Pradnya

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL NO. 542 OF 2019
IN
JUDGE'S ORDER NO. 74 OF 2017
IN
COMMERCIAL EXECUTION APPLICATION (L) NO. 31 OF 2017

Usha Kakade,]
Indian inhabitant, R/at Kakade]
Paradise, 55/11A, Law College Road]
Pune 411004] …Appellant
[Orig.Respondent No.2/Judgment Debtor]

VERSUS

1. **Vistra ITCL (India) Ltd.**,]
(formerly known as "IL&FS Trust]
Company Limited"), a company]
incorporated under the Companies]
Act, 1956, Having its registered]
office at IL&FS Financial Centre,]
Plot No.C-22, G Block,]
Bandra (East), Mumbai 51]
Being the trustee of the]
Infrastructure Leasing & Financial]
Services Realty Fund, a scheme of]
IL&FS Private Equity Trust, a SEBI]
Registered Venture Capital Fund,]
Through its investment manager]
IL&FS Investment Managers Ltd.,]
A company incorporated under the]
Companies Act, 1956, having its]
Registered office at IL&FS]
Financial Centre, Plot No.C-22,]
G Block, Bandra (East),]
Mumbai 51]

2. **IIRF Holdings III Limited,**]
a company incorporated in]
Mauritius as a company limited]
by shares, having its registered]
office at C/o International]
Financial Services Limited,]
IFS Court, 28, Cybercity Ebene,]
Mauritius]

3. **Kakade Construction Company**]
Pvt. Ltd.,]
A company incorporated under the]
Companies Act, 1956, having its]
Registered office at Kakade Capital]
1205, Shirole Road, Pune 411005]
Through its Director,]
Mr Ashok Yadav,]

4. **Mr. Sanjay Kakade**]
Indian inhabitant, R/at Kakade]
Paradise, 55/11A, Law College]
Road, Pune 411 004] …Respondents
[R1 & R2 are Orig. Applicants/Decree Holders]
[R3 & R4 are Orig. Respondent Nos.3 & 1/Judgment Debtors]

WITH
COMMERCIAL APPEAL NO. 29 OF 2020
IN
JUDGE'S ORDER NO. 74 OF 2017
IN
COMMERCIAL EXECUTION APPLICATION (L) NO. 31 OF 2017

Sanjay Kakade,]
Indian inhabitant, R/at Kakade]
Paradise, 55/11A, Law College Road]
Pune 411004] …Appellant

[Orig.Respondent No.1/Judgment Debtor]

VERSUS

1. **Vistra ITCL (India) Ltd.**,]
(formerly known as "IL&FS Trust]
Company Limited"), a company]
incorporated under the Companies]
Act, 1956, Having its registered]
office at IL&FS Financial Centre,]
Plot No.C-22, G Block,]
Bandra (East), Mumbai 51]
Being the trustee of the]
Infrastructure Leasing & Financial]
Services Realty Fund, a scheme of]
IL&FS Private Equity Trust, a SEBI]
Registered Venture Capital Fund,]
Through its investment manager]
IL&FS Investment Managers Ltd.,]
A company incorporated under the]
Companies Act, 1956, having its]
Registered office at IL&FS]
Financial Centre, Plot No.C-22,]
G Block, Bandra (East),]
Mumbai 51]

2. **IIRF Holdings III Limited,**]
a company incorporated in]
Mauritius as a company limited]
by shares, having its registered]
office at C/o International]
Financial Services Limited,]
IFS Court, 28, Cybercity Ebene,]
Mauritius]

3. **Kakade Construction Company**]
Pvt. Ltd.,]
A company incorporated under the]
Companies Act, 1956, having its]

Registered office at Kakade Capital]
1205, Shirole Road, Pune 411005]
Through its Director,]
Mr Ashok Yadav,]

4. **Mr. Sanjay Kakade**]
Indian inhabitant, R/at Kakade]
Paradise, 55/11A, Law College]
Road, Pune 411 004] …Respondents
[R1 & R2 are Orig. Applicants/Decree Holders]
[R3 & R4 are Orig. Respondent Nos.3 & 1/Judgment Debtors]

WITH
COMMERCIAL APPEAL NO. 22 OF 2023
IN
JUDGE'S ORDER NO. 74 OF 2017
IN
COMMERCIAL EXECUTION APPLICATION (L) NO. 31 OF 2017

Kakade Construction Company Pvt. Ltd.,]
A company incorporated under the]
Companies Act, 1956, having its]
Registered office at Kakade Capital]
1205, Shirole Road, Pune 411005]
Through its Director,]
Mr Ashok Yadav] …Appellant
[Orig.Respondent No.3/Judgment Debtor]

VERSUS

1. **Vistra ITCL (India) Ltd.**,]
(formerly known as "IL&FS Trust]
Company Limited"), a company]
incorporated under the Companies]

Act, 1956, Having its registered]
office at IL&FS Financial Centre,]
Plot No.C-22, G Block,]
Bandra (East), Mumbai 51]
Being the trustee of the]
Infrastructure Leasing & Financial]
Services Realty Fund, a scheme of]
IL&FS Private Equity Trust, a SEBI]
Registered Venture Capital Fund,]
Through its investment manager]
IL&FS Investment Managers Ltd.,]
A company incorporated under the]
Companies Act, 1956, having its]
Registered office at IL&FS]
Financial Centre, Plot No.C-22,]
G Block, Bandra (East),]
Mumbai 51]

2. **IIRF Holdings III Limited,**]
a company incorporated in]
Mauritius as a company limited]
by shares, having its registered]
office at C/o International]
Financial Services Limited,]
IFS Court, 28, Cybercity Ebene,]
Mauritius]

3. **Mr. Sanjay Kakade**]
Indian inhabitant, R/at Kakade]
Paradise, 55/11A, Law College]
Road, Pune 411004]

4. **Mrs. Usha Kakade**]
Indian inhabitant, R/at Kakade]
Paradise, 55/11A, Law College]
Road, Pune 411 004] …Respondents

[R1 & R2 are Orig. Applicants/Decree Holders]
[R3 & R4 are Orig.

Respondent Nos.1 & 2/Judgment Debtors]

APPEARANCES-

Mr P. Chidambaram, Senior Advocate, a/w Navroz Seervai, Senior Advocate, Pushpa Ganediwala, Shivaji Jadhav, Karan Bhosale, Neha Bhosale, Laveena Tejwani, Anuja Divadkar, Abdul Basit Kudalkar, Dhwani Mehta, Disha Parekh, Madhura Shah, Yash Jadhav, Yashwant Singh, Shivangi, Anshu Agarwal, Ankit Rathod i/b. NDB Law for the appellants in COMAP/542/2019 and COMAP/29/2020.

