

O.S.A.(CAD)No.59 of 2024

**O.S.A.(CAD) No.59 of 2024
and**

WEB COPY C.M.P.No.12779 of 2024 in O.S.A. (CAD)No.59 of 2024

M.SUNDAR, J.
AND
K.GOVINDARAJAN THILAKAVADI, J.

(Order of the Court was made by M.SUNDAR.J.)

Captioned matter shall be referred to as 'Surendira case' as the cause title is 'Mital Surendira (appellant) Vs. Ms.Malack Safaa Fathima and another (respondents)'.

2. Surendira's case is a typical legal tussle between a lessor and a erstwhile lessee wherein lessor had filed a suit against erstwhile lessee in C.S (Comm.Divn.) No.262 of 2007 (after taking possession of the demised property) claiming certain sums of moneys inter-alia towards rental arrears, damages for use and occupation, etc., There were two lessors (co-owners) who are plaintiffs and the sole lessee was lone defendant. Erstwhile lessee (defendant) was set ex parte. Prayer in a Order IX Rule 7 of 'the Code of Civil Procedure, 1908' (hereinafter 'CPC' for the sake of brevity) application (to set aside the order setting her ex parte) was negatived. The suit was directed to be listed before learned



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Additional Master-IV on 19.06.2024 for Chief Examination and on 20.06.2024 for cross examination, if any. This was vide an order dated 05.06.2024 made by the Commercial Division. Assailing this 05.06.2024 order, captioned appeal has been filed primarily contending that suit summons has not been served on the defendant and the time for filing written statement starts running only from the date of service of suit summons. When the captioned matter was listed before this 'Commercial Appellate Division' ['CAD' for the sake of brevity] on 27.06.2024 (first listing), the following proceedings were made:

'O.S.A. (CAD) No.59 of 2024
and
C.M.P. No.12779 of 2024 in O.S.A. (CAD) No.59 of 2024

M.SUNDAR,J.,
and
K.GOVINDARAJAN THILAKAVADI, J.,
(Order of the Court was made by M.SUNDAR, J.)

In the captioned appeal, Mr.S.Haja Mohideen Gisthi, learned counsel for the lone appellant is before us.

2. The lone appellant before us is the sole defendant before the Hon'ble Commercial Division in a suit being C.S.(Com.Div.) No. 262 of 2023. The two plaintiffs have been arrayed as two respondents in the captioned appeal.

3. Captioned appeal is directed against an order dated 05.06.2024 made in A.No.2231 of 2024 wherein and whereby Hon'ble Commercial Division has negated an application to set aside an order dated 08.04.2024 setting the sole defendant exparte. This means the prayer in A.No.2231 of 2024 is under Order IX Rule 7 of



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'The Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of convenience and clarity] and not under Order IX Rule 13 CPC.

4. The above takes us to the question of maintainability of captioned appeal in the light of proviso to Section 13(1-A) of 'The Commercial Courts Act, 2015 (Act 4 of 2016)' (hereinafter 'CCA' for the sake of brevity) and the judgment of Hon'ble Full Bench in Surajlal Vs. Pradeep Stainless India Pvt. Ltd., and Ors., reported in AIR 2023 MAD 178 : 2023(2) CTC 257 : (2023 2 MLJ 461).

5. Learned counsel for appellant requested for a short accommodation to argue on maintainability.

6. Subject to maintainability, the question as to the date on which sole defendant entered appearance i.e., 24.11.2023 would be the reckoning date or should it be the date of service of suit summons will fall for consideration. To be noted, Mr.S.Haja Mohideen Gisthi emphatically submits that suit summons has not been served on the sole defendant until this day.

7. In the next listing, Registry shall list captioned matter under the cause list caption 'FOR MAINTAINABILITY' .

8. Considering the nature and the number of matters that are coming up, we deem it appropriate to appoint an Amicus Curiae and Mr.Sharath Chandran is appointed as Amicus Curiae to assist the Court in this matter. To be noted, learned counsel for appellant will be heard on 'Maintainability' and Amicus Curiae will be assisting the Court.

9. List as above on 10.07.2024 in the Admission Board i.e., Motion List.

(M.S.J.) (K.G.T.J.)
27.06.2024

mmi'



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3. The aforementioned proceedings are tell-tale and speaks for itself. Therefore without dilating more on factual matrix of the case at hand, it will suffice to say that the captioned matter is not alone as there are many other matters in this CAD where the question as to whether a appeal to CAD will lie against a interim order in respective matters arise. This is in the light of section 13 of 'the Commercial Courts Act, 2015' ['CCA' for the sake of brevity and convenience] and more particularly proviso to sub section (1-A) of section 13 of CCA.

4. As regards appeals against kinds of interim orders that are permissible, *Surajlal* being *Surajlal Vs. Pradeep Stainless India Pvt. Ltd.*, reported in (2023) 2 MLJ 461 (order dated 02.03.2023) made by a Hon'ble Full Bench is holding the field. To put it in simple terms, *Surajlal* (which answered a reference pertaining to a question as to whether refusal to revoke leave granted under Clause 12 of Letters Patent is appealable qua CAD) held that only interim orders adumbrated under Rule 1 of Order XLIII of CPC are appealable qua CAD. To be noted, under Rule 1 of Order XLIII, sub clauses are (a) to (w) but the adumbration consists of 18 kinds of orders making allowance for insertions and deletions.



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5. As regards Commercial courts, all kinds of interim orders (not

restricted to the adumbration under Rule 1 of Order XLIII of CPC) can be assailed in this court under Article 227 of the Constitution of India. This fact coupled with multiple kinds of interim orders that can be made by the Commercial Division leads to a question which has trappings of a conundrum. Therefore, this CAD deems it appropriate to invite the attention of Hon'ble Chief Justice with a request to place *Surajlal* for hearing before a Bench of a larger coram, i.e., larger than the bench which rendered *Surajlal* owing to doubts which shall be alluded to elsewhere infra in this order / proceedings.

6. Before we set out our doubts, we deem it appropriate to record the legal position regarding reference and the position is as follows:

(a)Reference is governed by Order I Rule 6 of the 'Rules of the High Court, Madras, Appellate Side, 1965' ['MHC AS Rules' for convenience]. Rule 4 of Order I is also of relevance. Rules 6 and 4 of Order I captioned 'Constitution of Benches' reads as follows:

'[Rule 6] Notwithstanding anything in the foregoing rules, the Chief Justice may direct that any application, petition, suit, appeal or reference shall be heard by a Full Bench as



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defined in these rules.

[Rule 4] A Full Bench shall consist of not less than three judges.'

(b)A Full Bench of this Court in *Rajalingam* case being [*K.Rajalingam Vs. R. Suganthalakshmi* reported in (2020) 4 CTC 1 recognised the opinion of the then Hon'ble Chief Justice of this Court that it is legally permissible even for a single judge, who doubts a decision of a larger bench, to seek a reference. Hon'ble Mr.Justice M.M.Sundresh (as His Lordship then was) writing for a Full Bench in *Rajalingam*, in paragraph 2 adverted to and recognised the opinion of the then Hon'ble Chief Justice of this Court in the following language :

'2..... The Honourable Chief Justice accordingly opined that it is legally permissible for a single Judge, who doubts a decision of the Larger Bench to seek for a Reference. This Reference has been made consciously after taking note of the subsequent decisions of the Apex Court governing the field wherein one of the judgments which took into consideration the earlier judgment of the Apex Court, which weighed heavily in the minds of the Full



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Bench.'

(c) In *Dawoodi Bohra* case [*Central Board of Dawoodi Bohra Community v. State of Maharashtra* reported in (2005) 2 SCC 673] Hon'ble Supreme Court held that in case of doubt, all that a bench of lesser coram can do is to invite the attention of Hon'ble Chief Justice to request the matter for being placed for hearing before a bench larger than the one which rendered the larger bench decision. Sub paragraphs 2 and 3 of paragraph 12 of *Dawoodi Bohra* read as follows:

'12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:

(1) x x x x x x x

(2) [Ed.: Para 12(2) corrected vide Official Corrigendum No. F.3/Ed.B.J./21/2005 dated 3-3-2005.]
A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench



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whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) [Ed.: Para 12(3) corrected vide Official Corrigendum No. F.3/Ed.B.J./7/2005 dated 17-1-2005.] The above rules are subject to two exceptions: (i) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh* [(1989) 2 SCC 754] and *Hansoli Devi* [(2002) 7 SCC 273] .'

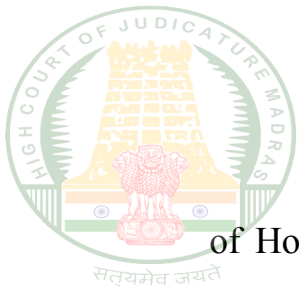


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(d)In *In re Sornavelayutham Pillai and others* reported in *1974 SCC OnLine Mad 292 : (1975) 2 MLJ 267 (FB)* and *L.I.C. Employees' Welfare Association (Termination Full Time Temporary Employees) Vs. Senior Divisional Manager, L.I.C. Ltd., Thajavur Div., Thanjavur* reported in *(1993) 1 LLJ 1030*, it was made clear by two different Full Benches of this Court that the validity of a order of reference made by Hon'ble Chief Justice cannot be questioned and that the matter cannot be challenged on the ground that the question of law does not arise.

7. In the light of *Dawoodi Bohra* principle, this CAD being a Bench of lesser coram qua *Surajlal*, it is made clear with specificity that we are only inviting the attention of Hon'ble Chief Justice and we are not expressing any opinion regarding correctness of *Surajlal*. To put it differently, we shall be setting out only doubts which impel this CAD to invite the attention of Hon'ble Chief Justice.

8. Reverting to reasons for doubting *Surajlal* and inviting attention



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of Hon'ble Chief Justice with a request for placing the matter before a

WEB COPY Bench with larger coram than the one which rendered *Surajlal*, an adumbration of the same is as follows:

(i)The reference before *Surajlal* was restricted to two questions and the same as can be culled out from *Surajlal* itself are as follows:

'(i)Whether an order passed by this Court, on its ordinary original civil jurisdiction, exercising powers under Clause 12 of the Letters Patent for High Court of Madras, granting leave to any applicant to institute suit within the jurisdiction of this Court, can be said to be an order passed under the Commercial Courts Act, 2015? and further

(ii)Whether an order passed by this Court refusing to revoke leave granted to any applicant as referred in (i) above, can be said to be an order passed under the Commercial Courts Act, 2015?'

(ii)*Surajlal* was carried to Hon'ble Supreme Court and interestingly in *Surajlal*, Hon'ble Supreme Court granted leave in the first listing itself and held that leave is being granted as the matter may require consideration in the context of larger issue. This is vide order dated 05.04.2023 in Special Leave to Appeal (C) Nos.5793-5796 of 2023 and the order reads as follows:



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ITEM NO.13 COURT NO.2 SECTION XII

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s). 5793-5796/2023

(Arising out of impugned final judgment and order dated 02-03-2023 in OSA No. 26/2020, OSA No. 27/2020, OSA No. 28/2020 and OSA No. 29/2020 passed by the High Court Of Judicature At Madras)

SURAJLAL ETC.

Petitioner(s)

VERSUS

PRADEEP STAINLESS INDIA PVT. LTD.

Respondent(s)

(FOR ADMISSION and I.R. and IA No.60818/2023-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 05-04-2023 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AHSANUDDIN AMANULLAH

For Petitioner(s) Mr. Shyam Divan, Sr. Adv.
Mr. N. Vijayraghavan, Adv.
Mr. P. B. Suresh, Adv.
Mr. Vipin Nair, AOR
Mr. Sharath Chandran, Adv.
Mr. Vijay Kumar, Adv.
Mr. R. Pradeep, Adv.
Mr. Arun Karthik Mohan, Adv.
Mr. Arindam Ghosh, Adv.
Mr. Karthik Jayashankar, Adv.
Mr. Anshuman Bahadur, Adv.
Mr. Sudipto Sircar, Adv.
Mr. Vinayak Mishra, Adv.

For Respondent(s) Mr. Dama Seshadri Naidu, Sr. Adv.
Mr. K. Sukumaran, Adv.
Mr. M. R. Gokul Krishnan, Adv.
Mr. S. Patrick, Adv.
Mr. Anish R. Shah, AOR

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UPON hearing the counsel the Court made the following
O R D E R

Prayer for Interim Relief

Issue notice, which accepted by learned counsel for the respondent.

On hearing learned counsel for parties we are not inclined to stay the proceedings before the High Court but those proceedings shall continue to operate subject to the rights of the appellants agitated in the present appeal.

Prayer for interim relief stands disposed of.

Special Leave Petition No(s). 5793-5796/2023

Leave granted as the matter may require consideration in the context of larger issue.

List on the regular board on 16th August, 2023 for final hearing.

Learned counsel for parties to file short synopsis running into not more than three pages each.

At this stage, learned counsel for parties have shown willingness to resolve the dispute through a private mediation process with the help of Shri Sriram Panchu, Senior Advocate as the Mediator.

