

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION

COMMERCIAL APPEAL NO.327 OF 2018

IN

CHAMBER SUMMONS NO.1030 OF 2018

IN

COMMERCIAL EXECUTION APPLICATION NO.2113 OF 2018

1. Shailendra Bhadauria
2. Surabhi Bhadauria
3. Maharana Infrastructure & Professional
Services Ltd.
4. Maharana Construction Private Limited Appellants

- Versus -

1. Matrix Partners India Investment
Holdings LLC
2. Matrix Partners India Investments LLC
3. Resurgence PE Investments Limited
4. Maharana Pratap Education Centre
5. Sakshi Institute of Technology and
Management
6. Mair Rajput Educational Society Respondents

WITH

NOTICE OF MOTION NO.683 OF 2018

IN

COMMERCIAL APPEAL NO.327 OF 2018

IN

CHAMBER SUMMONS [LODGING] NO.1167 OF 2018

IN

COMMERCIAL EXECUTION APPLICATION NO.2113 OF 2018

Shailendra Bhadauria & 3 Others	 Applicants
<i>In the matter of</i>	
Shailendra Bhadauria & 3 Others	 Appellants
Vs.	
Matrix Partners India Investment Holdings LLC & 5 Others	 Respondents

WITH
COMMERCIAL APPEAL [LODGING] NO.414 OF 2018
IN
CHAMBER SUMMONS NO.1030 OF 2018
IN
COMMERCIAL EXECUTION APPLICATION NO.2113 OF 2018

1. Maharana Pratap Education Centre ("MPEC")
 2. Sakshi Institute of Technology and Management ("SITM")
 3. Mair Rajput Educational Society ("MRES")
- Appellants

- Versus -

1. Matrix Partners India Investment Holdings, LLC ("Matrix 1")
 2. Matrix Partners India Investments, LLC ("Matrix 2")
 3. Resurgence PE Investments Ltd. (Formerly Avigo PE Inv. Ltd.) ("RPEIL")
 4. Shailendra Bhadauria
 5. Surabhi Bhadauria
 6. Maharana Infrastructure and Professional Services Ltd. (MIPSL)
 7. Maharana Construction Pvt. Ltd. ("MCPL")
- Respondents

WITH

NOTICE OF MOTION [LODGING] NO.941 OF 2018
IN
COMMERCIAL APPEAL [LODGING] NO.414 OF 2018
IN
CHAMBER SUMMONS NO.1030 OF 2018
IN
COMMERCIAL EXECUTION APPLICATION NO.2113 OF 2018

Maharana Pratap Education Centre & Others	 Applicants
<i>In the matter between</i>	
Maharana Pratap Education Centre ("MPEC") & 2 Others	 Appellants
Vs.	
Matrix Partners India Investment Holdings, LLC ("Matrix 1") & 6 Others	 Respondents

Mr. Zal Andhyarujina with Mr. Vaibhav Sugdare,
 Mr. Hursh Meghani, Mr. Samsher Garud & Ms Radhika
 Nair i/by Jayakar & Partners for the Appellants in
 COMAP-327/2018, for the Applicants in NMCA-683/2018
 and for Respondent Nos.4 to 7 in COMAPL-414/2018.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Sharan
 Jagtiani, Mr. Nitesh Jain, Ms Juhi Mathur, Mr. Aditya
 Malhotra & Ms Ayusmita Sinha i/by Shardul Amarchand
 Mangaldas & Co. for Respondent Nos.1 to 3 in COMAP
 -327/2018, NMCA-683/2018 and COMAPL-414/2018.

Mr. Rakesh V. Misar i/by Kachwala Misar & Co. for
 Respondent Nos.4 to 6 in COMAP-327/2018, for the
 Appellants in COMAPL-414/2018 and the Applicants
 in NMCA-941/2018.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : SEPTEMBER 25, 2018

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. These commercial appeals challenge an order passed by a learned single Judge on 20-8-2018 in Chamber Summons (Lodging) No.1167 of 2018 in Execution Application No.2113 of 2018. This order reads as under:-

“1. This is a Chamber Summons in execution of an interim order made by an Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act 1996 (“Arbitration Act”). The operative portion of the interim order is from pages 98 to 101. There is a specific finding against the Respondents and an order that they must jointly and severally deposit an amount of Rs.190 crores within four weeks or alternatively furnish a bank guarantee. There are also injunctions granted in clauses (c), (d) and (e) of the operative portion. Clause (f) is an order of disclosure. The injunctions in terms of clauses (c), (d) and (e) of the interim order will necessarily have to continue as injunctions of this Court in this Chamber Summons. The order of disclosure in clause (f) of the interim arbitral order is one that was required by the Tribunal. What is sought from this Court however, in terms of disclosure, is in pursuance of execution of clauses (a) or (b) of clause 47, that is to say a disclosure of assets sufficient to meet the requirement of a deposit of Rs.190 crores.

2. One of the points agitated at the forefront before

the learned sole Arbitrator was whether Respondents Nos. 5 to 7 were properly impleaded in the arbitral proceedings. He held they were. That finding has not been disturbed yet although I am informed that Section 37 Appeal has been filed. Whether or not that finding as to arbitrability and joinder can be even taken up in a Section 37 appeal is for that Court to decide. What remains here, however, is that Respondents Nos. 5 to 7 are jointly and severally liable with Respondents Nos. 1 to 4 and are also required to jointly and severally make this deposit of Rs.190 crores.

3. Given the fact that the Respondents are even now attempting to have the Section 37 appeal listed, I will grant them time of three weeks to make the necessary disclosures in terms of prayer clause (a) and (d) of the Chamber Summons. There will also be an ad-interim injunction that will operate until 17th September 2018 in terms of prayer clause (b).

4. The Affidavits of Disclosure are to be filed on or before 7th September 2018.

5. The injunctions in terms of clauses (c), (d) and (e) of the interim arbitral order will also continue.

6. List the matter on 17th September 2018.”

2. When these appeals were placed for admission before us, Mr. Janak Dwarkadas, learned Senior Counsel appearing on behalf of the original applicants/respondent Nos.1 to 3 to these appeals, raised a preliminary objection to the maintainability of these appeals. Relying upon the Commercial Courts, Commercial Division and Commercial Appellate Division

of High Courts Act, 2015 (for short, “**the Commercial Courts Act, 2015**”) and particularly Section 13 thereof, he would submit that the order under challenge is not appealable.

3. It is, therefore, imperative for us to consider this preliminary objection and we have considered it by hearing the Counsel on either side at great length.

4. After the conclusion of the oral arguments, both sides have tendered their written submissions.

5. We shall, firstly, refer to the submissions and arguments of Mr. Dwarkadas. He would submit that the Commercial Courts Act, 2015, prior to its amendment by Amendment Act No.28 of 2018, with effect from 3-5-2018 and later on as well is an Act to provide for the constitution of the Commercial Courts, the Commercial Appellate Courts, the Commercial Division and the Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto. He would submit that the statement of objects and

reasons leading to this enactment emphasised as to how the proposal to provide for speedy disposal of high value commercial disputes was under consideration of the Government for quite some time. The high value commercial disputes involve complex facts and questions of law. There is a need to provide for an independent mechanism for their early resolution. This early resolution is also necessary so as to create a positive image to the investor world about the independent and responsive Indian legal system. That is how our attention was invited to the Report of the Law Commission of India. It was urged before us that the provisions of this Act should receive an interpretation consistent with this object and purpose. It is argued that the instant appeals have been filed challenging an order passed by this Court in an execution application. It is submitted, by inviting our attention to the wording and phraseology of Section 13 of the Commercial Courts Act, 2015, that it admits of no other construction but consistent with the aim and object sought to be achieved by the enactment itself. This wording and phraseology rules out totally an appeal against

any order which specifically does not fall within the provisions of the two Laws referred in Section 13. In other words, Section 37 of the Arbitration and Conciliation Act, 1996 (for short, “**the Arbitration Act**”) is the applicable and guiding provision in this case. That provides for an appeal challenging specific orders and no others. In the Arbitration Act, Section 37, granting a right of appeal vide Chapter IX, titled as Appeals, by sub-section (1) says in the clearest terms that 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, and thereafter, according to Mr. Dwarkadas, the appealable orders are listed. Then, it says that an appeal shall also lie to a Court from an order of the Arbitral Tribunal. Thus by sub-clauses (a) to (c) appeals from the orders passed by the Court are contemplated, whereas by sub-section (2) of Section 37, an appeal from an order of the Arbitral Tribunal is provided for. In the instant case, sub-section (2) of Section 17, by clause (b) provides for an appeal against an order of the Arbitral Tribunal granting or refusing to grant an interim measure under

Section 17.

6. These Sections 17 and 37 of the Arbitration Act read as under:-

“17. Interim measures ordered by arbitral tribunal.-

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

- (e) *such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,*

and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were an order of the Court.”

“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.”

7. Mr. Dwarkadas has also invited our attention to Section 17 of the Arbitration Act to urge that by sub-section (2) of Section 17, the interim measures ordered by the Arbitral Tribunal gain finality subject to orders passed in an appeal under Section 37 and such orders of the Arbitral Tribunal if passed under Section 17 shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (for short, “**the CPC**”) in the same manner as if it were an order of the Court.

