

Equivalent Citation: 2018GLH(1)221, (2018)2GLR1690

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

First Appeal No. 3096 of 2017, Civil Application No. 11626 of 2017 in First Appeal No. 3096 of 2017, First Appeal No. 3097 of 2017 to First Appeal No. 3098 of 2017 and Civil Application No. 11629 of 2017 in First Appeal No. 3097 of 2017 to Civil Application No. 11630 of 2017 in First Appeal No. 3098 of 2017

Decided On: 28.09.2017

Appellants: **Kandla Export Corporation and Ors.**

Vs.

Respondent: **OCI Corporation and Ors.**

Hon'ble Judges/Coram:

M.R. Shah and B.N. Karia, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: S.N. Soparkar, Senior Advocate, Archit P. Jani and Salil M. Shah, Advocate

For Respondents/Defendant: Mihir Thakore, Senior Advocate, Nirag Pathak, Shwiti Sabhiwal, Grima Ahuja and Shalin Jani for Shardul Amarchand Mangaldas and Co.

Subject: Commercial

Acts/Rules/Orders:

Arbitration And Conciliation Act, 1996 - Section 37, Arbitration And Conciliation Act, 1996 - Section 45, Arbitration And Conciliation Act, 1996 - Section 47, Arbitration And Conciliation Act, 1996 - Section 48, Arbitration And Conciliation Act, 1996 - Section 49, Arbitration And Conciliation Act, 1996 - Section 50, Arbitration And Conciliation Act, 1996 - Section 50(1)(a), Arbitration And Conciliation Act, 1996 - Section 50(1)(b); Code of Civil Procedure, 1908 (CPC) - Order XLIII Rule 43; Code of Civil Procedure, 1908 (CPC) - Order XLIII Rule XLIII; Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 13, Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 13(1), Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 13(2), Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 15, Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 15(5), Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 2(2), Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 2(9), Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 21, Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 - Section 5; Foreign Awards (recognition And Enforcement) Act, 1961 [repealed] - Section 6

Cases Referred:

Fuerst Day Lawson Ltd. and Ors. etc. etc. vs. Jindal Exports Ltd. and Ors. etc. etc. [MANU/SC/0761/2011](#); Vijay Sekhri and Anr vs. Tinna Oils and Chemicals and [MANU/DE/2915/2010](#); Arun Dev Upadhyaya vs. Integrated Sales Service Ltd. and Ors. [MANU/SC/1114/2016](#); Hubtown Limited vs. IDBI Trusteeship Service Limited [MANU/MH/2182/2016](#); Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement and Anr. [MANU/SC/0249/2010](#); The Vanguard Fire and General Insurance Co. Ltd., Madras vs. Fraser and Ross and Anr. [MANU/SC/0196/1960](#); Harmanprit Singh Sidhu vs. Arcadia Shares and Stock Brokers Pvt. Ltd. [MANU/DE/2694/2016](#)

JUDGMENT

M.R. Shah, J.

1. As common question of law and facts arise in this group of First Appeals and as such arise out of the impugned common order passed by the learned Single Judge, passed as Commercial Division of the High Court constituted under the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court Act, 2015 (hereinafter referred to as "Commercial Courts Act"), all these First Appeals are decided and disposed of together by this common judgment. The facts leading to the present First Appeals in nut-shell are as under:-

[2.1] That all these appellants as such are the original judgment debtors against whom concerned foreign awards are passed in the International Arbitration, by the concerned Arbitrators. Therefore, as such the parties are governed by Part II of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act"). That thereafter the original judgment creditors in whose favour the foreign awards are passed in International Arbitration have filed the execution petitions under Section 48 of the Arbitration Act. At this stage it is required to be noted that initially the original judgment creditors filed the execution petitions before the concerned District Court, Gandhidham. However thereafter the original judgment creditors approached this Court under Section 15(5) of the Commercial Courts Act for seeking clarification and appropriate direction to transfer Special Execution Petition No. 167/2015 and other execution petitions pending before the District Court, Gandhidham, Kutch to the High Court or to the appropriate Commercial Courts, Commercial Divisions. The Division Bench of this Court vide judgment and order reported in 2077 (1) GLH 383 observed and held as under:-

"11.00. The sum and substance of the above discussion would be,

(1) Where the subject matter of an Arbitration is a commercial dispute of a specified value and if such arbitration is international commercial arbitration, all the applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 shall be heard, decided and disposed of by the Commercial Division where such commercial Division has been constituted in the High Court i.e. in the present case High Court of Gujarat.