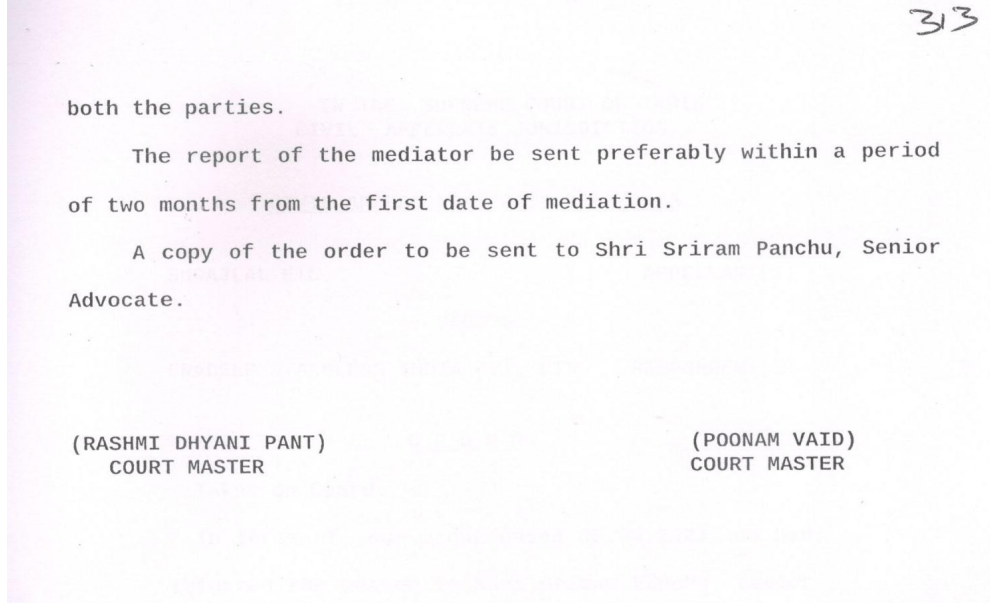
Ordered accordingly.

Learned Mediator will fix his own fee to be equally borne by

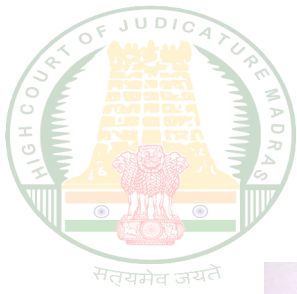


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However, *Surajlal* in Hon'ble Supreme Court did not have the benefit of consideration of larger issue as the matter was settled between the parties and closure was given by order dated 13.12.2023 by Hon'ble Supreme Court and 13.12.2023 order reads as follows:



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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2639-2642/2023

SURAJLAL ETC. APPELLANT(S)

VERSUS

PRADEEP STAINLESS INDIA PVT. LTD. RESPONDENT(S)

O R D E R

Taken on Board.

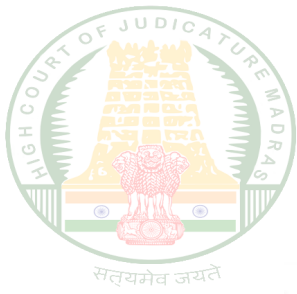
In terms of our order dated 05.04.2023, we had referred the matter to Shri Sriram Panchu, senior Advocate as a Mediator. The time period for mediation was extended in terms of our order dated 02.11.2023. The matter has been mentioned for taking the mediated settlement on record so that the parties can proceed to act in terms of the settlement.

We may note that this was somewhat an intricate dispute but with the assistance of the counsels and positive approach of parties the comprehensive terms of settlement have been arrived at and have been duly signed by the parties and their counsels on 07.12,2023

We take the settlement on record. We see no reason why we should not give our imprimatur to

Signature Not Verified
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Charanjit Singh
Date: 2024.12.14
17:17:30 IST
Reason:

CA Nos.2639-2642/2023



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the settlement arrived at inter se the parties and accordingly accept the settlement. In terms of para D of the settlement, certain directions have been sought from this Court as per sub-paras (a) to (d).

We direct the parties to abide by those terms for seeking necessary approval and permissions.

In view of the aforesaid, the decree stand modified in terms of the settlement and decree sheet be accordingly drawn up. The settlement shall form the part of the decree sheet.

We appreciate the role placed by the learned Mediator Shri Sriram Panchu for bringing the parties to the settlement.

We are informed the fee of the learned Mediator stands paid.

The appeals are disposed of in above terms,

.....J.
[SANJAY KISHAN KAUL]

.....J.
[SUDHANSHU DHULIA]

NEW DELHI,
DECEMBER 13, 2023.



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(iii) In *Surajlal, Polaris* [*Owners and Parties Interested in the*

WEB COPY *vessel M.V.Polaris Galaxy Vs. Banque Cantonale De Geneve* reported

in (2024) 5 SCC 750] was applied to come to the conclusion that only orders adumbrated under Rule 1 of Order XLIII are appealable but *Polaris* arises out of a interlocutory order in a Admiralty suit as would be evident from paragraph 79 thereof which reads as follows:

'79. If such an order under the Code of Civil Procedure which does not fall under Order 43CPC is held to be appealable, then the entire purpose of the Commercial Courts Act would be defeated, and every single order passed in course of a trial of an admiralty suit would be appealable under Section 14 of the Act. Such orders would be large in number including orders in relation to discovery, inspection, case management hearing, admissibility of evidence, framing of issues, interrogatories, etc. This would make a mockery of the intended purpose of Parliament in enacting the Commercial Courts Act, which is to expedite trials in commercial suits of a specified value, and restrict the number of interlocutory appeals.'

(iv) The word 'such' occurring in proviso to section 13(1A) of CCA is an adjective qualifying the noun 'orders' which follows it. The word 'such' signifies the particular nature or character and this has been explained by Hon'ble Supreme Court in Central Bank case [*Central*



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Bank of India Vs. Ravindra reported in (2002) 1 SCC 367]. Relevant

paragraph in **Central Bank** is paragraph 43 and the same reads as follows:

'43. *Webster* defines “such” as “having the particular quality or character specified; certain; *representing the object as already particularised* in terms which are not mentioned”. In *New Webster's Dictionary and Thesaurus*, meaning of “such” is given as “of a kind previously or about to be mentioned or implied; of the same quality as something just mentioned (used to avoid the repetition of one word twice in a sentence); of a degree or quantity stated or implicit; the same as something just mentioned (used to avoid repetition of one word twice in a sentence); that part of something just stated or about to be stated”. Thus, generally speaking, the use of the word “such” as an adjective prefixed to a noun is indicative of the draftsman's intention that he is assigning the same meaning or characteristic to the noun as has been previously indicated or that he is referring to something which has been said before. This principle has all the more vigorous application when the two places employing the same expression, at the earlier place the expression having been defined or characterised and at the latter place having been qualified by use of the word “such”, are situated in close proximity.'

(v) *Khimji* [*Shah Babulal Khimji Vs. Jayaben D. Kania and*

another reported in (1981) 4 SCC 8] holds that (a) final judgment, (b)



preliminary judgment and (c)interlocutory / intermediary judgment are

appealable under clause 15 of Letters Patent (we are aware that *Khimji* is prior to CCA) but in paragraph 120, *Khimji* sets out an illustrative list of interlocutory orders not falling under Order XLIII Rule 1 of CPC and paragraph 120 of *Khimji* reads as follows:

'120. Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the trial Judge amounts to a judgment within the meaning of the letters patent. We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments:

- (1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.
- (2) An order rejecting the plaint.
- (3) An order refusing leave to defend the suit in an action under Order 37, of the Code of Civil Procedure.
- (4) An order rescinding leave of the trial Judge granted by him under clause 12 of the letters patent.
- (5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Section 80, bar against



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competency of the suit against the defendant even though the suit is kept alive.

(6) An order rejecting an application for a judgment on admission under Order 12 Rule 6.

(7) An order refusing to add necessary parties in a suit under Section 92 of the Code of Civil Procedure.

(8) An order varying or amending a decree.

(9) An order refusing leave to sue in forma pauperis.

(10) An order granting review.

(11) An order allowing withdrawal of the suit with liberty to file a fresh one.

(12) An order holding that the defendants are not agriculturists within the meaning of the special law.

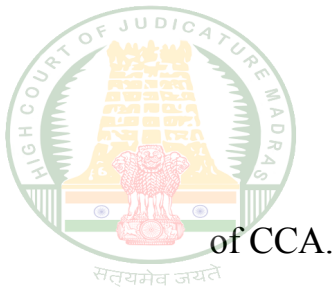
(13) An order staying or refusing to stay a suit under Section 10 of the Code of Civil Procedure.

(14) An order granting or refusing to stay execution of the decree.

(15) An order deciding payment of court fees against the plaintiff.'

(vi)An appeal against an order granting or refusing leave / revoking leave may not qualify as interlocutory judgment. To be noted, this is doubt and not a opinion.

(vii)The proviso to Section 13(1A) of CCA in its classical sense is an exception to the general rule codified in sub section (1A) of section 13



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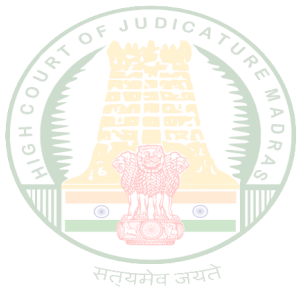
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(viii)The Law Commission in its 253rd Report dated 29.01.2015 addressing the issue, restricted / prevented appeals which derail case management hearings. Relevant part of the Law Commission report reads as follows:

'(iv)Appeals

3.23.1 The Bill presently provides for a direct appeal to the Supreme Court. This is proposed to be replaced with a provision, which mandates that there will be no appeals from orders of the Commercial Division or the Commercial Court save under Order XLIII of the CPC and from final judgments of the Commercial Division or Commercial Court. Such appeals will only be to the jurisdictional Commercial Appellate Division.

3.23.2 It is further recommended that notwithstanding any other law, no civil revision application or petition shall be entertained against an interlocutory order of the Commercial Court, including an order on a jurisdictional challenge. The purpose here is to prevent the time frames stipulated for case management hearing from becoming redundant by the frequent filing of civil revision applications and petitions against every interlocutory order. By removing a potential source of bottleneck of cases, the Bill hopes to ensure the expedited disposal of cases.'



WEB COPY (ix)A careful perusal of aforesaid Law Commission Report brings to light that the objective was restriction of appeals to case management hearings and therefore, a doubt whether present section 13, more particularly section 13(1A) of CCA should be read in this context, arises.

9. Before we conclude, we deem it appropriate to highlight two points and they are as follows:

(A)Any interim order made by the Commercial Court in the State of Tamil Nadu can be carried to this Court under Article 227 of the Constitution of India but a similarly placed litigant in a identical case may even in same case, if he is in Madras (not in the rest of Tamil Nadu), will not have the benefit of assailing the interim order in this Court;

(B)In *Surajlal*, the opening paragraph says that a reference has been made doubting the correctness in *Hindustan Unilever* by another Division Bench [*Hindustan Unilever Limited Ponds House Vs. S.Shanthi* reported in (2021) 6 CTC 1 : (2021) 4 LW 777] but details of the order have not been set out. Therefore, we deem it appropriate to



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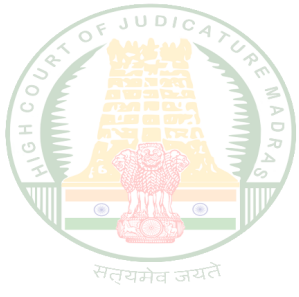
set out details. The details are the order of Hon'ble Division

WEB COPY Bench is dated 23.09.2021 made in O.S.A.No.230 of 2019,
etc. batch cases.

10. Aside of reference, we also invite / draw the attention of Hon'ble Chief Justice to consider listing all Article 227 C.R.Ps arising from Commercial Courts in rest of Tamil Nadu before CAD (instead of a Single Bench as it is being done hitherto) to avoid conflict and dichotomy of / different views. Two reasons which buttress this suggestion are (a) an order irrespective of whether it is made by Hon'ble Single Bench in a Article 227 C.R.P or by a CAD will be a order of the High Court for District Courts. In this view of the matter, different views can create conundrums in the Commercial Courts in district judiciary in terms of precedents and (b) an order irrespective of whether it is made by a 227 Court or CAD can be carried only to Hon'ble Supreme Court and therefore, one tier is not being lost.

11. Several other matters with similar issues are coming up and we would refer to this Surendira case for grouping, if need arises.

12. Registry is directed to place this case file along with this proceedings made by us before Hon'ble Chief Justice and seek orders.



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(M.S., J.) (K.G.T., J.)

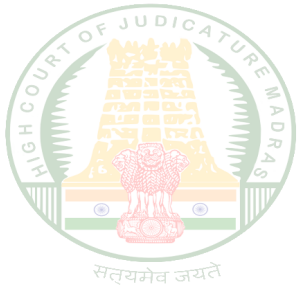
27.09.2024

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M.SUNDAR, J.

AND

K.GOVINDARAJAN THILAKAVADI, J.



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