Mr Karan Bhosale, a/w Neha Bhosale, Laveena Tejwani, Anuja Divadkar, Abdul Basit Kudalkar, Dhwani Mehta, Disha Parekh, Madhura Shah, Yash Jadhav, Yashwant Singh, Shivangi, i/b. NDB Law for the appellants in COMAP/22/2023.

Mr Aspi Chinoy, Senior Advocate, Jatin Pore, Ashwini Hariharan and Vishal Mandal i/b. DSK Legal for the Respondent Nos.1 and 2 in COMAP/542/2019.

Mr Gaurav Joshi, Senior Advocate, Jatin Pore, Ashwini Hariharan and Vishal Mandal i/b. DSK Legal for Respondent Nos.1 and 2 in COMAP/29/2020 and COMAP/22/2023.

Mr N. C. Pawar (O.S.D.) and Mr Gajanan G. Surve, Master (Adm.) from Court Receiver Officer present.

CORAM : M.S.Sonak &
Jitendra Jain, JJ.

RESERVED ON : 06 December 2024

PRONOUNCED ON : 14 December 2024

JUDGMENT (*Per MS Sonak J*):-

1. Heard learned counsel for the parties.

2. These are appeals against what the appellants style, "*the impugned judgment and order dated 22.02.2018 passed by the learned Single Judge of this Hon'ble Court in purported exercise of powers referable to Order XXI Rule 2, purportedly recording satisfaction of the Arbitral Award dated 14.07.2014 by way of Consent Terms dated 22.02.2018 ……..……".*

3. On 18 June 2018, when these appeals were taken up for admission, a preliminary objection was raised about their maintainability. A Coordinate Bench of this Court admitted these appeals "*only to address the issue in respect of maintainability of appeals as stated above*". Interim relief was, however, declined.

4. Since interim relief was declined, the Respondents' execution proceedings before the learned Single Judge proceeded. By order dated 24 August 2018, a learned Single Judge appointed a Receiver regarding some of the disputed lands.

5. The appellants filed Commercial Appeal (L) No.109 of 2019 and connected appeals against the learned Single Judge's order dated 24 August 2018. Again, the Respondents objected to the maintainability of such appeals. By a detailed judgment and order dated 9 August 2019, a Coordinate Bench dismissed the appeals as not maintainable.

6. At the final hearing of these appeals, again, arguments were heard on the maintainability of these appeals, which is the main issue before us at this stage.

APPELLANTS CONTENTIONS

7. Mr P. Chidambaram, learned Senior Advocate for the appellants, submitted that the Executing Court, which made the impugned judgment and order dated 22 February 2018, was a Commercial Court within the meaning of Section 13 read with Section 2(b) of the Commercial Courts Act, 2015 [CCA] Therefore, these appeals would be maintainable under Section 13, including Section 13 (1A) of the CCA.

8. Mr P. Chidambaram submitted that the central portion of Section 13(1A) provides for an appeal against a judgment or order. The proviso to Section 13(1A), advisedly refers not to the expression "*judgment or order*" but only to "*orders*". He, therefore, submitted that the restriction, if at all, under the proviso to Section 13(1A), would not apply in case of "judgment". He submitted that even though a "judgment" may not constitute an order specifically enumerated under Order XLIII of CPC as amended by the CCA and Section 37 of the Arbitration and Conciliation Act, 1996 [ACA], an appeal would still lie against the "judgment" under the central provision of Section 13(1A) of the CCA. He relied upon **D & H India Ltd. vs. Superon Schweisstechnik India Ltd.**[1], **Hubtown Limited vs. IDBI Trusteeship Service Limited**[2] and

[1] 2020 SCC On Line Del 477

[2] 2016 SCC OnLine Bom 9019

Sigmarq Technologies Pvt. Ltd. and others vs. Manugrah India Limited and others[3] in support of his contentions.

9. Mr P. Chidambaram finally submitted that should this Court, for any reason, conclude that these appeals are not maintainable, then the appellants should be granted liberty to approach the Court, which made the impugned judgment and order dated 22 February 2018 with a request to modify/revise the said judgment and order on the ground that the compromise terms are contrary to the law i.e. Foreign Exchange Management Act, 1999 (FEMA). He relied on **Banwari Lal vs. Chando Devi and another**[4] and **Vipan Aggarwal and another vs. Raman Gandotra and others**[5] to support this contention.

RESPONDENTS CONTENTIONS

10. Mr Chinoy, learned Senior Advocate for the first and second respondents, submitted that the issue of maintainability of these appeals stands concluded against the appellants by the detailed judgment and order dated 9 August 2019 in Commercial Appeal (L) No.109 of 2019 and connected appeals involving the same parties and in the same execution proceedings. He submitted that this judgment and order dated 9 August 2019 operates as *res judicata*, and based upon the same, even these appeals must be dismissed as not maintainable. He submitted that the principle of *res judicata* applies at two different stages of the same proceedings.

---

3 2017 SCC OnLine Bom 9191

4 (1993) 1 SCC 581

5 (2023) 10 SCC 529

11. Without prejudice, Mr Chinoy submitted that the proceedings for enforcement of the arbitral award were not proceedings under the CPC or the CCA but under the ACA. He, therefore, submitted that the issue of appealability had to be determined by reference to the provisions of the ACA, particularly Section 37 of the ACA and not by any of the provisions of the CPC or the CCA. He submitted that the later two enactments only provided the forum of appeal. He relied upon **Jet Airways (India) Limited and another vs. Mr Subrata Roy Sahara and others**[6], **Vikram V. Vyas and others vs. Madhusudan G. Vyas and others**[7], **Shailendra Bhadauria and others vs. Matrix Partners India Investment Holdings LLC and others**[8], **Kandla Export Corporation and another vs. OCI Corporation and another**[9], **BGS SGS SOMA JV vs. NHPC Limited**[10] and **Government of India vs. Vedanta Limited and others**[11] to support his contentions.

12. For all the above reasons, Mr Chinoy submitted that these appeals may be dismissed as not maintainable.

APPELLANTS REJOINDER

13. Mr Seervai, by way of rejoinder, submitted that the principle of *res judicata* does not bar the raising of pure questions of law because there could never be any estoppel

---

6 2012 (2) AIR Bom R 855

7 2016 SCC OnLine Bom 12709

8 2018 SCC OnLine Bom 13804

9 (2018) 14 SCC 715

10 (2020) 4 SCC 234

11 (2020) 10 SCC 1

against the law. He relied on **Canara Bank vs. N. G. Subbaraya Setty and another**[12].

14. Mr Seervai submitted that the decision in *Kandla* (supra) was distinguishable and restricted only to Part II of the ACA, particularly Sections 49 and 50 of the ACA. He submitted that there was a vast difference between the provisions, the scope and the scheme of Part I and Part II of the Arbitration Act, as was explained by the Hon'ble Supreme Court in **Fuerst Day Lawson Limited vs. Jindal Exports Limited**[13].

THE EVALUATION OF THE RIVAL CONTENTIONS

15. The rival contentions now fall for our determination.

16. The genesis of these appeals is the disputes between Kakade Construction Company Pvt. Ltd. (appellant), Vistra ITCL (India) Ltd. (formerly known as "IL&FS Trust Company Limited") (R-1) and IIRF Holdings III Limited (R-2) concerning certain agreements entered by these parties. These disputes were referred to an Arbitral Tribunal in June 2011.

17. The Arbitral Tribunal made a consent award dated 14 July 2014, under which R-1 and R-2 agreed to accept a reduced amount of Rs.178 crores with interest from the appellants. However, since the appellants refused to make any payments under the consent award, R-1 and R-2 applied Section 36 of the ACA to enforce the consent award, seeking to recover an amount of Rs.276.73 crores from the appellants. A Chamber Summons (L) No.137 of 2017 was taken out in

---

12 (2018) 16 SCC 228

13 (2011) 8 SCC 333

these proceedings to appoint a Court Receiver in respect of the lands specified in the Chamber Summons.

18. The appellants objected to the enforcement and execution of the consent award dated 14 July 2014, alleging that it violated the provisions of FEMA. However, in these enforcement/execution proceedings, the parties once again filed consent terms, based on which the learned Single Judge of this Court (Executing/Enforcement Court) made the impugned order dated 22 February 2018. Under this order, R-1 and R-2 extended further concessions to the appellants.

19. Without complying with any of the directions in the impugned order dated 22 February 2018, the appellants instituted these appeals, alleging that even the consent terms in the execution/enforcement proceedings before the learned Single Judge violated FEMA provisions.

20. As noted earlier, the order dated 18 June 2018 admitted these appeals "*only to address the issue in respect of maintainability of appeals as stated above*." However, since no interim relief was granted to the appellants while admitting these appeals, the respondents' execution proceedings before the learned Single Judge proceeded. By order dated 24 August 2018, the learned Single Judge appointed a Receiver for some of the disputed lands.

21. Against the order dated 24 August 2018 appointing a Court Receiver in the execution proceedings, the appellants instituted Commercial Appeal (L) No.109 of 2019 and connected appeals. Again, the respondents objected to the maintainability of such appeals.

22. By a detailed judgment and order dated 9 August 2019, the Coordinate Bench comprising **Pradeep Nandrajog, C.J. and Nitin Jamdar, J.** dismissed Commercial Appeal (L) No.109 of 2019 and connected appeals as not maintainable. The judgment and order dated 9 August 2019 have attained finality because though it was attempted to be appealed, the Special Leave Petition against the same was withdrawn unconditionally by the appellants.

MAIN ISSUES FOR DETERMINATION

23. In these appeals as well, the issue of maintainability is raised. Accordingly, in the context of maintainability of these appeals, the following two issues arise: -

(a) Does the judgment and order dated 9 August 2019 made by the Coordinate Bench in Commercial Appeal (L) No.109 of 2019 operate as *res judicata,* and, based upon the same, will the present appeals have to be held as not maintainable?

(b) Assuming that the principle of *res judicata* is not attracted, still, whether these appeals are not maintainable because they do not relate to any proceedings or orders made under the CPC or the CCA, but they relate to proceedings under the ACA which is an exhaustive self-contained code?

RES JUDICATA OR PRINCIPLES ANALOGOUS TO RES JUDICATA

24. As regards the objection based upon the doctrine of *res judicata*, we note that this doctrine, having a very ancient

history, embodies a rule of universal law and is a sum total of public policy reflected in various maxims like '*res judicata pro veritate occipitur',* which means that a judicial decision must be accepted as correct; and '*nemo debet bis vexari pro una et eadem causa'*, which means that no man should be vexed twice for the same cause. The doctrine of *res judicata* is not technical, but it is a fundamental doctrine of all Courts that there must be an end to litigation. This rule embodies a principle of public policy, which, in turn, is an essential part of the rule of law.[14]

25. This doctrine finds expression in Section 11 of CPC, but it is well settled that Section 11 of CPC is not the foundation of this doctrine but is merely the statutory recognition thereof. Accordingly, Section 11 of CPC is not exhaustive of the general doctrine of *res judicata*. This doctrine is founded on equity, justice and good conscience.[15] This principle of finality of litigation is based on the high principle of public policy and even the rule of law.[16] In effect, the provision in Section 11 of CPC or the doctrine of *res judicata* says that once a matter is finally heard and decided between two parties, such a matter will not be allowed to be re-agitated amongst the same parties or the parties claiming under them. The earlier decision will be final with respect to the matter so decided.

26. The Hon'ble Supreme Court has held that the principle of *res judicata* would apply not only to two suits or proceedings but also to two different stages in the same suit

---

14 S. Ramachandra Rao vs. S. Nagabhushana Rao and others, 2022 SCC OnLine SC 1460

15 Lal Chand (dead) by L.Rs. vs. Radha Krishan, (1977) 2 SCC 88

16 Daryao and others vs. State of U. P. and others, AIR 1961 SC 1457

or proceedings. The Court held that even if the strict parameters of Section 11 of CPC are not attracted, still, principles analogous to *res judicata* or estoppel would still apply. This position was made evident in **Vijayabai and others vs. Shriram Tukaram and others**[17], **Y B Patil and others vs. Y L Patil**[18], **Prahlad Singh vs Col. Sukhdev Singh**[19], **Satyadhyan Ghosal vs. Deorajin Debi**[20] and S. *Ramachandra Rao* (supra).

27. To sustain the plea of *res judicata* or principles analogous to *res judicata*, respondents will have to establish (i) That the parties in the former proceedings, i.e. the proceedings which concluded with the judgment and order dated 9 August 2019, were the same; (ii) The judgment and order was made by a Court of competent jurisdiction; (iii) the matter directly and substantially in issue in the former proceedings is directly and substantially in issue in the present proceedings, either actually or constructively; (iv) The matter must have been finally decided as between the parties.

28. There is no dispute about the sameness of the parties or the competence of the Court, at least in deciding whether it had the jurisdiction to entertain the appeals before it. There is also no dispute about the judgment and order dated 9 August 2019 attaining finality as between the parties. Admittedly, a Special Leave Petition was instituted against the judgment and order, but the same was unconditionally withdrawn.

