

Jvs.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**COMMERCIAL APPEAL FROM ORDER NO. 17 OF 2023
IN
COMMERCIAL SUIT NO. 234 OF 2022**

Sohanlal V. Jain (HUF) & Ors.	}	Appellants
Versus		
RBL Bank Ltd.	}	Respondent

Mr. Pankaj Jain with Mr. Parth Shah i/b. P. D. Jain & Co. for the appellants.

Mr. Harsh Sheth with Ms. Khushbu Chajjed and Mr. Shahbaz Malbari for the respondent.

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ.
& ARIF S. DOCTOR, J.**

DATE: 1st AUGUST 2023

P.C.:

1. Heard learned counsel for the parties.
2. Defendant Nos. 1 to 3 are in appeal before us challenging the order dated 21st June 2023 passed by the City Civil Court, Greater Mumbai, whereby the application moved by the defendants-appellants under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereafter referred to as "the CPC") for setting aside an *ex-parte* judgment dated 31st October 2022 in Commercial Suit No. 234 of 2022, was allowed.

3. Learned counsel for respondent-plaintiff has raised a preliminary objection about the maintainability of this appeal and has referred to section 13 of the Commercial Courts Act, 2015 (hereafter referred to as "the said Act"), which relates to appeals from decrees and orders of Commercial Courts and Commercial Divisions. He has submitted that the proviso appended to section 13(1-A) of the said Act clearly provides that an appeal shall lie only from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the CPC. It has thus been stated by learned counsel for the respondent that Order XLIII of the CPC lists the orders against which the appeal from order lies under section 104 of the CPC and according to him, Order XLIII Rule 1(d) though provides for an appeal against an order passed on an application preferred under Order IX Rule 13 of the CPC, the order ought to be rejecting the application seeking restoration of a suit or any proceeding. His submission is that in the instant case, since the application for setting aside *ex-parte* decree has been allowed, the order does not qualify to be an order as enumerated under Order XLIII Rule 1(d).

4. Replying to the said submission regarding maintainability of the appeal, learned counsel for the appellants has drawn our attention to a judgment of the Hon'ble Supreme Court in the case of ***Tea Auction Ltd. vs. Grace Hill Tea Industry and Anr***¹. He has thus submitted that in a situation where the Court, while setting aside an *ex-parte* decree passed against the defendants, imposes some condition which is harsh, an

¹ (2006) 12 SCC 104

appeal would be maintainable. He has also argued that the Hon'ble Supreme Court in the case of ***Tea Auction Ltd.*** (supra) has clearly held that though the Court is possessed of the power to put the defendants to terms in case an *ex-parte* decree is set aside; however, such terms should not be unreasonable or excessively harsh.

5. Having regard to the submissions made by the parties, we find force in the submissions made by learned counsel for the respondent in respect of the maintainability of this appeal. The suit filed by the plaintiff-respondent before the Commercial Court was decreed *ex-parte* on 31st October 2022. The defendants, however, moved an application seeking setting aside of the said *ex-parte* judgment of the learned Court below. While passing the order under appeal before us, the learned Court below came to the conclusion that the defendants were able to show sufficient cause for not attending the proceedings of the suit and accordingly, the learned Court below set aside the judgment and restored the proceedings; however, while passing the order, the learned Court below has put the defendants to certain terms. The operative portion of the order under appeal before us reads thus: -

"ORDER

1. Notice of Motion No. 4692/2022 is allowed as under:
 - i. Ex-parte judgment and decree passed in Commercial Suit No. 234/2022 dated 31.10.2022 is set aside subject to following conditions: -
 - ii. Defendants Nos. 1 to 3 are directed to deposit amount of Rs.36,00,000/- (Rs.

Thirty Six Lakhs only) in Court within two months from the date of this order.

- iii. The effect and implementation of ex-parte judgment and order dated 31.10.2022 is stayed till further order.
- iv. Defendants Nos.1 to 3 are directed to pay cost of Rs.20,000/- (Rs. Twenty Thousand only) to plaintiff within two months from the date of this order.
- v. After compliance of order the Commercial Suit No.234/2022 be restored on its original number.
- vi. Both the parties are directed to appear in Commercial Suit No. 234/2022 on 21.07.2023 before concerned Court.

2. The proceeding of Notice of Motion No.4692/2022 is closed.”

6. Learned counsel for the appellants is primarily aggrieved by the condition no. 2 in the order passed by the learned Court below and has submitted that asking the defendants to make deposit of the amount is harsh and unreasonable and in view of the law laid down by the Supreme Court in the case of **Tea Auction Ltd.**(supra), such condition is not sustainable.

7. As regards the maintainability of the present appeal, we may only observe that the said issue was not before the Supreme Court in the case of **Tea Auction Ltd.**(supra). The proviso appended to section 13 of the said Act clearly provides 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. Rule 1(d) of Order XLIII enumerates an order passed by a Court in a proceeding under Order IX Rule 13, however, it specifically states that an appeal would lie only if such application is

rejected and not if it is allowed. As we have noticed, in this case the application moved by the defendants-appellants for setting aside the *ex-parte* decree has been allowed and accordingly, we have no hesitation to hold that the instant appeal would not be maintainable.

8. In respect of the judgment cited by learned counsel for the appellants in the case of ***Tea Auction Ltd.***(supra), we may also note that the judgment was pronounced on 13th September 2006, whereas, the Commercial Courts Act was enacted in the year 2015. Hence, so far as the issue relating to maintainability is concerned, the judgment in the case of ***Tea Auction Ltd.***(supra) does not have any application.

9. As regards the submission of the learned counsel for the appellants that requiring the defendants to make deposit of an amount Rs. 36 lakhs is a condition which is harsh and hence, the same is not sustainable, we may notice that the said condition has been put in place by the learned Court below while allowing the application taking into consideration the facts and circumstances of the case. In our considered opinion, the condition requiring the defendants to make deposit of Rs. 36 lakhs in Court is not harsh to the extent of the same being not sustainable for the reason that the claim primarily in the suit by the plaintiff was for a money decree. The Hon'ble Supreme Court in the case of ***Tea Auction Ltd.***(supra) had found the condition of making deposit of the amount harsher in the peculiar facts of the case. We may also notice that in the said case the learned Court below, while setting aside the *ex-parte* judgment, had directed the defendant to deposit the entire money claimed in the suit,

whereas, in the instant case, only half of the amount claimed has been directed to be deposited by the defendants.

10. In view of the reasons given above, we hold that the instant appeal is not maintainable, which is hereby dismissed.

11. Interim applications, if any, stand disposed of.

12. No order as to costs.

JAYANT
VISHWANATH
SALUNKE

Digitally signed by
JAYANT VISHWANATH
SALUNKE
Date: 2023.08.03
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(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)