(2) Where the subject matter of an arbitration is a commercial dispute but not of a specified value and if such arbitration is international commercial arbitration, considering the provisions of Arbitration and Conciliation (Amendment) Act, 2015 the same shall be heard, decided and disposed of by the concerned High Court

(3) Where the subject matter of an arbitration is a commercial dispute of a specified value and if such arbitration is other than international arbitration, all the applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 shall be filed in and heard, decided and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such commercial Court has been constituted.

Considering Section [15](#) of the Commercial Courts Act, all the applications/appeals in question under the Arbitration and Conciliation Act, 1996, therefore are required to be transferred to the concerned Commercial Division of the High Court of Gujarat or before the Gujarat High Court or before the concerned commercial Court and as observed hereinabove and as the case may be.

12.0. In view of the above and for the reasons stated above, all these applications stand disposed of and it is held that the concerned Executing Court before whom the respective Execution Petitions are pending shall not have any jurisdiction to execute foreign awards for which the Execution Petitions are filed. Consequently, the concerned Commercial Court to return the respective Execution Petitions to the concerned original applicant to present it before appropriate Court considering the observations made in para 11 of the present judgment and order."

It is reported that subsequently the said decision has been confirmed by the Hon'ble Supreme Court. That pursuant to the aforesaid judgment, the respective special execution petitions came to be transferred to this Court and as the claim involved in the respective execution petitions is above Rs. 1 Crore, the same have been transferred to the Commercial Division of the High Court, constituted under the provisions of the Commercial Courts Act.

2.2 That the learned Single Judge acting as a Commercial Division of the High Court heard the learned Counsel appearing on behalf of the respective parties on the issue of applicability of Sections [47](#), [48](#) and [49](#) of the Arbitration Act. That by impugned common order the learned Single Judge has held that the respective foreign awards in International Arbitrations which are sought to be executed are enforceable under Part II of the Arbitration Act and the respective foreign awards shall be deemed to be a decree.

[2.3] Feeling aggrieved and dissatisfied with the impugned common order passed by the learned Single Judge as Commercial Division of the High Court in observing and holding that the respective foreign awards are enforceable under Part II of the Arbitration Act and consequently the concerned foreign awards shall be deemed to be decree of the Court, the original opponents - original judgment debtors against whom the foreign awards are passed have preferred the present First Appeals purported to be appeals under Section [13](#) of the Commercial Courts Act.

2. Shri S.N. Soparkar, learned Counsel has appeared on behalf of the respective appellants herein - original opponents - original judgment debtors and Shri Mihir Thakore, learned Senior Advocate has appeared on behalf of the respondents herein - original applicants - original judgment creditors in whose favour the foreign awards are passed.

3. Preliminary issue/objection is raised by Shri Thakore, learned Counsel appearing on behalf of the original applicants on the maintainability of the present first appeals under Section [13](#) of the Commercial Courts Act, before this Court. It is vehemently submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicants - original Judgment Creditors that in view of the specific bar of appeal against the order passed by the Executing Court in holding the concerned foreign awards enforceable, as per Section [50](#) of the Arbitration Act, the present First Appeals shall not be maintainable.

3.1 It is vehemently submitted by Shri Thakore, learned Counsel appearing on behalf of the original Judgment Creditors that the present First Appeals are preferred under Section [13](#) of the Commercial Courts Act. It is submitted that Section [13](#) of the Commercial Courts Act provides for an appeal from a Commercial Division of the High Court to the Commercial Appellate Division of the High Court. It is submitted that however proviso to Section [13\(1\)](#) of the Commercial Courts Act provides that an appeal shall lie from only those orders that find specific mention in Order [XLIII](#) of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") and Section [37](#) of the Arbitration Act. It is submitted that therefore an in light of the proviso to Section [13\(1\)](#) of the Commercial Courts Act, only those orders mentioned in Order [XLIII](#) of Code of Civil Procedure, 1908 and Section [37](#) of Arbitration Act would be appealable to the Commercial Appellate Division.

3.2 It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original Judgment Creditors that the term "decision" used in Section [13](#) of the Commercial Courts Act is not defined therein and is also not defined in CPC. It is submitted that Section [2\(2\)](#) of the Commercial Courts Act provides that, the words and expressions, which are used and not defined in the Commercial Courts Act, shall have the same

meanings, as defined under the CPC and Evidence Act. It is submitted that the CPC provides for a definition of the term "Judgment" under Section [2\(9\)](#) to mean the statement given by the Judge on the grounds of a decree or order. It is submitted that in context of Section [13](#) of the Commercial Courts Act, the terms "Judgment" would have to be interpreted to mean Judgment other than in support of an order i.e. in support of decree. It is submitted that an order under both Sections [37](#) and [50](#) of the Arbitration Act are treated as orders by the Arbitration Act itself and cannot be treated as Judgment for the purpose of Section [13](#) of the Commercial Courts Act. It is submitted that since, an order under Section [48](#) of the Arbitration Act is not covered in the proviso to Section [13](#) of the Commercial Courts Act, no appeal would lie therefrom.

3.3 It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original judgment creditors that even otherwise an appeal filed under Section [13](#) of the Commercial Courts Act cannot be read de hors Section [50](#) of the Arbitration Act. It is submitted that Section [50](#) of the Arbitration Act, which provides for which orders are appealable, does not provide for an appeal against an order enforcing the foreign awards. It is submitted that the appellants have filed the present appeals under Section [13](#) of the Commercial Courts Act, which cannot be read in isolation and must be read harmoniously with the provisions of the Arbitration Act. It is submitted that therefore in view of the specific bar under Section [50](#) of the Arbitration Act, which only provides for an appeal against the order refusing to enforce a foreign award and it does not provide for an appeal against enforcing the foreign award, the First Appeal, may be under Section [13](#) of the Commercial Courts Act shall not be maintainable against the order enforcing the foreign award.

3.4 It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original Judgment Creditors that as such the Arbitration Act is a complete Code in itself which provides substantive as well as procedural law regarding Arbitrations. It is submitted that therefore and as a natural corollary, those acts which do not fall under the purview of the Arbitration Act are not permissible to be done. It is further submitted that where Special Acts sets out a self-contained code, applicability of general law procedure would be impliedly excluded. Relying upon the decision of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited v. Jindal Exports Limited reported in [MANU/SC/0761/2011](#) : (2011) 8 SCC 333 (Paras 89, 90 and 91), it is submitted that in the aforesaid decision the Hon'ble Supreme Court has specifically observed and held that the Arbitration Act is a self-contained and exhaustive Code, thereby excluding applicability of any general law. It is submitted that in the aforesaid decision the Hon'ble Supreme Court concluded that no Letters Patent Appeal would lie against the order which would not be appealable under Section [50](#) of the Arbitration Act, as the said Act is a complete Code.

It is submitted that a similar view has been taken by the Delhi High Court in the case of Vijay Sekhri and Another v. Tinna Oils and Chemicals and Others reported in [MANU/DE/2915/2010](#) : (2010) 174 DLT 462. It is submitted that in the aforesaid decision the Delhi High Court had an occasion to consider the scope of appeals provided under Section [37](#) of the Arbitration Act and to consider which orders are appealable regarding domestic Arbitrations.

3.5 It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original Judgment Creditors that the scope for appeal under Part II of the Arbitration Act is restricted by Section [50](#) of the Arbitration Act. It is submitted that Section [50](#) provides for those orders which can be appealed in the context of an International Arbitration under Part II of the Arbitration Act. It is submitted that as per the said provision, an appeal shall lie from the orders refusing to either referring the parties to Arbitration under Section [45](#) or refusing to enforce a foreign award under Section [48](#) of the Arbitration Act. It is submitted that in the case of Fuerst Day Law son Limited (Supra), the Hon'ble Supreme Court had an occasion to consider the comparison between the provisions of Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as "Foreign Awards Act") and the Arbitration Act and thereafter the Hon'ble Supreme Court had observed that the scheme of Sections [49](#) and [50](#) of the Arbitration Act is such that it exclude an opportunity to appeal even on limited grounds which were earlier provided for under Section [6](#) of the Foreign Awards Act. It is submitted that in the aforesaid decision the Hon'ble Supreme Court has further observed and held that it was for this reason that Section [50\(1\)\(b\)](#) provides for an appeal only against the order refusing to enforce a foreign award under Section [48](#). It is submitted that thereafter the Hon'ble Supreme Court has concluded that Letters Patent Appeal shall not be maintainable against the order which is not appealable under Section [50](#) of the Arbitration Act.

3.6 It is submitted that the Delhi High Court in the case of Vijay Sekhri and Anr. (Supra) has also observed that Section [50](#) of the Arbitration Act creates a bar against Appeals from any orders which are not mentioned under the said provision. It is submitted that therefore Appeal can only be made against an order refusing to enforce an award under Section [48](#) of the Arbitration Act and not against other orders.

It is submitted that Section [50](#) of the Arbitration Act specifically restricts the appealable order to the orders of a Court refusing to refer the parties to arbitration [Section [50\(1\)\(a\)](#)] and refusing to enforce a foreign award [Section [50\(1\)\(b\)](#)]. It is submitted that therefore and accordingly the Arbitration Act being a complete Code in itself, legislature intended on restricting the right of appeal to the limited order expressly provided for under Section [50](#) thereof.

3.7 It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original judgment creditors that Section [5](#) of the Commercial Courts Act, establishes a new class of Courts or a Forum for the adjudication of commercial disputes. It is submitted that Section [13](#) of the Commercial Courts Act provides for an appeal from the Commercial Court or Commercial Division to the Commercial Appellate Division. It is submitted that however, an appeal emanating from the Arbitration Act could only be valid in so far as it is in consonance with the express provisions in the Arbitration Act.

3.8 It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original Judgment Creditors that Section [13](#) of the Commercial Courts Act and Section [50](#) of the Arbitration Act cannot be read separately and have to be read harmoniously. Relying upon the decision of the Hon'ble Supreme Court in the case of Arun Dev Upadhyay v. Integrated Sales Services Ltd. and Anr. reported in [MANU/SC/1114/2016](#) : (2016) 9 SCC 524, it is submitted by Shri Thakore, learned Counsel appearing on behalf of the original Judgment Creditors that in the aforesaid decision the Hon'ble Supreme Court has observed that an Appeal under Section [50](#) of the Arbitration Act will lie from an order refusing to enforce a foreign award as envisaged under Section [48](#) of the Arbitration Act. It is submitted that in the aforesaid decision it is further observed by the Hon'ble Supreme Court that even after the commencement of the Commercial Courts Act, an appeal under Section [13](#) of the Commercial Courts Act can be preferred from the order if it is provided for in Section [50](#) of the Arbitration Act. It is submitted

that therefore the provisions of the Commercial Courts Act are required to be read harmoniously with the provisions of the Arbitration Act in order to give the fullest effect to both the legislations.

3.9 It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original Judgment Creditors that in the present case the execution petitions would be before the Commercial Division of the High Court only because of the fact that the claim would be above Rs. 1 Crore. It is submitted that if the claim would not have been above Rs. 1 Crore, in that case the execution petitions would not have been before the Commercial Division of the High Court and therefore Appeal before the Commercial Appellate Division of the High Court under Section 13 of the Commercial Courts Act would not have arisen and therefore, considering the bar contained under Section 50 of the Arbitration Act, the Appeal against the order of enforcing a foreign award would not be maintainable.

Making above submissions and relying upon above decisions it is requested to dismiss the present Appeals by holding that the present Appeals under Section 13 of the Commercial Courts Act against the impugned orders passed by the learned Commercial Division of the High Court and against the impugned orders holding that the concerned foreign awards shall be enforceable, shall not be maintainable.

4. Shri S.N. Soparkar, learned Counsel appearing on behalf of the appellants - original Opponents has vehemently submitted that against the impugned orders passed by the learned Commercial Division of the High Court holding that the concerned foreign awards are enforceable under Section 49 of the Arbitration Act Appeal would be maintainable before the Commercial Appellate Division of the High Court under Section 13 of the Commercial Courts Act.

4.1 It is submitted by Shri Soparkar, learned Counsel appearing on behalf of the original Opponents that Section 13(1) of the Commercial Courts Act provides a right to file an appeal against any decision, judgment and order passed by the Commercial Division of the High Court. It is submitted that proviso to Section 13(1) of the Commercial Courts Act shall not be applicable to the present case. It is submitted that the proviso to Section 13(1) of the Commercial Courts Act is only applicable to an "order", and since the impugned decision/order/judgment passed by the learned Commercial Division of the High Court is not merely an "order", the said proviso shall not be applicable.

4.2 It is further submitted by Shri Soparkar, learned Counsel appearing on behalf of the original Opponents debtors that the impugned decision is a "judgment" and therefore, the appellants have a right to file the present appeal under Section 13(1) of the Commercial Courts Act, challenging the impugned decision dated 08.08.2017. It is submitted that the learned Commercial Court has adjudicated the issue of enforceability of the foreign award on the merits of the matter, by providing reasons thereto. It is submitted that process of reasoning by which the Commercial Division Court ultimately came to the conclusion that the foreign award is deemed to be a decree, is clearly recorded in the impugned decision. It is submitted that therefore the impugned decision dated 08.08.2017 is a decision/judgment and cannot be said to be merely an "order" of the learned Commercial Division Court.

In support of his above submissions, learned Counsel appearing on behalf of the appellants has relied upon the decision of the Privy Council in *Rajah Tasadduq Rasul Khan v. Manikchand* reported in 30 Indian Appeal PC 35 wherein term "decision", "decree", "judgment" and "order" have been defined and explained.

Learned Counsel appearing on behalf of the appellants has also heavily relied upon the decision of the Bombay High Court in the case of *Hubtown Ltd. v. IDBI Trusteeship Service Ltd.* reported in [MANU/MH/2182/2016](#). It is submitted that the Bombay High Court in the aforesaid decision has held that an appeal under Section 13 of the Commercial Courts Act will be maintainable if the order has even a tinge of finality to it. It is submitted that in the present case by impugned order/decision the issue of enforceability of foreign decree has been adjudicated and therefore, has a sense of finality to it. It is submitted that if the said decision is not challenged by the appellants, the appellants would not be able to raise the contention with respect to the enforceability of the foreign award once the same is executed by the Hon'ble Commercial Division Court as a decree of this Court. It is submitted that therefore the appellants will virtually be left remediless. It is submitted that the present appeal under Section 13(1) of the Commercial Courts Act would be maintainable in law.

4.3 It is further submitted by Shri Soparkar, learned Counsel appearing on behalf of the appellants that it would not be open for the respondent to contend that the provisions of the Arbitration Act shall have to be read alongwith Section 13 of the Commercial Courts Act, for the purposes of determining the maintainability of the appeal filed under Section 13 of the Commercial Courts Act. It is submitted that as the present appeals are filed under Section 13 of the Commercial Courts Act, challenging the decision passed by the learned Single Judge of the Commercial Division Court, the maintainability of the present appeal has to be determined in terms of the provisions of the Commercial Courts Act only. It is submitted that right to file an appeal being a creature of the statute, once a statute provides a right to file an appeal, the said right cannot be curtailed or restricted by statutory interpretation of the same or by reading provisions of another Act. It is submitted that therefore it is not open for the respondent No. 1 to contend that since Section 50 of the Arbitration Act does not provide the appellants with a right to file an appeal against a decision holding the foreign award to be enforceable, the present appeal filed under Section 13 of the Commercial Courts Act is not maintainable in law.

4.4 It is further submitted by Shri Soparkar, learned Counsel appearing on behalf of the appellants that even it would not be open for the respondent No. 1 to contend that if Section 13(1) of the Commercial Courts Act is not interpreted in harmonious manner alongwith Section 50 of the Arbitration Act, the said Section 50 would become redundant. It is submitted that Section 13(1) cannot be interpreted in any manner which would restrict or curtail the right to file an appeal under Section 13 of the Commercial Courts Act. In support of his above submissions, Shri Soparkar, learned Counsel appearing on behalf of the appellants has heavily relied upon the decision of the Hon'ble Supreme Court in the case of *Rajkumar Shivhare v. Assistant Director, Directorate of Enforcement & Ors.* reported in [MANU/SC/0249/2010](#) : (2010)4 SCC 772 wherein according to Shri Soparkar, learned Counsel appearing on behalf of the appellants, it has been held that the right to appeal is a creature of a statute and its ambit and width are to be determined from the statute itself under which the appeal has been filed, and that no statutory interpretation is warranted either to widen or to restrict/curtail the same. It is submitted that therefore and accordingly if Section 13 of the Commercial Courts Act provides the appellants with the right to file an appeal before the Commercial Appellate Division of the High Court against the impugned decision

of the Commercial Division of the High Court, the same cannot be taken away or restricted, by way of statutory interpretation of Section 13 of the Commercial Courts Act.

