

(1997) 08 MAD CK 0131

In the Madras High Court

Case No : L.P.A. No's. 90 of 1994, 87 to 90 and 101 of 1996

Karuppusamy Pillai and Others

APPELLANT

Vs

Swami Subramania Chettiar

RESPONDENT

Date of Decision : 22-08-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 104, 4

Citation : (1997) 2 CTC 261 : (1997) 2 MLJ 625

Hon'ble Judges : Thanikkachalam, J; S.M. Abdul Wahab, J; N.V. Balasubramanian, J

Bench : Full Bench

Advocate : R. Muthukumaraswamy, M. Venkatachalapathy for S.M. Loganathan, T.V. Ramanujam for T.V. Krishnamachari and AR.L. Sundaresan, for the Appellant; G. Masilamani for M. Palani, A.L. Somayaji for Aiyar and Dolia and T.R. Rajaraman, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Balasubramanian, J.—In the above said Letters Patent Appeals, the following question was referred for decision:

Whether Letters Patent Appeal would lie against the order of a learned single Judge of the High Court passed in a Civil Miscellaneous Appeal?

2. The necessary facts leading to the reference of the abovesaid question are as follows: One Durairajan and his son D. Rajkumar filed a scheme

suit in O.S.No. 684 of 1995 on the file of Sub-Judge, Coimbatore, to frame a scheme for the administration of a trust known as G.R.

Govindarajulu & Sons Charities. The trust was created by a trust deed dated 15.9.1958. In the said scheme suit, LA. No. 944 of 1995 was filed

praying for an interim injunction restraining D. Srinivasan from acting as a

trustee. LA. No. 943 of 1995 was filed praying for an interim injunction restraining the respondents therein from re-constituting and replacing or altering the Trust Board without the sanction of the Court. Interim injunction in both the above said applications were initially granted by the trial court. The trial court then by a common Order dated 26.8.1995 vacated the interim injunction granted in both the applications on the grounds (1) Chandrakanthi and Rengasamy in collusion co-opted the trustees and disqualified Seethalakshmi as trustee, without notice; (2) the meetings were not held as per the trust deed or resolutions; and (3) D. Srinivasan is not a fit person for trusteeship and he was restrained from attending the Trust Board meetings and allowed Seethalakshmi to act as a trustee in the Trust Board.

3. While vacating the interim injunction in I.A.No. 943 of 1995, the trial court held that (1) the trustees can be co-opted by an unanimous decision of the Trust Board; (2) the irregularities pointed out by Rajkumar have not been rectified; (3) the minutes of the Trust Board meeting dated 15.6.1995 were not signed by Rajkumar.

4. On contest made by the respondents, the trial court, with the above said findings, dismissed the applications for injunction. Against the common order, the following civil miscellaneous appeals were filed before this Court:

1. CMA.No. 1341 of 1995 against LA. No. 943 of 1995 by respondents 1,2, and 3.
2. CMA.No. 1388 of 1995 against LA. No. 944 of 1995 by do.
3. CMA.No. 1441 of 1995 against I.A. No. 944 of 1995 by D.Srinivasan.
4. CMA.No. 1442 of 1995 against LA. No. 943 of 1995 by D.Srinivasan.
5. CMA.No. 1357 of 1995 against LA. No. 943 of 1995 by Rajkumar and Devarajan.

5. The learned single judge of this Court by a common Order dated 7.5.1996 and by a clarification Order dated 17.5.1996, modified the order of the trial Court to the effect that Seethalakshmi's removal can be decided in the suit and that the co-option can be effected by majority. The learned single Judge also granted permission to the Trust Board to fill up the vacancy of Rajkumar by a majority decision even during summer holidays and the appointment should be ratified by the Sub-Court, Coimbatore. It was pointed out that no Trust Board meeting was held from 26.9.1995 till the

date of the order passed in the civil miscellaneous appeals on 17.5.1996. It is also to be noted that on 15.9.1994, the Trust Board passed a resolution adopting unanimously to increase the strength of the Trust Board members from seven to nine.

6. Against the common order passed by the learned single Judge in the civil miscellaneous appeals, these appeals LPA. Nos. 87 to 90 and 101 of

1996 were filed and interim orders also sought for the appointment of Seethalakshmi and Rajkumar as the trustees of the Trust Board. Stay of the

operation of the orders of the first appellate Court was also asked for. At the time of admission of these Letters Patent Appeals, the question of

maintainability of Letters Patent Appeals was raised. Since LPA No. 90 of 1994 has already been referred to a Full Bench to decide this question,

the other appeals were also referred to the Full Bench for deciding the question of maintainability.

7. As already stated, the present appeals under Clause 15 of the Letters Patent are filed against the order of the learned single Judge in C.M.A.

