

Order appointing receiver in execution of award- if appealable? (Bombay High Court)

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Kakade Construction Company Ltd. v. Vistra ITCL (India) Ltd.

Court: Bombay High Court | **Case Number:** Commercial Appeal No.401 of 2019 | **Citation:** 2019 SCC Online Bom 152 | **Bench:** Pradeep Nandrajog CJ & Nitin Jamdar J | **Date:** 09 August 2019

From a judgment or order passed by the Commercial Division of a High Court, an appeal lies to the Commercial Appellate Division.¹ But appeal lies only from such orders, specifically enumerated under Order XLIII of CPC and section 37 of the Arbitration and Conciliation Act, 1996 (“ACA”).

Here, an arbitral award was being executed under Section 36 ACA before the Commercial Division of the High Court. A single judge passed an order appointing a receiver. An appeal was filed before the Commercial Appellate Division, contending that the order appointing receiver was made under Order XL Rule 1 of CPC and was appealable Order XLIII Rule 1(s).

Was the order made under CPC or under the ACA? And, if it was under the ACA, was it appealable?

Answering that the order was under the ACA and not appealable, the court held: –

- (a) A division bench of the High Court of Bombay in *Jet Airways (India) Ltd. Subrata Roy Sahara* 2012 (2) AIR Bom 855 relying on Supreme Court’s decision in *Paramjeet Singh Patheja v. ICDS Ltd.* (2006) 13 SCC 322 already has held that execution proceedings under the ACA are not proceedings under CPC.
- (b) What *Jet Airways* considered was a final order but, whether final or not, is not a material distinction for the position of law.
- (c) The Supreme Court’s decision in *Sundaram Finance Ltd. Abdul Samad*, (2018) 3 SCC 622² has not diluted the ratio of *Jet Airways*. The Supreme Court analysed the fiction contained under section 36 and held it is an enforcement mechanism akin to the enforcement of a decree, but the award itself is not a decree of the Civil Court.
- (d) In *Kandla Export Corporation OCI Corporation*, (2018) 14 SCC 715 the Supreme Court has clarified that the ACA is a self-contained code on arbitration. In arbitration matters only the appeals mentioned in Section 37 are maintainable before Commercial Appellate Division.
- (e) It cannot be the legislative intent to provide a speedy remedy of arbitration only till the award is passed, with no priority when the award is to be put to execution. The purpose of the arbitral process is not only to expedite the declaration of an award on paper but the actual receipt of the claim.
- (f) “What if the appellant was not a party to the arbitration?” is a hypothetical question that need not be decided.

¹ Section 13 of Commercial Courts and Commercial Appellate Division of the High Courts Act, 2015.

² An award under Section 36 of the ACA is decree of the court by way of fiction and only for the purposes of execution. Enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings.