

(1993) 04 GUJ CK 0028
In the Gujarat High Court

Babulal Ambalal Patel and Others

APPELLANT

Vs

Maniben Patel and Another

RESPONDENT

Date of Decision : 26-04-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100A, 100A
Government of India Act, 1915 — Section 107, 108
Letters Patent Act, 1865 — Clause 15

Citation : (1993) 2 GLR 1312

Hon'ble Judges : S. Nainar Sundaram, C.J;M.S. Parikh, J

Bench : Division Bench

Judgement

S. Nainar Sundaram, C.J.—This Letters Patent Appeal is being sought to be preferred against the order of the learned single Judge made on 9-3-1993 in Civil Application No. 514 of 1993, which was one for condonation of delay in filing a Second Appeal. The learned single Judge dismissed the Civil Application in the following terms:

No substantial question of law is made out. Therefore, C.A. is disposed of as dismissed. No orders as to costs.

There is no declaration by the learned single Judge that the case is a fit one for further appeal.

2. The question that comes up for consideration on the basis of the Office Note is with reference to the maintainability of the Letters Patent Appeal. The learned single Judge was asked to consider the application for condonation of delay in preferring the Second Appeal. The papers in the Second Appeal, obviously, have been presented into the Court. The application for condonation of delay is part of the proceedings in the Second Appeal. Only by condonation of delay, the papers in the Second Appeal could be processed further and the Second Appeal could be prosecuted. If there is no condonation of delay there would not be an occasion to process further the papers in the Second Appeal and the same getting prosecuted. By condonation of the delay, if that should happen, the Second

Appeal would get numbered and the process for further consideration of it would commence. There could not be an application for condonation of delay, when there is no main proceeding in the Second Appeal. The consideration of the main proceeding stands deferred awaiting the results in the application for condonation of delay. We are obliged to remember the above features so as to enable us to decide as to the nature of the jurisdiction, which the learned single Judge was called upon to exercise in the matter.

3. First the question may, legitimately, arise as to whether the order made by the learned single Judge in the Civil Application is a "judgment" so as to attract Clause 15 of the Letters Patent. Clause 15 of the Letters Patent reads as follows:

And we do further order that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act or in exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made (on or after the first day of February, 1929) in exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us, our Heirs or Successors in Our or their Privy Council, as hereinbefore provided.

4. Clause 15 of the Letters Patent as could be seen from the extract above speaks about a judgment and by its earlier part excludes from its purview a judgment passed in the exercise of appellate jurisdiction in respect a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court. However, the latter part of Clause 15 of the Letters Patent of course permits an appeal being entertained even from such a judgment of a single Judge where the Judge, who passed the judgment, declares that, the case is a fit one for appeal. But this has been done away with, by Section 100A introduced with effect from 1-2-1977 into the Code of Civil Procedure, 1908, hereinafter referred to as the Code, in a case where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court and it says that no further appeal shall lie from the judgment, decision or order of such a single Judge in such appeal or from any decree

passed in. such appeal and this is notwithstanding anything contained in any Letters Patent for nay High Court or in any other instrument having the force of law or in any other law for the time being in force. Section 100A of the Code reads as follows:

Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal.

5. In the present case, the learned single Judge has not simply dismissed the application for condonation of delay in preferring the Second Appeal, but has also pronounced upon the merits of the Second Appeal by saying that no substantial question of law is made out. Though keeping aside this aspect, it is not possible to say that by the learned single Judge merely deciding the application for condonation of delay in preferring the Second Appeal, he has not decided any appeal as such from an appellate decree or order, so as to attract the bar of Section 100A of the Code, yet even to come within the latter part of Clause 15 of the Letters Patent so as to be appealable with the leave of the Judge, there must be a judgment rendered in exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the High Court. Or in other words, there ought to be a judgment rendered by a single Judge in second appellate jurisdiction.

6. If the learned single Judge has condoned the delay, it could not be stated that there is a decision affecting the merits of the rights and liabilities of the parties. The said decision does not conclude the further progress of the second appeal and on the other hand it allows the second appeal to be continued. Such a decision does not prevent the rights and liabilities of the parties from getting adjudicated upon in the Second Appeal; and it is merely a procedural step, placing and bringing the Second Appeal to a stage, where the rights and liabilities of the parties could be adjudicated upon by the Court. Nothing gets decided and there is no determination of any right or liability of parties by such an order and it is only a step-in-aid to make further progress in the Second Appeal towards determination of the rights and liabilities of the parties. Hence, such a decision will not be a judgment at all within the meaning of Clause 15 of the Letters Patent, and no appeal would be competent from such a decision. To the above effect is the pronouncement of a Bench of the High Court of Bombay in *Vaijayantappa Shirsappa Ijari Vs. Anasuya Waman Anant*, .

