In the High Court at Calcutta
Original Jurisdiction
ORIGINAL SIDE
(Commercial Division)

The Hon'ble Justice Sabyasachi Bhattacharyya

EC/283/2023
GAURAV CHURIWAL
VS
CONCRETE DEVELOPERS LLP AND ORS.
with
APO/71/2023
IA NO: GA-COM/1/2024
ARUN KUMAR SUREKA AND ORS
VS
GAURAV CHURIWAL AND ANR

For the petitioner	:	Mr. Ratnanko Banerji, Sr. Adv. Mr. Kumarjit Banerjee, Adv. Ms. Sanchari Chakraborty, Adv. Ms. Tanishka Khandelwal, Adv.
For the respondent	:	Mr. Sabyasachi Chaudhury, Adv. Mr. Sayantan Bose, Adv. Mr. Shaunak Mukhopadhyay, Adv. Ms. Ankita Chaudhury, Adv.
Hearing concluded on	:	15.07.2024
Judgment on	:	19.07.2024

Sabyasachi Bhattacharyya, J:-

1. The present challenge under section 37 of the Arbitration and Conciliation Act, 1996 has been preferred against an interim order passed by the learned Arbitrator under Section 17 of the said Act, directing the respondents/appellants to set apart a sum of rupees 6,41,73,413/- in a separate account till final adjudication of the arbitral reference.

2. The arbitral proceeding has been initiated by respondent no.1, one of the partners of a Limited Liability Partnership (LLP), the proforma respondent herein, against the other partners, who are the appellants

before this Court.

3. One of the reliefs sought in the statement of claim was induction of the claimant/responder no.1 as a partner in the LLP, which has been rendered infructuous in view of such induction having taken place in the meantime.

4. The claimant has sought a further award setting aside the financial statement for the financial years 2019-2020 and 2020-2021, prepared and adopted by the present appellants allegedly without representation of the 33.4% shares of the deceased father of the claimant, who was originally a partner in the LLP.

5. Other consequential reliefs were also sought.

6. Two separate appeals were filed under Section 37, one by the LLP and the present by the respondents in the arbitral proceeding, that is, the other partners than the claimant.

7. The LLP's appeal bearing APO 65 of 2023 was dismissed by a judgment and order dated November 24, 2023, passed by a co-ordinate Bench of this Court. In the said appeal, the present appellants were impleaded as respondents.

8. Learned Counsel for the petitioners argues that the said judgment does not debar the appellants from moving the present challenge. It is argued that the other appeal bearing APO 65 of 2023 was preferred by the LLP, which is a separate juristic entity under the Limited Liability Partnership Act, 2008 (for short, "the LLP Act").

9. It is further argued that the provisions of Order XLI Rule 22 of the Code of Civil Procedure (CPC), are not applicable in a challenge under Section 37 of the 1996 Act.

10. In support of such submission, Learned Counsel cites *Mahanagar Telephone Nigam Limited vs. Applied Electronics Limited* reported at *(2017) 2 SCC 37*,where the Supreme Court held that the provisions of the Code of Civil Procedure are not applicable to a challenge under the 1996 Act.It was observed that the respondents in an appeal under Section 37 can challenge an award only by way of a separate Section 37 appeal and that the provisions of Order XLI Rule 22 do not apply;

as such, no cross objection can be filed by the respondent in a Section 37 proceeding.

11. While holding so, the Supreme Court considered its previous judgment in the matter of *ITI Ltd. v. Siemens Public Communications Network Ltd.* reported at *(2002) 5 SCC 510,* where it was held that the provisions of the Code of Civil Procedure are applicable to a challenge under Section 37 of the 1996 Act. In *Mahanagar* (supra), the Supreme Court doubted its previous judgment and referred the question to a larger Bench. It is submitted by Counsel that the larger Bench reference is yet to be answered.

12. Thus, it is contended that it is open for this Court to take up the challenge against the impugned interim order on all grounds, irrespective of the dismissal of the previous appeal by the LLP.

13. It is further submitted by the appellants that the coordinate Bench, while adjudicating the previous appeal, was aware of the existence of the present appeal and also noted the same in its orders. Thus, it was well within the knowledge of the court that the said appeal was distinct and different from the present appeal, having been filed by the LLP in its independent capacity and not on behalf of the partners individually.

14. Learned Counsel next contends that the strict yardsticks applicable in an application under Section 34 of the 1996 Act are not applicable to an appeal under Section 37.

15. It is submitted that in the present case, the learned Arbitrator, although referring to the Balance Sheet of the LLP, failed to take into consideration that the assets of the firm were offset by the liabilities as reflected in the Balance Sheet itself. The Arbitrator directed the assets, comprised of the sale proceeds from several flats which had been transferred, to be set aside in a separate account commensurate with the share of the claimants/respondent no.1. However, the individual partners do not have ownership over the assets of the LLP, which is a separate juristic entity.

16. it is contended that, at best, the claimant could stake a claim to the share of the profits of his deceased father. However, since the LLP is running at a loss, the Arbitrator acted beyond jurisdiction in calculating the share of the claimant in the assets of the LLP and asking such amount to be set apart, without looking into the entire Balance Sheet, particularly the liability side of it.

17. Such selective reliance on the Balance Sheet is assailed. In support of such contention, learned counsel for the appellants cites *R.N. Gosain vs. Yashpal Dhir* reported at *AIR (1993) SC 352*where it was held that it is not permissible for a party to approbate and reprobate in the same breath. Such principle was held to be based on the doctrine of election.

18. It is argued that the learned Single Judge, while dismissing APO 65 of 2023, did not consider such aspect of the matter. As such, the said issue was not decided previously. Thus, it is argued that the impugned order ought to be set aside.

19. Learned senior counsel appearing for the claimants/respondent no. 1 contends that Section 37 of the 1996 Act takes colour from Section 34 of the said Act. For such proposition, learned senior counsel cites the judgment in *GLS Foils Products Pvt Ltd. v. FWS Turnit Logistic Park LLP and Others,* reported at*(2023) SCC OnLine Del 3904*, rendered by a learned Single judge of the Delhi High Court.

20. It is contended that since Section 34 contemplates a challenge against the final award in an arbitral proceeding, an interlocutory challenge under Section 37 cannot be of wider scope than such final challenge.

21. It is next argued that the present appellants are barred by the principle of *res judicata* in view of the dismissal of the previous appeal of the LLP. Learned senior counsel takes pains to take the court through the judgment of the learned Single Judge in APO 65 of 2023, where the court proceeded on the basis that the present appellants were also appellants therein along with the LLP.

22. Learned senior counsel also places before the Court an order dated June 13, 2023 passed by the learned Single Judge by which the

present appellants were directed to be impleaded as parties to the previous appeal.

23. Learned senior counsel next argues that applying the parameters of Section 34 of the 1996 Act, the learned Arbitrator chose to accept one of the plausible views, taking into account the fact that the present appellants have been siphoning off the funds of the LLP by selling all the flats which comprised of the assets of the LLP, apart from the flat which is occupied by the respondent no. 1. The sale proceeds were misappropriated by the appellants, thus raising a red flag, necessitating an interim order. In fact, the learned Arbitrator has directed setting apart of an amount which is commensurate with the share of the respondentno.1 in the assets. Left to themselves, it is argued, the appellants would have misappropriated the entire assets of the LLP, leaving no scope of any profits to be awarded to the claimant.

24. Thus, it is argued that this Court ought not to sit in judgment over the co-ordinate Bench judgment and that in view of the learned Arbitrator having taken a possible view, such view should not be substituted by that of this Court within the limited scope of Section 37 of the 1996 Act.

25. In order to comprehensively decide the issues involved herein, the first question which is required to be addressed is:

Whether Section 34 parameters are applicable to Section 37 of the 1996 Act

26. Respondent no.1 has argued that since Section 34 is the final challenge against an award, an interim challenge under Section 37 cannot exceed the scope of such final challenge.

27. However, *GLS Foils (supra)* does not directly help the respondent no.1 on such count. The learned Single Judge of the Delhi High Court held in paragraph number 43 of the said report that the court, while exercising jurisdiction under Section 37, would be loathe to interfere with an interim measure of protection granted by an Arbitral Tribunal,

particularly when the order passed under Section 17 is well reasoned and based on a thorough and minute examination of the matter, as in the said case.

28. Such proposition cannot be disputed since even without looking into Section 34, any challenge by way of an appeal or otherwise is only limited to the scope of the original provision under which the impugned order was passed. In the reported case, the judgment of the Arbitrator was well reasoned and based on a thorough and minute examination of the matter and as such, there arose no scope of interference.

