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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 13th November, 2017*

+ **FAO(OS)(COMM) 93/2016**

M/S SWARAJ INDUSTRIAL AND DOMESTIC APPLIANCES (P)
LTD & ANR Appellants

Through Mr. Shailen Bhatia, Mr. Amit Jain,
Ms. Ekta Nayar Saini and Ms.
Priyanka Anand, Advocates

versus

SOCIETE DES PRODUITS NESTLE S.A & ANR..... Respondents

Through Mr. Hemant Singh, Mr. Manish
Mishra and Ms. Akansha Singh,
Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE V.KAMESWAR RAO

G.S.SISTANI, J. (ORAL)

1. This is an appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015(hereinafter referred to as the 'Commercial Courts Act') read with Order XLIII Rule 1 of the Civil Procedure Code against the order dated 28.07.2016 passed by the learned Single Judge, by which the application filed by the defendants no.4 and 5, appellants herein, for filing additional documents has been rejected.
2. Mr. Bhatia, learned counsel for the appellants submits that the learned Single Judge failed to consider that the suit has been delayed not on account of reasons attributed to the defendants no.4 and 5 but because of the conduct of the respondents, i.e. plaintiffs in the suit. He has

drawn the attention of this Court to the fact that on 06.09.1995, the respondents(plaintiffs) had filed an IA.8139/1994 seeking impleadment of defendants no.4 and 5(appellants herein). Counsel further submits that on 26.08.1996, plaintiffs filed an application seeking amendment of the plaint. Another application seeking amendment of the plaint was filed by the plaintiffs on 26.07.2004. The plaintiffs had also filed an additional affidavit in the year 2001 and an application seeking substitution of a witness was filed in the year 2015. It is strenuously urged before us that even after the evidence of the plaintiffs was closed, the plaintiffs sought further amendment of the plaint which was allowed.

3. The sum and substance of the arguments raised by Mr. Bhatia is that the learned Single Judge was largely influenced by the fact that the suit was instituted way back in the year 1993 and pending till date, but failed to consider that the delay was caused by the plaintiffs and not the defendants. The learned Single Judge has failed to balance the equities and take into consideration that it is the plaintiffs, who have been delaying the finality in the suit. Additionally, Mr. Bhatia contends that no prejudice would be caused to the respondents as the additional documents sought to be relied upon by the appellants are already on record and the appellants have also filed the additional evidence and thus, there would be no delay in the matter.
4. Mr. Hemant Singh, learned counsel for the respondents submits that the present appeal is not maintainable. He relies upon the decision of this Court in the case of *HPL(India) Limited & Ors. v. QRG*

Enterprises and Another, FAO(OS)(COMM).12/2007, decided on 14.02.2017. Paragraphs 32 to 36 of which read as under:

“32. From the above, it is evident that the natural presumption that can be raised while interpreting a proviso is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso. In sub-Section (1) of Section 13, the word ‘order’ would have a very wide amplitude and that could have included even orders which are not specifically enumerated in Order XLIII of the CPC. The proviso has taken out those orders and carved out an exception by limiting the appeal from orders to those which are specifically enumerated under Order XLIII of the CPC (apart from an Order under Section 37 of the Arbitration and Conciliation Act, 1996).

33. The above analysis reveals that:- (a) the word ‘judgment’ appearing in Section 13(1) of the said Act actually relates or has a reference to a ‘decree’; (b) the word ‘order’ in that provision would have to be construed in the light of Section 2(14) of the CPC as meaning ‘a formal expression of a decision of a Civil Court which is not a decree; (c) the appealable orders would be only those which are specifically enumerated under Order XLIII, as provided in the proviso to Section 13(1) of the said Act.

34. Now, let us examine sub-section (2) of section 13 of the said Act. As noticed above, it begins with the non obstante expression “notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court ..”. The words - “any other law for the time being in force” – would include the Delhi High Court Act, 1966. The portion after the non obstante expression specifically cautions that —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”. In other words, whatever may be contained in, inter alia, the Delhi High Court Act, 1966, an appeal from

any order or decree of a Commercial Division or Commercial Court -“shall lie” only in accordance with the provisions of the said Act. To be clear, if an appeal from a particular kind of order or decree were to be provided under the Delhi High Court Act, 1966 but not under the said Act then, such an order or decree would not be appealable. Therefore, even if, by virtue of section 10 of the Delhi High Court Act, 1966, an appeal lay from a particular kind of an order, no appeal could be preferred thereagainst unless the said Act itself provided for such an appeal.

35. Reading the entire section 13 of the said Act the clear position is that an appeal lies from an order which is specifically enumerated under Order XLIII CPC. Furthermore, no appeal would lie from an order not specifically enumerated in Order XLIII CPC because of the incorporation of the expression “from no other orders” appearing in section 104 CPC (which is clearly applicable by virtue of section 16(2) of the said Act). And, Section 10 of the Delhi High Court Act, 1966 would not come to the rescue because of the non obstante provision contained in section 13(2) of the said Act.

36. Therefore, as the impugned order does not find place in the orders specifically enumerated in Order XLIII CPC, no appeal could lie against it and the present appeal is not maintainable. But, as the learned counsel for the appellants have made several submissions to the contrary we shall have to deal with them.”

5. Mr. Bhatia, learned counsel for the appellants submits that the judgment relied upon by the learned counsel for the respondent is a subject matter of Special Leave Petition which is pending in the Supreme Court and he submits that the decision in the SLP should be awaited in case this Court is inclined to dismiss the appeal on the

ground that the same is not maintainable based on the judgment in the case of **HPL(India) Limited & Ors.**(supra).

