Bombay High Court
Suresh Jayantilal Ajmera And ... vs Rasiklal Gokaldas Ajmera And ... on 10 September, 1996
Author: . B Saraf
Bench: B Saraf, D Deshpande
JUDGMENT Dr. B. P. Saraf, J.

1. This is an appeal from the order of the learned single Judge rejecting the application of the appellants under Section 28 of the Arbitration Act, 1940 (the "Act") for extending the time for making the award.

2. When this appeal was taken up for hearing. Mr. Virendra Tulzapurkar, learned counsel for the respondents, raised a preliminary objection in regard to the maintainability of this appeal. It was contended that no appeal lies against an order under Section 28 of the Act refusing to enlarge the time for making an award. Our attention was drawn to Section 39 of the Act, which provides for appeal, to show that an order under Section 28 refusing to enlarge time for making the award is not included in the list of appealable orders set out in sub-section (i) thereof. It was submitted that appeal lies under Section 39(1) of the Act only from the order specified therein and "from no others". It was also submitted that no appeal lies from the impugned order even under Clause 15 of the Letters Patent in view of the specific prohibition contained in Section 39 of the Act. In support of the above contentions, reliance was place by Mr. Tulzapurkar on the decisions of the Supreme Court in Union of India v. Mohindra Supply Co. , State of West Bengal v. M/s. Gourangalal Chatterjee , and the decision of this Court in Shiv Omkar v. Bansidhar , Municipal Corporation of Greater Bombay v. Patel Engineering Co. Ltd. , and M. H. Tajani v. Kulsumbai . Our attention was also drawn to the decision of the Andhra Pradesh High Court, in P. Ramula v. N. Appalaswami (AIR 1957 A.P. 11).

3. In reply to the above preliminary of objection of Mr. Tulzapurkar, Mr. Doctor, learned counsel for the appellants, submits that an order of the court under Section 28 of the Act refusing to extend the time for making an award amounts to super-session of the arbitration within the meaning of Item (i) of sub-section (1) of Section 39 of the Act and hence appeal lies from such an order. In support of the above contention, Mr. Doctor relies on the decision of the Kerala High Court in E. K. Abdulkhader Haji v. Thalakkal Kunhammad (AIR 1974 Ker. 3), and decision of this court in M. H. Tejani v. Kulsumbai , In the alternative Mr. Doctor submits that even if no appeal lies from the above order under Section 39(1) of the Arbitration Act, appeal would be maintainable under Clause 15 of the Letters Patent. Reliance is placed in support of this contention on the decision of Madras High Court in Martirosi v. Subramaniam Chettiar (AIR 1928 Mad. 69). So far as the decision of the Bombay High Court in Shiv Omkar v. Bansidhar (supra) is concerned, Mr. Doctor submits that the ratio of the said decision will not apply to the present case because that was a case where time had been extended by the court and the challenge was to the extension of time, whereas in the present case the learned Judge has refused to extend time which has the effect of superseding the arbitration. This aspect of the controversy, according to Mr. Doctor was not before this court in the above case and hence the ratio of the same cannot help the respondents in this appeal.

4. We have carefully considered the rival submissions of the counsel for the parties. The law is well settled that right of appeal is not an inherent right. It is a creature of statute. Therefore, right of appeal must be expressly conferred by the statute. If right of appeal is not given by the statue, it cannot be implied. As observed by the Supreme Court in Ganga v. Vijay right of appeal inheres in no one and, therefore, an appeal for its maintainability must have the clear authority of the law. In the instant case, there is no dispute about the fact that in the Arbitration Act the legislature has provided for appeal only from certain orders passed under that Act. Such orders are specified in Clause (i) to (ii) of sub-section (1) of Section 39 thereof. While providing for appeal from the specified orders, the legislature has also categorically stated that appeal shall lie only from those orders and "from no others", Section 39 reads as follows :

"39. Appealable order. (1) An appeal shall lie from the following orders passed under this Act and from no others to the court authorised by law to bear appeals from original decrees of the Court passed the order :

An order :

(i) superseding an arbitration :

(ii) on an award stated in the form of a special case;

(iii) modifying or correcting an award;

(iv) filing of refusing to file an arbitration agreement;

(v) staying or refusing to stay legal proceedings where there is an arbitration agreement :

(vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply not apply to any order passed by Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under his section, but nothing in this section shall effect or take away any right to appeal to the Supreme Court."