29. However, certain other judgments of the same High Court were considered by the learned Single Judge in *GLS Foils*(supra)where it was observed that the restraints which apply on the court while examining a challenge to a final award under Section 34 equally apply to a challenge to an interlocutory order under Section 37(ii)(b) of the 1996 Acts.

30. With utmost humility, I have a slightly different take on the issue. A bare comparison between Sections 37 and 34 of the 1996 Act reveals that whereas a challenge under Section 34 has been referred to as "an application", that under Section 37 has been specifically mentioned as "an appeal". Even the caption of Section 37 is "Appealableorders".The Legislature, in its wisdom, chose to use such different expressions for the two provisions which must be lent a meaning, since it is well-settled that superfluity cannot be attributed to any word used in a statute.

31. Seen from such perspective, there is no reason as to why Section 37 is required to borrow its colours from Section 34 insofar as the specific parameters of interference are concerned.

32. Another important and peculiar feature of Section 37, unlike that of the CPC or any comparable statute, is that it provides for appeals against a wide range of orders, encompassing challenges both to orders passed by the Court and by the Arbitral Tribunal and against interlocutory orders as well as final award.

33. Hence, unlike a regular appeal before a Civil Court, a challenge under Section 37 can be preferred from an order setting aside or refusing to set aside an arbitral award under Section 34(which is in the nature of a final relief) on the one hand, and an interim order under Sections8, 9, 16 or 17 of the 1996 Act on the other. Such peculiarity of the provision has to be kept in mind while understanding the texture of the same.

34. It would be absurd to propose that a challenge under Section 37 against an order refusing to refer parties to arbitration by a court under Section 8 of the 1996 Act shall be governed by the same yardsticks which would govern a challenge to an order passed under Section 34 against a final award.

35. Thus, keeping in mind the implicitly layered structure of Section 37, it cannot be held in a blanket fashion that it borrows its hue from Section 34 in all cases. In fact, Section 37 must borrow its hues, like any other hierarchical challenge, not horizontally but by vertical osmosis, drawing its parameters from the provision under which the order which is impugned therein is passed.

36. Thus, the parameters of a Section 37 appeal against an order passed under Section 17 of the Act would be governed by the limitations of Section 17, whereas an appeal under Section 37 against an order under Section 34 against a final award would adhere to the same rigours as Section 34. Hence, the touchstones to be applied to adjudication of appeals under the self-same provision (Section 37) will vary according to the provision under which the impugned order is passed.

37. The provision of an appeal under any civil law format is a pyramidal structure, tapering off as it goes up from the base. Hence, the appellate court in an appeal under Section 37 has to look into the implicit bars in the parent provision under which the impugned order was passed as its markers.

38. The argument that a challenge under Section 37 to an interim order cannot travel beyond a final challenge under Section 34 is rather misconceived, since a challenge under Section 37 can be preferred against both an original interim order under Section 17 and a final order under Section 34. In the latter case, the Section 37 challenge is of the second order, the parties having already crossed the first hurdle under Section 34 against the final award; while in the former case, the Section 37 challenge is of the first order, being the first challenge against an original order.

39. The implicit checks and bounds built into Section 37, thus, are not derived horizontally from Section 34, but vertically, from the particular provision under which the order impugned in the appeal under Section 37 was passed. The said interpretation can be the only valid and acceptable one, since otherwise there would be a jurisprudential anarchy, if the court applies the same tests in a Section 37 appeal against an order passed under Section 8, for example, or Section 16 for that matter, and to a challenge against an order under Section 34, which conclusively decides the fate of a final award.

40. However, this court is not unmindful of the fact that, in any event, a Section 37 challenge against an interlocutory order has to be more limited in scope than a final challenge against a Section 34 order. Hence, considered in appropriate perspective, the following two principles are found to be applicable to an appeal under Section 37:

i) The parameters and fetters to be applied by the court taking up a Section 37 appeal are to be governed by the parent provision under which the order impugned therein was passed;

ii) The scope of challenge in an appeal under Section 37 is much more limited in scope than a similar appeal against an order passed under Section 34, where the fate of a final award is decided.

41. Needless to say, the general governing principles of appellate jurisdiction are also applicable to the effect that an appellate court under Section 37, like any other appellate court, shall be more circumspect than the original court, since the appellate court cannot substitute its own views for that of the original court merely for the asking, but can only interfere when there is a palpable error of law or fact and/or patent perversity.