29. On the crucial issue of the matter being *directly and substantially in issue* in the former proceedings, the learned

[17] (1999) 1 SCC 693

[18] (1976) 4 SCC 66

[19] (1987) 1 SCC 727

[20] AIR 1960 SC 941

counsel for the appellants submitted that the Commercial Appeal (L) No.109 of 2019 and connected appeals were against an "**interim**" order appointing a Court Receiver in the execution/enforcement proceedings and the present appeals are against a judgment and order dated 22 February 2018 "**finally**" disposing of the execution/enforcement proceedings. On this basis, it was urged that the matter directly and substantially in issue in the former proceedings differed from the matters directly and substantially in issue in these proceedings. In short, the judgment and order dated 9 August 2019 was sought to be distinguished on the ground that it was in appeals directed against "**interim**" orders and the present appeals were directed against "**final**" orders, even though both were made in the very same proceedings seeking execution/enforcement of the arbitral award dated 14 July 2014.

30. The locus classicus on the point of determining if an issue was "*directly and substantially*" decided in the previous suit or proceedings is the decision of the Hon'ble Supreme Court in **Sajjadanashin Sayed Md. B.E. Edr vs. Musa Dadabhai Ummer and others**[21]. Here, the Court held that if the matter was in issue directly and substantially in a prior litigation and decided against a party, the decision would be *res judicata* in a subsequent proceeding. The expression "*directly and substantially*" must be contrasted with "*collaterally or incidentally*". In paragraph 18, the Court referred to similar tests (Mulla, 15th Edition, p.104). The Court quoted the learned author: *A matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and*

[21] (2000) 3 SCC 350

*substantially" in issue, but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. The question arises as to what the test is for deciding into which category the case falls into. One test is that if the issue was "**necessary**" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in the issue. If the judgment was, in fact, based upon that decision, then it would be res judicata in a latter case.*

31. The Court then held that the above summary in Mulla is the correct statement of the law. In paragraph 19, the Court adverted another principle of caution referred to by Mulla (P. 105): *It is not to be assumed that the matters in respect to which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance attached to the fact that the particular issue is the first on the list of issues. Which of the matters are directly in issue and which, collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision.*

32. On an exhaustive survey of the decisions about res *judicata,* a Three Judge Bench of the Hon'ble Supreme Court in **Jamia Masjid vs. Sri K. V. Rudrappa and others**[22] held that the twin test that is used for identification of whether an issue has been conclusively decided in the previous suit is:

[22] (2022) 9 SCC 225

(A) Whether the adjudication of the issue was 'necessary' for deciding on the principal issue ('the necessity test'); and

(B) Whether the judgment in the suit is based upon the decision on that issue ('the essentiality test').

33. In the earlier Commercial Appeal or, for that matter, in the present Commercial Appeals, the issue of the impugned orders being interim, or final was entirely irrelevant. The principal issue in the earlier and present appeals was not whether an appeal lay against an interim order and not a final one or vice versa. The principal issue involved in the earlier and the present appeals was/is whether the proceedings for execution or enforcement of an arbitral award could be regarded as proceedings under the ACA or whether they were proceedings under the CPC/CCA. That was the principal issue. An adjudication on that issue was "necessary" for deciding the principal issue. The judgment and order dated 9 August 2019 was based upon the decision on that principal issue. Thus, applying the "necessity test" and the "essentiality test", it is apparent that the judgment and order dated 9 August 2019 has finally decided the principal issue, which was directly and substantially involved in the earlier appeals by its judgment and order dated 9 August 2019.

34. Incidentally, we must note that in Commercial Appeal (L) No.109 of 2019 and connected appeals when the decision of the Coordinate Bench of this Court in *Jet Airways* (supra)

was cited, the appellants argued that Jet Airways was an appeal concerning challenge to a final order disposing of proceedings for execution or enforcement of an arbitral award under Section 36 of the Arbitration Act. On that ground, the *Jet Airways* (supra) decision was sought to be distinguished. Now that the present appeals are against a similar order disposing of proceedings for execution or enforcement of an arbitral award under Section 36, the appellants urged that the judgment and order dated 9 August 2019 will not apply because the same concerned a challenge to an interim order. By this logic, the appellants cannot object to the applicability of the precedent in *Jet Airways* (supra) unless, of course, they wish to persist in approbation and reprobation.

35. In any event, this distinction based upon the impugned order in the appeal, being an interim order or a final order, was considered and rejected in the former proceedings. This is evident from paragraph 18 of the judgment and order dated 9 August 2019, which reads as follows: -

> *"18. The Appellants have sought to get over this position by contending firstly that what was under consideration in the case of Jet Airways, was the final order passed in the execution proceedings which is not the case in the present Appeals. They contend that the impugned order appoints a receiver which is not a final order in the execution proceedings. We do not find this distinction material for the position of law regarding Section 36 of the Act of 1996.* ***The Division Bench has categorically held that adjudication of the proceedings under Section 36 is under the Act of 1996 and not under the Code of Civil Procedure. There is thus no warrant to distinguish between interim orders and final orders passed in the execution of the arbitral award."***

36. In *Canara Bank vs. N. G. Subbaraya Setty and another* (supra) relied upon by Mr Seervai on behalf of the appellants,

the Hon'ble Supreme Court has explained that the general rule qua *res judicat*a is that all issues that arise directly and substantially in the former suit or proceeding between the same parties are *res judicata* in subsequent suit or proceeding between the same parties and that these would include issues of fact, mixed question of fact and law, and issues of law.

37. However, the Hon'ble Supreme Court explained that to the above general proposition of law, there are certain exceptions, one of the exceptions being that an issue of law which arises between the same parties in a subsequent suit or proceeding is not *res judicata* if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to - This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter partes), as the public policy contained in the statutory prohibition cannot be set at nought. The second exception would be when a competent authority alters the law itself since the earlier decision may have attained finality.

38. Neither any of the above exceptions nor, for that matter, the other exceptions referred to in *Canara Bank vs. N. G. Subbaraya Setty and another* (supra) apply in this matter. We find nothing erroneous in the judgment and order dated 9 August 2019, whether on facts or issues of law relating to the jurisdiction of the Court. No statutory prohibition was ignored, and this is also not a case where the competent legislature or, for that matter, the Hon'ble Supreme Court has altered the legal position with or without any retrospective effect since the earlier decision. Instead, as will be noticed

hereafter, the view taken in *Kandla Export Corporation* (supra), which was relied upon in the judgment and order dated 9 August 2019, has been subsequently reiterated and followed in *BGS SGS SOMA JV* (supra) and *Government of India vs. Vedanta Limited and others* (supra).

39. Thus, we are satisfied that the matter of maintainability of appeals against judgments and orders made in proceedings for execution or enforcement of arbitral awards was directly and substantially in issue in the former proceedings, which came to be disposed of by judgment and order dated 9 August 2019. It is precisely the very same issue that is directly and substantially in issue in the present proceedings. Therefore, all the parameters necessary to attract the doctrine of *res judicata*, or in any event, the principles analogous to *res judicata,* are fully satisfied in these matters. None of the exceptions in *Canara Bank vs. N. G. Subbaraya Setty and another* (supra) apply. Based upon all these factors, we hold that the judgment and order dated 9 August 2019 in the former proceedings is sufficient to uphold the first objection to the maintainability of these appeals raised by and on behalf of the respondents.

