

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

ARBA No. 47 of 2021

S K S Power Generation (Chhattisgarh) Ltd. 501 B, Elegant Business Park,
Andheri Kurla Road, J. B. Nagar, Andheri (E) Mumbai 400059

---- Appellant

Versus

M/s I S C Projects Pvt. Ltd. S-2, "The Metropole" Adjacent Inox Bund Garden
Road Pune Maharastra Pin Code 411001

---- Respondent

For Appellant	:	Shri Sachin Singh Rajput, Advocate
For Respondent/Caveator	:	Shri Abhishek Sinha, Senior Advocate with Shri Goutam Khetrapal, Advocate

**D.B. :Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Smt. Justice Vimla Singh Kapoor**

CAV Order

5/10/2021

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against order dated 30th January 2021 passed by learned Commercial Court, Naya Raipur by which, appellant's application under Order 21 Rule 46-A read with Section 151 Code of Civil Procedure, 1908 as also an application under Section 47 r/w Order 21 Rule 58 CPC has been rejected.

Dispute between the parties as aforesaid led to reference of the dispute for arbitration to the Arbitrators. The Arbitration proceedings eventually culminated in an Award dated 11.6.2018.

As the pleadings revealed, appellant filed an application under Section 34

of the Arbitration and Conciliation Act, 1996 (for short "*the Arbitration Act*") before the High Court of Delhi. Prayer was made for setting aside the Award. Said application was, however, dismissed vide an order dated 3.4.2019 on the grounds of limitation only.

It is further revealed from the pleadings that an Appeal under Section 37 of the Arbitration Act has also been preferred which is said to be pending before the appellate forum.

2. The respondent, however, moved an execution application for execution of Award before the learned Commercial Court, Naya Raipur. It is also disclosed on facts that remedy has also been taken seeking stay of operation of the arbitral Award and additional Award passed by the Arbitrators, wherein orders have been passed and various proceedings are pending.
3. Learned Commercial Court, Naya Raipur, however, passed an order on 23rd January 2020 issuing directions towards attachment of an amount of Rs.15,52,96,141/- lying in the bank account of judgment debtor/appellant herein. Thereafter, respondent- decree holder also filed application on 7.3.2020, purporting to be an application under Section 151 CPC seeking issuance of further direction for transfer of the aforesaid amount to the Bank accounts of the Court and, thereafter, release of the same in favour of the decree holder.
4. While matter stood thus, the appellant moved various applications including two applications, with which we are concerned in the present case, one being an application under Order 21 Rule 46-A r/w Section 151 CPC and another being an application under Section 47 r/w Order 21 Rule 58 CPC. Both these applications came to be rejected by the impugned order giving rise to this appeal.
5. The respondent, however, raised preliminary objection regarding maintainability of the instant Arbitration Appeal mainly relying upon two

decisions of the Supreme Court in the case of **Kandla Export Corporation & Another** (2018) 14 SCC 715 and **BGS SGS Soma JV Vs. NHPC Ltd.** (2020) 4 SCC 234. Learned senior counsel appearing for respondent made pointed submission that as the order impugned does not fall in the category of orders as exhaustively enumerated in Section 37 of the Arbitration Act read with Section 13 of the Commercial Court Act, 2015, the appeal is not maintainable.

6. Replying to the said objection, learned counsel for the appellant argued that proviso to sub-Section (1A) of Section 13 of the Commercial Court Act has to be interpreted liberally and widely to include within its scope and ambit, the orders of the nature which have been passed by the Commercial Court and impugned in the appeal. Referring to the provision contained therein and relying upon decisions in the cases of **Hubtown Limited Vs. IDBI Trusteeship Service** 2016 SCC On-line Bombay 9019, order dated 5th July 2021 passed by the High Court of Delhi in the case of **Delhi Chemical and Pharmaceutical Works Pvt. Ltd. & Anr.** and order dated 16.3.2020 passed by the High Court of Delhi in **D & H India Ltd. Vs. Superon Schweisstechnik India Ltd.**, it has been contended that the appeal in the present case would certainly be maintainable under the statutory scheme of appeal engrafted under Section 13 of the Commercial Courts Act.
7. After hearing learned counsel for the parties and the judgment cited at the bar before us, we are of the considered view that objection to the maintainability of the appeal has to be sustained in view of authoritative pronouncement of the Supreme Court in the cases of **Kandla Export Corporation** (supra) and **BGS SGS Soma JV** (supra).
8. In the case of **Kandla Export**, Their Lordships in the Supreme Court examined statutory scheme of appeals under the Arbitration Act as also under Section 13 of the Commercial Courts Act. Taking into consideration the statement of objects and reasons of the Commercial Courts Act and various provisions contained in Sections 2, 4, 5, 7, 10, 11, 13, 14, 15 and 21