42. The next issue which necessarily comes up for consideration is as follows:

Whether the dismissal of the previous appeal by the LLP, being APO 65 of 2023, operates as a bar to this Court from entering into the merits of the case in a separate appeal by the partners of the LLP

43. An interesting argument has been made by the appellants to the effect that the appellants were not represented by the LLP in the previously decided appeal, since the latter is an independent juristic entity in law, separate from its partners. There cannot be any manner of doubt on the legal proposition that an LLP, in law, is an independent and separate juristic entity than its individual partners. The LLP Act itself provides so.

44. However, the question which is germane here is whether, even if the partners are taken to be completely independent and separate entities from the LLP, the dismissal of the LLP's appeal operates as a bar. In such context, it cannot be lost sight of that the co-ordinate Bench, while deciding APO 65 of 2023, was fully aware of the fact that there was a different appeal (the present one) pending at the behest of the partners in their individual capacity. Despite having such knowledge,

the court consciously took a decision to direct the present appellants to be added as respondents to the previous appeal and to decide the same first.

45. It is well-settled that all the parties in a proceeding of civil nature, including an appeal, are bound by the decision of a competent court/forum. It would be as absurd to argue that respondents in an appeal are not bound by its decision as that the defendants in a suit are not bound by the decree.

46. In a suit, the carriage of proceeding lies with the plaintiff, but it is open for the defendants to argue their case and controvert the arguments of the plaintiffs. Over and above controverting the plaint case, the defendants are at full liberty also to advance their own case and substantiate the same by cogent evidence in a suit.

47. Similarly, it is not that the respondents in an appeal are mere puppets in the hand of the appellant simply because the appellant carries the proceeding. The judgment in an appeal is equally binding on the appellants and the respondents, if not otherwise, by operation of the principle of *res judicata.*

48. In this context, the judgment in *Mahanagar* (supra), cited by the appellants, also needs to be discussed. In the said judgment, the Supreme Court differed with its own view in *ITI*(supra). In *ITI*(supra), the Court had held that merely because the provisions of the Code of Civil Procedure are not specifically made applicable to an arbitral proceeding, it cannot be said that the CPC provisions cannot be applied to proceedings under the 1996 Act.

49. In fact, in *ITI (supra)*, the Supreme Court went so far as to apply the provisions of revision under Section 115 of the CPC against an order passed in an arbitral proceeding.

50. In *Mahanagar (supra)*, the Supreme Court took a diametrically opposite view and held that the provisions of the CPC are not applicable in proceedings under the 1996 Act. The Court particularly considered the context of Order XLI Rule 22 of the CPC and observed that no cross objection can be filed in an appeal under the 1996 Act.

51. The predicament of this Court is that in *Mahanagar (supra)*, the matter was referred to a larger Bench in view of the difference of opinion with *ITI (supra)*. Nothing has come before this court to indicate that such larger Bench reference has yet been answered. Thus, the unenviable task before this Court is to choose between the ratio of the two judgments of the Supreme Court, which are of equal binding value, by applying the test as to which is more apt in the circumstances of the present case.

52. While doing so, however, there is a middle path available to this Court. While in the context of the evolution of arbitration law in India it cannot but be said that the provisions of the CPC are *per se* not applicable to proceedings under the 1996 Act, at the same time, we are to carefully consider the fabric of the CPC itself before jumping to hasty conclusions.

53. The 1996 Act primarily lays down adjective law, governing the procedure and providing fora in arbitration and connected matters. In an arbitral proceeding and/or in a proceeding under the said Act before the Court, the substantive law has to be applied as per the law of the land. The peculiarity of the CPC, on the other hand, is that it contains both procedural as well as substantive provisions.

54. Insofar as the substantive rights are concerned, those are not exactly conferred by the CPC but recognized by it to be implicit in the judicial structure of India.

55. One such example is Section 11 of the CPC and its Explanations, where the principle of *res judicata* has been recognized, and not conferred, in all its manifestations. The principle of *resjudicata* is a cardinal principle of civil law across nations and civilizations. The same is implicit in any civil proceeding to lend finality to a proceeding, premised on the principle that a person cannot be vexed twice on the self-same cause of action. Further, the principle of *resjudicata* is also premised on the more basic sub-stratum of Comity of Courts.