THE LAW OF THE CASE DOCTRINE

40. The "*law of the case doctrine*" would also persuade us to reach the same conclusion. Though no arguments were advanced on the law of the case doctrine, we refer to the decision of the Coordinate Bench in **Commissioner of Income Tax vs. V. M. Salgaonkar Brothers Private Limited**[23]. There,

[23] Tax Appeal No.72 of 2015

reference was made to the Black's Law Dictionary[24] to explain this doctrine, which means that a decision rendered in a former appeal of a case is binding in a later appeal of the same case. Reference was also made to **Messenger v. Anderson**[25]**,** in which Justice Holmes observes that in the absence of statute, the phrase "law of the case," as applied to "the effect of previous orders on the later action of the court rendering them in the same case," merely expresses the practice of courts generally refusing to reopen what has been decided. It is not a limit to their power, though.

41. The law-of-the-case doctrine is said to come in at least two forms. One form, also called the mandate rule, forestalls relitigating in the trial court of matters explicitly or implicitly decided by an early appellate decision in the same case. Once an appellate court decides an issue, then it stands settled in further proceedings in the trial court and controls the case. The other form generally binds a court to its own earlier ruling in the same case—in the absence of an intervening ruling by a higher court on the same issue. This doctrine wants the courts to "display disciplined self-consistency" throughout the case[26]. It distinguishes itself from *res judicata* (for instance, Section 11 of CPC) and 'issue estoppel' (as seen in Order 2, Rule 2 of CPC), which are much more rigid[27].

42. To put this doctrine in perspective, the interpretative intricacies in understanding a precedent differ from those involved in understanding the law of the case. A precedent

[24] 9th Edn.

[25] 225 U.S. 436, 444 (1912)

[26] The Law of Judicial Precedent, Bryan A. Garner et al., Thomson Reuters (2016), p. 442

[27] State of Kerala v. K. K. Mathai, AIR 2018 Kerala 18 (DB)

binds to the extent the holding accords with the facts on hand. On the other hand, the law of the case fetters a later Bench in the same case from taking a contrary stand to that taken earlier by the previous Bench. Of course, this constraint flows down to the lower judicial echelons or applies to coordinate Benches, but not appellate or higher fora[28].

43. Applying the law of the case doctrine as well, we hold that these appeals are not maintainable given the judgment and order dated 9 August 2019 in Commercial Appeal (L) No.109 of 2019 and connected appeals. Since no arguments were advanced on this law of the case doctrine, we clarify that the invocation of this doctrine should not be taken as the basis for deciding the issue of maintainability of these appeals. Our reasoning rests on the principle of *res judicata* or principles analogous to *res judicata* upon which the counsel advanced exhaustive arguments.

INDEPENDENT OF RES JUDICATA, WHETHER THESE APPEALS ARE MAINTAINABLE?

44. Even independent of the principle of *res judicata,* we are satisfied that these appeals are not maintainable simply because the proceedings for execution or enforcement of the arbitral award were not proceedings under the CPC or the CCA, but they were proceedings under the ACA. Accordingly, the issue of appealability of orders, whether interim or final, made in such proceedings for execution or enforcement of arbitral awards would have to be determined by the provisions of the ACA in general and Section 37 of the ACA in these particular cases.

---

[28] Ibid

45. Mr Chidambaram and Mr Seervai, however, contended that since an arbitral award had to be enforced "*in the same manner as if it were a decree of the Court*", the proceedings for execution or enforcement of the arbitral awards were nothing but proceedings for execution under Order XXI of CPC. Going further, they contended that all provisions relating to appeals as available under the CPC and the CCA would apply and determine the appealability issue. Therefore, they contended that the present appeals would be maintainable based upon the provisions of Order XLIII of CPC and Section 13(1) & 13(1A) of the CCA. This contention, with the greatest respect, is misconceived and has been repeatedly rejected by the Hon'ble Supreme Court and this Court.

46. Section 35 of the Arbitration and Conciliation Act imparts finality to arbitral awards. This section provides that subject to this Part, i.e. Part I, an arbitral award shall be final and binding on the parties and persons claiming under them, respectively. Section 36 of the Arbitration and Conciliation Act provides that where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced *in accordance with the provisions of the Code of Civil Procedure*, 1908 (5 of 1908), *in the same manner as if it were a decree of the Court*.

47. The expression "*in the same manner as if it were a decree of the Court*" was interpreted and explained by the Hon'ble Supreme Court in **Paramjeet Singh Patheja vs. ICDS Ltd.**[29]. The Court held that an arbitral award is not a decree as defined

[29] (2006) 13 SCC 322

under Section 2(2) of the CPC. The Court held that the expression "*as if*" in fact, shows the distinction between a decree and an arbitral award. The expression *"as if"* demonstrates that the arbitral award and the decree differ. The legal fiction created by the expression "*as if*" is for the limited purpose of facilitating the enforcement of an arbitral award as if it were a decree. The legal fiction was not intended to make the arbitral award a decree for all purposes under all statutes, whether State or Central. The Court held that a legal fiction should not be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration Act cannot be construed as a "decree".

48. Mr Seervai's contention that the Respondents had themselves styled their execution applications as "*application for execution under Order XXI, Rule 11(2) of the Code of Civil Procedure (Rule 313 of the Bombay High Court (Original Side) Rules)"* does not convert the proceedings for enforcement of an arbitral award under Section 36 to proceedings for execution under Order XXI of the CPC. The titles that the parties may provide are quite irrelevant. Such a title was perhaps used because, as explained by various decisions of the Hon'ble Supreme Court and this Court, the Arbitration Act adopts the mechanism of execution from the CPC.

49. However, adopting the mechanism under the CPC does not convert the execution or enforcement proceedings under Section 36 of the Arbitration Act into proceedings under Order XXI of the CPC. Therefore, even if Respondents 1 and 2 may have referred to the provisions of Order XXI of the CPC or Rule 313 of the Bombay High Court (Original Side) Rules,

that can make no difference to the character of the enforcement proceedings under Section 36 of the Arbitration Act.

