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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 10th April, 2023

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FAO(OS) (COMM) 143/2020 & CM APPL. 28503/2020

TREX INDIA PVT. LTD.

..... Appellant

Through: Mr. A. S. Chandhiok, Sr. Advocate with
Mr. Angad Baxi and Ms. Purva Kohli,
Advocates

Versus

CDE ASIA LIMITED

..... Respondent

Through: Mr. Sudhir Chandra, Sr. Advocate with
Mr. Rajat Manchanda, Advocate

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J: (ORAL)

1. The respondent-plaintiff before the learned Single Judge, is a company duly incorporated under the laws of India engaged in wet processing equipment for use in quarries, mining & minerals and waste recycling products and also to have established new processes in the iron ore industry by developing custom build washing systems to improve the quality, productivity, efficiency and profitability with a view to ensure the preservation of natural resources.
2. The respondent, claims to have filed an application for grant of patent for the invention titled as "*System/ Device Process for Classification of Various Materials*" in India on 3rd September, 2013 and been granted patent i.e. Patent No.307249¹ on 12th February, 2019 for a period of *twenty years* from the date of

¹ Hereinafter referred as "IN'249"

filing of the application. The respondent claims to have filed similar applications for registration of the same patent in various other countries. The respondent also claims to have obtained a Certificate of Registration for its Design No.262629² dated 20th March, 2015, which is valid for a period of fifteen years from the date of filing of the application.

3. The respondent, claiming to have come to know that the appellant-defendant no.2 before the learned Single Judge was engaging in manufacturing, offering for sale, selling impugned products similar to its suit patent in the last week of November, 2018, instituted a suit for a decree of permanent injunction against the appellant and one of its Director with respect to the product “FM 120 CONEXUS” or any other product covered by its Patent IN’249 and also with respect to its registered Design ID’629 along with other ancillary reliefs.

4. Upon service, appellant filed an application under Order VII rule 10 and rule 11³ of The Code of Civil Procedure, 1908⁴ for return/ rejection of the plaint before the learned Single Judge primarily raising two issues, *firstly* with respect to the learned Single Judge having no territorial jurisdiction to try and entertain the suit and *secondly* relying upon the judgment of the Hon’ble Supreme Court in *Aloys Wobben and Anr. vs. Yogesh Mehra and Ors*⁵ as to the non-maintainability of the suit before the learned Single Judge.

5. After considering the submissions made by the learned counsel(s) for the parties, especially the appellant, learned Single Judge dismissed the aforesaid application holding that it is trite law that while deciding an application of like nature, the averments in the plaint have to be looked into by way of demurrer. However, the learned Single Judge left the issue of territorial jurisdiction to be

² Hereinafter referred as “ID’629”

³ Hereinafter referred as “application”

⁴ Hereinafter referred as “CPC”

decided after the parties have led their evidence.

6. Aggrieved thereby, the appellant has filed the present appeal raising various grounds. However, today, prior to commencement of arguments by the learned Senior Counsel for appellant, the learned Senior Counsel for respondent placing reliance upon *HPL (India) Limited and Ors. vs. QRG Enterprises and Another*⁶ and drawing our attention to the recent judgment rendered by this very Court in *Bhushan Oil and Fats Pvt. Ltd. vs. Mother Dairy Fruit and Vegetables Pvt. Ltd.*⁷ candidly, and in our opinion rightly, as would unfurl hereinafter, so as to save the precious time and effort of this Court and both parties involved, raised the preliminary objection with respect to the maintainability of the present appeal before this Court, contending that the same being beyond the purview of Order XLIII rule 1(a)⁸ of the CPC was not maintainable under Section 13(1A)⁹ of The Commercial Courts Act, 2015¹⁰ and as such is liable to be dismissed.

7. In contradistinction, learned Senior Counsel for the appellant placing

⁵ (2014) 15 SCC 360

⁶ 2017 SCC OnLine Del 6955

⁷ 2023 SCC OnLine Del 227

⁸ **ORDER XLIII APPEALS FROM ORDERS**

1. Appeal 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 VII has been followed]

⁹ **13. Appeals from decrees of Commercial Courts and Commercial Divisions.**—

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(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, 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:

Provided 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 Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 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

¹⁰ Hereinafter referred as “CCA”

reliance upon *D & H India Ltd. vs. Superon Schweissttechnik India Ltd.*¹¹ and *Dahiben vs. Arvinbhai Kalyanji Bhanusali (Gajra) (D) Through Lrs. and Others*¹² tried to carve out a distinction between what is stipulated in the first part of Section 13(1A) of the CCA and what is contained in the *proviso* thereof by contending that in view of what is contained in the first part of Section 13(1A) of the CCA, the present appeal is very much maintainable against “...
...the judgment or order of the... Commercial Division of a High Court” sans what is provided in the *proviso* therein as the same are disjoint to each other and thus have to be read separately.