Nos. 1341 of 1995 etc., The main objection taken in these appeals is that no letters patent appeal under Clause 15 of the Letters Patent would lie

against the appellate order of the learned single Judge of this Court. The objection to the maintainability of the appeal is mainly based on the

following decisions:

New Kenilworth Hotel (P) Ltd., v. Orissa State Finance Corporation, 1997 2 L.W. 276; Resham Singh Pyara Singh Vs. Abdul Sattar, ;

Sarasammal Vs. Murugasamy and Others, ; Somasundaram v. Thangaraju, 1997 1 L.W. 506; Madan Naik (Dead) by Legal Representatives and

Others Vs. Hansubala Devi and Others, ; B.S. Adityan and Others Vs. Fencing Association of India, Jabalpur and Others, ; Union of India (UOI)

Vs. Mohindra Supply Company, ; The charity commissioner, Maharashtra State, Bombay Vs. Rahandrasigh Anandrao Jadhao and Another, .

It is upon those judgments, it was argued that Section 104(2) of the CPC bars appeals under Clause 15 of the Letters Patent. Civil miscellaneous

appeals were filed in this Court u/s 104 read with Order 43, Rule 1(J) of the Code and therefore, by virtue of the provisions of Section 104(2), no

further appeal will lie from an order passed in such appeals. Mr. G. Masilamani, learned Senior Counsel appearing for the respondents submitted

that Letters Patent is a special law and the CPC is a central law and therefore, the special provisions cannot be done away with by resorting to the

subsequent central legislation. Mr.G. Masilamani, learned Senior Counsel further pointed out that the subsequent rulings of the Supreme Court

have not referred to ruling of four Judges" Bench of the Supreme Court in the case of Union of India (UOI) Vs. Mohindra Supply Company, .

8. It has to be seen that the right to get an injunction is covered by a special law, namely, Specific Relief Act, Chapter VII. Section 36 of the

Specific Relief Act deals with the grant of preventive relief of injunction by grant of injunction, temporary or perpetual. Section 37 of the said Act

deals with temporary and perpetual injunction and states that temporary injunction is regulated by the Civil Procedure Code. In Civil Procedure

Code, we find Section 94 and Order 39 Rules 1 and 2 and that is made appealable under Order 41 Rule 1(r) read with Section 104, C.P.C.

Therefore, a special right to get injunction with inbuilt remedy of appeal under Order 43, Rule 1(r) read with Section 104 is governed by the Civil

Procedure Code. When the relief is granted under the Civil Procedure Code, the remedy should be only within the four corners of the CPC and

not otherwise. Section 4 of the CPC cannot be resorted to and even otherwise grant of injunction is a special remedy, covered by the Specific

Relief Act resorting to the Civil Procedure Code. This is the view adumbrated in the decision in Madan Naik (Dead) by Legal Representatives and

Others Vs. Hansubala Devi and Others, . The decision in the case of Union of India (UOI) Vs. Mohindra Supply Company, does not lay down

that an appeal would lie under Clause 15 of the Letters Patent, irrespective of Section 104(2) of the Code of Civil Procedure.

9. Clause 15 of the Letters Patent cannot be read in isolation and dissociated from Clause 44 of the Letters Patent. The provisions of the Letters

Patent are only subject to the legislative powers of the Indian Legislature. Consequently, Clause 44, which was substituted in 1919 clearly makes it

subject to the CPC and the Letters Patent will not override the civil Procedure Code, when there is a conflict between the Letters Patent and the

Civil Procedure Code. CPC alone could govern the matter, as the CPC is not a general law, but a special law providing the implementation of the

rights created Under Sections 36 and 37 of the Specific Relief Act. In fact, the decision in the case of Union of India (UOI) Vs. Mohindra Supply

Company, , though decided by a Bench of four Judges, does not lay down the proposition that despite Section 104(2) of the Code, Clause 15 of the Letters Patent could be invoked.

10. The rulings in Shri Radhey Shyam Vs. Shyam Behari Singh, , is arising under Order 21, Rule 90 of the Code. The main point that centered

round was that an order under Order 21 Rule 90 of the Code would amount to a judgment and the question of Section 104(2) was not at all

raised in that case. In fact, the ruling in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, was considering the various types of orders that

would come within the scope of the expression ""judgment"" and in the above said judgment, it was observed that there is no warrant for accepting

the argument of the respondent therein that if Order 43, Rule 1 applies, then a further appeal will also lie against the appellate order to a Division

Bench, this is neither contemplated nor borne out by the provisions of the Letters Patent. The Supreme Court categorically laid down that no

appeal was available against the appellate order of a single judge to a Division Bench under Clause 15 of the Letters Patent. It is significant to note

that even the rulings in Shri Radhey Shyam Vs. Shyam Behari Singh, and Union of India (UOI) Vs. Mohindra Supply Company, were not referred

to. But the decision in the case of Madan Naik (Dead) by Legal Representatives and Others Vs. Hansubala Devi and Others, decided by three

Judges clearly holds a contrary view.

