



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

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Date of decision: 6th December, 2023

(85) + FAO (COMM) 217/2023 & CM APPL. 54519/2023

SUSHIL KUMAR

..... Appellant

Through: Mr. Vijay Kinger, Mr. Ashwani
Gehlot and Ms. Roopa Nagpal, Advs.

versus

M/S BIG FISH VENTURES RESTAURANT PVT.LTD
AND ORS.

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

V. KAMESWAR RAO, J. (ORAL)

1. This appeal has been preferred by the appellant/plaintiff ('*appellant*', *hereinafter*) challenging the order dated August 07, 2023 passed by the District Judge, Commercial Court-03, Patiala House Courts, New Delhi ('*Commercial Court*', *hereinafter*) in CS (COMM) NO. 261/2022, whereby the Commercial Court has dismissed two applications filed by the appellant under Order VIII Rule 1 CPC – one seeking condonation of delay in filing replication to the written statement filed by the respondent/defendant ('*respondent*', *hereinafter*)



in the main suit, and the other seeking condonation of delay in filing written statement to the counter-claim filed by the respondent.

2. The suit was filed by the appellant for recovery of amount of ₹17,70,000/- along with interest, damages, *mesne* profits and *pendente lite* interest from the respondent. The first application was filed by the appellant seeking condonation of delay for a period of 27/28 days in filing replication to the written statement filed by the respondent in the main suit. It is observed in the impugned order that though the application had sought condonation of delay of around 27/28 days, the replication has been filed with a delay of around 43/45 days. The Commercial Court while holding that it is trite law that replication has to be filed within a period of 30 days from the date of filing of the written statement, condonable up to a maximum period of 15 days and not thereafter, noted that the written statement in the suit was filed on September 22, 2022 and the replication was filed only on November 21, 2022, which is way beyond the total mandatory period of 45 days as prescribed in law. Further, it was also observed from records that the application was not accompanied by an affidavit, a proper statement of truth and the affidavit of admission-denial of documents of the respondent. Accordingly, the application was dismissed and replication was not taken on record.

3. Insofar as the second application seeking condonation of delay in filing written statement to the counter-claim filed by the respondent is concerned, the Commercial Court noted that though the written statement was filed within the mandatory period of 120 days, it was not accompanied by the mandatory statement of truth and the affidavit of



admission-denial of documents filed by the counter-claimant/respondent. Though the learned counsel for the appellant before the Commercial Court had sought time to rectify the said defects, the Court held that the request cannot be acceded to for the reason that the period of 120 days from the date of filing of the counter-claim had already expired. Accordingly, the application was disposed off stating that the Court does not deem it fit to take on record the written statement to the counter-claim. Impugning the above, appellant has preferred this present appeal.

4. During the course of hearing, this Court had raised an issue with regard to the maintainability of the present appeal, inasmuch as the same does not arise from the orders specifically enumerated under Order XLIII of the CPC, for it to be appealable to this Court under Section 13 of the Commercial Courts Act, 2015.

5. Having heard the learned counsel for the appellant, the primary issue which arises is the maintainability of the present appeal. Though the learned counsel for the appellant had attempted to satisfy this Court that the appeal is maintainable, we note that the law with regard to the same is no more *res integra* in view of the judgment of the Supreme Court in the case of **Kandla Export Corporation and Anr. v. OCI Corporation and Anr., 2018 14 SCC 715**, wherein it was held as under:

“14. The proviso goes on to state that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order 43 of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration Act. It will at once be noticed that orders that are not specifically enumerated under Order 43 CPC would, therefore, not be appealable, and



appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court.”

6. We find that the above decision in ***Kandla Export Corporation (supra)*** has been followed by a co-ordinate bench of this Court in ***Prime Hi-Tech Engineering Ltd. v. Sahara Forage ET BTP Sarl Limited Liability Company Pvt. Ltd., FAO (COMM) 67/2023*** decided on July 28, 2023.

7. Suffice it to state, it is clear that since orders passed under Order VIII Rule 1 CPC do not find mention amongst those specifically enumerated in Order XLIII Rule 1, no appeal thereto shall lay before this Court.

8. Though the learned counsel for the appellant had relied upon the judgment of the Supreme Court in the case of ***N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd., 2021 (1) SCALE 475*** in support of his argument that the present appeal is maintainable, we are of the view that the reliance is misplaced as the issue in that case was with regard to the maintainability of a Writ Petition filed challenging the order passed by a District Judge in a commercial dispute, refusing to refer the parties to arbitration. In that context, the Supreme Court had held that the writ petition shall not be maintainable, as the order refusing reference to arbitration was appealable under Section 37 (1) (a) of the Arbitration and Conciliation Act, 1995, and the appeal would lay before the Commercial Appellate Division of the High Court. The judgment has no applicability to the present case.



9. In view of the foregoing discussion and the judgment of the Supreme Court in *Kandla Export Corporation (supra)*, we are satisfied that there is no provision of appeal for the impugned order of the Commercial Court under Order XLIII Rule 1 CPC r/w Section 13 of the Commercial Courts Act, and as such, the present appeal is not maintainable. The same is dismissed, along with the pending application. No costs.

V. KAMESWAR RAO, J

ANOOP KUMAR MENDIRATTA, J

DECEMBER 06, 2023/jg