
(2007) 08 RAJ CK 0019
In the Rajasthan High Court

Maharao Brijraj Singh

APPELLANT

Vs

Smt. Sarawati Devi Sharma @ Poddarni and Others

RESPONDENT

Date of Decision : 06-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100A
Constitution of India, 1950 — Article 226, 227
General Clauses Act, 1897 — Section 6

Citation : (2009) 5 RCR(Civil) 522 : (2007) 4 RLW 3526

Hon'ble Judges : R.S. Chauhan, J; R.M. Lodha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.M. Lodha and R.S. Chauhan, JJ.—This special appeal is liable to be dismissed as not maintainable.

In the suit for specific performance of the contract filed by the present respondent No. 1 against the appellant and respondents No. 2 to 5, initially an application for rejection of plaint was filed by the present appellant. The said application came to be rejected on August 11, 2006. A day earlier i.e. on August 10, 2006 the present respondent No. 6 was impleaded as party-defendant. He then made an application for rejection of plaint. The said application was granted by the trial court on March 1, 2007 and, thus, plaint came to be rejected.

2. The present respondent No. 1 original plaintiff preferred first appeal (the order of rejection of plaint being deemed decree) before this Court which was registered as SB Civil First Appeal No. 181/2007. On April 2, 2007, the Single Judge allowed the first appeal, set aside the order of the trial Court dated March 1, 2007 and restored the civil suit to the trial Court.

The present appellant made an application for recalling the order dated April 2, 2007. The said application has been rejected by the Single Judge on May 15, 2007. The present special appeal is from the said order.

3. Section 100A substituted by Section 4 of the CPC (Amendment) Act, 2002 effective from July 1, 2002 reads thus:

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 law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge.

4. Mr. Paras Kuhad, the counsel for the appellant submits that Section 100A of the CPC is not an impediment for maintaining this special appeal. Firstly, because the present appeal is not from the judgment and decree of the Single Judge; it is from the order refusing to recall the order whereby the Single Judge restored the suit to the trial Court. Secondly, because in a matter like this where the litigant has not been heard by the Single Judge, the legislature never intended to fore-close the right of intra court appeal. The counsel relies upon the judgment of the Jharkhand High Court in the case of Ganesh Singh and Another Vs. Bishram Singh and Others,

5. The real question before us is whether Section 100A of the Code as substituted/By the Amendment Act, 2002 affects and restricts further appeal from the judgment of the Single Judge exercising the first appellate jurisdiction arising out of the suit filed prior to 1st July, 2002.

6. It is true that the Jharkhand High Court has taken the view that Section 100A of the CPC does not affect the right of appeal under the Letters Patent in respect of suits filed prior to 1.7.2002.

However, we find it difficult to concur with the view of Jharkhand High Court; with respect we differ in view of the earlier decision of our own High Court and the Full Bench decisions of some other High Courts.

7. The effect of amended Section 100A of the CPC came up for consideration before the Division Bench of the Rajasthan High Court in the case of UCO Bank and Another etc. Vs. Roopa Ram and etc., In paragraph 10 of the report, the Division Bench held thus:

10. Thus, it clearly emerges that right of appeal is a substantive right. The vested right of appeal can be taken away only by a subsequent enactment, if so provides expressly or by necessary intendment and not otherwise. Thus, while examining the retrospectivity, it is advisable to know the object behind introducing of provision in the statute justice Malimath Committee examined the issue of further appeal against the judgment of the Single Judge exercising the first appellate jurisdiction. Committee recommended for suitable amendment of Section 100A of the CPC with a view to provide that further appeal in this regard shall not lie. The committee also recommended for suitable enactment by Parliament for abolition of appeal to Division Bench against the decision and

order rendered by the Single Judge of the High Court in a proceeding under Article 226 or 227 of the Constitution of India. However, by Amendment Act of 2002, appeal to Division Bench under Articles 226 and 227 of the Constitution of India have been restored. Section 10 of the C.P.C. (Amendment) Act, 1999 has abolished the appeal against the judgment of Single Judge of the High Court in all cases. The net result of Amendment Acts of 1999 and 2002 is that where an appeal from original or appellate decree where order is heard and decided by Single Judge of the High Court, no further appeal shall lie to Division Bench of High Court. In the amending Act, the words "no further appeal shall lie" is of great significance. It clearly means that no further appeal shall be entertained in respect of appeal filed after the cut off date. Looking to the object of introducing the provision, any other interpretation would be anathema to the provision. Reading the words "heard and decided" and the words "no further appeal shall lie" conjointly, clearly indicates that vested right-of appeal has been taken away by the Legislature from the cut off date i.e. 1.7.2002. It is in consonance with the intention of the Legislature to curtail the second appeal in the third Court. The Legislature in its wisdom has considered the right of appeal to a singular one. Thus, the Legislature has expressly stated that no further appeal shall lie after the appeal has been heard and decided against the judgment and decree of original Court. Thus, we are of the view that the substitution of Section 100A of the CPC does not permit the Division Bench to entertain special appeal against the judgment and decree of the learned Single Judge rendered in first appeal after the cut off date i.e. 1.7.2002.