8. Mr. Dwarkadas would submit that in the instant case the appellants may argue that they have filed an appeal challenging these interim measures ordered by the Arbitral Tribunal and that appeal is pending. However, during the pendency of the appeal and when no orders have been passed thereon, interim or final, the present respondents are not precluded or prohibited by law from moving an execution application and relying on the language of sub-section (2) of

Section 17 of the Arbitration Act. They have, in these circumstances, filed Execution Application No.2113 of 2018 and moved therein the instant chamber summons. This chamber summons sought reliefs so as to protect the interim measures ordered by the Tribunal and safeguard against their frustration and total defeat. The Executing Court was requested to make such orders as would carry the interim measures forward, namely, by enforcing and executing them. If the execution application can be filed seeking enforcement of these interim measures ordered by the Tribunal as if they were orders of a Court and in like manner executable and enforceable, then, by the impugned order the learned Judge has done nothing but to direct the appellants to abide by the interim measures ordered by the Arbitral Tribunal. The learned single Judge was aware of the pendency of an appeal against these interim measures. He has neither frustrated or rendered illusory the right of appeal conferred by law in the appellants nor has he enlarged the ambit and scope of the interim measures by the order under challenge. If this order and direction of the learned single Judge is perused

in its entirety, it would reveal that the learned single Judge has acted in furtherance of the same measures as were ordered by the Arbitral Tribunal at an interim stage. He has not granted any additional or substantive reliefs. In the circumstances, such an order which is not appealable either in terms of Section 37 of the Arbitration Act or otherwise in terms of Order XLIII Rule 1 of the CPC, then, the instant appeals should be dismissed.

9. Mr. Dwarkadas has invited our attention to the interim measures ordered by the Tribunal and submitted that the impugned order cannot be challenged by terming it as a judgment within the meaning of Clause 15 of the Letters Patent of this Court. In that regard, our attention has been invited to a Division Bench Judgment of this Court rendered in the case of **Jet Airways (India) Limited & Another v. Subrata Roy Sahara & Others**, reported in 2011 SCC OnLine Bom 1379 : (2011) 113 (6) Bom LR 3835. It is submitted that no appeal would lie against such an order passed in execution proceedings. It is submitted that this is not an appealable order under Section 13 of the Commercial Courts Act, 2015. If the object and purpose of

this Act is to accelerate economic growth, improve the international image of the Indian Justice delivery system and the faith of the investor world in the legal culture of the nation, then, all the more we should reject these appeals.

10. The 253rd Report of the Law Commission of India and particularly paragraphs 3.23.1 and 3.24.5 have been highlighted to urge that multiple appeals in the Indian legal system created an adverse impact, thereby tarnishing its reputation and image in the commercial world. It is to reduce the appeals that this provision has been worded accordingly. Our attention has been invited to Sections 13 and 14 of the Commercial Courts Act, 2015, as the provisions stood prior to the amendment and post-amendment in 2018 and it is urged that the legislative intent has remained unchanged.

11. Our attention is also invited to the proviso to Section 13 of the Commercial Courts Act, 2015 to submit that post-amendment the Section has now been divided into three sub-sections. The sub-section (1) earlier engrafted the proviso which

is now inserted below sub-section (1A) but the wording of sub-section (2) has not changed. It is, therefore, submitted that the Legislature consciously and deliberately, so also intentionally omitted the word “decision” from sub-section (1) and substituted it by the words “judgment or order” of a Commercial Court. It has retained the proviso. In sub-section (2), it has used the words “from any order or decree”. This is reflective of the intent of the Legislature. This would mean, and coupled with the exclusion of the Letters Patent of a High Court, that an appeal lies only against an order or decree but that has to be appealable in terms of the CPC, as amended by the Commercial Courts Act, 2015, and Section 37 of the Arbitration Act. Mr. Dwarkadas submits that in the instant case, Section 37 of the Arbitration Act has application. Once that does not provide for an appeal against an order of the nature impugned in these appeals, then, by an oblique or an indirect method, no appeal can be entertained by holding that the order under challenge is a judgment within the meaning of Clause 15 of the Letters Patent. It is in these circumstances submitted that the words of the

statute are plain, unambiguous and clear. There is no scope for any interpretation. In these circumstances, relying upon the three orders {**Jet Airways** (supra), **Smt. Sushila Singhania & Ors. v. Bharat Hari Singhania & Ors.**, reported in 2017 SCC OnLine Bom 360 : (2017) 4 Bom CR 348 and **Sigmarq Technologies Pvt. Ltd. v. Manugrah India Limited**, reported in 2017 SCC OnLine Bom 9191 : (2018) 1 Bom CR 202} passed by this Court and a judgment of the Hon'ble Supreme Court in the case of **Kandla Export Corporation & Anr. v. M/s. OCI Corporation & Anr**, reported in 2018 SCC OnLine SC 170, Mr. Dwarkadas would submit that these appeals deserve to be dismissed. Mr. Dwarkadas has then submitted that by subsection (2) of Section 13 of the CC Act, 2015, the Commercial Courts Act has been given an overriding effect over the Letters Patent of a High Court. Hence, no appeal can be entertained against the impugned order by us by relying upon Clause 15 of the Letters Patent either. Mr. Dwarkadas would submit that in the instant case, the learned single Judge has passed an order which is neither appealable in terms of the Commercial Courts

Act, 2015 nor under Section 37 of the Arbitration Act. We must, therefore, not allow the appellants to get over the legal bar but dismiss these appeals. Mr. Dwarkadas was at pains to point out that no broad or general considerations of equity, fairness and justice would also enable us to entertain such appeals. Such broad and general considerations cannot be imported into a law unless the law permits so. If we apply and introduce them, then, we would be re-writing the statute or the statutory provision. That is also impermissible. For all these reasons, he would submit that these appeals be dismissed.

12. In the written submissions, these aspects have been highlighted in some details and copies of the judgments relied upon are annexed.

13. In meeting this preliminary objection, Mr. Andhyarujina, learned counsel appearing on behalf of the appellants in Commercial Appeal No.327 of 2018, and whose submissions have been adopted by the counsel appearing for the appellants in the companion appeal, would urge that we must

not accept the arguments of Mr. Dwarkadas, for that would mean that in the garb of ease of doing business and to purportedly improve the image of the Indian legal system, we would discourage filing of appeals which are otherwise maintainable. Mr. Andhyarujina would submit that a high value commercial dispute requires an independent mechanism for an early resolution with a view to accelerate economic growth but that cannot be at the cost of justice. Access to justice and guarantee of justice flows from the Constitution of India. Once that is the supreme document and guiding us, then we should not be carried away by what is urged before us. It is submitted that the object of the Commercial Courts Act, 2015 is to provide an independent remedy. In that regard, it is submitted that the Arbitration Act is a general Act dealing with arbitration and not a specific Act dealing with high value commercial disputes. Hence, we should give full effect to Section 13 of the Commercial Courts Act, 2015. That is an independent mechanism of appeals. That would govern the present appeal as well. It is submitted that the proviso to Section 13(1) and

Section 13(1A) clarifies that an appeal shall lie from the orders passed by the Commercial Court/Commercial Division Court specifically enumerated under Order XLIII of the CPC, as amended by the Commercial Courts Act, 2015, and Section 37 of the Arbitration Act. It is submitted that if the proviso is read as being exhaustive of all appeals under Section 13, it would result in large part of the language being superfluous and otiose. The Court should lean against giving an interpretation of a statute, which results in its language being rendered otiose. It is urged that the scheme of these sub-sections permits appeal from judgment and order of the Commercial Court, subject to clarification made in the proviso. It is submitted that the wider expression “judgment or order” is used in sub-section (1) of Section 13, whereas sub-section (2) of Section 13 uses the expression “order or decree”. It is accordingly submitted that the appeal provided for under Section 13(1) and Section 13(1A) is of a wide and plenary nature, whereas the exclusion under Section 13(2) is with regard to Letters Patent Appeals in respect of orders and decrees. An appeal against a judgment is possible

under Section 13 of the Commercial Courts Act, 2015. The expression “judgment” has been defined under the CPC {Section 2(9)} as a statement given by the Judge on the grounds of a decree or order. A more expansive definition of judgment has been given in the Supreme Court's decision in the case of **Shah Babulal Khimji v. Jayaben D. Kania & Ors.**, reported in (1981) 4 SCC 8. Relying upon this Judgment, it is submitted that an appeal has been provided against a judgment. That is how Section 13 reads. If there is an appeal provided to a person aggrieved by the judgment and not only orders and decrees, then, we must apply the principle in the case of **Shah Babulal Khimji** (supra) and give a wide and expansive meaning to this term.

14. It is submitted that the non-obstante clause under Section 13(2) does not curtail in any manner an appeal against a judgment but only curtails an appeal against orders and decrees. It is then submitted that apart from Section 13, no part of the Commercial Courts Act, 2015 has specifically sought to exclude the Letters Patent. A statute can be excluded only by

express and specific language. It is submitted that the Legislature while enacting the Commercial Courts Act, 2015 did not in any manner seek to exclude the Ordinary Original Civil Jurisdiction of this Court under the Letters Patent. Hence, except to the extent excluded, the Letters Patent continues with full force in commercial disputes.

15. Mr. Andhyarujina would submit that the present appeal is maintainable because the order of the learned single Judge is traceable to the powers derived by him under Order XXXIX Rule 1 of the CPC. He may have passed an order on a chamber summons in an execution application at the instance of the decree holders but his substantive power has been derived from Order XXXIX Rule 1. The interim measures ordered by the Arbitral Tribunal, particularly in para 47(a) and para 47(b) are reliefs in the nature of Order XXXVIII Rule 5 of the CPC and the interim measures from para 47(c) to para 47(f) are reliefs governed by the principles of Order XXXIX Rule 1 of the CPC. If these principles apply to grant of interim measures by the Arbitral Tribunal, then, the learned single Judge was expected to

give effect to those interim measures and not pass any substantive orders of his own. If he has given effect to and enforcing the interim measures as ordered by the Arbitral Tribunal, then, the learned single Judge had no authority to pass an order in terms of the prayers of Chamber Summons No.1030 of 2018. Mr. Andhyarujina has taken us through the prayers in this chamber summons to urge that, though it is styled as a chamber summons in an execution application, the prayers are not innocuous. The prayers in the instant case are claiming injunction of a mandatory as also of a prohibitory nature. The learned single Judge has also granted injunctions in terms of Clauses (c), (d) and (e) of the interim award. This, as would suggest, are therefore injunction orders. If there are fresh injunction orders granted by the learned single Judge, though purportedly already granted by the learned Sole Arbitrator, then, the powers exercised by the learned single Judge are traceable to only Order XXXIX of the CPC. Order XLIII Rule 1 of the CPC provides for an appeal against an order passed in exercise of the powers conferred by Order XXXIX of the CPC.

