

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

**COMMERCIAL APPEAL NO. 161 OF 2022
IN
SUMMONS FOR JUDGMENT NO. 43 OF 2021
ALONG WITH
INTERIM APPLICATION (L) NO. 31167 OF 2021
ALONG WITH
INTERIM APPLICATION (L) NO. 31198 OF 2021
ALONG WITH
INTERIM APPLICATION (L) NO. 14361 OF 2022**

Indian Bank .. Applicant/Appellant
v/s.
SKS Power Generation (Chhattisgarh) Ltd. .. Respondent

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Mr. Prakash Shinde a/w. Ms. Niyati Merchant, Mr. Yash Dhruva and Mr. Harsh Sheth i/by MDP & Partners for applicant / appellant.

Mr. Venkatesh Dhond, Senior Advocate a/w. Mr. Rohan Kelkar, Ms. Vinodini Srinivasan, Ms. Poorva Garg and Mr. Simon Mascarenhas i/by Mulla & Mulla and Cragie Blunt & Cadre for respondent.

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**CORAM : K. R. SHRIRAM &
KAMAL KHATA, JJ.
DATED : 20TH DECEMBER, 2022.**

P.C. :

1. The order impugned in this appeal grants the appellant conditional leave to defend the suit. Operative part reads as under:

“ i] Leave to defend is granted to the Defendant subject to deposit of a sum of Rs.57,30,00,000/- along with interest @ 9% p.a. from 19th November, 2019 till the date of deposit in the Court, within a period of five weeks from today.

ii] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file written statement within a period of four weeks from the date of deposit;

iii] If the conditional order of deposit is not complied with within the aforesaid stipulated period, the plaintiff shall be entitled to apply for an ex-parte decree against the defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

iv] Summons for Judgment stands disposed of accordingly.”

2. At the outset Mr. Dhond appearing for respondent raised preliminary objection on the maintainability of this appeal. Mr. Dhond relied upon judgment of this Court disposing 4 Commercial Appeals in ***Skil-Himachal Infrastructure & Tourism Ltd. and Others v/s. IL&FS Financial Services Ltd.***¹ to submit that an appeal from an order granting conditional leave to defend in a summons for judgment in a commercial suit is not maintainable in view of Section 13 of the Commercial Courts Act.

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3. This appeal is an appeal from an order granting conditional leave to defend in a summons for judgment in a commercial suit that respondent had filed against appellant.

4. Paragraph nos. 44 to 53 of *Skill-Himachal Infrastructure (supra)* reads as under:–

“44. In the Supreme Court decision in Kandla Export Corporation, Section 13 was addressed like this. First, that Section 13(1) of the CC Act is in two parts. The main provision deals with appeals from judgments, orders and decrees to the Commercial Division of the High Court. To this, the proviso is an exception. Second, the proviso must be construed harmoniously with the main provision, not in derogation of it. It operates in the same field. If main provision is in clear language, the proviso cannot be used to ‘interpret’ the main part, or to exclude — let alone by implication — any part of the main provision; except, of course, if the proviso plainly contemplates such an exclusion. Under the proviso, appeals against orders are restricted to those orders under Order 43 of the CPC, and Section 37 of the Arbitration Act. Therefore, no appeal lies to the Commercial Appellate Division against any order not specifically listed in Order 43 of the CPC (or an order not under Section 37 of the Arbitration Act).13

45. An order of conditional leave under Order 37 of the CPC is not enumerated in Order 43. It is an order, not a decree. Therefore, following Kandla Exports and Shailendra Bhadauria, such an order is not appealable under the CC Act.

46. Finally, there is the decision of division bench of this court in Kakade Construction which reviewed the previous decisions including Kandla Exports, Shailendra Bhadauria and Sushila Singhania. The appeals arose from an order appointing a Court Receiver of certain property. That order was made on a Chamber Summons in execution of a consent arbitral award. Once again, the division bench held that the appeal was not maintainable.

47. The appellants rely on paragraph 10 of a decision of a Division Bench in Resilient Innovations Private Limited v Phonepe Private Limited.¹⁴ This arose from an order in a commercial suit, which permitted the plaintiff to withdraw the suit with certain liberty. The argument before the court was that the appeal was maintainable under Section 13 since the order permitting a withdrawal was a ‘judgment’ and a ‘decree’ within the meaning of the CC Act. In paragraphs 17 to 23, the division bench dealt with the submission before it. It held that the word ‘judgment’ in Section 13 takes its meaning from the definition in Section 2(9) of the CPC. We agree. In paragraph 22, the Division Bench held that an appeal from a decree does lie under Section 13. That again is correct. What was rejected was the submission that a ‘decree’ for the purpose of Section 13 of the CC Act is ‘more restrictive’ than a decree under the provisions of the CPC. Again, we agree with the Resilient Innovations Division Bench. We do not see how this decision in any way assists the Appellants. The binding decisions to which we have referred do not seem to have been considered or applied in Resilient Innovations.