JET AIRWAYS (SUPRA) PRECEDENT

50. In *Jet Airways* (supra), a Coordinate Bench of this Court was precisely concerned with the issue of maintainability of an appeal against an order, finally disposing of proceedings for execution or enforcement of an arbitral award under Section 36 of the Arbitration Act. The Coordinate Bench accordingly framed the following three issues which arose for their consideration:-

> *"A. Whether the proceedings under section 36 of the 1996 Act are proceedings under the Code of Civil Procedure, 1908?*
>
> *B. Whether the provisions of clause 15 of the Letters Patent are applicable to the impugned Judgment and Order and whether applicability of clause 15 has been impliedly excluded by section 37 of the 1996 Act or by the amendment of section 2(2), 47 by Act 104 of 1976 amending the Code?*
>
> *C. Whether the Judgment of Supreme Court in the case of Fuerst Day Lawson (supra) is an authority which is applicable only in respect of a foreign award covered by Part II of the 1996 Act or whether the ratio of the said Judgment is a binding precedent even in respect of proceedings under part I of the 1996 Act or the same is obiter dicta?"*

51. The Coordinate Bench in *Jet Airways* (supra), by adverting to several binding precedents emanating from the Hon'ble Supreme Court, held that the execution/enforcement proceedings were proceedings under Section 36 of the Arbitration Act and not proceedings for execution under Section 47 or Order XXI of the CPC. The Coordinate Bench also held that the appealability issue would be governed by Section 37 of the ACA, a special enactment that would prevail

over the CPC, which was only a general enactment. Similarly, the Coordinate Bench also held that clause 15 of the Letters Patent was also impliedly excluded by the special provisions of the ACA. Finally, the Coordinate Bench held that the Supreme Court's decision in *Fuerst Day Lawson Limited* (supra) conclusively determined the question of maintainability and the observations in paragraphs 70 to 73 constitute a binding precedent even in respect of maintainability of an appeal against an order passed in proceedings arising out of a domestic award under Part I of the ACA.

KANDLA (SUPRA) PRECEDENT

52. *Kandla* (supra) is the lead authority for the proposition that the issue of appealability of any orders relating to proceedings under the ACA is to be decided by reference to the ACA itself, which is an exhaustive and self-contained code and not by reference to the provisions of the CPC or the CCA. Only in so far as the forum of appeal is concerned would it be permissible to examine and apply the provisions of CPC and the CCA, but not to determine the appealability issue.

53. In *Kandla* (supra), the issue which arose for consideration of the Hon'ble Supreme Court was whether any order made in proceedings for execution of a foreign arbitral award under Section 48 of the Arbitration Act was appealable under the CPC or the Commercial Courts Act, even though, Section 50 of the Arbitration Act did not provide for any appeal against such order. The Kandla Export Corporation, like the appellants in the present case, had argued that such

an appeal was maintainable under the provisions of Section 13 of the Commercial Courts Act. Arguments almost similar to, if not identical to, those made by Mr. Chidambaram and Mr. Seervai in these appeals were advanced, supporting the maintainability of the appeal. However, the Hon'ble Supreme Court, upon a detailed consideration of all such contentions, held that the appeal was not maintainable.

54. The Court held that Section 13(1) of the Commercial Courts Act is in two parts. The central provision provides for appeals from judgments, orders and decrees of the Commercial Division of the High Court. The proviso for this central provision carves out an exception by stating that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are enumerated explicitly under Order XLIII of the Code of Civil Procedure Code, 1908 and Section 37 of the Arbitration and Conciliation Act, 1966. The Court, therefore, held: *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.*

55. Kandla Export Corporation's contention that Section 50 of the ACA does not find any mention in the proviso to Section 13(1) of the CCA and, therefore, notwithstanding that an appeal would not lie under Section 50 of the ACA, it would lie under Section 13(1) of the CCA was rejected by the Hon'ble Supreme Court by adverting to its decision in *Fuerst Day Lawson Limited* (supra). The Court referred to the principle laid down in sub-section (vii), in paragraph 36,

which reads thus: (SCC p.350, para 36) "*36. ...(vii) The exception to the aforementioned rule is where the special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred."*

56. Kandla Export Corporation's contention that the expression "*and from no others*" which was conspicuous by its absence in Section 50 of the ACA, was also rejected by the Hon'ble Supreme Court after referring to the observations in paragraphs 60 and 61 of *Fuerst Day Lawson Limited* (supra). The Court observed (in paragraph 20): *Given the judgment of this Court in Fuerst Day Lawson, which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in paragraph 89 of Fuerst Day Lawson that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act."*

57. The Court also rejected Kandla Export Corporation's contention that while Section 37 of the ACA was expressly included in the proviso to Section 13(1) of the CCA, no

specific reference was made to Section 50 of the Arbitration and Conciliation Act, 1996, and this factor suggests that the legislature intended to restrict the proviso to Section 13(1) to matters which concerned Section 37 of the ACA. This is evident from the observations in paragraphs 21 and 22, extracts from which read: *One answer is that this was done ex abundanti cautela. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where an order is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasise the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(a) and would, therefore, not be appealable under Section 13(1) of the Commercial Courts Act. Whatever may be the ultimate reason for including Section 37 of the Arbitration Act in the proviso to Section 13(1), the ratio decidendi of the judgment in Fuerst Day Lawson would apply, and this being so, appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone.*

58. The Court also explained that *in all arbitration cases of enforcement of foreign awards, Section 50 alone provides an appeal. Having provided for an appeal, the forum of appeal is left "to the Court authorised by law to hear appeals from such*

orders". Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal."

59. In *Kandla* (supra), the Hon'ble Supreme Court relied upon **Arun Dev Upadhyaya vs. Integrated Sales Service Ltd.**[30]**,** in which it was held that the issue of maintainability of an appeal has to be decided by reference to the provisions of the ACA and reference could be made to Section 13 of the CCA or Letters Patent only for determining the forum of such appeal. The Court held that neither Section 13 nor the Letters Patent could have been invoked if Section 50 of the ACA did not provide for an appeal.

60. The Court held that the matter can be viewed from a slightly different angle. Given both statutes' objects, arbitration is meant to be a speedy resolution of disputes between parties. Equally, enforcement of foreign awards should take place as soon as possible if India is to remain an equal partner, commercially speaking, in the international community. The raison d'être for enacting the CCA is that commercial disputes involving high amounts of money should be speedily decided. Given the objects of both the enactments, if an additional appeal were to be provided when Section 50 does away with an appeal to enforce expeditiously foreign awards, *that would amount to turning the Arbitration Act and the Commercial Courts Act on their heads.*

[30] (2016) 9 SCC 524

61. The Court held that Section 13(1) of the CCA must be construed in accordance with the object sought to be achieved by the Act. Therefore, any construction of Section 13 of the CCA, which would lead to further delay instead of expeditious enforcement of the foreign award, must be eschewed. Even on applying the doctrine of harmonious construction of both statutes, the Court held that it was clear that they are best harmonised by giving effect to the special statute, i.e. the ACA, vis-à-vis the more general statute, the CCA, being left to operate in spheres other than arbitration. Thus, *Kandla Export Corporation* (supra) provides a complete answer to almost all the contentions raised by Mr P. Chidambaram and Mr Seervai in support of the maintainability of these appeals.