Hence, the present appeal is maintainable.

16. Mr. Andhyarujina has distinguished the Judgments relied upon by Mr. Dwarkadas and in the process he relies upon the following Judgments:-

- “1. **The Secretary of State v. Mask And Co.**, reported in (1940) 42 Bom LR 767,
2. **Dhulabhai & Anr. v. The State of Madhya Pradesh & Anr.**, reported in 1968 SCR (3) 662,
3. **Vinita M. Khanolkar v. Pragna M. Pai & Ors.**, reported in AIR 1998 SC 424,
4. **Nimbus Communications Ltd. v. Board of Control for Cricket in India & Anr.**, reported in 2012 SCC OnLine Bom 287, and
5. **Kanwar Singh Saini v. The High Court of Delhi**, reported in (2012) 4 SCC 307”

17. For properly appreciating the rival contentions on this preliminary objection, a brief reference will have to be made to the Commercial Courts Act, 2015. As is evident from its long title, this Act has been enacted to provide for the constitution of the Commercial Courts, the Commercial Appellate Courts, the

Commercial Division and the Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto.

18. This Act is divided into several chapters. Chapter I contains the preliminary provisions, including the definitions. The definition by sub-section (1) of Section 2 says that, unless the context otherwise requires, a Commercial Appellate Court, Commercial Appellate Division, Commercial Court and commercial disputes shall mean the following:-

- “(a) “Commercial Appellate Division” means the Commercial Appellate Division in a High Court constituted under sub-section (1) of section 5;*
- (b) “Commercial Court” means the Commercial Court constituted under sub-section (1) of section 3;*
- (c) “commercial dispute” means a dispute arising out of-*
 - (i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;*
 - (ii) export or import of merchandise or services;*

- (iii) *issues relating to admiralty and maritime law;*
- (iv) *transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;*
- (v) *carriage of goods;*
- (vi) *construction and infrastructure contracts, including tenders;*
- (vii) *agreements relating to immovable property used exclusively in trade or commerce;*
- (viii) *franchising agreements;*
- (ix) *distribution and licensing agreements;*
- (x) *management and consultancy agreements;*
- (xi) *joint venture agreements;*
- (xii) *shareholders agreements;*
- (xiii) *subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;*
- (xiv) *mercantile agency and mercantile usage;*
- (xv) *partnership agreements;*
- (xvi) *technology development agreements;*
- (xvii) *intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;*
- (xviii) *agreements for sale of goods or provision of services;*

- (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;*
- (xx) insurance and re-insurance;*
- (xxi) contracts of agency relating to any of the above; and*
- (xxii) such other commercial disputes as may be notified by the Central Government.*

Explanation. - A commercial dispute shall not cease to be a commercial dispute merely because -

- (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;*
- (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;”*

The term “Commercial Division” is defined in Section 2, sub-section (1), clause (d) to mean the Commercial Division in a High Court constituted under sub-section (1) of Section 4, whereas the term “District Judge” is defined in clause (e) of this sub-section to carry the same meaning as is assigned to it in clause (a) of Article 236 of the Constitution of India. The term “Specified Value” is defined in Section 2, sub-section (1), clause (i) to mean in relation to a commercial dispute, the value of the subject matter in respect of a suit as determined in accordance

with Section 12 which shall not be less than rupees one crore or such higher value, as may be notified by the Central Government.

19. Then Chapter II contains Sections 3 to 11. They provide for constitution of Commercial Courts, designation of Commercial Appellate Courts, constitution of Commercial Division of High Court and constitution of Commercial Appellate Division. By Sections 6 and 7, the jurisdiction of Commercial Court and of Commercial Divisions of High Courts is set out and defined. Then Section 8 is very important for our purpose and reads as under:-

“8. Bar against revision application or petition against an interlocutory order.

Notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of section 13, shall be raised only in an appeal against the decree of the Commercial Court.”

A bare perusal of Section 8 would reveal that an overriding

effect has been given to this provision over any other law for the time being in force and no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of Section 13, shall be raised only in an appeal against the decree of the Commercial Court. This language is on par with Section 105 of the CPC. That Section reads as under:-

“105. Other orders.- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”

20. As far as jurisdiction in respect of arbitration matters is concerned, that is carved out by Section 10 of the Commercial Courts Act and it reads as under:-

“10. Jurisdiction in respect of arbitration matters.-
Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and -

- 1. If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.*
- 2. If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.*
- 3. If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.”*

21. A perusal of Sections 10 and 11 would leave us in no manner of doubt that outside the Commercial Courts Act, 2015, there is no jurisdiction in relation to commercial disputes and

proceedings before a Commercial Court. Thus, this is a self-contained Code insofar as resolution of commercial disputes of a specified value are concerned. The adjudication of commercial disputes of specified value has to be within the four corners of this Act alone. Section 11, therefore, is a pointer towards this intent of the Legislature and reads thus:-

“11. Bar of jurisdiction of Commercial Courts and Commercial Divisions.-

Notwithstanding anything contained in this Act, a Commercial Court or a Commercial Division shall not entertain or decide any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.”

22. Section 12 appears in Chapter III, titled as Specified Value, whereas the newly introduced Chapter IIIA, titled as Pre-Institution Mediation and Settlement, contains Section 12A. Then follows Chapter IV wherein appears Sections 13 and 14. These two provisions read as under:-

“13. Appeals from decrees of Commercial Courts and Commercial Divisions.

(1) Any person aggrieved by the judgment or order of a

Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, 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 the judgment or order:

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.

14. Expeditious disposal of appeals.- *The Commercial Appellate Court and the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within a period of six months from the date of filing of such appeal.”*

23. Before we analyse Sections 13 and 14, we would complete our reference to other chapters of the Commercial Courts Act, 2015, and particularly Chapter V which, by Section 15, provides for transfer of pending suits and by Chapter VI, containing Section 16, amends the provisions of the CPC, 1908

in its application to commercial disputes. By Chapter VII, miscellaneous provisions are made so that full effect is given to this law. The Schedule then lists the amendments. There are rules as well which have been put in place.

24. Now we come to Sections 13 and 14.

25. By sub-section (1) of Section 13, any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order. Such is not the nature of the proceedings before us but the language of sub-section (1) is indicative of the fact that a judgment or order of a Commercial Court below the level of a District Judge is appealable to the Commercial Appellate Court. Sub-section (1), prior to its amendment, was reading as under:-

(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.”

26. Post-amendment that sub-section is now styled as sub-section (1A). By that, an appeal is provided to a person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court and he may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order. The proviso thereto says 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 CPC as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996.

27. In the three decisions relied upon by Mr. Dwarkadas, it is emphasised that this proviso cannot be ignored while interpreting Section 13. If this proviso is kept aside or not looked into, that will not be a proper and correct reading of Section 13 itself. Thus, the judgment or order of a Commercial Court or a Commercial Division of a High Court is appealable and the person aggrieved by that can file an appeal

within sixty days from the date of the judgment or order, but when we look at the proviso and its clear language, it is not as if appeal can be filed against every order passed by this Court but appeal lies only from such orders that are specifically enumerated under Order XLIII of the CPC, as amended by this Act and Section 37 of the Arbitration Act. We have reproduced above Sections 17 and 37 of the Arbitration Act.

28. While it is true that the interim measures ordered by the Tribunal is an appealable order, in terms of Section 37, sub-section (2) of the Arbitration Act such an appeal has indeed been filed by the appellants but Mr. Andhyarujina has fairly not argued that there was a prohibition against the enforcement and executing the interim measures ordered by the Arbitral Tribunal and hence the execution application filed by the respondents, styling themselves as beneficiaries of the interim measures, was *per se* not maintainable. He does not go as far as to argue that this execution application or the chamber summons moved therein by the respondents was not maintainable. His emphasis was that no order of the learned single Judge should be

construed as non-appealable. We are mindful of the fact that the appellants have challenged the interim measures ordered by the Arbitral Tribunal in an appeal and that appeal is pending. The appellants urge that if the learned Judge was conscious of this fact, then, he should not have issued substantive and sweeping directions, as are impugned by the appellants. It is in these circumstances, he would argue that an appeal would lie against the impugned order and we must hold that it is maintainable.

29. It is not possible to agree with Mr. Andhyarujina for more than one reason. Firstly, this appeal is filed challenging an order which is really an ad-interim order passed during the pendency of the chamber summons. The chamber summons contains the following prayers:-

“(a) to direct all Respondents/Order Debtors to declare their bank accounts (current and savings);

(b) to restrain the Respondents/Order Debtors, their executive directors, members, employees, agents and servants etc. and/or any person or entity acting for them from operating the Respondents' bank accounts listed at Item No.A, B, C, D and E of Schedule “B” to the Execution Application, and as may be disclosed under (a) above;

(c)

(d) to direct the Respondents/Order Debtors to disclose on affidavit its particulars of assets, including the complete particulars of the debtors of the Respondent/Order Debtor along with their complete addresses, under Order XXI Rule 41 of the Code of Civil Procedure, 1908;

(e) to detain in civil prison the Respondents/Order Debtors No.1 and 2, the executive directors of the Respondents/Order Debtors No.3 and 4 and the members of the governing bodies of the Respondent/Order Debtors Nos.5 to 7 under Order XXI Rule 41(3) of the Code of Civil Procedure, 1908 for non-compliance, if any, of the order(s) passed by the Hon'ble Court in terms of prayer clause (d) above;

(f), (g), (h) and (i) ”

30. Secondly, a perusal of the prayers together with the interim measures as directed by the Tribunal would leave us in no manner of doubt that the learned single Judge has not gone beyond these interim measures, as directed/ordered by the Arbitral Tribunal.