8. This Court, accordingly, took the view that the amended Section 100A of the CPC does not permit the Division Bench to entertain special appeal against the judgment and decree of the single Judge rendered in first appeal after the cut off date i.e. 1st July, 2002.

9. The Full Bench of Madhya Pradesh High Court in the case of Laxminarayan Vs. Shivilal Gujar and Others, held that no appeal that is covered within the ambit and sweep of language used u/s 100A would lie after 1st July, 2002. It was further held that it is prospective to that extend and it has limited retrospectivity by which the vested rights of a suitor qua a suit filed prior to 1st July, 2002 is not saved but the fate of pending appeals before the cut off date remains unaffected.

10. In the case of Shri Rahul Sharad Awasthi Vs. Shri Ratnakar Trimbak Pandit and Others, the Full Bench of the Bombay High Court was concerned with the question as to whether Section 100A of the CPC as substituted by CPC (Amendment) Act, 2002, affects and restricts the right of further appeal from the judgment of the Single Judge exercising first appellate jurisdiction arising out of the suit filed prior to 1st July, 2002. The Full Bench of Bombay High Court presided over by one of us (R.M. Lodha, J as was then, considered the judgment of the Supreme Court in the case of Garikapatti Veeraya Vs. N. Subbiah Choudhury, and Jose Da Costa and Another Vs. Bascora Sadasiva Sinai Narcornim and Others, . Based on the judgments of the Supreme Court, the

Bombay High Court noticed the legal position that the right of appeal is a vested right but a vested of appeal can be taken away by a subsequent enactment if it so provides expressly or by necessary intendment and by no other way. The Full Bench of the Bombay High Court in paragraphs 27, 28, 29 and 30 considered the matter thus:

27. The expression "notwithstanding", "is heard and decided" and, "no further appeal shall lie" in the new Section 100A of the Code substituted by the Amendment Act, 2002, are of vital importance and significance. What is the plain meaning of these expressions in the context they have been used? What does not grammatical meaning of these expressions convey? What were the circumstances under which the new Section 100A was brought? What is the object of Section 100A and nature of right affected? We shall advert to these aspects.

28. The non-obstante clause with which the new section begins indicates that irrespective of the right of appeal provided in Letters Patent or any other law, the provision contained therein shall override such provisions. In other words, what it provides is that in spite of provision of appeal made in Letters Patent or any other law, the enactment made in Section 100A shall have full operation. The learned author Justice G.P. Singh in his monumental work "Principle of statutory interpretation" makes the statement of law that ordinarily, there is a close approximation between the non-obstante clause and the enacting part of the section and the non-obstante clause may throw some light as to the scope and ambit of the enacting part in case of its ambiguity but when the enacting part is clear its scope can not be cut down or enlarged by resort to non-obstante clause.

Keeping the aforesaid legal position in mind, we shall consider what is the scope of enacting part of Section 100A of the Code brought into force on 1st July, 2002. Plainly it says that no further appeal shall lie where any appeal from original decree is heard and decided by the Single Judge of the High Court. The appeal is continuation of suit and the legal pursuit of a remedy, suit, appeal or second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. When the Legislature employed the expression where any appeal from a original decree or decree is heard and decided by a Single Judge of High Court, no further appeal shall lie from a judgment and decree of such a Single Judge, the Legislature expressed its intention in clear and unequivocal terms that no further appeal shall lie from the judgment and decree of a Single Judge in first appeal given on or after coming into force of the amended provision, i.e. 1st July, 2002. The carefully chosen words "is heard and decided" refers to present time and a close study thereof shows that tense is simple present. The tense of a verb shows the time of an action or event. It is also the slate of an action referred to. The word, "is" in contra-distinction to "has been" is key to the clear intendment of the Legislature that further appeal is barred from the decision of the Single Judge given in appeal from original decree or order which is heard and decided on and after the

new Section 100A of the Code has come into force and not the appeal which has been heard and decided before that date. The action that has yet to take place. Put it differently, it refers to the appeal covered by Section 100A to be not amendable to the further appellate jurisdiction after said provision has come into force. When the two expressions, "is heard and decided" and "no further appeal shall lie" are read together, as they should be, the express intendment is that no further appeal arising out of an appeal from the original decree or order heard and decided by the Single Judge on and after the new Section 100A has been brought into force shall lie. To that extent the vested right of the unambiguous, its scope cannot be enlarged by resort to non-obstante clause and bring within its ambit in its entirety taking away the scope of adjudication of the pending Letters Patent Appeals. So also Section 6 of the General Clauses Act, which is applicable as the expression "without prejudice to the generality of the provisions of Section 6 of the General Clauses Act" is used in Section 16(2) of the Amendment Act, 2002, does not entirely save the vested right of the appeal in the parties to the suit instituted prior to 1st July, 2002 on the face of clear intention expressed in the new Section 100A of the Code. That would be doing violence to the plain language of new Section 100A substituted by Amending Act, 2002. After all close attention must be paid to the language of statutory provision for determining its scope and the language used is the most important factor to be taken into account.