8. Alas! the appellant is asking for introduction of something which is not provided under the Statute and which is thus, by far, outside the contours of the Statute. This, we are afraid, is against the basic principles of law enshrined, more so, whence it is trite that a Court of law is a creation of the Statute. Being so, a Court of law is bound to follow the Statute, and so are the parties before it. A Court of law is merely to interpret the language and wordings of/in a Statute literally as borne out from a plain and simple reading instead of adding, deleting, modifying, or much less giving it a new meaning thereto. A Court of law is to only expound the law but not legislate.

9. It is the golden rule that while interpreting the provisions of a Statute, they must be construed strictly as it is, particularly when the words of/ in a Statute are themselves clear, specific, explicit, unambiguous, and unequivocal. The present appeal involving the provisions of Order XLIII rule 1 of the CPC and Section 13 of the CCA is one such, where, in the opinion of this Court, there is no ambiguity of any sort in either the language or the wordings of either of the

¹¹ 2020 SCC OnLine Del 477

¹² 2020 SCC OnLine SC 562

Statutes. Additionally, a party cannot be allowed to call upon a Court of law to make some provision of law which is neither available nor provided in the Statute.

10. In continuance of the above, the law qua non-maintainability of an appeal of the present nature under Section 13(1A) of the CCA against an order dismissing an application under Order VII rule 10 and rule 11 of the CPC such as the order impugned before this Court already stands settled by the Hon'ble Supreme Court in ***HPL (India) Limited and Ors. (supra)***, wherein while dealing with Section 13(1) of the CCA prior to the amendment (which is now Section 13(1A) of the CCA after the amendment), it held as under:-

“36. Reading the entire section 13 of the said Act the clear position is that an appeal lies from an order which is specifically enumerated under Order XLIII CPC. Furthermore, no appeal would lie from an order not specifically enumerated in Order XLIII CPC because of the incorporation of the expression —from no other orders appearing in section 104 CPC (which is clearly applicable by virtue of section 16(2) of the said Act). And, Section 10 of the Delhi High Court Act, 1966 would not come to the rescue because of the non obstante provision contained in section 13(2) of the said Act.

37. Therefore, as the impugned order does not find place in the orders specifically enumerated in Order XLIII CPC, no appeal could lie against it and the present appeal is not maintainable. But, as the learned counsel for the appellants have made several submissions to the contrary we shall have to deal with them.

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58. It was lastly contended that if the interpretation given by the respondents were to be accepted, there would be a conflict between the provisions of Sections 13 and 16 of the said Act and in such an eventuality, the rule of harmonious construction ought to be employed. We do not see as to how there would be a conflict between the provisions of Sections 13 and 16 if the interpretation advanced by the respondents and accepted by us was to be employed. We have already pointed out above that Section 13(1) not only provides for a forum of appeal but also a specified period of limitation. The proviso to Section 13(1) explicitly provides that an appeal shall lie from such orders that are specifically enumerated under Order XLIII of CPC. Section 13(2)

makes it further clear that no appeal shall lie from any Order or decree of a Commercial Division or a Commercial Court otherwise than in accordance with the provisions of the said Act notwithstanding anything contained in any other law for the time being in force or in a Letters Patent of a High Court. When the provisions of a statute are explicit and the intendment of the legislature is clear, there is no question of trying to resolve an imagined conflict between the provisions by employing the rule of harmonious construction.”

11. The same position has been taken by the Hon’ble Supreme Court in ***Kandla Export Corporation vs. OCI Corporation***¹³ and by a Co-ordinate Bench of this Court in ***Odean Builders (P) Ltd. vs. NBCC (India) Ltd.***¹⁴, which after dealing with a contrary view of another Co-ordinate Bench of this Court in ***D & H India Ltd. (supra)*** agreed with the settled position qua maintainability of an appeal against orders under Order XLIII rule 1 of the CPC. It is thus well-settled that an appeal under the said provision of Order XLIII rule 1 of the CPC is maintainable **only** against such order(s) passed by a Court below which are specifically stated/ stipulated and thus covered therein and barring those, no appeal of any kind against any other order(s) passed by a Court below are maintainable in law. It is to be noted that the decision rendered by the Co-ordinate Bench in ***Odean Builders Pvt. Ltd. (supra)*** has since been upheld by the Hon’ble Supreme Court in ***Rayban Foods Pvt. Ltd. vs. Gas Logistics Pvt. Ltd.***¹⁵. Also noteworthy is that this very Court has also recently, placing reliance upon both ***Kandla Export Corporation (supra)*** and ***Odean Builders (P) Ltd. (supra)*** in ***Bhushan Oil and Fats Pvt. Ltd. (supra)***, spoken in the same words.

12. As is inferable from the aforesaid existing position of law, there is a clear bar from the filing of any appeal for which there is no provision provided in Order XLIII rule 1 of the CPC and Section 13(IA) of the CCA. Thus an appeal

¹³ (2018) 14 SCC 715

¹⁴ 2021 SCC OnLine Del 4390

¹⁵ Order dated 31st January, 2022 in SLP(C) No. 901/2022

of the said nature like the present one is not maintainable. A Court of law cannot come to the aid of a litigant, if there is remedy available to such litigant under law. The remedy sought for by the appellant is not available to a party like the appellant herein under Order XLIII rule 1 of the CPC as there is no such provision therein which provides for filing of an appeal against an order of dismissal of an application under Order VII rule 10 of the CPC and against any order allowing or dismissing an application under Order VII rule 11 of the CPC by the Court below. Thus, no appeal of any nature can lie or be maintainable in the eyes of law. Not to forget, it is also trite law that a Court of law cannot create a provision when it is not provided in law.

13. While interpreting the provisions of Section 13(1A) of the CCA, it is relevant to note that the word “judgment” used therein has the same meaning and purport as in Section 2(9) of the CPC and similarly, it is to be borne in mind that the word “order” used therein also has the same meaning and purport as that in Section 2(14) of the CPC.

14. The contention of learned Senior Counsel for appellant qua breaking up the provision of Section 13(1A) of the CCA in two parts, i.e. to read and interpret the proviso *de hors* the section is, we feel, against the settled principles of law as the proviso in/ to a Section is an integral part thereof and is an enabling provision which to our mind has to be read conjointly rather than disjointly as has been tried to be contended by the learned Senior Counsel for appellant. If this Court agrees with the aforesaid contention put forth by the learned Senior Counsel for appellant, then the same shall tantamount to reading and interpreting two parts of the very same provision, i.e. Section separately. This, in our view, could not and cannot be the intention of the Legislature as it will be against the established principles of law. This is the settled law as per

Star India P. Ltd. v. Telecom Regulatory Authority of India¹⁶ wherein a Co-ordinate Bench of this Court has held as under:-

“25. The next aspect is whether a Proviso partakes of a character akin to the main provision itself or can it stand independently? It would be appropriate to commence the discussion with the decision of the Constitution Bench in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha, (1962) 2 SCR 159. After referring to a number of English decisions Their Lordships observed that generally “a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a Proviso is not interpreted as stating a general rule. But, Provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be constructed as controlled by the section.” These observations were applied in S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591 as well as Motiram Ghelabhai v. Jagan Nagar, (1985) 2 SCC 279. In Pillai it was observed that “the well established rule of interpretation of a Proviso is that a proviso may have three separate functions. Normally, a Proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the Proviso would be within the purview of the enactment. In other words, a Proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.”

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30. The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and Proviso, taken and construed together is to prevail.”

15. Further, the reliance by the learned Senior Counsel for appellant upon ***D & H India Ltd. (supra)*** is misconceived under the facts and circumstances of the present case and the settled position of law in view of the discussion hereinabove. The judgment in ***D & H India Ltd. (supra)*** is not applicable as there is now clarity and no doubt over the legal position with respect to maintainability of an appeal under Section 13(1A) of the CCA. Nothing needs to be expounded more. Contrarily, the case of the respondent expounded with respect to the non-maintainability of the present appeal is squarely covered by

¹⁶ 2007 SCC OnLine Del 951

the settled position of law laid down in *HPL(India) Limited and Ors. (supra)*, *Kandla Export Corporation (supra)*, *Odean Builders (P) Ltd. (supra)* and lastly *Bhushan Oil and Fats Pvt. Ltd. (supra)*.

16. Axiomatically, the aforesaid leaves no scope of interference by this Court in the impugned order by way of the present appeal as doing so would tantamount to re-writing the law against the letter and spirit of the Statute. It is thus sufficient for this Court to hold that the present appeal is neither maintainable in law and/ or facts. Accordingly, the present appeal alongwith the applications, if any, is dismissed leaving the parties to bear their own costs.

SAURABH BANERJEE, J.

MANMOHAN, J.

APRIL 10, 2023

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