31. The interim measures, as directed/ordered by the Arbitral Tribunal, read as under:-

“(a) that pending further proceedings and Award, the Respondents shall jointly and severally deposit an amount of Rs.190 crores (Rupees One Hundred and Ninety Crores) with a Nationalized Bank, obtain a Fixed Deposit for a period of one year and deposit

the same with the Tribunal within a period of four weeks from today;

- (b) that in the alternative, the Respondents shall jointly and severally obtain a Bank Guarantee from a Nationalized Bank in the amount of Rs.190 crores (Rupees One Hundred and Ninety Crores) and deposit it with the Tribunal within a period of four weeks from today;*
- (c) that pending the proceedings and Award, the Respondent Nos.1 to 4 are restrained from selling / transferring / alienating / disposing and/or encumbering their interests (legal, beneficial and/or economic) in any and all properties of the Respondent Nos.1 to 4, wherever located within India or outside, other than in the ordinary course of business including the Respondent Nos.1 to 3 owned properties listed in Schedule-I to the Petition;*
- (d) that pending the proceedings and Award, the Respondent Nos.1, 2, 3 and 5 are restrained from selling / transferring / alienating / disposing and/or encumbering their interests (legal, beneficial and/or economic) in the land bearing No.332 (area admeasuring 0.5.19 Hect) and land bearing No.315 (area admeasuring 0.572 Hect) situated at Gram Baikunthpur, District Kanpur, Uttar Pradesh and the Respondent Nos.1, 2, 3 and 5 are directed to deposit the original title documents before this Tribunal within a period of four weeks from today;*
- (e) that pending the proceedings and Award, the Respondent Nos.5, 6 and 7 are restrained from selling / transferring / alienating / disposing and/or encumbering their interests (legal, beneficial and/or) economic in any and all properties of the Respondent Nos.5, 6 and 7, wherever located within India or outside, other*

than in the ordinary course of business including the Respondent Nos.5, 6 and 7 owned by them which are listed in Schedule-2 of the Petition within a period of four weeks from today;

- (f) *that the Respondents are directed to provide a complete disclosure on affidavit of the details of all their respective interests (legal, beneficial and/or economic) in movable and/or immovable properties (including but not limited to monies lying in bank accounts, land, properties encumbered/charted to third parties), whether such properties may be located within India or outside and whether held by them or by a third party (such as a trustee, nominee or fiduciary) for their benefit, on their behalf or at their direction; all the information requested by the Applicants till date and to provide the Applicants with all information required to be provided under Clause 9.3 of the Shareholders' Agreement on an ongoing basis, and the financial statements, books of accounts, cash and sales records of the Respondent Nos.3, 4, 5, 6 and 7;*

- (g) *Costs to be assessed at the final Award."*

32. Hence, this is not a case where the learned single Judge has, in addition to or by utilising or invoking his substantive powers under Order XXXIX of the CPC, granted any relief over and above the interim measures. The prayers in the chamber summons, firstly, directs the appellants/debtors to declare their bank accounts, seeks to restrain them and persons claiming through them from operating their bank accounts listed

in Schedule-B to the execution application, then to appoint a Receiver but which relief has not been granted. The prayer clause (d) directs the appellants to disclose on affidavit the particulars of their assets, including the complete particulars of the debtors along with their addresses, under Order XXI Rule 41 of the CPC. The impugned order directs such disclosures but it is evident that these disclosures are directed so as to give effect to the interim measures ordered by the Arbitral Tribunal. Whether they should have been directed or not is not the debate before us nor it can be debated once we hold that the appeals themselves are not maintainable. However, we clarify that this is an ad-interim order and direction. It would be open for the appellants to argue, in the event the chamber summons has to be fully and totally argued, that such directions need not be issued or are uncalled for given the interim measures ordered by the Arbitral Tribunal or that they go beyond the same, that without prejudice to the same the disclosures as are already made on oath are enough to give effect to the interim measures ordered by the Arbitral Tribunal. On this aspect, we do not

foreclose the arguments of both sides but keep them open.

33. The prayer clause (e) of the chamber summons seeks a direction to detain the appellants in civil prison, and by prayer clause (f) a precept is sought to be issued invoking Section 46 of the CPC. Pertinently, the learned single Judge while passing the impugned order has referred to the operative portions or operative paragraphs of the interim measures ordered by the Arbitral Tribunal. He was aware there is an appeal filed by the appellants which is pending. Given the fact that Rs.190 Crores have been ordered to be deposited and the appellants are only making attempts to have their appeal listed but no serious effort to press it or have it heard expeditiously, the learned single Judge granted them time of three weeks to make the disclosure and only then he has passed the ad-interim order of injunction in terms of prayer clause (b) and has continued the injunction/interim measures in terms of clauses (c), (d) and (e), as ordered by the Arbitral Tribunal. Beyond this, he has not made any order.

34. In the facts and circumstances of the present case,

we do not think that the learned single Judge has made any order either taking recourse to the substantive powers conferred by the CPC or has usurped the jurisdiction or has purported to pass orders beyond the ambit and scope of his powers as a Civil Court. If such an order and direction had been passed and issued during the course of exercise of the power vesting in the Executing Court and if an appeal lies against such orders within the scheme of Order XLIII Rule 1 of the CPC, or Section 37 of the Arbitration Act, then, the matter would have been approached and looked at from a different angle. Such is not the position before us.

35. In the circumstances, we are clearly bound by the language of Section 13. Now, what remains for consideration is the argument of Mr. Andhyarujina that Section 13 or sub-sections (1) and (1A) employ the word “judgment”. That word must be interpreted consistent with the language of Clause 15 of the Letters Patent of this Court for that is not overridden by Section 13, sub-section (1A). We are unable to agree with him for more than one reason. Precisely such an argument was

canvassed before the Hon'ble Supreme Court of India in the recent Judgment delivered by it in the case of **Kandla Export Corporation** (supra). The argument was, whether an appeal, not maintainable under Section 50 of the Arbitration Act, is nonetheless maintainable under Section 13(1) of the Commercial Courts Act, 2015. In dealing with such an argument, the Hon'ble Supreme Court made a reference to the law and held as under:-

“2. The present appeals raise an important question as to whether an appeal, not maintainable under Section 50 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Arbitration Act”), is nonetheless maintainable under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as “the Commercial Courts Act”).

3.

4.

5. Meanwhile, an Execution Petition, being E.P. No.167 of 2015, was filed under Section 48 of the Arbitration Act on 29th June, 2015 by the Respondents before the District Court, Gandhidham-Kutch. On 7th March, 2016, the Appellants filed their objections to the said petition. On 12th September, 2016, the Respondents preferred an application before the High Court of Gujarat, under Section 15(5) of the Commercial Courts Act, for an appropriate order to transfer the execution petition to the High Court. By an order dated 11th November, 2016, the

High Court transferred the aforesaid execution petition to the Commercial Division of the High Court of Gujarat, and a Special Leave Petition against the said order was dismissed by this Court on 3rd March, 2017.

6. On 8th August, 2017, the High Court of Gujarat dismissed the objections that were filed by the Appellants and allowed the execution petition filed by the Respondents. Being aggrieved by this judgment, the Appellants filed an appeal under the Commercial Courts Act, which was dismissed by the impugned judgment dated 28th September, 2017, stating that the Commercial Courts Act did not provide any additional right of appeal which is not otherwise available to the Appellants under the provisions of the Arbitration Act. Considering the fact that Section 50 of the Arbitration Act only provided for an appeal in case a petition to enforce a foreign award was rejected, the High Court held, keeping in view the legislative policy of the Arbitration Act (which was to speedily determine matters relating to enforcement of foreign awards) that since an appeal did not lie from a judgment enforcing a foreign award under the said section, no such appeal would be maintainable under the Commercial Courts Act.

7. Shri V. Giri, learned senior counsel appearing on behalf of the Appellants, has taken us through the Commercial Courts Act in painstaking detail. He relied upon Sections 3 to 7 of the said Act and then took us to Section 13. According to the learned counsel, Section 13 provided an appeal to any person aggrieved by the decision of a Commercial Division of a High Court, and as Section 50 of the Arbitration Act found no place in the proviso to Section 13(1) of the Commercial Courts Act, it is clear that the wide language of Section 13(1) would confer a right of appeal, notwithstanding anything contained in Section 50 of the Arbitration Act. This, according to him, became even clearer when read with Section 21, which provides that the provisions of the Commercial Courts Act shall have effect notwithstanding

anything inconsistent contained in any other law for the time being in force. He argued that Section 37 of the Arbitration Act, which is expressly mentioned in the proviso to Section 13(1) of the Commercial Courts Act, specifically speaks of the enumerated appeals in the said provision, together with the expression “and no others”, which expression is conspicuous by its absence in Section 50 of the Arbitration Act. He also argued that the language of Section 13(1) of the Commercial Courts Act is extremely wide – it embraces “decisions”, “judgments” and/or “orders” by the Commercial Division of a High Court, and that this being so, the impugned judgment of 8th August, 2017, allowing the execution petition filed by the Respondents, would certainly be a “decision” and/or “judgment” which would expressly be covered by the wide terms contained in Section 13(1) of the Commercial Courts Act. He also relied upon Section 13(2) to state that, after the coming into force of the Commercial Courts Act, appeals lie only in the manner indicated in the aforesaid Act and not otherwise than in accordance with the provisions of the Act. According to the learned counsel, the scheme of the Act would show that, in all matters over Rs.1 crore, the legislative intent is to provide an appeal, given the stakes involved, which will, under Section 14, be expeditiously disposed of within a period of 6 months from the date of filing of such appeal. Learned counsel also referred us to Section 5 of the Arbitration Act, which contains a non-obstante clause insofar as Part I of the Arbitration Act is concerned, and stated that the absence of a similar non-obstante clause, so far as Part II of the Arbitration Act is concerned, is significant. Therefore, this is not even a case where there are competing non-obstante clauses and, therefore, Section 21 of the Commercial Courts Act must be given full play. According to him, Section 49 of the Arbitration Act also makes it clear that the award shall be deemed to be a decree of the Court that enforces it. This being the case, an appeal from such decree is provided by Section 13(1) of the Commercial Courts Act, which, as has been argued by him, speaks of “decisions”, “judgments” and “orders”. He relied upon several judgments of this Court and the

High Courts to buttress his submissions.

