A.F.R.

Neutral Citation No. - 2024:AHC-LKO:35647-DB

Court No. - 2

Case :- SPECIAL APPEAL DEFECTIVE No. - 266 of 2024

Appellant :- M/S Moksh Innovations Inc. Lko. Thru. Manager Jitendra Singh Bisht
Respondent :- E City Property Management And Services (P) Ltd. New Delhi Thru. Property Manager And Others
Counsel for Appellant :- Desh Mitra Anand
Counsel for Respondent :- Pushpila Bisht

Hon'ble Rajan Roy,J.
Hon'ble Om Prakash Shukla,J.

1. Heard Mr. Desh Mitra Anand, learned counsel for the appellant and Ms. Pushpila Bisht, learned counsel for the respondents.

2. There is a delay of 135 days as on 01.05.2024 in filing the special appeal. Counsel for the respondents has no objection in application for condonation of delay being allowed, therefore, we allow the application for condonation of delay and condone the delay in filing the special appeal.

3. This special appeal has been filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 (hereinafter referred as 'High Court Rues') challenging the judgment of learned Single Judge of this Court dated 18.11.2023 passed in ***Arbitration and Conciliation Application under Section 11 (4) No. 3 of 2022 (M/s Moksh Innovations Inc. Thru. Manager vs. E-City Property Management and Services (P) Ltd. and others)*** as also the order dated 12.01.2024 passed by the said Single Judge Bench in ***Civil Misc. Review Application No. 178 of 2023 (M/s Moksh Innovations Inc. Thru Manager Jitendra Singh Bisht vs. E-City***

Property Management and Services Pvt. Ltd.).

4. At the very outset, Ms. Pushpila Bisht, learned counsel for the respondents invited our attention to ground (h). Without saying much, we have perused the same. We have also seen the averment made in support of the application for interim relief and an order dated 16.02.2009 passed by a Division Bench of this Court in First Appeal From Order No. 718 of 2008. Apart from the fact that the wording of ground (h) is highly objectionable, we have summoned the scanned copy of records of First Appeal From Order No. 718 of 2008 and we find that the learned Single Judge who has passed the impugned judgments/orders had not signed the vakalatnama on behalf of the appellant herein who was the appellant in First Appeal From Order No. 718 of 2008. The vakalatnama is signed by Mr. B.K. Saxena, Advocate. The learned Judge at the relevant time was junior to Mr. Saxena. Mr. Saxena had filed his vakalatnama and thereafter moved an application for recall of some order in the said First Appeal From Order No. 718 of 2008 and on 16.02.2009 the learned Single Judge who at that time was an Advocate holding the brief of his senior informed a fact to the Division Bench, nothing more to seek recall of an order. There is no other pleading nor any material on record of this appeal that he was the counsel for appellant in his independent capacity in that appeal or in any other proceedings on behalf of the appellant.

5. Most important, when we confronted the learned counsel for the appellant as to whether at any point of time during pending of Application under Section 11 (4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'Act 1996') the said order dated 16.02.2009

and the aforesaid fact was brought to the notice of the learned Single Judge, he submitted that this was not brought to the notice because the appellant himself was not aware of this fact during pendency of the said proceedings.

6. We find that against impugned judgment dated 18.11.2023 a review application was filed, but, we do not find any such ground in the said review application nor any such averment in any affidavit or application filed along with it informing the learned Single Judge about the said fact. The learned counsel for the appellant says that this fact came to the knowledge of the appellant only after decision in the review application. If it is so, then, how the learned Single Judge could have known that 15 years ago he had been holding the brief of his senior and had made some mention before the Division Bench in an application for recall in First Appeal From Order No. 718 of 2008 filed by the appellant herein. In these circumstances it is highly unjust to make such an averment as has been made in ground (h) and the affidavit in support of the interim relief.