11. There is no controversy between the rulings in Union of India (UOI) Vs. Mohindra Supply Company, and Babulal Khimji's case AIR 1981

SC 1756 . The view expressed in Boopathi Vijayaraghvan Chettiar v. Radha Rukmani Ammal, 1984 TLNJ 92 and in Rukmani and Others Vs.

H.N. Thirumalai Chettiar, are not supported by any reasoning but merely following the earlier decisions. The decision in Pandey Mishra and

Company Vs. Anil Upendra Pitale and others, is another judgment holding that Letters Patent Appeal is not maintainable. The rulings in Resham

Singh Pyara Singh Vs. Abdul Sattar, and New Kenilworth Hotel's case, 1997 2 L.W. 506 are in no way inconsistent with the rulings in the case of

Union of India (UOI) Vs. Mohindra Supply Company, . At this juncture, it is necessary to refer to the rulings in Union of India (UOI) Vs.

Mohindra Supply Company, , Kevelchand Daga v. Girdhardoss 1961 2 MLJ 528

and Penugonda Radhakrishnamurthy Vs. V.A.Y. Ethirajulu

Chetty and Co. and Others, . The decision in Penugonda Radhakrishnamurthy Vs. V.A.Y. Ethirajulu Chetty and Co. and Others, was overruled

by the ruling in Kevelchand Daga's case, 1961 2 MLJ 528. The decision in Union of India (UOI) Vs. Mohindra Supply Company, overruled the

ruling in Kevelchand Daga's case, 1961 2 MLJ 528 and restored the decision in Penugonda Radhakrishnamurthy Vs. V.A.Y. Ethirajulu Chetty

and Co. and Others, .

12. The powers conferred under order 43 Rule 1(r) read with Section 104 are special power of appeal in respect of injunction. In fact, in State of

West Bengal Vs. Gourangalal Chatterjee, , it was held referring to the decision in the case of Union of India (UOI) Vs. Mohindra Supply

Company, that no appeal would lie u/s 104(2) of the code. This argument was based upon a number of judgments. It is significant to note that in

Punjab Land Development and Reclamation Officer, Corporation v. Presiding, Labour Court , 1990 3 SCC 582 , where the Supreme Court said

that the Supreme Court is not bound by its own decisions. It was also held that a precedent may need be departed from, if the basis of legislation

changes. All these aspects were considered in Madhusudan Vegetable Products Co. Ltd. Vs. Rupa Chemicals, Vapi and Others, , Fr. Abraham

Mathews and Another Vs. Illani Pillai and Others, , Obedur Rehman and Another Vs. Ahmedali Bharucha and Others, and Charity

Commissioner's case, AIR 1984 Bom. 470.

13. In fact, in Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others, , it was mentioned that no order is appealable unless an appeal is

provided by the CPC or by some other law. In the present cases it cannot be said that the Letters Patent is a special law. It is pertinent to note that

the earlier decision in Bhaidas Shivdas v. Bai Gulab and other, AIR 1921 P.C. 6 throws some light on the matter and it runs counter to Section

98(2) of the Code. Clause 36 of the Letters Patent deals with the powers of the single judges and Division Benches and Courts. Section 98(3)

subsequently covered Clause 36 of the Letters Patent. Similarly, CPC excludes its applicability to the Original Side of the High Court. Reference

to Section 120, C.P.C. excluding Sections 16, 17 and 20 of the Code in Original Side may also be made. It is a well known principle of

interpretation of statute that when a particular provision preserves an earlier enactment and other provisions made no reference to the same, what is not preserved is impliedly made inapplicable.

14. In *M/s. New Kenilworth Hotel's case*, 1997 2 L.W. 276, it was held as under:

It is settled legal position that right of appeal is a creature of the statute. Against an interlocutory order, an appeal has been provided under Sec.

104(1) of the Code read with Order 43, Rule 1. In respect of interim injunction, it is covered by Order 43, Rule 1(r). In this case, the order of

status quo was passed in an application filed under Order 39, Rule 1 appealable under Order 43, Rule 1 (r) of the Code. Sub-section (2) of

Section 104 specifically prohibits second appeal against such an order postulating that ""No appeal shall lie from any order passed in appeal under

this section."" In *Resham Singh Pyara Singh Vs. Abdul Sattar*, a Bench of this Court consisting of K. Ramaswamy and B.L. Hansaria, JJ. has held

that against an appellate order of a learned single Judge of a High Court passed by the Civil Court, a Letters Patent Appeal would not lie by

reason of the bar created by Sub-section (2) of Section 104 of the Code.