(Underlining is ours)

8.

9. *Having heard learned counsel for both parties, it is interesting to note that both the Commercial Courts Act as well as the detailed Arbitration Amendment Act of 2015, were brought into force on the same day, i.e. 23rd October, 2015, as a result of two reports of the Law Commission of India.*

10. *The Statement of Objects and Reasons for the Commercial Courts Act, inter alia, provides:*

“The proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The high value commercial disputes involve complex facts and questions of law. Therefore, there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system.

xxx

6. *It is proposed to introduce the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 to replace the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 which inter alia, provides for the following namely:—*

(i) constitution of the Commercial Courts at District level except for the territory over which any High Court is having ordinary original civil jurisdiction;

(ii) constitution of the Commercial Divisions in those High Courts which are already exercising ordinary civil

jurisdiction and they shall have territorial jurisdiction over such areas on which it has original jurisdiction;

(iii) constitution of the Commercial Appellate Division in all the High Courts to hear the appeals against the Orders of the Commercial Courts and the Orders of the Commercial Division of the High Court;

(iv) the minimum pecuniary jurisdiction of such Commercial Courts and Commercial Division is proposed as one crore rupees; and

(v) to amend the Code of Civil Procedure, 1908 as applicable to the Commercial Courts and Commercial Divisions which shall prevail over the existing High Courts Rules and other provisions of the Code of Civil Procedure, 1908 so as to improve the efficiency and reduce delays in disposal of commercial cases.

7. The proposed Bill shall accelerate economic growth, improve the international image of the Indian Justice delivery system, and the faith of the investor world in the legal culture of the nation.

11.

12. The Arbitration and Conciliation Act, 1996, repealed the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. Its long title reads as follows:

“An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.”

13. The said Act is in four parts. Part I, with which we are not concerned in the present appeals, speaks of domestic as well as international commercial arbitration

that takes place in India. Part II, with which we are directly concerned, speaks of enforcement of foreign awards. A foreign award is defined in Section 44 as meaning an arbitral award on differences between persons arising out of legal relationships considered commercial, inter alia, in pursuance of an agreement in writing for arbitration to which the New York Convention set forth in the First Schedule applies. Sections 49 and 50, with which we are directly concerned, read as under:

“49. Enforcement of foreign awards.- Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

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.”

14.

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 construed harmoniously with the main enactment. (Per Das, C.J. in *Abdul Jabar Butt v. State of Jammu & Kashmir* [(1957) SCR 51, 59]). Bhagwati, J., in *Ram Narain Sons Ltd. v. 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 Maharatta Railway Co. v. 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 that is its necessary effect. (Vide also Corporation of City of Toronto v. Attorney-General for Canada [(1946) AC 32, 37] .)”

16. The proviso goes on to state that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 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-sections (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.

(Underlining once again ours)

18. So far, so good. However, it is Shri Giri's main argument that Section 50 of the Arbitration Act does not find any mention in the proviso to Section 13(1) of the Commercial Courts Act and, therefore, notwithstanding that an appeal would not lie under Section 50 of the

Arbitration Act, it would lie under Section 13(1) of the Commercial Courts Act.

19. To answer this question, it is necessary to advert to the judgment in *Fuerst Day Lawson (supra)*. The common question that arose for consideration in the batch of cases before the Court was whether an order, though not appealable under [Section 50](#) of the Arbitration Act would, nevertheless be subject to appeal under the Letters Patent of the High Court. In answering this question, this Court exhaustively reviewed the authorities and then stated, in paragraph 36, that the decisions noticed so far lay down certain broad principles. We are directly concerned with the principle laid down in sub-section (vii), which reads as under:

“(vii) The exception to the aforementioned rule is where the special 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.” (at page 350)

20. One of the submissions made before this Court in that case is the identical submission made by Shri Giri before us that [Section 37](#) contains the expression “and from no others” which is conspicuous by its absence in [Section 50](#) of the Arbitration Act. This was answered by the Court as follows:

“60. It is also evident that Part I and Part II of the Act are quite separate and contain provisions that act independently in their respective fields. The opening words of [Section 2](#) i.e. the definition clause in Part I, make it clear that meanings assigned to the terms and expressions defined in that section are for the purpose of that part alone. [Section 4](#) which deals with waiver of right to object is also specific to

Part I of the Act. [Section 5](#) dealing with extent of judicial intervention is also specific to Part I of the Act. [Section 7](#) that defines “arbitration agreement” in considerable detail also confines the meaning of the term to Part I of the Act alone. [Section 8](#) deals with the power of a judicial authority to refer parties to arbitration where there is an arbitration agreement and this provision too is relatable to Part I alone (corresponding provisions are independently made in Sections 45 and 54 of Chapters I and II, respectively of Part II). The other provisions in Part I by their very nature shall have no application insofar as the two chapters of Part II are concerned.

61. Once it is seen that Part I and Part II of the Act are quite different in their object and purpose and the respective schemes, it naturally follows that [Section 37](#) in Part I (analogous to [Section 39](#) of the 1940 Act) is not comparable to [Section 50](#) in Part II of the Act. This is not because, as Mr Sundaram contends [Section 37](#) has the words in parenthesis “and from no others” which are not to be found in [Section 50](#) of the Act. [Section 37](#) and [Section 50](#) are not comparable because they belong to two different statutory schemes. [Section 37](#) containing the provision of appeal is part of a much larger framework that, as seen above, has provisions for the complete range of law concerning domestic arbitration and international commercial arbitration. [Section 50](#) on the other hand contains the provision of appeal in a much limited framework, concerned only with the enforcement of the New York Convention Awards. In one sense, the two sections, though each containing the appellate provision belong to different statutes.” (at pages 356-357)

21. The Court then went into the legislative policy which led to the enactment of [Section 50](#) of the Arbitration Act. It found that under the erstwhile [Foreign Awards Act](#), a formal decree had to be passed in terms of

the foreign award, and there was a possibility that such decree may be in excess of or not in accordance with the award. It was for this reason that an appeal lay under [Section 6\(2\)](#) of the Foreign Awards Act even against a decree enforcing the foreign award. However, this was done away with in the [Arbitration Act](#), by enacting [Section 49](#), which makes a radical change by which the foreign award itself is deemed to be a decree of the Court. The exclusion of an appeal in such cases has thus to be understood in the light of the change in law introduced by [Section 49](#) of the Act (see paragraphs 74 and 75 of the judgment). It may be added that the aforesaid amendment has speeded up the process of enforcing foreign awards by taking away the right of appeal in cases where the Single Judge decides in favour of enforcing a foreign award.

22.

23. Given the judgment of this Court in *Fuerst Day Lawson (supra)*, which Parliament is presumed to know when it enacted the [Arbitration Amendment Act, 2015](#), and given the fact that no change was made in [Section 50](#) of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that [Section 50](#) is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in paragraph 89 of *Fuerst Day Lawson (supra)* that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.

24. However, the question still arises as to why Section 37 of the Arbitration Act was expressly included in the proviso to Section 13(1) of the Commercial Courts Act, which is equally a special provision of appeal contained in

a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act. One answer is that this was done ex abundanti cautela. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where an order is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasize the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(a) and would, therefore, not be appealable under Section 13(1) of the Commercial Courts Act. Whatever may be the ultimate reason for including Section 37 of the Arbitration Act in the proviso to Section 13(1), the ratio decidendi of the judgment in Fuerst Day Lawson (supra) would apply, and this being so, appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone.

(Emphasis & underlining by us)

25. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left “to the Court authorized by law to hear appeals from such orders”. Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal.”

36. Once this authoritative pronouncement is in the

field, then, we do not think that the argument of Mr. Andhyarujina to the contrary can be accepted.

37. Pertinently, the word “judgment or order” may have been used or employed in these sub-sections but by sub-section (2) it is made clear 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 the Commercial Courts Act, 2015.

38. The word “judgment” is defined in Section 2, Clause 9 of the CPC as under:-

“(9) “judgment” means the statement given by the Judge on the grounds of a decree or order;”

A bare reading of this would denote that it means the statement given by the Judge on the grounds of a decree or order. The word “decree” is defined in sub-section (2) of Section 2 and the word “order” is defined in Section 2, sub-section (14).

39. A combined reading of these two definitions would denote that an order means the formal expression of any

decision of a Civil Court which is not a decree, whereas a decree means the formal expression of an adjudication but has a finality or conclusiveness attached to it. Sub-section (2) of Section 2 defines the word decree in such a way that an adjudication which conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit may be either preliminary or finally, is termed a decree. By the deeming fiction, it includes the rejection of a plaint and the determination of any question within the meaning of Section 144 but does not include what is specifically excluded from its purview.

