

(2014) 05 RAJ CK 0018

In the Rajasthan High Court

Case No : Special Appeal (Civil) No. 3 of 2014

Bharat Bhushan Pareek

APPELLANT

Vs

Ambrish Chand Kudasiya and Others

RESPONDENT

Date of Decision : 30-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100A, 100-A, 96
Constitution of India, 1950 — Article 226

Citation : (2015) 1 RLW 634

Hon'ble Judges : Amitava Roy, C.J;Veerender Singh Siradhana, J

Bench : Division Bench

Advocate : R.N. Mathur, Sr. Counsel, assisted by Bajrang Lal Choudhary, Advocates for the Appellant; Rajesh Sharma, Mahendra Pareek and Suresh Bansal, Advocates for the Respondent

Judgement

Veerender Singh Siradhana, J.—In the instant intra-court appeal, the appellant has assailed the order dated 18th February, 2014, passed by the learned Single Judge in Civil Regular First Appeal Number 453 of 2003 (Bharat Bhushan Pareek v. Ambrish Chand Kudasiya & Anr.) on a miscellaneous application, which sought for vacation of the conditional stay order dated 24th October, 2007, in view of the default of the condition number 4 therein. Briefly, the indispensable material facts necessary for appreciation of the controversy needs to be outlined first. The respondents instituted a Civil Suit against the appellant for eviction claiming damages for use and occupation of the premises in dispute in November, 2000. The appellant denied the relationship of landlord-tenant since the landlord and respondents were not title holder. The learned Trial Court decreed the Civil Suit vide judgment and decree dated 25th July, 2003. The appellant filed an appeal being Civil Regular First Appeal Number 453/2003, which was admitted. The learned Single Judge on 24th October, 2007, made an order directing the appellant to pay an amount of Rs. 9,800/- (Rupees : Nine Thousand) as mesne profit as condition number four aside three other conditions. The fourth condition stipulated, is in regard to institution of execution proceedings, by the plaintiffs/

respondents, during the pendency of the appeal, in the event of default in payment of mesne profit for consecutive three months. The respondent number 1 filed a miscellaneous application stating default in payment for three consecutive months i.e., November, December, 2001 and January, 2012, and therefore, sought permission for institution of execution proceedings, during the pendency of the appeal, in view of default of the conditional order dated 24th October, 2007, with a further prayer for vacation of the conditional stay order as well. The learned Single Judge granted the application for execution of decree of eviction during the pendency of the appeal vacating the conditional stay order dated 24th October, 2007, which is impugned herein.

2. On institution of the instant intra-court appeal, the Registry of this High Court pointed out a defect as to the maintainability of the Special Appeal in the face of Rule 134(i) of the Rajasthan High Court Rules, 1952 (hereinafter referred to as the "Rules of 1952", for short). The objection has been responded by the appellant with the statement that the instant Special Appeal has been preferred under Rule 134(H) of the Rules of 1952. Rule 134 of the Rules of 1952, contemplates appeal under sub-clause (i) "APPEAL" whereas sub-clause (ii) deals with "SPECIAL APPEAL" and the two provisions are distinct and separate from each other, intended for different purpose inherent in the language of Rule 134 of the Rules of 1952, and therefore, should not be confused by a conjoint reading of Rule 134. The bar imposed vide Rule 134(0), is not applicable to a "SPECIAL APPEAL" under sub-clause (ii) of Rule 134 of the Rules of 1952. In order to reinforce his stand, reliance is placed on the opinion of the Coordinate Bench of this Court, in the case of Jaipur Metro Rail Corporation Limited v. Alok Kotahwala & Ors.: 2013 (2) WLC (Raj.) 381. On 16th April, 2014. When the matter came up before this Court, the respondents entered appearance. A copy of the memo of the special appeal along with annexures thereto, was furnished and the matter was posted to 23rd April, 2014, for consideration on the issue of maintainability of the Special Appeal.

3. Since the learned counsel for the respondents have raised the question of maintainability of the intra-court appeal, as such, we have heard the matter at length, confining ourselves, only to the question of maintainability of the Special Appeal,

4. The plaintiffs/respondents, who are respondent number 1 and 2 herein, aggrieved of the default committed by the appellant of the conditional order dated 24th October, 2007, made on Civil Regular First Appeal Number 453 of 2003, preferred a miscellaneous application for vacation of the conditional stay order dated 24th October, 2007, while seeking permission for execution of decree of eviction even during the pendency of the appeal, which has been granted by the learned Single Judge, and is the subject matter of the instant intra-court appeal under Rule 134 of the Rules of 1952.

5. Mr. Rajesh Sharma, the learned counsel for the respondents, placing reliance on the mandate of Section 100-A of the Civil Procedure Code (hereinafter

referred to as "CPC", for short) as amended from 1st July, 2002, questioned the very maintainability of the Special Appeal, and vehemently argued that the Special Appeal is not sustainable in view of the provisions of Section 100-A of CPC as it stands. In order to reinforce his submissions, the learned counsel has placed reliance upon the opinion of the Hon"ble Supreme Court in the case of Salem Advocate Bar Association Vs. Union of India (UOI), .

6. We have heard the learned counsel for the parties and with their assistance, perused the materials available on record.

7. Rule of 1952 under Rule 134 provides for appeal to the High Court from judgment of Judges of the Court. The text of Rule 134 reads thus:--

"134(i) Appeal to the High Court from Judgment of Judges of the Court:-An appeal shall lie to the High Court from the Judgment or a final order (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 High Court and not being an order made in the exercise of revisional Jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence or in the exercise of criminal Jurisdiction) of one Judge of the High Court.

(ii) Special appeal:-A person desiring to prefer a special appeal from the judgment of the Single Judge shall present a duly stamped memorandum of appeal within sixty days from the date of such judgment. Where such appeal is presented after the period mentioned above, it shall be accompanied by an application supported by an affidavit explaining the cause of delay and it shall be rejected unless the appellant satisfies the court that he had sufficient cause for non preferring the appeal within the aforesaid time. The memorandum of appeal shall be drawn-up in accordance with Rules 125, 130 and 131 of this Chapter and shall be accompanied by a certified copy of the judgment or order appealed from alongwith two extra typed copies of the judgment or order."

8. After 1st July, 2002, Section 100-A of the CPC reads thus:--

"100A. No further appeal in certain cases? 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 or such single Judge in such appeal or from any decree passed in such appeal."

9. A glance at Section 100-A of CPC would reveal that the Legislature expressly has provided for a specific exclusion with reference to any appeal from an original or appellate decree or order, heard and decided by a single Judge of a High Court. The controversy raised herein above, leaves no room for any doubt that the impugned order arises out of Civil Regular First Appeal under Section 96 of CPC against the judgment and order dated 25th July, 2003, preferred by the

appellant in the year 2003 i.e., much after 1st of July, 2002.

10. In the case of Salem Advocate Bar Association (supra), the Hon"ble Supreme Court while considering the challenge to the constitutionality of Section 100-A CPC, upholding the validity held thus:--

"14. Section 100-A deals with two types of cases which are decided by a Single Judge. One is where the Single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not. Even at present depending upon the value of the case, the appeal from the original decree is either heard by a Single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provide for the regular first appeal to be heard by a Single Judge.

15. In Such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved is large. In such a case, the High Court by Rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100-A."

11. In the case of Jaipur Metro Rail Corporation Limited (supra), the Coordinate Bench of this Court dealt with the issue of maintainability of intra-court appeal, considering the nature of the order passed by the learned Single Judge, staying the land acquisition proceedings, while exercising extraordinary original jurisdiction under Article 226 of the Constitution of India. The Coordinate Bench while considering the question as to whether the interlocutory order impugned therein, was a "judgment", for which, it must contain the traits and trappings of finality, observed thus:--

"13. Coming to the first objection raised by Shri A.K. Bhandari, learned Sr. Counsel, assisted by Mr. Vaibhav Bhargava, appearing on behalf of the respondents No. 1 to 4 Alok Kotahwala & ors., as to maintainability of the appeal, we find that considering the nature of the order passed by the Single Bench staying the land acquisition proceedings and giving liberty to the State Government to restart the land acquisition proceedings afresh amounts to judgment or final order within the purview of Rule 134 of the High Court Rules. Rule 134 of the High Court Rules is quoted below:

134 (i) Appeal to the High Court from Judgment of Judges of the Court--An appeal shall lie to the High Court from the Judgment or a final order (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 High Court and not being an order made in the exercise of revisional Jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence or in the exercise of criminal Jurisdiction) of one Judge of the High Court.

(ii) Special appeal--A person desiring to prefer a special appeal from the judgment of the Single Judge shall present a duly stamped memorandum of appeal within sixty days from the date of such judgment. Where such appeal is presented after the period mentioned above, it shall be accompanied by an application supported by an affidavit explaining the cause of delay and it shall be rejected unless the appellant satisfies the court that he had sufficient cause for non preferring the appeal within the aforesaid time. The memorandum of appeal shall be drawn-up in accordance with Rules 125, 130 and 131 of this Chapter and shall be accompanied by a certified copy of the judgment or order appealed from alongwith two extra typed copies of the judgment or order.

The Apex Court has considered the meaning of the judgment in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, in the context of Letters Patent (Born.), Cl. 15, it has been observed that the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings. The Apex Court has further laid down that an order of the trial judge refusing to appoint a receiver or to grant an ad interim injunction is undoubtedly a judgment within the meaning of the Letters Patent both because O.43 R. 1 applies to internal appeals in the High Court and apart from it such an order even on merits contains the quality of finality and would therefore be a judgment within the meaning of Cl. 15 of the Letters Patent. The Apex Court has laid down in para 119 and 123 thus:

119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the Trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the Trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is *ex facie* legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in

controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind.

123. In the instant case, as the order of the trial judge was one refusing appointment of a receiver and grant of an ad interim injunction, it is undoubtedly a judgment within the meaning of the Letters Patent both because in view of our judgment, O. 43 R. 1 applies to internal appeals in the High Court and apart from it such an order even on merits contains the quality of finality and would, therefore, be a judgment within the meaning of Clause 15 of the Letters Patent. The consistent view taken by the Bombay High Court in the various cases noted above or other cases which may not have been noticed by us regarding the strict interpretation of clause 15 of the Letters Patent are hereby overruled and the Bombay High Court is directed to decide the question in future in the light of our decision."

12. Considering the nature of the impugned order therein, passed by the learned Single Judge, under paragraph 19, it was further observed as under:--

"16. Thus, considering the nature of the order passed by the Single Bench, as the very project of Metro may be jeopardized and also the fact in the order the State has been given liberty to restart the land acquisition proceedings afresh, we term it to be a "judgment" falling within the purview of Rule 134 of the High Court Rules appealable before the Division Bench of this court considering the nature of the order passed and its effect."

13. Thus, the facts attendant in the instant case at hand are entirely different than that of the Jaipur Metro Rail Corporation Limited (supra), and therefore, has no application to the case at hand.

14. There is no dispute about the proposition of law that right to appeal is an inherent statutory right and when conferred by the statute, the same acquires the status of a "vested right". Further, an appeal is continuation of the proceedings, which would also include the proceedings before the appellate authorities, but the applicability of general law would be subject to exception where a provision for implied exclusion exists.

15. In the case of Kamla Devi Vs. Khushal Kanwar and Another, ; the Hon"ble Supreme Court while examining the bar to further appeal against the judgment and decree passed in appeal by Single Judge of the High court, though with reference to temporal applicability (prospective or retrospective), held the applicability of bar imposed by virtue of Section 100-A of CPC, inserted with effect from 1st July, 2002 is prospective.

16. In the case of Mohd. Saud and Another Vs. Dr. (Maj.) Shaikh Mahfooz and Others, ; reiterating the law declared in the case of Salem Advocate Bar

Association and Kamla Devi (supra), held thus:--

"7. The Full Bench by the impugned judgment has held that after the introduction of Section 100-A with effect from 1.7.2002, no Letters 5 Patent Appeal shall lie against the judgment or order passed by a learned Single Judge in an appeal. The Full Bench has held that the decision of the Division Bench of the High Court in *Birat Chandra Dagra v. Taurian Exim Pvt. Ltd. & Anr.* (vide page 5) 2006 (11) OLR 344 does not lay down the good law while the decision of Division Bench in *V.N.N. Panicker v. Narayan Patil & Anr.* 2006 (2) OLR 349 lays down the correct law. The Full Bench has further held that after the amendment of Section 100-A w.e.f. 1.7.2002 no LPA shall lie against the order or judgment passed by a learned Single Judge even in an appeal arising out of a proceeding under a Special Act."

17. The Hon''ble Supreme Court further adopting purposive interpretation to resolve the conflict as pointed out under Section 100-A CPC as amended in 2002; observed thus:--

"14. It may be noted that there seems to be some apparent contradiction in Section 100-A as amended in 2002. While in one part of Section 100-A it is stated "where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court", in the following part it is stated "no further appeal shall lie from the judgment and decree of such Single Judge". Thus while one part of Section 100-A refers to an order, which to our mind would include even an interlocutory order, the later part of the Section mentions judgment and decree.

15. To resolve this conflict we have to adopt a purposive interpretation. The whole purpose of introducing Section 100-A was to reduce the number of appeals as the public in India was being harassed by the numerous appeals provided in the statute. If we look at the matter from that angle it will immediately become apparent that the LPA in question was not maintainable because if it is held to be maintainable then the result will be that against an interlocutory order of the District Judge there may be two appeals, first to the learned Single Judge and then to the Division Bench of the High Court, but against a final judgment of the District Judge there can be only one appeal. This in our opinion would be strange, and against the very purpose of object of Section 100-A, that is to curtail the number of appeals.

16. It is well settled that the modern method of interpretation is purposive vide *Directorate of Enforcement Vs. Deepak Mahajan and another*, , *Hindustan Lever Ltd. v. Ashok Vishnu Kate & Ors.* (1995) 6 JT 625 (vide page 631) and *Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation*, .

17. We are of the opinion that the apparent contradiction in Sec. 100A as amended in 2002 was only due to bad drafting, and not much can be made out of it once we understand the purpose of Section 100-A.

18. For the reasons given above we are of the opinion that the Full Bench of the High Court has taken a correct view. Thus there is no force in these appeals, which are accordingly dismissed. No costs."

18. For the reasons and discussions herein above as well as in view of the authoritative pronouncement on the controversy by the Hon"ble Supreme Court, we have no hesitation in holding that the instant intra-court appeal is not maintainable in view of the bar imposed by amendment of Section 100-A of CPC with effect from 1st July, 2002.

19. In the result, the intra-court appeal is held to be not maintainable and is hereby dismissed.

20. In view of the final adjudication on the intra-court appeal, the stay application as well as other misc. application(s) stand closed. However, in the facts and circumstances of the case, there shall be no order as to costs.