

Tata Steel Processing and Distribution Ltd. Vs Unit Construction Company Pvt. Ltd. and Others

Court: Calcutta High Court

Date of Decision: Dec. 16, 2011

Acts Referred: Arbitration and Conciliation Act, 1996 â€” Section 16, 17, 34, 34(2), 37
Civil Procedure Code, 1908 (CPC) â€” Order 39 Rule 3, Order 39 Rule 3A
Constitution of India, 1950 â€” Article 141, 227

Citation: (2012) 2 CHN 245

Hon'ble Judges: Harish Tandon, J

Bench: Single Bench

Advocate: Siddhartha Mitra, Mr. Raj Ratno Sen and Ms. Rajashree Chowdhury Mukherjee, for the Appellant; A.K. Mitra, Mr. A. Mitra, Ms. R. Kajoria, J. Chowdhury and Mr. S. Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Harish Tandon, J.

This revisional application is directed against an order No. 2 dated 25.11.2011 passed by the learned District Judge, Alipore in Title Suit No. 1536 of 2011.

2. The present revisional application is at the instance of the defendant/opposite party assailing and/or challenging the ex-parte ad-interim order of

injunction passed u/s 9 of the Arbitration and Conciliation Act, 1996.

3. The point which emerges for consideration is whether the revisional application under Article 227 of the Constitution is maintainable when there

is an alternative efficacious remedy by way of a statutory appeal u/s 37 of the said Act.

4. Before dealing with the aforesaid point, short facts are necessary to be narrated. The plaintiff/opposite party filed an application u/s 9 of the

Arbitration and Conciliation Act praying for an order of injunction restraining the petitioner from invoking or encashing the Bank Guarantees. The

Trial Court passed an ex-parte ad-interim order of injunction on the above terms for a limited period i.e. till 21.12.2011.

5. According to the petitioner the unconditional Bank Guarantee is valid till 20.12.2011 and the trial court passed an interim order which is

operative till 21.12.2011 and as such the petitioner is precluded from invoking the Bank Guarantee which is not permissible under the law.

6. Although the said point has been taken but this court invited the submission from the respective Counsels relating to the exercise of the powers

under Article 227 of the Constitution of India when the statute provides for an appeal against such an order.

7. Mr. Siddhartha Mitra, the learned Advocate appearing for the petitioner submits that the power of superintendence of the High Court under

Article 227 can be exercised to keep the inferior court within the boundaries of law. He further submits that the High Court under supervisory

jurisdiction can interfere with the order of the inferior tribunals or court, if the same is passed beyond its jurisdiction, refusal to exercise jurisdiction,

arbitrary or a capricious exercise of authority or discretion, finding which is perverse and the error of law apparent on the record. In support of the

aforesaid contentions he placed reliance upon the judgment of the supreme court in case of Achutananda Baidya Vs. Prafulla Kumar Gayen and

others, . He further submits that if the subordinate courts have committed a serious dereliction of duty and flagrant violation of fundamental principle

of law or justice, the high court under Article 227 of the Constitution can interfere and place reliance upon a judgment of the Supreme Court in

case of M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd., . By contending that the power under Article 227 is much wider and is not subject to any

technicalities of procedure or traditional fetters, he placed reliance upon judgment of the Supreme Court in case of Surya Dev Rai Vs. Ram

Chander Rai and Others, which has been relied in a subsequent judgment of the Supreme Court in case of Smt. Shail Vs. Shri Manoj Kumar and

Others, . He strenuously submits that the Apex Court in case of Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others,

and Morgan Stanley Mutual Fund Vs. Kartick Das, has laid down the proposition of law that if the court did not record any reason for granting an

ex-parte ad-interim order of injunction as envisaged under Order 39 Rule 3 of the CPC such order per se is illegal and without jurisdiction. He

further submits that under Article 141 of the Constitution of India the law declared by the Supreme Court is binding upon the subordinate courts

and any departure therefrom would render the said decision, judgment or order without jurisdiction and is capable of being set aside by the High

Court under supervisory jurisdiction.

8. Mr. Aninda Mitra, the learned Advocate General submits that the High Court should not exercise jurisdiction under Article 227 of the

Constitution if there is an efficacious alternative remedy by way of a statutory appeal is provided. He further submits that the court shall refuse to

exercise the power under Article 227 of the Constitution to maintain the hierarchy of appeal and placed reliance upon the judgment of the Apex

Court in case of Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, and in case of Punjab National Bank Vs.

O.C. Krishnan and Others, He further submits that although the jurisdiction of the High Court under Article 227 of the Constitution of India cannot

be expressly ousted but the court should refrain from exercising its jurisdiction if there is a remedy available under the special statute and placed

reliance upon a Single Bench Decision of this Court in case of Dindayal Agarwal Vs. UCO Bank & Ors. reported in 2002 (2) CLJ 239. He

further submits that on identical set of fact the another Single Bench in case of Prabir Kumar Nath Vs. Naba Kumar Das reported in 2002 (2) CLJ

288 refused to exercise powers under Article 227 of the Constitution of India in view of an existence of a provision for an appeal under the Code

of Civil Procedure. Lastly he submits that the Arbitration and Conciliation Act is the self-contained Code and a special provision for an appeal is

provided therein which should not be circumvented by invocation of power under Article 227 of the Constitution of India and placed reliance upon

the judgment of the Supreme Court in case of Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. reported in AIR 2011 SC 2649.