It would, thus, be seen that Clause 10 of the Letters Patent consists of only two parts. In the first part, an appeal shall lie from a judgment of a

learned single Judge to a Division Bench not being a judgment passed in exercise of the appellate jurisdiction or revisional jurisdiction. In other

cases, where the learned single Judge exercises the appellate jurisdiction, if he certifies that it is a fit case for an appeal to the Division Bench.

Notwithstanding the prohibition contained in the latter part of Clause 10, an appeal would lie. It is seen that the Division Bench in *Sukkri Dibya's*

case (*supra*) has interpreted Clause 10 and stated that it consists of three components.

The question then is: Whether notwithstanding such prohibition, though an order of injunction passed by the learned single Judge in the appellate

jurisdiction under Order 39, Rule 1 is a judgment, as held by this court in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , an appeal

would lie on the basis thereof? It is contended that an appeal would lie to the Division Bench. We find no force in the contention. It is true that the

learned Judges composing of the Division Bench as well as the Full Bench of the High Court construed that the ratio in *Shah Babulal Khimji Vs.*

Jayaben D. Kania and Another, , would attract item (ii) of the analysis of the learned Judges and, therefore, an appeal would lie to the Division

Bench. We are of the view that the learned judges, with due respect, have not understood the scope of the judgment in Shah Babulal Khimji Vs.

Jayaben D. Kania and Another, , in its proper perspective. Therein, the learned single Judge exercising the original jurisdiction of the High Court

passed an order in applications filed under Order 40, Rule 1 for appointment of a receiver and issue of injunction order under Order 39, Rule 1.

Since Section 104(2) expressly prohibits an appeal, against an order passed by the appellate court under Order 43, Rule 1 read with Section

104(1) no appeal would lie. As a consequence no Letters Patent Appeal would lie. This view taken in Madhusudan Vegetable Products Co. Ltd.

Vs. Rupa Chemicals, Vapi and Others, and Firm Chhunilal Laxman Prasad v. Agarwal and Co. and Ors, AIR 1987 MP. 172 by the two High

Courts is correct in law. The view of the Division Bench in Shashikala v. Hiren, 1991 CLT 197 is correct in law. Sukuri Dibya's case and the

Birendra's case are not good law.

Thereby the judgment from an appellate jurisdiction stands excluded under the first part of Clause 10 of the Letters Patent itself. Therefore, the

Division Bench of the High Court was right in holding that the Letters Patent Appeal would not lie against an order of the learned single Judge.

15. It was held in Resham Singh Pyara Singh Vs. Abdul Sattar, by the Supreme Court while considering Section 104 and Order 43 Rule 1(r)

C.P.C. as follows:-

It would, therefore, be clear that when an appeal was filed against the order of the City Civil Court, Bombay to the learned single Judge under

Order 43 Rule 1(r) as provided in Sub-section (1) of Section 104 by operation of Sub-section (2) of Section 104, no further appeal shall lie from

any order passed in appeal under this section. In Khimji's case, the suit was filed on the original side of the High Court and the learned Single

Judge on the original side passed an interlocutory order. Against the orders of the learned single judge, though it was an interlocutory order, since

the appeal would lie to the Division Bench under the Letters Patent, this Court held that against the interlocutory orders passed by the Single

Judge, Letters Patent Appeal would be maintainable. That ratio, therefore, is

clearly inapplicable to the facts in this case.

16. Similarly, a Division Bench of this Court consisting of Srinivasan, J. (as he then was) and S.S. Subramani, J, in LPA No. 204 of 1992 by the

judgment dated 16.7.1996 *Somasundaram v. Thangaraju*, 1997 1 L.W. 506 after considering the prior decisions on this subject, held that Letters

Patent Appeal is not maintainable because of the provision of Section 104(2) of the CPC and consequently, Letters Patent Appeal was dismissed.

This judgment was rendered by taking into consideration the above said two decisions of the Supreme Court along with other decisions.

17. A similar view was taken by a Division Bench comprising of Mr. K.A. Swami, C.J. and Raju, J., which was reported in *Sarasammal Vs.*

Murugasamy and Others, , wherein it was ultimately held that Section 104, C.P.C. overrides Clause 15 of the letters patent. This view taken was

taken in accordance with the view by the Supreme Court in *M/s. New Kenilworth Hotel's* case, 1997 1 L.W. 256.

18. In view of the above said recent decisions of the Supreme Court, whatever may be the reasons given by the learned counsel appearing for the

appellants that letter patent appeal would lie against an order passed by the learned single Judge of this Court sitting on the appellate side, we are

unable to accept such an argument. Accordingly, we answer the question referred to us by holding that since Section 104(2) of the Code expressly

prohibits an appeal against the order passed by the appellate court under Order XLIII Rule 1 read with Section 104 of the Code, no Letters

Patent Appeal would lie. Accordingly, these Letters Patent Appeals are dismissed as not maintainable. There will be no order as to costs. All the

pending civil miscellaneous petitions are dismissed.