4.5 It is further submitted by Shri Soparkar, learned Counsel appearing on behalf of the appellants that Section 21 of the Commercial Courts Act provides that the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. It is submitted that therefore if Section 50 of the Arbitration Act is considered to be contrary to Section 13 of the Commercial Courts Act, the later provision would prevail in view of Section 21 of the Commercial Courts Act. It is submitted that even the Commercial Courts Act being a latter enactment as compared to the Arbitration Act; the same would prevail over the Arbitration Act.

4.6 It is submitted that the Commercial Courts Act is also a special enactment and it has created the forums of the Commercial Division and Commercial Appellate Division, before which the appeal would lie. It is submitted that therefore when Section 13 of the Commercial Courts Act clearly provides the appellants with a right to file an appeal, it would not be open for the respondent No. 1 to contend otherwise by drawing analogies to any hypothetical situations or by relying upon the provisions of the Arbitration Act.

4.7 Relying upon the decision of the Hon'ble Supreme Court in the case of Vanguard Fire and General Insurance Ltd. v. Fraser and Ross and Anr. reported in [MANU/SC/0196/1960](#) : AIR 1960 SC 971, it is submitted that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different Sections of the Act depending upon the subject or the context.

4.8 It is further submitted that therefore considering Section 13 of the Commercial Courts Act, the Commercial Courts Act which provides for an appeal to the Commercial Appellate Division of the High Court against the impugned decisions of the Commercial Division of the High Court, present appeals would be maintainable.

Making above submissions it is requested to overrule the preliminary objection of maintainability of the present appeals, raised by the respondents herein and to decide the present appeals on merits.

5. Heard learned Counsel appearing on behalf of respective parties at length. The short question which is posed for consideration of this Court is whether appeal, against the impugned order passed by the learned Commercial Division of the High Court constituted under the provisions of the Commercial Courts Act passed under Section 49 of the Arbitration Act holding that the foreign award which is sought to be enforced is enforceable under Part II of the Arbitration Act, shall be maintainable or not?

5.1 It is the case on behalf of the appellants herein - original Opponents that as the impugned order has been passed by the learned Commercial Division of the High Court under the provisions of the Commercial Courts Act, appeal before this Court - Commercial Appellate Division of the High Court under Section 13 of the Commercial Courts Act shall be maintainable. It is also the case on behalf of the appellants - original Opponents that considering sub-Section (1) of Section 13 of the Commercial Courts Act, appeal to the Commercial Appellate Division of the High Court shall be maintainable against any decision of the Commercial Court/Commercial Division of the High Court within 60 days from the date of judgment or order. Therefore, it is the case on behalf of the appellants that as by impugned order/decision, final decision has been taken with respect to enforceability of the foreign award, the rights of the parties are determined and therefore, the impugned order can be said to be "judgment" and therefore, considering sub-Section (1) of Section 13 of the Commercial Courts Act, the appeal shall be maintainable before the Commercial Appellate Division. It is also the case on behalf of the appellants that proviso to sub-Section (1) of Section 13 shall be applicable only with respect to the "orders" and not the "decision" or the "judgment". On the other hand it is the case on behalf of the respondent that as per Section 50 of the Arbitration Act, appeal shall be maintainable only against the order refusing to refer the parties to arbitration under Section 45 and/or enforce a foreign award under Section 48 and therefore, against the impugned order holding that the foreign award which is sought to be executed is enforceable, no appeal shall lie.

6. Having heard learned Counsel appearing on behalf of the respective parties and having given our conscious thought to the issue involved in the present appeals, our conclusions are as under:-

6.1 Now, so far as the submission on behalf of the appellants that proviso to sub-Section (1) of Section 13 of the Commercial Courts Act shall be applicable to the facts of the case on hand is concerned, the aforesaid has no substance. Proviso to sub-Section (1) of Section 13 of the Commercial Courts Act is required to be read alongwith sub-Section (1) of Section 13 as proviso to sub-Section (1) of Section 13 is part of Section 13(1) of the Commercial Courts Act.