40. We cannot then take recourse to Clause 15 of the Letters Patent which has been specifically overridden by the non-obstante clause in sub-section (2) of Section 13 of the Commercial Courts Act, 2015. That would mean we can entertain an appeal otherwise than in accordance with the provisions of the Commercial Courts Act, 2015. That would also mean that in cases of orders, unless these are specifically enumerated in Order XLIII Rule 1 of the CPC, as amended by the

Commercial Courts Act, 2015, and Section 37 of the Arbitration Act, may be non-appealable but they would be otherwise appealable because they are judgments. By that process any judgment or order which is not an order or decree as understood by the CPC but is a judgment within the broad sweep of Clause 15 of the Letters Patent, would be appealable though the Letters Patent has been specifically overridden by the Commercial Courts Act, 2015. As held above, this Law is a complete Code by itself, then, we cannot accept the argument of Mr. Andhyarujina that the impugned order is a judgment and therefore is otherwise appealable. This is the precise reason why the Commercial Courts Act, 2015 has been brought in. We have noticed that unmindful of the language of Section 105 of the CPC which we have reproduced above, every interlocutory order and passed during the course of the proceedings was termed as a judgment and merely because it had detailed reasons, it was presumed that it was an appealable order. Multiple appeals were filed and entertained by this Court regularly in exercise of the powers derived from its Letters Patent. We have seen number of

appeals entertained even in execution matters. It may be that these orders discuss in detail the controversy and assign reasons for the conclusion but unless and until by law they were made specifically appealable nobody could have challenged them. Though they were not appealable orders and decrees within the scheme of the CPC, by relying on the wording of Clause 15 of the Letters Patent, appeals were routinely filed in this Court. Such appeals being filed routinely and entertained, delayed the main proceedings. We are witness to a tragic scenario in which the main proceedings are lingering and pending in this Court for 20 years. Merely because interlocutory orders during the course of a trial of a suit or execution were challenged and the challenges were entertained, the suit was not heard by this Court for nearly two decades. The decrees and orders passed decades back were not enforced and executed only because the objections raised by the Judgment-Debtors and parties claiming through them though rejected, appeals were entertained and the enforcement and execution of decrees/orders was stayed. Such appeals themselves were not heard in the Bombay High Court

for years together may be because of paucity of Judges. This tarnished the name of this Court and the Judiciary itself. That was the experience prior to the Commercial Courts Act, 2015 intervening. This scenario was not healthy by any standards, whether in the world of commerce or otherwise. All the more in a competitive commercial world, the disputes arising during the course of business, need early and expeditious resolution. That intent and purpose was wholly frustrated and defeated by the long drawn proceedings and devised only on account of forensic skill and ingenuity of the party and the Bar. This had to be avoided at all costs and once the Parliament stepped in, what it prohibits directly cannot be achieved in an indirect and oblique manner. This is the precise motive and intent, which the appellants seek to achieve, by the argument canvassed before us by Mr. Andhyarujina. In the circumstances, we do not think that the plain language of Section 13 which has to be read harmoniously with the CPC, as amended by the Commercial Courts Act, 2015, and the sections of the Arbitration Act, particularly Section 37 thereof, would permit entertaining the

instant appeals.

40A. This Court had an occasion to consider somewhat similar question in *Jet Airways (supra)*. On a detailed analysis of the relevant provisions, the Hon'ble Division Bench in para 22 of its Judgment, concluded as under:-

*“22. In fact a perusal of 1996 Act and the 1940 Act will indicate that both the enactments provide for filing of an appeal against only some specified orders and do not provide for an appeal against every order passed in the proceedings under the 1996 Act. It is well established that general law cannot defeat a provision of special law to the extent to which they are in conflict; else effort has to be made on reconciling the two provisions by homogeneous reading. In the present case, the provisions of [section 37](#) (the relevant portion of which is *pari materia* relevant portion of [section 39](#) of 1940 Act) leave no manner of doubt that the provisions of the special enactment will prevail over the general law namely, the 1908 Code. The Statutory Scheme of 1996 Act and the Letters Patent and the binding precedents of Supreme Court and this Court lead us to only one conclusion that clause 15 of the Letters Patent are impliedly excluded by the 1996 Act.”*

40B. This conclusion was reiterated along with others in the Judgment in **Smt. Sushila Singhania** (*supra*). The Division Bench held as under:- (*para numbers added by us*)

“102. We therefore answer the questions framed in para 19 above as under:-

QUESTIONS	ANSWERS
<i>[1] Whether, in an application for execution of an Award passed under the Arbitration Act, 1996, an order passed by the learned Single Judge is appealable under Section 13(1) of the Commercial Courts Act as if it is a decree?</i>	No Paras 98-99 Pages 29-30
<i>[2] Whether the word “decision” means a decree?</i>	Yes Para 93, Page 28
<i>[3] Whether a decision in the form of an order is appealable only under the conditions given in proviso to section 13(1) viz. that the order/decision is appealable only on the grounds mentioned in Section 37 or Section 104 or Order XLIII of the CPC?</i>	Yes Para 98 Pages 29-30
<i>[4] Whether the word “decision” which is found in Section 13(1) of the Commercial Courts Act includes a “decree” or an “order” which has the effect of having finality or final adjudication of rights of parties?</i>	No Para 97 Page 29
<i>[5] Whether, the heading to Section 13 of the Commercial Courts Act governs Section 13(1) i.e. whether the word “decision” is to be taken as a “decree” on account of the heading of the Section?</i>	Yes Para 93 Page 28
<i>[6] Whether ratio of the judgment in Jet Airways (India) Ltd. (supra) is applicable to the facts of the</i>	Yes Para 69 Page 22

<i>present case and is a binding precedent with reference to the facts arising in the present case?</i>	
<i>[7] Whether ratio of the judgment in the case of Paramjeet Singh Patheja (supra) which has been relied upon in the case of Jet Airways (India) Ltd. (supra) is applicable to the facts of the present case?</i>	Yes Para 95, Pages 28-29

40C. A later Division Bench had an occasion to consider an identical controversy in the case of **Sigmarq Technologies** (supra). The Bench speaking through one of us (Shri S.C. Dharmadhikari, J.) referred to the Judgments in Jet Airways, Smt. Sushila Singhanian and one more in the case of **Hubtown Limited vs. IDBI Trusteeship Service Ltd.**, reported in 2017 (4) Bom.C.R. 310, and held as under:-

“84. Precisely this is what the Division Bench in Hubtown also held. It may have not referred to the very provisions, but eventually the reference to the same was in the context of consideration of issue of maintainability of the appeal. The issue arose from the order under appeal in that case. The order under appeal in that case was that of a conditional leave to defend a summary suit. In the very scheme of Order XXXVII such an order is contemplated. So long as there is a leave to defend, the summary suit cannot be defended and such leave can be conditional or unconditional. If that leave is granted conditionally so long as these conditions are not complied

with, there is no right to defend. The suit then cannot be defended by the defendant. If these conditions were styled as onerous or excessive or the discretion in imposition of the same is labelled as arbitrary or capricious taking away a valuable right, then, the appeal is held to be maintainable. That is irrespective of whether section 13 and the decision contemplated as far as sub-section (1) is concerned together with its proviso circumscribes or restricts the right of appeal and by sub-section (2) exhausts it. Therefore, assuming that the non obstante clause is there, what the Division Bench holds is that the decision to be appealable or not must meet the test of being a judgment and the word 'judgment' must be construed in the light of the further test laid down in the Supreme Court judgment. Hence, if there is an adjudication conclusively determining the rights of the parties to all or any of the matters in controversy in the suit, whether the order is deciding matters of moment which works serious injustice to the party concerned was left to be decided on a case to case basis. In Smt. Sushila Singhania, however, the Division Bench had to rule upon the maintainability of the appeal and which appeal challenged an order during the course of the execution proceedings. By their very nature, the proceedings were of execution and the award of the arbitrator could have been executed in terms of the Arbitration & Conciliation Act, 1996, as if it were a decree of the court. The scheme of the Code of Civil Procedure and the adjudication of rights contemplated thereby was, therefore, extremely relevant for deciding the maintainability of the appeal. The right to appeal could not be claimed and that is how it was claimed even in matters of execution or enforcement of the award of the arbitrator as if it were a decree of a civil court. It is in the backdrop of all this that the Court ruled that the appeal would not be maintainable and held it to be incompetent.