9. Having considered the respective submissions of the Counsels, there is a specific provision u/s 37 of the Arbitration and Conciliation Act, 1996

which provides an appeal against an order passed u/s 9 of the said Act. It would be profitable to quote Section 37 of the said Act which read thus:

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 u/s 9;

(b) setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.-

(a) accepting the plea referred in sub-section (2) or sub-section

(3) of section 16; or

(b) granting or refusing to grant an interim measure u/s 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.

10. On meaningful reading of the said provision it does not make any differentiation between an ex-parte ad-interim order of injunction or an ad-

interim order of injunction or a final order of injunction u/s 9 of the said Act.

11. It is undisputed that while considering an application u/s 9 of the Arbitration and Conciliation Act, the court must adhere to the provision of

Order 39 of the CPC wherein Order 39 Rule 3 cast a mandate upon the court to record the reason for granting ex-parte ad-interim order of

injunction. If the court did not comply the mandatory provision of recording a reason by passing an ex-parte ad-interim order the said order is

illegal, erroneous but cannot be said to be an order passed without jurisdiction. Omission of the Court to adhere the statutory provisions cannot

make an order per se without jurisdiction nor can it be termed to be a manifest in justice caused to the parties. Such an order is capable of being

corrected and /or quashed and/or set aside by an appellate court in a statutory appeal. The power under Article 227 of the Constitution of India

should be exercised in an extreme and/or exceptional circumstances. There is no quarrel to the proposition of law as indicated by the petitioner that

the High Court can interfere under Article 227 of the Constitution in case of an erroneous assumption or acting beyond its jurisdiction or refusal to

exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law or an arbitrary or capricious exercise of authority

or discretion but the high court should make a self-imposed restrictions in exercise of the powers under Article 227 if the erroneous, illegal order is

capable of being corrected by the appellate jurisdiction under the statute.

12. None of the judgments cited by the petitioner considered such eventuality where in spite of the existence of the provision of an appeal the court

have exercised the power under Article 227 of the Constitution. It is to be borne-in-mind that the power of superintendence under Article 227 is

not ousted and/or taken away even if there is a provision of an appeal under the statute but the high court should refrain from entertaining an

application in supervisory jurisdiction to ensure the hierarchy of appeal. The Apex Court in case of Achutanda Baidya (supra) while considering a

matter where after exhaustion of the appellate Forum the matter is challenged in a revisional application under Article 227 of the Constitution.

13. Thus it was not a case of jumping of forum by invoking under Article 227 of the Constitution. The Supreme Court in case of Extralla Rubber

(supra) while reiterating the power of superintendence under Article 227 held that the same should be exercised sparingly and only in appropriate

cases to keep the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors by converting itself into a

court of appeal. Furthermore, in case of Surya Dev Rai(supra) the Supreme Court held that the care, caution and circumspection need to be

exercised while invoking the supervisory jurisdiction by the court against an error calling for correction if it is found that the same is also capable of

being corrected in an appeal. It has been pointed out in case of Raj Kumar Shivhare (supra) that where a right of liability created by a statute

which gives a speedy remedy, then such remedy must be availed of and the court must imposed self-limitation to exercise the supervisory

jurisdiction or writ jurisdiction. In case of Prabir Kumar Nath (supra) this court was considering an application under Article 227 of the

Constitution of India against an ad-interim order of injunction passed under Order 39 of the CPC where the trial court did not record the reason as

envisaged under Order 39 Rule 3 of the Code, while rejecting the said application this court held that the power of superintendence of the high

court refers to an overall guardianship, a power of checking in general of the performance of the lower courts but the mistake of law if committed

by the trial court does not give unbridled power of superintendence to the high court to correct the same in these words:

11. There is another aspect of the matter. In the said judgment A. Venkatasubbiah Naidu Vs. S. Challappan and Others, the Apex Court has

come to hold further that while entertaining the appeal against such an order the appellate Court shall be obliged to take note of the omission of the

subordinate Court in complying with the provisions of Rule 3-A and in appropriate cases apart from granting or vacating or modifying the order of

such injunction may suggest suitable action against the erring judicial officer including recommendation to take steps for making adverse entry in his

A.C.rs.

14. Thus, mere omission to record the reason as provided under Order 39 Rule 3 of the Code is not a case of rare or rarest for invocation of

supervisory jurisdiction when there is a remedy by way of an appeal provided under the statute. The petitioner cannot jump the appellate Forum

and invoke the supervisory jurisdiction under Article 227 of the Constitution.

15. Thus, this court feels that the instant revisional application is not entertainable in view of an existence of alternative efficacious remedy by way

an appeal under the Arbitration and Conciliation Act, 1996.

16. The revisional application is, therefore, dismissed.

17. The petitioner is permitted to take back the certified copy of the impugned order upon replacement of the Photostat copy thereof and the

concerned officer is directed to return the certified copy if the Photostat copy is furnished by the petitioner.

18. There shall, however, be no order as to costs.