48. We are unable to see the distinction that Dr Tulzapurkar and Mr Dhond draw between these cited and binding decisions that hold the field and the present order. Hubtown held that an appeal from an order of conditional leave to defend in a Summons for Judgment was maintainable. Shailendra Bhadauria held that Hubtown was no longer good law; i.e., that an appeal does not lie from an order of conditional leave to defend on a Summons for Judgment. This really should be the end of the matter. Indeed, every argument that Dr Tulzapurkar and Mr Dhond make, including the submissions that an appeal lies against a ‘judgment’, has been negated in Shailendra Bhadauria. That was the earlier view in Hubtown and Siqmarq Technologies; both have been held in Shailendra Bhadauria not to be good law.

49. As we have noted above, Mr Dhond’s submission unacceptably enlarges the scope of appeals even beyond what the CPC intends. It is inconceivable that the CC Act would expand the scope of appeals even beyond the CPC. There is nothing

whatsoever to support this. We also cannot see the logical basis or foundation for Dr Tulzapurkar's submission that even though there may not be a 'decree' properly so called, a judgment in and of itself, i.e., the statement of reasons, should be deemed to be some sort of a decree and should be held to be appealable.

50. We accept Dr Saraf's formulations on all four grounds. First, that plain language of Section 13 must be followed. Second, that there is no material to indicate that the 2018 amendment was conceived as an enlargement of the appellate jurisdiction. Third, that all previous applicable decisions of this court and of the Supreme Court, not one of them distinguished by the Appellants, are binding on this court on any principles of doctrines of stare decisis. Fourth, that the Appellants' rights are not in fact in any way determined.

51. The last point requires emphasis once again because we find much substance in it. This is where Dr Saraf says that the defendants have a choice either to await the outcome of the suit subject to fulfilment of the condition of deposit, or to not follow the condition of deposit, suffer a decree and then come in appeal. It is no answer for the appellants to say that if they come in appeal, they will be forced to deposit. As he points out, the condition in a Summons for Judgment as also a condition for stay of a decree would be deposit not payment. There is a material difference. Further there is a Maharashtra amendment to Order XLI Rule 1 of the CPC which specifically allows the court to exercise its discretion to dispense with the deposit or security where it deems fit and for sufficient cause even in an appeal against a money decree. None of these rights are taken away. It is impermissible, he therefore says, to inject a further right of appeal simply because there is an order of conditional deposit on a Summons for Judgment.

52. Our conclusions are:

52.1 An appeal from an order granting conditional leave to defend in a Summons for Judgment in a Commercial Summary Suit is not maintainable in view of Section 13 of the Commercial Courts Act.

52.2 No appeal under Clause 15 of the Letters Patent is maintainable under Section 13 of the Commercial Courts Act, i.e., in a Commercial Suit.

52.3 Section 13 of the Commercial Courts Act permits only appeals (i) against decrees; (ii) against orders specifically enumerated in Order 43 of the Code of Civil Procedure, 1908; and (iii) under Section 37 of the Arbitration Act.

53. For these reasons, we hold that none of these appeals are maintainable. All four are dismissed. Under the CC Act, ordinarily costs would have had to be imposed; if not, reasons are required. Since these appeals have been argued on a question of law, we decline to make an order of costs."

5. The judgment in ***Skil-Himachan Infrastructure (supra)*** squarely applies to the facts of this case. Therefore we hold that this appeal is not maintainable.

6. Appeal dismissed.

7. Mr. Dhond is pressing for costs. Under the Commercial Courts Act, ordinarily, cost have to be imposed and if not, reasons are required to be given. Though, the appeal came to be filed before the judgment in ***Skil-Himachan Infrastructure (supra)*** was delivered, law was laid down by the court before this appeal was taken up by hearing. Appellant could have withdrawn the appeal but the appellant chose not to.

8. In the circumstances we impose cost of Rs.10,00,000/- to be paid within four weeks from the date this order is uploaded.

9. Consequently all interim applications disposed.

(KAMAL KHATA, J.)

(K.R. SHRIRAM, J.)