85. We do not think that we must answer the larger question posed for our consideration and particularly whether there is any conflict in the two views. Even if one were to assume that Dr. Saraf can rely upon the view

taken in Hubtown's case and also some of the provisions of the Code of Civil Procedure like section 97, what we feel is that the impugned order does not conclude the issue of jurisdiction, in the sense it is not to the detriment of the defendants. If the court holds that it has territorial jurisdiction to entertain and try the suit it may as well proceed to dismiss it on merits. If the suit is decreed, then, against such a final decree an appeal is always competent and maintainable within the meaning of sub-section (1) of section 13. In such an appeal, the ground of this Court's territorial jurisdiction can very well be raised. The salutary purpose and which is served by ensuring expeditious disposal of commercial suits can be harmonized, therefore, in the facts and circumstances of the present case by holding that the order under challenge is not of a conclusive nature going by the tests laid down above. What we have seen and for that purpose is even in the Code of Civil Procedure, a provision like section 105 has been enacted. That follows section 104 which enumerates the order from which the appeal lies and in section 105, which opens with the words "Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction, but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Then, by sub-section (2) it says that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. Outlining the ambit and scope of his power, a judgment of the Hon'ble Supreme Court in the case of Shiv Shakti Cooperative Housing Society vs. Swaraj Developer reported in AIR 2003 SC 2434 notes that it relates to appealable as well as non appealable orders. The section contemplates two things (1) regular appeal from decree and (2) the provision relating to grant of objection relating to interim order. Thus, in an appeal in terms of section 96 having regard to section 105, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of an interlocutory order

passed in the suit subject to the conditions laid down therein. In paragraph 31 of this judgment, the Hon'ble Supreme Court held thus :

“31. In Section 2, the expressions 'decree' and 'order' have been defined in clauses (2) and (14) respectively. It is to be noted that it matters little that the judgment is styled as an "order". If, in fact, it fulfills the conditions of the definition under Section 2(2), it is a decree and becomes appealable. Orders that are not appealable are, generally speaking, those which are procussual i.e. interlocutory or incidental orders regulating proceedings but not deciding any of the matters of controversy in the suit. Order 43 deals with the "appeals from orders". These appeals lie under Section 104 of the Code. The said Section deals with appeals from orders and specifies the orders from which appeals can lie. Sub-sec. (2) of S. 104 says that no appeal shall lie from any order passed in appeal under the said Section. Section 104 and Order 43 Rule I contain a full list of appealable orders. An order which amounts to a decree within S. 2(2) does not fall within S. 104 and the only applicable section is section 96. Clauses (a) to (f) of S. 104 were omitted by Arbitration Act 1940. Section 105 relates to other orders. It, inter alia, relates to any order i.e. so appealable as well as non-appelable orders. It is in the nature of a prohibition stipulating that save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Sub-sec. (2) deals with case of remand. This section, in fact, contemplates two things i.e. (1) regular appeal from decree; and (2) the provision relating to grant of objection relating to interim order. Order 43 Rule 1 is an

integral part of S.104.”

86. Even otherwise, in the larger interest of judicial discipline and certainty, we have carefully perused the two judgments, one in *Hubtown* and another in *Smt. Sushila Singhania*.

87. As we have already held above, *Hubtown* was an appeal arising from an order passed by the learned single Judge granting conditional leave to defend a Summary Suit. The Hon'ble Division Bench deciding *Hubtown* also had before it a judgment of the Hon'ble Supreme Court in the case of *Midnapore Peoples' Co-op. Bank Ltd. & Ors. vs. Chunilal Nanda & Ors.* reported in *AIR 2006 SC 2190*. After referring to the Act 4 of 2016, and particularly Summary Suits and unamended Code of Civil Procedure, 1908, the Court proceeded to consider the scheme of Commercial Courts Act in paragraphs 15, 16 and 17. Then, in paragraph 20, the Division Bench in *Hubtown* analysed section 13 and concluded that appeals will lie to Commercial Appellate Division against the decision of the Commercial Court or Commercial Division. With greatest respect, though the Division Bench referred to section 13(1) of the Act 4 of 2016, that provides for an appeal to the Commercial Appellate Division of the High Court against the decision of the Commercial Court or Commercial Division of a High Court by any person aggrieved. That is how the Division Bench in *Hubtown* concluded that these words, namely, 'decision', 'judgment', 'order', 'decree' as such are not defined. Some of them are defined and elaborated in the Code of Civil Procedure, 1908. The observations in paragraph 21 would indicate that the Division Bench held that the language of section 13(1) is such that it includes judgment or order and read with sections 8, 13(2), it includes decree of the Commercial Court or Commercial Division. Then, in the proviso below sub-section (1) of section 13, it is stated that an appeal shall lie from such orders passed by a Commercial Division or Commercial Court that are specifically enumerated under Order XLIII of the Code

of Civil Procedure, 1908, as amended by the Act 4 of 2016 and section 37 of the Arbitration & Conciliation Act, 1996. Thus, it is apparent that the difference between the language in sub-section (1) and that of the proviso was very much present to the mind of both Division Benches deciding *Hubtown* and *Smt. Sushila Singhania*. Their understanding of section 13(2) was that other than the Act 4 of 2016, insofar as the matters covered by that enactment are concerned, no appeal shall lie from any order or decree of a Commercial Division or a Commercial Court, otherwise than in accordance with the provisions of Act 4 of 2016. The Division Bench in *Hubtown*, therefore, concluded that where the Commercial Division has taken a decision and/or passed the judgment and/or order or decree, an appeal will lie. That is how paragraph 22 in *Hubtown* reads. In paragraph 23, the Division Bench says that appeal against any final decision, including judgment by the Commercial Court and/or Commercial Division will not invite the proviso as the proviso refers to orders. The reference to orders in the opening portion of sub-section (1) of section 13 would relate to the application of the proviso to sub-section (1). However, the opening portion of sub-section (1) (words prior to the proviso) uses the words 'decision', 'judgment' and 'order'. This part of the provision is quite broad when it comes to appeal arising out of the orders other than the categories of orders falling under Order XLIII of the Code of Civil Procedure, 1908. Thus, so long as it is an order, but which has a tinge or colour of judgment, then, an appeal under section 13(1) would be maintainable. The provisions of the Code of Civil Procedure (amended and unamended) are applicable to Commercial Courts Act proceedings. The term 'judgment' was not defined even in the Letters Patent. Therefore, even if it is an interlocutory order of granting defendants conditional leave to defend a Summary Suit as it directly affects and loses the valuable right of the defendant without giving full opportunity, that order is appealable. It is a judgment.

88. In *Smt. Sushila Singhania* the Division Bench framed the questions for consideration in paragraph 23 and in questions 2, 3 and 4, the issue of maintainability of appeals under section 13 of the Act 4 of 2016 was summed up. The discussion in that regard starts from paragraph 30 and the Division Bench concludes that there is no separate provision of appeal against execution of an Award passed in Arbitration proceedings and, therefore, the word 'decision' will have to be dealt with accordingly. That is because in section 37 of the Arbitration & Conciliation Act, 1996, which sets out that orders against the appeals can be filed, it was noticed that no appeal has been provided against an order passed in execution proceedings. Then, the Division Bench proceeded to consider the doctrine of precedents and from paragraph 53, it discussed the ambit and scope of an appeal which can be filed under section 13(1) from the orders which are passed in proceedings for execution of an award. That is how section 13 was interpreted and it was held that the proviso to sub-section (1) of section 13 cannot be said to be an additional enactment providing for an appeal against the orders, but it restricts the orders against which appeals can be filed. The interpretation sought to be placed by the appellants on the provision was rejected because it was held that it would be contrary to section 37 of the Arbitration & Conciliation Act, 1996 and to the provisions of the Commercial Courts Act. That is how the provision came to be interpreted. The Court, therefore, rejected the argument that it is not possible to read something more in the word 'decision' to mean that it also includes orders which are not otherwise appealable. It is in that context the Hon'ble Division Bench in *Smt. Sushila Singhania* concluded that restricted meaning has to be assigned to the word 'judgment' appearing in section 13 (1) and it will not be possible to expand the meaning of this word as has been done in the Letters Patent by virtue of the judgment of the Hon'ble Supreme Court in *Shah Babulal Khimji* (supra). However, all the observations made from paragraphs 56 onwards relate to the facts

and when the arbitral proceedings had concluded, the Award was brought for execution, the orders passed in such proceedings were held not to be appealable in the light of the specific provisions of section 37 of the Arbitration & Conciliation Act, 1996, which is referred to in sub-section (1) of section 13 proviso. Hence, the aid and assistance of Letters Patent was not allowed to be taken. More so, when it is overridden by sub-section (1) of section 13. Our conclusion is supported by the observations in paragraph 70 of *Smt. Sushila Singhania*. We have also perused the further paragraphs, namely, paragraphs 72 and 73. The word 'decision' will have to be read only as a decree or wider meaning has to be given to that term or word was then considered and then, certain Supreme Court judgments are referred in paragraphs 73, 75, 76 and 77. The Hon'ble Division Bench then concluded that the word 'decision' in this context would mean a final decision in the entire suit and, therefore, a decree. The construction as proposed by the appellant in that case based on the dictionary meaning of this word was expressly rejected. Finally, in paragraph 93, it was concluded that the word 'decision', therefore, will have to be interpreted to mean a decree.

89. Then, the answers to each of the questions framed, in paragraph 102, have also been perused by us.

90. In whichever way one looks at this issue, we are not able to agree with Dr. Saraf that there is any divergence or difference in the opinion on what is appealable, irrespective of the nomenclature under section 13(1) of the Act 4 of 2016 for what both judgments hold, according to us, are that the term 'decision' cannot be interpreted to mean any and every order by styling it as a judgment. It is that decision, which satisfies the tests referred by us above and which tests can also be culled out from the definition of the term 'decree' as appearing in section 2(2) of the Code of Civil Procedure, which would be appealable. Thus, decree means the formal expression of an adjudication

but sub-section (2) of section 2 does not stop here and says further that which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any the matters in controversy in the suit and may be either preliminary or final, it shall be deemed to include what falls in the latter part of this definition and exclude what is excluded by clauses (a) and (b) of sub-section (2) of section 2. Then, the definition ends with an explanation and says that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit and it may be partly preliminary and partly final. That which is not a decree is an order and it is apparent from the definition of this word appearing in section 2 sub-section (14) of the Code of Civil Procedure. Therefore, we do not think that there is a difference or divergence in the opinion of the two Division Benches on the right of appeal, its maintainability or the ambit and scope of that power as enumerated in section 13(1) of the Act 4 of 2016. Our conclusions are also reinforced by the decisions of the Hon'ble Supreme Court of India on the ambit and scope of the word "appeal" and the power in relation thereto. Suffice it to say that all these judgments have not been noticed by either the counsel appearing before us or the Hon'ble Division Benches deciding "*Hubtown*" and "*Sushila*".

