

Cref Finance Limited Vs. Puri Construction Ltd. and ors.

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Court : Delhi

Decided On : Apr-18-2001

Reported in : AIR2001Delhi414; 2001(60)DRJ85

Judge : Mr. Arijit Pasayat, C.J. and; Mr. D.K. Jain, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 16(2), 17 and 37(2); Orissa Sales Tax Rules, 1947 - Rule 49(1); Indian Limitation Act, 1908 - Schedule - Article 182; Benami Transaction (Prohibition) Act, 1988 - Sections 4(1); [Arbitration Act, 1940](#) - Sections 39(1 and 2); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100, 104, 106(2) - Order 43, Rule 1; [India Act, 1915](#); [Delhi High Court Act, 1966](#) - Sections 10(1); [Delhi Rent Control Act, 1958](#) - Sections 39 and 43

Appeal No. : LPA 109/2001

Appellant : Cref Finance Limited

Respondent : Puri Construction Ltd. and ors.

Advocate for Def. : Mr. Madan Bhatia, Sr. Adv., ; Mr. Arun Khosla, ; Ms. Manish

Advocate for Pet/Ap. : Mr. Anil B. Dewan, Sr. Adv.,; Mr. S. Ganesh,; Ms. Punita Si

Judgement :

ORDER

Arijit Pasayat, C.J.

1. This appeal has been filed purportedly under Clause (10) of the Letters Patent of Lahore High Court as applicable to Delhi High Court. challenge is to the judgment of learned Single Judge dated 12.2.2001 in FAO 75 OF 2001 holding the same to be not maintainable under Section 37(2) of the [Arbitration and Conciliation Act, 1996](#) (in short the Act). Subject matter of the said appeal was order dated 12th January, 2001 passed by the Arbitrator appointed pursuant to the directions given by this court in OMP 173/2000.

2. First appeal was filed as an application before the Arbitrator to implead respondents 2 to 6 herein was rejected by the Arbitrator on the ground that there was no arbitration agreement between the appellant and the said respondents and therefore, there is no question of impleading respondent 2 to 6 herein as parties to the arbitration proceedings. In the FAO, stand of the appellant was that order of the Arbitrator is under Section 16(2) of the Act and consequently an appeal against the said order is maintainable. Learned Single Judge held that the matter raised before the Arbitrator by the appellant and decision taken therein was not encompassed by Section 16(2) of the Act and therefore, the plea was not maintainable.

3. A preliminary objection was raised by the respondent as to the maintainability of the present appeal with reference to Section 37(3) of the Act. While issuing notice on 28.2.2001, it was indicated by us that the appeal shall be heard on the question of maintainability and on merits if it is held to be maintainable and therefore we have permitted the parties to address us on the question of maintainability.

4. Before we deal with respective stands it would be appropriate to quote 37(3) of the act, the applicability of which is the foundation for questioning maintainability as raised by respondents, along with other sub-section.

37. Appealable orders. --(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely:-

(a) granting or refusing to grant any measure under Section.

(b) Setting aside or refusing to set aside an arbitral award under Section 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.'

5. According to the appellants, Section 37(3) postulates three conditions. Firstly there must be an order passed in appeal; secondly, the order passed in appeal must be under Section 37 and thirdly, the appeal filed must be a second appeal. In any event, it is submitted that Letters Patent Appeal is not prohibited in the absence of specific bar in that regard, even if it is conceded, for the sake of argument, that appeal in question amounted to a second appeal. According to learned counsel for the respondents, the appeal shall lie to this Court against the order of the arbitrator if the same relates to acceptances of plea referred in sub-section (2) and (3) of Section 16 or granting or refusing to grant an interim measure under Section 17. Sub-sections (2) and (3) of Section 16 read as follows:

'16(2). A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.'

According to them, order which was impugned before the learned Single Judge was not an order which related to acceptance of a plea referred in sub-section (2)

and (3) of Section 16. It is further submitted that the order was passed in appeal, holding that the same to be not maintainable, and it was passed in exercise of appellate jurisdiction and is an order passed in appeal.

6. In support of their respective stands, several decisions have been referred to. We do not think it necessary to proliferate this judgment with all of them, except by referring to those which have relevance to the subject matter of the controversy.

