arbitration" in Section 2 (1) (f) will govern. However, when applied to Part II, "international commercial arbitration" has reference to place of arbitration which is international in the sense of the arbitration taking place outside India. Thus construed, there is no clash at all between Section 10 of the Commercial Courts Act and the Explanation to Section 47 of the Arbitration Act, as an arbitration resulting in a foreign award, as defined under Section 44 of the Arbitration Act, will be enforceable only in a High Court under Section 10 (1) of the Commercial Courts Act, and not in a District Court under Section 10 (2) or Section 10 (3)."

Taking clue from the enlightening observations as quoted hereinabove the contention of Mr. Saha that the enforceability of an award before the Commercial Court or the Commercial Division is impliedly excluded is not tenable. The tenate of the aforesaid observation leaves no ambiguity that "all applications" including an application relating to the enforceability of the award under Section 10 of the said Act more particularly, under sub-Section (2) of Section 10 which in unequivocal term indicates that all such applications or appeals, shall be filed arising out of an arbitration which is not International Commercial Arbitration before the Original Side of the High Court and disposed of by the Commercial Division if already set up therein. It is thus apparent from the above that the enforceability of an arbitral award where the subject matter relates to commercial disputes of its specified value lies with the Commercial Division of the High Court and any order passed therein would be regarded to have been passed by the

Commercial Division and, therefore, Section 13 will have its impact with regard to the remedy by way of an appeal.

The Co-ordinate Bench in an unreported judgment delivered in APL Metals Ltd. (supra) held that the appeal is not maintainable arising from an arbitral proceeding or award unless provided under Section 37 of the Arbitration and Conciliation Act in the following:

> ***"We also discern that the nature, purport and scope of the order confined its extent and operation to the question of security to be furnished by the appellant to obtain stay of execution of the order under Section 36. Hence, it is not a type of order without jurisdiction or one transgressing the jurisdiction of the court under the Arbitration and Conciliation Act, 1996. The legislature enacting Section 37 of the said Act expressly provided that an appeal lay from certain orders described in that section and from no other orders. This, in our opinion, expressly excludes the applicability of Clause 15 of the Letters Patent with regard to appealability of orders made under the Arbitration and Conciliation Act, 1996 which as the Supreme Court has told us should be treated as a self contained code. Moreover, this is a commercial matter to which the Commercial Courts Act, 2015 also applies. As the Supreme Court has said in the above decisions, this section provides no extra right of appeal than that provided by Section 37 of the Arbitration and Conciliation Act, 1996. If an order is not appealable under Section 37, it is also not appealable under Section 13 of the***

Commercial Courts Act, 2015. Moreover, Section 13 of the Commercial Courts Act, 2015 makes it abundantly clear by express words that clause 15 of the Letters Patent could not be invoked if an order was not appealable under Section 13. The impugned judgment and order is not appealable under Section 13."

In addition to the above and keeping adherence to a judicial discipline upon giving due regard to the judgment of the co-equal strength Bench of this Court, the language employed in sub-Section (2) of Section 13 can also be pressed in service. The said sub-Section starts with the non-obstante clause having overriding effect on any other law for the time in force including the Letters Patent of the High Court which manifestly indicate the legislative intent that the remedy by way of an appeal under Clause 15 of the Letters Patent is excluded in the event the order is passed by the Commercial Division or the Commercial Courts. The exclusion is express and, therefore, due regard is required to be given to its effect. We, therefore, unable to accept the contention of Mr. Saha that Clause 15 has its applicability in the instant case. In view of the discussion made hereinabove, it leads to an inescapable conclusion that an appeal against an order passed under Section 36 (2) of the Arbitration and Conciliation Act is not maintainable in view of Section 37 of the said Act. Since we have held that the appeal is not maintainable it would not be proper on our part to go into other questions relating to merit of the said order including whether it contained a reason or not as such finding would have a counter effect in an appropriate proceedings if exhausted by the appellant.

The appeal is thus dismissed as not maintainable and all connected applications are also dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree. **(Harish Tandon, J.)**

(Prasenjit Biswas, J.)