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O.S.A.(CAD) No.122 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.12.2023

CORAM

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR
and
THE HONOURABLE MR. JUSTICE P.DHANABAL

O.S.A.(CAD) No.122 of 2022
and CMP.No.13297 of 2022

M/s.Poorvikaas Global Logistics
Rep. by its Manager V.Gurumoorthi,
Old No.76, New No.80,
ANP Complex, Moore Street,
Chennai 600 001.

...appellant

Vs.

M/s.Stoneplus Enterprises,
Private Limited,
Rep. by its Director Mr.Prasan Dilip Shah,
Reg. Office: 1-118/19, East -19,
Solitaire Projects,
Rohini Layout, Opp. Cyber Towers,
Madhapur, Hyderabad 500 081
Telangana State.
...respondent

Prayer: Original Side Appeal filed under Section 13(1) of the Commercial Courts Act against the order dated 05.09.2017 passed in Application No.1446 of 2017 in CS.No.149 of 2017 by a learned Single Judge of this Court.



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For Appellant : Mr.T.M.Hariharan
For Respondent : Mr.N.Ramakrishnan
for M/s.Waron & Sairams

J U D G M E N T

[Judgment of the Court was delivered by D.KRISHNAKUMAR, J]

This appeal has been filed by the appellant challenging the order of the learned Single Judge dated 05.09.2017 in Application No.1446 of 2017, which is filed under Order 38 Rule 5 of CPC, directing them to furnish security to the value of Rs.27,13,449/-.

2. It is the contention of the learned counsel for the appellant that since investigation is pending for a money claim, there is no basis to direct the appellant to furnish security. Further, the respondent has not complied with any of the mandatory statutory requirements for invoking Order 14 Rule 8 of the Original Side Rules of this Court read with Order 38 Rule 5 of CPC for furnishing security. Hence, the learned counsel seeks to set aside the order of the learned Single Judge.



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3. The learned counsel appearing for the respondent raised a preliminary objection regarding the maintainability of the present appeal as no appeal lies against the order passed in the application filed under Order 38 Rule 5 CPC.

4. Heard both sides and perused the materials available on record.

5. As rightly pointed out by the learned counsel for the respondent, it has to be decided as to whether an appeal lies against the order passed in the application filed under Order 38 Rule 5 CPC. The issue involved in this appeal had already been decided by this Court in **O.S.A(CAD)No.70 of 2021, dated 20.11.2023**, wherein this Court has held that the order passed in the application filed under Order 38 Rule 5 CPC would not come under the purview of appealable orders under Order 43 Rule 1 CPC. The relevant portion of the said order reads as follows:

"10. The present intra Court appeal has been filed under the provisions of Section 13(1) of the Commercial Courts Act, 2015, which details with appeal remedy from decrees of Commercial Courts and Commercial Divisions and the same reads as follows:



13. Appeals from decrees of Commercial Courts and Commercial Divisions:- (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 the judgment or order, as the case may be:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order 43 of the Code of Civil Procedure, 1908 (5 of 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."

Proviso to Section 13(1) of the Commercial Courts Act specifies that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order 43 Rule of CPC.

11. Order 43 Rule 1 CPC deals with appeals from orders and the same reads as under:

" 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 I[except where the procedure specified in rule 10A of Order VII has been followed];

2* * * *

(c) an Order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an Order to set



aside the dismissal of a suit;

(d) an Order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside a decree passed ex parte.

2 * * * **

(f) an Order under rule 21 of Order XI;

2 * * * **

(i) an Order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an Order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

1[(ja) an Order rejecting an application made under sub-rule (1) of rule 106 of Order XXI, provided that an Order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that Order is appealable.]

(k) an Order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an Order under rule 10 of Order XXII giving or refusing to give leave;

3 * * * **

(n) an Order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an Order to set aside the dismissal of a suit;

4[(na) an Order under rule 5 or rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent persons:]

3 * * * **

(p) Orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;

(q) an Order under rule 2, rule 3 or rule 6 of Order XXXVIII;

(r) an Order under rule 1, rule 2 4[rule 2A], rule 4 or rule 10 of Order XXXIX; (s) an Order under rule 1 or rule 4 of Order XL;

(t) an Order of refusal under rule 19 of Order XLI to



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re-admit, or under rule 21 of Order XLI to re-hear, an appeal;

(u) an Order rule 23 [or rule 23A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

*5 * * * **

(w) an Order under rule 4 of Order XLVII granting an application for review."

A careful reading of Order 43 Rule 1 CP reveals that an order passed in the application filed under Order 38 Rule 5 CPC would not comes under the purview of appealable orders under Order 43 Rule 1 CPC.

*12. A Hon'ble Division Bench of this Court had an occasion to deal with a similar issue in an appeal filed against the dismissal of the application seeking rejection of the plaint under Order VII Rule 11 CPC in the decision in **Hindustan Unilever Limited Ponds House v. S.Shanthi and Others [2021 SCC Online Mad 5428]**, wherein it was held as under:*

"98. The appellant in OSA No. 208 of 2021 has referred to a judgment reported at (2005) 4 SCC 480 (Kailash v. Nanhku) for the proposition that merely because a provision of law is couched in a negative language implying a mandatory character, the same is not without exceptions; and, when a court is called upon to interpret the nature of the provision, it may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory, though worded in the negative form. That matter also pertained to the delay in filing a written statement; but in an election petition. The submission of the relevant appellant by placing the judgment is that if it is possible, in



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the interest of justice, to read down negative words and make for exceptions, the absence of negative words in the proviso to sub-sections (1) and (1A) of Section 13 of the said Act should guide the court to interpret such provision as being permissive of appeals rather than restricting the scope of appellability.

105. Accordingly, OSA (CAD) No. 3 of 2021 is found to be not maintainable since it is an appeal against an order refusing to reject the plaint under Order VII Rule 11 of the Code and no appeal is provided against such an order in Order XLIII of the Code. For the same reason, OSA (CAD) No. 4 of 2021 is held to not be maintainable since the appeal is directed against an order refusing to strike off a defendant from the array of parties, against which no appeal is provided for in Order XLIII of the Code. OSA (CAD) No. 29 of 2021 is not maintainable as the order impugned is one dismissing an application for revocation of the leave granted under Clause 12 of the Letters Patent. Though such appeal may have been maintainable under Clause 15 of the Letters Patent, in view of the bar under Section 13(2) of the said Act and no provision for such appeal being recognised in Order XLIII of the Code, such appeal is not maintainable. For the same reasons, OSA (CAD) No. 30 of 2021 is found to not be maintainable as the order impugned is the dismissal of an application to reject the plaint under Order VII Rule 11 of the Code. Nonetheless, the objections raised by the appellant may be urged at the trial."

13. Considering the aforesaid provisions of the Act as well as the Division Bench decision of this Court cited supra, the order passed in the application filed under Order 38 Rule 5 CPC would not come under the purview of appealable orders under Order 43 Rule 1 CPC. Therefore, accepting the contention of the respondent that the instant appeal cannot be entertained and the same is not maintainable, this Court is of the view that the present appeal is liable to be dismissed as



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not maintainable."

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6. In view of the above decision, this Court is of the view that the instant appeal also cannot be entertained and the same is liable to be dismissed as not maintainable. Accordingly, this appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

[D.K.K., J] [P.D.B., J]
07.12.2023

Index : Yes / No
Speaking order: Yes/No
pvs



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and
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