91. In the case of *Mithailal Dalsangar Singh & Ors. vs. Annabai Devram Kini & Ors.* (2003) 10 SCC 691 : AIR 2003 SC 4244, the Hon'ble Supreme Court though considering the expression 'judgment' appearing in clause 15 of the Letters Patent made some pertinent observations. Paragraphs 12, 13, 14, 15 and 16 of this judgment read as under :

"12. We are also of the opinion that the Letters Patent appeal against the order setting aside the abatement of the suit was not maintainable. What is a 'judgment' within the meaning of Letters

Patent came up for the consideration of this court in *Shah Babu Lal Khimji vs. Behan D. Kangro* AIR 1981 SC 1786. It was held that a decision by a trial judge on a controversy which affects valuable rights of one of the parties is a 'judgment'. However, an interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties, and which work serious injustice to the party concerned. This court further held that there is no inconsistency between Section 104 read with Order 43 Rule 1 of the CPC and the appeals under the Letters Patent. The Letters Patent do not exclude or override the application of Section 104 read with Order 43 Rule 1 CPC to internal appeals within the High Court. Even if it is assumed that Order 43 Rule 1 does not apply to Letters Patent appeals yet the principles governing those provisions would apply by a process of analogy. A perusal of Section 104 read with Rule 1 of Order 43 of the CPC shows that while an appeal is provided against an order refusing to set aside the abatement or dismissal of a suit; there is no appeal provided against an order whereby the abatement or dismissal of a suit has been set aside. Whether the trial judge passed an order setting aside an abatement or allowed substitution of the legal representatives, no valuable right of parties was decided. The constitution of the suit was rendered good and the suit proceeded ahead for being tried on merits. Such an order does not amount to 'judgment' within the meaning of Letters Patent.

[Underlining ours]

13. The learned counsel for the appellant has invited attention of the Court to the Full Bench decision of the Calcutta High Court in *Nurul Hoda and Ors. vs. Amir Hasan and Anr.* AIR 1972 Cal 449 and the Division Bench decisions of the

Punjab High Court in Smt. Chando Devi vs. Municipal Committee, Delhi AIR 1961 Punjab 424 and of the Bombay High Court in Maria Flaviana Almeida and Ors. vs. Ramchandra Santuram Asavie and Ors., AIR 1938 Bombay 408.

14. In *Nurul Hoda & Ors. (supra)*, *Sabyasachi Mukharji, J. (as His Lordship then was)*, speaking for the Full Bench, held that a decision setting aside an abatement does not in any way effect any right accrued to the defendant and, therefore, does not amount to a 'judgment'. No merits, in controversy between the parties, have been decided; the order merely reopens the controversy.

15. A Division Bench of the Punjab High Court, consisting of *D. Falshaw and G.L. Chopra, JJ.*, in *Smt. Chando Devi's case (supra)* has held that the order setting aside the abatement of a suit or appeal is not a decision which affects the merits of the question between the parties by determining some right or liability in the suit. Such an order cannot be regarded as a deciding a question materially in issue between the parties and directly affecting the subject matter of the suit and, therefore, it would not amount to a 'judgment'.

16. In *Maria Flaviana Almeida & Ors.'s case (supra)*, Chief Justice Beaumont speaking for the Division Bench observed that an order setting aside an abatement is really one in procedure. The party originally had a cause of action which through no fault of their own came to an end by the death of their opponent and the effect of setting aside the abatement is merely to excuse delay in restoring the suit to an actionable condition. The Division Bench held that the order setting aside an abatement does not effect the merits of the dispute between the parties though it

certainly determines a right and, therefore, does not amount to a 'judgment'."

92. This judgment has been cited and relied upon in several cases and matters later on by the Hon'ble Supreme Court. The distinguishing part in the subsequent judgments or decisions is not on the meaning of the term 'judgment'. There is one judgment which must be referred in this context and that is *Bhag Mal alias Ram Bux & Ors. vs. Munshi by LRs & Ors. (2007) 11 SCC 285*. In this judgment, it is stated that decision on merits is not the only test to determine the finality of the same. In another judgment on the meaning of the term 'judgment', in the case of *Midnapore Peoples' Co-op. Bank Ltd. & Ors. vs. Chunilal Nanda & Ors. (2006) 5 SCC 399 : AIR 2006 SC 2190*, the expression has been considered and given a meaning as ascribed by the Division Bench in *Hubtown*.

93. Then, we have a judgment by a three Judge Bench in the case of *Subal Paul vs Malina Paul AIR 2003 SC 1928 : (2003) 10 SCC 361*, which has also been later on followed. It has been followed in the case of *Liverpool & London S.P. & I Association Ltd. vs. M.V. Sea Success 1 & Anr. (2004) 9 SCC 512*. We have also a judgment of the Hon'ble Supreme Court's five-Bench judgment in the case of *P.S. Sathappan vs. Andhra Bank Limited & Ors. (2004) 11 SCC 672*. In all these cases, the expression 'judgment' has been, not just in the context of clause 15 of the Letters Patent, but even otherwise understood to mean something which gives finality or which satisfies the tests laid down by the Hon'ble Supreme Court as noted above.

94. Similarly, we must also note sub-section (1) of section 13 of the Act 4 of 2016, which provides for an appeal by a "person aggrieved". In the case of *Banarasi & Ors. vs. Ram Phal AIR 2003 SC 1989*, this expression was interpreted by the Hon'ble Supreme Court in the context of sections 96 and 100 of the Code of Civil Procedure. Section 96, as is evident, provides for an

appeal from an original decree and section 100 provides for second appeal. In paragraph 8 of this judgment, the Hon'ble Supreme Court held as under:

“8. Sections 96 and 100 of the CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. See *Phoolchand and another v. Gopal Lal* 1967 (3) SCR 153; *Smt. Jatan Kanwar Golcha v. M/s. Golcha Properties (P) Ltd.*, 1970 (3) SCC 573; *Smt. Ganga Bai v. Vijay Kumar and others.*, (1974) 2 SCC 393. No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 of the CPC provide for an appeal against decree and not against judgment.”

95. Even this view has been relied upon in later judgments and we would refer to the judgment in the case of *Hardevinder Singh vs. Paramjit Singh & Ors.* (2013) 9 SCC 261. Thus, even if the word 'decision' is taken to be a decree, the provisions enabling filing of an appeal and worded like sub-section (1) of section 13 do not enumerate the categories of persons who can file an appeal. The significant words and expressions appearing in section 13(1) and its proviso are “Any person aggrieved by the decision may appeal from the date of judgment or order, as the case may be” and “An appeal shall lie from such orders passed by a that are specifically enumerated under Order XLIII of the CPC as amended by this Act”. The intent of the legislature is obvious and in the first part of sub-section (1) it employs the words “a person aggrieved by the decision may appeal from the date of judgment or order” to convey that the remedy of appeal may be

resorted to, but that will not be available as of right and whenever that remedy can be availed of as of right, the words and expressions used in the proviso convey the same clearly. Then by sub-section (2) it is stated that no right of appeal is provided otherwise than in accordance with the provisions of the Act 4 of 2016. The persons prejudiced or affected by a decision can maintain an appeal but whether that should be entertained or not depends upon the nature and effect of that which is appealed against. Whether a decision is appealable or not depends upon the facts and circumstances in each case. Once this vital distinction is borne in mind and so viewed, there is no scope for accepting the argument of Dr. Saraf in the case before us that though an objection to the territorial jurisdiction of this Court has been overruled, that order or the reasoning overruling this objection is of the nature enabling the appellant to file an appeal. Neither of the Division Bench judgments enable filing of an appeal against such an order.

96. We are, therefore, of the firm view that in the facts and circumstances of this case, considering the nature of the order under appeal even if we go by the view taken in *Hubtown's* case as also the relevant paragraphs in the case of *Smt. Sushila Singhania*, the test would be whether the same concludes the rights of the parties. That has not concluded the rights, but it has merely overruled an objection to the territorial jurisdiction of this Court raised as a preliminary one by the defendants. The defendant, in the event aggrieved by the final decree, can always, in one of the grounds of appeal, raise the issue of correctness of this order as well. For that purpose, we need not entertain this appeal and prolong the trial. We have noted that the object and purpose of the Act 4 of 2016 was present to the minds of both Division Benches and to ensure expeditious disposal of the suits and applications involving a commercial dispute, the Parliament had enacted a scheme. We would be defeating and frustrating it wholly in the event we hold that an order of the present nature and impugned in this appeal is an

appealable one under sub-section (1) of section 13. Therefore, upholding the preliminary objection of Mr. Kadam, we dismiss all these appeals.”

Now, the Commercial Courts (Amendment) Act, 2018 amends the Act 4 of 2016 and deletes the word “decision” from Section 13. We have already reproduced it above. Thus, the earlier view in **Hubtown Limited** (supra) and **Sigmarq Technologies** (supra) will have to give way and all the more after the Judgments of the Hon'ble Supreme Court delivered in the case of **Fuerst Day Lawson Limited v. Jindal Exports Limited**, reported in (2011) 8 SCC 333 and the authoritative and binding pronouncement in the case of **Kandla Export Corporation** (supra). The statute has to confer a right of appeal. That has to be conferred in clear words. We cannot, as suggested by Mr. Andhyarujina, by an interpretative process carve out a right of appeal, when the law is not creating it.

41. As a result of the above discussion, we uphold the preliminary objection of Mr. Dwarkadas and proceed to dismiss both these appeals as not maintainable. There will be no order as to costs.

42. In view of dismissal of the appeals, the notices of motion preferred in the respective appeals do not survive and they accordingly stand disposed of.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)

Suresh
Jagdish
Sajnawat

Digitally signed
by Suresh
Jagdish
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