6. On the merits of the matter, Mr. Hemant Singh, learned counsel for the respondents submits that the amendments sought were formal in nature and on account of the pecuniary jurisdiction of the High Court being raised beyond Rs.2 Crores. He submits that the amendments had no bearing on the factual aspect of the matter and no delay was caused on account of seeking amendments to the plaint. He further submits that the application seeking leave to place additional documents on record by the appellants is a gross abuse of the process of the Court and the grounds set up in the application are baseless for the reason that the appellants have shifted the entire blame for not placing documents on record on the erstwhile counsel, whereas no affidavit of the counsel has been placed on record. He further submits that as per the application, Mr. Rajesh Mehta, appellant no.2, had inspected the court file and learnt that the documents which he had handed over to the erstwhile counsel had not been filed and this is the sole ground for not placing the documents on record.
7. We have heard learned counsel for the parties and considered their rival submissions.
8. At the outset, we are not inclined to adjourn the matter to await the decision in the SLP filed against the order passed in **HPL(India) Limited & Ors.**(supra) for the reason that this is a commercial dispute covered under the Commercial Courts Act. The suit is ripe for final arguments and we are told that the evidence was concluded on 27.04.2017. We are also informed that the matter is being adjourned

before the learned Single Judge to await the outcome in this appeal, though, no stay of proceedings was granted. We decline the request of the learned counsel for the appellants that we should await the decision of the SLP, as we would then have to adjourn the matter against the judgment rendered in *HPL(India) Limited & Ors.* (supra). We have examined the matter on merits, as agreed by both the parties.

9. The reading of the order of the learned Single Judge dated 28.07.2016 would show that the learned Single Judge has traced the history of the suit which was filed in the year 1993. We reproduce paragraph 4 of the order passed by the learned Single Judge, which reads as under:

“4. It transpires (i) that the present suit was instituted as far back as in 1993 though was re-numbered in 2004; (ii) that the suit is to restrain the use of the trademark ‘MAGGI’ in relation to mixers, grinders and juicers and for ancillary reliefs; (iii) that the suit as originally instituted was against the defendants No.1&2 who were manufacturing the goods under the said trademark and the defendant No.3 was stated to be the dealer of the defendants No.1&2 at Delhi; (iv) that the defendant No.3 has not contested the suit and is ex-parte; (v) that the defendants No.1&2 have now assigned the trademark to the defendants No.4&5 who were subsequently impleaded in this suit and the defendants No.1&2 also are now not appearing; (vi) that there is no formal order proceeding ex-parte against defendants No.1&2 as yet; (vii) that the issues were framed in the suit on 8th December, 2000 and additional issues were framed on 28th July, 2005; (viii) that there is no interim order in favour of the plaintiffs because on 20th February, 2001, the counsel for the plaintiffs stated that if the trial is expedited he is not pressing for interim orders; (ix) that though the counsel for the defendants No.4&5 furnished advance copy of affidavit by way of examination-in-chief of the defendant No.4 to the counsel for the plaintiffs along with documents which were not filed earlier but now after the evidence of the plaintiffs

stood concluded on 5th November, 2015 and the stage for evidence of the defendants No.4&5 was reached, it transpired that the said affidavit by way of examination-in-chief of the defendant No.4 is not on record; (x) that the defendants No.4&5 were however permitted to file a fresh affidavit by way of evidence of the defendant No.4; (xi) that the defendants No.4&5 have along with the fresh affidavit, besides the documents which were filed along with the earlier affidavit, have filed a large number of additional documents; (xii) that the said additional documents are to show user of the trademark in relation to mixers and grinders since 1982 and inter alia comprise of legal notices, replies thereto and advertisements in newspapers; (xiii) that the suit is a commercial suit within the meaning of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Commercial Courts Act).”

10. The learned Single Judge has also taken into consideration the fact that the appellants(defendants no.4 and 5) before the learned Single Judge are not uneducated persons from a village, who are not well-conversant with the legal issues. The learned Single Judge has also considered the aim and objective of the Commercial Courts Act, which is to expedite the disposal of the suit in comparison to an ordinary suit. We find no infirmity in the view so taken by the learned Single Judge. We may also note that the application filed by the appellants herein, in para 5 of the same they have completely shifted the blame on not filing the documents on the erstwhile counsel. No affidavit has been filed of the counsel, hence we are unable to accept the plea that although documents were handed over to the counsel he did not file the same. Secondly, we find that para 6 of the application shows that defendant no.4 (appellant no.2) herein had inspected the

court file which shows that the appellant no.2 is well-conversant with court proceedings. The Court also can also not lose track of the fact that the affidavit by way of evidence was filed by defendants no.4 and 5 in the year 2001 of DW4 Rajesh Mehta, , however in the year 2015 it was learnt that the same was not record and the defendants were allowed to place another affidavit on record. At that stage he could have either questioned his counsel or moved an application which has been filed as late as in 2016. In effect even when the first affidavit was filed, the deponents did not feel the need to place those documents on record which were handed over to the erstwhile counsel. The facts noted above give a clear indication that the application is not *bona fide*, but an attempt to delay the final hearing of the suit and any indulgence shown at this stage would be against the very aim and objective of the Commercial Courts Act.

11. Thus, we find no infirmity in the order passed by the learned Single Judge. We find no merit in the present appeal; which is also otherwise not maintainable; the same is accordingly dismissed.

G.S.SISTANI, J.

V.KAMESWAR RAO, J.

NOVEMBER 13, 2017

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