It is clear from a plain reading of the above section that the right of appeal against orders passed under the Arbitration Act has been confined to the orders specifically set out in Clauses (i) to (vi) of sub-section (1). The legislature in its wisdom even thought it fit to make this intention clear by specifically declaring that appeal shall lie only from those orders and from no others. In such a situation, appeal will be maintainable from an order passed under this Act only if that order meets the description of any of the orders set out in Clauses (i) to (iv) of sub-section (1) of Section 39. If an order does not no fall in any of those clauses, no appeal will lie from that order. Moreover, by Section 39(1), appeal against other orders being expressly taken away, no appeal would lie against such other orders under Clause 15 or the Letters Patent also.

5. We are supported in our above conclusion by the decision of the Supreme Court in Union of India v. Mohindra Supply Co., (supra) and State of West Bengal v. M/s. Gourangalal Chatterjee (supra). In Union of India v. Mohindra Supply Co. (supra), the Supreme Court observed that under Section 39(1) an appeal lies from the orders specified in that sub-section and from no others. It was further observed that the legislature has plainly expressed itself that the legislature has plainly expressed itself that the right to appeal against orders passed under the Arbitration Act, may be exercised only in respect of certain specified orders. The right of appeal against other orders has been expressly taken away. The Supreme Court also made it clear that in view of the express prohibition contained in Section 39(1), a right to appeal from a judgment which might otherwise be available under the letters Patent is also restricted. The above decision was referred to with approval by the Supreme Court in State of West Bengal v. M/s. Gourangalal Chatterjee (supra) It was reiterated that under sub-section (1) of Section 39, an appeal shall lie only from the orders mentioned in that sub-section itself.

6. Reference may also be made in this connection to the decision of the court in Municipal Corporation of Greater Bombay v. Patel Engineering Company Limited, (supra), where it was held that Section 39(1) of the Arbitration Act takes away the right of appeal given by Clause 15 of the Letters Patent. The following observations in the above decision are pertinent :

"..... if all that was intended to provided by sub-section (1) of Section 39 of the Act was to give a right of appeal, there was no necessity, in the first instance, to add to it the words "and from no others". The combined effect of the words "and from no others" and the omission of the words "and save as otherwise expressly provided in the body of this Code or by any law for the time being in force" is so far as Section 39(1) of the Act is concerned, to take away the right of appeal" given under Clause 15 of the Letters Patent. In our view, recourse of Clause 15 of the Letters Patent for the purpose of considering maintainability of this appeal is not permitted as Clause 15 of the Letters Patent are required to be read subject to the provisions of Section 39 of the Act."

7. So far as the decision of the Madras High Court in Martirosi v. Subramaniam Chettiar (supra), which has been referred by Mr. Doctor in support of his contention that an appeal would lie under Clause 15 of the Letters Patent against an order passed under Section 28 of the Act refusing to enlarge the time for making the award is concerned, we find that the reliance on the said decision is wholly misplaced. The above decision was rendered before the enactment of the Arbitration Act of 1940 where Section 39 contains an express bar on appeal against any order except those specified in sub-section (1) thereof.

8. The only question that survives for consideration in this appeal, therefore, is whether an order of the Court passed under Section 28 of the Act refusing to enlarge the time for making the award meets the description of any of the orders set out in Clauses (i) to (iv) of sub-section (1) of Section 39 or, to put it differently, whether it falls under any of those six clauses. According to Mr. Doctor, the learned counsel for the appellants, such an order falls under Clause (i) which speaks of an order "superseding arbitration". The submission of Mr. Doctor, in other words, is that an order refusing to extend the time for making an award under Section 28 of the Act is an order superseding the arbitration and therefore, appeal would lie from the same.

9. We have given our careful consideration to the above submission of Mr. Doctor. We, However, find it extremely difficult to accept the same. In our opinion, an order under Section 28 of the Act extending the time or refusing to extend the time for making an award, cannot be construed as meaning an order superseding the arbitration so as to be appealable under sub-section (1) of Section 39 of the Act.

10. We are supported in our above conclusion by the Division Bench decision of this Court in Shiv Omkar v. Bansidhar (supra), where it was held that an order passed by the trial Judge extending time for making award is not appealable. In the above case, speaking for the Bench, Gajendragadkar, J. (as his Lordship then was) said :

"..... the contention that extension of time should not have been allowed by the learned Judge cannot, in our opinion, be made by the appellants because under Section 39, Arbitration Act, an order passed by the trial Judge extending time is not appealable. Legislature has clearly contemplated that the question as to whether time should be extended should be left to the discretion of the extended should be left to the discretion of the trial Judge and the order that the trial Judge may pass in the exercise of his discretion should be regarded as final."

