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HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Appeal No. 33 of 2018**

1. State of Chhattisgarh, Through : The Dy. Secretary, Government of Chhattisgarh, Public Health Engineering Department, Mahanadi Bhawan, Mantralaya, Naya Raipur (C.G.)
2. State of Chhattisgarh, Through : The Chief Engineer, Public Health Engineering Department, Near Bhawan, Raipur (C.G.)
3. State of Chhattisgarh, Through : The Executive Engineer, P.H.E. Project Division, Raipur (C.G.)

---- Appellants**Versus**

- M/s Maneesh Pipes Pvt. Ltd. Through : Its Director – Jagdish Jhawar having its Office at Jayshree Marline, Pandri, Raipur, Chhattisgarh.

---- Respondent

For Appellants/State	:	Shri Ramakant Mishra, Dy. A.G.
For Respondent	:	Shri Vivek Chopra, Advocate.

Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Shri Justice Gautam Chourdiya****Order on Board****Per Manindra Mohan Shrivastava, J****18/09/2018**

1. Heard.
2. An issue with regard to the maintainability of this appeal has been raised before us at the instance of Respondent.
3. In the matter of dispute between the Appellants and Respondent, invoking arbitration clause, dispute was referred for arbitration before the Sole Arbitrator who passed an award on 07.10.2017. Aggrieved by the said award, the Respondent filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act, 1996') for setting aside the award passed by the Sole Arbitrator. The application was however, barred by limitation. Respondent, therefore,

sought condonation of delay in filing appeal by moving an application of condonation of delay under Section 34(3) of the Arbitration Act, 1996. Despite objection, the application was allowed vide impugned order dated 04.08.2018 which is now sought to be challenged by the Appellants by way of this appeal.

4. Learned counsel for the Respondent has raised an objection with regard to the very maintainability of the appeal by submitting that as the order is neither appealable under Section 37 of the Arbitration Act, 1996 nor an order of the nature covered under order 43 of the CPC, the appeal itself would not be maintainable under Section 13 of The Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (hereinafter referred to as 'Commercial Courts Act, 2015'). In support of this submissions learned counsel for the Respondents places reliance on a recent judicial pronouncement of the Supreme Court in the case of **Kandla Export Corporation & Another Vs. M/s OCI Corporation & Another** reported in **2018 SCC Online SC 170**.
5. On the other hand, learned counsel for the Appellants would submit that even if, the order may not appealable one under the provision of Section 37 of the Arbitration Act, 1996, Section 13 creates an additional remedy of appeal against any decision or order and there is nothing in the said provision to bar an appeal against an order of the nature as has been passed in the present case by the Commercial Court i.e. an order allowing an application for condonation of delay in filing application under Section 34 of the Arbitration Act, 1996. He would further submit that the order impugned, has rejected the objection which if, otherwise allowed, would have resulted in final disposal of the application under Section 34 of the Arbitration Act, 1996 itself. Therefore, the order impugned is not merely an

interlocutory order, but a decision against which remedy of appeal would be available under Section 13 of the Commercial Courts Act, 2015.

6. The appeal in the present case arises out of an order allowing Respondent application for condonation of delay in filing application under Section 34 of the Arbitration Act, 1996.
7. Section 37 of the Arbitration Act, 1996 provides for appeal against orders as below:

“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) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under Section 9;

(c) setting aside or refusing to set aside an arbitral award under Section 34.]

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

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 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.”

The provision clearly provides that appeal shall lie from only such orders which are enumerated in the provision itself and form no other orders. The order passed in the present case is apparently not an order within the scope and ambit of the provision contained in Section 37 of the Arbitration Act, 1996.

8. If the impugned order is not appealable order under Section 37 of the Arbitration Act, 1996, whether remedy of appeal against the said order is at all available under Section 13 of the Commercial Courts Act, 2015 is required to be examined upon the scheme of the provision contained in Section 13 of the Commercial Courts Act, 2015 which we consider opposite to reproduce herein below:

“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 Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 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.”

The provision contained in Section 13 of the Commercial Courts Act, 2015 provides for appeal against the decision of the Commercial Courts or Commercial Division of the High Court to the Commercial Appellate Division of the High Court within a period of 60 days from the date of judgment or order. The proviso thereof, however, qualifies the generality of the main provision, therefore, if an order of the nature, as referred to in proviso, is passed by the Commercial Courts or Commercial Division of the High Court, an appeal would certainly lie before the Commercial Division Bench or the High Court under proviso sub-section (1) of Section 13 of the Commercial Courts Act, 2015.

Where an order is neither appealable under Section 37 of the Arbitration Act, 1996 nor appealable under the aforesaid proviso, Section 13 of the Commercial Courts Act, 2015 does not generally provide for an additional remedy of appeal.

9. The inter play between the statutory scheme of the Arbitration Act, 1996 and Commercial Courts Act, 2015 in the matter of appellate remedy was examined by the Supreme Court in decision of the **Kandla Export Corporation & Another** (supra). That was a case where an execution petition for enforcement of foreign award was allowed, rejecting the objection, by the High Court. Against the said order, appeal was filed before the Commercial Appellate Division Bench. The appeal was dismissed holding that Commercial Courts Act, 2015 did not provide any additional right which is not otherwise available to the Appellants under the provisions of the Arbitration Act, 1996. In context of the issue raised as aforesaid the provisions contained in the Arbitration Act, 1996 and Commercial Courts Act, 2015 were examined by the Supreme Court as below:

“15. Section 13(1) of the Commercial Courts Act, with which we are immediately concerned in these appeals, is in two parts. The main provision is, as has been correctly submitted by Shri Giri, a provision which provides for appeals from judgments, orders and decrees of the Commercial Division of the High Court. To this main provision, an exception is carved out by the proviso. The primary purpose of a proviso is to qualify the generality of the main part by providing an exception, which has been set out with great felicity in *CIT v. Indo-Mercantile Bank Ltd.*, 1959 Supp (2) SCR 256 at 266-267, thus:

“The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which

is foreign to the main enactment. "It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso". Therefore, it is to be constructed harmoniously with the main enactment. (Per Das, C.J. in *Abdul Jabar Butt Vs. State of Jammu & Kashmir* [(1957) SCR 51, 59]. Bhagwati, J., in *Ram Narain Sons Ltd. Vs. Assistant Commissioner of Sales Tax* [(1955) 2 SCR 483, 493] said:

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

Lord Macmillan in *Madras & Southern Maharatha Railway Co. Vs. Bezwada Municipality* [(1944) LR 71 IA 113, 122] laid down the sphere of a proviso as follows:

"The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms."

The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that is its necessary effect. (Vide also *Corporation of City of Toronto Vs. Attorney-General of Canada* [(1946) AC 32, 37]."

"16. The proviso goes on to state that an appeal shall lie such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration Act. It will at once be noticed 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."

“17. Thus, an order which refers parties to arbitration under Section 8, not being appealable under Section 37(1)(a), would not be appealable under Section 13(1) of the Commercial Courts Act. Similarly, an appeal rejecting a plea referred to in sub-section (2) and (3) of Section 16 of the Arbitration Act would equally not be appealable under Section 37(2)(a) and, therefore, under Section 13(1) of the Commercial Courts Act.”

10. It would thus appear that in order to maintain appeal under Section 13 of the Commercial Courts Act, 2015, the impugned order should either be appealable under Section 37 of the Arbitration Act, 1996 or under proviso to sub-section (1) Section 13 of the Commercial Courts Act, 2015.

In the aforesaid decision, the availability of remedy of appeal was considered with reference to the provision contain in Section 50 of the Arbitration Act, 1996 which dealt with appealable orders. It was found that as the order allowing execution and rejecting objection against execution was neither appealable under Section 50 of the Arbitration Act, 1996 nor appealable under proviso to sub-Section (1) of Section 13 of the Commercial Courts Act, 2015, no appeal would lie.

11. In view of the aforesaid consideration, we are of the considered opinion that the present appeal is not maintainable under Section 13(1) of the Commercial Courts Act, 2015.

12. As an up short of aforesaid discussions the objections to the maintainability of the appeal raised by the Respondent is sustained and the appeal is dismissed as not maintainable under the law. However, with liberty to the Appellants to workout such remedy as may be available him under the law.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Gautam Chourdiya)
Judge