62. Mr. Seervai, in rejoinder, attempted to distinguish *Kandla* (supra) based on the observations in paragraphs 60 and 61 of the *Fuerst Day Lawson Limited* (supra) to the effect that the provisions, scope and scheme of Part I (which contain Sections 36 and 37) and Part II (which contain Sections 48 to 50) of Arbitration Act were entirely different and operated independently in their respective fields.

63. The distinction now sought to be made by Mr Seervai, is, with respect is, entirely misconceived. These differences in Part I and II were pointed out in answer to the contention that the expression "*and from no others*", which finds its place in Section 37 of the ACA but was conspicuous by its absence in Section 50 of the ACA. In any event, *Kandla* (supra), after considering precisely paragraphs 60 and 61 of *Fuerst Day*

Lawson Limited (supra)*,* rejected the argument very similar to what is now made by Mr Seervai.

64. In fact, *Kandla (Supra)* expressly refers to Section 37 of the ACA and holds that no appeals other than those enumerated under Section 37 would lie by resort to the provisions of the CCA or the Letters Patent. The Court holds that the same principle would apply in the context of Section 50 of the ACA even though Section 50, after enumerating the orders against which appeals would lie, does not use the expression "*and from no others*".

65. In any event, on a harmonious construction of the decisions in *Kandla* (supra) and *Fuerst Day Lawson Limited* (supra), it is apparent that the appeals against interim or final orders in proceedings for execution or enforcement of domestic awards will have to follow the drill of Section 37 of the ACA. This means that if Section 37 provides for no appeal against an order disposing of proceedings for execution or enforcement of an award under Section 36 of the ACA, then no such appeal will lie by reference to the CCA or the CPC. The two decisions make it clear that the issue of maintainability must be determined under the ACA, which is an exhaustive self-contained code. Only the forum issue can be decided by referencing the CCA or the CPC.

OTHER PRECEDENTS

66. In *BGS SGS SOMA JV* (supra), the Hon'ble Supreme Court explained that the interplay between Section 37 of the ACA and Section 13 of the CCA was laid down in some detail in the *Kandla* (supra) judgment. The Court held that the

precise question that arose in *Kandla* (supra) was as to whether an appeal, which was not maintainable under Section 50 of the ACA, was nonetheless maintainable under Section 13(1) of the CCA. In this context, after setting out various provisions of the CCA and the ACA, the Court held that there was no independent right of appeal under Section 13(1) of the CCA, which merely provides a forum for filing appeals. The parameters of Section 37 of the ACA alone must be examined to determine whether the appeals were maintainable. The Court then referred to Section 37(1), which had made it clear that the appeal shall only lie from the orders set out in sub-clauses (a), (b) and (c) *and from no others*.

67. The argument in the context of the proviso to Section 13(1A) of the Commercial Courts Act and Order XLIII of CPC was also considered in *BGS SGS SOMA JV* (supra) in paragraph 14. The Court held that interestingly, under the proviso to Section 13(1A) of the CCA, Order XLIII of CPC is also mentioned. After quoting Order XLIII Rule 1(a) the Court held that this provision was conspicuous by its absence in Section 37 of the ACA, which alone can be looked at for the purpose of filing appeals against orders setting aside or refusing to set aside awards under Section 34.

68. The Court also held that what was missed by the judgment impugned before the Hon'ble Supreme Court was the words "*under Section 34*". Thus, the refusal to set aside an arbitral award must be under Section 34, i.e. after grounds set out in Section 34 have been applied to the arbitral award in question and after the Court has turned down such grounds. Accordingly, the Court held that an order by which a Section 34 application was returned to be presented before an

appropriate Court or to a proper Court would not amount to an order "*refusing to set aside an arbitral award under Section 34*" and consequently not appealable under either Section 37 of the Arbitration Act. Therefore, by referencing Section 13 or 13(1A) of the CCA, such an order could not be held appealable.

69. In **Noy Vallesina Engineering Spa vs. Jindal Drugs Limited and others**[31], the Hon'ble Supreme Court was concerned with partial and final foreign awards. These awards were sought to be enforced by invoking Sections 47 and 48 of the ACA. The Respondent (Jindal) objected to the enforcement proceedings. The learned Single Judge of this Court substantially upheld the awards and proceeded to its enforcement by judgment dated 5 June 2006, simultaneously rejecting the challenge to the enforcement laid out by Jindal. Both parties appealed to the Division Bench: Jindal, on the challenge to the order dismissing its objection to the enforcement (Appeal No.492 of 2006), and NV Engineering, as to the part of the order of the Single Judge, refusing to enforce a part of the award (Appeal No.740 of 2006).

70. The Hon'ble Supreme Court referred to its decision in *Fuerst Day Lawson Limited* (supra), where it had to interpret Section 50 of the ACA, which provided a restrictive category of appealable subject matters and prohibited appeals on other issues. The Court held that the category of appealable matters could not be enlarged by referring to the Letters Patent. The Court noted that the observations in paragraph 10 of *Fuerst Day Lawson Limited* (supra) were quoted with approval in

[31] (2021) 1 SCC 382

Union of India vs. Simplex Infrastructures Ltd.[32]**,** and it was held that after this decision, there was no scope to contend that the remedy of Letters Patent appeal was available. The Court held that this legal position was also restated in *Arun Dev Upadhyaya* (supra). The Court also referred to *Kandla* (supra). Finally, it held that given the categorical judgments of the Supreme Court, Jindal's appeal to the Division Bench (Appeal No.492 of 2006) challenging the order rejecting its objection to enforcement of the award was not maintainable.

71. Finally, even in *Government of India vs. Vedanta Limited and others* (supra), the Hon'ble Supreme Court held that applications under Sections 47 and 49 for enforcement of foreign awards are substantive Petitions filed under the ACA. The Court held that it was well-settled that the ACA was a self-contained code. The application under Section 47 of the ACA was not an application filed under any of the provisions of Order XXI of CPC, 1908. The application was filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order XXI of CPC only for the purposes of execution of the foreign award as a deemed decree. Therefore, the bar contending Section 5 of the Limitation Act, which excludes an application filed under any of the provisions of Order XXI of CPC, would not apply to a substantive petition filed under the ACA. Consequently, it was held that an application for condonation of delay under Section 5 of the Limitation Act would be maintainable to consider the issue of condonation of delay in applying for enforcement of a foreign award if required in the facts and circumstances of the case.

---

[32] (2017) 14 SCC 225

72. Thus, considering the weight of the authorities of the Hon'ble Supreme Court and this Court on the subject, we cannot accept that the proceedings for enforcement of the arbitral award filed by the first and second respondent in this matter could be regarded as proceedings under Order XXI of CPC or any of the provisions of CCA. Since they were not proceedings under the CPC or the CCA, the impugned order, whether styled as a judgment or an order, cannot be regarded as one made under the CPC or the CCA. Accordingly, relying upon the provisions of the CPC or the CCA, the objection to the maintainability of these appeals cannot be rejected but will still have to be sustained.