In the the above case, application of the respondents for extending time was considered with the appellant's application for setting aside the award. It was, therefore, contended that because of the consolidation, appeal would lie also against the order under Section 28 extending time. Rejecting the above contention, it was observed :

"But this consolidation cannot give the appellant a right to challenge an order which, under the law, is not appealable. Therefore, in our opinion, it is unnecessary for us to consider whether the leaned Judge was right or wrong in extending the time for making the the award."

10A To the same effect is the decision of the Orissa High Court in R.N. Rice Mills v. State of Orissa (supra), where it was held that a refusal to extend time by the Court on the application of the arbitrators or the party does not amount to an order superseding the arbitration so as to be appealable under sub-section (1) of Section 39 of the Arbitration Act, 1940.

11. We have also considered the decision of the Kerala High Court in E. K. Abdulkhader Haji v. Thalakkal Kunhammad (supra), where a contrary view has been taken. The controversy before the Kerala High Court was also whether appeal lies under Section 39 of the Arbitration Act from the order of the Court refusing to enlarge time for making the award. The Kerala High Court was of the view that appeal would lie against such an order under Section 39(1) of the Act as in their opinion an order under Section 28 of the Act refusing to enlarge time for making the award was really an order superseding an arbitration. It was observed :

"The effect of an order refusing to enlarge time for making the award is that the arbitration as per the agreement of the parties appointing the arbitration comes to a grinding that. If the order becomes final, it goes without saying that there can be no arbitration as per the agreement of the parties appointing the arbitrator. Though the order does not not say in so many words that the

arbitration is superseded, there cannot be any arbitration as per the agreement after the Court refused to enlarge time for making the award. So, it has to be taken for granted that by refusing to enlarge the time for making the award the court really supersedes an arbitrator and an order under Section 28 of the Arbitration Act, refusing to enlarge time for making the award is really an order superseding an arbitration. Hence, it goes without saying that there is an appeal from such an order passed by the Court under Section 28 of the Arbitration Act."

We have given our careful consideration to the above decision of the Kerala High Court. We, however, find it extremely difficult to agree with the reasoning and conclusion of the Kerala High Court. In our opinion, by no process of interpretation or reasoning, an order under Section 28 of the Act refusing to extend time for making the award can be construed an an order superseding the arbitration.

12. Before parting with this appeal, it may be expedient to refer the decision of this court in M. H. Tejani v. Kulsumbai (super) on which much reliance was placed by Mr. Doctor, learned counsel for the appellants, in support of his contention that an order passed under Section 28 of the Act can be construed as an order superseding the arbitration. We have give our careful consideration to the above decision. The controversy in that case was whether an order under Clause (b) of sub-section (2) of Section 12 of the Act can be construed as an order superseding the arbitration. The contention before the learned single Judge in that case was that supersession of an arbitration has been dealt with in Sections 19 and 25 of the Act and hence an order under Clause (b) of the sub-section (2) of Section 12 which does not refer or use the expression "supersession" cannot be construed as an order of supersession of the award. The learned single Judge considered the provisions of Clause (b) of sub-section (12) of Section 12 of the Act and held :

"When the court passes an order that the arbitration agreement shall cease to have effect with respect to the difference, referred, the arbitration agreement itself ceases to have effect with respect to that differences and in such an eventually there is no question of the arbitration agreement subsisting with respect to the differences which had been referred to the arbitrator or arbitrators."

It was observed that though Section 19 and 25 were the only two sections which employ the expression "superseding in arbitration", the effect to such such expression was the same as when the Court says that the arbitration agreement shall cease to have any effect.

13. On a careful perusal of the above decision, we fail to understand how the said decision is relevant in the context of the controversy before us : In our opinion, the ration of the above decision has no application to an order under Section 28 of the Act because such an order cannot have the effect of superseding the arbitration. When by an order under Section 28 of the Act the Court refuses to extend time for making the award, it does not say that the arbitration agreement shall cease to have effect nor an order under Section 28 can have the effect of setting aside the arbitration agreement. In that view of the matter, reliance on the above decision by the appellants is wholly misconceived.

14. In view of the above, we are of the clear opinion that no appeal lies against the impugned order passed by the learned single Judge under Section 28 of the Act refusing to extend the time of making

of making the award either under Section 39(1) of the Arbitration Act, or under Clause 15 of the Letters Patent. Accordingly, we accept the preliminary objection of the learned counsel for the respondents Mr. Tulzapurkar to the maintainability of this appeal and dismiss the same on that ground itself without going into the merits of the case.

15. In the facts and circumstances of the case, we make no order as to costs

16. Appeal dismissed.