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Court : Allahabad

Decided On : Feb-02-2000

Reported in : 2000(1)AWC850

Judge : A.K. Yog, J.

Acts : [Constitution of India](#) - Articles 132, 133, 134, 134A, 135, 136 and 226; [Arbitration Act, 1940](#) - Sections 30, 33 and 39(1) and (2); [Arbitration and Conciliation Act, 1996](#) - Sections 37(3); Supreme Court Rules, 1966 - Order XV, Rule 1

Appeal No. : C.M.W.P. No. 4574 of 2000

Appellant : J. Qumairjee and Co.

Respondent : liird Additional District Judge, Dehradun and Others

Advocate for Def. : S.C.

Advocate for Pet/Ap. : S.K. Garg and ;Ravi Kant, Advs.

Judgement :

A.K. Yog, J.

1. Proceedings under Arbitration Act were initiated between the parties wherein an Arbitrator was appointed in the year 1987. Arbitrator rendered award dated December 30, 1989 (Annexure-1 to the writ petition).

2. Objections under Sections 30 and 33 of the then existing provision of Arbitration Act were rejected vide order dated 25.4.1996 (Annexure-2 to the writ petition) and the Appeal (M.C.A. No. 74 of 1996) has been dismissed by the respondent No. 1 vide impugned judgment and order dated October 30, 1999 (Annexure-4 to the writ petition).

3. Appeal having been dismissed, petitioner (M/s. J. Qumairjee and Company through its proprietor Sri J.K. Jain) has preferred this petition.

4. In the instant case, it is not disputed at the Bar that no objection was raised regarding enforcement of [Arbitration and Conciliation Act, 1996](#) and proceedings continued under the Act existing prior to 1996 (i.e., before coming into force of Arbitration and Conciliation Act. 1996).

5. Section 39(2) of the Arbitration Act prior to 1996 reads :

'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.'

Section 37(3) [Arbitration and Conciliation Act, 1996](#) contains similar provision.

6. Learned counsel for the petitioner, however, submits that aforesaid provisions will not preclude this Court from exercising its Jurisdiction under Article 226, [Constitution of India](#).

7. Submission of the learned counsel for the petitioner may be correct in its own place but this Court shall always be slow and reluctant to take recourse to its extraordinary Jurisdiction under Article 226, [Constitution of India](#), when a statutory remedy of appeal is contemplated under law and which is not shown to be inadequate or not efficacious. Parties must exhaust regular forum.

8. In this context, reference may be made to Article 136, [Constitution of India](#), which reads :

'.....Supreme Court in its discretion grant special leave to appeal from any judgment, decree, determination and sentence or order in any case or matter passed or made by any Court or Tribunal in the territory of India.'

9. Thus, Supreme Court has been conferred Jurisdiction to entertain appeal against any judgment, etc., as mentioned in the said Article.

10. A statement, which is not disputed from any corner, has been made at the bar that there is no direct decision to the best of the knowledge, on the point. However, reference is being made to the case of Union of India v. Nalin Ranjan Guha, AIR 1955 Col 257.

11. Perusal of the record shows that the facts of that case were different. In the case of Union of India (supra), an application for leave to Appeal to the Supreme Court from an order dated 5.5.1993 passed by learned single Judge in High Court was filed. Learned single Judge had directed that all matters and differences between the petitioner (Union of India) and the respondent be referred to the arbitration.

12. The Division Bench of the Calcutta High Court expressed surprise on such a petition being filed inasmuch as there was no reference to Article 136 of the Constitution in the said petition for leave to appeal and the Bench observed that probably Union of India was advised that, even under Indian Arbitration Act, they were required to obtain certificate for the purpose of leave to Supreme Court under Indian Arbitration Act. Referring to Section 39(2), Indian Arbitration Act, the Court observed that there was nothing under Section 39 which would affect or take away right to appeal to the Supreme Court. However, that there was nothing in the said section and the said section did not confer, as of right to appeal to the Supreme Court as such. The Bench observed that Section 39. Arbitration Act cannot possibly confer any jurisdiction on the Supreme Court which that Court did not possess under the Constitution itself.

13. The Division Bench of the Calcutta High Court had no occasion, as reading of the judgment shows, to consider the question in hand ; i.e., whether a party has a right to appeal under Section 39(2), Indian Arbitration Act read with Article 136, [Constitution of India](#),

14. It may be noted that Articles 132, 133. 134 and 135 of the [Constitution of India](#) deal with a case where High Court has entertained the matter.

15. In the present case, question is whether an order passed by a Subordinate Court (below to the High Court) can be challenged by filing an appeal before Supreme Court. Section 39(2) of Indian Arbitration Act, places no restriction on filing of second appeal before Supreme Court. Jurisdiction to entertain such an appeal is being conferred upon it under Article 136. [Constitution of India](#).

16. Reference is being made to the decision in State of West Bengal v. M/s. Gouranga Lal Chatterjee. 1994 123) ALR 33 (SC). This Judgment is also no authority on the point inasmuch as the question raised and decided by the Supreme Court in the said case was to the effect whether an appeal lay from the orders mentioned in Section 39(1). Arbitration Act, i.e.. in case an appeal was decided by learned single Judge in the High Court whether second appeal He to the same High Court before larger Bench under Letters Patent Jurisdiction. As noticed, this is not the question to be adjudicated in the present case.

17. Then reference is being made to the case of Union of India v. Mohindra Supply Company, 1962 SCR 497. I have gone through the judgment and find it is also not on the point under consideration. The said judgment, however, mentions that Section 39(2) does not contemplate 'Intra Court appeals' and, therefore, right to appeal under the Letters Patent was not restricted by subsections (1) and (2) of Section 39,

18. Said decision is no authority for determining the answer to the question whether this Court should exercise its jurisdiction under Article 226. [Constitution of India](#) when Section 39(2) specifically lays down that the restriction contemplated under said provision does not apply to the right of filing appeal to the Supreme Court, which has got jurisdiction to entertain by virtue of jurisdiction under Article

136, [Constitution of India](#).

19. I am of the opinion, as already observed, extraordinary constitutional discretionary remedy should not be allowed to be resorted in regular course under normal situation as a substitute for Second Appeal.

20. Order XV, Rule 1. Supreme Court Rules, 1966 Part II deals with appellate jurisdiction and provides that where a certificate of the nature referred to in clause (1) of Article 132 or clause (1) of Article 133 has been given under Article 134A of the Constitution or a certificate has been given under Article 135 of the Constitution or under any other provision of law, the party concerned shall file a petition of appeal in the Court.

21. This shows that Article 136, read with said Supreme Court Rules along with Section 39(2), Arbitration Act, contemplates Second Appeal and it is not prohibited under the Arbitration Act. On the other hand, it contemplates appeal/second appeal before Supreme Court, which is subject to grant of special leave as contemplated under Article 136, [Constitution of India](#).

22. There are no extraordinary circumstances or unavoidable contingency which may warrant invoking of extraordinary discretionary jurisdiction of this Court nor there is any Justifiable cause.

23. Moreover, if 'appeal' is preferred before Supreme Court and decided by the said Apex Court, it will save the parties from being involved in unnecessary innings before the High Court. Moreover, the statutory Jurisdiction (that qualified by Constitution) of the Apex Court in regular Appeal is much wider and it shall also be binding upon all concerned.

24. Without expressing opinion on the merit of the case, I dismiss the writ petition on the ground of appellate remedy being available under the Arbitration Act (and also under [Arbitration and Conciliation Act, 1996](#)) read with Article 136, [Constitution of India](#).

25. Writ petition is, accordingly, dismissed.