56. Certain elements of Order XLI Rule 33 and Order XLI Rule 22 of the CPC are also of the nature of substantive powers of the appellate court which affect the rights and liabilities of parties and hence go beyond adjective law.

57. For example, the Supreme Court, in *Mahanagar (supra),* held that no cross objection can be filed under Order XLI Rule 22 of the CPC in an appeal under Section 37. Such filing is a procedural right conferred by the CPC; however, Order XLI Rule 22 has another component which is an implicit feature in any appellate jurisdiction, which cannot be said to be mandatorily barred even in a proceeding under Section 37 of the 1996 Act; such feature being that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but also state that the finding against him in the court below in respect of any issue ought to have been held in his favour.

58. Again, in Order XLI Rule 33, CPC it has been laid down that the appellate court shall have power to pass any decree and make any order which ought to have been passed or made, notwithstanding that the appeal is as to part only of the decree. Such power may be exercised in favour of all or any of the respondents or parties, although they have not filed any appeal or objection.

59. Unless such powers are vested implicitly in an appellate court, the hands of the appellate court would be tied to such an extent that no comprehensive adjudication can be arrived at by it, even while granting or denying relief to the appellant.

60. Thus, some of the features of the CPC, although cannot be read into the 1996 Act, the principles thereof can and ought to be borrowed while deciding an appeal under Section 37.

61. Hence, it is evident that the present appellants, who were specifically impleaded as respondents in APO 65 of 2023, had very well available to them the right to join in with the appellant-LLP and ventilate their grievances.

62. In fact, although learned counsel for the appellants herein has tried to brush away as erroneous the observation of the learned Single Judge in APO 65 of 2023 to the effect that the other partners were also appellants before the court, the fact remains that in a specific sub-heading in the said judgment, immediately preceding paragraph no. 6 of the same, the court had mentioned the arguments following thereafter to be those of the appellant/LLP *and the remaining partners*.

63. Hence, it is abundantly clear that the remaining partners, who are the present appellants, had in fact their say in the matter and are also bound by the decision in APO 65 of 2023, if not for any other reason, by operation of the principle of *res judicata.*

64. That apart, nothing prevented the appellants from preferring an independent Special Leave Petition (SLP) against the said judgment in APO 65 of 2023, which they chose not to do. The SLP preferred by the LLP was dismissed at the threshold. Although such dismissal could not be tantamount to a merger of the coordinate Bench judgment with the same, the appellants in the instant appeal would do well to disclose the same before this court before the respondent no. 1 did so.

65. The coordinate Bench was fully conscious of the pendency of the present appeal at the relevant juncture, which might have been a reason for referring to the other partners also as appellants, on the premise that the contentions in their appeal were also compositely permitted to be ventilated at the time of hearing APO 65 of 2023.

66. Since the court chose to hear the present appellants, who were respondents in the previous appeal, or at least give an opportunity of hearing to them by impleading them as respondents in the said appeal, it cannot be said that the present appellants were prevented from advancing their full arguments on merits even in the previous appeal.

67. Also, respondent no. 1 has a point in contending that the dispute is not between the claimant and the LLP as such but between the partners, the claimant on the one hand and the other partners in control of the LLP at the relevant time on the other. Hence, the LLP

merely provided a façade for the other partners/present appellants to ventilate their grievances in its appeal, the order impugned wherein is the self-same order which is the subject-matter of challenge in the present appeal.

68. As such, it would be a travesty of justice and an abuse of the process of court if the self-same issues which were conclusively decided in APO 65 of 2023 are reopened by this Court, sitting in coordinate jurisdiction. Such an exercise might give rise to a conflict of decisions and would thwart the very premise of Comity of Courts, which is implicit in the domain of civil law jurisdictions. From the standpoint of the appellants too, they are barred by the principle of *res judicata*/constructive *res judicata* from re-agitating the same issues which were urged and decided in APO 65 of 2023, the judgment in which has attained finality by dismissal of the SLP against the same.

69. In view of the above discussions, there is no scope for this court to enter into the merits of the impugned order at all. Hence, this court desists from doing so.

70. In view of the above observations, APO/71/2023 along with IA No: GA-COM 1/2024 is dismissed on contest without any order as to cost.

71. EC/283/2023 shall next be listed on August 6, 2024.

72. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)