6.2 Now, so far as the submission on behalf of the appellants that the Commercial Courts Act being a special Act and is later in point of time and even otherwise considering Section 21 of the Commercial Courts Act, the Commercial Courts Act would have overriding effect over any other law for the time being in force including the Arbitration Act and therefore, the bar contained under Section 50 of the Arbitration Act shall not be applicable and Section 13 of the Commercial Courts Act shall have an overriding effect over Section 50 of the Arbitration Act is concerned, the aforesaid seems to be attractive but has no substance. First of all it is required to be noted that Commercial Courts Act provides a special Forum for speedy disposal of the commercial disputes. By no stretch of imagination it can be said to be conferring an additional right of appeal which otherwise is not provided under the substantive Act i.e. Arbitration Act. Only because the claim is above Rs. 1 Crore and the dispute is commercial dispute, the matter has gone to the Court under the Commercial Courts Act. If the claim would have been less than Rs. 1 Crore in that case and even as conceded by the learned Counsel appearing on behalf of the appellants, Section 50 of the Arbitration Act shall be applicable. There cannot be two different right of appeal. Merely because the claim is above Rs. 1 Crore and the matter is before the Commercial Court or Commercial Division under the provisions of the Commercial Courts Act, the party who is before the Commercial Court/Division shall not get an additional right of appeal which otherwise is not available under Section 50 of the Arbitration Act.

6.3 As such there is no conflict between the provisions of the Arbitration Act and the provisions of the Commercial Courts Act. Therefore, the provisions of the Arbitration Act and the provisions of the Commercial Courts Act are required to be read harmoniously and so as to see that provision in one Act may not become nugatory and/or otiose.

6.4 As held by the Hon'ble Supreme Court in the case of Furest Day Lawson Limited (Supra), Arbitration Act is self-contained Code on matters pertaining to arbitration. In the aforesaid decision the Hon'ble Supreme Court has further observed that a self-contained Code carries with it a negative import that only such acts as are mentioned therein are permissible to be done and acts or things not mentioned therein are not permissible to be done. It is further observed that where a special Act sets out a self-contained code, applicability of general law procedure would be impliedly excluded. In the aforesaid decision it is further observed and held by the Hon'ble Supreme Court that against the order of Court for enforcement of the award, considering Section 50 of the Arbitration Act, there is complete non-availability of appeal and therefore, even the Letters Patent Appeal against such an order would not be maintainable.

6.5 In the case of Arun Dev Upadhyaya (Supra) the question arose whether the appeal/Letters Patent Appeal before the Division Bench of the High Court against the order passed by the learned Single Judge of the High Court refusing to enforce foreign award under Section 50(1)(b) of the Arbitration Act shall be maintainable or not. To that it is held by the Hon'ble Supreme Court that on a conspectus reading of Section 5 and 13 of the Commercial Courts Act and Section 50 of the Arbitration Act leads to a irresistible conclusion that the Letters Patent Appeal shall be maintainable before the Division Bench in such a case. While holding so that it has to be treated as an appeal under Section 50(1)(b) of the Arbitration Act and has to be adjudicated within said parameters. Therefore, even the Hon'ble Supreme Court read and considered the provisions of the Commercial Courts Act and Arbitration Act harmoniously together and conjointly.

6.6 Identical question came to be considered by the Delhi High Court in the case of Harmanprit Singh Sidhu v. Arcadia Shares & Stock Brokers Pvt. Ltd. reported in [MANU/DE/2694/2016](#) : (2016) 234 DLT 30 (DB). In the aforesaid decision the Delhi High Court has observed and held in paras 8 and 9 as follows:-

"8. Insofar as Section 13 of the Commercial Courts Act is concerned, while it is true that it speaks of appeals from a judgment or order, the proviso to Section 13(1) makes it clear that the appeal would lie from such orders passed by, inter alia, a Commercial Division that are specifically enumerated under Order 43 of the Code of Civil Procedure, 1908 (as amended by the Commercial Courts Act) and Section 37 of the A&C Act. FAO (OS) 136/2016 Page 6 of 12 The use of the word "and in the proviso to? Section 13(1) is only to specify that an appeal would lie against any order passed by, inter alia, a Commercial Division, which finds mention in the list of orders specified in Order 43, CPC and Section 37 of the A&C Act. It is an admitted position that the impugned order having been passed in proceedings arising out of an arbitral award would have to be governed by Section 37 of the A&C Act.