of the Commercial Courts Act, it was held as below :-

“13. 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.*, thus: (SCR pp.-266-67: AIR pp 717-18 paras 9-10)

“9...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.

'8.....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]:

'10. 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."

10. 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] .)"

Applying aforesaid principles of law, the scope and ambit of the proviso to sub-Section (1A) of Section 13 of the Commercial Courts Act as also provision contained in Section 37 of the Arbitration Act was examined and Their Lordships held as below:-

“14. 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 Code, 1908, and Section 37 of the Arbitration Act. It will at once be noticed that orders that are not specifically enumerated under Order XLIII of the CPC would, therefore, not be appealable, and appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court.

15. 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. “

9. The aforesaid decision was again relied upon in subsequent judgment in the case of **BGS SGS Soma JV** (supra). It was further enunciated that there is no independent right of appeal under Section 13 (1) of the Commercial Courts Act 2015, as below:-

“13. Given the fact that there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals, it is the parameters of

Section 37 of the Arbitration Act, 1996 alone which have to be looked at in order to determine whether the present appeals were maintainable. Section 37(1) makes it clear that appeals shall only lie from the orders set out in sub-clauses (a), (b) and (c) and from no others. The pigeonhole that the High Court in the impugned judgement has chosen to say that the appeals in the present cases were maintainable is sub-clause (c). According to the High Court, even where a Section 34 application is ordered to be returned to the appropriate Court, such order would amount to an order “refusing to set aside an arbitral award under Section 34”.

14. Interestingly, under the proviso to Section 13(1A) of the Commercial Courts Act, 2015, Order XLIII of the CPC is also mentioned. Order XLIII Rule(1)(a) reads as follows:

“1. Appeals from orders.- An appeal shall lie from the following orders under the provisions of Section 104, namely-

(a)an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court except where the procedure specified in rule 10A of Order 7 has been followed;”

This provision is conspicuous by its absence in Section 37 of the Arbitration Act, 1996, which alone can be looked at for the purpose of filing appeals against orders setting aside, or refusing to set aside awards under Section 34. Also, what is missed by the impugned judgment is the words “under Section 34”.

Thus, the refusal to set aside an arbitral award must be under Section 34, i.e., after the grounds set out in Section 34 have been applied to the arbitral award in question, and after the Court has turned down such grounds. Admittedly, on the facts of these cases, there was no adjudication under Section 34 of the Arbitration Act, 1996 - all that was done was that the Special Commercial Court at Gurugram allowed an application filed under Section 151 read with Order VII Rule 10 CPC, determining that the Special Commercial Court at Gurugram had no jurisdiction to proceed further with the Section 34 application, and therefore, such application would have to be returned to the competent court situate at New Delhi. “

10. The aforesaid authoritative pronouncements of the Supreme Court in the two decisions leave no scope for further arguments relying upon decision passed in other judgments referred to herein above as the Supreme Court has very clearly held that the proviso to sub-Section (1-A) of Section 13 of the Commercial Court Act goes on to hold that remedy of appeal under the provision of the aforesaid two Acts is available only against those orders which are specifically and exhaustively enumerated therein and orders which do not fall within the scope and ambit of the orders specified therein, appeal shall not lie.

11. Indisputably, in the present case, the order which has been impugned in this case is not one which has been provided under the Law.

It is well settled that unless there is an express provision for appeal, no appeal would lie and such a right cannot be implied.

12. Inescapable conclusion, therefore, is that the present appeal is not maintainable under the Law and the appellant's remedy lies elsewhere.

13. The objection to the maintainability of the appeal is, therefore, sustained and the appeal is dismissed as not maintainable, however, leaving the appellant to work out its remedy as may be available to it under the Law.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge