

(1982) 08 RAJ CK 0018
In the Rajasthan High Court
Case No : Civil Special Appeal No. 500 of 1982

Gulam Abbas Kamruddin Bhalamwala	APPELLANT
Vs	
State of Rajasthan and Others	RESPONDENT

Date of Decision : 24-08-1982

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan High Court Ordinance, 1949 — Section 18

Citation : AIR 1983 Raj 128 : (1982) RLW 696 : (1982) WLN 580

Hon'ble Judges : S.K. Mal Lodha, J;Kanta Bhatnagar, J

Bench : Division Bench

Advocate : H.M. Parekh, for the Appellant; D.S. Shishodia, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mal Lodha, J.—By this appeal u/s 18 of the Rajasthan High Court Ordinance, 1949 (for short the "the Ordinance" herein); the appellant questions the correctness of the order dated June 4, 1982 of the learned single Judge of this Court which he passed in S. B. Civil Misc. Stay Petition No. 484 of 1981 in S. B. Civil Writ Petition No. 528 of 1981,

2. In this appeal, we are not concerned with the facts of the case, and, therefore, it is not necessary to detail the same in the judgment. Suffice it to state that the appellant filed writ petition (S. B. Civil Writ Petition No. 528 of 1981) under Article 226 of the Constitution seeking an order, direction or writ in the nature of certiorari or mandamus or any other writ which the Court may deem fit to issue for quashing Ex. 8 dated Feb. 17, 1981 of the Special Secretary Agriculture Group VI Department, Government of Rajasthan, Jaipur and Ex. 9 dated March 24, 1981 of the Fishery Development Officer, Rana Pratap Sagar. Rawat Bhata District Chhittorgarh and further for a direction to the respondents not to restrain the petitioner (appellant) from removing the material i. e. wood, charcoal etc., which he had prepared in execution of the contract and which is lying on the

spot, Along with the writ petition a stay petition (S. B. Civil Misc. Stay Petition No. 484 of 1981) was filed and it was prayed that the operation of the aforesaid two orders may be stayed pending the decision of the writ petition. In the stay petition, on April 29, 1981 in the presence of the counsel for the petitioner and the Government Advocate, the following ad interim order was passed: --

"In the meanwhile, It is ordered that the petitioner would be at liberty to remove the wood and bushes charcoal etc. which are covered by the contract and which have been removed or cut till today i.e. 29-4-1981. The petitioner would not be allow to do anything else in pursuance of the contract except the above till further orders. Mr. Shishodia requested that the petitioner should be asked to give surety for the removal of the wood etc. as ordered above. Mr. Hastimal opposes it on the ground that he has already invested the amount of Rupees Five lacs for that.

I am of the opinion that till the matter is decided, it would not be proper to specify the conditions. All that should be done is that while removing the wood or charcoal or bushes, which have already been removed from the roots, the petitioner would allow the representative of the respondents to prepare an inventory mentioning the weight, quality, quantity and cost of them and would give an undertaking to the respondents that in case the writ petition is dismissed, the amount so valued, would be paid by him."

On may 14, 1981, the learned single Judge made the following order in modification of the earlier order:--

"The petitioner shall be allowed to continue his operations to clear the disputed area of Rawat Bhata Dam. However, he will remove the wood or charcoal or bushes but the petitioner should allow the representative of the respondents to prepare an inventory mentioning the weight, quality, quantity and cost of them and would give an undertaking to the respondents that in case, the writ petition is dismissed, the amount so valued should be paid by him."

Subsequently, on June 4, 1982 the learned single Judge passed the following order:

"The petitioner would not remove wood or charcoal or bushes of the disputed area till the following conditions are fulfilled.

The Collector concerned should first get the valuation of the property consisting of the charcoal bushes and woodashes in terms of the market rate fetched and then direct the petitioner to submit an unconditional undertaking along with a surety bond that in case the writ petition is dismissed the market value so assessed would be deposited in the office of the Collector to be paid to the Government and the surety bond and the undertaking would not be accepted by the Collector if it contains any conditions against this Order." .

3. Feeling aggrieved, the petitioner (appellant) has filed this special appeal as aforesaid:

4. A show cause notice was issued to the respondents on July 27, 1982. In pursuance thereof, Mr. D. S. Shishodia, Government Advocate has appeared on behalf of the respondents.

5. On August 18, 1982, learned counsel for the parties stated that this appeal may be disposed of finally at the admission stage.

6. We have heard Mr. H. M. Parekh, learned counsel for the appellant and Mr. D. S. Shishodia, learned Government Advocate.

7. Mr. D. S. Shishodia, learned Government Advocate raised a preliminary objection that as the order under appeal is an interlocutory or interim one, it is not a "judgment" u/s 18 (i) of the Ordinance and, therefore, no appeal lay against it and as such, this special appeal is not maintainable. In support of his contention, Mr. D. S. Shishodia, learned Government Advocate placed reliance on the decisions reported in State Vs. Hindo Open Sugar Mills and Others, Ikram v. Union of India, 1980 Raj LW 253 : (AIR 1980 Raj 1821 and Radhey Shyam Vs. Sita Ram, He, however, submitted that the interim order was passed on May 14, 1982 and certain conditions were imposed vide the order under appeal. According to him, order under appeal is not a "judgment" so as to be appealable u/s 18 (1) of the Ordinance.

8. On the other hand, Mr. H. M. Parekh, learned counsel for the appellant strongly opposed the preliminary objection on the basis of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, It was strenuously urged that the order dated June 4, 1982 is "judgment" within the meaning of Section 18 (1) of the Ordinance and having regard to the nature of the order in question, it is appealable. It was further submitted that the aforesaid decisions of this Court on which reliance has been placed by the learned Government Advocate are no longer good law in view of the recent decision of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another,

9. We have given our most anxious and thoughtful consideration to the rival contentions raised by the learned counsel for the parties.

10. The most important question which arises for our determination is whether the order dated June 4, 1982 against which this appeal has been filed is a "Judgment" within the meaning of Section 18 (i) of the Ordinance. In other words, whether this appeal is maintainable against the order under appeal. In this connection, we will have to further consider whether the aforesaid three decisions of thin Court are still good law in view of Shah Babulal Khimji's case.

11. Section 18 (1) of the Ordinance reads as under:

"18. Appeal to the High Court from Judges of the Court.-

(1) An appeal shall lie to the High Court, 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 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 u/s 43 or in the exercise of criminal jurisdiction) of one Judge of the High Court." It may be stated that the appellant has filed a petition under Article 226 of the Constitution. In the writ petition, a stay petition was submitted for staying the operation of the impugned orders and on that stay petition, an interim order to last until the decision of the writ petition was passed after modification of the earlier orders on June 4, 1982. Before we examine the question whether the order under appeal can be regarded as a judgment within the meaning of Section 18 (1) of the Ordinance, we would like to consider *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, In that case, the plaintiff-appellant had filed a suit on the original side of the Bombay High Court for specific performance of a contract and prayed for an interim relief by appointing the receiver of the property in suit and injuncting the defendant from disposing of the suit property during the pendency of the suit. The learned single Judge, after hearing the notice of motion dismissed the application for appointment of receiver as also for interim injunction. Thereafter, the plaintiff appellant filed an appeal before the Bombay High Court which dismissed the appeal as being non-maintainable on the ground that the order impugned (order of the single Judge) was not a judgment as contemplated by Clause 15 of the Letters Patent of the High Court. Thereafter, a special appeal was filed before the Supreme Court. The substantial questions of law that arose before the Supreme Court were as to the scope, ambit and meaning of the word "judgment" appearing in Clause 15 of the Letters Patent of the Bombay High Court and corresponding clauses in the Letters Patent of other High Courts. Four important points of law mentioned in para. 13 of the report dwelling on the various facts of the question at issue were canvassed. Their Lordships after considering the various decisions of the Supreme Court and the other High Courts came to the conclusion that the order refusing to appoint a receiver or to grant interim injunction is a judgment within the meaning of Clause 15 of the Letters Patent and hence appealable to a Larger Bench. Their Lordships took note of Sections 4 and 5 and 104 and Order XLIII; Rule 1 and Order XLIX, Rule 3, C. P. C. and held that a combined reading of the provisions of Sections 4 and 5, 104 and Order XLIX, Rule 3, C. F. C. lead to the irresistible conclusion that Section 104 read with Order XLIII, Rule 1 clearly applies to the proceedings before the trial Judge of the High Court, and that there is no consistency between the Letters Patent Jurisdiction and Section 104 read with Order XLIII, Rule 1 of the Code. When an interlocutory order can be considered as "judgment" under Clause 15 of the Letters Patent of the High Court, it was observed as follows:

"Thus, in other words every interlocutory Order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which works serious injustice to the party concerned." In para 119 of the report, their Lordships expressed themselves in the following words:

"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."

In Para 120 of the report, their Lordships gave illustrations of interlocutory orders which may be treated as judgments. It has been specifically stated that the illustrations are not exhaustive. Mr. H. M. Parekh learned counsel for the appellant invited our attention to item No 14 mentioned in Para 120 of the report that "an order granting or refusing to stay execution of the decree" to show that this appeal is maintainable. The contention of Mr. H. M. Parekh, learned counsel for the appellant is that having regard, to the nature of the order and its effect, i. e. the rights of the appellant have been vitally affected though It is an interim order, it is a Judgment" within the meaning of Section 18 (1) of the Ordinance and hence appealable. It is significant to note that all the illustrations mentioned in Para 120 of the report relate to the orders contemplated under the various provisions of the Code of Civil Procedure. In this case, the question is whether the interim order with certain conditions passed by the learned Single Judge in writ proceedings under Article 226 of the Constitution will be a judgment within the meaning of Section 18 (1) of the Ordinance. His Lord-shin Fazal Ali, J. who wrote the judgment for himself and on behalf of A. Varadarajan, J. has observed as under (at P. 1818) :

"125. Before closing this judgment, we may indicate that we have refrained from expressing any opinion on the nature of any order passed by a trial Judge in any proceeding under Art 226 of the Constitution which are not governed by the Letters Patent, but by rules framed under the CPC under which in some High Courts writ petitions are heard by a Division Bench. In other High Court writ

petitions are heard by a single Judge and a right of appeal is given from the order of the single Judge to the Division Bench after preliminary hearing.

His Lordship A. N. Sen, of course, gave his separate reasoning though he agreed with the conclusion.

12. From the observations made in para 125 of the report, which have excerpted hereinabove, it is clear that their Lordships of the Supreme Court have expressed no opinion bearing on the question with which we are concerned in this appeal. It may be mentioned here that their Lordships of the Supreme Court approved the tests laid down in *T. V. Tuljaram Row v. M.K.R.V. Alagappa Chettiar*, (1912) ILR 35 Mad 1.

13. *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, was noticed, in *State Vs. Hindo Open Sugar Mills and Others*, wherein the question that cropped up for examination was whether the interim order staying the operation of the impugned notifications on certain conditions till the final decision is not a "judgment" and, therefore, not appealable u/s 16 (1) of the Ordinance. In *Asrumati Devi's* case, their Lordships of the Supreme Court observed as follows (at p. 199):--

"A final judgment is an adjudication which conclusively determines the rights of the parties with regard, to all matters in issue in the suit, where as a preliminary or interlocutory judgment is a decree by which the right to the relief claimed in the suit is decided but under which further proceedings are necessary before a suit in its entirety can be disclosed of. Save and except final and preliminary judgments thus defined, all other decisions are "orders" and they do not come within the description of "judgments" under the relevant issue of the Letters Patent."

In *State's* case *Beri*, C. J. speaking for the Court observed as under (at p. 111):

"The small question which arises for our consideration is whether the order passed by the learned single Judge on 17th January, 1973 is a judgment against which an appeal is competent u/s 18 of the Rajasthan High Court Ordinance. Our answer to the question is plainly in the negative. Our reasons are that the order operates subject to the ultimate decision of the rights of the parties in regard to the validity of the notification of 28th November, 1972. Specific conditions have been imposed by the learned single Judge under which this order has been passed. All arguments against the advisability or otherwise of such an order are irrelevant for the purposes of deciding the question whether the order appealed against is a judgment or an interlocutory order." The word "judgment" as used in Section 18 (1) of the Ordinance was examined by another Division Bench of this Court in *Ikram Vs. Union of India (UOI) and Others*, In that case, the special appeal was filed against the interim orders passed on the stay application filed in the writ petition and the question arose regarding the maintainability of the appeal. A prayer was also made for reconsidering the view taken in *State Vs. Hindo Open Sugar Mills and Others*, After considering the various authorities and

law, it was laid down as under:

"But there seems to be consensus of opinion among all the High Courts that an order in order to be appealed from as an interlocutory judgment must decide some points of controversy between the parties, though there is a difference of opinion on the interpretation of the terms "judgment" as used in Letters Patent."

It was further observed as follows :

"Suffice it to say that we do not at all feel persuaded to reconsider the view taken by this Court in *Hindo Open Sugar Mill's* case (supra). In *Ikram's* case AIR 1980 Raj 182 a preliminary objection regarding competency of the appeal was raised by the learned counsel and the appeal was held to be not maintainable.

The facts in *Radhey Shyam Vs. The State of U.P. and Others*, were identical with those in *State Vs. Hindo Open Sugar Mills and Others*, In *Radhey Shyam's* case it was observed as under :

"The situation in the instant case is different. The impugned order dated 31-3-1970 does not dispose of the writ petition. The writ petition is still pending before the single Judge. The impugned order is an interlocutory order.

Thus the settled view of this Court is that interlocutory order of this type is not appealable under Chapter VIII, Rule 5 of the Rules of Court. Since the appeal is not maintainable, it is not necessary to enter into the merit of the appeal."

The facts in *Radhey Shyam Vs. Sita Ram*, are these: The plaintiff-appellant obtained a money decree. Aggrieved, the defendant filed a first appeal. Along with the first appeal, a stay application under Order XLI, Rule 5, C. P. C. was filed for staying execution of the decree. The learned single Judge passed the interim order for payment on submission of solvent security. Being dissatisfied, the appeal u/s 18 (1) of the Ordinance was preferred. An objection regarding non-maintainability of the appeal was raised by the office on the ground that the order appealed against was one passed under Order XLI, Rule 5, C. P. C. The Division Bench sustained the objection raised by the office held that the appeal was not maintainable under sub-s. (1) of Section 18 of the Ordinance. While arriving at the above conclusion, *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, *K.G. Rangaswami Chettiar and Co. and Others Vs. K.R. Eswaramurthy Goundar*, *Rajputana Cold Storage & Refrigeration Co. Ltd. v. Rani Ajitkunverba* ILR (1955) 5 Raj 413 and *State Vs. Hindo Open Sugar Mills and Others*, were referred to. It was held that the orders passed on the application under Order XLI, Rule 5, C. P. C. are not "judgments" as they do not finally and conclusively determine the rights of the parties and being interlocutory, they are not appealable u/s 18 (1) of the Ordinance. It may be mentioned here that *State's* case and *Ikram Vs. Union of India (UOI) and Others*, are the cases in respect of interim orders passed on the stay petitions filed in the writ petitions under Article 226 of the Constitution, whereas *Radhey Shyam Vs. Sita Ram*, is regarding interim order passed on the stay application under Order XLI, Rule 5,

C. P. C.

14. In *Balwant Singh v. State of Rajasthan* (D. B. Civil Special Appeal. No. 357 of 1982, decided on April 9, 1982) a contention was raised on behalf of the appellant that in view of *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, the Division Bench of this Court can entertain an appeal from the order of a learned single Judge rejecting stay petition in a pending writ petition and that the earlier judgments in State's case and Ikram's case are no longer good law. After referring to para 119 of the report of *Shah Babulal Khimji's case* AIR 1931 SC 1786 the Division Bench consisting of G. M. Lodha and M. C. Jain, JJ., has observed:

"We are of opinion that the impugned order precisely falls in this category and, therefore, it is not a judgment."

15. The questions whether *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, overrules *State Vs. Hindo Open Sugar Mills and Others*, and Ikram's case AIR 1980 Raj 182 and whether an order rejecting stay petition in a pending writ petition under Article 226 of the Constitution is appealable u/s 18 (1) of the Ordinance were not decided.

16. In view of the various illustrations given in para 120 of the report in *Shah Babulal Khimji's case* and the reasoning given therein, we do not consider it proper to express any opinion on the question whether the principles laid down in *Radhey Shyam's case* AIR 1901 Raj 105 still hold good, because we are not concerned with an Order passed on a stay petition under Order XLI, Rule 5, C. P. C. However, we are of considered opinion that State's case and Ikram's case do not stand overruled by *Shah Babulal Khimji's case* as the principles laid down therein are not applicable to the interim or interlocutory orders passed on a stay petition filed in the writ petition under Article 226 of the Constitution and further for the reason that the question with which we are concerned in this appeal did not arise for determination in that case before the Supreme Court.

17. It may be mentioned here that the rights of the parties involved in the writ petition have not been determined by the order under appeal. The petitioner has been permitted to remove wood or charcoal or bushes of the disputed area on certain conditions. It also needs to be mentioned that the order under appeal does not at all determine the rights of the parties and in that sense, the order cannot be said to be final. We are, therefore, disposed to think that the order under appeal being interim or interlocutory does not possess the characteristics of attributes of a judgment as envisaged by Section 18 (1) of the Ordinance and the appeal filed by the appellant u/s 18 (1) of the Ordinance against the order dated June 4, 1981 is not maintainable.

18. We find force in the preliminary objection raised by the learned Government Advocate and hold that the appeal is not maintainable.

19. Learned counsel for the parties addressed us on the merits of the appeal but

in view of the conclusion that the appeal is not maintainable, we do not want to express any opinion in this regard.

20. The net result of the above discussion is that the appeal is non-maintainable u/s 18 (1) of the Ordinance and it is, accordingly dismissed without any order as to costs.