Oommen Thomas Panicker, vs Monica Constructions,

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Court : Kerala

Decided On : Sep-20-2021

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mrs. Justice M.R.Anitha

Appeal No. : FAO/44/2021

Appellant : Oommen Thomas Panicker,

Respondent : Monica Constructions,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K. NARENDRAN & THE HONOURABLE MRS. JUSTICE M.R.ANITHA MONDAY, THE 20TH DAY OF SEPTEMBER 2021 / 29TH BHADRA, 1943 AGAINST THE ORDER DATED 01.03.2021 IN I.A.NO.2 OF 2020 IN O.S.NO.202 OF 2018 OF I ADDITIONAL SUB COURT, THIRUVANANTHAPURAM APPELLANT: OOMMEN THOMAS PANICKER, AGED 45 YEARS, TOPS MANOR, VETTIKAVALA, PANAVELI-691 544, REPRESENTED BY POWER OF ATTORNEY HOLDER: OMMEN PANICKER, TOPS MANOR, VETTIKAVALA, PANAVELI-691 544. BY ADV S.A.RAZZAK RESPONDENTS:

1 MONICA CONSTRUCTIONS, ROYAL PLAZA, TC 6/895(4), II FLOOR, NEAR SBI VATTIYOORKAVU, REPRESENTED BY PARTNERS R.VINOD & L.KRISHNAPRIYA, MP 7/565D, DEVADARU, MALAYANKEEZHU, THIRUVANANTHAPURAM-695 571. 2 VASTUSHILPALAYA CONSULTANCY PVT. LTD., L-16, JAWAHAR NAGAR, KOWDIAR, THIRUVANANTHAPURAM-695 003, REPRESENTED BY PRINCIPAL ARCHITECT (KOSHY K.ALEX). BY ADVS. P.B.KRISHNAN SABU GEORGE THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY

HEARD ON 03.08.2021, THE COURT ON 20.09.2021 DELIVERED THE FOLLOWING: -2- CR

JUDGMENT

Anil K. Narendran, J.

The appellant is the 1st defendant in O.S.No.202 of 2018

on the file of the First Additional Subordinate Judge's Court, Thiruvananthapuram, a suit filed by the 1st respondent-plaintiff against the appellant and the 2nd respondent to realise a sum of Rs.85,80,203/- towards balance cost on works undertaken by the 1st defendant in a construction contract. The plaintiff has also sought for a declaration that termination of the said contract by the 1st defendant is illegal. In O.S.No.202 of 2018, the 1st defendant filed I.A.No.2 of 2020, an application under Section 8(1) of the Arbitration and Conciliation Act, 1996, to refer the parties to arbitration. The plaintiff filed objections. After considering the rival contentions, the court below, by the

order dated 01.03.2021, dismissed that application as not

maintainable, on the ground that, since the amount sought to be recovered is in excess of Rs.85,00,000/-, in the dispute arising out of a construction and infrastructure contract, O.S.No.202 of 2018 is liable to be transferred to the

Commercial Court, Thiruvananthapuram, in view of the -3- provisions under Section 15 of the Commercial Courts Act,

2015. Challenging the said order, the appellant has filed this appeal before this Court, under Section 104(1) of the Code of Civil Procedure, 1908 and Section 37(1) of the Arbitration and Conciliation Act, 1996.

2. Initially, Registry has not numbered this appeal

raising certain doubts as to its maintainability. On 08.07.2021, when the unnumbered appeal came up for consideration, after hearing preliminary arguments of the learned counsel for the appellant, we found that the question of maintainability of the appeal requires detailed consideration with notice to the respondents. Therefore, Registry was directed to number the

appeal, subject to the condition that the question of maintainability will be decided with notice to the respondents. Thereafter, on the same day, this Court issued urgent notice by

speed post to the respondents, along with a copy of the order

dated 08.07.2021, returnable within ten days.

3. Heard the learned counsel for the appellant- 1stdefendant and also the learned counsel for the 1 st respondent-plaintiff on the question of maintainability of this -4- appeal. The 2nd defendant in O.S.No.202 of 2018, who is arrayed as the 2nd respondent herein, is the Arbitrator as per the contract.

4. On the question of maintainability of this appeal, the learned counsel for the appellant-1st defendant contended that,

the impugned order of the court below, dismissing an application filed under Section 8(1) of the Arbitration and Conciliation Act, as not maintainable, is appealable under Section 104(1) of the Code of Civil Procedure and Section 37(1)

(a) of the Arbitration and Conciliation Act. Per contra, the learned counsel for the 1st respondent-plaintiff contended that, the impugned order of the court below dismissing an application filed under Section 8(1) of the Arbitration and Conciliation Act as not maintainable, in view of the provisions

under Section 15 of the Commercial Courts Act, is not an order

of the court below refusing to refer parties to arbitration under Section 8(1) of the Arbitration and Conciliation Act, which alone is appealable under Section 37(1)(a) of the said Act. In view of the prohibition contained in Section 37(1) of the Arbitration and Conciliation Act, such an order is not appealable. -5-

5. As already noticed, O.S.No.202 of 2018 is one filed by the plaintiff seeking a decree to realise a sum of Rs.85,80,203/- from the 1st defendant towards alleged balance cost of the work done under a construction contract. In that

suit, the 1st defendant filed I.A.No.2 of 2020 seeking an order

to refer the dispute to arbitration, under Section 8(1) of the Arbitration and Conciliation Act, 1996.

6. The Arbitration and Conciliation Act, 1996 was enacted by the Parliament to consolidate and amend the law

relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Section 2(e) of the Act defines the term court. As per Section 2(e)(i), court means, in the case of an arbitration other than international commercial arbitration, the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not

-6- include any civil court of a grade inferior to such principal civil court, or any court of small causes. Section 5 of the Act deals with extent of judicial intervention. As per Section 5, notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part [i.e., Part I], no judicial authority shall intervene except where so provided in this Part. 6.1. Section 8 of the Act deals with power to refer parties to arbitration where there is an arbitration agreement. Section 8, after the substitution of Section 8(1) and insertion of the proviso to Section 8(2), by the Arbitration and Conciliation (Amendment) Act, 2015 (Act No.3 of 2016) reads thus;

> 8. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or

order of the Supreme Court or any court, refer the parties

to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not

> -7- be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that court.