7. First we shall deal with the appellant's stand relating to the plea as to which order can be constituted as order passed on appeal or in appeal. Great emphasis has been laid on *Kalwati v. Durga Prasad* : AIR 1975 SC1272 , where it has been held that where an appeal is dismissed on the preliminary ground that it was not competent or for non-prosecution or for any other reason, the appeal is not entertained the decision cannot be said to be a decision on appeal, nor on affirmance. Where a case is heard and judgment is delivered thereafter, the judgment can be said to be a judgment of affirmation. Reference has been made to *Shanker v. Krishna* : [1970]1SCR322 to contend that where there is no adjudication on merits, it cannot be said that any order has been passed in appeal or on appeal. By way illustration, it has been stated that where the appeal has been dismissed on the ground of limitation or any ground of non-compliance with certain requirement, there is no adjudication on merits. The appellate court does not consider the merit and therefore in such a case decision made thereon cannot be said to be a decision on appeal. Reliance was also placed on *Mangalabai v. Sayyad Fakir* : AIR1976 Kant136 , where reference was made to *S. Kalawati*' case (supra) and held that the decision made in a case where the appeal is dismissed for want of prosecution or on any other technical ground cannot be construed to be a decision on appeal or a decree made in appeal. Reliance has also been placed on *State of Orissa vs Krishna Stores* : [1997]1SCR436 , wherein with reference to Rule 49(1) of Orissa Sales Tax Rules, 1947, it was held that rejection or dismissal of an appeal summarily could not qualify to be an appellate order under Rule 80. Such a rejection or dismissal is not a rejection or dismissal of an appeal after hearing the appellant on merit. Referring to several other decisions, e.g., *Chandri Abdul Majid v. Jawahar Lal* AIR 1914 P.C. 66. and *Bal Kishan v. Tulsa Bai* AIR 1987 MP 120 it is further submitted by the learned

counsel for appellant that the question of second appeal in terms of Section 37(3) can arise only when there is competent appeal to which the second appeal relates. Further there is no specific bar for Letters Patent Appeal and therefore the present appeal is competent. In any event a too technical view should not be taken and a party should not be deprived of a remedy and should not be rendered remediless. Reference has been made to Lokmat Newspapers Pvt Ltd vs. Shankar Prasad : (1999)11LLJ600SC in this regard.

8. Respondents for contra have submitted that in order to hold an appeal to be not maintainable, there has to be an adjudication and application of mind by the learned Judge. While doing so, learned Single Judge exercised appellate jurisdiction. The situation, therefore, is different from a case where the appeal is dismissed on the ground of limitation or on such technical grounds. Strong reliance has been placed on certain observations made by the Apex Court in 'Raja Kulkarni vs State of Bombay AIR 1964 SC 73, Mela Ram & Sons. V. CIT Punjab : [1956]29ITR607(SC) , Rani Choudhury v. Lt Col Suraj Jit Choudhury : [1983]1SCR372 , South Asia Industries (P) Ltd. vs. S.B. Sarup Singh, : [1965]2SCR756 , New Kenilworth Hotel vs Orissa State Finance Corpn. : [1997]1SCR395 . It is also submitted that in almost all cases where the question of affirmation came, they related to decrees and not orders. That accordingly to them, made a vital distinction.

9. On a consideration of rival submission, three aspects arise for consideration. They are (i) concept of an appeal (ii) the order passed in or on appeal and (iii) exercise of appellate jurisdiction.

10. An appeal in legal parlance is held to mean the removal of a cause from an inferior or subordinate forum in order to test and scrutinise correctness of the impugned decision. Wharton's Law Lexicon expresses an appeal as 'the removal of a cause from an inferior to a superior court for the purpose of testing the soundness of the decision of the inferior court.' It amounts in essence and pith to a complaint to a higher forum that the decision of subordinate forum is erroneous and therefore liable to be rectified or set right. An appeal strictly so called is one in which the question is whether the order of the forum from which the appeal is

brought was right on the materials which that forum had before it (per Lord Davery in *Ponnamma v. Arumagam* (1905) AC 390. A classic definition of appeal was given by Lord Westbury L.C. in *A.G. v. H.I. Sillem* (1864) 11ER 1200 . It was said: An appeal is the 'right of entering a superior court and invoking its aid and interposition to redress an error of the Court below'. According to Webster's Dictionary it is 'the removal of a cause or suit from an inferior to a superior judge or court for re-examination or review' In Law Dictionary by Sweet, it is defined as a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court or court of appeal. In *Nagendranath Dey v. Suresh Chandra Dey* , Sir Dinshaw Mulla construing the word 'appeal' in the third column of Article 182 of the Indian Limitation Act, 1908 observed :