30. The words "is "heard and decided"- the use of simple present tense-do not draw upon appeal heard and decided in past. These words apply to the appeal heard and decided on and after the operation of new Section 100A. It is true that it cannot be stated as an inflexible rule that use of present tense or present perfect tense is decisive of the matter but the grammatical meaning of the words is always safe guide in the matters of construction of the enacted law. The intendment of the Legislature ultimately is to be gathered from the language used, the object indicated, the nature of rights affected and the circumstances under which the enactment is brought. By CPC (Amendment) Act, 1976, Section 100A was introduced in the Code and as a result thereof Letters Patent Appeal against the decision of Single Judge in second appeal was barred. Now by the amended Section 100A by the CPC (Amendment) Act, 2002, Letters Patent Appeal against the decision of Single Judge in the first appeal (or by whatever name called) is barred. The Legislature was, of course, concerned about the delay in finality of the decision in civil suits. In other words, the Legislature was concerned with pending Letters Patent Appeal arising out of the decision of the Single Judge in the first appellate jurisdiction as well as such appeals that were to be preferred subsequently. If the Legislature intended to take away vested right of appeal acquired by the parties to the suit at the time it commenced in its entirety, it would have said so in express words but that was not done. The total retrospective operation of the new Section 100A is not manifested by express words or necessary implication. The express intendment of the Legislature as seen from the plain language employed in new Section 100A is of

limited retrospectivity i.e. it takes away right of Letters Patent Appeal from the date of operation of the said enactment in respect of the suits filed before that date where the decision of the Single Judge in the High Court in the first appeal is rendered on and after the date such amendment is brought into force.

11. The decision of this Court in the case of U.Co. Bank and also the decision of the Madhya Pradesh High Court in the case of Laxmi Narayan (Full Bench) and Andhra Pradesh High Court in the case of Gandla Pannala Bhulaxmi Vs. Managing Director, APSRTC and Another, were considered. In paragraph 41 of the report, the Full Bench of the Bombay High Court concluded thus:

41. The result of the foregoing discussion may here by shortly summarised:

(i) Section 100A in the Civil Procedure Code, 1908 substituted by Section 4 of the CPC (Amendment) Act, 2002 takes away the right of Letters Patent Appeal on and from 1st July, 2002 in respect of the suit filed before that date where the judgment or order of the learned Single Judge of the High Court in appeal against an original decree or order from such suit is rendered on and after 1st July, 2002 i.e., the date on which the amendment is brought into force. Put it briefly, no Letters Patent Appeal shall lie from the judgment, decree or order of a Single Judge in the first appeal (or by whatever name called) given on or after coming into force of the new Section 100A i.e. 1st July, 2002.

(ii) The provisions of Section 100A in the Code of Civil Procedure, 1908 substituted by Section 4 of the CPC (Amendment) Act, 2002 shall not apply to the judgment and order of the Single Judge of the High Court in appeal against an original decree or order rendered before 1st July, 2002 and the Letters Patent Appeal preferred against such judgment or order on or after 1st July, 2002.

(iii) In relation to the suit instituted prior to 1st July, 2002 and the judgment or order of the Single Judge of the High Court in appeal against an original decree or order rendered before 1st July, 2002, the pending Letters Patent Appeal as on 1st July, 2002 preferred against such judgment and order of the Single Judge shall remain unaffected by Section 100A of the Code of Civil Procedure, 1908 as substituted by Section 4 of the CPC (Amendment) Act, 2002.

(iv) In other words, Section 100A as substituted by CPC (Amendment) Act, 2002 has a limited retrospectivity as indicated in Clause (i) above and to that extent vested right of the parties to the suit filed prior to 1st July, 2002 is extinguished. The fate of Letters Patent Appeal arising out of any appeal from an original decree or order heard and decided by a Single Judge prior to 1st July, 2002 remains unaffected by the new Section 100A of the Code.

The view of this Court is in line with the view of Bombay High Court, Madhya Pradesh High Court and Andhra Pradesh High Court.

12. We adopt the reasoning of the Full Bench of the Bombay High Court in the case of Rahul Sharad Awasthi and hold that Section 100A CPC takes away the right of Letters Patent Appeal on and front 1st July, 2002 in respect of the suits

filed before that date where the judgment and decree of the Single Judge in appeal from a decree and judgment is rendered on and after 1st July, 2002. In other words, the special appeal shall not lie from the judgment and decree of the Single Judge in the first appeal (or by whatever name called) given on or after coming into force of the new Section 100A i.e. 1st July, 2002.

13. If the special appeal from the judgment and decree passed by the Single Judge in the first appeal is not maintainable on and after 1st July, 2002 after coming into force of Section 100A of the CPC irrespective of the fact that the suit was filed prior to 1st July, 2002, we are afraid, no special appeal shall lie from the order passed by the Single Judge on the application made in first appeal after the decision has already been given therein. The contention of Mr. Paras Kuhad, thus, that this special appeal is maintainable from the present order as this is not the judgment and decree and that it has been passed without hearing the appellant cannot be accepted. Since the appeal is not maintainable, we cannot and do not go into the merits of the order as to whether the order has been passed *ex parte* or not.

We hold accordingly.