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From The Ghost of Khimji to The Flaws of Kandla: Deciphering Section 13 of The Commercial Courts Act

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FROM THE GHOST OF *KHIMJI* TO THE FLAWS OF *KANDLA*: DECIPHERING SECTION 13 OF THE COMMERCIAL COURTS ACT

—Mansi Sood*

Abstract The Code of Civil Procedure, 1908 provides for a wide range of situations in which first appeals can be preferred against judgments and/or orders of an ordinary civil court. Section 13 of the Commercial Courts Act, 2015 consciously departs from this to improve efficiency and only permits a narrow range of first appeals in commercial decisions, including arbitration matters. While the legislative intent was laudable, its imprecise wording has given rise to conflicting interpretations in various judgments. This essay argues that in particular, it remains unclear whether interlocutory orders are appealable and whether appeals under s.50 of the Arbitration and Conciliation Act, 1996 are permissible under Section 13. In arguing for the exclusion of both these categories, it makes the case for a restrictive interpretation that furthers the aim of speedy disposal of commercial disputes.

I. INTRODUCTION

When the Commercial Courts Act, 2015 ('CCA') was enacted, its promise of expeditious disposal of commercial disputes was sought to be achieved through the twin prongs of specialised courts and efficient procedures.[1] Case management hearings,[2] stringent requirements for document disclosure,[3] and greater power to control and regulate evidence[4] were some of the novel introductions made towards this end. In addition, a whole new hierarchy of commercial

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1 *See*, Statement of Objects and Reasons, Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015.

2 CCA, s 16 r/w sch para 7.

3 CCA, s 16 r/w sch para 4(E).

4 CCA, s 16 r/w sch para 10.

courts was created, along with scope for appointment of judges with commercial experience to such courts.[5]

As anticipated, the initial days of this legislation saw the emergence of a few stumbling blocks.[6] Some provisions were unclear, while others faced the hurdle of ineffective implementation due to an endemic of issues affecting India's justice delivery system.[7] Yet others were dissonant with related provisions in the Arbitration and Conciliation Act, 1996 ('1996 Act').[8] In turn, this hampered a key governmental objective of the legislation – improvement of India's ranking in the Ease of Doing Business Index published by the World Bank.[9] Therefore, when the CCA was amended in 2018, it was expected that there would be comprehensive redressal of these shortcomings. Unfortunately, while the 2018 amendment[10] did get rid of some issues, it only put temporary fixes on others.

Section 13 of the CCA presents one such instance. Envisaged as a key aspect of speedy resolution, this section sought to restrict the scope of appeals from first-instance commercial decisions, in comparison with ordinary civil matters. While interlocutory orders under Order XLIII of the Code of Civil Procedure, 1908 ('CPC') are appealable in both cases, section 13 aimed to preclude appeals from commercial orders under other special provisions, including but not limited to the Letters Patent,[11] applicable in certain High Courts having original civil jurisdiction. Initially, the lack of clarity in its text gave rise to conflicting interpretations that threatened to undermine its original intent.[12] Thereafter, the 2018 amendment resolved some of these conflicts but gave rise to fresh ones, thereby failing to provide a complete remedy.[13] This essay

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5 CCA, ss 4 and 5.

6 Sulabh Rewari and Poorvi Satija, 'Are Commercial Courts the Answer to India's Arbitration Woes?' (*Kluwer Arbitration Blog*, 25 December 2015) <http://arbitrationblog.kluwerarbitration.com/2015/12/25/are-commercial-courts-the-answer-to-indias-arbitration-woes/> accessed 22 October 2020.

7 Vidhi Centre for Legal Policy, 'Commercial Courts Act, 2015: An Empirical Impact Evaluation' (5 July 2019) 31-34 <https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf> accessed 22 September 2020.

8 Vanita Bhargava, Jeevan Ballav Panda and Kudrat Dev, 'Transition from Commercial Courts Ordinance to Commercial Courts Act: Ambiguities and Implications' (*International Law Office*, 26 May 2016) <www.internationallawoffice.com/Newsletters/Arbitration-ADR/India/Khaitan-Co/Transition-from-Commercial-Courts-Ordinance-to-Commercial-Courts-Act-ambiguities-and-implications#> accessed 22 October 2020.

9 Sai Ramani Garimella and MZ Ashraful, 'The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?' (2019) 1 Erasmus Law Review 111 <www.erasmuslawreview.nl/tijdschrift/ELR/2019/1/ELR-D-18-00026.pdf > accessed 23 October 2020.

10 The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 ('2018 amendment').

11 Letters Patent of the High Court of Judicature for the Presidency of Bombay (28 December 1865) ('Letters Patent'), cl 15.

12 Part I(A).

13 Part I(B).

argues that in light of such persisting conflict, the scope of this section remains unclear even today. It argues for a narrow interpretation of section 13 and analyses this section from the lens of two principal points of debate.

The first is the nature of appealable orders – interlocutory versus final – and ancillary issues that arise from it. As such, the latest interpretation rendered by the Bombay High Court[14] appears consistent with the overall thrust of the CCA, pending the final word from the Supreme Court. However, it is argued that despite this clarification, the wording of the section retains ambiguity due to internal inconsistencies. The 2018 amendment could have conclusively resolved this, but its failure to do so leaves room for fresh conflicts, some of which are highlighted in this essay.

The second is the subject matter of cases that are appealable under section 13. Judicial decisions have long struggled to make sense of sub-section (1A) and the proviso thereto (sub-section (1) prior to the 2018 amendment), both of which lend themselves to multiple interpretations. Notable among these is *Kandla*,[15] which remains the most important, albeit flawed, pronouncement in this regard. In analysing its reasoning, this essay argues that legislative oversight and judicial jugglery have resulted in broadening the scope of section 13 beyond its underlying intent. The inconsistency with corresponding provisions in the 1996 Act has further compounded the confusion. It is concluded that a legislative amendment is imperative to resolve this conundrum and preserve the logic and efficiency of commercial dispute resolution.

This essay is divided into three parts. Part II outlines the nature of appealable orders under section 13 and potential challenges in this regard. Part III dissects the decision in *Kandla* and highlights three major shortcomings. Part IV builds on this to make out a case for a narrow interpretation of section 13.

II. THE GHOST OF *KHIMJI*[16]

Prior to its amendment in 2018, section 13(1)[17] read as follows –

> 13. Appeals from decrees of Commercial Courts and Commercial Divisions–
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> (1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within

[14] *Shailendra Bhadauria v Matrix Partners India Investment Holdings LLC* (2018) SCC Online Bom 13804 ('*Shailendra Bhadauria*').

[15] *Kandla Export Corpn v OCI Corpn* (2018) 14 SCC 715 ('*Kandla*').

[16] *Shah Babulal Khimji v Jayaben D Kania* (1981) 4 SCC 8 ('*Khimji*').

[17] CCA, s 13(1).

> a period of sixty days from the date of judgment or order, as the case may be:
>
> 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).

On a plain reading, this provision and its heading contain 4 separate terms – decree,[18] decision, judgment[19] and order[20] – whose definitions collectively govern the nature of permissible appeals. With the exception of 'decision', these terms are defined in the CPC and the same definitions are made applicable to the CCA as well, by virtue of section 2(2).[21] Consequently, their usage in this section is puzzling at the outset – while the trigger is clearly a grievance against a 'decision', the appeal is then to be preferred against the 'judgment' or 'order', as it may be.

This is further complicated by the possible application of *Khimji*, thereby giving a wide import to the word 'judgment'. In *Khimji*, the court was called upon to consider the scope of the word 'judgment' under Clause 15 of the Letters Patent. In doing so, the main controversy that it examined was whether interlocutory orders that were not appealable under Order XLIII, CPC could *nevertheless* be appealed under Clause 15 of the Letters Patent. In a seminal decision, the court ruled that the import of 'judgment' under Clause 15 was wider than 'judgment' in the CPC. Therefore, orders not covered by Order XLIII, CPC could be appealed under Letters Patent as long as they "possess the characteristics and trappings of finality", insofar as they affect valuable rights of parties and/or cause them serious injustice.[22]

Consequently, when the CCA was first enacted in 2015, these doubts regarding the interpretation of section 13 were brought to the attention of multiple courts.

A. Conflicting Interpretations and Judicial Discipline

In one of the earliest cases to grapple with this issue, namely *Hubtown Ltd.* v. *IDBI Trusteeship Service Ltd.*, the Bombay High Court interpreted section

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[18] CPC, s 2(2).
[19] CPC, s 2(9).
[20] CPC, s 2(14).
[21] CCA, s 2(2).
[22] *Khimji* [113], [115].

13 in a manner favouring a wide jurisdiction for commercial appellate courts.[23] It opined that the scope of the main provision had to be wider than that of the proviso; the main provision uses three of the four terms (except 'decree'), whereas the proviso only refers to 'orders'.[24] Thus, placing reliance on *Khimji*,[25] it held that the main part of section 13 would include appeals from interlocutory orders other than those specified under Order XLIII, CPC, as long as they have "a tinge or colour of judgment".[26] However, a year later, another Division Bench of the same court unwittingly departed from this view in *Sushila Singhania* v. *Bharat Hari Singhania*.[27] Without explicitly considering *Hubtown*, they observed that 'decision' could not receive a wide construction and was equivalent to a 'decree'.[28] Further, 'judgment' was not to be interpreted in line with *Khimji* as the latter interpreted 'judgment' in the context of Letters Patent, whose application was explicitly barred by section 13(2) of CCA. Thus, it was held that the proviso to section 13(1) is entirely self-contained and only the appeals specified therein are maintainable.[29]

Almost simultaneously, the Delhi High Court considered the same question in *HPL (India) Ltd.* v. *QRG Enterprises*,[30] and affirmed the *Sushila Singhania* viewpoint. After a detailed consideration of each of the four terms, it held that a 'decree' is different from an 'order', and although both are 'decisions', neither is a 'judgment' i.e. the statement based on the reasons in the decree or order.[31] On this basis, the court concluded that 'judgment' as used in section 13 is a misnomer and refers to 'decree', since the scheme of the CPC only permits appeals from either decrees or orders but not from judgments.[32] Further, it affirmed that the *Khimji* interpretation would be inapplicable as the import of 'judgment' under the CPC is narrower than under Letters Patent and application of the latter is excluded by section 13(2).[33] It also observed that since section 13 uses 'judgment' and 'order' disjunctively, one cannot be brought within the other by applying the *Khimji* interpretation.[34] In deciding this question, the Delhi High Court considered and explicitly chose to differ from the *Hubtown* position.[35]

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[23] *Hubtown Ltd v IDBI Trusteeship Service Ltd* (2016) SCC OnLine Bom 9019 ('*Hubtown*').
[24] ibid [33].
[25] *See also*, *Midnapore People's Coop. Bank v Chunilal Nanda* (2006) 5 SCC 399.
[26] *Hubtown* [33]; *See also*, *Khimji* [113] – [120].
[27] *Sushila Singhania v Bharat Hari Singhania* (2017) SCC OnLine Bom 360 : (2017) 3 AIR Bom R 357 ('*Sushila Singhania*').
[28] ibid [81], [84], [87].
[29] *Sushila Singhania* (n 27) [94].
[30] *HPL (India) Ltd v QRG Enterprises* (2017) SCC OnLine Del 6955 ('*HPL*').
[31] ibid [26].
[32] *HPL* (n 30) [27].
[33] *Hubtown* (n 23).
[34] *HPL* (n 30) [33], [40], [41].
[35] *HPL* [55], [56].

Later in the same year, a Division Bench of the Bombay High Court had a chance to revisit this issue yet again, in *Sigmarq*.[36] Although the decision in *HPL* was not brought to its notice, it did take note of the decisions in *Hubtown* and *Sushila Singhania*. However, instead of bringing much-needed clarity, this decision only amplified the prevailing confusion. It observed that it did not need to answer the larger question posed before it (i.e., regarding the scope of s.13). Furthermore, it refrained from answering whether there was a conflict between *Hubtown* and *Sushila Singhania*, because the impugned order in question was not 'final'. The court reasoned that any eventual decree on merits would still be appealable. Consequently, the objection of territorial jurisdiction, which was the subject of the impugned order, would be available as a ground of appeal.[37] Having thus dealt with the facts before it, the court then examined *Hubtown* and *Sushila Singhania* for the sake of judicial discipline.[38] Eventually, it found that there was no divergence between the two judgments and that reconciliation was possible as they both hold that–

> the term 'decision' cannot be interpreted to mean any and every order by styling it as a judgment. It is that decision, which satisfies the tests referred by us above and which tests can also be culled out from the definition of the term 'decree' as appearing in section 2(2) of the Code of Civil Procedure, which would be appealable.[39]

In my opinion, the judgment in *Sigmarq* is problematic on four separate counts. First, its observation that it does not need to interpret section 13 due to its particular facts is inaccurate and erroneous. The scope of section 13 and maintainability of the appeal thereunder was squarely raised before the court.[40] It could not have applied the law to the facts without clarifying the law itself. To put it simply, if the court were to restrict section 13 appeals to orders specifically enumerated in Order XLIII, CPC or section 37, 1996 Act, then the inconclusive nature of an order would be irrelevant. Therefore, its failure to crystallise the legal position that it proposed to apply, is a fundamental error in reasoning. Second, its finding that the impugned order is not conclusive, because territorial jurisdiction will still be available as a ground of appeal against any eventual decree, is also plainly incorrect. Rightly or wrongly, the court had itself stated that the question before it was whether or not the impugned order was a final determination affecting valuable rights of the parties.[41] Further, it made extensive reference to *Khimji* for elaborating upon the

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[36] *Sigmarq Technologies (P) Ltd v Manugrah India Ltd* (2017) SCC OnLine Bom 9191 ('*Sigmarq*').
[37] ibid [85].
[38] *Sigmarq* (n 36) [86].
[39] *Sigmarq* (n 36) [90].
[40] *Sigmarq* (n 36) [14] – [17].
[41] *Sigmarq* (n 36) [83].

test for such a determination.[42] Yet, the court failed to note that the factual situation before it was expressly considered in *Khimji* and the impugned order would be conclusive on this basis –

> *(b)* Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.[43] (emphasis added)

Third, as noted above,[44] the word 'decision' is not defined in either the CPC or the CCA, and ought not to have been used in the section for this reason alone. Be that as it may, there is no independent basis for the definition given by the court other than the arbitrary equation of 'decision' with 'decree' in *Sushila Singhania*, which is adopted as it is in *Sigmarq*.[45] In fact, this plainly reveals the fallacy of the court's analysis. On one hand, it purports to read 'decision' as 'decree' by applying *Sushila Singhania*, thereby implicitly rejecting *Khimji* and narrowing the scope of section 13. On the other hand, by using *Khimji* to delineate the test for appealable 'decisions',[46] it has the opposite effect of expanding section 13 and approving *Hubtown*. These positions are mutually inconsistent and their purported reconciliation in *Sigmarq* presents a logical flaw in its reasoning. Fourth, in the interest of judicial discipline, the court ought to have referred this issue to a larger bench. Although this argument was canvassed before the court, it declined a reference on the basis of its finding that there was no conflict. As noted above, this conclusion rests on flimsy grounds and settlement by a larger bench would have furthered the cause of certainty. It is well settled that even in High Courts,[47] coordinate benches are ordinarily bound by decisions of previous benches of the same

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42 *Sigmarq* (n 36) [66] – [77].
43 *Khimji* [113] (emphasis added).
44 *Khimji* (n 22).
45 *Sigmarq* [88].
46 *Sigmarq* [83], [84], [90], [96].
47 *Safiya Bee v Mohd. Vajahath Hussain* (2011) 2 SCC 94 [28] – [30].

strength.[48] In case, conflicting decisions of two co-equal benches are placed before a later bench, the proper course is for the matter to be referred to a larger bench for authoritative settlement.[49]

This was the chaos into which the 2018 amendment was introduced, whereby the word "decision" was replaced with "judgment or order" and the erstwhile s.13(1) was made section 13(1A). Thus, section 13 now reads as follows –

> 13. Appeals from decrees of Commercial Courts and Commercial Divisions–
>
> (1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.
>
> (1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:
>
> Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).
>
> (2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.

Undoubtedly, this injected much-needed uniformity into the text of section 13 and resolved a large part of the problem, which was immediately noticed by the Bombay High Court in *Shailendra Bhadauria*. However, it missed the

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[48] *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005) 2 SCC 673 [12].

[49] *Jaisri Sahu v Rajdewan Dubey* AIR (1962) SC 83 [9] – [11]; *Zenith Steel Tubes & Industries Ltd v Sicom Ltd* (2008) 1 SCC 533 [39] – [40]; *Atma Ram v State of Punjab* AIR (1959) SC 519 [12].

opportunity to decisively settle the conflicts regarding section 13 – a mistake that is likely to prove costly in the future. The next section demonstrates why.

B. The 2018 Amendment and *Shailendra Bhadauria*

Taking note of the 2018 amendment and the conflicting interpretations rendered prior to it, the court in *Shailendra Bhadauria* opined that the *Hubtown* and *Sigmarq* line of reasoning would have to give way to a narrower view and the *Khimji* line of interpretation would no longer be tenable.[50] Although the decision proceeds on a sound basis, its deduction that *Khimji* has been conclusively discarded is not borne out. While the removal of 'decision' made section 13 *internally* harmonious to some extent, the failure to replace the word 'judgment' with 'decree', left it open to *external* dissonance in light of *Khimji*. As rightly noted in *HPL*, the scheme of the CPC, and by extension, the CCA, only permits appeals from decrees or orders.[51] Therefore, it would have been apposite for section 13 to be brought in line with this scheme. This would have removed any potential conflict with section 13(2)[52] while also making it consistent with section 37 of the 1996 Act, which refers to the "court authorised by law to hear appeals from original decrees". (emphasis added)

The fact that the section heading for section 13 already refers to 'decrees' would have only supported such a modification.[53]

Nevertheless, in attempting to make sense of the 2018 amendment, the court rightly relied upon *Kandla*'s clarification that only those orders enumerated in Order XLIII of the CPC or section 37 of the 1996 Act are appealable thereunder.[54] It then went on to observe that what is directly disallowed cannot be indirectly allowed, i.e., orders that are not appealable as 'orders', cannot be made appealable as 'judgments' by using *Khimji*.[55] On the face of it therefore, *Shailendra Bhadauria* poses an unqualified bar against the application of *Khimji*. This conclusion, however, can be questioned on two grounds.

First, in applying *Kandla*, the court here failed to appreciate that the *Khimji* argument was neither made before the Supreme Court in that case, nor was it even under consideration. In fact, *Kandla* proceeds on a different basis altogether, i.e., that because section 50 of the 1996 Act, which also deals with appealable orders, is a special enactment and a self-contained code, it

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[50] *Shailendra Bhadauria* [43] [44].

[51] *HPL* [27].

[52] *Fuerst Day Lawson* (n 61).

[53] "It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clause and affording a key to a better understanding of its meaning." – *Union of India* v *Raman Iron Foundry* (1974) 2 SCC 231 [9].

[54] *Shailendra Bhadauria* [37], [38].

[55] *Shailendra Bhadauria* [43].

must prevail over section 13, which is a general enactment in this context.[56] Arguably therefore, the reliance on *Kandla* is questionable to the extent that *Kandla* itself can be distinguished; it does not deal with situations where only the general enactment is applicable. In any event, *Kandla* itself fails to justify a water tight separation between the general and special enactments insofar as it holds that section 13 would still provide the forum for appeals under section 50 of the 1996 Act (which falls outside the text of section 13). Hence, even by that logic, the disqualification of appeals from orders not enumerated under section 13, is not necessarily absolute. Part III below contains a detailed analysis of *Kandla*.

Second, this position renders the word 'judgment' completely otiose, insofar as it restricts section 13 to appeals against 'orders' alone. If this were truly the legislative intent, then the word 'judgment' would have been removed altogether. Notably, while section 13(1) and (1A) use the phrase "judgment or order", the *non obstante* clause in section 13(2) departs from this and uses "order or decree". Given that the *Khimji* argument hinges on an interpretation of the term 'judgment' found under the Letters Patent, it could be argued that this was done deliberately, to avoid the rigours of section 13(2) for 'judgements'. In fact, a similar argument was taken in *Shailendra Bhadauria* itself,[57] but was not explicitly considered.

As noted above, the 2018 amendment could have categorically removed these doubts, but it failed to do so. Admittedly, neither of these two arguments are strong enough to completely turn the tide in favour of *Khimji*. Nevertheless, they are sufficient to obviate its exclusion and trigger re-evaluation of this issue time and again, particularly since the *Khimji* argument has previously found acceptance.[58] In turn, this hinders certainty and erodes the foundation of the CCA. Therefore, until a legislative amendment puts it to bed once and for all, it is likely that the ghost of *Khimji* will continue to haunt section 13.

III. THE THREE FLAWS OF *KANDLA*

In *Kandla*, the central issue was whether an appeal against an order, which was not maintainable under section 50 of the 1996 Act, would nevertheless be maintainable under section 13 of the CCA. In its decision, the Supreme Court clarified that such an appeal would not be *independently* maintainable under s.13. In doing so, it held that the proviso to section 13, qualifies the main provision such that only orders specified under Order XLIII of CPC and section 37 of the 1996 Act are appealable under it. Further, even in cases where an appeal is maintainable under section 50 of the 1996 Act, the 'right' to appeal will be

[56] *See*, *Kandla* [20], [21].
[57] *Shailendra Bhadaauria* [13]- [14].
[58] *See*, *Magic Frames v Radiance Media (P) Ltd* (2019) 5 Mad LJ 479.

traceable to the latter provision, it being a self-contained code; section 13 of the CCA will provide only the 'forum' for such an appeal. Therefore, it concluded that section 13 would not apply to arbitration matters like those covered by section 50, *except* to provide a forum for appeal where section 50 is already applicable.[59]

I have no quarrel with the court's reasoning, in so far as it concludes that section 50 is a self-contained code and appeals not mentioned therein are not permissible. This is also evident from the earlier decision in *Fuerst Day Lawson Ltd* v. *Jindal Exports Ltd*[60] that was relied upon here. However, the second part of its reasoning regarding the interplay between section 13 and section 50, in cases which are appealable under section 50, is deeply flawed for three reasons –

A. The First Flaw in *Kandla*

The decision correctly notes that while section 37 and section 50 of the 1996 Act are *both* self-contained codes, the proviso to section 13(1A) makes a distinction between them by specifically mentioning the former and omitting the latter. However, its consideration of the reasons for this distinction is unsound. If section 37 and Order XLIII, CPC were merely included in the proviso to clarify that appeals not covered by either of these provisions would not be independently maintainable under section 13 or *ex abundanti cautela*,[61] then the same logic should apply to section 50. Consequently, the exclusion of section 50 would mean that orders outside it are in fact appealable under section 13. However, the latter is untenable in light of *Fuerst Day Lawson* and has now been confirmed in *Kandla* itself.

B. The Second Flaw in *Kandla*

Notwithstanding the fact that the proviso to section 13 omits any mention of section 50, if appeals under section 50 are to nevertheless fall within its ambit, then it implies one of three things.

One possibility is that the proviso to section 13(1A) is merely clarificatory and does not actually qualify the operation of the main part of section 13(1A). However, the presumptive interpretation of a proviso is that it carves out a field of operation that would otherwise have been excluded from the main provision. Exceptions to this rule are limited, and must be self-evident from the wording of the proviso.[62] In fact, *Kandla* itself emphasises and affirms this read-

[59] *Kandla* [21], [22].
[60] (2011) 8 SCC 333 ('*Fuerst Day Lawson*').
[61] *Kandla* [21].
[62] *CIT v Indo Mercantile Bank Ltd* AIR (1959) SC 713; *Kedarnath Jute Mfg Co Ltd v CTO* AIR (1966) SC 12; *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v Subbash Chandra Yograj*

ing of the proviso to section 13(1A).[63] Therefore, in the absence of an apparent legislative intent, it would be inapposite to adopt an interpretation that relegates it to being merely clarificatory.

The second possibility is that appeals under section 50 will still be before the Commercial Appellate Division, but will be outside the purview of section 13. Consequently, they will be subject to the more rigorous 30-day limitation for intra-court appeals,[64] rather than 60 days under section 13. This might also explain the decision in *Arun Dev*, which held that an appeal under section 50(1)(b) is maintainable before a Division Bench.[65] However, this interpretation is directly hit by section 13(2),[66] which restricts appeals *from* the order/decree of a Commercial Court or Division except in accordance with the CCA itself. In my view, this is significant because it is not just a restriction on the appeals *before* the Commercial Appellate Division, but indeed, on the *right to appeal* against an order/decree of the Commercial Court/Division itself. I would argue that this takes away the right to appeal under section 50 altogether, except directly to the Supreme Court.

Kandla observes that the 1996 Act will prevail over the CCA on account of it being a special enactment.[67] However, it is arguable that in so far as commercial appeals are concerned, the reverse is true and the CCA ought to prevail.[68] The CCA gives special consideration to arbitration matters,[69] contains an overarching *non obstante* clause,[70] and is the more recent legislation.[71] In light of this inconsistency, a harmonious construction of the two is necessary, which

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Sinha AIR (1961) SC 1596.

63 *Kandla* [13].

64 Limitation Act 1963, art 117.

65 *Arun Dev Upadhyaya v Integrated Sales Service Ltd* (2016) 9 SCC 524 ('*Arun Dev*').

66 CCA, s 13(2).

67 *Kandla* [20], [21].

68 *LIC v DJ Bahadur* (1981) 1 SCC 315 [52], [57]

> In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special… Which is a special provision and which general, depends on the specific problem, the topic for decision, not the broad rubric nor any rule of thumb. The peaceful coexistence of both legislations is best achieved, if that be feasible, by allowing to each its allotted field for play. Sense and sensibility, not mechanical rigidity gives the flexible solution.

69 *See*, CCA, s 10.

70 CCA, s 21.

71 *Ajoy Kumar Banerjee v Union of India* (1984) 3 SCC 127 [38]. See also *JK Cotton Spg & Wvg Mills Co Ltd v State of UP* AIR 1961 SC 1170 [9]

> The general rule to be followed in case of conflict between two statutes is that the later abrogates the earlier one. In other words, a prior special law would yield to a later general law, if either of the two following conditions is satisfied:
>
> '(*i*) The two are inconsistent with each other.
>
> (*ii*) There is some express reference in the later to the earlier enactment.'
>
> If either of these two conditions is fulfilled, the later law, even though general, would prevail.

can only lead to the conclusion, that appeals under section 50 of the 1996 Act are now preferable only before the Supreme Court.[72] Any other interpretation would mean that the Commercial Appellate Division can hear appeals *other* than those under section 13, thereby defeating a basic premise of the CCA.[73]

A third and very unlikely possibility could be that arbitration appeals under section 50 will go before a non-commercial Division Bench, and will be outside the purview of the CCA altogether. However, this would not stand to reason either. Section 10 of the CCA unequivocally brings all arbitration matters within the purview of the commercial courts under it.[74] Further, notwithstanding that this possibility would still be hit by section 13(2) as explained above,[75] and that this is not what *Kandla* suggests at all, a non-commercial bench hearing an appeal from a commercial judge would be highly incongruous and absurd. This would also mean that foreign awards are actually being given *less* importance than domestic awards, which goes against the pro-foreign investor stance of the CCA and the 1996 Act.[76]

C. The Third Flaw in *Kandla*

In order to explain the issue of right to appeal versus forum of appeal, *Kandla* draws a parallel to section 10(1)(a) and section 10-F in the Companies Act, 1956, by relying on the 2008 decision of *Sumitomo*.[77] In interpreting section 50, *Sumitomo* held that once the right to appeal under section 50 was attracted, the "court authorised by law to hear appeals from such order" would be found by reference to the specific appellate hierarchy of the forum that had passed the order.[78] For instance, on those facts, the impugned order under section 45 of the 1996 Act, was passed by the erstwhile Company Law Board ('CLB'), and since appeals therefrom ordinarily lay to the High Court, the appeal under section 50 would also be heard by the High Court. *Kandla* then uses the same logic to hold that section 13 is a parallel instance of provision of a forum for the exercise of the right under section 50.

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[72] *Maya Mathew v State of Kerala* (2010) 4 SCC 498 [12]; *CTO v Binani Cements Ltd* (2014) 8 SCC 319.

[73] *See*, Statement of Objects and Reasons, Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, cl 6(iii).

[74] CCA, s 10.

[75] CCA, s 10.

[76] *See*, Statement of Objects and Reasons, Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, cls 1 and 6; Moazzam Khan and Shweta Sahu, 'Enforcing Foreign Diktat: Puncturing the Stereotype' (*Kluwer Arbitration Blog*, 24 July 2017) <http://arbitrationblog.kluwerarbitration.com/2017/07/24/enforcing-foreign-diktat-puncturing-stereotype/> accessed 22 October 2020; Statement of Objects and Reasons, Arbitration and Conciliation (Amendment) Act 2015, cl 4.

[77] *Sumitomo Corpn v CDC Financial Services (Mauritius) Ltd* (2008) 4 SCC 91 ('*Sumitomo*').

[78] *Sumitomo* [28].

However, this reliance on *Sumitomo* ignores a crucial difference between section 10-F and section 13. section 10-F did not curtail the right to appeal in any form and permitted appeals from any decision or order made by the CLB. Therefore, in so far as the CLB acted as a 'judicial authority' under section 45 of the 1996 Act, the High Court was authorised by law to hear appeals from such an order. On the contrary, section 13 restricts the right to appeal to certain orders, i.e., those specified in Order XLIII and section 37. To this extent, the Commercial Appellate Division is *not authorised by law* to hear any other appeals and cannot fit the definition of 'court authorised by law' under section 50.

Moreover, with the overhaul of the Companies Act, and creation of the National Company Law Tribunal ('NCLT'), as well as the National Company Law Appellate Tribunal ('NCLAT'), the landscape has changed significantly. Earlier, appeals from the CLB, which was a quasi-judicial body,[79] lay before the High Court.[80] This has now been replaced with a hierarchy where appeals from the quasi-judicial NCLT,[81] lie before the NCLAT, which is also quasi-judicial.[82] Strictly going by the interpretation of section 50 in *Sumitomo* and *Kandla*, an appeal from a NCLT order under section 45 should be decided by the NCLAT. But this militates against the essence of the 1996 Act, by relegating arbitration matters to adjudication before a non-specialised, quasi-judicial forum.[83] Perhaps it is in recognition of this anomaly that the NCLAT has observed that appeals from orders refusing arbitration under section 45 of the 1996 Act will not be maintainable before it, but before the appropriate forum as per the 1996 Act itself.[84] Either way, the bottom line is that the *Sumitomo* logic requires revalidation in light of fundamental legislative changes in the last decade, and its blanket affirmation in *Kandla* cannot hold good in this situation.

IV. THE CASE FOR A NARROW INTERPRETATION OF SECTION 13

Prior to, and even after *Kandla*, several decisions have reiterated that the proviso to section 13(1A) means that only appeals under Order XLIII and section 37 are maintainable under section 13.[85] For instance, in *Brahmos*, the

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[79] Companies Act 1956, s 10E r/w Company Law Board (Qualifications, Experience and Other Conditions of Service of Members) Rules, 1993.

[80] Companies Act 1956, s 10F.

[81] *See*, Companies Act 2013, s 408.

[82] Companies Act 2013, s 410; Insolvency and Bankruptcy Code 2016, s 61.

[83] Sumeet Kachwaha, 'Arbitration Law of India – A Critical Analysis' (2005) 1(2) Asia International Arbitrational Journal 105.

[84] *Thota Gurunath Reddy v Continental Hospitals (P) Ltd* (2018) SCC OnLine NCLAT 885; *Surinder Mehta v Prime Meiden Ltd* (2018) SCC OnLine NCLAT 796.

[85] *Eros Resorts & Hotels Ltd v Explorer Associates (P) Ltd* (2018) SCC OnLine Del 8945 ('*Eros*'); *Nirman Consultants (P) Ltd v NNE Ltd* (2019) SCC OnLine Del 11088 ('*Nirman*');

bench was called upon to consider the maintainability of an appeal under section 13, against an order passed under section 124 of the Trademarks Act, 1999.[86] After noticing the previous decisions in *HPL* and *Eros*, the court reiterated that after the CCA came into force, only orders under Order XLIII and section 37 would be appealable, and section 124, Trademarks Act, orders were not included therein.[87] However, on facts it was held that the appeal was maintainable as section 13 was not attracted. The appeal was filed prior to re-designation of the underlying suit as a commercial suit, thereby vesting the pre-CCA right to appeal on the date of its filing.[88] Even though most other cases under section 13[89] have followed a similar path of reasoning, there are two notable departures.

In *Arun Dev*, it was held that the bar under section 13(2) was inapplicable to section 50 appeals under the Letters Patent, on the basis that section 13 bars an appeal under Letters Patent only if no appeal is provided under the 1996 Act.[90] More recently, in *Superon*, the Delhi High Court held that section 13(1A) is an enabling provision, allowing appeals against all orders and judgments of the Commercial Division, and the proviso thereto is merely clarificatory.[91] Therefore, orders passed by a Single Judge exercising commercial jurisdiction, which are *not passed under the CPC* (and by necessary corollary, the 1996 Act) do not attract the limitation of the proviso and will be covered by section 13(1A).[92] It also distinguished *HPL* and *Samsung*[93] on this ground as the impugned orders therein emanated from the provisions of the CPC.

In my opinion, neither of these conclusions are sustainable in law. A plain reading of section 13(2) shows that the reasoning in *Arun Dev* is devoid of any textual basis. The wording of section 13(2) unambiguously states that "no appeal shall lie … otherwise than in accordance with the provisions of this Act". In this context, the phrase 'this Act' can only mean the CCA itself, and not any other enactment, including the 1996 Act.[94] Therefore, in the face of a blanket bar on Letters Patent appeals, a section 50 appeal cannot be maintainable as such, irrespective of whether the 1996 Act provides for an appeal. It is worth noting here that in referring to *Arun Dev*, the decision in *HPL* suggests that the basis of its reasoning is that the phrase "said Act" relates to the 1996

Kakade Construction Co Ltd v Vistra ITCL India Ltd (2019) SCC OnLine Bom 1521.

86 *Brahmos Aerospace (P) Ltd v Fitt Jee Ltd* (2019) SCC OnLine Del 7282 ('*Brahmos*').

87 ibid [7].

88 *Brahmos* [13].

89 *Brahmos* (n 89).

90 *Arun Dev* [26].

91 *D & H India Ltd v Superon Schweisstechnik India Ltd* (2020) SCC OnLine Del 477 ('*Superon*').

92 *Superon* [48].

93 *Samsung Leasing Ltd v Samsung Electronics Co Ltd* (2017) SCC OnLine Del 9374 ('*Samsung*').

94 *See*, *Duport Steels Ltd v Sirs* (1980) 1 WLR 142, 157; *LAO v Karigowda* (2010) 5 SCC 708 [30], [36]; *Union of India v Raman Iron Foundry* (1974) 2 SCC 231 [8].

Act therein, and to the CPC on *HPL*'s own facts.[95] However, section 13(2) uses the phrase "this Act" rather than "said Act". Therefore, to this extent, even *HPL* proceeds erroneously. However, its main reasoning continues to be sound law, as noted in Part I above.[96]

Similarly, in *Superon*, notwithstanding its conclusion that the impugned order was passed under Rule 5, Chapter II of the Delhi High Court (Original Side) Rules, 2018, the reasoning is assailable on three grounds. First, its failure to consider *Kandla* renders it *per incuriam*; second, it ignores well-settled law regarding the presumptive interpretation of a proviso as explained above;[97] and third, it militates against clear legislative intent to remove a multi-tiered appeal process and expedite commercial dispute resolution.[98] Even otherwise, its analysis is wholly unattractive. While it could perhaps answer the section 50 conundrum, it would then open up the Pandora's box for a host of other appeals under section 13, which has been eschewed by courts time and again.[99] It is notable that *Superon* has not only been distinguished by a coordinate bench of the Delhi High Court,[100] but in fact, another recent coordinate bench judgment of the same court has noticed some of the criticisms outlined above and has declined to follow *Superon* on this basis, holding itself to be bound by *Kandla* instead.[101]

In my view, the most reasonable course would be to read section 13 narrowly[102] by holding that only appeals under section 37 and Order XLIII are permitted, and appeals under section 50 are no longer maintainable, except if preferred directly to the Supreme Court. This interpretation would not only give full effect to the legislative intent of reducing the number of appeals for commercial disputes, but would also promise greater enforceability for foreign awards.

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95 *HPL* [54].

96 *See*, Part I(A).

97 *Arun Dev* (n 66).

98 Phoenix Legal, 'Speedy Resolution of Commercial Disputes' (*Mondaq*, 2 March 2018) <www.mondaq.com/india/contracts-and-commercial-law/677700/speedy-resolution-of-commercial-disputes> accessed 22 October 2020.

99 *Kandla* [27]; *South Delhi Municipal Corpn v Tech Mahindra* (2019) SCC OnLine Del 11863 [6] – [9]; *Nirman* [11], [12].

100 *Prasar Bharti v Stracon India Ltd* (2020) SCC OnLine Del 737.

101 *Odeon Builders Pvt. Ltd.* v. *NBCC (India) Ltd.* 2021 SCC OnLine Del 4390.

102 *See*, Ajit Warrier and Aditya Nayyar, 'Appeals under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 – A Legal Quagmire' (Mondaq, 24 April 2018) <www.mondaq.com/india/contracts-and-commercial-law/694944/appeals-under-the-commercial-courts-commercial-division-and-commercial-appellate-division-of-high-courts-act-2015-a-legal-quagmire#:~:text=Section%2013(1)%20of%20the,as%20the%20case%20may%20be.>accessed 23 October 2020.

V. CONCLUSION

In 2015, when the 253rd Report of the Law Commission of India re-examined the issue of fast-track commercial courts, many of the recommendations it made were intended as improvements over previous efforts.[103] The underlying aim, as before, was to ensure speedy disposal of high value disputes, thereby, providing assurance to foreign investors in India. One of the salient features of the report, concerned the appellate procedure for commercial disputes. While noting that previous versions of a proposed legislation had envisaged a single appeal to the Supreme Court, the report observed that this was not feasible, and would make the process lengthier, costlier and less effective.[104] Consequently, it was suggested that appeals should be permissible from final judgments of the Commercial Division/Court and commercial tribunals like the CLB/NCLT in addition to orders under Order XLIII of the CPC or under section 37 of the 1996 Act and "against no other orders".[105] This was reflected in three separate provisions in the draft bill annexed to the 253rd Report, i.e. Sections 14, 15 and 16, which dealt with appeals from orders, decrees and judgments of tribunals, respectively.[106] Unfortunately, this clarity of thought was lost in subsequent iterations, and the final legislation, while arguably possessing the same intent, was unable to express it unambiguously.

In the five years since then, this uncertainty has only become more pronounced. As is evident from the judicial decisions analysed in this essay, the interpretation of section 13 remains unclear at best and much of this is a result of its rather unhappy wording. If the intent was to disallow endless appeals from interlocutory orders, the application of *Khimji* could have been clearly excluded by using 'decree' instead of 'judgment', as was done in the Law Commission of India's proposed bill.[107] Similarly, if section 50 appeals were meant to be excluded, the proviso to section 13(1A) ought to have been couched in clear negative terms. Conversely, if section 50 appeals were not to be excluded, its express inclusion in the proviso would have easily achieved that. But by following through on neither of these lines of thought, the legislature has not only created a conundrum regarding section 50, but has given courts the leeway to expand section 13 even beyond its application to section 50. At present, appeals from *HPL,*[108] *Samsung*,[109] *Eros*[110] and other similar mat-

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[103] Law Commission of India, *Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015* (Law Com No 253, 2015) ('LCR 253').

[104] LCR 253 [2.10].

[105] LCR 253 [3.23.1] – [3.23.3], [4.3(f)].

[106] LCR 253 Annexure ch IV.

[107] LCR 253 Annexure ss 14-16.

[108] SLP (C) No 5837 of 2017 and SLP (C) No 6581 of 2017 (Pending) (SC).

[109] *Samsung Leasing Ltd v Samsung Electronics Co Ltd* SLP (C) No 897-898 of 2018 (Pending) (SC).

[110] *Explorer Associates (P) Ltd v Eros Resorts and Hotels Ltd* SLP (C) No 23365 of 2018 (Pending) (SC).

ters are pending adjudication before the Supreme Court,[111] which has noted the divergence between the Bombay and Delhi views and may partially resolve this confusion.[112] But as *Kandla* has reaffirmed, judicial interpretation cannot entirely resolve textual flaws in legislations. Therefore, the best way forward would be for a legislative amendment to decisively settle the matter, by giving full effect to the intent behind the CCA.

[111] The petitions have been tagged together with the lead petition being SLP (C) No 5837 of 2017 (Pending) (SC).

[112] *HPL (India) Ltd v QRG Enterprises* order dated 15-3-2018 in SLP (C) No 5837 of 2017 (Pending) (SC).