9. On a plain reading of Section 13 of the Commercial Courts Act, it is evident that it does not amplify the scope of appealable orders specified in Section 37 of the A&C Act. It actually reiterates that, in a matter of arbitration, an appeal shall lie only from the orders specified in Section 37 of the A&C Act. In fact, Section 13(2) reinforces this by providing that notwithstanding anything contained in any other law for the time being in force or the 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 the Commercial Courts Act."

Therefore, on conjoint reading of the provisions of the Arbitration Act and the Commercial Courts Act, considering Section 50 of the Arbitration Act, we are of the opinion that the present appeal against the order passed under Section 49 of the Arbitration Act holding the foreign award enforceable shall not be maintainable.

6.7 Now, so far as the submission on behalf of the appellants and reliance placed upon the decision of the Hon'ble Supreme Court in the case of Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and Another reported in [MANU/SC/0249/2010](#) : (2010) 4 SCC 772 that right of appeal is a creature of statute and therefore, when Section 13 of the Commercial Courts Act confers right in favour of the appellants to prefer an appeal against the decision of the Commercial Division, the same cannot be taken away and/or denied and the submission on behalf of the appellants that if against the impugned order appeal is held to be not maintainable, in that case the appellants would be remediless is concerned, it is required to be noted and as observed hereinabove, Commercial Courts Act does not confer any additional right of appeal which otherwise shall not be available under Section 50 of the Arbitration Act. It is required to be noted that as such the proceedings are under the Arbitration Act. As observed hereinabove only a special Forum is provided by enacting Commercial Courts Act for speedy disposal of the commercial disputes and by the special Courts/Forum. At the cost of repetition it is stated that it does not provide any additional right of appeal which otherwise is not available to the appellants under the provisions of the Arbitration Act. Therefore, if otherwise the appeal is not provided against the impugned order considering Section 50 of the Arbitration Act and even as per the catena of decisions the right of appeal is a creature of statute and therefore, if Section 50 of the Arbitration Act does not provide any appeal, the appellants would have no right prefer an appeal which otherwise is not maintainable in view of Section 50 of the Arbitration Act.

6.8 Now, so far as the submission on behalf of the appellants that if against the impugned order/decision the appeal is held to be not maintainable, the appellants would be remediless is concerned, again at the cost of repetition it is observed that right of appeal is creature of statute. If under the statute the appeal is not provided and/or in a given case the appeal is provided subject to certain restrictions, the aggrieved party cannot still contend to have a right of appeal on the ground that if the appeal is not held maintainable the appellants would be remediless. The question is with respect to maintainability of the appeal. The appellants might have any other remedy which may be available under the law, but certainly if under the statute the appeal is not provided, the aggrieved party cannot pray for right of appeal which otherwise under the statute is not provided/available.

6.9 In view of the aforesaid and our above conclusions, we refrain ourselves from considering other issue whether the impugned order can be said to be "judgment" or not or against any order/decision of the Commercial Division, appeal before the Commercial Appellate Division shall be

maintainable or not. Therefore, we do not touch the said aspect as, as observed hereinabove, we are of the opinion that on harmonious and conjoint reading of Section [50](#) of the Arbitration Act and Section [13](#) of the Commercial Courts Act, against the impugned order holding the foreign award enforceable, passed under Section [49](#) of the Arbitration Act, the appeal shall not be maintainable.

In view of the above and for the reasons stated above, the preliminary issue/objection raised on behalf of the respondent -original applicants with respect to maintainability of the present appeals against the impugned order passed by the learned Commercial Division of the High Court holding the foreign award which is sought to be executed as enforceable is hereby sustained and all the First Appeals deserve to be dismissed and are, accordingly, dismissed as not maintainable.

In view of dismissal of main First Appeals, respective Civil Applications also stand dismissed.

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