Union Of India vs M/S. Simplex Infrastructures Ltd on 13 April, 2017

Equivalent citations: AIR 2017 SUPREME COURT 2119, AIR 2017 SC (CIVIL) 1765, (2017) 4 ANDHLD 100, (2017) 3 ICC 431, (2017) 5 SCALE 76, (2017) 2 CAL HN 187, (2017) 4 MAD LW 909, (2017) 3 ALLMR 919 (SC), (2017) 3 RECCIVR 264, (2017) 175 ALLINDCAS 73 (SC), (2018) 2 CIVLJ 345, 2017 (3) KCCR SN 318 (SC), 2018 (127) ALR SOC 24 (SC)

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Bench: A.M.Khanwilkar, Dipak Misra

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 4892-4893 OF 2017
(Arising out of SLP (Civil) Nos. 33363-33364 of 2016)

Union of India …. Appellant

Versus

M/S. Simplex Infrastructures Ltd. .... Respondent

J U D G M E N T

A.M.KHANWILKAR, J.

1. The short question that arises for consideration in this appeal is:

> whether an intra-Court Letters Patent Appeal under clause 15 of the Letters Patent of High Court at Calcutta can be maintained against an order passed by the Single Judge on an application for condonation of delay filed along with the petition (for setting aside an Arbitration Award) under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act')?

2. Briefly stated, the Respondent being the lowest bidder was allotted a contract by the Appellant in respect of work styled as "Construction of Tsunami Reconstruction Project in A & N Islands. SH: Construction of 821 units of permanent shelters (single stories) including internal water supply sanitary installation & internal Electrification in the Island of Teressa." The contract agreement was entered into between the parties on 5th October, 2006. According to the Appellant, the Respondent failed to adhere to the time frame for completion of the contract. As a result, a show cause notice

was issued to the Respondent on 27th April, 2007 to show cause as to why the contract should not be rescinded by invoking clause 3 of the agreement. The Respondent submitted its response thereto on 8th May, 2007. Despite the dismal performance of the Respondent, the Appellant gave it one more opportunity to improve on the performance vide a letter dated 20th June, 2007. The Respondent, however, submitted its 12th revised completion plan dated 10th October, 2007. Since the Respondent failed to adhere to the extended time line and also miserably failed to maintain the quality and progress of work, the Appellant served it with a second show cause notice on 4th January, 2008. The Respondent replied to the said show cause notice on 1st February 2008. However, the explanation offered by the Respondent, in the perception of the Appellant, was found to be unsatisfactory and baseless. Hence, the Appellant rescinded the contract vide letter No. 57(12)/RE/TRP/Kamorata/07-08/638 dated 25th February, 2008.

3. The Respondent then invoked the arbitration clause in the agreement, pursuant to which the competent authority appointed an Arbitrator vide letter no. 23(6)/(1)ADG(SR)/TRP/08-09/469 dated 27th August, 2008. The arbitration hearing concluded on 27th March, 2014. An Award was published vide letter No.ARB/RKM/TRP/Case 005/2014-20 dated 27th October, 2014. The Appellant received a hard copy of the Award on 31st October, 2014, wherein the Arbitrator held that the rescindment order passed by the Appellant was illegal as time was not the essence of the contract and further directed the Appellant to pay the final bill submitted by the Respondent. Aggrieved, the Appellant filed a petition for setting aside the arbitral award before the District Court at Port Blair being Appeal No. 2 of 2015. The Respondent, on the other hand, filed an execution proceeding in relation to the self same Award before the High Court at Calcutta being EC Case No.734 of 2015. The Appellant then preferred an application in Appeal No.2 of 2015 before the District Court, for stay of the Award. The District Judge allowed the said application. That fact was brought to the notice of the High Court at Calcutta in execution proceedings initiated by the Respondent. The High Court vide order dated 15th September, 2015, disposed of the Execution petition filed by the Respondent and gave liberty to the Respondent to appear before the District Court and to resist the proceedings pending in that court.

4. The Respondent then filed objections in the proceedings before the District Court. According to the Respondent, the appeal before the District Court was not maintainable as the application under Section 9 of the Arbitration Act with regard to the subject matter of the arbitration proceedings was filed before the High Court at Calcutta. It was then contended that the District Court did not have territorial jurisdiction as per Section 42 of the Act and that the petition under Section 34 against the subject award can proceed only before the High Court. The District Court vide order dated 12th February, 2016 accepted that objection. It held that the petition filed by the Appellant under Section 34 of the Act was not maintainable on account of territorial jurisdiction.

5. The Appellant then challenged the Award by filing Arbitration Petition No. 224 of 2016 before the High Court at Calcutta under Section 34 of the Act and prayed for setting aside the Arbitral Award. The Appellant also filed an application being G.A. No: 958 of 2016 for condoning delay, mentioning the circumstances in which the Appellant had to approach the High Court under Section 34 of the Act. The learned Single Judge after hearing the parties allowed the said application for condonation of delay, being satisfied that sufficient cause was made out by the Appellant for condoning the delay

of 131 days. The said order reads thus:

> "The Court: After considering the submissions made by the learned advocate for the applicant/petitioner and upon perusing the application for condonation of delay, it appears that sufficient cause has been shown to explain the delay in filing the application, being AP No.224 of 2016 and as such the delay is condoned. The application for condonation of delay, being GA No.958 of 2016, is accordingly allowed."

6. Aggrieved by the aforementioned order dated 27th April, 2016, the Respondent preferred an intra court letters patent appeal being G.A:

> No.1650 of 2016. This appeal was contested by the Appellant inter alia on the ground that such letters patent appeal was not maintainable. The Division Bench adverted to the relevant decisions pressed into service by both the sides including the decision of this Court in Fuerst Day Lawson Limited v. Jindal Exports Limited.[1] It has also noted that the order under appeal is not appealable under Section 37 of the Act. The Division Bench, however, relied on the judgment of the Division Bench of the High Court at Calcutta in the case of Modi Korea Telecommunication Ltd. V. Appcon Consultants Pvt. Ltd.[2] and of the special Bench of three-Judges in M/s. Tanusree Art Printers & Anr. V. Rabindra Nath Pal,[3] to hold that the three-Judge Bench decision of the High Court was directly on the point and was binding on it. It then proceeded to conclude that the order passed by the learned Single Judge, sensu stricto was not falling within the provisions of the Act and was without jurisdiction. On that logic the Division Bench reversed the order of the learned Single Judge by invoking its jurisdiction under Letters Patent Appeal.

7. The Appellant contends that the Division Bench committed manifest error in entertaining the appeal disregarding the settled legal position restated by this Court in Fuerst Day Lawson Limited (supra). It is submitted that the Act is a self contained code. It provides for a remedy against the arbitral award, including for condonation of delay in filing of the petition under Section 34 of the Act. The order passed by the learned Single Judge on the subject application for condonation of delay in filing petition under Section 34 was, therefore, in relation to the arbitration proceedings. Even if the discretion or for that matter jurisdiction is misapplied and is not in accordance with law, that can be no reason to hold that the order in such proceedings was not under the provisions of the Act as such. It would nevertheless come within the ambit of the Act. Further, such order has not been made appealable under Section 37 of the Act as applicable at the relevant time. The correctness whereof could be assailed before the appropriate forum, but not by way of a Letters Patent Appeal under clause 15. The Appellant has stoutly relied on the dictum of this Court in the case of Fuerst Day Lawson Limited (supra) to buttress this contention.

8. The Respondent, on the other hand, has supported the view taken by the Division Bench in the impugned judgment being in conformity with the dictum of the special bench of the High Court of three-Judges in the case of M/s. Tanusree Art Printers & Anr.(supra). It is submitted that as the

order passed by the learned Single Judge is not in terms of the provisions of the Act and thus without jurisdiction, the exercise of powers under clause 15 of the letters patent appeal was just and proper. It was submitted that Section 34 of the Act gives no jurisdiction to the court to condone delay in filing of the petition for setting aside the award, beyond the period prescribed in sub-Section (3) thereof. After expiry of the prescribed period, it is submitted that even though it may be a case of gross hardship caused to the Appellant because of the ill advised remedy pursued before the District Court and virtually being rendered remediless, that is the inevitable consequence of the mandate of Section 34 of the Act. Further, the explanation offered by the Appellant in the application for condonation of delay cannot be reckoned as a sufficient cause in law. Thus, the learned Single Judge committed manifest error in entertaining the same to show indulgence to the Appellant by condoning the delay of 131 days in filing of the petition under Section 34 of the Act.

9. After hearing the counsel for the parties and going through the decisions relied upon by both sides, we have no hesitation in allowing this appeal. The efficacy of the provisions of the Act has been expounded by this Court in the case of Fuerst Day Lawson Limited (supra). After analyzing the relevant provisions and the decisions on the subject and in particular the decision in P.S. Sathappan v. Andhra Bank Ltd.[4], it has been held that the Act is a self contained Code relating to arbitration. In paragraphs 88 and 89 of the reported judgment, this Court opined:

> "88. Mohindra Supply Co.3 was last referred in a Constitution Bench decision of this Court in P.S. Sathappan16, and the way the Constitution Bench understood and interpreted Mohindra Supply Co.3 would be clear from the following para 10 of the judgment: (P.S. Sathappan case16, SCC pp. 689-
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> 90) "10. ... The provisions in the Letters Patent providing for appeal, insofar as they related to orders passed in arbitration proceedings, were held to be subject to the provisions of Sections 39(1) and (2) of the Arbitration Act, as the same is a self-contained code relating to arbitration."
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> 89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan) was held to be a self-

contained code. Now, if the Arbitration Act, 1940 was held to be a self- contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

10. After this decision, there is no scope to contend that the remedy of Letters Patent Appeal was available in relation to judgment of the learned Single Judge in question. This legal position has been restated in the recent decision of this Court (to which one of us was party, Justice Dipak Misra), in the case of Arun Dev Upadhyaya V/s. Integrated Sales Service Ltd & Anr.[5]

11. The Division Bench of the High Court, however, made a fine distinction by holding that the judgment of the learned Single Judge of condoning delay in filing of the petition under Section 34 of the Act was without jurisdiction and not in terms of the provisions of the Act. It is not possible to countenance this approach. The Division Bench, in our opinion, was not right in observing that the decision in M/s. Tanusree Art Printers & Anr. (supra) being of a special bench of three-Judges of the same Court, was binding, in spite of having noticed the decision of this Court in Fuerst Day Lawson Limited (supra) – which is directly on the point and was pressed into service by the Appellant. Neither the Division Bench of the High Court at Calcutta which dealt with the case of Modi Korea Telecommunication Ltd. (supra) nor the three-Judges Bench which decided the case of M/s. Tanusree Art Printers & Anr.(supra), had the benefit of the judgment of this Court in Fuerst Day Lawson Limited (supra), which is later in time.

12. The Act as applicable to the present case, provides for a remedy of appeal in terms of Section 37 of the Act. The same reads thus:-

> "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) Refusing to refer the parties to arbitration under section 8;
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> (b) granting or refusing to grant any measure under section 9;
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> (c) setting aside or refusing to set aside an arbitral award under section
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> 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. On a bare reading of this provision, it is noticed that remedy of appeal has been provided only against an order of setting aside or refusing to set aside an arbitral award under Section 34(1) (c). No appeal is provided against an order passed by the Court of competent jurisdiction condoning the delay in filing the petition under Section 34 of the Act as such. The Division Bench in the impugned Judgment, therefore, rightly noted that remedy of appeal against the impugned order of the learned Single Judge was not otherwise available under Section 37 of the Act.

14. In our opinion, the issue is squarely answered against the Respondent by the decision of this Court in Fuerst Day Lawson Limited (supra). In that, the Judgment of the learned Single Judge dated 27th April, 2016, was passed on an application purported to be under Section 34(3) of the Act, for condoning delay in filing of the petition for setting aside the arbitral award. Hence, the remedy of Letters Patent Appeal against that decision is unavailable. The question as to whether the learned Single Judge had rightly exercised the discretion or otherwise, could be assailed by the Respondent before this Court by way of special leave petition. But, certainly not by way of a Letters Patent Appeal under clause 15. For, even if the learned Single Judge may have committed manifest error or wrongly decided the application for condonation of delay, that judgment is ascribable to exercise of jurisdiction under Section 34(3) of the Act. In other words, whether the prayer for condonation of delay can be accepted or whether the application deserves to be rejected, is a matter well within the jurisdiction of that court.

15. The learned counsel for the Respondent was at pains to persuade us that the decision of the learned Single Judge is palpably wrong and cannot be sustained in law. However, we cannot permit the Respondent to agitate that plea in the present appeal preferred by the Appellant challenging the impugned decision of the Division Bench. Instead, we deem it appropriate to leave all contentions available to both sides open and give liberty to the Respondent to challenge the judgment of the learned Single Judge dated 27th April, 2016 in G.A.No.958 of 2016, if so advised.

16. Accordingly, the impugned judgment of the Division Bench of the High Court at Calcutta dated 20th June, 2016 passed in G.A.No.1650 of 2016 in APOT No. 183/2016 in A.P. No. 224/2016 is set aside with liberty to the Respondent to challenge the judgment of the learned Single Judge dated 27th April, 2016 in G.A. No. 958 of 2016 in AP No.: 224 of 2016. All contentions available to both sides with regard to the correctness of the Judgment of the Learned Single Judge dated 27th April, 2016, are kept open.

17. While parting, we may take note of the order dated 7th November, 2016 passed by this Court directing the Appellant to deposit Rs. 5,00,00,000/- (Rupees Five Crores) in the Registry of this Court and further to invest the same in a short term fixed deposit. We are informed that the Appellant has complied with the said order and deposited the amount in the Registry. That has been invested by the Registry. The said amount along with interest accrued thereon be transferred to an escrow account linked to the proceedings pending before the High Court at Calcutta being A.P. No.224 of 2016. The High Court will be free to pass appropriate directions regarding disbursement or investment of the said amount.

18. The appeals are allowed in the above terms with no order as to costs.

.....J. (Dipak Misra) .....J. (A.M.Khanwilkar) New Delhi, Dated: April 13, 2017

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[1] (2011) 8 SCC 333
[2] (1999) 2 CHN 107

[3] (2000) 2 CHN 213
[4] (2004) 11 SCC 672
[5] (2016) 9 SCC 524