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

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Date of Decision: 23.01.2023

+ **EFA(OS) (COMM) 15/2018**

H P COTTON TEXTILE MILLS LTD Appellant

Through: Ms Shantha Devi Raman, Mr
Arihant Jain and Mr Rishabh
Kapoor, Advocates.

Versus

ORIENTAL INSURANCE COMPANY
LIMITED

..... Respondent

Through: Mr Udyan Srivastava,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant has filed the present intra-court appeal impugning an order dated 31.08.2018 passed by the learned Single Judge, disposing of the appellant's petition for enforcement of an arbitral award dated 19.10.2016. Admittedly, the said order has been passed under Section 36 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**').

2. The learned counsel for the respondent has raised a preliminary objection regarding maintainability of the present appeal. He contends that the order impugned in this appeal is not appealable. Thus, the principal question to be addressed at this stage is whether the present

appeal is maintainable under Section 13 of the Commercial Courts Act, 2015 (hereafter ‘the **Commercial Courts Act**’)

3. In terms of Section 36 of the A&C Act, an arbitral award is required to be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (hereafter ‘**CPC**’) in the same manner as if it were a decree of the Court.

4. Section 13 of the Commercial Courts Act provides for appeals from decrees of Commercial Courts and Commercial Divisions. In terms of Sub-section (1A) of Section 13 of the Commercial Courts Act, an appeal would lie to the Commercial Appellate Division against a judgment or order of the Commercial Court at the level of the District Judge, or as the case may be, of a Commercial Division of the High Court. However, proviso to Sub-section (1A) to Section 13 of the Commercial Courts Act expressly provides that an appeal shall lie from such orders passed by the Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the CPC as amended by the Commercial Courts Act and Section 37 of the A&C Act. Further, sub-section (2) of Section 13 of the Commercial Courts Act expressly proscribes an appeal against any order or decree of a Commercial Division or a Commercial Court other than in accordance with the provisions of the Commercial Courts Act. For ready reference, Section 13 of the Commercial Courts Act is set out below:

“13. Appeals from decrees of Commercial Courts and Commercial Divisions.—(1) [Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial

Appellate Court within a period of sixty days from the date of judgment or order.

(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.”

5. Undisputedly, the order passed by the learned Single Judge is not appealable under Section 37 of the A&C Act. It is also not one of the orders enumerated under Order XLIII of the CPC, from which an appeal lies. Thus, on plain reading of the proviso to Section 13(1A) of the Commercial Courts Act, the present appeal would not be maintainable.

6. The Supreme Court in ***Kandla Export Corporation and Ors. v. OCI Corporation and Ors.: (2018) 14 SCC 715*** had authoritatively explained that the scope of appeal under Section 13(1A) of the Commercial Courts Act is controlled by the proviso to the said Sub-section. The relevant extract of the said decision is set out below:

“13. Section 13(1) of the Commercial Courts Act, with which we are immediately concerned in these appeals, is in two parts. The main provision is, as has been correctly submitted by Shri Giri, a provision which provides for appeals from judgments, orders and decrees of the Commercial Division of the High Court. To this main provision, an exception is carved out by the proviso. The primary purpose of a proviso is to qualify the generality of the main part by providing an exception, which has been set out with great felicity in CIT v. Indo-Mercantile Bank Ltd. [CIT v. Indo-Mercantile Bank Ltd., 1959 Supp (2) SCR 256 : AIR 1959 SC 713] , thus : (SCR pp. 266-67 : AIR pp. 717-18, paras 9-10)

“9. ... The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment.

‘8. ... it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso.’

Therefore, it is to be construed harmoniously with the main enactment. (Per Das, C.J. in Abdul Jabar Butt v. State of J&K [Abdul Jabar Butt v. State of J&K, 1957 SCR 51 : AIR 1957 SC 281 : 1957 Cri LJ 404] , SCR p. 59 : AIR p. 284, para 8). Bhagwati, J., in Ram Narain Sons Ltd. v. CST [Ram Narain Sons Ltd. v. CST, (1955) 2 SCR 483 : AIR 1955 SC 765] , said : (SCR p. 493 : AIR p. 769, para 10)

‘10. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.’

10. Lord Macmillan in *Madras & Southern Mahratta Railway Co. Ltd. v. Bezwada Municipality* [Madras & Southern Mahratta Railway Co. Ltd. v. Bezwada Municipality, 1944 SCC OnLine PC 7 : (1943-44) 71 IA 113] laid down the sphere of a proviso as follows : (IA p. 122 : SCC OnLine PC)

‘... The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude, from it by implication what clearly falls within its express terms.’

The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary effect. (Vide also *Toronto Corp. v. Attorney-General* of

Canada [Toronto Corpn. v. Attorney-General of Canada, 1946 AC 32 (PC)] , AC p. 37.)”

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.

15. Thus, an order which refers parties to arbitration under Section 8, not being appealable under Section 37(1)(a), would not be appealable under Section 13(1) of the Commercial Courts Act. Similarly, an appeal rejecting a plea referred to in sub-sections (2) and (3) of Section 16 of the Arbitration Act would equally not be appealable under Section 37(2)(a) and, therefore, under Section 13(1) of the Commercial Courts Act.”

7. The learned counsel appearing for the appellant contended that the proviso to Section 13(1A) of the Commercial Courts Act does not restrict the main provision and the same must be read in an expansive manner. He further referred to the decision of a Co-ordinate Bench of this Court in ***D&H India Ltd. v. Superon Schweisstechnik India Ltd.: FAO(OS)(COMM) 237/2019, decided on 16.03.2020***, and drew the attention of this Court to Paragraph nos.44 and 45 of the said decision. In particular, she referred to the following observations:

44. We see no reason to exclude orders passed by the learned Single Judge, exercising commercial jurisdiction, *which have not been passed under any of the provisions of the CPC*, from the expansive sweep of Section 13(1A) of

the Commercial Courts Act, within which such orders would undoubtedly stand covered.

45. XXXX XXXX XXXX

(iii) The proviso to Section 13 (1A) cannot, in our view, be read as *limiting* the right to appeal, conferred by Section 13 (1A). The said proviso merely states that, from orders passed by the Commercial Division of the High Court, as are specifically enumerated under Order XLIII of the CPC, an appeal would lie under Section 13 (1A). In our view, *the proviso cannot be read as meaning that no appeal would lie in any other case, especially where the order under appeal has not been passed under the CPC at all, but under Rule 5 in Chapter II of the 2018 Original Side Rules.*”

8. The observations, to the effect that Section 13(1A) of the Commercial Courts Act has to be read in an expansive manner and the proviso to Section 13(1A) cannot be read as limiting the right to appeal conferred under Section 13(1A), are contrary to the decision of the Supreme Court in ***Kandla Export Corporation and Ors. v. OCI Corporation and Ors.*** (*supra*). It also apparent that the said decision of the Supreme Court was not brought to the notice of this Court in ***D&H India Ltd. v. Superon Schweisstechnik India Ltd.*** (*supra*).

9. In view of the above, we find merit in the contention that the present appeal is not maintainable. It is, accordingly, rejected.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 23, 2023

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