'There is no definition of appeal in the code of Civil Procedure but their Lordship have no doubt that any application by a party to an appellate Court, is an appeal within the ordinary acception of the term and that it is no less an appeal because it is irregular or incompetent'. Westbury C. in *A.G. v. Sillam* (1864) 33 LJEx. 209 described an appeal as 'the right of enter in a superior court and invoking its aid and interposition to redress the error of the court below.' According to him, it was a paramount right. That a right of appeal is a matter of substance was emphasized in the illustrious case *Colonial Sugar Refining Co v. Irving* (1905) AC 369 . An appeal posits the existence of a superior forum with competence to deal with the subject matter of appeal. A remedy by way of appeal is sometimes described as a statutory bounty. Modality for exercising the right of appeal is conditioned by the provision conferring said right.'

An appeal is judicial examination of a decision of an inferior court by a higher forum. According to Halsbury's Laws of England, an appeal is an application to reverse, vary or set aside the judgment or decision or award of an inferior court on the ground that it was wrongly decided or that as a matter of justice or law it requires to be corrected. While appeal is the judicial examination, the memorandum of appeal contains the grounds on which the judicial examination is invited. (See *Lakshmiratan Engineering Works Ltd. vs. Assistant Commissioner (Judicial) Sale Tax*, : [1968]1SCR505).

11. It would be of relevance to not that sub-section (2) of Section 37 uses the expression : 'an appeal shall also lie to a court.' The word 'lie' has been defined in Collins English Dictionary 1979 Edn, re-printed as subsequently, in connection with suits and proceedings. At page 848 of the Dictionary, while dealing with topic No. 9 under the definition of the term it is stated 'For an action, claim, appeal etc. to subsist, be maintainable or admissible. With reference to Section 4(1) of the Benami Transaction (Prohibition) Act, 1988, Apex Court in R. Rajagopal Reddy vs. Padding Chandrasekharan, : [1995]213ITR340(SC) , examined the expression 'no such claim, suit or action shall lie'. It was held that no such suit claim or action shall be permitted to be filed or entertained or admitted to the portals of any Court.

12. At this juncture it would proper to take note of Section 39(1),(2) of the [Arbitration Act, 1940](#) (in short, the Old Act).

Section 39(2) of the Old Act expressly prohibited a second appeal from the order passed under Section 39(1) of the said Act, except an appeal to the Supreme court. In Union of India vs Mohindra Supply Co. : [1962]3SCR497 , it was observed that there was clear indication inherent in sub-section (2) that expression : second appeal does not mean an appeal under Section 100 of the Code of Civil Procedure 1908 (in short, CPC) and it means further appeal from an order passed in appeal under Section 39 and not an appeal under Section 100 CPC. Agreeing with the view expressed in Madhvdas vs Vithaldas : AIR1952 Bom229 and Mulchand Kewal Chand Daga v. Kishan Dass Girdhari Dass, 2nd 1961 Madras 809 (FB), it was held that second appeal 'imports further appeal i.e. numerically second appeal'. Certain observations have been made in that case which throw a considerable light on the present controversy. It was, inter alia, noted as under:

'5. The problem to which attention must then be directed is whether the right to appeal under the Letters Patent is all restricted by Section 39, sub-sis (1) and (2). Clause 10 of the Letters Patent of the High court, in so far as it is material, provides:

'And we do further ordain that an appeal shall lie to the said High Court..... from the judgment (not being a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a

court subject to the superintendence of the said High Court and not being an order made in the exercise of the revisional jurisdiction...) of one Judge of the High Court...' By this clause, a right to appeal except in the case specified from one Judge of the High Court to a Division Bench is expressly granted. But the Letters Patent are declared by Cl.37 subject to the legislative power of the Governor-General in Council and also of the Governor in-council under the government of [India Act, 1915](#), and may in all respects be amended or altered in exercise of legislative authority. Under Section 39(1), an appeal lies from the orders specified in that sub-section and from no other. The legislature has plainly expressed itself that the right of appeal against order passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away. If by the express provision contained in Section 39(1), a right to appeal from a judgment which may otherwise be available under the Letters patent is restricted, there is no ground for holding that clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent. If for reason aforementioned the expression 'second appeal' includes an appeal under the Letters Patent, it would be impossible to hold that notwithstanding the express prohibition, an appeal under the Letters Patent from an order passed in appeal under sub-section (1) is competent.'

Similar view was taken by a Full Bench of this Court about the maintainability of LPA under Section 10(1) of the Delhi Court Act, 1966 (in short, High Court Act) in the background of about maintainability of an appeal vis-a-vis those prohibited under Section 39 of the Old Act. (See: Union of India vs. A.S. Dhupia : AIR1972 Delhi108).

13. Certain illuminating observation of Mehmood, J. in Muhammad Naim-Ullah Khan's case (1892) 2nd 14 All 226 (FB) quoted below are of great significance:

'To hold then that where this statute of ours, namely, our present Code of Civil Procedure, declares a decree or order non-appealable, such decree or order can be made the subject of consideration by the whole of this Court under the Letters Patent, is to hold that wherever no appeal lies to this Court the ceremony of presenting it to this Court to single judge of this Court who would undoubtedly

reject the appeal, makes it the subject of consideration by a Bench of the court.'

These observations were noted by the Apex court in *Shah Babulal Khimji v. Jayaben*, : [1982]1SCR187 . In the said case controversy related to the question whether there was any inconsistency between Letters Patent jurisdiction and Section 104 read with Order 43 rule 1 CPC. It was observed that although Letters Patent is a special law, certain provisions of CPC in the matter of procedure do apply to appeals against the decision of a trial Judge to a larger Bench i.e. internal appeals.

14. In *Rani Chudhary's case* (supra), following observation are of great significance:

'14. An appeal may be disposed of on various grounds. It may be disposed of after proper hearing on merits and this is usually the normal way of disposal of an appeal. An appeal may be disposed of also for non-prosecution thereof. Though the disposal of the appeal on the ground of non-prosecution of the same is not disposal of the appeal on merits, yet the dismissal of the appeal for non-prosecution results in the disposal thereof. An appeal may also be dismissed on the ground of limitation, if condensation of delay in filing the appeal is not allowed by the Court. An appeal may also be liable to be dismissed for non-compliance with any condition relating to the filing of the appeal and also for other reasons'

'20. The disposal of an appeal on the ground of limitation may or may not be adjudication on the merits of the appeal, depending on the particular facts and circumstances of the case and may or may not result in the merger of the decree of the trial court with the decree if any, of the appellate Court, but there cannot be any manner of doubt that when an appeal from the ex parte decree is dismissed on the ground of limitation, the appeal is disposed of on any ground other than the ground that the appellant has withdrawn the appeal. As the dismissal of the appeal on the ground of limitation results in the disposal of the appeal on any ground other than the ground of the withdrawal of the appeal by the appellant, the Explanation is attracted, and the application for setting aside the ex parte decree becomes incompetent after the disposal of the appeal and cannot be entertained.'

15. In Raja Kulkarni's case (supra) also it was noted that whether appeal is valid or competent is a question entirely for the appellant court before whom appeal is filed to determine and this determination is possible only after the appeal is heard, but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g. when it is to be held to be barred by limitation or it does not lie before that Court or is concluded by a finding of fact under section 100 CPC.