73. Thus, even independent of our finding that the judgment and order dated 9 August 2019 in Commercial Appeal (L) No.109 of 2019 and connected matters operates as *res judicata* to the issue of maintainability of these appeals, we are satisfied that these appeals are not maintainable and are required to be dismissed as not maintainable.

SECTION 13(1A) CCA ARGUMENT

74. The arguments based upon the interpretation of the provisions of Section 13 or 13 (1A) of the CCA or Order XLIII of the CPC fade into irrelevancy once it is clear that the maintainability of these appeals has to be adjudged by following the drill of Section 37 of the ACA. The provisions of the ACA determine the issue of appealability in such matters. The provisions of the CCA, or the CPC, can be examined only to determine the forum of appeal. The latter two enactments do not decide the substantive maintainability of the appeal. Thus, if the appeal is not maintainable under the ACA, then

there is no question of referring to the forum provided by the CCA or the CPC and then holding that the appeals are nevertheless maintainable.

75. Similarly, the decisions in *D & H India Ltd.* (supra), *Hubtown Limited* (supra) and *Sigmarq Technologies Pvt. Ltd. and others* (supra) would not apply given the legal position that the issue of maintainability of these appeals must be determined by reference to the provisions of ACA and not the CCA or the CPC. In any event, another Coordinate Bench of this Court, in the case of *Shailendra Bhadauria and others* (supra), has expressly held that *"the earlier view in Hubtown Limited (supra) and Sigmarq Technologies (supra) will have to give way and all the more after the judgments of the Hon'ble Supreme Court delivered in the case of Fuerst Day Lawson Limited v. Jindal Exports Limited and the authoritative and binding pronouncement in the case of Kandla Export Corporation (supra). The statute has to confer a right of appeal. That has to be conferred in clear words. We cannot, as suggested by Mr Andhyarujina, by an interpretative process carve out a right of appeal, when the law is not creating it."*

76. Thus, the Coordinate Bench, in *Shailendra Bhadauria and others* (supra) upheld that the preliminary objection regarding maintainability of appeals against an order made by the learned Single Judge by this Court in an application for execution/enforcement of an arbitral award, *inter alia* on the ground that such an appeal was not maintainable under Section 37 of the ACA, and therefore, by tortious interpretation of the provisions of the CCA or the CPC, right of appeal against such orders could not be carved out by the Court.

77. In **Bank of India v. M/s Maruti Civil Works**[33], another coordinate Bench of this Court distinguished *D & H India Ltd.* (supra) and referred to a later decision of the Delhi High Court in **Delhi Chemical and Pharmaceutical Works Pvt. Ltd. v. Himgiri Realtors Pvt Ltd.**[34] which had doubted the correctness of the view taken in *D & H India Ltd.* (supra). The Court held that an appeal under Section 13(1A) of the CCA would lie only against the judgment and orders enumerated or enlisted under Order XLIII of the CPC.

78. For all the above reasons, we hold that these appeals cannot be held to be maintainable by reference to sections 13 or 13(1A) of the CCA read with the provisions in Order XVIII of the CPC.

ALTERNATE ARGUMENT BASED ON ORDER XLIII RULE 1A (2) CPC

79. Mr P. Chidambaram's ultimate but without prejudice submission that should this Court, for any reason, hold that these appeals are not maintainable, then the appellants must be granted the liberty to approach the Court, which passed the order dated 22 February 2018 with a request to such Court to modify/revise its order on the ground that the compromise terms were contrary to law. For this, Mr P. Chidambaram relied upon the provisions of Order XLIII Rule 1 A (2) of CPC and the decisions of the Hon'ble Supreme Court in *Banwari Lal* (supra) and *Vipan Aggarwal and another* (supra).

---

[33] Appeal From Order No.362 of 2021 decided on 15 December 2023.

[34] 2021 SCC Online Del 3606

80. Since we have held that the proceedings for enforcement of the arbitral award before the learned Single Judge were not proceedings under Order XXI or any other provisions of CPC, there is no question of granting the liberty as prayed for. *Banwari Lal* (supra) and *Vipan Aggarwal and another* (supra) are cases concerning proceedings under the CPC. In the context of such proceedings, the two decisions hold that parties aggrieved by a compromise decree had a right to avail either the remedy of appeal in terms of Order XLIII Rule 1A of CPC or to file an application before the Court which made the compromise decree given the proviso along with Explanation to Rule 3 of Order XXIII of CPC. These decisions do not even remotely deal with proceedings for the enforcement of arbitral awards, and the consent orders compromise orders made in such proceedings. Therefore, the liberty to move the Court which made the order dated 22 February 2018, i.e., the learned Single Judge of this Court, cannot be granted as prayed for.

COSTS AND CONCLUSIONS

81. In these matters, we cannot but resist noting that the disputes between the parties culminated in a reference to the Arbitral Tribunal. A consent award dated 14 July 2014 disposed of the arbitral proceedings. Since the appellants failed to honour their undertakings and pay the awarded amounts, the first and second Respondents were forced to file proceedings to enforce the arbitral/consent award dated 14 July 2014. Even these execution/enforcement proceedings were disposed of by consent order dated 22 February 2018, which gave further concessions to the appellants. Instead of honouring the consent order dated 22 February 2018, the

appellants instituted these appeals, which we now find were not maintainable.

82. Thus, the appellants are determined not to pay the first and second Respondents under the consent award dated 14 July 2014 and the consent order dated 22 February 2018. Considerable judicial time has been spent dealing with almost identical arguments on the issue of maintainability in Commercial Appeal (L) No.109 of 2019 and connected matters and the present appeals. This is at the cost of several non-commercial matters, which cry for scarce judicial time and commercial matters, which must be expedited given the legislative intent of both the Commercial Courts Act and the Arbitration Act. Even though all the arguing counsel presented arguments with clinical precision and admirable restraint, considerable judicial time of the Single Judge and two Division Benches was consumed. For all this, the appellants must pay costs not only to the first and second Respondents but also to the Maharashtra State Legal Services Authority, which provides legal aid to those who cannot afford the luxury of engaging advocates to prosecute their causes.

83. Accordingly, we dismiss these appeals as not maintainable. The appellants are directed to pay consolidated costs of Rs.20,00,000/-, out of which Rs 10,00,000/- to be shared by the first and second Respondents, and the balance Rs 10,00,000/- by the Maharashtra State Legal Services Authority. These costs must be paid within four weeks from today, and proof of payment must be filed in the Registry.

84. These appeals and interim applications therein, if any, are dismissed with costs as indicated above. Interim orders, if any are also vacated.

(Jitendra Jain, J) (M. S. Sonak, J)