

68 20.09.22

Ct. No. 04

Akd

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Commercial Division**

**F.M.A.T. 305 of 2022
CAN 1 of 2022**

Batliboi Environmental Engineering Limited.

Vs.

Eastern Metec Private Limited.

**Mr. U. S. Menon,
Mr. Abhirup Chairaborty.**

... for the appellant.

**Mr. Subhankar Nag,
Ms. Vaswati Banerjee,
Mr. Soumya Roy.**

... for the respondent.

The instant appeal is taken out by the plaintiff/appellant against an order dated 11th July, 2022 passed by the Commercial Court at Alipore in Money Suit No. 13 of 2022; by which the written statement along with counter-claim was accepted and consequential order was passed upon the defendant/respondent to file the original documents as well as to put in the deficit court fees.

The learned Advocate appearing for the appellant vociferously submits that the instant suit was filed before the Civil Court at the relevant point of time when the Commercial Courts Act was not promulgated. After service of summons, the defendant filed the written statement thereat and, in fact, the suit was proceeded substantially.

On the advent of the Commercial Courts Act, 2015 and in view of Section 15 thereof, an application was taken out by the defendant to transfer the suit to Commercial Court, which, in fact, was allowed. The moment the suit came up before the Commercial Court, an order was passed to explore the provision relating to mediation and, in fact, the matter was

delayed for such reason. Ultimately the mediation failed and the moment the defendant realized that the suit is likely to be proceeded with and may be brought to its logical conclusion at the earliest, the written statement along with counter-claim was filed and the Court mechanically accepted the same without advertent to the fact that the defendant, in fact, filed the written statement at an earlier point of time and, therefore, such course of action is neither contemplated in the procedural law nor under the substantive provisions of the said Act.

The learned Advocate for the appellant relies upon a judgement of the Delhi High Court rendered in case of *D & H India Ltd. vs. Superon Schweissttechnik India Ltd.* reported in (2020) 268 DLT 15 (DB) for the proposition that even if Section 13 of the said Act does not expressly include the order of such nature amenable to be challenged by way of an appeal, yet there is no fetter in entertaining the appeal if miscarriage of justice is eminent and patent on the face of the record. It is further contended that the proviso appended to Sub-Section (1A) of Section 13 of the said Act cannot be construed to prohibit other types of orders, if the miscarriage of justice is evident therefrom.

On the other hand, the learned Advocate appearing for the defendant/respondent raises a preliminary objection on the maintainability of the appeal under Section 13 of the said Act. According to him, the nature of the impugned order neither comes within the ambit of Order XLIII of the Code nor can be regarded as an order appealable under Section 37 of the Arbitration and Conciliation Act, 1996 and, therefore, the instant appeal is liable to be dismissed at the threshold. He, however, relies upon a judgement of the Apex Court rendered in case of

Kandla Export Corporation & Anr. vs. M/s. OCI Corporation & Anr. reported in (2018) 14 SCC 715.

On the conspectus of the aforesaid submissions and the undisputed facts emerged before us, the only question involved in the instant appeal is whether an appeal is maintainable under Section 13 of the Commercial Courts Act against an order passed by the Commercial Court accepting the written statement along with counter-claim in violation of the procedural law.

It admits no ambiguity that an appeal is a creature of stature. A litigant cannot assume inchoate right of an appeal unless provided under the statute. It does not flow from common law nor can be perceived, but can only be exercised on conferment of jurisdiction under the statute.

Such being the fundamental principle the argument is sought to be advanced that canon of interpretation is required to ascertain any prohibition having imposed upon the Appellate Court in entertaining an appeal in absence of any prohibitory language having used in Section 13 of the said Act. The emphasis is much put upon the Division Bench judgement of Delhi High Court in *D & H India Ltd.* (supra), wherein it is held that proviso to Section 13(1A) of the Act is merely an enabling provision and does not create any disability in maintaining an appeal, which is otherwise maintainable. It has further been held that since the said proviso does not contain any prohibitory word, which has to be interpreted in such fashion, there is no absolute bar in maintaining the appeal; otherwise maintainable even if it does not fall within the strict four-corner of the said proviso.

We have noticed the said judgement and found to be distinguishable with the caveat that we do not

intend to go and take a different view though we initially intended to. The distinction, which has been made in the said judgement, is that the Original Side Rules of the Delhi High Court provides certain application to be dealt with by the Registrar and the remedy by way of an appeal was also provided therein. The Division Bench is of the view that since the said order neither eminent from the Code of Civil Procedure nor from any Letters Patent, but from a provision contained in the Original Side Rules, which provides the remedy by way of an appeal, such an appeal is maintainable and cannot be fettered by taking aid to proviso inserted in Sub-Section (1A) of Section 13 of the said Act.

The judgement is to be read in context of the given facts and should not be read as a statute. Different facts or the additional facts may invite a complete different conclusion and, therefore, it would be a safe course to cull out of the ratio on the basis of the given facts and the Court must be cautious to apply such ratio.

We do not feel that we should delve much deep in to the said aspect after our attention is drawn to the judgement of the Supreme Court in case of Kandla Export Corporation (supra); wherein identical point was raised after noticing the enabling provision with the main provision and the proviso inserted thereto. The Apex Court held that the main provision though provides for an appeal from judgements, orders and decrees of the Commercial Division, yet by introduction of the proviso an exception is carved out and the primary purpose of the proviso is to somehow control and qualify the generality of the main part. Therefore, it is the duty of the Court to harmonize the enabling provision with the proviso appended thereto.

However, it has been held that the moment the

proviso restricts the remedy of the appeal even if the enabling provision in general provided the remedy by way of an appeal is somehow bridled with the restrictions having imposed in the proviso. The Apex Court held that any order, which does not come within the purview of Order XLIII of the Code of Civil Procedure nor under Section 37 of the Arbitration and Conciliation Act, 1996, is not open to be challenged by way of an appeal before the Commercial Division. The relevant excerpts from the said report is reproduced as under:

“14. 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].)”

Having sensed with the disability put in maintaining an appeal, the learned Advocate for the appellant vehemently submits that he cannot be rendered remediless. He further submits that Section 8 of the Act creates a bar in maintaining a civil revision and in view of the view having expressed in the instant judgement by us he cannot be rendered remediless.

Learned Advocate for the defendant/respondent submits that there is no fetter in maintaining an application under Section 227 of the Constitution of India and, in fact, it has been entertained by this Court in several matters and, therefore, the contention of the learned Advocate for the appellant that he is remediless is not tenable.

We do not intend to go into such aspect as our consideration is restricted to the maintainability of the appeal against the impugned order and it is open to the appellant to exhaust the remedy, if permissible in law, before other forum.

In view of the reasons having assigned hereinbefore we could not persuade ourselves to hold that the appeal is maintainable against the impugned order.

The appeal is thus dismissed as not maintainable.

For abundant precaution we must say that we had no occasion to go into the merit of the impugned order and, therefore, any observations made hereinbefore touching thereupon shall not have any persuasive effect in any proceedings taken out before the appropriate forum.

The learned Advocate on record of the appellant is directed to take back the certified copy of the order

impugned in this appeal upon replacement with a photocopy thereof.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)