7. Where the learned single Judge rejects the application for condonation of delay further progress in the Second Appeal is nipped out in the bud and the adjudication of the rights and liabilities of the parties are negated then and there by such a rejection. It has been countenanced by pronouncements of Courts, including these of the highest Court in the land that in order to find out

as to whether an order is a judgment or not, the Court must ascertain that the order affects the merits of the action between the parties by determining same right or liability. When there is a refusal to condone the delay in preferring the Second Appeal, the rights of the appellant are determined and there is no scope for him to prosecute further process in the Second Appeal and there is determination of the *Lis*. Its direct and inevitable result is to put an end to the proceedings and they stand terminated. In that view of the matter it will be proper to hold that the rejection of the application for condonation of delay in preferring the Second Appeal is a "judgment to fall within the ambit of Clause 15 of the Letters Patent. Furthermore, in the present case as already noted, the learned single Judge has in fact, pronounced upon the merits of the case by saying that "no substantial question of law is made out". We have no ambiguity in our mind that the order of the learned single Judge is a judgment within the meaning of Clause 15 of the Letters Patent.

8. Then the further question that comes up for consideration is what is the nature of the jurisdiction exercised by the learned single Judge, when he dismissed the application for condonation of delay in preferring the Second Appeal. An application for condonation of delay would arise in original jurisdiction or first appellate jurisdiction, or second appellate jurisdiction. "The entertaining of such application and disposal of it are not independent of the main proceedings in relation to which it is filed. The filing of an application for condonation of delay is inextricably related to and connected with the main proceedings, concerning which it is filed. The nature of the main proceedings will decide the nature of the jurisdiction. If the said application is filed in relation to original proceedings, the jurisdiction invoked will be original. If it is filed in first appellate proceedings the jurisdiction will be first appellate. If it is filed in second appellate proceedings the jurisdiction involved would be second appellate. An application for condonation of delay has no independent existence *de hors* the main proceedings in which it is filed. Here in the present case the application for condonation of delay in preferring the second appeal must be held to have been dealt with only in second appellate jurisdiction.

9. However, Mr. K.B. Padia, Learned Counsel for the appellants in the H Letters Patent Appeal, would draw our attention to a pronouncement of a Bench of This Court in *Chamar Govindbhai Hirabhai (since deceased by his heirs) Vs. Harijan Tababhai Alabhai (since deceased by his heirs)*, to say that the learned single Judge must be held to have exercised only original jurisdiction when he declined to condone the delay in preferring the Second Appeal. In that case, a Bench of This Court was asked to deal with an order made by the learned single Judge, refusing to set aside the abatement in a Second Appeal. The Bench of This Court opined that the very Second Appeal having abated by operation of law, there was no question of the learned single Judge exercising any appellate jurisdiction and the order passed by the learned single Judge was clearly on the original proceeding, which was taken by filing the petition to set aside the abatement. The Bench referred to a further earlier pronouncement of Bench of This Court in

Shantilal Chandrashankar and Another Vs. Bai Basi, But we find that in the further earlier pronouncement referred to above, the Bench noted the statement of the learned Amiens Curiae appointed by Court that an order refusing to restore a second appeal and re-admit it, finally disposed of the rights of the parties and as really an order on an original proceeding and the Bench proceeded to deal with the question on that footing without further discussion We need not express any opinion of ours on the questions, which specifically arose before the earlier Benches of This Court, either following or choosing to differ from them, since on the facts presented in this case, we have no occasion to enter into the field of investigating into those questions. Here, we are concerned with an order made by the learned single Judge, declining to condone the delay in filing the Second Appeal. That question never came up for consideration in the earlier pronouncements. As we discussed earlier, the papers in the Second Appeal got presented with delay and an application for condonation of delay has been taken, seeking an entry for the Second Appeal after the condonation of delay. It is not possible to dissociate the application for condonation of delay from the proceedings in the Second Appeal. If there is no Second Appeal, there is no question of an application for condonation of delay in preferring the Second Appeal. When there is a decline to entertain the application for condonation of delay in preferring the Second Appeal, the further process of and progress in the Second Appeal are put an end to. The learned single Judge entertained and disposed of the application for condonation of delay in preferring the Second Appeal only in the second appellate jurisdiction.

10. Once it is found that the order of the learned single Judge is a judgment and it is rendered in second appellate jurisdiction, if at all it is further appealable, it could be only with the leave of the learned single Judge, as contemplated in the latter part of Clause 15 of the Letters Patent. Such a leave, admittedly has not been accorded by the learned single Judge. Even otherwise, as already noted the learned single Judge has pronounced upon the merits of the case in the Second Appeal, and in that view he could be stated to have heard and decided the very Second Appeal itself and hence the bar u/s 100A of the Code would come into play, inhibiting the preferring of Letters Patent Appeal.

11. In any view of the matter, the proposed Letters Patent Appeal is not maintainable and the same is rejected.