(3) Notwithstanding that an application has been made

under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made. 6.2. As per Section 8(1) of the Act, a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. -8- 6.3. In Bharat Aluminium Co. v. Kaiser Aluminium

Technical Services Inc. [(2012) 9 SCC 552] a Five-Judge Bench of the Apex Court held that, use of the term judicial authority, in Section 5 and Section 8 of the Arbitration and Conciliation Act is not a recognition by Parliament that Part I will apply to international commercial arbitrations held outside India. The term judicial authority is a legacy from the 1940 Act. The corresponding provision of Section 34 of the 1940 Act, which covered purely domestic arbitrations, between two or more Indian parties, within the territory of India, also refers to judicial authority. The term judicial authority has been retained especially in view of policy of least intervention, which cannot be limited only to the courts. This is clearly in recognition of the phenomenon that the judicial control of commercial disputes is no longer in the exclusive jurisdiction of courts. There are many statutory bodies, tribunals which would have adjudicatory jurisdiction in very complex commercial matters. Section 5 would be equally applicable to such bodies. The use of the term judicial authority in no manner has any reference to arbitrations not held in India. It is in conformity

-9- with clause (v) of the objects and reasons for the Arbitration and Conciliation Act, which has been given statutory recognition in Section 5. 6.4. In Vidya Drolia v. Durga Trading Corpn. [(2021) 2 SCC 1], propounding a four-fold test, the Apex Court held that, a dispute in an arbitration agreement is not arbitrable: (1) when cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;

(2) when cause of action and subject-matter of the dispute

affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable; (3) when cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; (4) when the subject- matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist

-10- in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non- arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable. However, the aforesaid principles have to be applied with care and caution. 6.5. Section 37 of the Act deals with the appealable orders. Section 37, after the substitution of Section 37(1), by the Arbitration and Conciliation (Amendment) Act, 2019 (Act No.33 of 2019) and substitution of Section 37(1)(a) and (b), by the Arbitration and Conciliation (Amendment) Act, 2015 (Act No.3 of 2016) reads thus; 37. Appealable orders.- (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely:-

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under Section 9;

(c) setting aside or refusing to set aside an arbitral award under Section 34. -11-

(2) An appeal shall also lie to a court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in

appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court. 6.6. As per Section 37(1)(a) of the Act, notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from an order refusing to refer the parties to arbitration under Section 8, to the court authorised by law to hear appeals from original decrees of the court passing the

order.

6.7. In Chintels (India) Ltd. v. Bhayana Builders (P) Ltd. [(2021) 4 SCC 602] the Apex Court held that, appeal against an order refusing to condone delay in filing an application under Section 34 of the Arbitration and Conciliation

Act is maintainable under Section 37(1)(c), as such an order

amounts to order refusing to set aside award.

7. The Commercial Courts Act, 2015, originally titled as -12-

the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, was enacted by the Parliament to provide for the constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto. 7.1. Section 2(c) of the Act defines commercial dispute. As per Section 2(c)(vi), commercial dispute means a dispute

arising out of construction and infrastructure contracts, including tenders. As per Explanation to Section 2(c), a commercial dispute shall not cease to be a commercial dispute merely because (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or

instrumentalities, or a private body carrying out public functions. 7.2. Section 2(i) of the Act defines the term specified -13- value. Section 2(i) of the Act, after its substitution by the

Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (Act No.28 of 2018), defines the term specified value to mean, in relation to a commercial dispute, the value of the subject- matter in respect of a suit as determined in accordance with Section 12, which shall not be less than three lakh rupees or

such higher value, as may be notified by the Central Government. It is pertinent to note that, by Act No.28 of 2018, the words which shall not be less than one crore rupees in Section 2(i) was substituted with the words which shall not be less than three lakh rupees, with effect from 03.05.2018. 7.3. In Ambalal Sarabhai Enterprises Ltd. v. K.S.

Infraspace LLP [(2020) 15 SCC 585] the Apex Court held

that, only the disputes which actually answer the definition of commercial dispute as provided under Section 2(1)(c) of Commercial Courts Act must be entertained by Commercial Courts. A strict construction to provisions of the said Act is therefore required in this regard. Else the same would defeat the very object and purpose of the said Act, i.e., speedy

-14- disposal of high value commercial disputes. 7.4. Section 3 of the Act deals with constitution of Commercial Courts. Section 3, after its substitution by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (Act No.28 of 2018), reads thus;

> 3. Constitution of Commercial Courts.- (1) The State Government, may after consultation with the concerned High Court, by notification, constitute such number of Commercial Courts at District level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those courts under this Act: Provided that with respect to the High Courts having ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, constitute Commercial Courts at the District Judge level:

Provided further that with respect to a territory over which the High Courts have ordinary original civil jurisdiction, the State Government may, by notification, specify such pecuniary value which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction exercisable by the District Courts, as it may consider necessary.

(1A) Notwithstanding anything contained in this Act, the

State Government may, after consultation with the concerned High Court, by notification, specify such -15- pecuniary value which shall not be less than three lakh rupees or such higher value, for whole or part of the State, as it may consider necessary.

(2) The State Government shall, after consultation, with

the concerned High Court specify, by notification, the local limits of the area to which the jurisdiction of a Commercial Court shall extend and may, from time to time, increase, reduce or alter such limits.

(3) The State Government may, with the concurrence of

the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a Commercial Court either at the level of District Judge or a court below the level of a District Judge. 7.5. Section 6 of the Act deals with jurisdiction of

Commercial Courts. As per Section 6, the Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a specified value arising out of the entire territory of the State over which it has been vested territorial jurisdiction. As per Explanation to Section 6, for the purposes of this Section, a commercial dispute shall be considered to arise out of the entire territory of the State over which a Commercial Court has been vested jurisdiction, if the suit or application relating to such commercial dispute has been instituted as per the provisions of Sections 16 to 20 of the Code

-16- of Civil Procedure, 1908. 7.6. Section 9 of the Act, which dealt with transfer of suit if the counter-claim in a commercial dispute is of specified value, was omitted by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (Act No.28 of 2018), with effect from 03.05.2018. 7.7. Section 10 of the Act deals with jurisdiction in respect of arbitration matters. Section 10 reads thus; 10. Jurisdiction in respect of arbitration matters.- Where the subject matter of an arbitration is a commercial dispute of a specified value and-

(1) If such arbitration is an international commercial

> arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(2) If such arbitration is other than an international

> commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by -17- the Commercial Division where such Commercial Division has been constituted in such High Court.

(3) If such arbitration is other than an international

> commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court

has been constituted. 7.8. As per Section 10(3) of the Act, where the subject-

matter of an arbitration is a commercial dispute of a specified value and if such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.

7.9. Section 11 of the Act deals with bar of jurisdiction of commercial Courts and Commercial Divisions. As per Section -18-

11, notwithstanding anything contained in this Act, a Commercial Court or a Commercial Division shall not entertain or decide any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

7.10. Section 13 of the Act deals with appeals from decrees of Commercial Courts and Commercial Divisions. Section 13, after its substitution by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (Act No.28 of 2018), reads thus; 13. Appeals from decrees of Commercial Courts and Commercial Divisions.- (1) Any person aggrieved by the

judgment or order of a Commercial Court below the level

of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

(1A) Any person aggrieved by the judgment or order of a

Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the

Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or -19-

order:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

(2) Notwithstanding anything contained in any other law

for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act. 7.11. As per the proviso to Section 13(1A), an appeal shall lie from the orders passed by a Commercial Division or a

Commercial Court that are specifically enumerated under Order

XLIII of the Code of Civil Procedure, 1908 as amended by the Commercial Courts Act and Section 37 of the Arbitration and Conciliation Act, 1996. As per Section 13(3), notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any

order or decree of a Commercial Division or Commercial Court

otherwise than in accordance with the provisions of the said Act. 7.12. Section 15 of the Act deals with transfer of pending -20- cases. Section 15, after its substitution by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (Act No.28 of 2018), reads thus;

> 15. Transfer of pending cases.- (1) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of

1996), relating to a commercial dispute of a specified value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.

(2) All suits and applications, including applications under

the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a specified value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court: Provided that no suit or application where the final

judgment has been reserved by the court prior to the

constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2).

(3) Where any suit or application, including an application

under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of specified value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer. -21-

(4) The Commercial Division or Commercial Court, as the

case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new timelines or issue such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance with Order XV-A of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the proviso to sub-rule (1) of Rule 1 of Order

V of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to such transferred suit or application and the court may, in its discretion, prescribe a new time period within which the written statement shall be filed.

(5) In the event that such suit or application is not

> transferred in the manner specified in sub-section (1), sub-section (2) or sub-section (3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding. 7.13. As per Section 15(2) of the Act, all suits and

applications, including applications under the Arbitration and Conciliation Act, 1996, relating to a commercial dispute of a specified value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, -22- shall be transferred to such Commercial Court. As per the proviso to Section 15(2), no suit or application where the final

judgment has been reserved by the court prior to the

constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub- section (2). 7.14. As per Section 15(3) of the Act, where any suit or

application, including an application under the Arbitration and Conciliation Act, 1996, relating to a commercial dispute of specified value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer. As per Section 15(5), in the event that such suit or application is not transferred in the manner specified in Section 13(1) or 13(2) or 13(3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be,

-23- having territorial jurisdiction over such suit, and such order of transfer shall be final and binding. 7.15. Section 21 deals with overriding effect of the Commercial Courts Act. As per Section 21, save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act.

8. In Kandla Export Corporation v. OCI

Corporation [(2018) 14 SCC 715], a decision relied on by the learned counsel for the appellant, the question that came up for consideration before the Apex Court was as to whether an appeal, not maintainable under Section 50 of the Arbitration and Conciliation Act is nonetheless maintainable under Section 13(1) of the Commercial Courts Act. The Apex Court noticed that, Section 13(1) of the Commercial Courts Act is in two parts. The main provision provides for appeals from judgments, orders and decrees of the Commercial Division of the High Court. To this main provision, an exception is carved out by the

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proviso. The primary purpose of a proviso is to qualify the generality of the main part by providing an exception, which has been set out with great felicity in CIT v. Indo-Mercantile Bank Ltd. [AIR 1959 SC 713]. The proviso goes on to state that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration and Conciliation Act. The orders that are not specifically enumerated under

Order XLIII of the Code would, therefore, not be appealable,

and appeals that are mentioned in Section 37 of the Arbitration Conciliation Act alone are appeals that can be made to the

Commercial Appellate Division of a High Court. Thus, an order

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

-25- 8.1. In Kandla Export Corporation, before the Apex

Court, the learned Senior Counsel for the appellants argued that, Section 50 of the Arbitration and Conciliation Act does not find any mention in the proviso to Section 13(1) of the Commercial Courts Act and therefore, notwithstanding that an appeal would not lie under Section 50 of the Arbitration Act, it would lie under Section 13(1) of the Commercial Courts Act. Section 37 of the Arbitration and Conciliation Act contains the expression and from no others which is conspicuous by its absence in Section 50 of the Arbitration Conciliation Act. The Apex Court held that, given the judgment in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. [(2011) 8 SCC 333], which Parliament is presumed to know when it enacted the Arbitration and Conciliation (Amendment) Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration and Conciliation 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, which is exhaustive in nature. It carries the negative import mentioned in Para.89 of Fuerst

-26- 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--vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act. 8.2. In Kandla Export Corporation, on the question as

to why Section 37 of the Arbitration Conciliation Act was expressly included in the proviso to Section 13(1) of the Commercial Courts Act, which is equally a special provision of appeal contained in a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act, the Apex Court answered that, this was done ex abundanti cautela. As Section 37 itself was amended by the Arbitration and Conciliation (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

-27- one more category into the category of appealable orders in the Arbitration and Conciliation 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 and Conciliation 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. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that 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

-28- as laying down the forum which will hear and decide such an appeal. 8.3. In Kandla Export Corporation, the Apex Court noticed that, in Sumitomo Corpn. v. CDC Financial Services (Mauritius) Ltd. [(2008) 4 SCC 91], in the context of Section 50 of the Arbitration and Conciliation Act and Sections 10(1)(a) and 10F of the Companies Act, 1956, it was held that, once an appeal is provided for in Section 50 of the Arbitration and Conciliation Act, the court authorised by law to hear such appeals would then be found in Sections 10(1)(a) and 10F of the Companies Act. The present case is a parallel instance of Section 50 of the Arbitration and Conciliation Act providing for an appeal, and Section 13(1) of the Commercial Courts Act providing the forum for such appeal. In the present case, as no appeal lies under Section 50 of the Arbitration Act, no forum can be provided for. What is important to note is that it is Section 50 that provides for an appeal, and not the letters patent, given the subject matter of appeal. Also, the appeal has to be adjudicated within the parameters of Section 50 alone. Concomitantly, where Section 50 excludes an appeal, no such

-29- appeal will lie. 8.4. In Kandla Export Corporation, the Apex Court

noticed that, given the objects of both the statutes, it is clear that arbitration itself 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 as an equal partner, commercially speaking, in the international community. In point of fact, the raison d'tre for the enactment of the Commercial Courts Act is that commercial disputes involving high amounts of money should be speedily decided. Given the objects of both the enactments, if we were to provide an additional appeal, when Section 50 does away with an appeal so as to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads.

8.5. In Fuerst Day Lawson [(2011) 8 SCC 333], a decision relied on in Kandla Export Corporation, the common question that arose for consideration by the Apex Court was as to whether an order, though not appealable under Section 50 of the Arbitration and Conciliation Act would nevertheless be -30-

subject to appeal under the relevant provision of the Letters Patent of the High Court. In other words even though the Arbitration and Conciliation Act does not envisage or permit an appeal from the order, the party aggrieved by it can still have his way, bypassing the said Act and taking recourse to another jurisdiction. Before the Apex Court it was argued on behalf of the appellants that the jurisdiction of the High Court under the Letters Patent is an independent jurisdiction and as long as the

order qualifies for an appeal under the Letters Patent, an

appeal from that order would be maintainable before the High Court. The Apex Court noticed that the Arbitration Act, 1940 was held to be a self-contained code, in P.S. Sathappan v. Andhra Bank Ltd. [(2004) 11 SCC 672]. If the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration and Conciliation Act is a self- contained code and exhaustive, then it must also be held that it

carries with it a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done. In other words, a letters patent appeal would be excluded by the application of one of the general principles that, where the Special Act sets out a self-contained code, the applicability of the general law procedure would be impliedly excluded. Therefore the Apex Court held that no Letters Patent appeal will lie against an order which is not appealable under Section 50 of the Arbitration and Conciliation Act.

9. In Deep Industries Ltd. v. Oil and Natural Gas

Corporation Ltd. [(2020) 15 SCC 706], another decision relied on by the learned counsel for the appellant, the question that arose for consideration of the Apex Court was relating to exercise of jurisdiction by the High Court under Article 227 of the Constitution of India in matters that are decided under the Arbitration and Conciliation Act. The Apex Court noticed that, under Section 29A of the Act, which was inserted by the Arbitration and Conciliation (Amendment) Act, 2016, a time limit was made within which arbitral awards must be made,

namely, 12 months from the date the Arbitral Tribunal enters upon the reference. Section 34(6) of the Act, added by the same amendment states that, the applications under Section 34 for setting aside arbitral award are to be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in Section 34(5) is served upon the other parties. Given the aforesaid statutory provision and given the fact that the 1996 Act repealed three previous enactments in order that there be speedy disposal of all matters covered by it, it is clear that the statutory policy of the Act is that not only are time limits set down for disposal of the arbitral proceedings themselves but time limits have also been set down for Section 34 references to be decided. Equally, in Union of India v. Varindera Constructions Ltd. [(2020) 2 SCC 111], the Apex Court has imposed the selfsame limitation on first appeals under Section 37 of the Act, so that there be a timely resolution of all matters which are covered by arbitration awards. The non obstante clause contained in Section 5 of the Act, which states that notwithstanding anything contained in any other law, in matters that arise under

Part I of the Arbitration and Conciliation Act, no judicial authority shall intervene except where so provided in that Part. Section 37 of the Act grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see: Section 37(2) of the Act]. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. What is important to note is that, though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the

High Court would be extremely circumspect in interfering with the same, taking into account

the statutory policy as adumbrated as above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction. -34-

10. In Bhaven Construction v. Executive Engineer,

Sardar Sarovar Narmada Nigam Ltd. [2021 SCC OnLine SC 8], another decision relied on by the learned counsel for the appellant, the question that arose for consideration of the Apex Court was as to whether the arbitral process could be interfered with under Article 226/227 of the Constitution of India, and under what circumstance. The Apex Court noticed that, non obstante clause is provided in Section 5 of the Arbitration and Conciliation Act to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the said Act. The Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfill the basic ingredients provided under Section 7 of

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the said Act. Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Act. If parties fail to refer a matter to arbitration or to appoint an arbitrator in accordance with the procedure agreed by them, then a party can take recourse for court assistance under Section 8 or 11 of the Act.

10.1. In Bhaven Construction, the Appellant acted in

accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without the 1 st respondent mounting a judicial challenge at that stage. The 1 st respondent then appeared before the sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Act. Thereafter, the 1 st respondent impugned the order passed by the arbitrator under Section 16(2) of the Act through a petition filed under Article 226/227 of the Constitution of India. The Apex Court noticed that, in the usual course, the Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as recourse to a court against an arbitral award may be made

only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). The use of term only as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure. In any case, the hierarchy in our legal framework mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, [(2011) 14 SCC 337] it was held that, there cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India [(1997) 3 SCC 261]. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or

order passed by a quasi-judicial body/authority, and it is an

altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

10.2. In Bhaven Construction the Apex Court held that,

it is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear bad faith shown by one of the parties. This high standard set by the Apex Court is in terms of the legislative intention to make the arbitration fair and efficient. The Apex Court found that the 1st respondent has not been able to show exceptional circumstance or bad faith on the part of tha Appellant, to invoke the remedy under Article 227 of the Constitution of India. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used

-38- its inherent power to interject the arbitral process at this stage.

11. In State of Kerala v. Somdatt Builders Ltd. [2012 (2) KLT 64], a decision relied on by the learned counsel for the 1st respondent, a Division Bench of this Court

held that, the only provision in the Arbitration and Conciliation

Act for an appeal to the High Court from the order of the court dealing with an application for setting aside an arbitral award under Section 34 is Section 37(1), which enumerates the orders which are appealable under that provision. The legislature, in its wisdom, has categorically expressed that an appeal shall lie from the orders enumerated in Section 37(1)(a) and (b) 'and from no others'. The use of the phrase 'and from no others' within brackets in Section 37(1) is a legislative device used to keep reminding that no appeal other than that which would fall in Section 37(1)(a) and (b) would lie. Section 5 of the Act restricts the extent of judicial intervention. The appeal in question was, admittedly, against an order by which the court refused to grant leave to amend an application filed under Section 34 of the Act. The Division Bench held that, in terms of what is noted on the issue of jurisdiction referable to the

-39- provisions under Section 37 and also, Section 5 of the Act, no appeal lies against an order refusing leave to amend an application filed under Section 34 of the Act.

12. In Pranathmaka Ayurvedics Pvt. Ltd. v.

Cocosath Health Products [2020 (6) KLT 620], another decision relied on by the learned counsel for the 1 st respondent, the question that arose for consideration of a learned Single Judge of this Court was whether an order passed under Section 9 of the Arbitration and Conciliation Act, by a Commercial Court appealable under Section 13(1) of the Commercial Courts Act. In that case, the 1st and 2nd respondents filed an application under Section 9 of the Arbitration and Conciliation Act in the

District Court, Ernakulam, against the petitioners. That

application was transferred to the Commercial Court, Ernakulam (Principal Sub Court, Ernakulam) and numbered as C.M.A.(Arb.)No.8 of 2020. As per judgment dated 14.09.2020, the Commercial Court allowed that application, restraining the respondents from appointing any persons and/or business establishments as the exclusive global marketer or distributor for the distribution, marketing or sale of the products of the 1st

-40- respondent company and from transferring to any third parties the product know-how or confidential information of the products till arbitration proceedings are commenced in the case. Challenging the legality and propriety of the said judgment, original petition was filed under Article 227 of the Constitution of India. 12.1. In Pranathmaka Ayurvedics Pvt. Ltd., on the

facts of the case on hand, the learned Single Judge noticed

that, the impugned order is an order of injunction. It is appealable under Order XLIII of the Code of Civil Procedure. It is an order passed under Section 9 of the Arbitration and Conciliation Act. It is also appealable under Section 37 of the Arbitration Act. Section 37(1)(b) states that an appeal shall lie from an order granting or refusing to grant any measure under Section 9 of the said Act. Right of appeal is the creature of a statute. It is well settled that right of appeal is a substantive right. Nothing contained in Section 13(1) or (2) of the Commercial

Courts Act curtails this right of appeal. The proviso to Section 13(1A) restricts the right of appeal from orders that are specifically enumerated under Order XLIII of the Code of

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Civil Procedure and Section 37 of the Arbitration and Conciliation Act. If the contention of the learned counsel for the petitioners is accepted, the proviso to Section 13(1A) would be meaningless. Moreover, in order to find out whether an appeal against an order passed under Section 9 of the Arbitration and Conciliation Act is maintainable or not, the provisions of the said Act have to be looked into. There is no independent right of appeal provided under Section 13(1) of the Commercial Courts Act. It merely provides the forum of filing appeals. Section 37(1)(b) of the Arbitration and Conciliation Act creates the right to file an appeal against an order granting or refusing to grant any measure under Section 9 of the said Act. It is the parameters of Section 37(1) of the Arbitration and Conciliation Act alone which have to be looked at in order to determine whether an appeal against an order under Section 9 of the said Act is maintainable or not [See: BGS SGS Soma JV v. NHPC Ltd. - (2020) 4 SCC 234]. The question whether the proviso in Section 13 of the Commercial Courts Act applies only to Section 13(1A) or whether it applies to Section 13(1) also, does not arise for consideration, since the order impugned in the

-42- original petition is an order passed under Section 9 of the Arbitration and Conciliation Act and therefore, appealable under Section 37 of the said Act, which is specifically mentioned in the proviso. Therefore, the learned Single Judge concluded that an

order under Section 9 of the Arbitration and Conciliation Act,

passed by a Commercial Court below the level of a District Judge is appealable under Section 13(1) of the Commercial Courts Act. 12.2. In Pranathmaka Ayurvedics Pvt. Ltd. the learned

Single Judge did not accept the contention of the learned counsel for the respondents that, the remedy of appeal against an order provided under a statute is an absolute bar in entertaining an application or petition under Article 227 of the Constitution of India. The learned Single Judge held that, the High Court in exercise of its jurisdiction of superintendence can interfere in order to keep the tribunals and the courts subordinate to it 'within the bounds of their authority'. The High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and courts subordinate to it or where there has been a

gross and manifest failure of justice or the basic principles of natural justice have been flouted. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction. However, when there is a remedy of appeal before a civil court available to an aggrieved person and such remedy is not availed of by him, it would deter the High Court, not merely as a measure of self imposed restriction, but as a matter of

discipline and prudence, from exercising its power of superintendence under Article 227 of the Constitution. Since the petitioners have not shown any reason for not availing the remedy of appeal against the order impugned in this original petition, the learned single Judge declined to interfere with the said order, invoking the power under Article 227 of the Constitution of India.

13. In Amazon.com NV Investment Holdings LLC v.

Future Retail Ltd. [2021 SCC OnLine SC 557 - Civil Appeal No.4492-93 of 2021 dated 06.08.2021], a decision in the additional list of citation dated 09.08.2021 filed by the learned counsel for the 1st respondent, with copy to the learned counsel for the appellant, one of the questions that arose for

consideration of the Apex Court was as to whether an order

passed under Section 17(2) of the Arbitration and Conciliation Act in enforcement of the award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable. The

appellant initiated arbitration proceedings and filed an application on 05.10.2020 seeking emergency interim relief under the Singapore international Arbitration Centre Rules (SIAC Rules), asking for injunctions against the aforesaid transaction. The Emergency Arbitrator passed interim award, on 25.10.2020, granting injunctions/directions. The appellant initiated proceedings under Section 17(2) of the Arbitration and

Conciliation Act before the High Court of Delhi to enforce the

interim award of the Emergency Arbitrator in SIAC Arbitration No. 960 of 2020. The seat of the arbitral proceedings was New Delhi, and as per the arbitration clause agreed upon by the -45- parties, SIAC Rules apply. On 18.03.2020, the learned Single

Judge passed a detailed judgment giving reasons for an order

made under Section 17(2) of the Act, read with Order XXXIX, Rule 2A of the Code of Civil Procedure, in which it was held that an Emergency Arbitrator's award is an order under Section 17(1) of the Act. Against the said judgment, F.A.O.No.51 of 2021 was filed by the 1st respondent. The Division Bench of the Delhi High Court by the order dated 22.03.2021 stayed the

judgment of the learned Single Judge. Against the said order,

Special Leave Petitions were filed before the Apex Court. The Apex Court by its order dated 19.04.2021 stayed further proceedings before the learned Single Judge as well as the Division Bench of the Delhi High Court, and set the matter down for final disposal. 13.1. In Amazon.com NV Investment Holdings LLC, on the question as to maintainability of the appeal that has been filed under Order XLIII, Rule 1(r) of the Code of Civil Procedure, the Apex Court noticed that the Law Commission recommended an amendment to Section 17 of the Arbitration and Conciliation Act to provide the arbitral tribunal the same -46-

powers as a court would have under Section 9. Section 9(1) of the Act, after setting out in clauses (i) and (ii) what interim measures or protection could be granted, then goes on to add, and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. The arbitral tribunal cannot itself enforce its orders, which can only be done by a court with reference to the Code of Civil Procedure. But the court, when it acts under Section 17(2), acts in the same manner as it acts to enforce a court

order made under Section 9(1). If this is so, then what is clear

is that the order of the arbitral tribunal gets enforced under Section 17(2) read with the Code of Civil Procedure. Section 17(2) creates a legal fiction. This fiction is created only for the purpose of enforceability of interim orders made by the arbitral tribunal. To extend it to appeals being filed under the Code of Civil Procedure would be a big leap not envisaged by the legislature at all in enacting the said fiction. There can be no doubt that the legal fiction created under Section 17(2) of the Act for enforcement of interim orders is created only for the limited purpose of enforcement as a decree of the court. To

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extend this fiction to encompass appeals from such orders is to go beyond the clear intention of the legislature. The argument in stressing the words under the Code of Civil Procedure in Section 17(2), thus holds no water as a limited fiction for the purpose of enforcement cannot be elevated to the level of a genie which has been released from a statutory provision and which would encompass matters never in the contemplation of

the legislature. Coming to the appeal provision in the Arbitration and Conciliation Act, the Apex Court found that, there can be no doubt that Section 37 is a complete code so far as appeals from orders and awards made under the

Arbitration and Conciliation Act are concerned. This has further been strengthened by the addition of the non-obstante clause by the Arbitration and Conciliation (Amendment) Act, 2019.

13.2. In Amazon.com NV Investment Holdings LLC, the Apex Court noticed that, in Kandla Export Corporation [(2018) 14 SCC 715], in the context of an appeal under Section 50 of the Arbitration and Conciliation Act, the Apex Court reiterated that Section 50 of the Act is a provision contained in a self-contained code on matters pertaining to -48- arbitration, which is exhaustive in nature. It carries the negative import 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--vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration and Conciliation Act. The judgment in Kandla Export Corporation is, therefore, an

authority for the proposition that the Arbitration and Conciliation Act is a self-contained code on matters pertaining to arbitration, which is exhaustive in nature. The appeal provision in that case (Section 50) was held to carry a negative import that only such matters as are mentioned in the Section are permissible, and matters not mentioned therein cannot be brought in. It was further held that what follows from this is that the substantive provision of appeal is contained in Section 50 of the Act, which alone must be read, Section 13(1) of the Commercial Courts Act being a general provision, which must give way to the specific provision contained in Section 50.

14. In BGS SGS Soma JV v. NHPC Ltd. [(2020) 4 -49-

SCC 234] on the maintainability of an appeal under Section 37 of the Arbitration and Conciliation Act, in a case in which an application under Section 34 of the Act was ordered to be transferred from a court which had no jurisdiction to a court which had jurisdiction, the Apex Court held that, there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals, it is the parameters of Section 37 of the Arbitration and Conciliation Act, 1996 alone which have to be looked at in order to determine whether the present appeals were maintainable. Section 37(1) makes it clear that appeals shall only lie from the orders set out in sub-clauses (a), (b) and

(c) and from no others. The pigeonhole that the High Court in

the impugned judgment [NHPC Ltd. v. Jaiparkash Associates Ltd. - 2018 SCC OnLine P&H 1304] has chosen to say that the appeals in the present cases were maintainable is sub-clause (c). According to the High Court, even where a Section 34 application is ordered to be returned to the appropriate court, such order would amount to an order refusing to set aside an arbitral award under Section 34. Under the proviso to Section

13(1A) of the Commercial Courts Act, Order XLIII of the Code of Civil Procedure is also mentioned. As per Order XLIII, Rule 1(a) of the Code, an appeal shall lie under the provisions of Section 104, from an order under Order VII, Rule 10 returning a plaint to be presented to the proper court except where the procedure specified in Rule 10A of Order VII has been followed. This provision is conspicuous by its absence in Section 37 of the Arbitration and Conciliation Act, 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. Also, what is missed by the impugned judgment [NHPC Ltd. v. Jaiparkash Associates Ltd. - 2018 SCC OnLine P&H 1304] is the words under Section 34. Thus, the refusal to set aside an arbitral award must be under Section 34, i.e., after the grounds set out in Section 34 have been applied to the arbitral award in question, and after the court has turned down such grounds.

Admittedly, on the facts of these cases, there was no adjudication under Section 34 of the Arbitration and Conciliation Act - all that was done was that the Special Commercial Court at Gurugram allowed an application filed -51- under Section 151 read with Order VII, Rule 10 of the Code of Civil Procedure, determining that the Special Commercial Court at Gurugram had no jurisdiction to proceed further with the Section 34 application, and therefore, such application would have to be returned to the competent court situate at New Delhi. The Apex Court found that this judgment is determinative of the issue before it, as it specifically ruled out appeals under Order XLIII Rule 1 of the Code of Civil Procedure when it comes to orders being made under the Arbitration and Conciliation Act. 14.1. In BGS SGS Soma JV the Apex Court noticed that

Section 37 of the Arbitration and Conciliation Act did not remain untouched by the 2015 Amendment Act. As a matter of fact, a new category of appeals was infused into the said provision by adding a new sub-section (1)(a), which provides as follows; notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely, (a) refusing to refer the parties to arbitration under

-52- Section 8. Despite Section 17 being amended by the same Amendment Act, by making Section 17(1) the mirror image of Section 9(1) as to the interim measures that can be made, and by adding Section 17(2) as a consequence thereof, significantly, no change was made in Section 37(2)(b) to bring it in line with

Order XLIII, Rule 1(r). The said Section continued to provide

appeals only from an order granting or refusing to grant any interim measure under Section 17. There can be no doubt that granting or refusing to grant any interim measure under Section 17 would only refer to the grant or non-grant of interim measures under Section 17(1)(i) and 17(1)(ii). In fact, the opening words of Section 17(2), namely, subject to any orders passed in appeal under Section 37 also demonstrates the legislature's understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1). For example, an appeal against an order refusing an injunction may be allowed, in which case Section 17(2) then kicks in to enforce the order passed in appeal. Also, the legislature made no amendment to the granting or refusing to grant any measure under Section 9 to bring it in line with Order XLIII, Rule 1(r) of

-53- the Code, under Section 37(1)(b). What is clear from this is that enforcement proceedings are not covered by the appeal provision. The Apex Court thus answered the second question posed by declaring that no appeal lies under Section 37 of the Arbitration Act against an order of enforcement of an Emergency Arbitrator's order made under Section 17(2) of the Act. Accordingly, the Apex Court vacated all interim orders and set aside the impugned judgment of the Division Bench of the High Court.

15. In Sadasivan K. v. Surendradas [2020 (5) KHC

461] a Full Bench of this Court, in which one among us [M.R. Anita, J] is a party, noticed that, Section 104 of the Code of Civil Procedure says that an appeal shall lie from the orders mentioned in the Section, and save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other orders. In Section 104(1) of the Code, a list of appealable orders has been specifically shown. The words "save as otherwise expressly provided in the body of this Code or by any law for the time being in force" occurring in Section 104 of the Code were not there in Act XIV of 1882.

Section 104 and Order XLIII, Rule 1 of the Code together specify a full list of appealable orders. Stated differently, no other order passed in a suit or proceeding can be challenged in an appeal. On a conjoint reading of these provisions, it will be clear from clause (i) of Section 104(1) of the Code that these provisions are complementary to each other, as it is specifically mentioned in the above clause that any order made under the Rules, from which an appeal is expressly allowed by the Rules, also should be treated as orders from which appeal could be laid. As per Order XLIII, Rule 1A of the Code, where any order, other than those mentioned in Rule 1, is made against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced. It is

pellucid that orders from which appeal lies are clearly mentioned in Section 104 and Order XLIII, Rule 1 of the Code; any other order made against a party and thereupon any

judgment is pronounced against such a party, he may take up a

specific ground, by challenging the order, in the memorandum -55-

of appeal, to be filed against the decree by invoking Section 96, read with Order XLI, Rule 1 of the Code. On a close look at Section 104 and Order XLIII, Rule 1 of the Code, the Full Bench concluded that only a limited number of orders, allowable in a suit or proceeding, alone are made appealable. Rest of the orders can be challenged in a regular appeal filed against the decree, as provided under Order XLIII, Rule 1A of the Code.

16. In the instant case, by the impugned order dated

01.03.2021, the court below dismissed as not maintainable, I.A.No.2 of 2020 in O.S.No.202 of 2018 filed by the appellant/ 1st defendant, an application filed under Section 8(1) of the Arbitration and Conciliation Act, 1996 to refer the parties to arbitration. The impugned order will not fall under the list of appealable orders specified in Section 104 or Order XLIII, Rule 1 of the Code. Therefore, conclusion is irresistible that the above appeal filed against the order dated 01.03.2021 of the court below in I.A.No.2 of 2020 in O.S.No.202 of 2018 is not maintainable under Section 104 or under Order XLIII Rule 1 of the Code.

17. As per Section 8(1) of the Arbitration and -56-

Conciliation Act, a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or

order of the Supreme Court or any court, refer the parties to

arbitration unless it finds that prima facie no valid arbitration agreement exists.

18. As noticed by the Five-Judge Bench of the Apex

Court in Bharat Aluminium Co. [(2012) 9 SCC 552], the term judicial authority has been retained in the Arbitration and Conciliation Act especially in view of policy of least intervention, which cannot be limited only to the courts. This is clearly in recognition of the phenomenon that the judicial control of commercial disputes is no longer in the exclusive jurisdiction of courts. In the said decision the Apex Court noticed that there

are many statutory bodies, tribunals which would have adjudicatory jurisdiction in very complex commercial matters.

19. The Apex Court in Vidya Drolia [(2021) 2 SCC 1] -57-

laid down a four-fold test to decide the question as to whether a dispute in an arbitration agreement is not arbitrable. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

20. In BGS SGS Soma JV [(2020) 4 SCC 234], on the

maintainability of an appeal under Section 37 of the Arbitration and Conciliation Act, in a case in which an application under Section 34 of the Act was ordered to be transferred from a

court which had no jurisdiction to a court which had jurisdiction, the Apex Court held that, the refusal to set aside an arbitral award must be under Section 34, i.e., after the grounds set out in Section 34 have been applied to the arbitral award in question, and after the court has turned down such grounds. The High Court of Punjab and Haryana at Chandigarh, in the impugned judgment held that, even where a Section 34

-58- application is ordered to be returned to the appropriate court, such order would amount to an order refusing to set aside an arbitral award under Section 34. While setting aside the

judgment of the High Court, the Apex Court held that, there

was no adjudication under Section 34 of the Act. All that was done by the Special Commercial Court at Gurugram was that, the said court allowed an application filed under Section 151 read with Order VII, Rule 10 of the Code of Civil Procedure, determining that it had no jurisdiction to proceed further with the Section 34 application, and therefore, such application would have to be returned to the competent court situate at New Delhi.

21. In the instant case, by the impugned order dated

01.03.2021, the court below dismissed I.A.No.2 of 2020 filed by the appellant-1st defendant, under Section 8(1) of the Arbitration and Conciliation Act, to refer the parties to arbitration, as not maintainable, on the ground that, since the amount sought to be recovered is in excess of Rs.85,00,000/-, in the dispute arising out of a construction contract, O.S.No.202 of 2018 is liable to be transferred to the Commercial Court,

-59- Thiruvananthapuram, in view of the provisions under Section 15 of the Commercial Courts Act.

22. In order to find out whether an appeal against an

order passed on an application filed under Section 8(1) of the

Arbitration and Conciliation Act is maintainable or not, the parameters of Section 37(1)(a) of the said Act alone have to be looked into. The impugned order of the court below cannot be said to be an order refusing to refer the parties to arbitration under Section 8(1) of the Arbitration and Conciliation Act, on a finding that prima facie no valid arbitration agreement exists. Only when an application filed under Section 8(1) of the Act is dismissed by a judicial authority, refusing to refer the parties to arbitration on a finding that a dispute in the arbitration agreement is not arbitrable, the order passed by that authority will come under the purview of an appealable order under Section 37(1)(a) of the Act. In view of the law laid down in Fuerst Day Lawson [(2011) 8 SCC 333], Kandla Export Corporation [(2018) 14

SCC 715], BGS SGS Soma JV

[(2020) 4 SCC 234], Amazon.com NV Investment Holdings LLC [2021 SCC OnLine SC 557] and Sadasivan K. -60- [2020 (5) KHC 461], an order, which is not appealable under Section 37(1)(a) of the Arbitration and Conciliation Act would not be appealable under Section 13(1) of the Commercial Courts Act or under Section 104 or Order XLIII, Rule 1 of the Code of Civil Procedure.

23. As per Section 15(2) of the Commercial Courts Act,

all suits and applications, including applications under the Arbitration and Conciliation Act relating to a commercial dispute of a specified value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court. As per Section 15(3), where any suit or application, including an application under the Arbitration and Conciliation Act, relating

to a commercial dispute of specified value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer. As per Section 15(5), in the event that such suit or application is not transferred in the manner specified in Section 13(1) or 13(2) or 13(3), the Commercial

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Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding.

24. In view of the provisions under Section 15 of the of

the Commercial Courts Act, the court below, instead of dismissing I.A.No.2 of 2020 in O.S.No.202 of 2018 filed under Section 8(1) of the Arbitration and

Conciliation Act to refer the parties to arbitration as not maintainable, ought to have ordered transfer of O.S.No.202 of 2018 pending before that court to the Commercial Court, Thiruvananthapuram, along with I.A.No.2 of 2020, as provided under Section 15(2) of the Commercial Courts Act, so as to enable that court to proceed with O.S.No.202 of 2018 and also I.A.No.2 of 2020, as provided under Section 15(3) of the said Act. The impugned order of the court below, dismissing I.A.No.2 of 2020 filed under Section 8(1) of the Arbitration and Conciliation Act as not maintainable, assuming jurisdiction which it does not have, can certainly be

-62- challenged invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution of India, in view of the law laid down by the Apex Court in Deep Industries Ltd. [(2020) 15 SCC 706] and Bhaven Construction [2021 SCC OnLine SC 8]. In the result, this appeal is dismissed as not maintainable, subject to the above observation. ANIL K. NARENDRAN, Judge M.R. ANITHA, Judge AV