16. In Mela Ram's case (supra), it was observed that even if an appeal is presented out of time, it is an appeal and an order dismissing it as barred by time is one passed in appeal. Following observations in Sheodan Singh vs Smt Daryao Kunwar, : [1966]3SCR300, are also relevant :

'To hold otherwise would make rest judicata impossible in cases where the trial court decided the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial court on the merits. It is well settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once rest judicata again becomes rest sub judice and it is the decree of appeal court which will then be rest judicata. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming in too the trial court's decision on merits, the appeal court's decree cannot be rest judicata, the result would be that even though the decision of the trial court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be rest judicata. We cannot therefore, accept the contention that even though the trial court may have decided the matter on the merits there can be no rest judicata if the appeal court dismisses the appeal on the preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground with the result that the decision given on the merits also becomes useless as between the

parties. We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision to the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground of dismissal of the appeal.'

17. We may that Section 106(2) of the CPC expressly prohibited an appeal passed by appellate court under Order 43 Rule 1 read with Section 104(1). As a consequence no LPA would lie. In South Asia Industries' case (supra), the question relating to maintainability of an appeal in the Letters Patent was considered in the background of Section 39 of the [Delhi Rent Control Act, 1958](#). Following observations as regards maintainability of an appeal under the Letters Patent when there is a bar in some other statute were made:

'(18). To escape from this construction a larger scope is sought to be given to the expression 'appeal to the High Court. it is said that the expression 'appeal' in Ss. 43 and 39 of the Act means an appeal to the High Court and not to a single Judge and that the said appeal is finally disposed of only by the final judgment of the High Court. It is said that whatever may be the internal arrangement in disposing of that appeal, there is only one appeal till it is finally disposed of. this argument is plausible, but it has not found favor with this court. This Court in Union of India vs. Mohindra Supply Co : [1962]3SCR497 considered the question whether Section 39(2) of the Indian [Arbitration Act, 1940](#), has taken away the right of appeal under the Letter Patent. Section 39(2) of the said Act reads as follows:

'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.'

It was argued as it is argued before us that the second appeal under the section referred to an appeal to a superior court and not to appeals 'intra-court' and therefore Section 39(2) of the Arbitration Act did not operate to prohibit an appeal under the Letters Patent against the order of a single Judge. This Court held that the expression 'second appeal' included an appeal under the Letters Patent. This

decision ruled that a Letters patent appeal is not a part of the appeal filed in the High Court against the award of the Arbitrator but is a fresh appeal against the order of the single Judge.'

18. In *New Kenilworth Hotel's case* (supra) also this aspect was considered as follows:-

'It is seen that the very object of introducing these amendments was to cut down the delay in disposal of suits and to curtail the spate remedial steps provided under the Code. As held earlier, the right of appeal is a creature of the statute and the statute having expressly prohibited the filing of second appeal under sub-section (2) of Section 104, the right of appeal provided under clause 10 of the letters patent would not be available. As already noted, the main part of clause 10 clearly indicates that 'an appeal would lie from the judgment not being a judgment passed in exercise of appellate jurisdiction'. Thereby the judgment from an appellate jurisdiction stands excluded under the part of clause 10 of the letters patent itself.'

19. View expressed in the *New Kenilworth Hotel's case* (supra) was considered in *Hemlata Panda vs Sukuri Dibya and Ors* 2002 (2) SCC 218 and the position when a learned Single Judge sits in the original side of the Court and decides a case was analysed. It was held as follows:

'5. We are not convinced with the aforesaid submission and find that there is no merit in this contention of the learned counsel. The Single judge was exercising jurisdiction as an appellate court under Section 104(1) CPC. Sub-Section (2) of Section 104 clearly state that no appeal shall lie from any order passed in appeal under this section. thereforee, when the Single Judge hears an appeal in exercise of his jurisdiction under Section 104(1) no further appeal by virtue of Section 104(2) is maintainable. Learned counsel for the respondent sought to place reliance on a decision entitled *Shah Babulal Khimji v Jayaben D. Kania*, : [1982]1SCR187 . This decision is not applicable. This was a case where a Single Judge of the High Court sitting on the original side passed an order against which a letters patent appeal was filed. This Court held that the letters patent appeal was maintainable. The reason for this is that an appeal from the order the subordinate

court can be entertained in those circumstances provided by Section 104(1). Where the original order is not passed by the subordinate court but is passed by the High Court exercising original jurisdiction, then if appeal under Section 104(1) is not provided the letters patent may enable such a type of order to be appealable. This is exactly what was held in Shah Babulal Khimji case and this is the reason why in New Kenilworth Hotel's case the said decision of Shah Babulal Khimji was distinguished.'