7. One could understand if this fact was brought to the notice of the learned Single Judge and then an order had been passed on merits. Even otherwise, the learned Single Judge did not appear in his independent capacity but was associated with the counsel who had filed his vakalatnama and only as a junior lawyer he appeared and made a statement before the Division Bench.

8. The only reason we have narrated these facts is that in our view it is unfair to expect the learned Single Judge to remember that he had by chance appeared in some matter that too on behalf of his Senior in an application for

recall and had informed the Division Bench in the aforesaid First Appeal From Order No. 718 of 2008 15 years ago in an appeal filed by the appellant that some proceedings had already been initiated elsewhere and then to recuse himself from hearing of the Application under Section 11 (4) of the Act 1996, 15 years thereafter, without being informed about the said fact. It was the duty, if at all the appellant felt that the matter should not have been heard by the said learned Single Judge, to inform him about the said fact, but, it seems that having contested the matter unsuccessfully before the learned Single Judge this idea came to the appellant only thereafter. Even in the review application this fact was not mentioned. Although a second review is not maintainable but, in these circumstances, if the appellant was serious about this objection, he could have filed an application for recall of the impugned judgment informing the learned Judge about the aforesaid fact but, even this has not been done, instead, uncalled for language has been used in ground (h) of this appeal. The only reason we have mentioned all this is because of manner in which the ground raised in this appeal has been phrased.

9. We say no more on this issue, as, a preliminary objection has been raised by Ms. Pushpila Bisht, learned counsel for the respondents that the Special Appeal is not maintainable on account of the bar in view of Section 11(7) of the Act 1996 which reads as under:

"(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision."

10. In response, learned counsel for the appellant says that the appeal is maintainable under Chapter VIII Rule 5 of the High Court Rules, as, it does not fall in any of the exclusionary categories mentioned therein. As regards Section 11 (7) of the Act 1996, he says that the said provision has been omitted and, therefore, the bar in maintaining a special appeal which is analogous to Letters Patent Appeal is no longer in existence.

11. However, we find that as per the Arbitration and Conciliation (Amendment) Act, 2019 (hereinafter referred as 'Amending Act 2019') (Act No. 33 of 2019) the same was enacted to amend the Act 1996. As per Section 1 (2) save as otherwise provided in this Act, it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision. Now, Section 11 of the Act 1996 was amended omitting sub-Section (7) of Section 11 thereof vide Section 3 of the Amending Act 2019. A notification dated 30.08.2019 was issued by the Ministry of Law and Justice in exercise of the powers conferred by sub-Section (2) of Section 1 of the Amending Act 2019 by which 30.08.2019 was appointed as the date on which the provisions contained in Section 1; Sections 4 to 9 (both inclusive); Sections 11 to 13 (both inclusive); Section 15 of the Amending Act 2019 shall come into force. The words used in the notification: - "the provisions of the following Sections of the said Act" refer to the Amending Act 2019 and not the original Act 1996. Now, when we peruse the Amending

Act 2019, we find that no date has been appointed for coming into force of Section 3 of the Amending Act 2019 by which Section 11 (7) of the original Act 1996 is sought to be omitted, meaning thereby, sub-Section (7) of Section 11 of the Act 1996 barring a Letters Patent Appeal/Special Appeal against an order passed under Section 11 (4) (5) (6) of the Act 1996, still exists, therefore, the bar continues so long as Section 3 of the Amending Act 2019 is not notified.

12. This being the position, there is a statutory bar in the Act 1996 which is a special enactment and Chapter VIII Rule of the High Court Rules cannot be read, understood and applied contrary to the said provision, therefore, this special appeal is not maintainable.

13. We ***dismiss*** the special appeal as not maintainable, leaving it open for the appellant to pursue other remedies as may be permissible in law.

14. The records of First Appeal From Order No. 718 of 2008 which were summoned by us shall be returned to the concerned section.

[Om Prakash Shukla, J.] [Rajan Roy, J.]

Order Date :- 8.5.2024
Santosh/-