

SC RULES: NO APPEAL UNDER COMMERCIAL COURTS ACT FROM AN ORDER ENFORCING A FOREIGN AWARD

Kandla Export Corporation & Anr. (“Kandla”) v. OCI Corporation & Anr. (“OCI”) (7 February 2018)

INTRODUCTION

1. The issue which arose for consideration before the Supreme Court was when an order enforcing a foreign award is passed by the Commercial Division of the High Court, would an appeal against such order be maintainable before the Commercial Appellate Division of the High Court, given that Section 50 of the Arbitration and Conciliation Act, 1996 (“Act”) does not permit an appeal from an order enforcing a foreign award.
2. Section 13(1)¹ of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (“Commercial Courts Act”) provides for the jurisdiction of the Commercial Appellate Division of the High Court. Section 50²(1) (b) of the Act provides that an appeal shall only lie from the order refusing to enforce a foreign award under Section 48 of the Act. Therefore, under Section 50 of the Act, no appeal lies from an order allowing the enforcement of a foreign award.
3. In the captioned decision, the Supreme Court examined the construction and the judicial interpretation of Section 13(1) of the Commercial Courts Act and Section 50 of the Act, and nurtured the objectives of both statutes.

BACKGROUND

4. The arbitral appellate tribunal passed an Award dated 16 April 2015 in favor of OCI, under Rule No.125 of the Grain and Feed Trade Association and awarded an amount of US\$ 815,000 along with interest to OCI (“Award”). Kandla filed various appeals in the United Kingdom i.e. before the Queen’s Bench; the Queen’s Bench Division, Commercial Court; and the Court of Appeal, Civil Division. However, all the appeals arising from the Award were rejected.

In the meantime, in June 2015, OCI filed an Execution Petition under Section 48 of the Act, before the District Court Gandhidham-Kutch, India (“Execution Petition”). The Commercial Courts Act came into force on 23 October 2015, and consequently, OCI filed an application³ before the High Court of Gujarat (“HC”) to transfer the Execution Petition to the Commercial Division of the HC (“Commercial Division”). The HC transferred the Execution Petition to the Commercial Division.

5. The Commercial Division allowed the Execution Petition thereby enforcing the foreign award, and Kandla filed an appeal under Section 13(1) of the Commercial Courts Act, before the Commercial Appellate Division of the HC (“Appellate Division”). The Appellate Division held that the appeal was not maintainable under the Commercial

¹ Section 13. “Appeals from Decrees of Commercial Courts and Commercial Divisions-(1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be: Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996.

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.” [Emphasis Supplied]

² Section 50. “Appealable orders.-(1) An appeal shall lie from the order refusing to— (a) refer the parties to arbitration under section 45; (b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order. (2) 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.” [Emphasis Supplied]

³ Section 15(1), Commercial Courts Act, “Transfer of Pending Cases- (1) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996, relating to a commercial dispute of a Specified Value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.”

Courts Act (“**Order**”) as an order enforcing a foreign award is not appealable under Section 50 of the Act. Kandla challenged the Order before the SC.

OBSERVATIONS AND FINDINGS

Scope of Section 13(1) of the Commercial Courts Act

6. The SC examined Section 13(1) of the Commercial Courts Act in two parts to determine the jurisdiction of the Commercial Appellate Division i.e. (i) Section 13(1) provides for appeals from judgments, orders and decrees of the Commercial Division of the High Court, and (ii) the proviso to Section 13(1) carves out an exception - and states that an appeal shall only lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order XLIII⁴ of the Code of Civil Procedure, 1908, and Section 37⁵ of the Act. Therefore, orders that are not specifically mentioned in Order XLIII or in Section 37 of the Act, shall not be appealable before the Commercial Appellate Division.
7. Relying upon the *CIT v. Indo Mercantile Bank Ltd*⁶, the SC concurred that the primary purpose of a proviso is to qualify the generality of the main part by providing an exception and held that “*orders that are not specifically enumerated under Order XLIII of the CPC would, therefore, not be appealable and appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court.*”

Interpreting Section 50 of the Arbitration Act

8. In *Fuerst Day Lawson Limited v. Jindal Exports Limited (“Fuerst”)*⁷, the SC had held that an order which is not appealable under Section 50 of the Act, is also not maintainable under the Letters Patent of High Court, “*The exception to the aforementioned rule is where the special Act (i.e. Arbitration Act) sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words “letters patent” but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.*”
9. Relying upon its ruling in *Fuerst*⁸, the SC concurred (i) that the Arbitration Act is a self-contained code and in the event that general law procedure (i.e. Commercial Courts Act) is applicable, such general law procedure would be impliedly excluded; and (ii) that the *ratio decidendi* of *Fuerst*⁹ would apply, therefore, “*all appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone*”.
10. Upon considering the legislative policy which led to the enactment of Section 50 of the Act, the SC clarified that by taking away the right of appeal in cases where the single judge of a high court decides in favor of enforcing a foreign award, the process of enforcing foreign awards has speeded up. The SC noted that despite its ruling in *Fuerst*¹⁰ and the subsequent enactment of both acts i.e. Commercial Courts Act and the Arbitration and Conciliation Amendment Act, 2015 (“**Amendment Act**”) on the same day, the legislature did not amend Section 50, thus clarifying its intent for Section 50 to be in a self-contained and exhaustive code.
11. The SC observed that since all arbitration cases to enforce foreign awards fall within the ambit of Section 50 of the Act and the forum of appeal is ‘*the court authorized by law to hear appeals from such orders*’, the appeal for appealable orders under Section 50 of the Act would lie before the forum provided under Section 13(1) of the Commercial Courts Act. However, since an order accepting the enforcement of a foreign award is not appealable, the SC distinguished the present case and held that “*as no appeal lies under Section 50 of the Arbitration Act, no forum can be provided for.*”

⁴ Appeals from orders, Order XLIII, Code of Civil Procedure, 1908.

⁵ Appealable orders, Section 37, the Act.

⁶ 1959 Supp (2) SCR 256

⁷ (2011) 8 SCC 333

⁸ (2011) 8 SCC 333

⁹ (2011) 8 SCC 333

¹⁰ (2011) 8 SCC 333

CONCLUSION

12. Based on the above findings, the SC held that “*the appeal has to be adjudicated within the parameters of Section 50 alone. Concomitantly, where Section 50 excludes an appeal, no such appeal will lie.*” The SC held in favor of OCI and dismissed the appeal.
13. The SC nurtured the objective of the Commercial Courts Act i.e. to provide for speedy disposal of high value commercial disputes and to create a positive image to the investor world about the independent and responsive Indian legal system, and simultaneously gave preference to the special statute i.e. the Act *vis-à-vis* a more general statute by applying the doctrine of harmonious construction.
14. While the decision will be a step ahead in projecting India as an arbitration friendly and pro-arbitration jurisdiction, a brewing cause of concern is that in the event an order allowing the enforcement of a foreign award is erroneous, the aggrieved party will be left with no remedy in Indian courts.

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**ECONOMIC
LAWS
PRACTICE**
ADVOCATES & SOLICITORS

MUMBAI
mumbai@elp-in.com

AHMEDABAD
ahmedabad@elp-in.com

NEW DELHI
delhi@elp-in.com

PUNE
pune@elp-in.com

BENGALURU
bengaluru@elp-in.com

CHENNAI
chennai@elp-in.com

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