20. As has been noted above, the question whether an order has been passed in appeal or on appeal mainly depends on the context in which the order is passed, the provisions governing the lodging of an appeal, procedure of its disposal and finally its disposal. There may be cases (see Mela Ram's case supra) where a further appeal against the order passed in the appeal may be maintainable by treating the order rejecting the appeal as non-maintainable or barred by time to be an order passed in appeal. In the case at hand, the appeal was not held to be non-maintainable on the ground of limitation or the like. As Section 37(2) itself shows an appeal lies to this Court from an order of the arbitral tribunal, where such tribunal accepts the plea referred to in sub section (2) or (3) of Section 16. Section 16 deals with competence of an arbitral tribunal to rule on its jurisdiction. This is a part of Chapter IV of the Act dealing with jurisdiction of arbitral tribunals.

21. Sub-section (1) of Section 16 provides that arbitral tribunal may rule on its own jurisdiction including ruling on any objection with respect to authority of arbitration agreement, and for that purpose a plea that it does not have jurisdiction shall not be raised not later than the submission of the statement of defense as stipulated in sub-section 92). However, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of an arbitrator Similarly, sub-section (3) 16 provides that a plea to the effect that arbitral is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. However, tribunal has the power to admit a belated plea notwithstanding the time stipulation in sub-section (2) and (3) if it considers that delay was justified. Sub-section (5) provides that arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub section (3) and where the arbitral tribunal

takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award. Appeal which was dealt with by learned Single Judge was filed in this Court under Sub-section (2) of Section 37. According to the appellant the same related to the situation encompassed by sub-section (2) and (3) of Section 16. A perusal of the order passed by the learned Single judge shows that he has examined as to how the appeal was not maintainable. To put it differently, learned single Judge considered the question of maintainability on merits. Maintainable means capable or fit to be maintained. To maintain an action is not always the same as bringing an action, it connotes the idea of supporting an action which has already been brought. When an aggrieved approaches the appellate forum with a prayer for modification of the inferior authority, there would be an appeal. The appeal may have very many defects or disabilities; some of them may be even fatal. the defects and the disabilities of the appeal would not obliterate the factual existence of the appeal. In a sense, it may be a stillborn one, never having had a life in it, when it was presented before the appellate venue. Still the law would deem that there was an appeal carried right up to the portals of the appellate forum. this appears to be the position in relation to the birth, life and ultimate end of an appeal. Similar view was expressed in Thankappan v. Trivandrum Dt Coop Bank Ltd : AIR1987 Ker1 . When an appeal is held to be non maintainable, it involves an adjudication of that question. Where an appeal is held to be not maintainable without any discussion what would be its effect is not for consideration in this case. In fact, learned single judge analysed as to why he felt the appeal before him not to be covered by Section 37(2). thereforee, there was adjudication on merits regarding maintainability. The situation may be contextually and conceptually different where an appeal is held to be not maintainable or entertainable on the ground of its belated presentation or such other technical defects. It would depend upon the statutory back ground of the case e.g. Mela Ram's case (supra) The consideration of merits for the purpose of finding out maintainability invests the order passed with the characteristics of an order in appeal or on appeal. The matter can also be looked at from another angle. Learned Single Judge's consideration or examination of the question as to whether the appeal was maintainable or no was done in the appellate jurisdiction. There is no other jurisdiction under which such a consideration or examination could have

been undertaken by learned Single Judge. It could not be shown to us by learned counsel for the appellant that there was nay other jurisdiction which authorised or permitted such examination or consideration. the inevitable conclusion, thereforee is that the order was passed by the learned Single Judge in exercise of the appellate jurisdiction.

22. In view of the analysis made above, the following conclusion are inevitable.

- (1) Learned Single Judge's order was passed in exercise of appellate jurisdiction;
- (2) Such order is an order in appeal or on appeal;
- (3) In view of the conclusion (1) and (2) above, the present appeal is a second appeal which is not maintainable in the light of Section 37(3) of the Act.
- (4) LPA also is not maintainable.

The appeal is dismissed as not maintainable.

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